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COMMITTEE ON INTERNATIONAL CRIMINAL JURISDICTION

First Session

SUMMARY RECORD OF THE NINETEENTH MEETING

held at the Palais des Nations, Geneva,
on Tuesday, 21 August 1951, at 3 p.m.

CONTENTS:

Present:

Chairman: Mr. MORRIS

Members:

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:

Mr. Liang — Secretary to the Committee

1. PROCEDURE OF AN INTERNATIONAL CRIMINAL COURT

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

Article 41 B (A/AC.48/L.9)

1. The CHAIRMAN invited the Committee to continue its consideration of chapter IV of the United States proposal (A/AC.48/L.9).

2. Mr. MAKTOS (United States of America) said that article 41 B was self-explanatory, the intention being to restrain governments from withholding evidence and to enable the court, on establishing that a case was of an unsubstantial, frivolous or vexatious character, to dismiss it.

3. Mr. JONES (United Kingdom) observed that the court would automatically have the right to stop proceedings if the evidence were not available, and that the institution of an investigating authority would provide a sufficient safeguard against the bringing of a frivolous or vexatious case. He was therefore opposed to the insertion of such an article in the statute of the court.

4. Mr. PINTO (France) supported the United Kingdom representative.

5. Mr. RÖLING (Netherlands) also agreed with the United Kingdom representative so far as the first part of paragraph 1 of article 41 B was concerned. There was, however, a notion in that paragraph that merited retention. It seemed to him that in order to warn governments that any attempt to withhold evidence could not be made with impunity, provision should be made in the statute for dismissal of a case by the court, somewhat along the following lines:

> "The court shall have the power to dismiss at any stage in the proceedings any case in which a fair trial cannot be had because of unavailability of evidence."

6. The CHAIRMAN believed that the court should have power to dismiss at any stage in the proceedings any case in which a fair trial could not be had, even for reasons other than the unavailability of evidence. That being so, he

wondered whether the words "because of unavailability of evidence" might not be deleted from the Netherlands proposal. He feared that to mention in the statute one reason for which the court could dismiss a case, might preclude it from doing so for other equally valid reasons.

7. Mr. COHN (Israel) supported the Netherlands proposal as modified by the Chairman's suggestion. It might, however, be preferable to say that the court should have power to dismiss a case when it was satisfied that no fair trial could be had. To dismiss a case because of its frivolous or vexatious nature, and to dismiss it because of unavailability of evidence were two very different matters; for in the former case the court would be entitled to pronounce an acquittal, which would rule out any question of the dismissal being without prejudice to further prosecution, as provided for in paragraph 2 of article 41 B. Whereas in the latter case, that would not be so.

8. He was therefore inclined to retain the notion that dismissal on the grounds of unavailability of evidence should be without prejudice to further prosecution.

9. Mr. RÖLING (Netherlands) was able to accept the Israeli suggestion, since it covered what he had in mind.

10. Mr. PINEYRO CHAIN (Uruguay), in order to make his position clear, mentioned the different decisions which the court might be called upon to make in the course of the proceedings. It might dismiss the case when, without having examined the substance, it found that certain forms had not been respected, for example, in the event of the injured party failing to bring an action. Then the case would be dismissed, but it might be re-opened if the formal defect responsible for its dismissal were corrected. In other cases the court could, again without examining the substance, decide to dismiss the case, for example when the offence was extinguished by the death of the accused. In that event the case could not be re-opened. Lastly, the court could pronounce an acquittal when, after examining the case, it found no grounds for conviction. Thus it was only in the first case that proceedings could be re-opened.

11. Article 41 B provided for dismissal of the case for lack of evidence. Any dismissal of a case must be final, in accordance with the rule non bis in idem. To permit a re-hearing would be to leave the accused in a state of painful suspense contrary to respect for individual liberty.

12. He was therefore in favour of substituting the words "in which there is not sufficient proof of guilt, or which" for the words "which in its opinion is of unsubstantial character, or" in article 41 B.

13. He also proposed the deletion of paragraph 2, which left the door open to re-trial.

14. The CHAIRMAN believed that the Israeli proposal corresponded to the ideas expressed by the Uruguayan representative. In the circumstances, he would put to the vote the following text:

> "1. The court shall have the power to dismiss at any stage of the proceedings any case in which the court is satisfied that no fair trial can be had.
>
> "2. Such a dismissal may be stated to be without prejudice to further prosecution."

The Israeli proposal was rejected, there being 3 votes in favour and 3 against with 6 abstentions.

