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# COMMITTEE ON INTERNATIONAL CRIMINAL JURISDICTION

First Session

## SUMMARY RECORD OF THE SIXTEENTH MEETING

held at the Palais des Nations, Geneva,
on Monday, 20 August 1951, at 10 a.m.

CONTENTS:

Present:

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| Chairman: | Mr. MORRIS |

Members:

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| Australia | Mr. WYNES |
| China | Mr. WANG |
| Denmark | Mr. SÖRENSEN |
| Egypt | MOSTAFA Bey |
| France | Mr. PINTO |
| Israel | Mr. COHN |
| Netherlands | Mr. RÖLING |
| Pakistan | Mr. MUNIR |
| Syria | Mr. TARAZI |
| United Kingdom of Great Britain and Northern Ireland | Mr. JONES |
| United States of America | Mr. MAKTOS |
| Uruguay | Mr. PINEYRO CHAIN |

Secretariat:

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| Mr. Liang | Secretary to the Committee |

1. PROCEDURE OF AN INTERNATIONAL CRIMINAL COURT:

Chapter III to Annex II to the Secretary-General's memorandum (continued) (A/AC.48/1, A/AC.48/L.9, A/AC.48/L.11)

1. The CHAIRMAN called upon the Netherlands representative who, in the absence of the Danish representative, had presided over the last meeting of the Drafting Sub-Committee, to report in the light of the Sub-Committee's discussions as to the order of the Committee's work.

2. Mr. RÖLING (Netherlands) said that the Drafting Sub-Committee had drafted two further articles relating respectively to the law to be applied by the court and to the establishment of a committing authority, and that it was in process of considering texts to give effect to other decisions of the Committee. It now seemed appropriate that the Committee should resume its discussion on the rights and duties of accused with regard to the making of statements and the answering of questions, whether or not on oath.

Self-incrimination (article 36A in document A/AC.48/L.9)

3. The CHAIRMAN believed that the view of the Drafting Sub-Committee was that in respect of the rights and duties of the accused concerning the making of statements and answering of questions, the same rules should apply in the international field as would apply to any procedure before national criminal courts under recognized systems of penal law. It also seemed to consider that the only general rule that should be applied was that an accused should not be compelled to testify against himself, and that no adverse construction should be placed on his refusal to make a statement.

4. Mr. PINTO (France) was generally in agreement with the United States representative on the underlying principles of article 36A of his proposal (A/AC.48/L.9). All the members of the Committee were of course prepared to ensure that the accused would be given every guarantee necessary for his defence.

5. He felt some concern, however, lest the United States proposal forced the Committee to go into procedural details. It seemed to him that it would be better to leave them to the court. He (Mr. Pinto) would have preferred a general formula

embodying the principles summarized by the Chairman. For that purpose, the Committee would perhaps do well to adopt the principle laid down in the United States Constitution that no-one could be compelled to be a witness against himself.(1) That formula, in fact, provided for all the contingencies that might arise, and it would no doubt find unanimous support in the Committee. The means of applying that principle could be left to the court itself to prescribe in its rules of procedure.

6. Mr. RÖLING (Netherlands), observing that under continental systems of law the position of the witness was quite different from that of an accused, in that the latter enjoyed the option of speaking or remaining silent, considered that that distinction should be carefully maintained on the international level. Thus, the issue was whether an accused would have the right to make a statement at his descretion, or whether he would have a duty to make such a statement on oath or not on oath with all the consequential implications thereof.

7. The Committee could, he believed, agree that an accused was under no obligation to make a statement if he preferred to keep silent but that he had a right to testify, even on oath, and also that any decision on his part to remain silent would not be allowed to prejudice his case. It had transpired at the Tokyo Trial that when several accused had been tried at the same time, some of them had refused to testify, with the result that their failure had been adversely commented on by the prosecution. Yet their refusal to speak could have been legitimately interpreted as dictated by an understandable desire not to implicate their fellow-accused.

8. He therefore felt that a text on the following lines would meet the situation:

> "The accused may, whether or not on oath, make statements to the court or answer questions. If he prefers to remain silent, no conclusion shall be drawn therefrom."

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(1) Fifth amendment to the United States Constitution.

