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1953 COMMITTEE ON INTERNATIONAL CRIMINAL JURISDICTION

SUMMARY RECORD OF THE SECOND MEETING

Held at Headquarters, New York,
on Tuesday, 28 July 1953, at 10.30 a.m.

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PRESENT:

Chairman:	Mr. MORRIS	United States of America
Rapporteur:	Mr. ROLING	Netherlands
Members:	Mr. GARCIA OLANO	Argentina
	Mr. LOOMES	Australia
	Mr. DAUTRICOURT	Belgium
	Mr. WANG	China
	Mr. DONS-MOLLER	Denmark
	Mr. SAMI	Egypt
	Mr. MERLE	France
	Mr. ROBINSON	Israel
	Mr. de la OSSA	Panama
	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. BOZOVIC	Yugoslavia
Secretariat:	Mr. STAVROPOULOS	Principal Director in charge of the Legal Department
	Mr. LIU	Secretary of the Committee

CONSIDERATION OF THE IMPLICATIONS AND CONSEQUENCES OF ESTABLISHING AN INTERNATIONAL CRIMINAL COURT

Mr. MERLE (France) said that the establishment of an international criminal court involved the acceptance of a form of international criminal law and its application by a permanent body. For the purpose of application, concrete methods for enforcing the law would have to be devised. That was the central issue before the Committee, and its solution depended on the measure of agreement reached on those methods. His delegation had always supported the principle that some form of international criminal jurisdiction should be evolved.

The comments by the United Kingdom Government (A/2186), which suggested that the establishment of the proposed court was useless and even dangerous, were somewhat exaggerated. Its establishment would not be useless because it was desirable to have some form of permanent jurisdiction to deal with international crimes such as breaches of the peace. There was also a practical and immediate need for such a body to deal with proceedings in cases - such as the Oradour atrocities committed in France - which involved conflicts of national and international law. That particular case would have been easier to settle if recourse to some form of international criminal jurisdiction had been possible. It was unlikely that an international criminal court of the type contemplated would disrupt world peace.

It would be inadvisable to bring the international criminal court, if established, into too close a relationship with the United Nations as such an arrangement would entail more serious risks and might widen existing gaps. The traditional principle of the voluntary accession of States should be respected. Accession to the statute of the court would help to extend its competence. The best method of promoting the development of an international criminal jurisdiction would therefore be to provide for the court's establishment by voluntary accession

Mr. LOOMES (Australia) recalled that his delegation's position had been made clear at the fifth session of the General Assembly and, after studying the Committee's Report (A/2136) at the seventh session, it had found no new element and no new development in international relations to justify any change of position. The establishment of an international criminal court was a noble ideal to which he was not opposed, but the method and timing of its establishment were altogether different matters. A necessary implication of a decision to set up such a court on a permanent world basis as contrasted with an ad hoc procedure when an emergency arises, was that general support of the organized international community was available. At present, in the view of my Government, there was no warrant for considering that that support existed. The acid test of the practicability of the project was the extent to which States were prepared to recognize its jurisdiction.

In the Sixth Committee at the seventh session of the General Assembly, his delegation had remarked that the Committee's Report raised two important questions whether the court would have sufficient work to justify its establishment and whether States would confer upon it sufficient jurisdiction for it to operate effectively; if they were not so prepared, when would they be. He considered that most States were not at the moment willing to grant the court such jurisdiction. Some States felt that the court could exercise a limited form of jurisdiction in dealing with certain crimes of international concern such as the illicit trade in narcotic drugs, but such crimes were already covered for the most part by international bilateral and multilateral agreements and could be effectively dealt with by national courts.

The Australian Government adhered to those views, and its position in the matter was reserved.

He fully agreed with the Israel representative's remarks regarding paragraph 12 of the Committee's Report, which said that no member of the Committee, by participating in its deliberations and voting on any draft texts, would commit his government to any of the decisions which the Committee might eventually adopt. Despite the views which he had outlined, he would not be adverse to further study of the subject; in fact Australia had supported General Assembly resolution 687 (VII).

Mr. PEREZ PEROZO (Venezuela) recalled that his delegation had constantly opposed the establishment of an international criminal jurisdiction for reasons which had been explained in full. But, Venezuela having been elected to the Committee, his duty was to participate in the discussion of whatever was of concern to the United Nations. His participation would in no way prejudge his delegation's attitude in the General Assembly.

A general discussion of the matter was not justified because it had already been fully and carefully considered at various times in United Nations bodies. The exact position of each government represented on the Committee was well known.

Referring to General Assembly resolution 687 (VII), paragraph 3 (a) (i), he said that the Committee would encounter serious difficulties if it tried to explore the implications and consequences of establishing the proposed court before it knew what would be the court's nature, organization and competence and relationship to the United Nations.

