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1953 COMMITTEE ON INTERNATIONAL CRIMINAL JURISDICTION

SUMMARY RECORD OF THE THIRTEENTH MEETING

Held at Headquarters, New York,
on Monday, 10 August 1953, at 2.30 p.m.

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53-22658

PRESENT:

Chairman:	Mr. MORRIS	United States of America
Rapporteur:	Mr. RÖLING	Netherlands
Members:	Mr. GARCIA OLANO) Mr. LAUREL)	Argentina
	Mr. LOOMES	Australia
	Mr. DAUTRICOURT	Belgium
	Mr. WANG	China
	Mr. SAMI	Egypt
	Mr. MERLE	France
	Mr. MARMOR	Israel
	Mr. MAURTUA	Peru
	Mr. MENDEZ	Philippines
	Mr. VALLAT	United Kingdom of Great Britain and Northern Ireland
	Mr. MAKTOS	United States of America
	Mr. PEREZ PEROZO	Venezuela
	Mr. NINCIC	Yugoslavia
Secretariat:	Mr. STAVROPOULOS	Principal Director in charge of the Legal Department
	Mr. LIU	Secretary of the Committee

RE-EXAMINATION OF THE DRAFT STATUTE PREPARED BY THE 1951 COMMITTEE ON INTERNATIONAL CRIMINAL JURISDICTION (A/2136) (continued)

Article 30

Mr. LOOMES (Australia) considered it necessary to define the word "parties" in paragraph 1. It did not seem that a challenge of jurisdiction could concern any other party but the accused.

The CHAIRMAN stated that matters arising during the hearing of the case might cause parties other than the accused to challenge the court's jurisdiction; it thus seemed better to retain the existing text.

Mr. NARMOR (Israel), recalling his Government's observations, considered that the ambiguous wording of paragraph 1 might preclude a State from challenging the jurisdiction of the court if the accused himself did not challenge it. The right of a State to make such a challenge appeared to be made dependent on a challenge by the accused. Moreover, in view of the connexion between articles 27 and 30, it would be wise to refer the text of article 30 back to the Drafting Sub-Committee, which had been instructed to study article 27.

The CHAIRMAN said that the Drafting Sub-Committee would make sure that there was no discrepancy between articles 27 and 30.

Mr. MAKTOS (United States of America), supported by Mr. RÖLING (Netherlands), explained that there was no connexion between challenge by the accused and challenge by one or more States. Any State concerned could challenge the court's jurisdiction for reasons entirely different from those which might be put forward by the accused. The Drafting Sub-Committee might clarify that point, which would be discussed in the report.

Mr. NARMOR (Israel) asked how the concluding words of paragraph 1, "for this purpose" were to be interpreted.

Mr. RÖLING (Netherlands) replied that the words should be understood to mean "for the purpose of challenge".

Mr. MERLE (France) agreed with the Netherlands representative's interpretation but considered that in that case the end of the paragraph, after the words "article 27", could be deleted.

Mr. MAKTOS (United States of America) thought that the words had some use; they signified that a State could intervene only in order to challenge and excluded all possibility of intervention for other purposes.

Mr. DAUTRICOURT (Belgium) stated that the word "parties" was not clear enough. The text should state that the accused had the right to challenge the court's jurisdiction.

Mr. MERLE (France) pointed out that the sentence in paragraph 2: "Elle peut joindre l'incident au fond" had no counterpart in the English text.

The CHAIRMAN suggested that the Drafting Sub-Committee should make proposals in the light of the observations which had been made and in particular, should concord the English and French texts.

It was so decided.

Article 31

Mr. MERLE (France) read his Government's observations (A/AC.65/1). It appeared unnecessary to provide that States agreeing to render assistance to the court should do so by means of supplementary conventions. Paragraph 2 should be deleted and paragraph 1 amended by substituting for the words "national authorities" the words "authorities of the States parties to the statute". If only States parties to the statute were meant, and he interpreted the article in that way, paragraph 2 became redundant. The limits of treaty law should be observed and obligations should be placed only on the States parties to the

statute. The system proposed by the existing text, which gave the court rights, but made the obligations of States contingent on their acceptance by convention, was one-sided and would be misleading in practice. Paragraph 2 cancelled paragraph 1.