9. Mr. COHN (Israel) agreed with the substance of the Netherlands proposal, but submitted an alternative text for the consideration of the Committee, which read:

> "The accused shall have the right, but shall not be compelled, to testify on his own behalf, whether on oath or without oath.
>
> If the accused chooses to testify on oath, he shall be liable to cross-examination by the prosecutor.
>
> The refusal of an accused to testify, or to testify on oath, shall not be deemed relevant for the determination of his guilt." (1)

He had added the second paragraph so that an accused might clearly realize the consequences for himself of electing to testify on oath.

10. Mr. RÖLING (Netherlands) said that, so far as he was concerned, the objection to the Israeli text was that an accused testifying on oath would be compelled to answer questions. He personally considered that no accused should be compelled to give answers to questions which might adversely affect his own interests, or those of his fellow-accused, and that a refusal on his part to do so should not be adversely construed.

11. Mr. MUNIR (Pakistan) inquired whether, under the Israeli proposal, an accused testifying on oath in respect of one of a number of charges laid against him would be liable to cross-examination on the other charges.

12. Mr. COHN (Israel) confirmed that such would be the case. An accused giving evidence on oath normally laid himself open to cross-examination on the whole case against him, such cross-examination frequently extending beyond considerations directly related to the charges brought against him.

13. The CHAIRMAN, developing the Israeli representative's reply, observed that such a refinement of the rule could probably be left for determination by the court itself.

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(1) A/AC.48/L.11 section 1.

14. Mr. MAKTOS (United States of America) considered that an accused would be afforded reasonably wide protection if given the option of going into the box or not and of making an unsworn statement, the weight of which it would be for the court to determine. In his view, it would be extending that protection unduly to enable an accused to make a statement on oath without being subject to cross-examination. It would, moreover, be appreciated that such a facility would even reduce the scope of the protection afforded to accused, for the court might easily regard his evidence on oath as of no greater value than an unsworn statement. Cross-examination could bring out the truth which an honest accused might well wish to be established, and there seemed no point in seeking to protect an untruthful accused at the expense of the interests of justice. As to the point made by the Pakistani representative, it might be advisable for the Committee to decide forthwith whether cross-examination of an accused should be limited to questioning on the counts of the charge concerning which he had gone into the witness-box.

15. Mr. MUNIR (Pakistan) said that in his view cross-examination should be so limited.

16. The CHAIRMAN thought that the Committee should first settle the issue which divided the Israeli and Netherlands proposals, namely, whether there should be any cross-examination at all.

17. Mr. PINEYRO CHAIN (Uruguay) remarked that the Israeli proposal like that of the Netherlands representative, would allow the accused the right to testify on oath. According to Uruguayan law, however, the accused could not testify in his own behalf, nor could he be compelled to take an oath. It should be emphasized that there was a fundamental difference between the legal position of the witness and that of the accused. It was essential that the witness should speak the whole truth and nothing but the truth, and if he failed to respect his oath he might be charged with perjury. The case of the accused was entirely different. He did not, in fact, assist in justice being done, and he could not, even on oath, act as a witness. It was recognized in the Netherland's text that, even where the accused testified on oath, he was not obliged to speak the whole

truth. Accordingly, he felt it would be preferable to state more simply that the accused was not subject to the same obligations as witnesses, and that refusal to answer could not be held against him. At all events, his delegation was opposed to the principle of an oath capable of turning the accused into a witness.

18. Mr. RÖLING (Netherlands) said that in his country, too, an accused was never put on oath. Since, however, an accused before the court might be a national of a country where the Anglo-Saxon system of law applied, the Drafting Sub-Committee had considered it desirable to afford him the right, within the court's procedure, of making a sworn statement and of being cross-examined.

19. In his view few, if any, accused would be likely to exercise such a right, especially if the cross-examination entailed any risk of implicating fellow-accused. He again urged that an accused should have the right to refuse to answer questions, and that no adverse conclusions should be drawn therefrom.

20. The extent of the accused's contribution to the evidence was not an important consideration, and the Committee was really only concerned with the right of accused to make statements which should be regarded as a means of providing the court with general information largely of a background nature. In his view, therefore, the Israeli proposal should not be adopted.

