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SUMMARY RECORD OF THE THIRD MEETING

Held at Headquarters, New York,
on Wednesday, 29 July 1953, at 10.30 a.m.

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PRESENT:

Chairman:	Mr. MORRIS	United States of America
Rapporteur:	Mr. RÖLING	Netherlands
Members:	Mr. GARCIA OLANO	Argentina
	Mr. LOOMES	Australia
	Mr. DAUTRICOURT	Belgium
	Mr. WANG	China
	Mr. DONS-MOELLER	Denmark
	Mr. SAMI	Egypt
	MR. MERLE	France
	Mr. ROBINSON	Israel
	Mr. DE LA OSSA	Panama
	Mr. MAURTUA	Peru
	Mr. MENDEZ	Philippines
	Mr. WALLAT	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

METHODS BY WHICH AN INTERNATIONAL CRIMINAL COURT MIGHT BE ESTABLISHED (A/AC.65/L.2)(continued)

Mr. MAKTOS (United States of America) explained the considerations underlying a working paper (A/AC.65/L.2), prepared by the United States delegation, which was not to be taken as a statement of his delegation's position but as a basis of discussion.

The method of establishing an international criminal court by convention involved the danger that few States might ratify; the objection to establishing it by General Assembly resolution, on the other hand, was that, if no States submitted their nationals to its jurisdiction, the court would suffer loss of prestige. The method outlined in the working paper, however, was a combination of resolution and convention and obviated those disadvantages. In Part I of the paper the United States delegation envisaged a single-paragraph resolution approving the annexed text of the draft statute of the court, and asking States to confer jurisdiction upon it by convention, special agreement or unilateral declaration. The second paragraph of Part I was a safeguard against the court's incurring needless expense and loss of prestige, for it provided that the court would not come into existence until a specified number of States had conferred jurisdiction upon it.

Part II of the working paper suggested answers to the questions raised at the previous meeting concerning the proposed contents of the conventions and the method of operation of the court. The object of paragraph A was to ensure that a definition of each crime over which jurisdiction was to be conferred upon the court should be embodied in the relevant convention or other instrument. That would not, of course, mean that the judges of the court would be precluded from consulting precedents or textbooks.

Paragraph B was based on the premise that States willing to submit their nationals to the court's jurisdiction should also be willing to assist it as they assisted their domestic tribunals. References in the working paper were to articles of the draft statute prepared by the 1951 Committee (A/2136). In article 31, dealing with assistance of States, that Committee had not specified the type of assistance which the court might require; it would certainly include action to secure the attendance of witnesses. The remaining articles mentioned

conferred various powers upon the court. Article 32, on penalties, should contain a provision permitting a State to exercise reservations in the administration, for instance, of the death penalty which had been abolished in some States. Article 42, on powers of the court, should provide the court with the power to dismiss a case if justice could not be done without the kind of documentary evidence which the State concerned would withhold from its domestic tribunals. Article 52 should be more explicitly based on the assumption that any State seriously undertaking to submit its nationals to the court's jurisdiction should also be willing to carry out sentences to which those nationals were condemned by the court.

Under paragraph C certain matters of organization were to be covered by the statute of the court rather than left to the convention or other instrument, the object of the latter being to bind the States parties to the instrument to comply with the relevant provisions of the statute. The election of judges should be the province of the General Assembly plus non-member States, and would so have the backing of the world community; election by the States parties to the convention alone would not produce a truly international court. Article 23 of the draft statute had been worded in its present form because the 1951 Committee had envisaged establishment of the court by a convention; the question whether the court should be financed by the United Nations or by the States parties would have to be settled by majority decision.

Paragraph D, dealing with "faith and credit", referred to a well-known common law doctrine under which, for instance, a decree in force in Michigan was enforceable in New York.

There were four possible methods of establishing the court: first, by amendment of the Charter, not at present feasible; second, by convention, with the danger that the court might not be truly international; third, by General Assembly resolution giving immediate existence to what might remain an empty shell; fourth, the method suggested in the working paper, by resolution with the statute annexed as a "blueprint" to be given life in subsequent conventions or other instruments when ratified by a specified number of States.

