UNITED NATIONS

REPORT
OF THE
COMMITTEE ON INTERNATIONAL CRIMINAL JURISDICTION
on its session held from 1 to 31 August 1951

GENERAL ASSEMBLY
OFFICIAL RECORDS : SEVENTH SESSION
SUPPLEMENT No. 11 (A/2136)

NEW YORK, 1952

31 p.

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REPORT OF THE COMMITTEE ON INTERNATIONAL CRIMINAL JURISDICTION[1]

Chapter I.

INTRODUCTION

Organization of the session

1. The General Assembly, on 12 December 1950, adopted resolution 489 (V) which reads as follows:

"*The General Assembly,*

"*Recalling* that, in its resolution 260 B (III) of 9 December 1948, it considered 'that, in the course of development of the international community, there will be an increasing need of an international judicial organ for the trial of certain crimes under international law', and that, in the same resolution, it invited the International Law Commission 'to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions',

"*Having given* preliminary consideration to part IV of the report of the International Law Commission on the work of its second session,[2]

"*Bearing in mind* article VI of the Convention on the Prevention and Punishment of the Crime of Genocide,[3]

"*Bearing in mind,* further, that a final decision regarding the setting up of such an international penal tribunal cannot be taken except on the basis of concrete proposals,

"1. *Decides* that a committee composed of the representatives of the following seventeen Member States, namely, Australia, Brazil, China, Cuba, Denmark, Egypt, France, India, Iran, Israel, the Netherlands, Pakistan, Peru, Syria, the United Kingdom of Great Britain and Northern Ireland, the United States of America and Uruguay, shall meet in Geneva on 1 August 1951 for the purpose of preparing one or more preliminary draft conventions and proposals relating to the establishment and the statute of an international criminal court;

"2. *Requests* the Secretary-General to prepare and submit to the committee referred to above one or more preliminary draft conventions and proposals regarding such a court;

"3. *Requests* the Secretary-General to make all necessary arrangements for the convening of the committee and for its meetings;

"4. *Requests* the Secretary-General to communicate the report of the committee to the governments of Member States so that their observations may be submitted not later than 1 June 1952, and to place the question on the agenda of the seventh session of the General Assembly."

2. In pursuance of the above resolution, the Committee on International Criminal Jurisdiction (hereinafter referred to as the Committee) convened at Geneva, Switzerland, on 1 August 1951. It held thirty-one meetings and concluded its work on 31 August 1951.

3. With the exception of India and Peru, which did not send representatives, all the Member States appointed by the General Assembly under the resolution quoted above were represented on the Committee. The following is a list of their representatives and alternate representatives:

Australia: Mr. William Anstey Wynes
Brazil: Mr. Gilberto Amado
China: Mr. Hua-Cheng Wang
Cuba: Mr. Luis del Valle, Mr. Luis Valdés Roig
Denmark: Mr. Max Sörensen
Egypt: Abdel Monem Mostafa Bey
France: Mr. René de Lacharrière, Mr. Roger Pinto
Iran: Mr. Khosro Khosrovani
Israel: Mr. Jacob Robinson, Mr. Haim Cohn
Netherlands: Mr. Bernard Victor A. Röling
Pakistan: Mr. Muhammad Munir
Syria: Mr. Abdul Wahab Homad,[4] Mr. Salah el dine Tarazi
United Kingdom of Great Britain and Northern Ireland: Sir Frank Soskice, Mr. Lionel I. Gordon, Mr. E. C. Jones, Mr. Ian D. Turner
United States of America: Mr. George Maurice Morris, Mr. John Maktos
Uruguay: Mr. Luis E. Pineyro Chain.

4. At its first and second meetings, the Committee elected the following officers:

Chairman: Mr. George Maurice Morris, United States of America
First Vice-Chairman: Mr. Muhammad Munir, Pakistan

[1] Previously distributed as document A/AC.48/4.
[2] See *Official Records of the General Assembly, Fifth Session, Supplement No. 12.*
[3] General Assembly resolution 260 A (III) of 9 December 1948, annex.
[4] Mr. Homad was prevented from attending the meetings of the Committee.

Second Vice-Chairman: Mr. Gilberto Amado, Brazil
Rapporteur: Mr. Max Sörensen, Denmark

5. Mr. Ivan S. Kerno, Assistant Secretary-General for Legal Affairs, represented the Secretary-General. Mr. Yuen-li Liang, Director of the Division for the Development and Codification of International Law, acted as Secretary of the Committee.

6. At the fourth meeting, the Committee elected a standing drafting sub-committee consisting of the Chairman and the Rapporteur of the Committee and the representatives of France, Israel and the Netherlands. Under the chairmanship of the Rapporteur, this drafting sub-committee held twelve meetings and, on the basis of decisions on principles taken by the full Committee, prepared drafts for the consideration of the Committee.

7. The Committee had before it a memorandum (A/AC. 48/1) submitted by the Secretary-General in accordance with paragraph 2 of the operative part of General Assembly resolution 489 (V). This memorandum examines various questions arising in connexion with the preparation of a draft statute for an international criminal court, including the modes of creation of the court, its jurisdiction and functions, its character and organization, its procedure, and the law it might apply. The memorandum also contains, in its annexes, three alternative preliminary drafts of a statute for an international criminal court. One of these drafts was drawn up on the assumption that the court would be established by resolution of the General Assembly, another on the assumption that the court would be established by international convention, and still another on the assumption that the court would be an *ad hoc* tribunal.

8. In addition, a memorandum entitled "Historical Survey of the Question of International Criminal Jurisdiction" (A/CN.4/7/Rev.1), originally prepared by the Secretary-General for the International Law Commission, was also made available to the Committee for its information.

9. Using as a basis of discussion the drafts contained in the memorandum submitted by the Secretary-General referred to in paragraph 7 above, the Committee undertook the preparation of a draft statute for an international criminal court. The views expressed by members of the Committee are contained in the summary records of the plenary meetings (A/AC. 48/SR. 1 to A/AC. 48/SR. 31 inclusive).

Terms of reference

10. At the very beginning of its deliberations, the Committee examined the scope and nature of the task which the General Assembly had entrusted to it under resolution 489 (V) of 12 December 1950. Some members expressed the conviction that at the present stage in the development of international organization any attempt to establish an international criminal jurisdiction would meet with insurmountable obstacles. As an ultimate objective, an international criminal court would be highly desirable, but its establishment at the present stage would involve very real dangers to the further development of international good feeling and co-operation. The Committee should, therefore, it was urged, report to the General Assembly that the setting up of such a court could not be recommended. These delegations offered, however, their wholehearted co-operation to those who believed in the possibility and desirability of the establishment of such a court.

11. Some members felt that the General Assembly had not instructed the Committee to express an opinion as to the advisability of creating an international criminal court. The task of the Committee was to elaborate concrete proposals for the consideration of the General Assembly; that body would take decisions on broad questions of principle, but it wished to do so with a full knowledge of all the aspects and implications of any one solution. The General Assembly had found that a discussion of the questions of principle in the abstract did not provide a sufficiently solid basis for a decision, and it had therefore asked the Committee to draw up specific proposals in the form of a draft statute for a court; only in this way would the General Assembly be able to appreciate the full scope of the problems involved, and the primary duty of the Committee was therefore to draft such concrete proposals.

12. This opinion was shared by the great majority of the Committee, and it was agreed to proceed on that understanding of the task to be performed by the Committee. It was understood that no member would be debarred from expressing his opinion as to the desirability of setting up a court, and it was furthermore understood that no member of the Committee, by participating in its deliberations and voting on any draft texts, would commit his government to any of the decisions which the Committee might eventually adopt.

13. On this understanding of its terms of reference, the Committee has elaborated the draft statute for an International Criminal Court which is attached to the present report as annex I.

14. In addition to the many problems examined in the basic documents submitted to the Committee, it was found, as the deliberations of the Committee proceeded, that a considerable number of new and important problems needed careful consideration. Some of these problems related to the role of a criminal jurisdiction in the present state of international organization, in particular the need for bringing a judicial punishment of illegal acts into harmony with the principal purpose of the United Nations, i.e., the maintenance of peace. The question was raised, by way of example, whether it was conceivable that criminal proceedings could be instituted against an aggressor with which the United Nations, for that very purpose, wanted to reach a negotiated settlement.

15. Another group of problems arose out of the difficulties inherent in any arrangement under which individuals are made directly responsible before an international organ, while the traditional principles of State sovereignty are maintained.

16. One further group of problems arose out of the difficulties which are due to the wide differences between national systems for the prevention and punishment of crime. In particular, with respect to the rules of procedure under which a criminal tribunal should operate, the national background of members

of the Committee was anything but uniform; some difficulty was experienced in finding a satisfactory common denominator which might ensure the proper functioning of an international criminal tribunal.

17. Within the time limits set for its work the Committee has endeavoured to formulate intelligible proposals regarding some of the more important questions to which the creation of an international criminal tribunal gives rise. The Committee does not wish to give these proposals any appearance of finality. They are offered as a contribution to a study which, in the Committee's opinion, has yet to be carried several steps forward before the problem of an international criminal jurisdiction, with all its implications of a political as well as a juridical character, is ripe for decision.

Chapter II.

GENERAL PRINCIPLES

How should the court be established?

18. The view was expressed that the most satisfactory course would be to establish the court as a principal organ of the United Nations by way of amendment of the Charter. While all members of the Committee agreed that most of the difficulties in the way of creation, organization and jurisdiction of the court would be met by this method, it was the feeling of the majority that it would be fruitless to embark upon a draft statute on this basis since it was clear that amendment of the Charter was out of the question at the present stage of international relations. The problem before the Committee therefore was reduced to the following alternative: should the court be established by a resolution of the General Assembly or by a convention to be concluded between the States which wished to become parties?

19. Reasons for and against either method had been stated in the memorandum prepared by the Secretary-General (A/AC.48/1, part I, pp. 7-14). Taking the considerations presented therein as a point of departure, the Committee further examined the arguments for and against the two solutions.

20. To choose the method of a convention would, it was argued, give the court the dignity required by such an important organ and only by this method would it be possible for those States which wished to become parties to the statute to decide, without outside influence, on the framing of the statute. It was contended, on the other hand, that this method would have the consequence that the court would become, not a world court, but an organ composed of only part of the Members of the United Nations. The attitude which some Member States had taken in not even desiring to associate themselves with the work of the Committee—which the Committee regretted—did not leave any doubt on that point. Furthermore, the relationship between the court and the United Nations would, in such a contingency, give rise to numerous complications, relating to questions of principle as well as to practical questions.

21. The solution consisting in establishing the court by a resolution of the General Assembly would obviate such difficulties. The question of obtaining the services and facilities of the United Nations would be easily solved, and budgetary problems would not give rise to particular difficulties. This solution, on the other hand, also had serious disadvantages in the opinion of some members. Under the Charter, the court could only be established as a subsidiary organ. The principal organ would presumably be the General Assembly, but a subsidiary organ could not have a competence falling outside the competence of its principal, and it was questionable whether the General Assembly was competent to administer justice. Furthermore, the court would become subordinate to the Assembly, which in many respects was undesirable, and its continued existence would be made subject to shifting political currents, in so far as it might always be dissolved by a resolution of the Assembly.

22. Having weighed these arguments, the Committee decided by 8 votes to 3, with 2 abstentions, against recommending the establishment of the court by resolution of the General Assembly, and by 6 votes to 2, with 6 abstentions, the Committee expressed itself in favour of establishing the court by a convention.

23. It was understood that such a convention might be concluded under the auspices of the United Nations, and it was suggested that the General Assembly might elect to call a conference for that purpose. Thereby, a desirable link between the court and the United Nations would be established.

24. The opinion was voiced by a member of the Committee that the whole problem was one upon which the Committee was not in the position to make any recommendation at the present time. This opinion, however, was not shared by other members.

Should the court be a permanent or an *ad hoc* organ?