21. Mr. PINTO (France) said his reason for suggesting that the Committee should confine itself to taking a stand in principle on the question of procedure was that he had foreseen the discussion now taking place between the advocates of the different rules of evidence. The Uruguayan representative, had made his country's position clear, and had upheld a liberal conception of the rights of the accused according to which the latter had complete liberty to make any statement in his own favour. That was, moreover, a concept which was tending to disappear. The accused was being called upon more and more to assist in establishing the facts. Under the Anglo-Saxon system, which the Israeli representative had defended, the accused might testify, take an oath and thus act as a witness in his own behalf. As between those two opposing concepts, he (Mr. Pinto) preferred that of the Netherlands representative, which was a compromise and he hoped

that the Committee would adopt that intermediate position. Moreover, the thesis supported by the representative of Israel distinguished between the accused testifying on oath and the accused testifying without taking an oath. The French delegation was not in favour of that distinction. It was the business of the court to decide as to the value of statements made by the accused. He supported the formula which drew no distinction between the accused on oath and the accused who had not taken an oath.

22. Mr. COHN (Israel) submitted that the main objective was to secure for an accused the right to remain silent, that was to say, the right to refrain from convicting himself. The problem was how to guarantee such protection without obstructing the administration of justice. If an accused elected to remain silent, he could not be compelled to make a statement; if, however, he did not so choose, two alternatives were open to him: first, to make a statement but not as a witness subject to cross-examination; and secondly, to make a frank statement on oath, possibly with a view to adducing evidence which he alone could provide and to present his case in a manner calculated to bring out the whole truth in his own interests and in the interests of justice. It would be noted that Anglo-Saxon law had developed from the position of considering the accused as not competent to give evidence to the position of enabling him to present to the court the whole truth of the case in sworn statement and under cross-examination.

23. To his mind, therefore, if an accused was to be given the right to keep silent he should also be entitled to make a limited statement, or an unlimited statement on oath. The combination of those facilities, in his view, constituted all the protection any accused could possibly claim in any criminal court.

24. The French representative had argued that the distinction between testifying on oath and testifying without oath should be made by the court and not in law. He had no quarrel with the view that the court would be the sole judge of the weight of an accused's statements, whether on oath or without oath, but he submitted that the whole intention of introducing the consideration of testimony on oath was to direct the attention of the accused to the consequences involved in making statements on oath.

25. The CHAIRMAN said that the clear issue still before the Committee was whether an accused could testify on oath, with or without being subjected to cross-examination.

26. Mr. SÖRENSEN (Denmark) inquired whether the Netherlands representative, in using the words "or answer questions", did not envisage the same possibility as the Israeli representative, namely, that an accused should be given the option of answering or refusing to answer questions put to him either by his own counsel or by the prosecution. As he saw it, the whole difference between the two proposals before the Committee hinged on the question of the oath. The Israeli delegation admitted the possibility of cross-examination only when an accused was prepared to enter the witness-box. He personally could visualize the possibility of an accused being unwilling to make a statement on oath, and yet being prepared to be cross-examined, for the idea of swearing an oath was, in the minds of some people, bound up with specific associations, for example, religious considerations. He preferred the Netherlands wording, which would make it possible for an accused to enter the witness box but did not make the taking of an oath a condition of the privilege of answering questions.

27. Mr. MAKTOS (United States of America) wondered whether the two proposals could not be reconciled by providing that "an accused shall testify according to the law of his own country". In addition, he hardly thought it right that an accused should be precluded from giving evidence on oath merely because the law in the country of which he was a national did not recognize such a procedure.

28. Mr. RÖLING (Netherlands) believed that a rule such as the United States representative had suggested would lead to interminable discussions before the court as to exactly what law applied. He would prefer a rule that would not give rise to such a possibility.

29. Mr. COHN (Israel), supporting the Netherlands representative, raised the further objection that unfair discrimination might arise if several accused on trial at the same time were subjected to different procedures on furnishing

evidence because of differences in procedures in their respective countries.

30. After some further discussion Mr. MAKTOS (United States of America) revised his suggestion to read:

> "An accused may elect to testify under the rules of his national law or any other recognized system of law."

