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COMMITTEE ON INTERNATIONAL CRIMINAL JURISDICTION

First Session

SUMMARY RECORD OF THE TWENTIETH MEETING

held at the Palais des Nations, Geneva,
on Wednesday 22 August 1951, at 9 a.m.

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Procedure of an international criminal court:

Chapter III of annex II to the Secretary-General's memorandum (continued)

Present:

Chairman: Mr. MORRIS

Members:

Australia	Mr. WYNES
Brazil	Mr. AMADO
China	Mr. WANG
Cuba	Mr. VALDES ROIG
Denmark	Mr. SÖRENSEN
Egypt	MOSTAFA Bey
France	Mr. PINTO
Iran	Mr. KHOSROVANI
Israel	Mr. COHN
Netherlands	Mr. RÖLING
Pakistan	Mr. MUNIR
Syria	Mr. TARAZI
United Kingdom of Great Britain and Northern Ireland	Mr. TURNER
United States of America	Mr. MAKTOS
Uruguay	Mr. PINEYRO CHAIN

Secretariat:

Mr. Liang	Secretary to the Committee

PROCEDURE OF AN INTERNATIONAL CRIMINAL COURT

Chapter III of annex II to the Secretary-General's memorandum (continued) (A/AC.48/1, A/AC.48/L.9, A/AC.48/L.10, A/AC.48/L.13)

Article 41 (A/AC.48/1 and A/AC.48/L.9)

1. The CHAIRMAN invited the Committee to consider article 41 as drafted by the Secretariat in document A/AC.48/1, and by the United States delegation in document A/AC.48/L.9. He believed that in both versions the requirement of a majority vote meant a majority vote of judges present and voting. The main difference between the two texts was that, whereas the Secretariat's draft provided for the dismissal of the case in the event of a tied vote, the United States draft provided that the vote of the presiding judge should be decisive.

2. Mr. RÖLING (Netherlands) considered the provision in question to be a matter of detail that should be dealt with in the court's rules of procedure, particularly as the Committee had decided as far as possible to confine the procedural provisions of the statute to the formulation of minimum guarantees.

3. Mr. PINTO (France) said that his delegation was generally in favour of a minimum of detail in the statute. It did, however, consider it necessary to make an express stipulation to the effect that the decisions of the court should be by a majority. In the absence of such a provision, the court would find itself in a difficult position and might interpret the silence of the statute on the subject as an indication that decisions must be unanimous.

4. Mr. WYNES (Australia) agreed that there should not be too many detailed rules in the statute, but wondered whether the Netherlands representative had considered the fact that a rule similar to that at present under consideration was included in the Statute of the International Court of Justice.

5. Mr. RÖLING (Netherlands) said that he had no strong feelings in the matter; his only aim was to ensure that the statute should not become unbalanced through the inclusion of too many purely procedural provisions.

6. The CHAIRMAN gathered that the majority was in favour of retaining the provision concerning decisions by majority vote.

7. Mr. MAKTOS (United States of America) considered that once a quorum had been established, it would be sufficient to have judgments pronounced by majority vote. The United States text followed article 4(c) of the Nuremberg Charter and article 55 of the Statute of the International Court of Justice.

8. Mr. WANG (China) said that he preferred the Secretariat's text, since a decision by a majority of judges present might easily represent the view of a minority of the judges of the court.

9. Mr. SÖRENSEN (Denmark) said that he had interpreted the Secretariat's text somewhat differently to the Chinese representative. He (Mr. Sörensen) believed that when it was said that the decisions of the court should be by a majority of the judges, the intention was that such decisions should be by a majority of judges participating in the judgment. In his view, that principle should be sustained. So far as the United States text was concerned, he thought that it would be preferable to replace the word "present", in the third line, by the phrase "participating in the judgment".

10. Mr. WANG (China) observed that, while both texts would make it possible for a decision to be taken by a minority of the entire court, under the United States proposal that minority could be smaller than would be the case under the Secretariat's draft.

11. The CHAIRMAN said that the United States suggestion requiring a majority of judges present had been actuated partly by the fact that the United States delegation envisaged decisions by a chamber (Division) of the court as well as by the full court.

12. Mr. LIANG, Secretary to the Committee, explained that the Secretariat had wished to distinguish between criminal and civil cases, and to afford fuller protection to the accused than was necessary for a civil defendant. The

Secretariat's idea was that the decisions of the court should be taken by a majority of the judges sitting as a Bench on a given case, and the difference between the Secretariat and the United States drafts was the difference between a majority of judges participating in the trial and a majority of judges present and voting, that was to say, not abstaining.

13. Mr. WYNES (Australia) considered that on practical grounds it would be necessary to require that decisions should be taken by a majority of the judges sitting on a particular case.

14. The CHAIRMAN suggested that the Committee should take a decision as to whether the measure should be the total number of judges of the court, whether or not they had heard the case in question, or the majority of the judges sitting.