Mr. RÖLING (Netherlands) made it clear that paragraph 1 enabled the court to call on national authorities for assistance - and it should not be debarred from so doing - while paragraph 2 provided that certain national authorities would be obliged to render such assistance.

The CHAIRMAN thought that, if fifteen States accepted the statute and the obligation to render assistance, there would remain forty-five States which assumed no obligation but which might be prepared to give assistance to the court. It would be unfortunate if the court were not allowed to call on such assistance.

Mr. MERLE (France) pointed out, as a matter of form, that the French word "requérir" and the English word "request" had different meanings. His underlying intention was not to prevent the court from calling for the assistance of States not parties to the statute, but to impose an obligation on those States which were. For the latter, the obligation to render assistance should exist without any specific convention, whereas the others would be under an obligation only if they had undertaken it by a convention. Paragraph 1 should deal with the obligations of States parties to the statute and paragraph 2 with States not parties, whose obligation to render assistance would arise only from a special convention.

Mr. RÖLING (Netherlands) recalled that the Geneva Committee's basic principle had been that the statute should impose no such obligation on States so that their accession to the statute would be made easier. Obligations were to be defined in subsequent specific conventions. The French representative proposed to incorporate the obligation to render assistance in the statute, but the Geneva Committee's viewpoint appeared preferable. However, it seemed unnecessary to make any distinction between the conferring of jurisdiction and the

obligation to give assistance. The text should provide that acceptance of the court's jurisdiction entailed acceptance of the obligation to render assistance. Assuming that the court were established by a General Assembly resolution, paragraph 2 could be drafted as follows: "A State shall be obliged to render such assistance in conformity with the convention or other instrument in which the State has accepted the jurisdiction of the court".

Mr. GARCIA OLANO (Argentina) thought that the proposed changes would imply on the part of States an obligation to render assistance not only in connexion with the preliminary investigation but also with the execution of the sentence. The Argentine Government could not accept the latter implication.

Mr. MERLE (France), while observing that his ideas were close to those of Mr. Röling, asked the Netherlands representative whether the wording he had suggested did not exclude a case in which States not parties to the Statute would be required to render assistance.

Mr. RÖLING (Netherlands) pointed out to the Argentine representative that there would be no obligation unless it had been voluntarily accepted. In reply to the French representative, he stated that the Netherlands text was based on the idea that the court would be set up by means of a resolution. If that were the case, there would be no States parties or not parties to the Statute. There would be States which had accepted the court's jurisdiction and others which had not. For the former, the obligation to render assistance would result from the conferring of competence. The idea of having two separate agreements, which seemed to be implied by paragraph 2 as it stood, should be dismissed.

Mr. MAKTOS (United States of America) confirmed that the Geneva Committee had meant to reserve the creation of any obligations for subsequent conventions which might be very specific and call for accurate and detailed special agreements. The present text should be maintained but it should be specified that both obligations - acceptance of jurisdiction, and assistance - would derive from a single instrument and not from two separate ones.

Mr. NINCIC (Yugoslavia) was in favour of maintaining the present text. He wished to have more information, however, about the significance of the Netherlands amendment to replace the words "the jurisdiction of the court" by the words "such obligation".

Mr. ROLING (Netherlands) recalled that the 1951 Committee had thought fit to distinguish between conventions conferring jurisdiction upon the court, and those by which States agreed to render assistance to the court. One single kind of convention would be enough: it was understood that the Statute would not in itself be binding, but it would be appropriate for any State conferring jurisdiction upon the court by a convention to undertake thereby to render assistance to the court.

The CHAIRMAN explained that the 1951 Committee had thought that the undertaking to render assistance to the court, might very well be included in the convention, special agreement or unilateral declaration conferring jurisdiction on the court. That would even be the normal procedure. The 1951 Committee had never thought that there must necessarily be two substantially distinct conventio.