31. Mr. WYNES (Australia) considered that even that proposal did not fully cover the situation. As he saw it, the Committee had a choice between the Israeli and Netherlands proposals.[1] There were three possibilities to consider; first, that an accused could not be a witness; secondly, than an accused could make a statement but not be subject to cross-examination; and lastly, that an accused could make a statement on oath and be subject to cross-examination. Anglo-Saxon procedure appeared to cover all three cases, for under it an accused could make an unsworn statement or could go into the witness-box. If he wished to give evidence on oath he had to accept the accompanying responsibilities in the form of submitting to cross-examination. He agreed with the United States representative that an accused should not be prevented from electing to avail himself of a privilege not open to him under the rules of his national criminal jurisdiction, and wondered what objection, if any, the Uruguayan representative had to offering an accused such privilege. In sum, he considered that the Israeli proposal was preferable to that of the Netherlands representative.

32. Mr. PINEYRO CHAIN (Uruguay) shared the view that a compromise formula applicable to all possible cases should be sought. First, it should be laid down that the accused had the right by a confession, to make a statement about his own actions without being on oath. Secondly, when the accused wished to testify he could do so, without being put on oath or being subjected to the law of his country.

33. He was therefore in favour of the principle t[illegible] the accused could make statements without having to do so on oath.

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1) See paragraphs 8 and 9 above.

34. The CHAIRMAN put the United States revised text to the vote.[1]

The United States revised text was rejected by 7 votes to 1 with 3 abstentions.

35. Mr. PINTO (France) asked the representative of Israel whether, under the system he recommended, an accused person who was not sworn could, if he so desired, submit to examination and cross-examination by the defence or the prosecution. The accused could certainly not be denied that right.

36. The representative of Australia had mentioned three situations in which the accused might find himself, but did not appear to have considered that case.

37. Mr. COHN (Israel) said that, in the light of the comments of the Australian, Danish and French representatives, he would replace the words "whether on oath or without oath" in his proposal by the words "either from the witness stand or from the dock". That amendment would have the effect of leaving no doubt on the question of liability to cross-examination.

38. Mr. JONES (United Kingdom) asked whether the Israeli representative would consider modifying the phrase "whether on oath or without oath" to read "whether on oath or otherwise". He made that suggestion because of certain other possibilities, such as the admission of a statement by an accused prior to the trial.

39. Mr. COHN (Israel) felt that the word "otherwise" was not sufficiently precise. Such matters as solemn affirmation by an accused and the like were more questions of procedure than of principle.

40. Mr. JONES (United Kingdom) said that he had in mind the circumstances in which a statement would be made, for instance, at the preliminary hearing or between that hearing and the trial or during the course of the trial. With regard to drafting, he believed that it would be more emphatic, and therefore preferable, to delete the word "deemed" from the third paragraph of the Israeli proposal.

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(1) See paragraph 30 above.

41. Mr. PINTO (France) observed that the representative of Israel had not answered his question, namely, whether the prisoner at the bar could elect to be subjected to examination and cross-examination by the defence or the prosecution.

42. Mr. COHN (Israel) confirmed that his proposal would not prevent an accused from electing to answer questions even though he had not entered the witness-box for the purpose of making a statement.

43. The CHAIRMAN put the substance of the Israeli and Netherlands proposals to the vote.

The principle of the Israeli proposal was adopted by 6 votes to 5 with 1 abstention.

44. Mr. MUNIR (Pakistan), explaining his vote, said he had supported the Israeli proposal, subject to the proviso that cross-examination should be limited to the facts on which the accused had made a deposition, and to the further proviso that the right to cross-examine an accused would not be confined to the prosecution, but would be open to other accused persons on trial at the same time.

45. Mr. PINEYRO CHAIN (Uruguay) explained that he had voted for the Israeli proposal because it permitted the accused to choose one of the following alternatives: either to act as a witness, with all the resultant legal consequences, or to retain his status as the accused person.

46. The CHAIRMAN suggested that the Israeli representative's text be adopted for working purposes, and proposed that it be referred to the Drafting Sub-Committee for further consideration in the light of the various comments made, and especially of those made by the Pakistani representative.

It was so agreed.

The meeting was suspended at 11.35 and was resumed at 11.50 a.m.