15. Mr. PINEYRO CHAIN (Uruguay) noted that there were two distinct questions involved. The first was whether decisions should be taken by a plenary sitting of the court, or by a chamber of the court. On that point he approved the suggestion made by the United States delegation to the effect that the court might divide up into chambers.

16. The second question was whether, once the number of judges sitting had been fixed, decisions should be taken by a majority of the judges present, or by a majority of the judges appointed. In his opinion, the majority should be defined on the basis of the quorum of the chamber as fixed by the court. If the majority were based on the number of judges present, judges would be able to facilitate the constitution of a majority by voluntarily absenting themselves, and the determination of the majority would as a result, be to a certain extent governed by an arbitrary factor.

17. In view of the fact that there would probably be no appeal against decisions of the court, it would be desirable to provide the greatest possible guarantee of just decisions by including in the total, on the basis of which the majority had to be determined, any judges who might be absent.

18. Mr. MAKTOS (United States of America) submitted that the variable majority of which the Uruguayan representative had spoken would be possible under both drafts. The important consideration, however, was the establishment of a proper working basis that would take into account the absence of judges for one reason or another. He felt that judges could be relied upon to be conscientious in attendance whenever possible.

19. Mr. PINEYRO CHAIN (Uruguay), developing his previous observations, said that it would be for the court to determine for each trial how many judges should sit, the majority required for a decision then being calculated on the basis of that number. Under Uruguayan law, all members of the Bench must always be present. Such a rule was of great importance for international criminal jurisdiction, since, assuming the number of judges to be fifteen and the majority to be based on the number of judges present, whatever that might be, a decision might be taken in the absence of any rule to the contrary, by a very small majority indeed, if only two or three judges were present. It was essential, therefore, to stipulate that no decision could be taken in the voluntary absence of a judge, or with a judge or judges abstaining. Every judge present at a trial must vote, otherwise his abstention would entail a reduction in the number of votes required to constitute a majority.

20. In his opinion, the court might sit if a majority of the judges appointed was present, but its decisions could be taken only by a majority of the total number of judges appointed. If, for instance, seven judges were appointed to the court, proceedings could continue so long as four of them were present, but no decision would be valid unless there were four votes for or against.

21. He would further suggest that it be stipulated that the death penalty should be pronounced not by a bare majority, but only by a special majority, or even by unanimous vote.

22. The CHAIRMAN suggested that he should put to the Committee which of the following criteria it wished to adopt: first, the majority of all the members of the court; second, the majority of all members participating in a trial, whether or not they eventually voted; third, the majority of all members of the court voting one way or the other or abstaining.

It was so agreed.

23. The CHAIRMAN put to the vote the criterion of a decision by a majority of all members of the court.

The Committee unanimously decided against such a criterion.

24. The CHAIRMAN then put to the Committee the criterion of a decision by a majority of all members of the court participating in the trial, whether or not they eventually voted.

That criterion was accepted, 8 votes being cast in favour, and it was left to the Drafting Sub-Committee to prepare an appropriate text.

25. The CHAIRMAN said that the next point for consideration was whether, in the event of an equality of votes, a case should be dismissed, or the vote of the presiding judge should be decisive.

26. Mr. COHN (Israel) considered that distinctions should be made between the decisions of the court during the course of trial, its decisions as to guilt, and its decisions as to the sentence. The United States proposal that the vote of the presiding judge should be decisive would in his view be appropriate in the case of rulings by the court. The Secretariat's proposal that in the event of an equality of votes the case should be dismissed, was the rule that should apply to decisions with regard to the guilt of the accused. As to decisions relating to the sentence, whether death sentence or other, neither the rule that the case should be dismissed nor the rule that the vote of the presiding judge should be decisive should apply; instead, in the absence of a majority on the sentence to be pronounced the lightest sentence any member of the court wished to impose should be passed.

27. Mr. RÖLING (Netherlands) considered that rulings by the court should not be provided for in the statute. Nor could he support the Israeli representative's proposal with regard to decisions as to the sentence, for experience had shown that there would almost always be one judge who differed widely from his colleagues on that question, and it would not be right for the

court to be bound by the view of a dissenting judge. In his view, decisions as to sentence should be on the basis of a majority vote, and where it was a question of a death sentence, consideration could be given to the advisability of requiring a two-thirds majority.

28. The CHAIRMAN understood the Israeli representative to have suggested that only when there was a wide divergence of views as to what sentence should be imposed, thus making it impossible to obtain the required majority, should the lightest sentence be pronounced.

29. Mr. RÖLING (Netherlands) was of the opinion that, given time and consultation among judges, it would always be possible to obtain the required majority. National courts were faced with the same problem which, in practice, was solved without much difficulty.

30. Mr. WYNES (Australia) asked the Israeli representative what solution he would propose in a case where, of fifteen judges on the Bench, eight had found the accused guilty, and three wished to impose a sentence of six years imprisonment, one a sentence of five years, one a sentence of four years, and the remaining three a sentence of one year.