Mr. NINCIC (Yugoslavia) considered that, whatever the practical means adopted, the conferring of jurisdiction and a definite obligation to render assistance should be dissociated, and that provision should be made for States to give a special undertaking on the latter point.

Mr. MERLE (France) thought it would be possible to reach an agreement by amending paragraph 1, provided a suitable wording were found for paragraph 2. He therefore withdrew his proposal that paragraph 1 should be amended and paragraph 2 deleted, while reserving the right to speak about paragraph 2 later.

Mr. MAKTOS (United States of America) stated that, on second thought, the Netherlands amendment seemed to him too restrictive because it limited the

responsibility of undertaking to render assistance to the States which had recognized the court's jurisdiction. He did not see why a State might not subscribe to that obligation by an instrument of its own choice.

Mr. ROLING (Netherlands) admitted the soundness of that argument. He maintained, however, that the conferring of competence must imply the obligation to render assistance. He therefore proposed that paragraph 2 should be worded as follows: "A State shall be obliged to render such assistance in conformity with the convention in which it has accepted the jurisdiction of the court or any other instrument".

Mr. GARCIA OLANO (Argentina) proposed that paragraph 2 should be retained in its present form.

Mr. MAKTOS (United States of America) was ready to agree to the latter proposal if the Committee's report specified that there was nothing to prevent the instrument referred to in article 31 from being in fact the conventior conferring jurisdiction upon the court.

Mr. GARCIA OLANO (Argentina) had no objection to the explanations appearing in the report so long as, in accordance with the Yugoslav representativ. remark, the obligation to render assistance was considered to be an entirely separate idea.

The Committee tentatively adopted the text of article 31 in the draft statute by 7 votes to 3, with 3 abstentions.

Article 32

Mr. ROLING (Netherlands) recalled that, during the discussions in the Sixth Committee, the Salvadorian representative had expressed the opinion that the court's powers to determine penalties should be limited (A/AC.65/1, p.27). But it should not be forgotten that the court would have to deal with very serious crimes, for which the death penalty might justifiably be provided.

The 1951 Committee had not therefore considered it advisable to lay down a rule limiting the penalties which might be inflicted by the court. The present text was, in his opinion, satisfactory.

Mr. MERLE (France) pointed out that article 32 raised a very important problem: should the fundamental principle, nulla poena sine lege, be accepted or rejected in international criminal law? The present text of the article seemed to ignore the principle and its application would in any case be difficult until there was a general code of international penal law. He proposed that in determining penalties the court should, out of respect for an essential principle of any juridical system, refer whenever possible to the provisions of the nationa law of the accused. A guiding rule to that effect should appear either in the statute itself or in the Committee's report.

Mr. MENDEZ (Philippines) supported the French proposal. Article 32 conferred too wide powers on the court and left the accused ignorant of the penalty for which he was liable, and even of the crime with which he was charged: justice demanded that the provisions of the accused's national legislation should guarantee his rights.

Mr. ROLING (Netherlands) wondered whether it was better to turn to the law of the country of which the accused was a national, or to the law of the country where the crime had been committed. It could happen - there was no lacl of precedents for that - that an act generally recognized as an international crime might be perfectly legitimate under the law of the State of which the accused was a national. It would be more useful, therefore, to bear in mind the law of the country where the crime had been committed.

Mr. MERLE (France) agreed that in many cases the place of the crime and not the nationality of the accused should determine the law to be applied. The important point was that the court should take account of national positive law.

Mr. VALLAT (United Kingdom) thought the discussion was touching upon th fundamental question of the existence of a recognized system of international criminal law. He drew the Committee's attention to the consequences involved in the French proposal. If reference was to be made to national law or to territorial law, might that not result in one punishment being inflicted upon one man and a different punishment upon another for one and the same crime? What system of international jurisprudence could be hoped for from such a procedure? It would be dangerous to move in the direction the French representative proposed

The CHAIRMAN observed that the proposal before the Committee would in n wise oblige the court to apply the provisions of national law; it merely invited it to take account of national law in determining penalties.