47. Mr. COHN (Israel) thought that, before the Committee left the subject of self-incrimination, it should consider one further provision for the protection of the accused, namely, whether statements made out of court were to be recognized or not. The necessary safeguard was provided in section 2 of his amendment, (A/AC.48/L.11) which read:

> "No confession made by the accused out of Court shall be admitted in evidence against him, unless the Court is satisfied that the accused was not induced to make the confession by infliction of physical suffering upon him or threats thereof, or by any threats or promises likely to cause him to make any such confession falsely, and that he made the confession consciously and understanding what he said and did."

48. He claimed no copyright for that text, since he had taken it from a proposal by the American Law Institute for the Model Code of Evidence (1942).[1] It was not, furthermore, a correct statement of Anglo-Saxon Law as applied nowadays. Under the Anglo-Saxon system, no confessions of that kind were admitted as evidence against the accused unless certain very stringent rules had been observed by the authorities at the time of recording the statement.

49. He felt that the accused should be given some protection, and that provision should be made for it in the statute of the court; a reference to the "judges' rules" as applied in Anglo-Saxon countries would not be adequate in view of the intricacies involved. That was why he had submitted his text, which gave the accused the necessary protection against any statements unfairly or unlawfully extorted from him, being used against him. A decision on the matter could admittedly be left to the discretion of the court, which would no doubt immediately reject all evidence obtained by unfair means, but he none the less felt there was a pressing need for making specific provision in the statute to warn the police

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1) Model Code of Evidence, as adopted and promulgated by the American Law Institute at Philadelphia, Pa. May 15, 1942. (1942 American Law Institute, Philadelphia, Pa.).

and other authorities responsible for preparing evidence that any statement they obtained unlawfully could not be used to incriminate the accused. Such a provision would act as an effective deterrent.

50. Referring to the last clause of his text, namely, that the court should be satisfied that the accused had made the confession "consciously and understanding what he said and did", he pointed out that several countries had held political criminal trials, in which it was doubtful whether the statements attributed to the accused had been made consciously. He therefore considered it imperative to make it clear that such confessions would be of no avail in an international criminal court. The psychological effect on investigating authorities of the inclusion of such a provision in the statute should not be underrated.

51. He therefore proposed that the Committee accept section 2 of his amendment in addition to the principle already adopted.

52. Mr. MUNIR (Pakistan) could not accept the Israeli text. The Committee was discussing and making provision for machinery to be used at actual trials whereas the Israeli text was more concerned with the admissibility of evidence. The rule proposed was only one of several hundred, and if the Committee were to embark on a study of the rules of evidence, it would require at least six months to complete it. There were other important rules of evidence which might well be studied, such as those concerned with hearsay evidence, but the problem was too complicated to be tackled by the Committee in the short time at its disposal.

53. The CHAIRMAN agreed with the Pakistani representative. The rules of evidence presented enormous problems, and if the Committee once embarked on their study, it would be difficult to decide exactly where it should stop. He therefore suggested that the Committee should limit itself to taking note of the Israeli proposal, duly recognizing the importance of the topic, and also of the arguments of the Pakistani representative, which were based on practical considerations.

54. Mr. COHN (Israel) felt that a vote should be taken. He quite agreed with the Pakistani representative that it would be impossible to consider each and

every rule of evidence, but felt that the one to which he had referred was quite different from any other. The Committee was attempting to provide minimum guarantees for the accused; it had already agreed on a number of such safeguards, but unless the further, and most vital, safeguard provided by his text were admitted, all other guarantees would be vitiated. Furthermore, since the Committee had already agreed to one proposal concerning self-incrimination while the trial was in progress, it was only logical that it should adopt another relating to statements made outside the court.

55. The CHAIRMAN called for a vote on the Pakistani proposal that the Committee take no action on section 2 of the Israeli amendment.

The Pakistani proposal was adopted by 9 votes to 1 with 2 abstentions.

56. The CHAIRMAN interpreted the vote as applying equally to other points concerned with rules of evidence.

Article 36 of annex II to the Secretary-General's memorandum (A/AC.48/1)

57. Mr. SÖRENSEN (Denmark), Rapporteur, said that the next item for discussion was article 36 in annex II of the Secretary-General's memorandum. Certain of the problems connected with that article had already been discussed by the Committee in its study of the question of indictment. It had, for example, agreed in principle that the indictment should contain a list of the names of witnesses and a general description of the documentary evidence to be produced and, further, that it could be modified in certain ways in respect of such names and evidence. No reference, had, however, been made to experts or to the right of the court to hear witnesses and experts on its own initiative. He consequently suggested that the Committee should concentrate on those aspects, taking into account the amendment suggested by the United States representative in article 36 of his proposal (A/AC.48/L.9).