31. Mr. COHN (Israel) repeated that his proposal was that, if no majority could be obtained, the minimum sentence should be imposed. He had never envisaged the possibility of a court with more than seven judges; in fact, he believed that "equitable justice" would not be possible with a bench of fifteen judges. Assuming, however, the case put forward by the Australian representative, he considered that the accused should be given the minimum sentence of one year's imprisonment.

32. The CHAIRMAN said that as there appeared to be no support for the Israeli representative's proposal, he would ask the Committee to decide between the Secretariat and United States provisions governing cases of a tied vote.

33. Mr. WANG (China) believed that, in order to give effect in the Secretariat draft to the point made by the Netherlands representative, the word "judgments" in the first sentence should be substituted for the word "decisions".

34. Mr. LIANG, Secretary to the Committee, said that, as the Secretariat had not intended that "decisions" of the court should be interpreted as including the rulings of the court, he would agree to the amendment suggested by the Chinese representative.

35. The CHAIRMAN put to the vote the principle in the second sentence of article 41 of annex II to the Secretary-General's memorandum (A/AC.48/1).

That principle was adopted, 12 votes being cast in favour.

36. The CHAIRMAN said that the next point for consideration was the Uruguayan proposal, developed by the Netherlands representative, that, in the case of a sentence of death, a vote of two-thirds of all the participating judges should be required.

37. Mr. RÖLING (Netherlands) observed that at the Tokyo Trial a death sentence passed by a majority of six to five had been most unfavourably received.

38. Mr. MAKTOS (United States of America) pointed out that on a Bench of fifteen a simple majority would be eight and a two-thirds majority ten and contended that insistence on a two-thirds majority vote would be tantamount to abandoning certain democratic principles, the implication being that in the case of a death sentence it was necessary to take special precautions against errors on the part of the court.

39. Mr. SÖRENSEN (Denmark) submitted that the issue would be whether a death sentence or a sentence of life imprisonment should be imposed. There would be no question of acquittal or non-acquittal, and it seemed to be beside the point to introduce considerations of democratic principles. The special majority requirement was not unknown in many countries, with regard to decisions by both Bench and jury.

40. Mr. PINTO (France), supporting the United States representative, said that, since only a simple majority was required for the finding of guilt, he saw no ground for stipulating a larger majority for the penalty. The most serious decision was that whereby an accused person was convicted. It was therefore preferable that the simple majority already adopted should be made generally applicable.

41. It was, of course, regrettable that anyone could be sentenced to death by a majority of only one vote; but there was the possibility of a criminal sentenced to death having his sentence commuted by the clemency procedure.

42. Mr. RÖLING (Netherlands) admitted that at national level the system of reprieve could be relied upon. On the other hand, it had been found that the authority set up at Nuremberg and Tokyo with power to reduce sentences had been unwilling to take such action, largely because of the grave political considerations involved. He did not therefore think that at international level the system of reprieve should be relied upon in the case of death sentences.

43. The CHAIRMAN put to the vote the proposal that in cases involving a sentence of death, a two-thirds majority of the judges participating in the trial should be required.

The proposal was adopted by 7 votes to 3 with 4 abstentions, it being left to the Drafting Sub-Committee to prepare a suitable text.

Article 42 (resumed from the 19th meeting) (A/AC.48/1 and A/AC.48/L.9)

44. Mr. MAKTOS (United States of America) reminded the Committee of the explanation he had given at the 19th meeting[1] of the expanded text proposed in the United States amendment (A/AC.48/L.9).

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1) Summary record of the 19th meeting (A/AC.48/SR.19), paragraphs 77 and 78.

45. Mr. COHN (Israel) suggested as a drafting amendment to the United States proposal that the words "the facts constituting" should be inserted before the words "his participation" in paragraph 1.

46. The CHAIRMAN thought that that point could be left to the Drafting Sub-Committee.

47. Mr. LIANG, Secretary to the Committee, agreed that the Secretariat's text could well be amplified as proposed by the United States delegation, although so far as the question of the participation of the accused in the offence was concerned, he considered that an indication of that participation would already be given in the statement of the grounds on which the accused had been found guilty.

48. Mr. TARAZI (Syria) proposed the insertion of the words "and the provisions under which he is sentenced" between the word "guilty" and the words "and his participation ....." in paragraph 1, of the United States text.

49. Such a provision concerned was found in national law; for codes of criminal procedure habitually stated that judgments should mention the provisions of the law on which they were based, a stipulation which was generally observed by naming the relevant article of the penal code, failure to do so constituting a ground for quashing the sentence.

50. The CHAIRMAN observed that in giving his opinion a judge would almost inevitably make specific mention of the law on which the case was based.

51. Mr. PINTO (France) thought that it would be pointless to give the court instructions of too elementary a nature on how to state the reasons for its judgments. He preferred the text proposed by the United States delegation which closely resembled article 56 of the Statute of the International Court of Justice.