(Article 3 of the draft statute)

25. The Committee was unanimously agreed that the court should be a permanent body. This did not mean that it should be in permanent session; the permanence should be understood in the sense of organic, not of functional, permanence, and the court would only function when cases were submitted to it. There might be long periods in which the court would have no cases to consider, and it was therefore accepted that it should be called in session only when matters before it required consideration. In framing this general principle, as expressed in article 3 of the draft statute, the Com-

mittee did not wish to include in the statute any provision answering the question whether the President in his discretion should decide when sessions were to be convened, or whether he should be obliged to convene a session at the request of a certain number of judges. The Committee felt that this was one of the many subordinate questions which could be settled by the rules of the court.

26. There were several reasons for preferring a permanent court to an *ad hoc* tribunal. In the first place, it would be in the interests of justice that members of the court should not be appointed with regard to a specific case, under the influence of the spirit of revenge and hatred which might prevail at a given moment. Furthermore, the permanent existence of a judicial organ to try international crimes would express a tendency to develop international law, and even urge such development, in the direction of subordinating State action to the interests of the international community. Moreover, it would complete the substantive rules of international criminal law, which would remain imperfect in the absence of a judicial organ to try criminals. From the point of view of both prevention and punishment of international crimes a permanent judicial organ would be desirable.

27. The Committee did not discuss the possibility of establishing a criminal chamber of the International Court of Justice, since the establishment of such a chamber would require an amendment of the Statute of that Court in conformity with Article 108 of the Charter of the United Nations. The Committee noted that the International Law Commission, in its report on its second session, had recommended not to establish a criminal chamber of the International Court of Justice.[5]

THE PURPOSE OF THE COURT
(*Article 1 of the draft statute*)

28. There was some difference of opinion among members of the Committee as to the categories of crimes over which jurisdiction might be conferred upon the court. This question was taken up prior to any consideration of the methods by which the court might be given jurisdiction over crimes; it was found that a preliminary question as to the scope of the function to be fulfilled by the court had to be settled before detailed rules on jurisdiction could be laid down. The answer to this preliminary question would have some bearing upon such rules, as it was evident that no jurisdiction could be given to the court with respect to crimes falling outside the broad categories determining the function of the court. On the other hand, the determination of these broad categories would not establish any jurisdiction. It would have to be determined subsequently how and in respect of what crimes States would become bound to recognize the jurisdiction of the court.

29. There was general agreement that the court should be competent to judge crimes under international law. Without undertaking any profound analysis of this category of crimes, the Committee agreed that it was now a well-established fact that certain acts were criminal by virtue of international law, irrespective of whether they were criminal or not under any national legal system. The object of the study of an international criminal jurisdiction was to find out how a judicial organ could be established to deal with these crimes on the international level.

30. The difference of opinion among members of the Committee related to the question whether this should be the sole function of the court, or whether the court should be called upon, in addition hereto, to judge certain other categories of crimes. The proposal was made that such crimes under national law as were of international concern also should come within the purview of the jurisdiction which might be assigned to the court.

31. In favour of this proposal the following arguments were adduced. There were certain groups of crimes which affected the interest of several States, and for the punishment of which national courts might not always be impartial or adequate. Such crimes included counterfeiting of currencies, traffic in persons, traffic in narcotics, damaging of submarine cables, and also attacks upon foreign heads of State or government members and members of United Nations missions. As judges in most countries were not subject to government influence, a national judgment in such a case might be too lenient to satisfy the foreign party involved that justice has been rendered. Conversely, there might be situations, at times of international tension, in which a national tribunal, subject to the general psychological climate prevailing in a country, would judge a certain crime more severely than the foreign nationals or the foreign government concerned would find just. In such cases a government might find it greatly to its advantage if the matter could be referred to an impartial international tribunal.

32. Furthermore, it might be a good thing to determine the functions of the court in such a way that it would be unlikely to remain without occupation for long periods. It might be desirable, in this way, to accustom public opinion to the existence and operation of the international criminal tribunal. When new institutions were set up it was often useful to make them begin their activities rather modestly. Once they had affirmed their position and justified their existence in matters of less importance, they would have strengthened the foundation for their activities in matters of higher importance. The conception of a gradual growth was a sound one, also as applied to the problem of international criminal jurisdiction.

33. Against these arguments it was stated that there was no need for establishing an international jurisdiction in such matters which are of minor importance compared to international crimes proper. There was furthermore a risk that the prestige of the court would be lowered if such minor crimes are brought before it. Their inclusion under the jurisdiction of the court would add unnecessary complications, for instance with respect to the qualifications to be required of judges. Doubts were also expressed whether it rightly belonged to the field of activities of the United Nations to set up organs for judging this type of crime. It was finally claimed that conferring jurisdiction over such crimes would go beyond the terms of reference of the Committee.

[5] See *Official Records of the General Assembly, Fifth Session, Supplement No. 12.*

34. At the beginning of its deliberations the Committee resolved, by 8 votes to 5, to proceed on the assumption that minor crimes should be included in the article defining the purpose of the court. Having examined the problem in relation to other problems involved in the establishment of an international criminal jurisdiction, the Committee decided ultimately not to include any mention of this category of crimes in the statute. The vote in favour of the deletion of such mention in article 1 was 6 to 3, with 4 abstentions.

35. It was pointed out by some members that it was objectionable to give the court jurisdiction in general terms such as "crimes under international law" because there were many different opinions as to what crimes were crimes under international law, and in fairness to an accused it was essential that he should know exactly what he was charged with and the conditions under which he was being tried. The way to deal with this problem was to provide that the court should have jurisdiction over only such crimes under international law as might be provided in separate conventions giving the court jurisdiction over such offences. In order to meet this point of view it was proposed that the introductory article stating the purpose of the court should make it clear that the court should be called upon to deal only with such crimes as might be provided in conventions or special agreements between States parties to the statute.

36. This proposal was opposed by other members of the Committee on the ground that it might be construed as leaving outside the scope of the court a vast field of international crimes, which could then only be tried by special international tribunals.

37. The drafting sub-committee having included the words "as may be provided in conventions or special agreements among States parties to the present Statute" in article 1 of its proposals for a draft statute, the Committee voted upon the deletion of these words from the article. The vote was 5 to 5, with 3 abstentions, and the deletion was therefore not carried.

The law to be applied
(*Article 2 of the draft statute*)

38. The Committee had before it a proposal according to which there should be included in the statute an enumeration of the sources of law to be applied by the court of a nature similar to the enumeration contained in Article 38 of the Statute of the International Court of Justice. It was argued by some members that if such an enumeration were appropriate for the International Court of Justice it would be even more appropriate for the new criminal court. Other members did not find such an enumeration of any value. Its elaboration would give rise to numerous divergencies of a doctrinal character, such as the definition of customary law and the place of precedents among the sources of law. Such divergencies were of very little practical importance; the lessons to be derived from the jurisprudence of the International Court of Justice seemed to indicate that the judge would decide such issues in the course of the judicial process without scrupulously following an enumeration of the sources of law contained in the statute of the court. Some members even went so far as to propose that the statute should contain no express provision regarding the law to be applied.

39. This latter point of view, however, was not shared by the majority of the Committee. It was pointed out, in particular, that it would be useful for a new court, exercising jurisdiction in fields which have not hitherto been subject to regular judicial control, to have as a guidance some indication, even if only a brief one held in general terms, as to the law to be applied. It would be of especial significance, so the argument ran, to stress the fact that a judicial organ was now to be set up with the function of applying that special new branch of international law which is international criminal law.

40. On the basis of such considerations, the Committee decided to include in the statute an article regarding the law to be applied by the court.

41. As to the wording of such an article, the majority of the Committee favoured a brief, general formula. It was recognized, however, that the mention of only international criminal law would not be sufficient. Rules belonging to that branch of international law often referred to other branches of international law. To determine whether an act was a war crime, for instance, it was often necessary to examine the customary or conventional rules of warfare. Furthermore, in the course of a trial many preliminary questions might arise which must be solved according to the rules of international law other than international criminal law. As to national law, it was recognized that, even in cases concerning crimes under international law, points may arise which can only be settled if relevant rules of national law are taken into consideration. In the trial of a person accused of war crimes, for instance, the national rules regarding the relevance of superior orders for deciding upon the responsibility of a person or the gravity of the penalty might be of some importance, and the rules of a specific country regarding acquisition and loss of nationality might be decisive for the preliminary question whether the court had jurisdiction over an accused person.

42. For these reasons the Committee, by 9 votes to one, with 2 abstentions, adopted the provision that the court should apply international law, including international criminal law, and, where appropriate, national law.

Chapter III.

ORGANIZATION OF THE COURT

43. In drafting rules relating to the organization of the court, the Committee based itself to a considerable extent upon the corresponding provisions of the Statute of the International Court of Justice. On a number of points, however, it was felt that these provisions were not adequate to serve as a model, partly because

of the different functions of the two courts, partly because the International Court of Justice was established by the Charter of the United Nations whereas it was proposed that the international criminal court should be established by an instrument distinct from the Charter.

Qualifications of judges
(*Article 4 of the draft statute*)

44. The provisions of Article 2 of the Statute of the International Court of Justice were found to be adequate also for the purpose of the international criminal court, provided they were supplemented by a few words to indicate that the recognized competence in international law, which jurisconsults must possess in order to be qualified, should relate in particular to international criminal law.

Number of judges
(*Article 5 of the draft statute*)

45. The number of nine was found to be adequate and would allow a well-balanced composition of the court without making it too large to operate efficiently.

Division into chambers

46. It was suggested that the court should be divided into chambers, or at least should have a possibility of such division. It was argued that this would ensure a more expeditious handling of the affairs of the court, and would allow the court to increase its capacity of work if a great number of cases should be brought before it at any given time. It was also suggested that a certain element of regionalism might thereby be introduced into the structure of the court, by creating the possibility that a regional group of States might confer jurisdiction upon the court with regard to international crimes committed within this group, such jurisdiction to be exercised by a specially indicated chamber of the court.

47. On the other hand, some members of the Committee found that a chamber would not be so well balanced a body as the whole court. Furthermore, the division into chambers would compromise the unity of the jurisprudence of the court, unless appeals were allowed to the plenary, and in such event the establishment of chambers would not serve to expedite the handling of cases before the court. If in an unforeseeable future the load of work should become too heavy for the court, the establishment of chambers and possibly an increase in the number of members of the court might be provided by an amendment to the statute. Liberal provisions regarding revision of the statute should be adopted to meet such a contingency. By 6 votes to 2, with 2 abstentions, the Committee decided not to envisage the establishment of chambers.

Election of judges
(*Articles 6, 7, 8, 9 and 11 of the draft statute*)

48. The decision of the Committee to recommend that the statute should be adopted in the form of a convention was found to have an important influence upon the manner in which judges should be elected. However much the Committee favoured a close relationship between the United Nations and the court, the majority of the members expressed their preference for the solution that candidates should be nominated, and members of the court elected, only by the States parties to the statute, not by all States Members of the United Nations and by the General Assembly, respectively. The vote was 8 in favour to 2 against, with 2 abstentions on the question of nominations, and 5 in favour to 1 against, with 7 abstentions on the question of elections.

49. The attitude of the majority was based on several reasons. There would be little inducement to becoming a party to the statute, if States not parties would also enjoy the privilege of taking part in elections. The common will of States should be maintained as the basis of the court, and States which had not expressed their will to support the court should therefore have no influence upon its composition. Furthermore, every election by the General Assembly would furnish an opportunity for those States which objected to the court to raise a great debate about the principles upon which the court was established. Such a possibility was not desirable.

50. It was agreed, however, that if the General Assembly should prefer not to follow the advice of the majority of the Committee on the method of establishing the court, and should decide to establish the court by United Nations action, the links between the United Nations and the court would then be sufficiently close to warrant that members of the court should be elected by the General Assembly meeting with representatives of such non-member States as might have become parties to the statute.

