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Held at Headquarters, New York,
on Thursday, 30 July 1953, at 10.30 a.m.

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Yugoslavia

Principal Director in charge of
the Legal Department

Secretary of the Committee

Secretariat:

The CHAIRMAN announced that Mr. Geoffrey de Freitas, Member of Parliament of the United Kingdom and Rapporteur of the Legal Committee of the Consultative Assembly of the Council of Europe, was present as an unofficial observer for the Consultative Assembly of the Council of Europe.

Mr. de Freitas and his Committee were concerned with certain questions of international criminal jurisdiction affecting Europe.

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

Mr. MERLE (France) said the method by which an international court might be established was of capital importance because the essential characteristics of the court would depend upon the method selected.

A discussion of principles might serve to clarify the issue. The law normally served three purposes: 1. to ensure the settlement of disputes between litigents; 2. to ensure the punishment of offenders; 3. to ensure that the actions of subordinate authorities conformed to those of the sovereign authority. In international society, however, it performed only the first function and did so only on an optional basis. The reason was that the two other functions pre-supposed the existence not only of a rule of law but also of a political authority responsible in the first place for the issuing of orders having authoritative force and, secondly, for the apprehension of offenders with a view to committing them to trial and for the execution of sentences.

The implementation of international criminal jurisdiction was predicated upon the existence of that political authority. In that connexion, there was a fundamental difference between the proposed criminal court and the International Court of Justice. The representative of the Philippines had proposed that article 34 of the statute should merely be amended. However, article 36 would also have to be amended for the question was no longer one of a dispute between two States but of a legal action by society against an international offender.

Was international society - particularly the United Nations - ready to take such a long step forward, in other words did it have the political authority and the competent organs with which to back up the action of an international criminal court?

That was debatable, in view of the example of the Council of Europe and its attempt to ensure international protection of human rights. The plan introduced in the European Convention for the Protection of Human Rights and Fundamental Freedoms did not provide for penal sanctions against individuals; the consent of the States concerned was required before an individual could gain access to the court; the latter could only grant compensation to the injured party; even then the dispute was subject to political settlement by intervention of the Committee of Ministers in place of the court. That being the position in the Council of Europe, where States had much more in common than in the United Nations, the latter could hardly be expected to resolve the basic conflict between State sovereignty and international criminal jurisdiction.

He agreed with the Australian representative that the ideal characteristics of the international criminal court should be stability, permanence, independence, effectiveness and universality, particularly permanence and universality. Theoretically, the ideal solution would be to make the international criminal court an organ of the United Nations, like the International Court of Justice, or to extend the jurisdiction of the International Court by the addition of a criminal chamber.

As to the method which should be adopted in that case, he felt that the resolution method should be discarded as being contrary to the Charter - either because it was based on an erroneous interpretation of the functions and powers of the General Assembly (Articles 10 and next following), or because it required too broad an interpretation of Article 22. The only valid method would be an amendment of the Charter. In that case, the difficulty would be not so much the exercise of the veto by a particular State as the problem of getting the Member States to undertake a complete revision of the structure of the United Nations which was, according to the Charter, based on the free co-operation of States. In view of the number and significance of the reservations already expressed with respect to the Committee's task, it was doubtful whether States were prepared to replace the principle of sovereign equality by that of United Nations sovereignty.

Hence, the ideal solution was illusory for the time being and might even be dangerous if it established too close a relationship between the United Nations and the court. Should the plan fail in the United Nations, the future of

criminal jurisdiction would be jeopardized. If it succeeded, it might appear that, as in the case of Korea, the requirements of justice did not necessarily coincide with those of maintaining peace.

To those who believed that international criminal jurisdiction was both desirable and feasible, the only possible solution was for the States prepared to do so to enter into agreements providing for the surrender of such sovereignty as the establishment of an international criminal jurisdiction would require. That jurisdiction would perhaps not have the benefit of universality, which for the time being was both illusory and dangerous; on the other hand, it would gain in effectiveness and, it was hoped, establish a pattern.

The United States proposal, considered in the light of these remarks, was the least objectionable in so far as it reduced the General Assembly's role as much as possible and thus avoided constitutional difficulties. In the final analysis, however, there did not appear to be any valid reason to resort to that method because the position was as follows: either the General Assembly's intervention implied an organic and functional relationship between the court and the United Nations, in which case the previously mentioned objections would arise, or, on the other hand, its intervention was purely formal and the whole plan was based on the agreement of States. In the latter case, universality would not be achieved and a debate in the United Nations might do more for the opponents of international criminal jurisdiction than for its supporters. If it was merely a question of placing on record the action of the United Nations in developing the plan, reference to the Committee's work would afford ample proof of the Organization's interest in the question.