58. Mr. MAKTOS (United States of America) said that the Committee had already made provision for a screening process[1] and had decided that there should be an

1) Summary record of the 12th meeting (A/AC.48/SR.12), paragraph 58.

investigating authority responsible for determining whether a prima facie case had been made out.[1] The next stage to be considered was that of the trial itself. He envisaged the court as an impartial arbiter hearing and weighing the arguments submitted by the two parties, the prosecution and defence, and accordingly felt that it would be in the best interests of justice to leave the latter responsible for calling all witnesses, the court refraining from intervening at any stage. It had been with some misgivings that he had observed the reference in article 36 in annex II to the court being free to hear witnesses and experts "even of its own motion". The onus of demonstrating the guilt of the accused was on the presecution, and on the prosecution alone; if it failed to do so, the court must dismiss the case.

59. The court must not be confused with the prosecuting authority; it could recall such witnesses as had already been produced, but that was as far as it could intervene in the action. He personally found the phrase "the court shall be free to decide whether /witnesses and experts/ shall be summoned and heard" insidious. It was impossible for the court to say whether or not the accused needed or could have a given witness. It could, on the other hand, as article 41G of the United States amendments (A/AC.48/L.9) provided, rule out irrelevant issues, evidence and statements, in which case it would be the responsibility of counsel for the defence to demonstrate the relevancy of any evidence or statement he produced.

60. He admitted that the mention in article 36 annex II of "experts" sounded plausible, but wondered exactly what it was intended to convey. In a case involving Admiralty Law, for example, the court might conceivably call in experts, but he submitted that, if it was necessary to the prosecution's case to prove that some point of Admiralty Law was involved, it would be the responsibility of the prosecution, and not the court, to do so.

61. Mr. LIANG, Secretary to the Committee, appreciated the United States representative's remarks but, although he had no intention of defending the draft

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(1) Summary record of the 13th meeting (A/AC.48/SR.13), paragraph 25.

in annex II, felt that the Committee should bear in mind the fact that, in the issue it was discussing, as in many others, it was serving as a kind of school for the study of comparative law. The Secretariat had based itself on continental legal procedure, whereas the United States representative naturally viewed the problem from the standpoint of the Anglo-Saxon system. It was unnecessary to go into the merits and demerits of the two, but any study of continental procedure, which was also followed in China, would show that the powers of a court to summon witnesses and experts were very clearly stated. It was, indeed, a daily occurrence for a Chinese court to summon witnesses on its own initiative. The point at issue was: which system would prove preferable for the international criminal court? He personally had felt no misgivings on reading the United States proposal, since, in his opinion, it merely constituted a different line of approach.

62. Mr. RÖLING (Netherlands) felt that two main problems were involved. The Committee had first to decide whether the court was to remain passive and wait for witnesses to be produced, or whether it should be given some initiative in the matter. He pointed out that both at Nuremberg and at Tokio the court had had the right to summon witnesses[1]; at Tokio, however, it had not exercised that right (possibly because the majority of the judges had been versed in the Anglo-Saxon system), a circumstance which he regretted, since otherwise better results might well have been secured. Under the continental system, on the other hand, a judge could take the initiative of summoning witnesses and of requiring certain documents to be produced, thus playing a far more active part in the proceedings of the court. However, he did not feel that any specific mention of the point should be made in the statute of the court, as it was, in his opinion, rather a question for the rules of procedure.

63. The second issue which called for a decision was whether the Committee should itself define the powers of the court to rule out evidence on the grounds of irrelevancy.

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1) Charter of the International Military Tribunal, article 17; Charter of the International Military Tribunal for the Far East, article 11.

64. Mr. PINEYRO CHAIN (Uruguay) said that article 36 in annex II was intended to lay down the principles governing the appearance of witnesses. But, as the Secretary had rightly observed, those principles were not sacrosanct, and others might well be formulated. In any case, it must be left to the court to decide whether a witness should be heard or not and to assess the value of the evidence produced. The observance of those two principles was adequately ensured by the provisions of article 36, as drafted by the Secretariat. If the question of submission of evidence were introduced at that stage, the Committee would become involved in the complications of criminal procedure.