15. The CHAIRMAN put the original text of article 41 B (A/AC.48/L.9) to the vote.

Article 41 B was rejected, there being 5 votes in favour and 5 against, with 2 abstentions.

16. Mr. SÖRENSEN (Denmark) said, in explanation of his vote that he had opposed both texts not because he did not agree with the underlying principles, but because he considered that it would be possible to draft a comprehensive article, such as had already been suggested in the course of the Committee's discussions, giving the court the necessary powers concerning the conduct of trials, and embracing rules guaranteeing a fair trial.

17. Mr. PINTO (France) said t t he had voted with the same considerations in mind as the Danish representa ve.

18. Mr. TARAZI (Syr), speaking o a point of order, said that he would have abstained had he kn that the vote was being taken on paragraph 1 and paragraph 2 of article gether. In his opinion, an accused person once acquitted ought not to be t d a second time.

19. The C RMAN thought that article 41 B should be put to the vote again.

20. Mr. RÖLING (Netherlands), speaking to the point of order raised by the Syrian representative, pointed out that there was no question of acquittal in the terms of paragraph 2 of article 41 B, and that that paragraph was merely intended to enable pressure to be brought on governments to refrain from refusing to produce the evidence necessary for a fair trial.

21. Mr. COHN (Israel) suggested that if the matter were to be put to the vote again, a separate vote should be taken on each paragraph.

22. Mr. RÖLING (Netherlands), replying to Mr. SÖRENSEN (Denmark) said that if he voted in favour of the provisions of article 41 B it would be on the understanding that the Committee was voting on the principle, irrespective of where the provisions in question would appear in the statute.

23. The CHAIRMAN put paragraph 1 of article 41 B (A/AC.48/L.9) to the vote.

Paragraph 1 was rejected by 6 votes to 4.

24. The CHAIRMAN put paragraph 2 of article 41 B to the vote.

Paragraph 2 of article 41 B was rejected by 4 votes to 1.

25. Mr. MAKTOS (United States of America) said that in the light of the suggestion that a comprehensive article might be adopted, covering the powers of the court for guaranteeing a fair trial, he reserved his right to ensure that the Drafting Sub-Committee gave full consideration to the various points which his delegation had raised.

Article 41 C

26. Mr. MAKTOS (United States of America) observing that article 41 C was in his view self-explanatory, urged that before any conclusion was reached that the court would automatically have such powers as that article sought to confer upon it, due consideration be given to the fact that there was no rule of international criminal law which laid down such powers.

27. Mr. SÖRENSEN (Denmark), Rapporteur, felt that an article couched in negative terms, as was article 41 C, was scarcely appropriate for inclusion in a statute for an international criminal court. As it was, the Committee had adopted a positive rule with regard to the contents of the indictment, and he could see no reason for adding article 41 C to the statute.

28. Mr. RÖLING (Netherlands) supported the Danish representative. For the very reason that there was no rule of existing international law conferring powers on any international criminal jurisdiction, the court would have only those powers conferred on it by its statute.

29. Mr. PINEYRO CHAIN (Uruguay) said that article 41 C had a double purpose. On the one hand, it declared that the court might not entertain charges against persons other than those committed to it for trial. On the other, it declared that the court might not add other offences to those contained in the indictment. In his opinion the order of those two questions should in any case be reversed.

30. Regarding the counts of the indictment, care must be taken to distinguish between the fact and the offence. The judge must be bound by the incriminating facts, not by the description of the offence. If a charge appeared in the indictment and was described as war propaganda, the judge could not add a further fact to the indictment, but he could alter the charge and declare, for example, that the act in question was not war propaganda, but an act of genocide.

31. Regarding the persons tried, it was reasonable to limit the powers of the judge to persons committed to him for trial. The formula in article 41 C would, however, require modification.

32. Examination of a charge might reveal the existence of an offence by some other person. In the ordinary course, in national law, it would then be for the court to cause the competent body to be convened, in that case the examining magistrate, to examine the new case ab initio. In international law the same thing might occur. For example, a person charged with a war crime might maintain that he had acted as a result of other similar crimes committed by another person of a different nationality. In such an event, the court ought not to declare itself competent to try the case, but should communicate the evidence obtained to the competent bodies for them to make a charge.

33. He therefore proposed the insertion, after the words "committed to it for trial", of the following phrase:

> "without prejudice to transmission of evidence to the competent bodies for them to make the charge when it considers that there are sufficient grounds for the incrimination of another person".

34. It would also be necessary, in the second line, to substitute the word "act" for the word "offence".

35. Mr. COHN (Israel) asked the United States representative whether that was the only article in his proposal providing for the possibility of the indictment being amended.