Mr. VALLAT (United Kingdom) said that the United Kingdom delegation believed that amendment of the Charter would probably be the best method to give an international criminal court the necessary stature, power and authority. Indeed, if the conditions for amendment were present, in other words, if the amendments were acceptable to two-thirds of the States Members of the United Nations, including all the permanent members of the Security Council, the Committee might be nearer to conditions that would make the court a practical proposition. It was, however, generally recognized that, at present, amendment of the Charter for that purpose was out of the question.

In the view of the United Kingdom delegation, a General Assembly resolution would be the least satisfactory method of establishing the court. It would be deplorable and disastrous if the General Assembly ever reached the stage at which it would accept and act upon the argument that it could ignore the provisions of the Charter because there was no authority to rule on the validity of its resolution.

The most plausible argument in favour of the General Assembly's power to establish an international criminal court was that of precedent, for it had established other tribunals - the Administrative Tribunal and the Tribunals for Libya and Eritrea. However, those cases were quite different. The Administrative Tribunal had been set up to deal with United Nations Secretariat matters which were obviously within the jurisdiction of the General Assembly. The exercise of criminal jurisdiction for offences against international law was in an entirely different category and prima facie at least did not fall within the Assembly's competence.

The Tribunals for Libya and Eritrea were special cases which rested not on the authority of the United Nations Charter but on the Peace Treaty with Italy and the consent of the powers affected.

Much reliance had been placed on Article 22 of the Charter and the power of the General Assembly to establish subsidiary organs. However, it was an elementary proposition that the Assembly could not create subsidiary organs to do what it would not be entitled to do itself. It had no executive or judicial powers and could not legislate. Surely it was not being seriously suggested that the General Assembly had the power to arrest, try, condemn and punish an individual political leader.

Moreover, the powers of a court under a General Assembly resolution could not be as great as those that might be conferred by a convention. The "teeth" would have to be provided by the agreement of sovereign States. That was implicit in the United States suggestion but there did not seem to be any advantage in adopting the form of a General Assembly resolution when the substance would have to be achieved by convention.

It followed that if an international criminal court was to be established in the foreseeable future the best method would be by agreement or convention. A convention drawn up by a conference would at least have the merit that it would

be the creature of those who wholeheartedly supported the establishment of a court. The drafting of its statute would not be retarded or distorted by those who were either apathetic or openly antagonistic.

Mr. RÖLING (Netherlands) said that the difficulties involved in the establishment of an international criminal court emphasized by the Israel representative at the previous meeting would prove on examination not to be too formidable.

The Australian representative had said that the Committee should not advise the establishment of a court of inferior quality merely because the establishment of a court of higher quality was a more difficult proposition; on the other hand, to begin by establishing the court which the Australian delegate called a court of "inferior quality" might prepare the way for the establishment of a superior one - domestic general jurisdictions had developed over centuries, and an international jurisdiction could not be born fully grown.

In framing the Charter the alternatives had been to confer on United Nations organs legislative powers in a limited field - such as those which the International Telecommunication Union and the World Health Organization might be said to possess - and to confer powers to take decisions of strictly limited binding force in a field of unrestricted scope; such were the powers of the General Assembly. Similarly, international criminal jurisdiction could be established by convention, with binding force in a limited field, as it had been for the six States of the European Coal and Steel Community, or by General Assembly resolution covering the whole field of international crime, but binding only upon States declaring themselves subject to it in respect of particular crimes. Establishment by resolution was in line with the general United Nations approach in other spheres of rule-making.

Discussing detailed points in the order followed by the Israel representative, he said the first advantage of establishment of the court by General Assembly resolution was that a new road of international co-operation would thereby be opened, permitting States to choose for themselves how far they would travel along it. Also, the jurisdiction thus created would be elastic in nature and in extent, allowing for variations in the relations between States, as a convention, aiming to set up a fully-fledged jurisdiction, could not do.

It was hard to understand why the Israel representative had objected that once the resolution had been adopted the General Assembly would no longer be master of it, since for their application many resolutions depended on later action by States.