Representative character of the court
(*Article 10 of the draft statute*)

51. The directive to the electors that the judges as a body should, as far as possible, represent the main forms of civilization and the principal legal systems of the world, is in substance identical with the provision of Article 9 of the Statute of the International Court of Justice. As, however, it was possible that countries belonging to certain legal systems might not become parties to the statute of the international criminal court and candidates representing those systems might therefore not be nominated, the Committee found it necessary to qualify the provision by the words "as far as possible" which are not found in the above-mentioned Article of the Statute of the International Court of Justice.

Disqualification of judges
(*Article 17 of the draft statute*)

52. In addition to the principles regarding this subject embodied in the Statute of the International Court of Justice, the Committee felt that special rules would be necessary in view of the functions of the international criminal court. The principle of national judges *ad hoc* being inapplicable to a criminal proceeding against an individual, it should on the contrary be permitted to a party, whether the accused, the prosecution, or a

State intervening under article 30 of the draft statute, to challenge the sitting of any judge in the particular case.

53. Different methods were examined. That it should be the duty of a judge to withdraw at the request of a party was found to be impracticable. It would, indeed, paralyse the court if there were a number of defendants in the same case. A challenge made in open court to be ruled upon by the court was not found to be a happy solution either. The Committee preferred that a party wishing to raise objection against the participation of a judge in a trial, should approach the President of the court. If the President should find the objection justified, he might, in accordance with his general powers, advise the judge not to participate. In case of disagreement between the President and the judge, the court should decide.

Occupations of judges
(Article 15 of the draft statute)

54. As a consequence of the fact that the court would not remain in permanent session, the Committee agreed that judges should not be precluded from having other professional occupations. Such occupations, however, should not prevent a judge from attending sessions of the court, nor should they in any other way be incompatible with his judicial functions. His duties as a member of the court should, in other words, prevail over any other duties.

Emoluments of judges
(Article 22 of the draft statute)

55. One further consequence of the same fact was that judges should not receive a remuneration similar to that received by members of the International Court of Justice, unless they were actually sitting. The Committee found that they should receive an annual allowance of a symbolic nature, and in addition thereto a daily allowance when they participated in a session of the court. Travel expenses should of course also be paid. It was understood that the amount of allowances should be determined by the financial regulations which the States parties to the statute would adopt in conformity with article 23 of the draft statute.

Registrar and seat
(Articles 20 and 21 of the draft statute)

56. The question was raised whether the court should appoint its own registrar, or whether the statute should provide that the Registry of the International Court of Justice should perform the work of the registry of the international criminal court. Some members objected to this latter possibility. The Committee unanimously adopted the provision that the court should appoint its registrar. This did not rule out the possibility that the Registrar of the International Court of Justice might be appointed if he were authorized by that Court to accept such appointment. The functional separation of the two registries, however, would be maintained.

57. The question where the court should have its seat was left open for a later decision.

Finances
(Article 23 of the draft statute)

58. One of the consequences of establishing the court by a statute in the form of a convention would be that the expenses of the court and its related organs could not be covered from the budget of the United Nations. The Committee therefore, by 8 votes to none, with 4 abstentions, expressed itself in favour of the creation, by the States parties to the statute, of a fund for this purpose. Detailed rules for the collection and administration of the fund might be laid down by regulations adopted by the parties. This fund might in certain cases cover also the fees and expenses of counsel for the defence. Article 38, paragraph 2, sub-paragraph (*c*), of the draft statute provides that the accused shall be entitled to have the expenses of his defence charged to the fund in case the court is satisfied that he is financially unable to engage the services of counsel.

Privileges and immunities
(Article 14 of the draft statute)

59. The Committee decided to include in the draft statute an article having the same wording as Article 19 of the Statute of the International Court of Justice regarding the diplomatic immunities and privileges of the judges. In this connexion, the question was raised whether the draft statute should not also include corresponding provisions with respect to the registrar and other officers of the court. It was also mentioned that it might be considered necessary to secure the requisite immunities and facilities for other persons connected with a trial, such as counsels and witnesses. The Committee decided, however, by 4 votes to 2, with 6 abstentions, not to include in the draft statute an article relating to these questions. It was understood that subsequent conventions or arrangements might take care of the matter.

Chapter IV.

JURISDICTION OF THE COURT

Methods of conferring jurisdiction
(Article 26 of the draft statute)

60. It was proposed in the Committee that States, by the very fact of accepting the statute, should be bound to recognize the jurisdiction of the court. Most of the members of the Committee, however, preferred to omit from the statute any obligation of this kind and to leave this problem to special conventions to be concluded after the statute had become operative. They

feared that many States would be reluctant to accept the statute if they should thereby automatically become bound to recognize the jurisdiction of the court. For this reason, the Committee decided that jurisdiction should not be conferred upon the court by the statute itself. The decision was taken by 6 votes to 1, with 5 abstentions.

61. The Committee also discussed whether jurisdiction should be conferred upon the court by a special protocol attached to the statute. The view was expressed that the drafting of such a protocol, even with respect to only one crime as, for instance, genocide, would require a considerable time and the protocol would not, by its legal nature, be different from a special convention not attached to the statute of the court. For this reason, the Committee decided not to envisage any such protocol.

62. There was general agreement that the principal method of conferring jurisdiction upon the court would be the conclusion of particular conventions to that effect. Such conventions would be general, that is to say, they would not relate to any specific case but to future cases which might arise with respect to one or more groups of crimes. Such conventions might furthermore specify conditions under which jurisdiction would be conferred upon the court.

63. A proposal was made to the effect that jurisdiction might be accepted generally by a unilateral declaration of a type similar to the declaration envisaged in the so-called optional clause of Article 36 of the Statute of the International Court of Justice. It was pointed out, however, that there was not complete analogy between the jurisdiction of the international criminal court and the jurisdiction of the International Court of Justice. In the latter case, the Statute itself specified the groups of disputes to which the unilateral declaration should refer. In the case of the international criminal court there would be no such specification and it would be impracticable to leave it to each unilateral declaration to specify the groups of crimes to which it referred. Such specification must be made in a particular convention. There would, on the other hand, be nothing to preclude the inclusion in such a convention of a clause under which States could become parties to it by unilateral adherence.

64. In addition to the method of accepting jurisdiction generally, it was proposed that it should be possible for States to accept jurisdiction also with respect to any specific criminal act which had already been committed, that is to say, accept jurisdiction *ex post facto*. This would not be incompatible with the accepted principle *nullum crimen sine lege* since that principle was one of substantive law, whereas methods of conferring jurisdiction was a question of procedure. In national law it was recognized, for instance, that the said principle did not apply to modifications of the judicial structure or to rules of jurisdiction.

65. Such acceptance *ex post facto* might be effected either by a special agreement between two or more States or by a unilateral declaration made by one State renouncing jurisdiction in favour of the international criminal court. Special agreements would be needed in cases where the assent of two or more States would be necessary to give the court jurisdiction, for instance, where a crime had been committed on the territory of one State by a national of another State. Such agreement would also be needed where the practical co-operation of two States was necessary in order to start the trial, for instance, if the crime had been committed on the territory of one State and the criminal had taken refuge in another State which was not obliged to extradite him.

66. Doubts were expressed as to the appropriateness of any of these methods in criminal jurisdiction. It was pointed out, however, that States might in some cases find it to their advantage to be able, in this way, to refer a matter to the international criminal court. It might also be that States, in the beginning, would be reluctant to accept general obligations regarding the jurisdiction of the court, but would be ready in special cases to bring matters before it. In this way, it would be possible for them to test the new institution and gradually to gain confidence in it, and the ground would thereby be prepared for subsequent general acceptance of the court's jurisdiction.

67. On the basis of these arguments, the Committee accepted the principle that jurisdiction might be conferred by special agreement or by unilateral declaration. The vote was 11 in favour to none against, with 1 abstention.

68. Finally, the question was raised whether States not parties to the statute should have the right to confer jurisdiction upon the court by any of the methods agreed upon. It was pointed out that an acceptance of the statute for a particular case would be conceivable and that such a possibility was indeed envisaged by Article 35, paragraph 2, of the Statute of the International Court of Justice. It was pointed out, on the other hand, that in this respect also there was not complete analogy between criminal jurisdiction and the jurisdiction of the International Court of Justice. It would be preferable for the international criminal court to be open only to those States which had associated themselves in a more permanent way with the court. By 6 votes to 4, with 1 abstention, the Committee decided that particular conventions conferring jurisdiction upon the court generally should be limited to States parties to the statute and, by 9 votes to 4, it decided that the same rule should apply to special agreements and unilateral declarations.

Recognition of jurisdiction
(*Article 27 of the draft statute*)

69. The problem was raised whether an individual might be brought before the court if the State of which he was a national had not accepted the jurisdiction of the court. Some members gave an affirmative answer to this question. By becoming parties to the statute, States would, in the opinion of these members, have to delegate their territorial jurisdiction to the international criminal court and, under such circumstances, no further limitations would be required. Other members, without accepting this general consideration, felt that it should be possible to bring a person before the court by a decision of the General Assembly, even if the State of which he was a national had not accepted

the jurisdiction of the court. It would be undesirable to give an individual, who had committed international crimes and in the opinion of the General Assembly should be brought to trial, an immunity based upon the mere fact that the State of which he was a national had not accepted the jurisdiction of the court.

70. Against such arguments, it was pointed out that it would be necessary to proceed with caution in order to ensure that a large number of States would adhere to the statute of the court. If no limitation of the kind envisaged were maintained, many States might be reluctant to adhere to the statute. Under existing rules of international law, a State might object to any of its nationals being tried by a State which had not jurisdiction under general rules of international law, and the same would apply to jurisdiction of an international tribunal. Furthermore, it was not exclusively a question of protecting the individual against trial by an incompetent tribunal, but also a question of protecting the State itself, in so far as the trial of a high ranking political leader of a country involved a review of the internal or foreign policy of that country.

71. For these reasons, the Committee decided, by 9 votes to 2, that jurisdiction of the court, in regard to nationals of a certain State, should be based on the consent of that State.

72. For similar reasons, the Committee decided that no individual should be tried before the court unless its jurisdiction had been accepted by the State in which the crime was alleged to have been committed. It was argued that the statute should not require the acceptance of the jurisdiction of the court by both the State of which the accused was a national and the State in which the crime was alleged to have been committed. The acceptance of the court's jurisdiction by either State should be sufficient. A proposal to this effect was defeated by 4 votes to 3, with 5 abstentions.

73. In the case of double nationality and in the case of a crime committed in more than one State, the consent of all the States concerned would be necessary.

Approval by the United Nations of jurisdiction conferred upon the court

(Article 28 of the draft statute)

74. Concern was expressed by members of the Committee regarding the possibility that two States or a group of States might, by a convention or a special agreement between themselves, create new categories of international crimes which were not recognized as such by the prevailing opinion in the world. It was agreed that under existing rules of international law nothing could prevent States from concluding such treaties, but it was also agreed that measures should be taken to prevent States from bringing cases arising under such treaties before the court. By 7 votes to 1, with 4 abstentions, the Committee adopted the principle that any convention, special agreement or unilateral declaration conferring jurisdiction upon the court should be subject to the approval of an organ of the United Nations. This would ensure that the court could not be called upon to try as a crime acts which in the general world opinion were not criminal in character. It would likewise ensure that the court would not be given jurisdiction over types of crimes which did not merit the attention of such an important judicial organ. The Committee decided that the organ competent to give such approval should be the General Assembly.

75. The conditions under which such approval should be given might vary. If a convention conferring jurisdiction upon the court in respect of a particular crime were concluded under a resolution of the General Assembly, no further approval would be necessary. If a convention were concluded outside the framework of the United Nations, a resolution would have to be adopted approving the fact that jurisdiction was conferred upon the court by that convention. The same would apply to special agreements and unilateral declarations, although it was conceivable that the General Assembly in a more general way might express its prior approval of such agreements or declarations in so far as they concerned certain types of crimes.