The matter of competence was fundamental to a proper study of those implications and consequences. As was well known, the draft statute would not grant the court the necessary competence; it left the question of competence to be settled by conventions, special agreements or unilateral declarations.

In addition, it was also necessary to know what categories of crimes would be brought before the court. If the court had to deal merely with minor crimes and offences against international law, such as the white slave traffic, counterfeiting and traffic in obscene publications, the implications and consequences would not be the same as if it had to deal with crimes against international peace and security. The preservation of peace and security was the main reason for the existence of the United Nations, whereas the prevention and punishment of the former crimes would be the responsibility of the court.

If the court, in dealing with a crime against international law, imposed a sentence which might disturb world peace, the Security Council and the General Assembly could not remain indifferent. The United Nations would probably reject the court's decision. It might be possible to proceed on the basis of alternative methods and list the various implications and consequences for each alternative, but the main disadvantage of such a method was that there would be too many hypotheses.

Three methods by which an international criminal court might be established had been suggested: by a convention, by a General Assembly resolution and by an

amendment of the Charter. It might also be possible to set up a criminal chamber in the International Court of Justice, but the International Law Commission had studied and dismissed that possibility at its second session. The current international situation was such that any revision of the Charter would be impeded by the use of the veto. But such a procedure should not be dismissed altogether as there were signs of an improvement in international relations. At all events, the establishment of the court would take some time and increasing harmony among States might lead eventually to general agreement that the Charter should be revised.

So far there had been no satisfactory answer to the argument that a General Assembly resolution establishing the court would not be mandatory nor to the objection that the General Assembly would find it difficult to establish the court as one of its subsidiary organs, under Article 22 of the Charter, and to delegate to it judicial powers which the parent body did not itself possess.

The convention method would tend to weaken the universal character of the court, and it was unclear what the relationship between the court and the United Nations would be under a convention to which not all Member States, but possibly some non-member States, were parties.

Despite those objections and difficulties, the Committee should proceed in accordance with its terms of reference and recommend to the General Assembly the best method by which the court might be established.

Mr. WANG (China) said that the question of the court's establishment had been carefully studied by the International Law Commission and the Sixth Committee of the General Assembly, but so far no agreement had been reached. There were three schools of thought. The first considered the establishment of such a court to be an infringement of the sovereignty of Member States; the second that its establishment was premature at the moment; the third favoured the idea of a court and, in order to avoid disagreement on immediate issues, thought that it should first be established and that the difficulties should be overlooked in the hope that international relations would improve in the future.

With regard to the first position, he said that absolute sovereignty was a thing of the past. The objection advanced by the second group, that States were not at the moment prepared to co-operate, could be applied to all international organizations. The final decision regarding the establishment of the projected

court rested with individual States. A change of heart was needed; the idea of an international criminal court was new and should not be judged on the basis of out-dated traditional tenets. The position adopted by the third group was contradictory: they wanted to see a court established but were unwilling to assume any commitments. But if the statute of the court did not grant it effective jurisdiction, there would be little change from existing international practice.

If the majority favoured the establishment of the court, its statute should not be a framework but should include substantive provisions for its effective operation.

Mr. MENDEZ (Philippines) recalled that his delegation had adopted a not altogether negative position in the Sixth Committee of the General Assembly; it had appreciated the merits of an international criminal court but had pointed out the existing handicaps such as the absence of an international code of offences whereby to determine the guilt of a particular party. There were, however, a good number of known offences now of a more or less international character, such as piracy, traffic in slaves, women and children, counterfeiting, forced labour camps, and genocide. Aside from those, were the crimes against peace, violations of the laws of war, and crimes against humanity, established before the Nürnberg and Tokyo tribunals. There would thus be sufficient basis for the organized existence of an international criminal authority. It had also noted that the political climate was not favourable because certain States were jealous of their sovereignty. There was, on the other hand, a pressing need for an international criminal jurisdiction. The court should be so organized as to operate effectively in peace as in war.

It had been asserted that the Charter conferred no penal authority upon the United Nations. Yet the Charter had created the International Court of Justice. The judges of the international court were civil lawyers but they arrived at their conclusions in much the same way as judges specializing in criminal law. Their competence might be extended to cover international criminal cases or, in the future when judges were elected to the international court, their competence in criminal law might be taken into account. Article 34 of the Statute of the International Court of Justice did not debar the Court from hearing criminal proceedings against States.

That the Statute of the International Court of Justice formed an integral part of the United Nations Charter, but the latter was not an immutable instrument and was subject to amendment. Article 34 of the Statute might therefore be amended to allow individuals to be parties in cases before the Court. The criminal liability of individuals was one of the principles formulated by the Nürnberg trials.