He had earlier attempted to show that the objection relating to the constitutionality of establishment by resolution was not decisive, by demonstrating that an international criminal jurisdiction would be a factor in the maintenance of peace (which next to the responsibility of the Security Council was the Assembly's responsibility) since it would strengthen world moral opinion. Although excessively rigid enforcement of such jurisdiction could be a danger to peace, international criminal jurisdiction generally would contribute to the maintenance of peace.

The objection that a court created by the General Assembly could be abolished by the Assembly was unrealistic; the objection that the Assembly could influence such a court's decisions could be overcome by including appropriate provisions in the court's statute.

The Israel representative's three "alleged advantages" of the resolution method - the world-wide scope of the resultant jurisdiction, the avoidance or conflict with other United Nations organs, and the budgetary consideration - were real advantages. Establishment by resolution would mean that the court's statute would guarantee a world-wide approach, a basis on which world-wide international criminal jurisdiction could develop. Secondly, such establishment would make it easier to avoid conflicts with other United Nations activity. Thirdly, by creating the Court by United Nations resolution it would be proper for the United Nations to bear the small expenses. What mattered was how to reconcile the court's international character with its gradual growth from modest beginnings, the rate of growth of the jurisdiction being dependent on the readiness of States to submit to it.

As to the disadvantages alleged by the Israel representative, for example the danger that the statute might be emasculated by amendments pressed for by opponents of the jurisdiction, such objections were equally applicable to the convention method and to every decision of an international body. Votes for the establishment of the court by States later refusing to submit to its jurisdiction would be nothing new in international relations; the court would start life as

an empty shell, but the shell would fill the more quickly as the court demonstrate its usefulness. Once established, it would have the task of drawing up rules of procedure which would set a standard for every international criminal trial, and the judges would represent the various legal systems of the world; the convention method, where only a few States banded together to establish a court, had neither of those advantages.

The argument that a resolution was inappropriate because it was a majority decision not allowing of reservations was also not conclusive. A resolution establishing the court would impose no obligations on States; they would assume any such obligations later, by convention; therefore reservations were unnecessary.

Of the two methods of establishing the court available within the framework of the United Nations, amendment to the Charter was the ideal one. At the moment it was not practicable, though it might be when the Charter came up for amendment in 1955. Once the Court had proved its usefulness, it could, by amendment of the Charter, be incorporated on a solid legal basis in the structure of the United Nations organization. It might seem that the decisive element in the choice of the method of establishment was not of a legal character, but was determined by the intensity of the desire to establish an international criminal jurisdiction.

The CHAIRMAN said it seemed to be generally agreed that amendment of the Charter was at that time impracticable, and that establishment of the court by a simple General Assembly resolution raised doubts as to the constitutional power of the Assembly to create such a court, and as to its power to compel a State to accept the court's jurisdiction. The practicable alternatives appeared to be establishment by convention and by a combination of a General Assembly resolution plus conventions; he suggested that discussion should be concentrated on choosing between them.

Mr. WANG (China), referring to the method of establishment proposed in the United States working paper (A/AC.65/L.2), felt that the statute of the court should be brought into force by a separate convention, and that the court's existence should not depend on the ratification of a series of separate conventions; he wondered whether such had been the United States intention.

Mr. MAKTOŠ (United States of America) answered in the negative, explaining that the statute annexed to the proposed General Assembly resolution would be a blueprint for use by States which, desiring to submit themselves to the jurisdiction of the court, would make a convention containing a clause of acceptance of the statute. Until such a convention or conventions were ratified by a specified number of States, the statute would remain a dead letter. In that way the court could only exist if a specified number of States were willing that it should.

Answering the various criticisms levelled at the method of establishment proposed by his delegation, he said debate in the General Assembly would not be harmful to the draft statute, but beneficial; as it stood, the draft statute had merit, and it would be defended by those Members which had helped to frame it in the Committee. There was no constitutional difficulty facing the Assembly: a State existed to maintain the peace, and could establish domestic tribunals to assist it in doing so; the United Nations, according to Article 1 of the Charter, existed to maintain international peace and security, and the General Assembly, according to Article 10, might discuss any questions or any matters within the scope of the Charter and make recommendations to the Members of the United Nations. Article 13 prescribed that the General Assembly should initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification. The International Law Commission had been set up in pursuance of that Article, and the International criminal court could be set up likewise.

The advantages of his proposed method were: that the General Assembly of sixty States formed the best international conference which could be called together; that the statute would not be recommended unless the majority so decided; and that States would be left free to remain outside the court's jurisdiction if they did not choose to submit to it.