76. It was proposed that approval by the United Nations should not be required for special agreements or unilateral declarations when they related to such categories of crimes as were defined in conventions which had already been approved by the United Nations. The Committee did not find it necessary to formulate any such express exception to the general principle, but it was understood that the General Assembly might, if it so wished, give effect to the idea on which that proposal was based by general approval in advance as indicated above.

77. On the other hand, the principle of approval by the General Assembly as formulated by the Committee would not prevent the Assembly from approving a special agreement or unilateral declaration, even if it related to a type of crime over which no convention had, in general, conferred jurisdiction upon the court. The Committee having been asked whether a limitation of this kind should be expressed in the statute, a negative answer was adopted by 5 votes to 2, with 5 abstentions.

Challenge of the jurisdiction of the court

(Article 30 of the draft statute)

78. The principle that an individual accused before the court should be entitled to challenge the jurisdiction of the court was accepted by all the members of the Committee. The accused would have the right to a fair trial and it was implicit in that conception that he should have the right to claim before the court that it had no jurisdiction in the case. The Committee was also in general agreement that the court itself should decide any such issue raised by the accused.

79. Proceeding further, the Committee discussed whether the right to challenge the jurisdiction of the court should also be given to States. Although States would not be parties to the trial, at least not on the side of the accused, such a right could become effective by admitting a State to intervene in the proceedings before the court. Strong arguments were advanced in favour of giving States such a right. The principles previously admitted according to which an individual

could not be tried unless the State of which he was a national and the State in which the crime was alleged to have been committed had consented to the jurisdiction demonstrated the interest which a State might have in maintaining strict limitations upon the jurisdiction of the court. The trial of a high-ranking political leader of a State was a matter which transcended the individual interests of the accused, since it might involve, implicity or explicity, that the court would examine and pass judgment upon the internal or foreign policy of that State. The State should therefore have an independent right, over and above that of the accused, to challenge the jurisdiction of the court, and should not be compelled to leave that question to be taken up by the accused.

80. On the basis of these arguments, the Committee accepted, by 12 votes to none, with 2 abstentions, the principle that a State should have an independent right to challenge the jurisdiction of the court.

81. The question next arose, what organ should decide the issue if a State availed itself of this right. The opinion was expressed that such an issue, by its very nature, would be a question of interpreting a treaty, since it had been admitted that the jurisdiction of the court should be based upon conventions or other agreements (in the case of a unilateral declaration the question was not likely to arise). A legal question of this kind was a matter for the International Court of Justice to decide, and it was therefore proposed that should a State challenge the jurisdiction of the international criminal court, the matter should be referred to the International Court of Justice.

82. Certain practical objections were raised against this proposal. In the first place, the Statute of the International Court of Justice admitted only States as parties before the Court in cases of contentious jurisdiction, and it might be that a dispute as to the jurisdiction of the international criminal court was not a dispute between two States, for example, if the court had been seized pursuant to a resolution of the General Assembly of the United Nations. To meet this objection it was proposed that the issue should be submitted to the International Court of Justice for an advisory opinion, and that it might be made obligatory for the international criminal court to follow such an opinion if this tended to uphold the challenge.

83. Even assuming that the requirements of Article 96 of the Charter, according to which only organs of the United Nations or the specialized agencies might be authorized to ask for advisory opinions, could be fulfilled, it was felt, upon closer examination of the proposal, that such a solution would give rise to serious complications. States could not be precluded from raising the question of jurisdiction at an advanced stage of a trial, and if the question should then be referred to the International Court of Justice the proceedings before the international criminal court would have to be suspended for a considerable time. Furthermore, it could not be excluded that the decision of the international criminal court on a point raised by the accused would be inconsistent with the decision of the International Court of Justice on the same point raised by a State.

84. In view of these considerations, the Committee was in favour of giving the international criminal court a right in all cases to decide any issue raised with respect to its jurisdiction. A proposal to include in the draft statute an express provision to that effect was, however, rejected as superfluous. It would go without saying, it was argued, that in the absence of any provision to the contrary the court itself would have an exclusive right to settle such issues. Furthermore, the same answer to the question would be implied in the provisions inserted in paragraphs 2 and 3 of article 30 regarding the time at which the court should consider such challenges.

85. It was found desirable to include these two paragraphs also on their own merits, as the important question as to when challenges might be made and when they should be considered by the court might otherwise give rise to difficulties, due to varying principles followed in various national legal systems. Rules were adopted to the effect that such a challenge should be considered prior to the beginning of the trial if the challenge were made before the trial, and that it should be considered at a time fixed in the discretion of the court, if the challenge were made during the trial. The time at which the court would render its decision of the issue was in both cases left for the court itself to determine, and it might choose to defer its decision of the issue until the judgment was rendered on the substance of the matter before it.

SHOULD THE COURT BE COMPETENT TO TRY INDIVIDUALS ONLY, OR SHOULD IT ALSO BE COMPETENT TO TRY LEGAL ENTITIES?

(Article 25 of the draft statute)

86. The Committee agreed that this problem presented itself in a different manner under the following two contingencies: (*a*) the court was given jurisdiction to pass judgment only on the penal responsibility of the accused; (*b*) the court was given jurisdiction to pass judgment on the penal as well as the civil responsibility of the accused.

87. Addressing itself to the first contingency, the Committee first examined whether States might be tried before the court. Most members of the Committee agreed to answer this question in the negative. Quite apart from the problem whether substantive rules of international criminal law had at present admitted the penal responsibility of States as such, it was argued that the responsibility of States for acts constituting international crimes was primarily of a political character, and that it would not therefore be proper for the court to decide such a question. In the view of those members of the Committee, what was important was to reaffirm and consolidate the newly established principle that individuals might be held internationally responsible for criminal acts.

88. With respect to other legal entities, it was pointed out that penal responsibility of private corporations was not unknown in some national systems of penal law. Punishments, such as payment of fines or confiscation of property, might be inflicted upon legal entities found to be responsible for illegal acts. Other national legal systems, however, did not recognize such a penal responsibility on the part of legal entities, and it was therefore felt by most members of the Committee that the introduction of such a responsibility

in international law would be a matter of considerable controversy.

89. By 11 votes to none, with 3 abstentions, the Committee therefore expressed itself in favour of the principle that the court should be competent to pass judgment on the penal responsibility of individuals only.

90. The Committee was in agreement that no person should be exempt from the jurisdiction of the court merely because of his position as a responsible ruler, public official, etc. The Committee wished to confirm the precedents established by the Nürnberg and Tokyo judgments and also the corresponding rule expressed in article IV of the Convention on the Prevention and Punishment of the Crime of Genocide. Basing itself upon the wording proposed by the International Law Commission in article 3 of the draft Code of Offences against the Peace and Security of Mankind (contained in the report of the Commission on its third session,[6] the Committee chose to express this principle in the wording which appears in the latter half of article 25 of the draft statute to the effect that the court shall be competent to judge also persons who have acted as Head of State or agent of government.

Should the court be competent to award damages?

91. It was proposed that the court should be competent to decide also the civil responsibility of an accused for the crimes of which he might be found guilty, and adjudicate damages. In addition, it was proposed that the court should be competent to declare a State or other legal entity jointly liable for the payment of damages which the court might impose upon a convicted individual who acted on behalf of the State or other legal entity.

92. It was argued that a criminal jurisdiction without collateral jurisdiction with respect to the civil responsibility of the accused would be imperfect. The victims of a crime were not only interested in the just punishment of the perpetrator, but also, and perhaps even more, in obtaining adequate compensation for the wrong they had suffered. The allocation of damages was not a matter of secondary importance, although it might be treated as accessory from a procedural point of view. The case was mentioned of certain victims of so-called medical experiments in Nazi concentration camps. It had been recognized in connexion with this case that there was a lacuna in the system of war crimes trials in so far as there had been no possibility of obtaining a judicial decision regarding the responsibility of the German State to pay damages to the victims. An international criminal court which could not adjudicate the civil responsibility of an accused and the State for which he acted, would likewise be incomplete.

93. Other members of the Committee expressed strong objections against any proposal to give the court competence to decide questions of civil responsibility. If such questions were raised during a trial the emphasis would be shifted away from the penal responsibility and, if States might be declared liable, from the individual responsibility which it was essential to maintain. The very nature of a trial might thus be compromised; it would become a trial of a State, not of an individual criminal.

94. Furthermore, serious complications would ensue. In case of war crimes or crimes against humanity the number of victims might be very great, and it would not be practicable to allow each of them to become a party to the trial. The examination of the damage suffered by each individual and the calculation of the indemnity he should receive would require the attention of the court for a great length of time.

95. For these reasons, the Committee decided, by 7 votes to 2, with 4 abstentions, to preclude the court from deciding upon the responsibility of States for damage caused by crimes over which the court would have jurisdiction. By 6 votes to 3, with 4 abstentions, it decided also to preclude the court from deciding upon the civil responsibility of the accused himself.

96. A proposal was made to the effect that the civil responsibility of an accused should be implicitly established by his conviction, as an accessory to his penal responsibility, whereas the compensation should be fixed by other judicial organs, whether national courts or special indemnization tribunals. This proposal was likewise rejected by 6 votes to 3, with 4 abstentions.

Access to the court

(Article 29 of the draft statute)

97. Most members of the Committee were in favour of giving an organ of the United Nations the right to bring a case before the court. By 8 votes to none, with 4 abstentions, the Committee expressed itself in favour of such a solution. On the question of the organ or organs which should be competent to institute proceedings, members of the Committee agreed that the General Assembly should have this right. A proposal to the effect that the General Assembly should in this respect act by a two-thirds majority was defeated by 5 votes to 3, with 5 abstentions. Consequently, the draft statute contains no rule regarding the required majority, and the provisions of Article 18 of the Charter regarding voting in the General Assembly will therefore apply. A proposal to give also the Security Council the right to institute proceedings was defeated by 7 votes to 2, with 4 abstentions.

98. The question was raised whether, in addition hereto, other organizations of States should have the possibility of bringing cases before the court if they had been so authorized by the General Assembly of the United Nations. It was pointed out that certain regional organizations might have an interest in seizing the court. By 3 votes to 2, with 7 abstentions, the Committee answered this question in the affirmative.

99. Finally, the question was raised whether individual States should have a right to seize the court. The opinion was expressed that they should not have any such independent right, but be entitled only to submit the matter to the General Assembly, which might then decide to seize the court. This would be necessary in order to prevent a State from setting the machinery

[6] See *Official Records of the General Assembly, Sixth Session, Supplement No. 9.*

of the court in motion simply for reasons of political propaganda.

100. Against this opinion it was argued that the legal trial before the court would, under such a scheme, be preceded by a political trial before the United Nations. It was most undesirable to give added emphasis in this way to the political aspect of a trial, and States should therefore have the fullest facilities to bring matters directly before the court. This would not preclude the setting up of special machinery to screen complaints lodged with the court, but it did preclude that a State should be required to submit the case to the United Nations before seizing the court.

101. By 7 votes to 2, with 3 abstentions, the Committee expressed itself in favour of giving individual States the right to bring matters before the court.

102. The decision to give States access to the court did, of course, not imply that any State should be entitled to institute proceedings. Only States parties to the statute should have this right. It was further proposed that such a right should be conferred only upon those States parties to the statute which had themselves recognized the jurisdiction of the court with respect to offences belonging to the same category or class as the offence with which the accused was charged in the particular case. A certain element of reciprocity would thus be introduced, in so far as no State could bring complaints against the nationals of another State with regard to a certain offence, unless it had recognized that complaint might also be brought against its own nationals in respect of the same offence. This principle was adopted by 8 votes to none, with 5 abstentions.