52. The CHAIRMAN said that in the absence of support for the Syrian representative's proposal, he would put paragraph 1 of the United States text for article 42 to the vote.

53. Mr. MUNIR (Pakistan) proposed the deletion of the phrases "in which there shall be set forth" and "and his participation in the offence of which he has been convicted" so that paragraph 1 would read:

"The judgment shall be accompanied by an opinion in which there shall be stated the reasons on which the judgment is based, and the grounds on which each defendant is found guilty."

54. Mr. MAKTOS (United States of America) believed it would be desirable to retain the clause to the effect that the extent of the participation of an accused in the offence of which he had been convicted should be set forth in the opinion. He could visualize the possibility, in the absence of such a clause, of an opinion which did not clearly reveal how far a particular accused had participated in the crime.

The Pakistani proposal was adopted by 7 votes to 1 with 5 abstentions.

55. The CHAIRMAN put paragraph 1, as amended to the vote.

The United States text for article 42, paragraph 1, as amended, was adopted by 11 votes to none with 3 abstentions.

56. The CHAIRMAN put to the vote paragraph 2 of the United States text.

Paragraph 2 of article 42 was unanimously adopted.

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

57. Mr. MAKTOS (United States of America) explained that article 42 A of his proposal was based on Article 57 of the Statute of the International Court of Justice.

Article 42 A was adopted by 10 votes to 2 with 1 abstention.

Article 42 B (A/AC.48/L.9)

58. Mr. MAKTOS (United States of America) explained that article 42 B was based on Article 58 of the Statute of the International Court of Justice, the word "agents" in the latter having been replaced by the word "defendant".

59. Mr. LIANG, Secretary to the Committee, proposed that in the light of the terms of article 42 A just adopted the first sentence of 42 B should read "The judgment and the opinion shall be signed by the President and by the Registrar".

60. Mr. ROLING (Netherlands) questioned the expediency of including the first sentence. As to the addition of the words "and the opinion", quoting from experience at the Tokyo Trial, he submitted that, if consideration were to be given to the possibility of having the opinions of dissident judges read in open court, regard should be had to the possible length of such opinions. He had no experience on the national level in the matter, since the delivery of separate opinions was not permitted in the Netherlands, but he recalled how at Tokyo counsel for the defence had taken objection to the fact that dissident opinions had not been read in open court. It had been decided not to do so, because one dissenting opinion alone had run to 1300 pages.

61. Mr. COHN (Israel) considered that the first sentence of article 42 B could easily be deleted, for the court could be left to lay down in its rules of procedure, appropriate regulations for the signing of a judgment. He also took serious objection to the second sentence, which implied that if a defendant were given due notice of the fact that a judgment would be read in open court but failed to appear when it was read, the court could pass sentence in his absence. He could not vote for a text which made it possible for sentence to be passed on an accused in his absence.

62. The CHAIRMAN stated that it was the practice in the United States of America for judges of the Supreme Court to decide whether or not opinions should be read in open court, and it frequently happened that dissenting judgments of particular interest to the Bar were selected for such treatment. He wondered whether the words "prevailing opinion" would not be more satisfactory.

63. Mr. PINEYRO CHAIN (Uruguay) proposed that it be stipulated that the judgment should be signed by all the judges who had taken part in the decision, and by the Registrar, since all the judges, including those who had expressed dissenting opinions, had contributed to the criminal proceedings and their outcome. When signing the decision, any judge who so desired could state that he had expressed a dissenting opinion.

64. The texts of the dissenting opinions could be given separately.

65. Mr. RÖLING (Netherlands) recalled that at the Tokyo Trial certain judges had so strongly opposed the majority opinion that they had at first refused to sign the judgment, and had only finally agreed to do so under the formula "as evidence of the majority opinion". In his view, the court could be left to decide whether or not dissenting judges should be obliged to sign the judgment.

66. The CHAIRMAN put to the vote the Uruguayan proposal that all judges and the Registrar should be required to sign the judgment.

The Uruguayan proposal was rejected by 3 votes to 1 with 8 abstentions.

67. The CHAIRMAN put to the vote the Israeli proposal that the article 42 B as a whole should not be adopted for insertion in the statute.

The Israeli proposal was lost, 5 votes being cast in favour and 5 against, and with 4 abstentions.

68. The CHAIRMAN put to the vote the first sentence of article 42 B, revised to read: "The judgment and the prevailing opinion shall be signed by the President and by the Registrar".

Those words were adopted by 7 votes to 1, with 6 abstentions.

69. Mr. PINTO (France) observed that in French the word "arrêt" included both a statement of reasons and an operative part. In those circumstances, the addition proposed would not necessitate any alteration to the French text.