He made a formal proposal that the Committee's report should record the agreed view that the establishment of an international criminal court by amendment of the Charter was at present impracticable.

Mr. MENDEZ (Philippines) pointed out that amendment of the Charter was not an immediate issue. The United States proposal was not appropriate at the moment as the Charter might be revised at the tenth session of the General Assembly.

Mr. ROBINSON (Israel) agreed with the Philippine representative. It would be sufficient to place on record that the majority of the Committee was sceptical about the likelihood of amending the Charter under existing circumstances but that it did not dismiss that procedure as impossible.

Replying to a question by Mr. DAUTRICOURT (Belgium), Mr. MAKIOS (United States of America) explained that according to the suggestion in his working paper (A/AC.65/L.2), States which agreed by convention to submit to the jurisdiction of the court, for instance in respect of genocide, would be free to adapt the relevant provisions of the statute to the crime in question, but they should not alter its essential organizational features.

Mr. WANG (China) said that the draft statute dealt largely with organizational matters. If the statute to be annexed to the General Assembly resolution was to be of the same type, he wondered what objection there would be to having it ratified as a separate international convention which would bring the court into operation irrespective of other conventions conferring jurisdiction on the court in respect of particular crimes. The United States suggestion seemed to go beyond the proposals of the 1951 Committee as it left not only the matter of jurisdiction but also that of organization to be settled by a subsequent convention.

The CHAIRMAN stated that, according to his understanding of the United States proposal, the General Assembly, by adopting an appropriate resolution, would be approving the organization of the court as recommended by the Committee with possible amendments by the Sixth Committee, but the matter of jurisdiction would be left entirely to the States acceding to the convention.

On the assumption that it was agreed that the court should be established by a General Assembly resolution to be followed by a convention, he asked the Committee to consider how many States would have to accede before the court could start to operate and what duties would be imposed upon States by their accession.

Mr. WANG (China) drew attention to the difficulty which might arise if one group of States, entering into a convention to confer jurisdiction on the court in respect of genocide, decided that there should be seven judges to be elected by the General Assembly, while another group, conferring jurisdiction in respect of piracy, wished to have five judges to be appointed by the Security Council.

The CHAIRMAN replied that the problem would not arise as the convention would require acceptance of the articles of the statute referring to organization. When the convention stage was reached one important matter would be to define the crime or crimes which the States concerned wished to have covered.

Mr. MERLE (France) asked whether the organic provisions of the statute, once incorporated in a General Assembly resolution, were to be considered sacrosanct.

Mr. MAKTOU (United States of America) replied that, according to his delegation's suggestion, the convention should "provide that such state or states agree to the provisions of the International Criminal Court Statute". At Geneva certain representatives had felt that some articles, for example articles 32 and 52, should be subject to variation. If the United Nations was to participate in the election of the judges, the resolution could state that States acceding to the statute must accept its terms except in so far as departures therefrom were permitted.

Mr. VALLAT (United Kingdom) asked what advantage of status a text adopted by resolution of the General Assembly would have over a convention adopted by an international conference.

Mr. MAKIOS (United States of America) replied that the General Assembly had been the international conference which had so far considered the matter and which had referred it to the International Law Commission and to the Committee itself. It would be a duplication of effort to transfer the work to another body. Again, if the General Assembly recommended the statute, every Member State should respect its recommendation. Although only a few States might accede to the convention at first, further accessions were more probable if the convention had been prepared under the auspices of the General Assembly than if it had been drafted by a special conference.

Mr. VALLAT (United Kingdom) asked whether he considered that a State which voted for an assembly resolution would be morally or legally bound to accept the statute annexed to it.

Mr. MAKIOS (United States of America) replied in the negative.

Mr. PEREZ PEROZO (Venezuela) pointed out that the mandatory nature of the statute might discourage the accession of States not members of the United Nations which had had no opportunity of discussing it or of making reservations.

Mr. MAKIOS (United States of America) replied that, if Member States could not make reservations to the statute, there was no reason for regretting that non-member States were deprived of the privilege. When the Statute of the International Court of Justice was being framed at San Francisco, it had been felt that the States participating in the Conference should have their say and that States which later wished to accede would have to accept the statute as it stood. Moreover, States applying for membership in the United Nations knew that they would have to accept the Charter in the preparation of which they had not participated.

In view of the opposition expressed, he announced the withdrawal of his proposal on the impracticability of amending the Charter. He would soon submit another proposal incorporating the substance of his working paper.

The meeting rose at 12.50 p.m.

14/8 a.m.