36. Mr. MAKTOS (United States of America) said that once the committing authority had issued an indictment in respect of a specific crime or crimes, the court should not be permitted to try an accused on any charge other than that laid down by the committing authority, although it should be allowed to give a different qualification to the crime. As to the point made by the Danish representative, there was no reason why the article should not be framed in affirmative terms; but he would point out that a corresponding provision, namely article 99 in the Geneva Convention Relative to the Treatment of Prisoners of War, of 1949, was also worded negatively.

37. Mr. JONES (United Kingdom) also preferred a positive wording. He pointed out that the committing authority would issue a certificate to the effect

that there was sufficient evidence on which to bring a case, but would not frame an indictment. The indictment would be framed at a later stage. A provision of the nature outlined in article 41 C would be appropriate in relation to the indictment proper, and since the latter formed the subject of another article in the draft statute, such a provision should more properly be inserted there.

38. The CHAIRMAN observed that article 41 C was not concerned with the indictment proper, but simply sought to make it impossible for the court to extend the charges in the indictment.

39. Mr. SÖRENSEN (Denmark), Rapporteur, referred to the decision of the Committee, when laying down the contents of the indictment, to remit the article in question to the Drafting Sub-Committee with the request that it take into consideration the Israeli proposal that the court should have power to authorize amendment of the indictment, provided that the accused was not charged with graver offences than those contained in the original indictment.[1] The Drafting Sub-Committee would thus be looking into the problem of the amendment of the indictment, and the intention underlying the provisions of article 41 C seemed, therefore, to have been taken care of. The point at issue was whether in addition to an article on the indictment proper a further specific limitation of the powers of the court in that respect was necessary.

40. Mr. TARAZI (Syria) thought that since the indictment might contain several charges and the accused might be found guilty of several offences, it would be desirable to adopt in the statute of the court the principle of national criminal law recognized in the countries using the continental legal system, namely: that where there were a number of offences sentences should be concurrent.

41. Mr. COHN (Israel) suggested that the provision incorporated in article 41 C should be dealt with by the Drafting Sub-Committee when drafting the article on the indictment.

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1) Summary Record of the 14th meeting (A/AC.48/SR.14), paragraphs 50 et seq.

The Committee agreed that article 41 C should be referred to the Drafting Sub-Committee for consideration at the same time as the article on the indictment.

Article 41 F

42. Mr. MAKTOS (United States of America) said that article 41 F dealt with the right of a State to intervene in a particular case. The main purpose of that article was to enable a State that had an interest of a legal nature in a particular case to come in as a third party, and as an amicus curiae, when it felt that it could or should have something to contribute such as the interpretation of clauses in conventions or treaties on which the case was based.

43. Mr. COHN (Israel) said that as the Committee had decided that the State concerned should appoint the prosecutor, he could not see why it should also be allowed to intervene in the trial itself. He advanced that observation in the light of the possibility that several States might jointly have appointed the prosecutor, and of the consequent injustice that might be done if one or other of those States was allowed to intervene directly in the trial.

44. The CHAIRMAN and Mr. PINTO (France) considered that such intervention might be justified for states other than those directly concerned in the case.

45. Mr. RÖLING (Netherlands) recalled that the Committee had adopted a provision safeguarding the interests of a State in the jurisdiction of the court, and asked what other interests of the State were envisaged in article 41 F.

46. Mr. MAKTOS (United States of America) stated that the provisions in question followed the wording of Article 62 of the Statute of the International Court of Justice and article 26 of the Convention on the Creation of an International Criminal Court opened for signature at Geneva, 16 November 1937.[1] He saw no reason why the statute of the international criminal court should not contain a provision enabling an interested State, though not directly concerned in a particular case, to intervene on the question of the interpretation to be

1) A/CN.4/7.Rev 1, pages 88 to 97.

placed on specific provisions of the international instruments on the basis of which the case had been brought before the court.

47. Replying to Mr. WYNES (Australia), he confirmed that, while article 26 of the Convention on the Creation of an International Criminal Court provided such a facility only for States entitled to seize the court, his delegation's intention was that no such limitation should be imposed under the statute of the international criminal court, particularly as the final decision as to whether or not a State could intervene would rest with the court.

48. Mr. MUNIR (Pakistan) was in principle opposed to the intervention of a third party in a criminal matter. The court would be concerned with the commission of a criminal offence, and there were only two parties in a criminal case, the prosecutor and the accused. In the circumstances, it was difficult to see how the rights of an outside party could be defined if such an outside party were permitted to intervene.