Mr. MAKTOS (United States of America) reminded the United Kingdom representative that in the matter of the very serious crimes with which the court would be called upon to deal, it was unlikely that there were any great differenc between the various national laws. Moreover, States were always free to make reservations in the instrument conferring jurisdiction upon the court.

Mr. RÖLING (Netherlands) wished to make it clear that, although he had expressed the opinion that territoriality would be better than nationality as a criterion for deciding the national law to be applied he did not for that reason support the French representative's proposal. On the contrary, he was strongly in favour of leaving article 32 in its present form: aggression, war crimes and crimes against humanity were so heinous that the severest penalty was justified and was in conformity with present international law. Therefore, there was no question at all of any violation of the principle of nulla poena sine lege. Although the court might never be obliged to pronounce sentence of death, jurists would agree that the violation of international criminal law almost always gave rise to the possibility of sentence to death. Furthermore, in many cases, it wo be practically impossible to invoke national law, particularly where the literal

application of an obsolete law would hold justice up to ridicule. After the war, for example, the Netherlands law on war crimes provided for a maximum penalty of three years' imprisonment, whereas the acts charged had led to the massacre of thousands of people.

The French proposal to invite the court to take account of national law was tentatively adopted by 5 votes to 3, with 6 abstentions.

Article 33

The CHAIRMAN, recalling the history of the committing authority, said that, in countries under Anglo-Saxon law, it was customary, before passing judgment on an accused man, to refer the matter to an investigating authority, grand jury or magistrate, which had to decide whether the charges, testimony and presumptive evidence brought against the accused were likely to result in his conviction. Such a procedure had seemed the more desirable in the case of an international criminal court in that there was a danger that charges might be levelled against governments or heads of State for reasons purely of political propaganda. That was why, at Geneva, the United States delegation had approved the principle and the text of article 33 of the draft statute. But it had further been felt that the accused should be allowed a hearing from the time the preliminary enquiry opened: the article as it stood expressed that point of view. After a full hearing, the committing authority could either declare that there was no case, or send the accused to the court proper, so that there would be a double trial, or, it might be said, a trial followed by an appeal. Such a system would undoubtedly draw out the proceedings; some felt that to be an advantage and others a disadvantage.

He invited the members of the Committee to express their views on the question.

Mr. ROLING (Netherlands) proposed that article 33 should be deleted. As provided for in the draft statute, the committing authority was in effect to l a kind of court of first instance to determine the validity of the evidence adduced by the complainant in support of his complaint. In order to arrive at

a conclusion, the committing authority would necessarily have to examine the question thoroughly. Thus there would in fact be two successive trials. It would certainly be useful to hold a summary enquiry before a case could be taken to the court, in order to decide whether there was sufficient evidence to warrant prosecution and in order to avoid hasty action. But it did not seem necessary to set up a special body for that purpose; that would unnecessarily complicate the organization of the court and would unjustifiably prolong the examination of the cases submitted to it. A chamber of the court might well undertake the task devolving upon the committing authority.

Mr. DAUTRICOURT (Belgium) said that he had found the Chairman's statement very interesting but observed that, under the legal system applied in Belgium, the examining magistrate and the court sitting in chambers played more than a passive part. When the court in chambers considered the evidence inadequate, it could take the necessary measures for completing the examination. It would be useful for the committing authority to have the same powers.

The CHAIRMAN referred the Belgian representative to paragraph 120 of the 1951 Committee's report, which stated that the Committee had decided that the committing authority should not have powers equivalent to those of the court to summon witnesses and require evidence to be produced, but that it might, whenever it was found necessary, ask for the assistance of the court in that respect. The 1951 Committee had, however, taken a decision on the point only by a slight majority and there was nothing to prevent the 1953 Committee from re-examining the question and taking a different decision.

Mr. MERLE (France) wished to make two comments, one of form and the other of substance. The first concerned the words "within the framework of the United Nations" in paragraph 1 of article 33. They implied that the court would be connected with the United Nations. But the Committee had not yet taken any decision on that point and in order not to prejudge the question it had adopted an alternative text whenever it arose. The same method could be

applied again. He therefore formally proposed that the Committee's report should include as an annex two texts for article 33, one of which would and the other would not include the words "within the framework of the United Nations".