70. He also asked that a separate vote be taken on the two parts of the second sentence of article 42 B.

71. The CHAIRMAN put to the vote the first part of the second sentence of article 42 B, reading: "The judgment and the prevailing opinion shall be read in open court".

That rule was adopted by 9 votes to 2 with 3 abstentions.

72. Replying to the CHAIRMAN, Mr. MAKTOS (United States of America) said he would withdraw the phrase "due notice having been given to the defendant" since, as the Israeli representative had pointed out, its retention might lead to the undesirable position that a judgment could be pronounced in the absence of the accused.

The meeting was suspended at 11 a.m. and was resumed at 11.15 a.m.

Article 43 (A/AC.48/1, A/AC.48/L.9, A/AC.48/L.10)

73. Mr. MAKTOS (United States of America), introducing his amendments to article 43 (A/AC.48/L.9), said he felt there was no incompatibility between his text and that of the Secretariat (A/AC.48/1). His wording had been taken from Article 61 of the Statute of the International Court of Justice. Paragraphs 3, 4 and 5 of that Article had been deleted, because the international court to be set up was to deal with criminal, not civil cases. He had also deleted the last part of paragraph 1, reading "always provided that such ignorance was not due to negligence", because he felt that the court, in coming to its final decision, should not be swayed by any considerations as to negligence, but should be guided solely by the guilt or innocence of the accused, as revealed by the new fact which had been discovered.

74. Similar provisions were to be found in article 43 of the Convention for the Creation of an International Criminal Court (Geneva, 1937),[1] but he had found their wording insufficiently precise in places since, in his opinion, the criterion of whether a judgment was to be revised or not should be the discovery of some new fact. He considered that, if a man could prove his innocence, he should be allowed to apply to the court even thirty years after a judgment had been passed.

75. The CHAIRMAN pointed out that, if the United States proposal was intended as a substitution for the Secretariat's draft, it failed specifically to rule out the possibility of appeal, as did the latter.

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

76. Mr. MAKTOS (United States of America) explained that his proposal implied that no appeal would be allowed; the court could, however, decide in favour of the revision of any given case. In the event of an accused believing that the court had been mistaken in its judgment, he might consider appealing to the court for a reversal of its decision. Little purpose would be served, however, since the judges would presumably have given due consideration to his case and would not be likely to reverse their findings. If he waited until much later, when the membership had changed, his appeal would appear extremely suspect, while if it were lodged with an entirely different court great difficulties would be involved. No appeal should consequently be allowed to a defendant on the grounds that an error of law had been committed; it should only be permissible when a new fact had been discovered.

77. Mr. LIANG, Secretary to the Committee, agreed with the United States representative that there was no incompatibility between the two texts. The Secretariat's draft did not envisage the revision of any judgment, but such revision was not excluded by its wording.

78. Mr. COHN (Israel) felt there was no substantial difference between the United States representative's views and his own. He desired, however, to draw the attention of the Committee to the amendment (A/AC.43/L.10) he had submitted to articles 43 and 44. In order to facilitate discussion, the Committee might be well advised to examine his proposal first, before considering the United States text.

79. Mr. MAKTOS (United States of America) said that he had no objection to that suggestion. He noted that under the first paragraph of the Israeli text the procurator general was entitled to appeal if a judgment of acquittal were pronounced. He appreciated that it would be unjust not to grant the same rights to both the defendant and the prosecution, but felt that an accused who was acquitted would already have suffered very greatly, so that if, as the result of the human limitations of his judges, a judgment of acquittal had been pronounced, he should not be required to stand trial again. In most American States, moreover, the possibility of re-trial was excluded.

80. Mr. COHN (Israel) said that, before commenting on his own proposal, he wished to offer certain criticisms of the text drafted by the Secretariat. He noted that article 43 read "There shall be no appeal ...", whereas article 44 stated that: "Exceptionally an appeal may be lodged ...", and laid down three sets of circumstances (sub-paragraphs (a), (b) and (c)) in which such an appeal was admissible. Sub-paragraphs (a) and (c) both rested on the ground that the court had not been entitled in law to take the decision concerned, and both went to the very core of the problem of what the court's jurisdiction would be. Sub-paragraph (b), on the other hand, was concerned with irregular procedure, that was, with cases where the court had not for example respected the basic rights of the accused. The Secretariat's text failed, however, to clarify one vital issue, namely, whether such right of appeal would be enjoyed not only by the accused, but also by the prosecution; he assumed that both would enjoy it. He felt, however, that the three special cases mentioned in article 44 could not, and should not, be retained.

81. The Secretariat's text also provided for appeals to be lodged with the International Court of Justice, which meant that the international criminal court would be subordinate to that body. Such subordination would necessarily be detrimental to the dignity and standing of the international criminal court. He felt therefore that both bodies should be placed on an equal footing.

82. Mr. LIANG, Secretary to the Committee, pointed out that the steps provided for in article 44 of the Secretariat's draft were most exceptional and, indeed, not constitutionally possible at the present time; unless the Charter of the United Nations and the Statute of the International Court of Justice were revised, there would be no possibility of lodging such appeals. He was consequently prepared to withdraw article 44.