Replying to a question from Mr. ROBINSON (Israel), Mr. MAKTOS (United States of America) explained that the considerations set out in all four paragraphs of Part II of the working paper should be embodied in each separate convention dealing with a particular crime; but that the court could be brought into being by several different groups of States ratifying several different instruments, provided that the total of States thus conferring jurisdiction upon the court reached the number specified in the statute. At the previous meeting, the Netherlands representative had given an instance of an international jurisdiction being brought into being by five or six States in the European Coal and Steel Community.

Mr. ROBINSON (Israel) stated that his Government favoured the establishment of an international criminal court, but considered that that could not be hurried. He thought there were really only three methods of establishing the court; the United States suggestions as contained in the working paper merely clarified the method of establishment by resolution and rendered it more acceptable.

Criticizing those suggestions, he observed that if every convention or other instrument conferring jurisdiction upon the court had to embody all the provisions of Part II of the United States working paper - and the articles of the draft statute therein cited were examples rather than an exhaustive enumeration - the statute itself, annexed to the General Assembly resolution, would be deprived of its importance. Furthermore, it would be an unprecedented step in the history of the United Nations to confer upon States Members and not Members of the Organization the mastery over a United Nations instrument which was not a text of a treaty in the way that the resolution described in the United States paper would do.

If the method of General Assembly resolution were adopted, there was fairly general agreement that the resolution itself would be merely the first step; all subsequent steps in the development of the court, namely all measures imposing obligations on Member and non-member States, would be taken by means of conventions. It would thus be for the Assembly to provide the framework, and conventions the substance, of the court.

Establishment of the court by a resolution of the General Assembly could be considered under three heads: constitutionality; the advantages, or alleged

advantages, of the method; and the disadvantages, or alleged disadvantages, of the method.

The question of constitutionality was of limited importance, since there was no judicial organ in the world which could declare a General Assembly resolution unconstitutional. He recalled that the Institute of International Law had on its last session heard a paper by Mr. Wengler on the judicial review of the acts of the organs of the United Nations. The problem would, however, be discussed in the Assembly and should therefore be considered by the Committee.

The United States representative's comment at the previous meeting that to make the resolution depend for its implementation on forces outside the General Assembly would obviate the question of constitutionality was mistaken; it would tend rather to strengthen opposition to the method of establishing the court by resolution.

Resolutions of the General Assembly on world affairs were recommendations; but resolutions on the United Nations' own affairs were binding: for instance, those dealing with the budget, establishing subsidiary organs like the Interim Committee, and laying down such legal provisions as Staff Rules. Therefore a resolution establishing the framework of the court would be a decision.

The crux of the problem of constitutionality, however, lay in deciding what article of the Charter gave the General Assembly competence to establish the court. The answer that Article 11 did could be expressed in the following syllogism: major premise: the General Assembly had powers to take measures for the maintenance of international peace; minor premise: the administration of penal justice was a factor in the maintenance of international peace; conclusion: the General Assembly had competence to administer penal justice. But the minor premise had still to be proved, and therefore the conclusion was a fallacy. At the previous meeting the Netherlands representative had remarked that the international administration of criminal justice might even endanger the maintenance of peace. The Israel delegation considered that, at all events, the establishment of the court had hardly any direct connexion with the maintenance of international peace.

It had also been argued that the existence of an international criminal court would have a deterrent effect; but the long history of crime and punishment showed that legal philosophers did not agree that even national legislation was an effective deterrent to crime.

It was clear, therefore, that international criminal jurisdiction did not come within the terms of Article 11 of the Charter. The subject might be more appropriately discussed in the context of Article 13, but that article only authorized the General Assembly to initiate studies and make recommendations, functions similar to those of the Committee itself.

The Committee should consider the status of the court as that of a United Nations organ. In the United Nations the real criterion was not whether an organ was classified as "main" or "subsidiary", but whether it was mandatory or optional. Under the Charter the only mandatory organs were the General Assembly, the three Councils, the Secretariat and the Commission on Human Rights; other organs could be established, abolished or modified.