49. Mr. PINEYRO CHAIN (Uruguay) said that he was not in favour of the adoption of article 41 F, for the same reasons as the Pakistani representative had just given. Either the third State would intervene to associate itself with the charge, in which case the accused would have to deal with a number of attacks which would oblige him to extend his defence, or it would intervene on behalf of the accused and a dispute between States would result.

50. Mr. MAKTOS (United States of America) said that in the light of the observations of the Pakistani and Uruguayan representatives he would restrict the provision to the right of a State to intervene in a particular case only for the purpose of submitting briefs on legal points arising under treaties or conventions on which a case was based.

51. Mr. MUNIR (Pakistan) could see no reason for the intervention of a third party on any grounds whatsoever. Any such intervening party could side only with the prosecution or with the accused. If it supported the prosecution, it should instruct the prosecutor. The adoption of the provision either as originally

formulated or as revised by the United States representative would turn the proposed court into something more than an international criminal court.

52. The CHAIRMAN put to the vote article 41 F (A/AC.48/L.9), subject to appropriate drafting changes to give effect to the revision suggested by the United States representative.

Article 41 F was rejected by 8 votes to 1.

53. The CHAIRMAN said that he interpreted the vote as applying equally to the original text of article 41 F.

Article 41 G

54. Mr. MAKTOS (United States of America) thought that it might be advisable to deal with article 41 G by sub-paragraphs. Sub-paragraph (a) was based on article 18(a) of the Nuremberg Charter which laid down that the Tribunal should confine the trial strictly to an expeditious hearing of the issues raised by the charges. He had omitted the word "strictly" from his text.

55. Mr. JONES (United Kingdom) felt that sub-paragraph (a) of article 41 G would detract from the dignity of the court, in that it sought to impose a condition which was not a condition of law, but a directive as to how a case should be conducted.

56. Mr. COHN (Israel) regretted that the United States representative had not combined sub-paragraphs (a) and (b), for in his view they were indivisible. He favoured an express provision combining sub-paragraphs (a) and (b), and even sub-paragraph (c). The Committee had agreed that the statute should contain various provisions guaranteeing the rights of the accused, including the right to cross-examine subject to certain limitations. Under no national criminal legislation were those rights unlimited. The situation could not be allowed in which the court, in the absence of any restricting provisions, would conclude that any rule restricting such a right would be ultra vires. A provision combining sub-paragraphs (a) and (b) would thus be necessary. The drafting could be left to the Drafting Sub-Committee.

57. Mr. WYNES (Australia) said that in order to meet the United Kingdom representative's point it would be advisable to say: "The Court shall have power to:" instead of "The Court shall:".

58. Mr. MUNIR (Pakistan) enquired whether the term "contumacy" had the same meaning as the expression "contempt" in English law, as, for example, press comment on cases actually being tried.

59. The CHAIRMAN explained that contumacy only covered the idea of refusal to obey the directions of the court, whereas contempt went further.

60. Mr. MAKTOS (United States of America) said that sub-paragraph (c) was not intended to give the court power to punish the Press in circumstances such as the Pakistani representative had mentioned. Those who had drafted article 41 G had had in mind article 12 C of the Charter of the International Military Tribunal for the Far East, with the exclusion, however, of the clause "including exclusion of any accused or his counsel from some or all further proceedings, but without prejudice to the determination of the charges". The main idea on which sub-paragraph (c) was based was that the court should be able to keep order in the courtroom. Sub-paragraph (c) had been drafted with the idea in mind that it was better to try the patience of judges than to convict an accused in his absence.

61. Sub-paragraph (b) was based on article 18 (b) of the Nuremberg Charter, which laid down that the tribunal should take strict measures to prevent any action which would cause unreasonable delay, and rule out irrelevant issues and statements of any kind whatsoever. Those who had drafted the latter provision had not considered that they were in any way lowering the dignity of the Tribunal. The purpose of sub-paragraph (b) in article 41 G was to secure expeditious hearing of issues, in view of the fact that under international law almost any kind of evidence could be adduced.

62. Mr. JONES (United Kingdom) and Mr. RÖLING (Netherlands) supported the suggestion that formulation of suitable texts for sub-paragraphs (a), (b) and (c) should be left to the Drafting Sub-Committee. The latter, however, proposed the

deletion of the words "imposing appropriate punishment" from sub-paragraph (c), since he considered that it would be difficult for the court to take a decision as to the rules under which such punishment should be meted out, in view of the fact that the court might sit in various countries.

63. Mr. TARAZI (Syria) associated himself with the remarks of the Netherlands representative. In national law, when there was contempt of court, the court followed the national criminal code and applied the penalties provided in it. Thus, the statute of the court provided no such sanction.