Establishment of an international criminal court by a resolution of the General Assembly, if adopted by a large majority, would have a powerful effect and carry great authority.

The task of members of the Committee was not so much to submit the views of their respective governments as to arrive at a solution which would be in the general interest. If they insisted on prejudging the issue, they would be defeating the purpose of the Committee.

Mr. RÖLING (Netherlands) said the Committee's terms of reference made it quite clear that its function was to study the implications and consequences of establishing an international criminal court. The question whether or not such a court should be established was one which the Committee need not discuss. That was a question to be answered later by the General Assembly. It should proceed on the assumption that the court would be established; its task was to submit to the General Assembly the best possible statute for the court and to indicate to the Assembly the advantages and disadvantages of the various methods by which the court might be established. The result of votes taken in the Committee would not be as important as the strength of the arguments it presented and the intrinsic value of its reasoning.

The Committee's terms of reference therefore placed it in a rather special position. Members would not be serving a very useful purpose by merely stating that their respective Governments were opposed to the establishment of an international criminal court. They should nevertheless co-operate in drafting a statute which would gain wide acceptance.

Governments which opposed the establishment of an international criminal court did so because a limitation would be placed upon their sovereign rights, and because action by the court would constitute interference in the domestic affairs of States and hence violate the spirit of the Charter. Some States considered the concept of absolute State sovereignty to be the keystone of international relations

They failed to realize that State sovereignty was limited by international law and that it was within the sovereign rights of a State to enter into international agreements limiting its sovereignty. Other States realized that sovereignty was not the principal issue. A sense of interdependence had emerged in the world upon which the concept of international criminal jurisdiction was based. The idea of common action to curb a common evil was gaining recognition. A significant recent development was the growing recognition of the rights and liabilities of individuals in international law.

One of the essential prerequisites of international criminal jurisdiction was confidence that an international criminal court would act in the general interest. That condition could not be met if people continued to mistrust all foreigners. That such mistrust existed was undeniable. On the other hand, it could not be said that no State would place its nationals under the jurisdiction of an international criminal court. In Europe such international criminal jurisdiction had already been established, in a limited form, under the High Authority of the European Coal and Steel Community, to which six States were parties.

The tendency to judge international activity by common standards of morality would be strengthened by the existence of an international criminal court. While a mere denunciation of aggression would not prevent the commission of the offence, it would nevertheless make it more difficult for a government to enlist popular support for its aggressive policy.

However, the existence of strong moral feelings in international affairs gave rise to some danger and could be the cause of war. The ultimate function of moral and legal rules was to establish and promote the general well-being, which, in the international field, was peace. Too rigid an application of the law might however interfere with that function and do more harm than good. Maintenance of peace should therefore be the paramount consideration, even if it meant that international crimes in some specific cases would not be prosecuted. Any international criminal jurisdiction to be established should provide for the means to solve the problems of the rare, but possible, conflict between the maintenance of justice and the maintenance of peace.

Mr. VALLAT (United Kingdom) said that, by contrast with the impression apparently prevailing in the minds of some representatives, his own delegation's

view was that the Committee consisted not of experts but of government representatives.

The Netherlands representative had suggested that the Committee should not discuss the question whether or not an international criminal court should be set up. The United Kingdom delegation felt that the Committee could not disregard that question if it intended fully to explore the implications and consequences of establishing the court. It therefore felt free to express its views on that question as it did on other questions, without in any way committing the United Kingdom Government.

Mr. RÖLING (Netherlands) observed that the Committee, by proceeding on the assumption that an international criminal court would be established, would not in any way be prejudging the final decision to be taken in the matter by the General Assembly.

Mr. BOZOVIC (Yugoslavia) said that the Yugoslav Government was keenly interested in the question of the establishment of an international criminal court, the need for collective action having been proved by the trials of war criminals held after the Second World War at Nürnberg and Tokyo.

However, the war crimes trials had been a historical necessity and although the establishment of such ad hoc tribunals might again prove necessary in the future, there was no reason to set up a permanent court immediately. The primary consideration, in a discussion concerning the establishment of the court, was whether it could function effectively. His delegation had serious doubts on that score, particularly in the present international situation. Moreover, there was the question whether particular States would accept the court's jurisdiction if acceptance involved a limitation or even waiver of their sovereign rights. The problem before the Committee was therefore idealistic rather than realistic.

With regard to the method by which the court would be established, three possibilities had been mentioned: an amendment of the Charter, a General Assembly resolution, and a multilateral convention. Under existing circumstances, the first method was bound to fail; and so far as the second method was concerned, it should be borne in mind that a General Assembly resolution would not be binding upon Member States since the Assembly had merely recommending powers.