If the court was to be a creature of the General Assembly, it could as well be killed by the General Assembly and its judgments and operation would be subject to the latter's criticism. It might have to fight in the Fifth Committee for the appropriations essential to its existence. He doubted whether such an organ would have the dignity and authority necessary for it to function effectively.

The Netherlands representative had argued that, as the United Nations had already established other courts, there was no reason why it should not set up the court under discussion. But analogies were sometimes fallacious and even dangerous. The Tribunals for Eritrea and Libya were unique, as full authority to decide on the future of those ex-Italian colonies had been delegated to the General Assembly by the victorious Powers and so far as the Administrative Tribunal was concerned it dealt with staff problems only which were within the exclusive jurisdiction of the United Nations.

Discussing the advantages of the creation of the court by resolution, he said frequent reference had been made to the possibility that by that method the court would be "universal". It was, however, false to assume that a resolution by the General Assembly would ensure the universality of the court. It sufficed to consider the membership of the Committee itself, on which no members

of the "Eurasian heartland" countries were represented. Obviously the court would not enjoy the support of certain important Members in the General Assembly.

It would be unrealistic to consider the establishment of the court without taking into account the attitude of the Great Powers. The position of the Soviet Union was well known. The United Kingdom, a country of vast experience which had made a tremendous contribution to international law, maintained that the establishment of the court would be futile, an opinion which the Committee should pause to consider. The United States representative had recently explained that his co-operation in the Committee's work did not imply that his Government favoured the establishment of the court. Of the Great Powers, France alone had declared itself in favour of the court's establishment, not by the General Assembly but by a convention.

With regard to the "universality" of the court, it should also be remembered that a large part of Europe was not represented in the United Nations and it was very doubtful whether non-member States would accede to an agreement in the framing of which they had had no say. Again, some smaller Powers, including Belgium and the Scandinavian countries and member nations of the British Commonwealth, were still sceptical.

The advocates of establishment by a General Assembly resolution should bear in mind that, under its rules of procedure, the General Assembly could, at least theoretically, adopt a resolution by 2 votes to 1, with 57 abstentions. The danger of numerous abstentions was a real one: what authority would a resolution on the establishment of the court have if passed with numerous abstentions?

The same advocates maintained that, were the court to be set up by the General Assembly, there would be no conflict between it and the United Nations, but several representatives had recently referred to the very probability of such a conflict. It was also claimed that, if the General Assembly passed a resolution establishing the court, the latter's finances would be assured. That was far from certain as the Fifth Committee would adopt its own decision in the matter.

Turning to the disadvantages of the resolution method Mr. Robinson argued that a decision adopted at a diplomatic conference, at which each representative would have formal credentials, would be much more responsible than a vote by the General Assembly. Another serious disadvantage of the resolution method was that, if the draft Statute was submitted to the General Assembly, its opponents would

press for amendments to weaken it while its supporters would make concessions in the hope of its ultimate adoption. According to the United States working paper the resolution should provide that the court was to come into existence when States had conferred jurisdiction upon it by convention, special agreement or unilateral declaration. But that would be tantamount to inviting Member States not to subscribe immediately to the statute, as they would lose nothing by later accession. It was questionable finally whether a resolution (with an annexed Statute) which by its very nature does not allow for reservations will be able to secure a large number of acceptances.

The possibility of amending the Charter should not be dismissed simply because the political climate of 1953 did not favour such action. Governments changed and their approach to international affairs was liable to vary. It should also be remembered that the General Assembly had to decide, at its tenth session in 1955, on the advisability of amending the Charter. It would be recalled that Articles 108 and 109 of the Charter had been adopted at the San Francisco conference upon the initiative of the smaller Powers, particularly Australia. Whether the General Conference provided for in Article 109 would be called was still uncertain in view of the sentiment in some countries that to amend the Charter in the political climate which might obtain in 1955 would perhaps make it an even less effective instrument than it was at present. Perhaps a practical solution to the Committee's problem would be to defer a decision until the tenth or possibly the eleventh session of the General Assembly, by when it would be clearer whether a revision of the Charter was feasible.