65. Evidence against the accused should be produced by the prosecution, and evidence in his favour should be produced by the defence. But the submission of evidence could not be left entirely to the parties. The court should be able to supplement the evidence submitted by any other evidence which it considered material; moreover, provision should be made for such evidence to be verified by both parties to ensure that it was not prejudicial to them.

66. He therefore considered that the provisions of article 36 in annex II of the Secretary-General's memorandum, should be retained. Their scope might however, be extended by providing, for instance, that the court should be empowered of its own motion to produce any evidence which it considered material.

67. Mr. TARAZI (Syria) entirely agreed with the views expressed by the representative of Uruguay. He only wished to point out that the continental system gave the court certain powers, but made a distinction between the powers conferred on it by the code of procedure and the discretionary powers of the judge. If new evidence was produced during a hearing, the latter powers enabled the court to call new witnesses or experts.

68. With regard to the powers of the court, the United States proposal (A/AC.48/L.9) contained essential elements which must be introduced into the statute of the court, and to which another essential power might be added, namely, power to release the accused provisionally. In the United States text the question of powers of the court was dealt with before that of the conduct of the trial. However, the question under examination by the Committee concerned the latter point;

it would therefore be logical to examine article 41 A of the United States text at the present stage.

69. The CHAIRMAN felt that, since the Committee had already embarked on its examination of article 36, it would be best to continue, unless the Syrian representative wished to press his point.

70. As he interpreted the alternative text for article 36 submitted by the United States delegation, it contained nothing incompatible with the court being granted full powers to call for evidence and summon witnesses. The Secretariat's text, on the other hand, was more explicit, prescribing certain limitations which did not appear in the former.

71. Mr. MAKTOS (United States of America) recalled that the Secretary had suggested that the United States proposal was based on Anglo-Saxon legal concepts. He submitted, however, that no one present would disagree with its principles, since it was based on common sense and, unlike the Secretariat's text, took into account both the Anglo-Saxon and the continental systems.

72. He wished to make it quite clear that it was the first sentence of the Secretariat's text which he considered insidious, since it would make it impossible for counsel to know exactly when he should ask the court for a decision as to his witnesses or experts, or even to know whether some system of pre-trial had been instituted to approve the summoning of witnesses. If the Secretariat's text merely implied that the court could stop a trial in order to investigate the relevancy of evidence, it might, in his opinion, have been worded more precisely.

73. He suggested that the Committee should first vote on his alternative text, and then take up the first two sentences of the Secretariat's text.

74. Mr. RÖLING (Netherlands) said that the question of further guarantees of a fair trial had been raised at the last meeting of the Drafting Sub-Committee. He himself had one more which he would like to add to the seven guarantees prescribed by the Pakistani representative.

75. The Committee had certainly accorded the defendant the right to produce evidence, but both he and his counsel might well find themselves in an embarassing situation and virtually powerless. They might even find themselves in the position of the defendants before the Nuremberg and Tokio Military Tribunals. For example, while enjoying the theoretical right to produce evidence, the accused might not have any to produce, because it was in the hands of the prosecution. Of course it should be recognized that the accused could not be given the right to demand that all the documents he wanted should be produced. Archives of ministries of foreign affairs were often, and for very sound political reasons, top secret. The accused at Nuremberg had asked for papers on Soviet German relations in 1939 and 1940 and, while those papers had later been produced after there had been a change in the political situation, that had happened two years after the defendants had been hanged. There were many similar cases of foreign ministry archives being completely inaccessible. It was therefore impossible to draft an article guaranteeing that the court would help the accused and produce such evidence as he might require, it might none the less be possible to devise one whereby the court would at least lend him its assistance.

76. He consequently suggested the following text:

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

77. The CHAIRMAN thanked the Netherlands representative; he added that the problems mentioned by the latter were new to most members of the Committee and were indeed, met with only infrequently in national courts.

Mr. LIANG, Secretary to the Committee, wished to make it clear to the United States representative that his previous remarks had been confined to the varying approaches adopted in the different drafts. He consequently felt that it was impossible to label as "insidious" what was merely normal legal practice in many countries.

The meeting rose at 1 p.m.