103. The argument was advanced that even with these limitations the right of a State to institute proceedings before the court might in certain situations counteract the policy pursued by the majority of States in the United Nations. If, for instance, a crime of aggression were committed, and the General Assembly wished to mediate and bring the aggression to an end by peaceful means, its endeavours in this respect might be adversely affected by the decision of a single State to bring complaints before the international criminal court against individuals responsible for the aggression. It was consequently proposed that the General Assembly should have the right to decide, in the interest of the maintenance of peace, that proposed proceedings should not be instituted. This proposal, however, was not adopted, the vote being 2 in favour to 2 against, with 7 abstentions.

Should States parties to the statute be obliged to execute warrants of arrest issued by the court and carry out requests for other assistance?

(Articles 31 and 40 of the draft statute)

104. The Committee agreed that an essential precondition to the proper functioning of the court would be that it had power to issue warrants of arrest. It was felt that, unless the accused could be brought before the court, it would not be possible to carry through a trial. Although the Committee did not turn its attention directly to the possibility of a trial *in absentia,* it was the prevailing sentiment among the members that such a possibility should not be envisaged, bearing in mind the political aspects which were likely to characterize most of the cases before the court.

105. It was likewise agreed that the court, in order to fulfil its functions, would have to rely upon the assistance of governments in many respects, in particular, in regard to the taking of evidence and the appearance of witnesses. The court should have power to request the assistance of national authorities in such respects.

106. Divergences of opinion arose, however, as to the obligations of States to execute such warrants of arrest and to carry out such requests. Some members strongly took the attitude that such obligations should rest upon all States parties to the statute. Others held the view that only those States which had accepted the jurisdiction of the court by particular convention should be obliged to execute warrants or carry out requests for assistance, and only under the conditions which the convention might prescribe.

107. It was argued in favour of this latter point of view that it would be unwise to burden participation in the statute with such obligations. States which would otherwise be ready to accept the statute might be deterred from doing so if the statute imposed obligations of this kind. The immediate aim was to establish the court; further measures relating to the functioning of the court might be adopted later. Complicated issues such as those relating to extradition and asylum would then have to be solved.

108. Against this attitude, and in favour of including the undertaking in question in the statute itself the following arguments were adduced. Only in this way would it be possible to ensure the desirable measure of uniformity; if particular conventions, each with respect to a particular crime or group of crimes, could lay down different conditions for the execution of warrants, confusion would result. Furthermore, this obligation was so essential to the successful functioning of the court that it should be embodied in the statute itself. The difficulties involved could not be evaded simply by referring the matter to be settled by subsequent conventions; if any considerable number of States did not accept such conventions, the proper functioning of the court, even with respect to those States which were parties to a convention, would be impaired. So many limitations and guarantees had already been adopted, that no State would find its interests prejudiced by an obligation derived directly from the statute. It should be kept in mind that the problem would not arise unless a case were properly brought before the court. If the State of which the accused was a national, or in which the crime was alleged to have been committed, had not accepted its jurisdiction, the statute could not engage a State to render the court assistance, as there would be no trial at all.

109. The majority of the Committee, however, did not find this line of reasoning persuasive, and accepted the principle that no State should, under the statute, be obliged to carry out warrants of arrest or other similar decisions of the court. In drafting the articles relating to this problem, the Committee decided to separate the problem of the powers of the court to issue warrants of arrest from the problem of obligations on States to carry out such warrants. The clause which empowers the court to issue warrants of arrest was inserted as article 40 among the articles relating to the powers of the court. The provisions relating to the duties of States to assist the court were embodied in article 31. The scope of that article was enlarged to cover not only warrants of arrest but any request to national authorities for assistance to the court in the performance of its duties. The article provides that a State shall be obliged to render such assistance only in conformity with any convention or other instrument in which it has accepted such obligation. It was not found expedient, at the time of drafting the article, to establish any connexion between this problem and the acceptance of jurisdiction. A State might, therefore, even without recognizing the jurisdiction of the court, undertake to render the court assistance. On the other hand, a State might recognize the jurisdiction of the court without undertaking any obligation to assist it. The vote on article 31 was 6 in favour to none against, with 5 abstentions.

Penalties
(Article 32 of the draft statute)

110. By 13 votes to none, with 1 abstention, the Committee adopted the principle that the court shall impose such penalties as it may determine, subject to any limitation which may be laid down in the instrument by which jurisdiction is conferred upon the court. One member pressed for the inclusion of express power to order the confiscation of property. The majority of the Committee considered it unnecessary to include such a provision, leaving it to the court to make such an order as a part of any penalty it might impose.

111. The understanding was, that it would not be necessary for a convention defining a crime to specify the penalty for such crime. The Convention on Genocide was mentioned in this connexion. Nor would it be necessary that the convention conferring jurisdiction upon the court should specify the penalty. This convention, and incidentally also a convention defining the crime, might, however, lay down limitations with respect to the penalty, and the court must respect any such limitations. It might, for instance, be provided that the death penalty should not be imposed. In the absence of such limitations, the court might determine the nature of the penalty as well as its severity. Further, such a penalty as confiscation of property might be imposed, as indicated above in paragraph 110.

Chapter V.

COMMITTING AUTHORITY AND PROSECUTION

The committing authority
(Article 33 of the draft statute)

112. The proposal was made that some organ should be established to decide, upon a preliminary examination of the evidence adduced in support of a charge, whether there was a *prima facie* case against the accused. Only when this authority was satisfied that there was sufficient evidence to sustain the complaint should the case be allowed to come before the court for trial.

113. There was general agreement in the Committee that some kind of a screening process would be desirable. As to the purpose and function of such a process, different opinions were expressed. One line of thought was that no preliminary examination of the evidence would be necessary. Most cases to come before the court would relate to crimes so manifest that no doubt could exist as to the foundation of the charges. In cases of aggression, genocide, or the like, there would hardly be any doubt regarding the weight of the evidence. On the other hand, it would in such cases be an essentially political problem whether a charge should be brought before the court. Any decision on this question by a specially established body might run counter to the line of policy pursued by the United Nations in a given situation, and if any screening process were necessary it should, therefore, be performed by the pertinent organ of the United Nations, which should decide as to the political expediency of a trial.

114. Other members felt that emphasis should be laid on different aspects. The lack of a police force at the disposal of the court ruled out the practical possibility of a trial of rulers in power. For all practical purposes, it might be assumed that in cases concerning major crimes under international law only ex-rulers would be brought before the court. No conflict between the policy of the United Nations and the holding of a trial was therefore likely to arise.

115. There was, however, a need for protecting an individual against frivolous prosecution. Even if ultimately acquitted, an individual might suffer great harm from a trial, and a preliminary examination of the evidence would therefore serve the interests of justice. In thus protecting the individual, the screening process would incidentally also protect the court against the possibility of having to consider frivolous cases.

116. Some members felt that in addition to examining whether a *prima facie* case existed, the organ entrusted with the performance of this screening process should also be given authority to decide whether a trial was expedient, not only from the point of view of world politics, but more generally whether it was in the public interest.

117. By 6 votes to 5, with 3 abstentions, the Committee expressed itself in favour of limiting the purpose of the screening process to a determination of the question whether there was a *prima facie* case against the accused.

118. The next question was what method should be adopted for the establishment of the body to perform this function. Various possibilities were suggested. The body, which it was decided to call the "committing authority," might be set up by the court from among its own members; it might be elected by the court from among persons not members of the court; or it might be elected as an independent body in the same manner as members of the court were elected. None of these methods were, in the opinion of the members who suggested them, incompatible with the semi-judicial functions to be carried out by the committing authority.

119. By 7 votes to 1, with 5 abstentions, the Committee adopted the last named solution. The committing authority would consequently be elected in the same manner, at the same time, on the same terms, and from among persons possessing the same qualifications, as members of the court. The provisions contained in articles 4, 6 to 12 and 19 of the draft statute therefore apply, *mutatis mutandis,* to the election of members of the committing authority.

120. As to the powers of the committing authority, it was decided by 3 votes to 2, with 8 abstentions, that it should not have powers equivalent to those of the court to summon witnesses and require evidence to be produced. It was understood, however, that the committing authority might, in case it was found necessary, ask for the assistance of the court in this respect.

121. Finally, the question was discussed whether the accused should have the right to be heard and adduce evidence before the committing authority. Although such a right was not given the accused under certain national systems of law, which had, in the form of a Grand Jury or other similar body, an authority to commit a person to trial, it was felt by certain members of the Committee that the protection of the individual would be incomplete without such a right.

122. By 6 votes to 2, with 5 abstentions, the Committee decided to include a provision giving the accused such a right.

123. It was agreed that the committing authority should have the power to adopt its own rules of procedure, and it was understood that questions relating to quorum, voting, and other similar matters, would be regulated by these rules.

Prosecution
(*Article 34 of the draft statute*)

124. There was general agreement that the statute should contain provisions regarding the prosecuting authority. As to the contents of such provisions two different basic conceptions confronted each other. One conception was that the prosecutor should be a permanent officer, appointed by the General Assembly or by the court itself, to serve in all cases coming before the court. The other conception was that he should be chosen for each particular trial by the complainant, that is to say, the General Assembly of the United Nations, an organization of States, or a State, as the case might be.

125. In support of the first conception the following arguments were advanced. The prosecuting authority should be distinct from the complaining party. It should be an independent person who approached his duties in a non-partisan spirit. He should have the power not to proceed with a case if he were convinced that the accused was innocent or that a trial would not be in the general interest. If he proceeded to trial, he should see to it that the accused and his counsel obtained a fair hearing.

126. Against this conception, and in favour of the appointment of prosecutors for each particular case, it was argued that the institution of a permanent prosecutor with discretionary power not to proceed to trial when, for instance, the General Assembly had decided to bring a case before the court, was not feasible for an international criminal jurisdiction. To give so much power to any single person was inconceivable, and was not even called for, once the Committee had adopted the proposals for a committing authority. To do so might, indeed, amount to a duplication of the screening process.

127. Moreover, a permanent prosecutor would always be a national of some State, with his own special loyalties and with his views necessarily biased in certain respects. Cases could easily be visualized in which it would not be possible to trust his attitude. Furthermore, the ideal of a fair-minded prosecutor, not bent upon having the accused convicted at any cost, could be realized even with *ad hoc* prosecutors, and would not necessarily be realized with the appointment of a permanent officer who for long periods might have nothing to do. If suitable alternatives were available, it was undesirable to create new permanent organs or officers.

128. For these reasons, the Committee decided, by 7 votes to 4, with 3 abstentions, that the prosecuting authority should be established on an *ad hoc* basis.

129. The appointment of the prosecutor on an *ad hoc* basis did not, however, necessarily imply that he should be appointed by the complainant, and did not therefore rule out the possibility of a compromise between the two basic conceptions, to the effect that he should be appointed by the United Nations. A proposal was made that the Secretary-General should appoint a United Nations prosecuting authority to be responsible for the prosecution in a particular case, whether the United Nations or a State was the complaining party. He should be appointed from among ten persons previously elected for this purpose. In support of this proposal the argument was advanced that the prosecutor should represent the interests of the international society in general, and not only the interests of one State. If he were appointed by a complaining State, the proceedings before the court might degenerate into a quarrel between States, and proceedings before the court would be deprived of the dignity which must be required. Furthermore, a prosecutor appointed by the United Nations might be able to exercise a greater control over the proceedings

than a prosecutor appointed by a State, and he might be able to withhold action if political conditions required restraint. The panel of ten persons from which he should be elected would ensure that an independent person could always be found. The proposal was, however, rejected by 4 votes to 3, with 4 abstentions.

130. Another proposal was made to the effect that the President of the International Court of Justice should be asked to appoint a prosecutor general for the particular case. According to this proposal also, the appointment should be made from among ten persons previously elected for the purpose. This proposal was also defeated, the vote being 2 in favour to 2 against, with 7 abstentions.

131. Finally, the proposal was made that a prosecuting attorney should be appointed in each particular case by a panel of ten persons elected in the same manner as the judges of the court, that is to say, by the States parties to the statute. The prosecuting attorney would not necessarily be appointed from among these ten persons. He should possess the same qualifications as a member of the court. This proposal was adopted by 6 votes to 2, with 3 abstentions.