Objections raised to the establishment of the international criminal court had been both objective and subjective, yet the whole problem could be reduced to one simple question: were governments prepared to overcome all difficulties in order to establish and international criminal court? The way to find out the answer was to provide for the establishment of the court by means of a binding international convention, not through a General Assembly resolution. Many years might elapse before enough governments acceded to the convention to render it operative, but, after all, the establishment of an international criminal court was a revolutionary concept in international relations and should therefore be achieved in gradual stages. The drafting of an international convention was nevertheless the only correct approach to the problem.

Mr. LOOMES (Australia) felt that the ideal characteristics of an international criminal court should be stability, permanence, independence, effectiveness and universality. Those characteristics had particular relevance to the method of creating the court. Only by an amendment to the Charter could a court be established having all five characteristics, and while that method might not be feasible for the time being, it should not be discarded completely.

The Australian delegation's second preference was the drafting of an international convention by a conference called by the United Nations to which Members of the United Nations and also non-members might be invited. That method would ensure the presence of four of the five characteristics, the exception probably being that of universality of acceptance.

The least satisfactory method was to establish the court by means of a General Assembly resolution. Any such resolution was, by Article 10 of the Charter, to be interpreted as merely a recommendation and hence could not impose any real obligations on States. Secondly, the court, so established, would be a subsidiary and subordinate body of the General Assembly and could at any time be dissolved by it. Competence to establish such a court by General Assembly resolution under Article 22 of the Charter was also open to doubt as such subsidiary organs as were established under that Article had to be subsidiary to the principal objects of the Assembly. Nothing in the Charter suggested that the General Assembly had competence in international criminal law; nor was it tenable that the General Assembly's function of maintaining peace could include the trial and punishment of criminals.

Since the United Nations General Assembly was not a world parliament capable of imposing obligations on states, a State could refuse to submit its nationals to the jurisdiction of the court.

The United States proposal was similar in principle to a proposal put forward by the Secretariat in a working paper (A/AC.48/1). His first reaction had been that, as under the proposal separate conventions would be necessary to bring the court into existence, there was probably little reason why the whole question of the establishment of the court could not be dealt with by convention.

The Committee should not completely prejudge the method of creation of the court any more than it should prejudge the issue as to whether the court should be created at all at this stage. The Committee also should not propose the establishment of a court of inferior quality merely because a court with better qualities might seem more difficult to achieve.

Mr. MAKTOS (United States of America), disagreeing with the Australian representative, said the United States working paper was not similar to an earlier proposal made by the United Nations Secretariat because under the United States proposal the court would not come into existence by a General Assembly resolution but only when a specified number of States conferred jurisdiction upon the court by convention, special agreement, or unilateral declaration.

The objections raised by the Israel representative might equally have been applied to the Genocide Convention. That instrument had nevertheless been ratified by some forty States.

The possibility of a future amendment to the Charter was purely a matter of conjecture. The point was that the chances of an amendment to the Charter in the near future were extremely remote. Under the United States proposal, the international court could be established immediately. In time, it could be changed or superseded. When the Permanent Court of International Justice had been established under the League of Nations, it had not been thought that it would in time be replaced. That had nevertheless occurred. The fact that future action might be taken in respect of the international criminal court did not mean that no attempt should be made to establish it immediately.

Establishment of the court by General Assembly resolution implied a debate in which possibly all Member States would take part. Establishment by international convention independent of the United Nations would reduce interest in the court to the few States prepared to accede to the Convention.

There was no reason to fear a decision taken by majority vote. That did not in any way mean that opponents of a proposal could force a compromise on the proponents thereof. The latter would not necessarily accept any and all amendments merely for the sake of having their proposal adopted.

Mr. MAURTUA (Peru), referring to the statement made by the Israel representative, enquired if it was the latter's view that the establishment of an international criminal court would confer a new function upon the United Nations that of punitive action against international crimes. Since that went beyond the collective action now provided for under the Charter, surely an amendment to the Charter would be required.

Mr. MENDEZ (Philippines) asked the Israel representative to clarify his earlier reference to the relationship between peace and justice. He could not agree to the contention that it might at times be expedient to achieve a peace that was not just and to maintain it by force of arms rather than by justice.

Mr. ROBINSON (Israel) said that he would defer his reply to the two previous speakers until other representatives had commented on his statement.

The meeting rose at 1 p.m.