His delegation was not opposed to the idea of establishing an international criminal court; indeed, it intended to co-operate fully in the work of the

Committee. However, it doubted that the question had reached the stage at which a dividing line could be drawn between philosophical considerations and practical application. The attitude of the Yugoslav delegation would therefore depend entirely on future developments in the Committee.

The CHAIRMAN recalled that the 1951 Committee, meeting in Geneva, had held discussions in general terms lasting for three days; he had then concluded that, if an international criminal court was established, that court would embody the majority ideas of the Committee whether individual members regarded themselves as representatives of governments, as experts or as private persons. It was the present Committee's function to decide, in case the competent organs agreed that a court was to be established, what type of court it should be.

Mr. WANG (China) felt that there was a difference between the present Committee's terms of reference and those of the 1951 Committee. In Geneva he had objected to the Committee's discussing the question of whether the court should or should not be established; but the "implications and consequences of establishing an international criminal court" could not be explored without some consideration of that question. In his own view the main purpose of the General Assembly and of the Sixth Committee in setting up the present Committee had been to give full examination to that very question.

Mr. Perez Perozo (Venezuela), Vice-Chairman, took the Chair.

Mr. MORRIS (United States of America) pointed out that the 1951 Committee had recorded its opinion that in the view of the General Assembly a decision as to the advisability of an international criminal court could not be reached purely on the basis of a discussion of principle in the abstract, and that the Committee had been set up with the primary duty of making concrete proposals in the form of a draft statute. That did not mean that members of the Committee were debarred from expressions of opinion on the desirability of a court; furthermore, individual statements and votes in the Committee did not bind governments to any subsequent course of action.

In the Sixth Committee, on 17 November 1952, he had explained that the United States delegation approached the subject of an international criminal court with an open mind, while willing and pleased to co-operate in exploring all aspects of such a possible institution, without committing its Government in relation to future action, and with the proviso that the United States would not favour any proposal giving the court any authority which would impair, or tend to impair, the rights of individuals under the United States Constitution.

Mr. Morris (United States of America), Chairman, resumed the Chair.

Mr. VALLAT (United Kingdom) expressed his willingness to co-operate in the work of the Committee, without prejudice to his Government's known attitude of scepticism concerning the possibility or desirability of establishing an international criminal court at that stage.

METHODS BY WHICH AN INTERNATIONAL CRIMINAL COURT MIGHT BE ESTABLISHED

Mr. MAKTOS (United States of America) proposed that the court should be established by a resolution of the General Assembly, to which should be annexed the draft statute, stipulating that the court would come into being after a specified number of States had agreed to submit to its jurisdiction in respect of certain crimes. That method would meet the views, first, of the French representative who favoured the court's establishment by the gradual voluntary accession of States; secondly, of the Australian representative who, quite rightly, regarded active acceptance of the court by a sufficient number of States as the "acid test"; and third, of the Yugoslav representative who wondered which States, if any, would submit themselves to the court's jurisdiction.

The Australian representative's objection that the court might not have enough work to do was met by article 3 of the draft statute which provided that sessions should be called only when matters before it required consideration.

The Venezuelan representative and the Chairman had expressed the wish that the draft statute should contain more substance and specify the crimes over which the court should have jurisdiction, and the Chinese representative wished genocide to be specifically mentioned; but, as the work entailed in drafting the Convention on Genocide had shown, the definition of crimes was a lengthy process. To include such definitions in the draft statute to be submitted by the Committee would involve a heavy task, besides endangering the general acceptability of the statute. A better method would be so to establish the court that States wishing to submit to its jurisdiction in respect of a particular crime should meet to define that crime and enter into a convention to that effect.

The question of securing the attendance of witnesses at sessions of the court could be solved by the inclusion, in the several conventions, of a provision that any State ratifying a given convention undertook to punish by fine or imprisonment any person refusing to appear as a witness before the international criminal court. A similar provision could solve the problem of the execution of sentences.

Judges should be elected by the General Assembly; that would confer prestige and moral authority upon the court without binding Members of the Assembly to submit to the court's jurisdiction in respect of particular crimes, and without departing from the principle that the court would not function in the absence of a need for its services.

Replying to a point raised by Mr. ROBINSON (Israel) regarding the General Assembly's constitutional powers to establish tribunals, Mr. MAKTOS (United States of America) observed that, according to his proposal, the proximate cause of establishment of the court would be a series of conventions between States. The question whether the court would be a subsidiary organ of the Assembly, or whether the Assembly was competent to establish it, would therefore not arise. Furthermore, non-member States would then be more willing

to accede to particular conventions, whereby they would submit to the court's jurisdiction in respect of particular crimes. An analogous case was that of the Convention on the Declaration of Death of Missing Persons, which had established a bureau which was not a United Nations agency.

The meeting rose at 12.40 p.m.

11/8 a.m.