Chapter VI.

PROCEDURE OF THE COURT

132. In discussing the rules of procedure to be embodied in the draft statute, the Committee encountered a general difficulty due to the fact that the national systems of procedure in criminal cases were widely different. Members of the Committee, each of them educated and trained in his own national system for which he had a natural preference, conceived basic problems of procedure widely different, and used terms which conveyed no precise ideas to those of their colleagues who were trained in a different legal system.

133. The Committee endeavoured to formulate in as plain and non-technical language as possible the rules upon which it agreed. It tried to avoid terms having precise meaning and establishing implications in the legal language of one country, but not having an equally precise meaning in other countries. For instance, the term "cross-examination" has been avoided, although provisions have been included in the draft statute to the effect that witnesses may be interrogated not only by the party who introduces them, but also by the other party. In avoiding use of the technical term, the Committee has wished to preclude any implied reference to the body of rules which may govern cross-examination in any particular country.

134. The Committee, furthermore, endeavoured to limit the contents of the chapter on procedure to a statement of the most essential rules. The court should have power to adopt its own rules, and such rules might include any rule necessary to ensure an adequate procedure before the court. As the court should be a permanent body, it was found unobjectionable to leave it a considerable latitude in this respect. The Committee was of the opinion that the court should also have the right to lay down such general principles governing the admission of evidence as it might deem necessary, and did not therefore attempt to formulate rules on evidence for inclusion in the statute.

135. In order that the rules of the court might be ready for application when the first case was brought before the court, it was assumed that the court would elaborate and adopt those rules as soon as possible after it had been established. It was not, however, found necessary expressly to provide for this in the statute. In order to ensure that the rules would be known to the parties before the opening of a trial, it has been provided that the rules should be published without delay. As a further safeguard of the interests of an accused it has been provided that the rules should not be amended so as to affect pending proceedings.

136. The provisions regarding rules of the court, as contained in article 24 of the draft statute, were adopted by 8 votes to none, with 4 abstentions.

INDICTMENT

(*Articles 35 and 36 of the draft statute*)

137. The provisions of these articles require little comment. The question was discussed whether the indictment, in addition to a statement of the facts and a reference to the law, should contain also the names of witnesses and a list of documentary evidence to be introduced by the prosecution. It was recognized, however, that such indications could not be final and exhaustive. As was experienced during the Nürnberg and Tokyo trials, the prosecution might frequently be unable to present all the documentation and names of witnesses at the beginning of a case, but might be obliged to continue to collect evidence during the actual course of the trial. Therefore, the Committee preferred that the indictment should include only a statement of the facts and a reference to the law under which the accused was charged.

TRIAL WITHOUT JURY

(*Article 37 of the draft statute*)

138. A proposal was made to the effect that the statute should provide explicitly that trials before the court should be without a jury. It was found by some members of the Committee that such a provision might be necessary in order to preclude the possibility that a defendant might plead that he had a fundamental right according to his national law to be tried before a jury. Other members thought that such a right, where it existed, could not be asserted before an international tribunal, and that an express provision as

proposed would be superfluous. Since, however, such a provision might make it easier for some States to become parties to the statute, no member of the Committee would oppose the proposal, which was adopted by 10 votes to none, with one abstention.

Rights of the accused
(*Article 38 of the draft statute*)

139. It was pointed out that an essential principle in national criminal proceedings, which should also be followed by the international criminal court, was that an accused shall be presumed innocent until proved guilty. A provision to this effect was adopted by 10 votes to none, with one abstention, and although it was asserted that this was a rule of evidence rather than a substantial right of the accused, it was decided to insert this provision as the first paragraph of article 38 dealing with the rights of the accused. A further proposal that the accused should not be deprived of his liberty unless there was a *prima facie* case against him was not adopted; it was agreed that the provisions relating to the committing authority would ensure that a case would not even be brought before the court unless there was sufficient evidence to sustain the charge. A proposal to the effect that the accused should not be deprived of his liberty unless by process of the court was also rejected. Although the principle was unobjectionable to most members of the Committee, it was found to raise difficult questions as to the relationship between the competence of the court and the right of national authorities, under their respective national laws, to arrest and detain a suspected criminal. These problems, it was felt, could hardly be solved by a short provision in the statute, but should preferably be left to be solved by subsequent conventions.

140. There was general agreement that it would be essential to secure for the accused a fair trial. The question was raised, however, as to what was exactly meant by a fair trial; some elements might be considered essential by persons accustomed to one legal system, other elements might be considered essential by persons accustomed to another legal system. The mere statement of the principle of fair trial might therefore give rise to differences of interpretation.

141. It was pointed out, however, that the general principle could be stated with the addition of certain minimum conditions involved in the conception of a fair trial, whereas supplementary conditions and details could be laid down in the rules of the court. An enumeration contained in the statute should, therefore, not be considered as exhaustive. On this understanding, the Committee proceeded to consider the various elements of the general principle of fair trial.

142. The right of the accused to be present at all stages of the proceedings was accepted as uncontroversial. As to the right of the accused to conduct his own defence or to be defended by counsel of his own choice, there was also general agreement in principle. Some discussion took place, however, as to the qualifications to be required of counsel for the accused. Some members suggested that he should be qualified to practice as counsel according to the laws of his own country; others would not prescribe such rigid requirements, but were in favour of admitting only lawyers to act as counsel; other members again felt that persons without legal training might, in certain circumstances, be useful to the accused and fully qualified to act as counsel. The question was also discussed whether counsel in one or the other contingency should be approved by the court. Most members, however, were in favour of liberal provisions. It was finally agreed not to insert rules on this matter in the statute itself but to leave it to the court to adopt the necessary provisions as part of its own rules. It was decided, on the other hand, that the right of the accused to obtain free assistance of counsel, if he was unable to bear the expenses himself, should be guaranteed in the statute. The expenses should be charged to the fund collected and administered by the States parties to the statute for the maintenance and operation of the court. A provision to this effect was adopted by 4 votes to one, with 5 abstentions.

143. The right of the accused to have the proceedings of the court, including documentary evidence, translated into his own language was accepted as uncontroversial. It was also unanimously agreed that the accused should have the right to interrogate any witnesses and to examine any document or other evidence introduced by the prosecution during the trial. The right of the accused to adduce oral or other evidence in his defence was likewise unanimously accepted.

144. The idea was advanced that it would be required, before an international criminal court, to secure for the accused a certain right which was not generally important in national criminal proceedings. It might occur, as it had occurred in the past, that the accused and his counsel did not have sufficient knowledge of the material from which they could draw evidence and could not, therefore, request the production of any specific document. It would in such cases be necessary, for a proper conduct of the defence, that the accused or his counsel should have an opportunity to examine such material. Such an opportunity might not be given them if they could not obtain the assistance of the court in this respect. It was consequently decided, by 9 votes to none, with 4 abstentions, that the accused should have the right to the assistance of the court in obtaining material which the court was satisfied might be relevant to the issues before the court.

145. The proposal was made that the accused should not be obliged to testify against himself. This principle was generally accepted but some discussion arose as to its exact implications. What should be the consequences if the accused refused to testify? Should these consequences be the same if he had taken the witness stand and if he had not done so? Should he be allowed to testify under oath? Should he submit to cross-examination if he agreed to testify? In the course of the discussion of these questions the special rules and principles followed in various legal systems were referred to. It was finally agreed, however, to frame a provision which did not imply any reference to particular national systems. The content of this provision, as found in the last paragraph of article 38 of the draft statute, is to the effect that the accused should have the right to be heard by the court but should not be compelled to speak; that the refusal

to speak should not be relevant to the determination of his guilt; and that he should be liable to questioning by the court and by counsel for the prosecution and the defence if he chose to speak.

Publicity of hearings
(*Article 39 of the draft statute*)

146. It was agreed that an essential element in ensuring a fair trial of the accused would be the publicity of hearings before the court. It was pointed out, however, that there might be circumstances under which publicity would be against higher interests, for instance, of a moral, political or other character. There might also be cases in which the legitimate interests of the accused or witnesses required the exclusion of publicity. It was, therefore, decided to insert in the relevant provision of the statute a rule authorizing the court to sit in private, if it found that public sittings might prejudice the interests of justice. It was agreed that the deliberations of the court should take place in private and that it should not be allowed to disclose any part of these deliberations, even after the trial.

Warrants of arrest
(*Article 40 of the draft statute*)

147. As mentioned in paragraph 104 above the Committee found it desirable to state expressly that the court should have the power to issue warrants of arrest, and a special article has been included in the draft statute to that effect. The wording of that article as adopted by the Committee is so broad as to cover warrants of arrest with respect not only to the accused, but also other persons related to the criminal act which is the subject of the trial. In exceptional cases it might for instance appear necessary to resort to this means in order to ensure the presence of certain witnesses. It was understood, however, that, unless otherwise provided in a convention, the manner in which a warrant of arrest should be executed would be subject to the relevant provisions of the national law of the country concerned. Furthermore, it followed from what was previously said about article 31 of the draft statute (see paragraph 109 above) that no State was under any obligation to execute a warrant of arrest, unless it had undertaken such an obligation by a separate convention.

Powers of the court
(*Articles 42 and 43 of the draft statute*)

148. There was general agreement that the court should have the powers necessary to perform its functions, and the opinion of most members of the Committee was that the court should be allowed to lay down in its own rules specific provisions in this respect. The statute should only contain certain fundamental provisions. Some of the powers might be exercised by the court without assistance from outside. That would apply to the maintenance of order during the trial, the dismissal of the case, decisions to rule out irrelevant issues and evidence, decisions necessary to ensure a fair trial, etc. In such cases, the execution of decisions and rulings of the court did not give rise to any further problem.

149. With respect to the exercise of other powers of the court, it would be necessary to ensure assistance from States. That would apply, for instance, to the summoning of witnesses to attend the trial, the production of documents and other evidentiary material, and other similar decisions. It was agreed that the provisions previously adopted regarding the assistance of national authorities in the performance of the duties of the court (article 31) would apply to such cases and that no State, therefore, would be obliged to assist the court in exercising its powers unless that State had undertaken to do so by a convention or instrument separate from the statute.

150. It was proposed that special consideration should be given to the need for ensuring that a fair trial should be given to the accused. For that purpose it should be expressly stated that the court should have the right to dismiss a case if it came to the conclusion that a fair trial could not be had. The reason might be, for instance, that a government refused to co-operate in providing witnesses and other evidence. Such a power would give the court the possibility of bringing a certain pressure to bear upon a government which refused to co-operate. It would also be a safeguard of the rights of the accused. An article embodying this proposal was adopted by 7 votes to none, with 5 abstentions.

Majority required for decisions of the court
(*Article 46 of the draft statute*)

151. Although it was agreed that the court should in general proceed on the basis of majority decisions, it was proposed that final and condemnatory judgments of the court should require a two-thirds majority. In support of this proposal it was argued that most of the cases likely to be brought before the court would involve controversial political issues, and in order to ensure that a judgment was accepted by public opinion condemnations should not be carried by a bare majority. This proposal was, however, defeated by 6 votes to 3, with 2 abstentions.

152. The principle of majority decisions once accepted, some discussion arose as to the application of that principle. Should the majority be counted on the basis of the number of all the members of the court, or should it be based only upon the number of judges participating in a trial? The Committee decided to adopt this latter solution.

153. What should happen in case of an equality of votes? In this respect it was suggested that the solution might be different with regard to different decisions of the court; decisions taken in the course of the trial, decisions as to the guilt of the accused, and decisions as to the penalty might not be subject to the same rule. The Committee decided to make a distinction between final judgments and sentences, on the one hand, and other decisions of the court, on the other. With regard to final judgments and sentences, no specific provision should be inserted in the statute for the event of an equality of votes. The consequence would be that no action could be taken by the court if the votes were equally divided. The accused would

therefore be acquitted, if the votes were equally divided on the question of his conviction. With regard to decisions other than final judgments and sentences, it was decided to provide that the presiding judge should have a casting vote in the event of an equal division of the votes.