83. Mr. COHN (Israel) thanked the Secretary for his gesture. He personally felt that any criminal jurisdiction which conferred extensive powers on the court to pass sentence on an accused for an offence but under which neither the prosecution nor the defence were entitled to appeal, was not a proper criminal jurisdiction in the modern sense of the term.

84. He could envisage the case of a treaty which stipulated that a certain act was an offence; an accused would be brought before the court which, by a small majority and with serious dissentions, would decide that the offence had been committed and that the accused was guilty. It might be that, had the treaty been properly interpreted, the court would not have found that an offence had been committed at all. It was, therefore, essential to ensure that the accused should be entitled to appeal to a higher and more qualified tribunal.

85. He did not envisage appeals from the judgment being lodged with the International Court of Justice. He preferred the institution of a court of appeal within the international criminal court itself, with different judges from those who had taken part in the original trial. The Supreme Court of Judicature in England was composed of trial judges, and those same judges also sat on the Court of Criminal Appeal, where they were called upon to review cases which had been judged by their colleagues from the same court. It was fundamental to the acceptance of his proposal that the trials held by the international criminal court should not be held before the court in its entirety. That meant that in almost every instance a case would be tried before what might be called a chamber. He argued that the length of the Tokyo Trials might well have been reduced had less judges been sitting on the Bench, since the smaller the number of judges trying a case, the less risk there was of protracted hearings and miscarriages of justice. In every system of law there was a tendency to reduce the number of judges required to try a case. He pointed to the example of Jewish courts, where the number of judges had been progressively reduced from 71 in ancient times to seven, and later to three during the Middle Ages. In England, too, the judicial authority previously exercised by both Houses of Parliament had now devolved on a small group of Law Lords.

86. He felt that the grant of the right of appeal to the prosecution was not simply a question of ensuring equality of rights with the defence; if a case which had already passed through all the various preliminary stages of initiation, screening and preparation were brought before the international criminal court, and the trial court found the accused not guilty on a point of law, why, he asked, should not the prosecution, or even the United Nations, seek to have the case re-tried?

87. He also drew attention to the fact that his amendment allowed for three exceptions, namely: that no appeal would be allowed against want of form of the indictment, against erroneous admission or weighing of evidence, or against irregularity of procedure.

88. The CHAIRMAN understood that the representative of Israel envisaged the court as one integral whole, all its activities, including the appeal procedure, being confined within its own limits. No question would then arise as to the relative importance of any other body. He asked the Israeli representative to explain his attitude to the contention that the Committee could not prevent a country from challenging before the International Court of Justice an interpretation by the international criminal court of a treaty or convention.

89. Mr. COHN (Israel) explained that the answer to that contention was apparent if the problem were considered on the national plane. A similar question was involved in the daily conflicts of jurisdiction between criminal and civil courts, where difficulties often arose over claims for damages in civil courts resulting from the findings of the criminal courts on charges, for example, of assault. The problem had as many solutions as there were judicial systems. In any event, the parties would be different in each case, and the international criminal court could either hold that the judgment of the International Court of Justice would not be mandatory upon it, or that it would be guided by the decision reached by the latter.

90. Mr. PINTO (France) supported the view of the United States representative, since it simplified the problem. It was certainly most desirable that the court's judgment should wholly satisfy the requirements of justice. But if the possibility of a second instance were allowed, the very authority and prestige that the Committee was seeking to confer on the international criminal court would be undermined. It was for the court to give a final decision. Moreover, the appeals procedure envisaged in the Israeli proposal, which amounted to the creation of dual jurisdiction within the criminal court itself, would be too complicated.

91. The Committee would be well advised to retain the concept of a court with the status of a supreme court against whose judgments there would be no appeal.

92. Mr. RÖLING (Netherlands) said that he would vote against any right of appeal being granted. The proceedings of the court could be envisaged in two ways; a case could be tried by a limited number of judges, or by the international criminal court as a whole. The matter would be investigated very fully, so that it was reasonable to assume that a single trial would be sufficient. He therefore felt that no appeal should be granted, always provided the necessary guarantees were secured to the accused.

93. He also indicated his intention of voting against any procedure allowing the revision of a judgment. Most of the cases which would come before the court would be concerned with political issues and the policies of States, involving aggression or crimes against humanity. If provision were made for the revision of a judgment, a trial might be held in 1950 and then, some ten years later, when the world situation had completely changed, an appeal for revision might be lodged. To take a specific case, Japan might soon be accepted by many as a friendly State, and the Japanese might well wish to see the decisions taken by the Tokyo Military Tribunal changed. If those decisions had been taken by the international criminal court, Japan might apply for a revision which would, in the changed circumstances, possibly be granted, and that would undermine the prestige of the first judgment. In nearly all such cases an application for a revision might ultimately be successful. It would provoke great uncertainty. He therefore felt that all possibility of such revision must be excluded; all that was necessary was to ensure that real justice was done in the first instance.