The remark of substance related to the committing authority's functions. Certainly, the authority's role was not useless, but as the Belgian representative had proposed, its powers would have to be more extensive than those provided for under article 33 of the draft statute.

Mr. MAKTOS (United States of America) in reply to the Netherlands representative's arguments for deletion of article 33, observed that the argument that the committing authority's procedure would prolong the proceedings inordinately could not be accepted. The only thing that mattered was to safeguard the rights of the accused. That safeguard was ensured by the existence of the committing authority. The system of having a chamber of the court examine the evidence adduced by the complainant in order to determine whether it was adequate was dangerous. The chamber would be composed of the judges of the court who would later be called upon to try the case and who, at that preliminary stage of the trial would have a tendency to exceed their instructions. There was a danger that their dual role might result in prejudice against the accused when he appeared before the court.

The CHAIRMAN put to the vote the French proposal that, in the event of the Committee deciding to retain article 33, the Committee's report should include an alternative text for paragraph 1 of article 33 in which the words "within the framework of the United Nations" did not appear.

The proposal was adopted by 11 votes to none, with 1 abstention.

Mr. RÖLING (Netherlands) commenting on the Belgian representative's proposal, observed that in the legal system he had mentioned the examining process was carried out by only one person, the examining magistrate. In the case under discussion the process would be carried out by a committee of nine judges. At the present stage of the development of international penal law he did not think that a provision of that kind could be introduced into the statute of the court.

Mr. VALLAT (United Kingdom) said that he would vote against the Netherlands proposal. That did not, however, imply that he would vote for the maintenance of article 33 in its existing form, but only that he was in favour of setting up a committing authority.

Mr. DAUTRICOURT (Belgium) pointed out to the Netherlands representative that in the Belgian legal system the examining magistrate was not a member of the body which decided on the substance. In view of the comments of the United States representative and the Netherlands proposal, he proposed that the functions of the committing authority provided for in the draft statute should be conferred upon a chamber of the court composed of three members of the court, sitting as a college, who would not be the same as the judges of the court who were called upon to decide on the substance. As a corollary to that proposal, he reintroduced the proposal that the number of judges of the court should be increased to 15, which he had already submitted to the Committee.

Mr. MENDEZ (Philippines) thought, like the Netherlands representative, that the committing authority, as provided for under the draft statute, was actually a court of first instance and greatly complicated the organization of the court. In the legal system applied in the Philippines it was the public prosecutor's department which examined the evidence and screened complaints in private. After the prosecutor was satisfied that he had a case, he went to court, usually a court of first instance. If that court sustained the findings of the prosecutor after due trial, the accused might appeal to the higher courts. In the case of the international criminal court it seemed that the prosecutor could exercise the functions assigned to the committing authority, so that the danger of a pre-trial and pre-judgment by the authority could be avoided.

Mr. VALLAT (United Kingdom) considered the Belgian proposal interesting and asked whether the Belgian representative would submit it to the Committee as a working paper. It seemed, however, to go rather far in reducing to three the number of judges called upon to constitute the chamber of the court which would examine the evidence. Political considerations might make a larger number desirable. Perhaps it might be possible to increase the number of judges of the

chamber to five, since the number of judges of the court would be increased to 1· under the Belgian proposal. He also wondered how the judges constituting the chamber of the court would be selected. They could, apparently, be selected by the plenary court.

Mr. DAUTRICOURT (Belgium) replying to the United Kingdom representative suggestion, said he would gladly submit to the committee a working paper on his proposal, drawn up in the same form and under the same conditions as the working papers submitted to the Committee by the United States and Israel.

Mr. MAURTUA (Peru) asked the Chairman whether the Secretariat could not draw up a document indicating the articles the committee had adopted and those for which it was intended to provide an alternative text. The position seemed to be rather confusing.

The CHAIRMAN replied that, in the opinion of the Secretariat, it would be better for that document to be submitted in the first place to the Standing Drafting Sub-Committee.

The meeting rose at 5 p.m.