154. A specific exception to the majority principle was proposed with regard to sentences of death penalty. It was felt that the passing of such a sentence by a very narrow majority might hurt the sense of justice, and in the event of a miscarriage of justice the damage would be irreparable. The Committee rejected this proposal and decided, by 6 votes to 4, with 3 abstentions, to delete a provision which had previously been inserted in the draft on the basis of this proposal.

Separate opinions
(*Article 48 of the draft statute*)

155. The proposal was made that judges who did not share the opinion of the majority of the members of the court should be allowed to deliver separate opinions. This would conform to the rules governing the judgments of the International Court of Justice and would also be in conformity with judicial tradition of many countries.

156. Some members of the Committee were opposed to this proposal and held the view that it would be inadvisable to allow separate opinions with respect to the judgments of a criminal court. Such opinions would replace the necessary collective responsibility of the court by the individual responsibility of the judges; they would tend to undermine the authority of the judgment; they would tend to destroy the unity of the court and encourage antagonistic tendencies among its members; and the possibility of expressing separate opinions would make it more difficult to secure within the court the majority required for the sentence. This was of particular relevance in criminal jurisdiction, where the question of assessing the severity of the penalty might give rise to several different opinions.

157. The majority of the Committee did not find these arguments decisive, and adopted, by 9 votes to 2, with 1 abstention, a provision allowing for separate opinions.

158. In view of the length which such opinions may have in important cases, it was decided not to provide that separate opinions should be read in open court when the judgment was delivered.

Question of appeal
(*Article 50 of the draft statute*)

159. Some members of the Committee were of the opinion that a possibility for appeal from judgments of the court would be essential in order to prevent a miscarriage of justice. This consideration would be of particular importance if it should ultimately be decided that the court should consist only of a small number of judges. Other members felt that a possibility for appeal would undermine the authority and prestige of decisions of the court. The solution of the question depended, to a certain degree, upon the decision of the Committee as to the possibility of establishing chambers of the court. As it had been decided that no such division into chambers should be provided for in the statute, the question did not arise whether appeal should be allowed from a chamber to the plenary. The only problem which therefore presented itself was whether appeal should be allowed to some outside body. The Committee decided, by 10 votes to none, with 3 abstentions, that there should be no appeal to a body outside the court itself.

Subsequent trial
(*Article 51 of the draft statute*)

160. The proposal was made that a judgment of the court should have what in French legal terminology is called *l'autorité de la chose jugée,* in the States which have accepted the jurisdiction of the court. As it was a recognized principle in practically all countries, in American law under the name of "double jeopardy", that no person should be tried twice for the same offence, members of the Committee were in general agreement that this principle should also be established in respect of persons tried before the international criminal court. It was felt, in particular, to be an elementary requirement of justice that a person who had been acquitted by the court should not be brought to trial before a national court for the offence of which he had been acquitted. Some difficulty was experienced, however, in formulating this principle in such a way as to meet satisfactorily all possible contingencies. If, for example, an accused were acquitted by the international criminal court of a charge of genocide, on the ground that the subjective element, the intent to destroy a national, ethnical, racial or religious group, had not been proved, nothing should prevent a national court, on the basis of the same facts, to try him on a charge of homicide, that is to say a crime without the particular subjective element. If, on the other hand, he was acquitted on the ground that the objective element of the crime, the killing of men, had not been proved, he should not be tried subsequently before a national court on a charge of homicide, which embodied the same objective element. It would therefore be on the basis of the judgment of the court that the question must be answered in each particular case. The Committee had regard to these considerations in adopting, by 7 votes to none, with 5 abstentions, the provision that no person who has been tried, and acquitted or convicted, by the court shall be subsequently tried for the same offence in a national court in a State which has recognized the jurisdiction of the court with respect to such an offence. The Committee was aware that the application of this provision, as stated in general terms, might give rise to certain doubts and controversies. It would be for the national courts, before which an accused was subsequently brought to trial, to decide whether the offence charged was the same as the offence of which the accused had previously been found guilty or not guilty by the international criminal court.

Execution of sentences
(*Article 52 of the draft statute*)

161. The Committee considered several possible solutions of this problem, which was recognized as being

essential to the functioning of an international jurisdiction. One proposal was, that the statute of the court should impose upon the States parties an obligation to execute the sentence. For reasons similar to those adduced against obligations under the statute to execute warrants of arrest this proposal was rejected by the Committee by 5 votes to 3, with 7 abstentions.

162. Another proposal was to the effect that an obligation to execute the sentence should rest only upon such States as had assumed this obligation by special convention. It was not excluded that this convention might be the same as the one conferring jurisdiction upon the court; the essential thing, however, was that it should be an instrument separate from and subsequent to the statute. In the event that no such conventional obligation had been accepted, the court might request the Secretary-General of the United Nations to make the necessary arrangements. As the Secretary-General would probably not have means at his disposal for executing the sentence, he would have to make such arrangements with a State. Different States might come into consideration: the States directly concerned in the trial, the State where the court had its seat, or any third State. The Secretary-General should have liberty to make his arrangements with any State as he thought fit.

163. This proposal was adopted by 4 votes to 2, with 5 abstentions.

Revision of judgment
(*Article 53 of the draft statute*)

164. Even if appeal were not allowed, it would be possible, in the opinion of several members of the Committee, to provide for a revision of the judgment in the event that newly discovered facts which were unknown to the parties and the court at the time of the trial would warrant reconsideration of the issue. This was an elementary requirement of justice. Other members feared, however, that any such possibility would be exploited for political reasons. Most of the cases which would come before the court would be concerned with political issues, and the situation upon the background of which a trial was held might very well change radically in the course of time. It might therefore be apprehended that the possibility of revision would be used in interests other than those of justice. The Committee decided, however, by 7 votes to 3, with one abstention, to include in the statute an article providing for revision of the judgment.

Clemency
(*Article 54 of the draft statute*)

165. A proposal was made to provide for the possibility of pardon or parole. It was generally agreed that the idea of parole was an accepted principle in most countries, and the proposal was adopted by 8 votes to none, with 3 abstentions. The provision is to the effect that a Board of Clemency shall be established by the States parties to the statute. A preference was expressed by some members for giving the General Assembly of the United Nations the authority to elect the Board. In view of decisions previously taken by the Committee with respect to election of judges, the Prosecuting Attorney and members of the Committing Authority, the majority of the Committee felt that consistency required not to give the General Assembly any influence upon the election of the Board. It was understood, however, that in the event that the court should ultimately be established not by convention but by a resolution of the General Assembly, the question should be reconsidered.

Chapter VII.

FINAL PROVISIONS

166. A draft for final provisions of the statute regarding ratification, entry into force, amendment, denunciation, *et cetera*, was submitted to the Committee. This draft also contained a rule to the effect that the court should not be elected until a certain number of States, after the statute had entered into force, had conferred jurisdiction upon the court.

167. The Committee found, however, that it was not essential to the performance of the task entrusted to it by the General Assembly to make proposals regarding these matters. Many of the traditional final clauses of international conventions, such as the statute would be, were to a great extent uniform for conventions concluded under the auspices of the United Nations. Such provisions could therefore be added to the statute at a later stage of its elaboration.

Special tribunals
(*Article 55 of the draft statute*)

168. The Committee decided, however, by 6 votes to 4, with one abstention, to include an article to make certain that nothing in the statute should prejudice the right of States, by agreement between themselves, to set up special tribunals. Some members felt that it would be superfluous to state this principle in the statute, considering that sovereign States would always have the right to enter into particular agreements. Other members felt, however, that it might be of some advantage to avoid any possible doubt which might arise regarding the understanding of the relationship between the statute and particular agreements. As the statute had laid down extensive limitations on the

jurisdiction of the international criminal court, it should be stated beyond doubt that these limitations could not apply to cases in which States under ordinary rules of international law had a right to try, by joint action, the perpetrators of certain crimes. That would, in particular, apply to the States victims of an aggression, in so far as such States had an unquestionable right to set up joint tribunals to try the persons responsible for the crime, even if the conditions of conferring jurisdiction upon the international criminal court were not fulfilled.

169. The argument was also advanced that such a provision would make it clear that no contradiction existed between the provisions of the statute and the principles upon which the trials at Nürnberg and Tokyo were based.

Chapter VIII.

JURISDICTION IN RESPECT OF GENOCIDE

170. The Committee gave particular consideration to the possibility of conferring jurisdiction upon the international criminal court in respect of genocide. As indicated in paragraph 61 above, the Committee did not find time to draft specific proposals on this subject. By 5 votes to one, with 5 abstentions, the Committee expressed the *vœu* that, together with the instrument establishing the international criminal court, a protocol should be drawn up conferring jurisdiction on that court in respect of the crime of genocide (see text reproduced as annex II to the present report).

ANNEXES

Annex I. Draft statute for an international criminal court[7]

CHAPTER I

General Principles

Article 1

PURPOSE OF THE COURT

There is established an International Criminal Court to try persons accused of crimes under international law, as may be provided in conventions or special agreements among States parties to the present Statute.

Article 2

LAW TO BE APPLIED BY THE COURT

The Court shall apply international law, including international criminal law, and where appropriate, national law.

Article 3

PERMANENT NATURE OF THE COURT

The Court shall be a permanent body. Sessions shall be called only when matters before it require consideration.

CHAPTER II

Organization of the Court

Article 4

QUALIFICATIONS OF JUDGES

The Court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law, especially in international criminal law.

Article 5

NUMBER OF JUDGES

The Court shall consist of nine judges.

Article 6

NATIONALITY OF JUDGES

1. Judges may be elected from candidates of any nationality or without nationality.

2. No two judges may be nationals of the same State. A person who, for the purpose of membership in the Court, could be regarded as a national of more than one State shall be deemed to be a national of the State in which he ordinarily exercises civil and political rights.

Article 7

NOMINATION OF CANDIDATES

1. Judges shall be elected from a list of candidates nominated by the States parties to the present Statute.

2. Each State may submit the names of not more than four candidates.

Article 8

INVITATION TO NOMINATE

1. The date of each election shall be fixed by the Secretary-General of the United Nations.

2. At least three months before this date, he shall address a written request to the States parties to the present Statute, inviting them to undertake, within a time specified, the nomination of qualified persons in a position to accept the duties of a judge.

Article 9

LIST OF CANDIDATES

The Secretary-General of the United Nations shall prepare a list, in alphabetical order, of all candidates. He shall submit the list to the States parties to the present Statute.

Article 10

REPRESENTATIVE CHARACTER OF THE COURT

The electors shall bear in mind that the judges, as a body, should, as far as possible, represent the main forms of civilization and the principal legal systems of the world.

Article 11

ELECTION OF JUDGES

1. The judges shall be elected at meetings of representatives of the States parties to the present Statute by an absolute majority of those present and voting. The Secretary-General of the United Nations shall, after due notice to each of such States, convene these meetings.

2. In the event of more than one national of the same State obtaining a sufficient number of votes for election, the one who obtains the greatest number of votes shall be considered as elected and if the votes are equally divided the elder or eldest candidate shall be considered as elected.

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[7] Titles of articles have been included for purposes of reference and identification only, and shall not be considered as elements of interpretation.

Article 12

TERMS OF OFFICE

1. The judges shall be elected for nine years and may be re-elected; provided, however, that of the judges elected at the first election, the terms of three judges shall expire at the end of three years and the terms of three more judges shall expire at the end of six years.

2. The judges whose terms are to expire at the end of the initial periods of three and six years shall be chosen by lot drawn by the Secretary-General of the United Nations immediately after the first election has been completed.

3. Each judge shall continue to discharge his duties until his place has been filled. Though replaced, he shall finish any case which he may have begun.