64. Mr. MAKTOS (United States of America) agreed that sub-paragraphs (a), (b) and (c) should be referred to the Drafting Sub-Committee. He also accepted the Netherlands representative's amendment to sub-paragraph (c).

65. Mr. PINTO (France) approved the suggestion made by the representative of the Netherlands, and also suggested the deletion, in sub-paragraph (c), of the word "summarily" which might seem to imply a right to punish.

66. Mr. MAKTOS (United States of America) stated that the intention in providing that the court should have power to deal summarily with any contumacy was simply that it should be able to take action in such circumstances forthwith, and without any preliminary procedure.

67. Mr. COHN (Israel) supported the contention that the court should not be given jurisdiction over an offence against the court. The matter might be left to the Drafting Sub-Committee, which should take all steps to give effect to the conclusions of the Committee, but should not extend to the court such additional criminal jurisdiction.

68. The CHAIRMAN put to the vote the French and Netherlands proposals that the court should not be empowered to "deal summarily with any contumacy" or to "/impose/ appropriate punishment" in respect of such contumacy.

The proposals were adopted by 7 votes to 1, with 3 abstentions.

69. The CHAIRMAN put to the vote sub-paragraphs (a), (b) and (c) of article 41 G as amended.

Sub-paragraphs (a), (b) and (c) as amended were adopted by 7 votes to 2, with 1 abstention, it being understood that the Drafting Sub-Committee would prepare an appropriate text.

70. The CHAIRMAN requested the Committee to consider sub-paragraph (d) of article 41 G.

71. Mr. COHN (Israel) considered that the provision in sub-paragraph (d) should appear as a separate article, and that it would be preferable to word it somewhat differently, perhaps as follows:

> "The Court shall have power at any stage in the proceedings to dismiss the case against an accused if satisfied that he is not physically or mentally fit to stand his trial."

72. It would be agreed that the occasion might arise when a court would have to determine in the course of the trial whether the accused was mentally and physically fit to stand trial, and that it was in consequence not sufficient to empower the court to pronounce on his condition prior to proceeding to trial, as provided in sub-paragraph (d).

73. Mr. RÖLING (Netherlands) was opposed to the insertion in the statute of any such provision, for he felt that it should be left to the court to take whatever action it deemed appropriate when there was any question of the inability of accused to stand trial because of mental or physical incapacity. That was a matter of detail, and should be omitted, unless the whole procedure of the court was to be regulated in the statute.

74. Mr. MAKTOS (United States of America) accepted the wording proposed by the Israeli representative.

75. The CHAIRMAN put to the vote the Israeli representative's wording, subject to the inclusion of such a provision at an appropriate place in the statute.

The proposed provision was rejected by 6 votes to 3.

76. The CHAIRMAN said that he interpreted that decision as a rejection of the original text as well.

Article 42 (A/AC.48/1 and A/AC.48/L.9)

77. Replying to the CHAIRMAN, Mr. MAKTOS (United States of America) said that the committee should next consider article 42. The text (A/AC.48/L.9) proposed by his delegation was more detailed than the Secretariat's draft (A/AC.48/1), and more or less followed Article 56 of the Statute of the International Court of Justice. The main difference was that, as in the Statute, the United States text provided that the judgment should contain the names of the judges that had taken part in the decision.

78. The United States draft also attempted to take account of the fact that adequate reasons had not been given in the Nuremberg judgment, for the apparent disparity between the sentences awarded to different persons accused of the same crime. His Government would not be prepared to approve article 42 unless its wording was developed in some such detail as his delegation proposed.

2. FUTURE PROGRAMME OF WORK

79. The CHAIRMAN called upon the Rapporteur to indicate the probable development of the Committee's work.

80. Mr. SÖRENSEN (Denmark), Rapporteur, believed that the Committee would be able to complete consideration of chapter III of the draft statute at its next meeting. If so, the Drafting Sub-Committee might well meet the following afternoon and try to draft articles covering all the decisions of the Committee on the court's procedure. The Committee would then be in a position to begin its consideration of the structure of the court, including such questions as its establishment, its permanency, its organization and the election of judges. That work might well be concluded on the morning of 24 August and by 28 August a

complete draft of the Statute would possibly be ready for examination by the Committee. The latter's draft report would then have to be considered and if all went according to schedule he hoped it would be possible for the Committee to finish its work by the evening of 31 August.

81. Mr. PINTO (France) expressed his delegation's appreciation of the accuracy and clarity with which its statements had been reproduced in the records. The minute writers deserved special commendation.

The meeting rose at 5.10 p.m.