94. Mr. WANG (China) agreed with the two preceding speakers. He felt, moreover, that a clear distinction should be drawn between appeal and revision. An appeal could be lodged either with an outside body or with some agency within the international criminal court itself. Assuming the first possibility, he argued that the international criminal court was intended to be the equal of any other in authority, and it would consequently be impossible to allow an appeal to be lodged with any outside body. An appeal lodged within the court must likewise

be excluded. Any case before the court would be tried by judges of the court on its behalf, and their decision would consequently represent the decision of the court as a whole. He felt it would be unduly complicated to have two groups of judges, one concerned with trial, the other with appeal. The trial judges should command sufficient confidence to render a court of appeal superfluous and to enable their decision to be considered as final.

95. Mr. MUNIR (Pakistan) agreed that the decisions of the trial judges should be final.

96. Mr. MAKTOS (United States of America) drew the attention of the Committee to the United States proposals contained in document A/AC.48/L.13. Article 20 A therein provided that "The Court may from time to time form one or more chambers ... for dealing with particular categories of cases." Paragraphs 1 and 2 of Article 20 B read: "A judgment and sentence given by any of the chambers ..... shall be considered as delivered and pronounced by the Court ..... . The full Court may, upon application to it by any party, review on questions of law the final judgment of a chamber." The Committee might decide in favour of such chambers, in which case the question of appeal against them would still remain unsolved. On the other hand, it might decide against the idea of having chambers and for all trials being conducted by the court. He therefore suggested that, by first taking a decision whether the court should be empowered to form chambers, the Committee might easily settle the whole issue. Should the idea of chambers be accepted, the question of appeal against their judgment might be taken up.

97. Another problem was that raised by jurisdiction. If a State felt that the court had no genuine jurisdiction, it would not wish to hand over any of its nationals for trial by it. In the event of a United States citizen being accused of the crime of genocide by another State, the United States Government could, if it felt the court had no jurisdiction to interpret the Convention on Genocide, refer its application to the International Court of Justice, on the grounds that the State was wrong in its interpretation.

98. Mr. TARAZI (Syria) said that the point at issue was whether the court's judgment would or would not be subject to appeal. Should the establishment of a court with one or more chambers be contemplated, it would seem difficult to accept the principle of the possibility of an appeal to the full court against a judgment given by a chamber of that court, which in actual fact would be simply an internal subsidiary organ of the court.

99. If the Committee intended to give the international criminal court the status of a supreme court, it should not admit the possibility of appeals being lodged against its decisions.

100. On the other hand, the possibility of a revision of the court's decisions should be retained. The United States proposal provided that a request for such revision might be made only on the ground of the discovery of a new fact. Perhaps it would be well to add the grounds enumerated in article 44 of the Secretariat's preliminary draft, which would, exceptionally, justify an appeal being lodged against the decisions of the court.

101. Mr. RÖLING (Netherlands) considered that the first problem to be solved was that of whether chambers might be established. A decision on that point would mean that a large number of other questions would solve themselves.

102. He was opposed to the idea of chambers, whenever the international criminal court should be representative of the entire world. Its judges would therefore represent the various legal systems. If the court were to divide into chambers, the question would at once arise of how, and by whom, such chambers were to be constituted. A further problem raised would be that of distribution, since the principle of representation of the various legal systems would have to be observed in the case of each particular chamber.

103. Mr. COHN (Israel) supported the suggestion made in article 20 A of the United States proposal (A/AC.48/L.13), which he had not read before making his last statement. He had no objection to the full court sitting to try certain particularly serious cases if it so decided; he assumed there would then be no appeal, since all the judges would have taken part in the decision. He submitted,

however, that the question of whether a case should be heard before all the members of the court was a matter to be left to the discretion of the court itself.

104. The CHAIRMAN interpreted the Israeli representative's comments as implying that there should be no express stipulation that cases should be tried by less than the full court, but that if cases were in fact tried by chambers, then neither party would be bound by the decision of the chamber, but would be free to appeal from it to the full court.

105. Mr. PINEYRO CHAIN (Uruguay) said that the Committee was confronted with two totally different problems: revision and appeal. Revision of a judgment could only be requested after the decision had become final. On the other hand, an appeal was a petition lodged before the judgment had become final. So far as revision was concerned, the problem was relatively simple. Obviously the discovery of a new fact, of such a nature as to be a decisive element in the ruling of the court, would justify revision of the judgment pronounced by the court.

106. The problem was more intricate in the case of appeal. He felt that, if the decision had been pronounced by the full court, it should not be subject to appeal, whereas if it had been pronounced by a chamber of the court, the accused must be given the opportunity of appealing against it. At all events, it was obvious that, acceptance of the actual principle of appeal would detract from the court's authority.