4. In the case of the resignation of a judge, the resignation shall be addressed to the President of the Court, who shall transmit the resignation to the Secretary-General. This transmission shall make the place vacant.

Article 13

SOLEMN DECLARATION

Each judge shall, before taking up his duties, make a solemn declaration in open court that he will perform his functions impartially and conscientiously.

Article 14

PRIVILEGES AND IMMUNITIES

Each judge, when engaged on the business of the Court, shall enjoy diplomatic privileges and immunities.

Article 15

OCCUPATIONS OF JUDGES

1. No judge shall engage in any occupation which interferes with his judicial function during sessions of the Court. Nor shall he engage in any occupation which is incompatible with his function as a judge.

2. Any doubt on this point shall be settled by the decision of the Court.

Article 16

DISABILITY OF JUDGES

1. No judge may participate in proceedings relating to any case in which he has previously taken part in any capacity whatsoever.

2. Any doubt on this point shall be settled by the decision of the Court.

Article 17

DISQUALIFICATION OF JUDGES

1. If, for some special reason, a judge considers that he should not participate in a particular proceeding, he shall so inform the President.

2. Any party to a proceeding may submit that a judge should not participate in that proceeding. Such submission shall be addressed to the President.

3. If the President, upon receipt of such submission or of his own motion, considers that a judge should not participate in a particular proceeding, the President shall so advise the judge.

4. If the President and the judge disagree on the issue, the Court shall decide.

Article 18

DISMISSAL OF JUDGES

1. No judge shall be dismissed unless, in the unanimous opinion of the other judges, he has ceased to fulfil the conditions required for his continuance in office.

2. Formal notification of such unanimous opinion shall be made to the Secretary-General of the United Nations by the Registrar.

3. This notification shall make the place vacant.

Article 19

VACANCIES

1. Vacancies shall be filled by the same method as that prescribed for the first election, except that the Secretary-General of the United Nations, shall within one month of the occurrence of a vacancy, issue the invitations provided for in article 8.

2. A judge elected to replace a judge whose term of office has not expired shall hold office for the remainder of his predecessor's term.

Article 20

OFFICERS

1. The Court shall elect its President and Vice-President for three years; each may be re-elected.

2. The Court shall appoint its Registrar and shall provide for the appointment of such other officers as may be necessary.

Article 21

SEAT OF THE COURT

The permanent seat of the Court shall be established at... The Court may, however, sit and exercise its functions elsewhere whenever the Court considers it desirable.

Article 22

EMOLUMENTS

Each participating judge shall be paid travel expenses, and a daily allowance when the Court is in session. Each judge shall be paid an annual remuneration.

Article 23

FINANCES

The States parties to the present Statute shall create and maintain a fund to be collected and administered in accordance with regulations adopted by the parties. From this fund shall be paid the costs of maintaining and operating the Court, the Committing Authority, the Prosecution and the Board of Clemency, including the fees and expenses of counsel for the defence as provided in article 38, paragraph 2, sub-paragraph (*c*).

Article 24

RULES OF COURT

1. The Court shall adopt rules for carrying out its functions. In particular, it shall prescribe rules of procedure and such general principles governing the admission of evidence as the Court may deem necessary.

2. These rules and any amendments thereto shall be published without delay and shall not be altered so as to affect pending proceedings.

CHAPTER III

COMPETENCE OF THE COURT

Article 25

JURISDICTION AS TO PERSONS

The Court shall be competent to judge natural persons only, including persons who have acted as Head of State or agent of government.

Article 26

ATTRIBUTION OF JURISDICTION

Jurisdiction may be conferred upon the Court by States parties to the present Statute, by convention or, with respect to a particular case, by special agreement or by unilateral declaration.

Article 27

RECOGNITION OF JURISDICTION

No person shall be tried before the Court unless jurisdiction has been conferred upon the Court by the State or States of which he is a national and by the State or States in which the crime is alleged to have been committed.

Article 28

APPROVAL OF JURISDICTION BY THE UNITED NATIONS

No jurisdiction may be conferred upon the Court without the approval of the General Assembly of the United Nations.

Article 29

ACCESS TO THE COURT

Proceedings before the Court may be instituted only by:

(*a*) The General Assembly of the United Nations,

(*b*) Any organization of States so authorized by the General Assembly of the United Nations, or

(*c*) A State party to the present Statute which has conferred jurisdiction upon the Court over such offences as are involved in those proceedings.

Article 30

CHALLENGE OF JURISDICTION

1. The jurisdiction of the Court may be challenged not only by the parties to any proceeding, but also by any State referred to in article 27, which may intervene for this purpose.

2. Such challenges made prior to the beginning of trial, shall be considered by the Court before the trial begins.

3. Such challenges made after the beginning of trial, shall be considered by the Court at such time as the Court thinks fit.

Article 31

ASSISTANCE OF STATES

1. The Court may request national authorities to assist it in the performance of its duties.

2. A State shall be obliged to render such assistance only in conformity with any convention or other instrument in which the State has accepted such obligation.

Article 32

PENALTIES

The Court shall impose upon an accused, upon conviction, such penalty as the Court may determine, subject to any limitations prescribed in the instrument conferring jurisdiction upon the Court.

CHAPTER IV

COMMITTING AUTHORITY AND PROSECUTING ATTORNEY

Article 33

COMMITTING AUTHORITY

1. There shall be established within the framework of the United Nations a Committing Authority composed of nine members, elected in the same manner, at the same time, on the same terms, and possessing the same qualifications as the judges.

2. The function of the Authority shall be to examine the evidence offered by the complainant to support the complaint.

3. The complainant shall designate an agent or agents who shall present the evidence before the Authority.

4. If the Authority is satisfied that the evidence is sufficient to support the complaint, the Authority shall so certify to the Court and the complainant.

5. Before issuing any such certificate, the Authority shall give the accused reasonable opportunity to be heard and to adduce such evidence as he may desire.

6. The Authority shall adopt its own rules of procedure.

Article 34

PROSECUTING ATTORNEY

1. The States parties to the present Statute, at the meetings and in the manner provided for in article 11, shall elect a panel of ten persons whose duty it shall be, whenever a certificate for trial is issued by the Committing Authority, to elect forthwith a Prosecuting Attorney who shall possess the same qualifications as a member of the Court.

2. The Prosecuting Attorney shall file with the Court an indictment of the accused based on the findings certified by the Committing Authority and shall be responsible for conducting the prosecution before the Court.

CHAPTER V

PROCEDURE

Article 35

INDICTMENT

1. The indictment shall contain a concise statement of the facts which constitute each alleged offence and a specific reference to the law under which the accused is charged.

2. The Court may authorize amendment of the indictment.

Article 36

NOTICE OF THE INDICTMENT

1. The Court shall bring the indictment to the notice of the accused, of the State of which the accused is alleged to be a national and of the State in which the crime is alleged to have been committed.

2. The Court shall not proceed with the trial unless satisfied that the accused has had the indictment or any amendment thereof, as the case may be, served upon him and has sufficient time to prepare his defence.

Article 37

NO JURY

Trials shall be without a jury.

Article 38

RIGHTS OF THE ACCUSED

1. The accused shall be presumed innocent until proved guilty.

2. The accused shall have a fair trial and, in particular:

(*a*) The right to be present at all stages of the proceedings;

(*b*) The right to conduct his own defence or to be defended by counsel of his own choice, and to have his counsel present at all stages of the proceedings;

(*c*) The right to have the expenses of his defence charged to the fund referred to in article 23 in case the Court is satisfied that the accused is financially unable to engage the services of counsel;

(*d*) The right to have the proceedings of the Court, including documentary evidence, translated into his own language;

(*e*) The right to interrogate, in person or by his counsel, any witness and to inspect any document or other evidence introduced during the trial;

(*f*) The right to adduce oral and other evidence in his defence;

(*g*) The right to the assistance of the Court in obtaining access to material which the Court is satisfied may be relevant to the issues before the Court.

3. The accused shall have the right to be heard by the Court but shall not be compelled to speak. His refusal to speak shall not be relevant to the determination of his guilt. Should he elect to speak, he shall be liable to questioning by the Court and by counsel.

Article 39

PUBLICITY OF HEARINGS

1. The Court shall sit in public unless there are exceptional circumstances in which the Court finds that public sittings might prejudice the interests of justice.

2. The deliberations of the Court shall take place in private and shall not be disclosed.

Article 40

WARRANTS OF ARREST

The Court shall have power to issue warrants of arrest related to crimes over which the Court has jurisdiction.

Article 41

PROVISIONAL LIBERTY OF ACCUSED

The Court shall decide whether the accused shall remain in custody during the trial or be provisionally set at liberty, and the conditions under which such provisional liberty shall be granted.

Article 42

POWERS OF THE COURT

The Court shall have the powers necessary to the proper conduct of the trial, including the power to require the attendance of witnesses, require production of documents and other evidentiary material, rule out irrelevant issues, evidence and statements, and maintain order at the trial.

Article 43

DISMISSAL OF CASE

The Court may dismiss at any stage of the proceedings any case in which the Court is satisfied that no fair trial can then be had. In the event of such dismissal, the Court shall discharge the accused and may also acquit him.

Article 44

WITHDRAWAL OF PROSECUTION

A prosecution may be withdrawn only with the approval of the Court. In the event of such approval, the Court shall discharge the accused and may also acquit him.

Article 45

QUORUM

The participation of seven judges shall suffice to constitute the Court.

Article 46

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.

Article 47

CONTENTS AND SIGNATURE OF JUDGMENT

1. The judgment shall state, in relation to each accused, the reasons upon which it is based.

2. The judgment shall contain the names of the judges who have taken part in the decision. It shall be signed by the President and the Registrar.

Article 48

SEPARATE OPINIONS

If the judgment of the Court does not represent the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.

Article 49

DELIVERY OF JUDGMENT

The judgment shall be read in open Court.

Article 50

NO APPEAL

The judgment shall be final and without appeal.

Article 51

SUBSEQUENT TRIAL

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

Article 52

EXECUTION OF SENTENCES

Sentences shall be executed in accordance with conventions relating to the matter. In the absence of such conventions, arrangements for the execution may be made, upon motion of the Court, by the Secretary-General of the United Nations with any State.

Article 53

REVISION OF JUDGMENT

1. An accused who has been found guilty may apply to the Court for revision of the judgment.

2. An application for revision shall not be entertained unless the Court is satisfied:

(*a*) That a fact was discovered of such a nature as to be a decisive factor; and

(*b*) That that fact was, when the judgment was given, unknown to the Court and the applicant.

3. Revision proceedings shall be opened by a judgment of the Court expressly recording the existence of the new fact and recognizing that it has such a character as to lay the case open to revision.

CHAPTER VI

CLEMENCY

Article 54

BOARD OF CLEMENCY

1. A Board of Clemency consisting of five members shall be established by the States parties to the present Statute.

2. The Board shall have the powers of pardon and parole and of suspension, reduction and other alteration of a sentence of the Court.

3. The Board shall adopt its own rules of procedure.

CHAPTER VII

FINAL PROVISIONS

Article 55

SPECIAL TRIBUNALS

Nothing in the present Statute shall be taken to prejudice the right of two or more States parties thereto jointly to set up special tribunals to try the perpetrators of crimes over which each of such States has jurisdiction according to the general rules of international law.

Annex II. Vœu

The Committee on International Criminal Jurisdiction,

Considering that the crime of genocide—a crime under international law—has been exactly defined in the Convention on the Prevention and Punishment of the Crime of Genocide,

Considering that this Convention has been ratified by twenty-eight States,

Considering that special mention of the crime of genocide was made in the terms of reference of the International Law Commission under General Assembly resolution 260 B (III), and in those of this Committee under General Assembly resolution 489 (V),

Expresses the *vœu* that along with the instrument establishing the International Criminal Court a protocol shall be drawn up conferring jurisdiction on that Court in respect of the crime of genocide.