107. He agreed in principle with the Israeli representative's proposal to the effect that the accused might only lodge an appeal from the judgment on points of law, but thought that such appeal should be allowed only from judgments pronounced by a chamber of the court, and not from decisions of the full court.

108. The CHAIRMAN felt that the Committee should vote on whether a provision was required allowing the contending parties to seek the ruling of the full court on a point of law.

109. In answer to a question by Mr. RÖLING (Netherlands) he explained that such a vote would not prejudge the attitude of the Committee to the question of chambers.

110. Mr. AMADO (Brazil) felt that the main question was still whether the decisions of the court should or should not be subject to appeal. The solution of various other problems confronting the Committee depended on how that question was solved, and the Committee should therefore vote on it first. He personally thought that the decisions of the court should not be subject to appeal. If the Committee held the contrary, it would seriously impair the authority and prestige of the international criminal court. The publicity given to the court's proceedings would certainly be considerable, and the general public would have difficulty in understanding why decisions of such a high legal authority should be only of a transitory nature.

111. Mr. SÖRENSEN (Denmark) suggested that a vote should be taken as suggested by the representative of Brazil, with the reservation that the decision reached might be reconsidered if the Committee subsequently decided to adopt the system of chambers.

112. Mr. COHN (Israel) pointed out that there was now no proposal before the Committee that appeal should be allowed from a decision of the full court. The Secretariat's draft had originally provided for appeal to the International Court of Justice, but the Secretary had already withdrawn that provision.[1)]

113. Mr. AMADO (Brazil) thought that the representative of Israel had misunderstood the problem. The Committee had not in fact voted on article 43 of the Secretariat's draft. Article 44 of that draft did not refer to appeal as such, but to appeal in exceptional circumstances against decisions of the court. The question of the creation of chambers of the court had, wrongly, been linked with that of appeal. Those questions were not necessarily bound together, and

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1) See paragraph 82 above.

the principle of constituting one or more chambers within the court could be accepted without thereby accepting the principle of appeal. The Committee should therefore decide on those two questions separately. As he had already stated, he himself was opposed to the principle of appeal, but he reserved his position on the question of revision of the court's judgments.

114. The CHAIRMAN considered that the Committee was generally agreed that no appeal could be lodged outside the court, but the point at issue was whether the contending parties which were heard before any body less than the full court could lodge with the full court an appeal from the judgement of the former.

115. MOSTAFA Bey (Egypt) thought that the question had been badly framed, and that there was some confusion between the problems. The Committee had not yet come to the question of the organization of the court. It had first to decide whether appeal should be allowed. It could examine later how such an appeal was to be made when it considered the organization of the court.

116. Mr. PINTO (France) considered that the division within the Committee was mainly due to the manner in which the problem had been presented. The Brazilian representative wanted the Committee to vote first on article 43 of the Secretariat's draft, which provided that there should be no appeal from the decisions of the court. There seemed to be no objection to voting on that question immediately, for the adoption of article 43 would in no way prejudice the questions which were causing the present controversy.

117. Mr. AMADO (Brazil) pointed out that both he and the Netherlands representative had opposed the principle of any right to appeal being granted. It should be clearly understood that there was not necessarily any link between the right to appeal and the idea of instituting chambers. The purpose of such chambers would be to deal with particular categories of cases.

118. The CHAIRMAN called for a vote on the principle of the admissibility of an appeal from a lower to a higher division of the court.

The principle was rejected by 11 votes to 3 with 1 abstention.

119. Mr. PINEYRO CHAIN (Uruguay) accepted the principle of revision of a judgment, based on the discovery of some fact of such a nature as to be a decisive factor. He would therefore vote for the text of article 43 as contained in the United States proposal (A/AC.48/L.9), provided that the words "and also to the party claiming revision" were deleted from paragraph 1. Those words were really superfluous, since the discovery of a new fact, must, by definition, be unknown to the party claiming revision.

120. Mr. MUNIR (Pakistan) suggested that the idea contained in article 43 of the United States proposal might be better dealt with under article 45 A of the same proposal. The cases it envisaged were admittedly rare, but if the General Assembly had powers of clemency, it could also deal with cases of that kind. He therefore suggested that article 43 be deleted, and its substance incorporated in article 45 A.

121. The CHAIRMAN called for a vote on the Uruguayan proposal that the words "and also to the party claiming revision" be deleted from paragraph 1 of article 43.

The Uruguayan proposal was rejected by 6 votes to 1 with 7 abstentions.

Paragraph 1 of article 43 in the United States proposal (A/AC.48/L.9) was adopted by 9 votes to 3 with 3 abstentions.

122. The CHAIRMAN considered that, though the vote had not included the text of paragraph 2, no separate vote was necessary since the adoption of the ideas in paragraph 2 followed automatically from the adoption of those in paragraph 1.

It was so agreed.

The meeting rose at 1 p.m.