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SUMMARY RECORD OF THE FIFTH MEETING

Held at Headquarters, New York,
on Friday, 31 July 1953, at 10.30 a.m.

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PRESENT:

| | | |
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| <u>Chairman:</u> | Mr. MORRIS | United States of America |
| <u>Rapporteur:</u> | Mr. RÖLING | Netherlands |
| <u>Members:</u> | 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. MENDEZ | Philippines |
| | Mr. VALLAT | United Kingdom of Great Britain and Northern Ireland |
| | Mr. MAKTOŠ | United States of America |
| | Mr. PEREZ PEROZO | Venezuela |
| | Mr. NINCIC | Yugoslavia |
| <u>Secretariat:</u> | Mr. LIU | Secretary of the Committee |

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

The CHAIRMAN said that, as most members of the Committee considered amendment of the Charter to be impracticable at the moment, there appeared to remain only three methods of establishing the court: by a convention, by a General Assembly resolution or by a combination of both. If no other resolutions were forthcoming, he would submit three separate draft resolutions offering the three methods for the Committee's consideration at the next meeting.

Mr. MENDEZ (Philippines) asked that the word "jurisdiction" should be used instead of the word "court" in the text of the draft resolutions in order to cover the possibility of the international criminal jurisdiction becoming a chamber of the International Court of Justice.

Mr. LOOMES (Australia) agreed with the Chairman's procedure, but felt that the Committee's report should outline the discussion of the various methods, including that of amending the Charter.

The CHAIRMAN assured the Committee that the Rapporteur would deal with the matter.

Mr. RÜLING (Netherlands) felt that six methods existed. First, the Charter might be amended, as the Philippine representative had suggested at the second meeting, so as to incorporate the proposed court as a criminal chamber of the International Court of Justice. Such a course would be inadvisable as the two courts were at different phases of development. Since the International Court of Justice already existed and worked, the goodwill which it had created should not be endangered by burdening it with a new and risky function. In that connexion he referred to the statement of Mr. Hudson at the second session of the International Law Commission (A/CN.4/SR.42, page 8). Once the proposed court had reached a certain stage of maturity and had become a generally recognized factor in international affairs, the two courts would probably be merged, but such a development was a distant prospect.

Secondly, the Charter might be amended to establish the court as a permanent United Nations organ. He doubted whether, even if the question of the veto did not arise, it was advisable to lay down the nature and functions of a body before practical experience had shown along what lines it should be organized.

Thirdly, the Charter might be amended to provide for the possible establishment of the court. Such a method might be useful and the Committee might consider preparing a draft article to that effect for ultimate incorporation in the Charter.

Fourthly, the court might be established by a multilateral convention sponsored by the United Nations. Even if so sponsored, the convention would remain an agreement among the signatory States. The draft statute prepared at Geneva was based on the presumption of establishment by convention and clearly showed the illogicality of the arrangement whereby the United Nations would play a decisive part in the organization and activity (appointment of judges, approval of submission to jurisdiction, access to the court, appointment of the Committing Authority) of an organ established by certain States Members and non-members of the United Nations. He agreed that the relationship of the court to the United Nations should be close, but the only method of ensuring such a relationship was to make the court a United Nations organ.

The French representative had stated at the third meeting that it would be inadvisable to bring the 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. He would appreciate a clarification of that opinion.

Fifthly, the court might be established on the lines of the United States proposal. Despite the advantages of that method, it was uncertain when the court would be constituted. At first States might well be reluctant to confer general jurisdiction upon the court. The court might be unable to start its work until it had been granted jurisdiction in a particular case after the event.

He preferred the sixth method: establishment of the court as a subsidiary organ of the United Nations by a General Assembly resolution. Constitutionally, the General Assembly could undertake such establishment under Article 22 of the Charter. It had been asserted that it was not a function of the General Assembly

to try individuals and to punish them. It might well be asked whether it was a function of the General Assembly to watch the frontiers of certain Balkan States. But the General Assembly had appointed a commission for that purpose in the interests of peace and there was no reason why it should not establish an international criminal jurisdiction if it considered it to be in the interests of peace. No obligations would be placed upon Member States. The machinery of the court would be created, but would not come into operation until the necessary jurisdiction had been conferred by States.

Mr. ROBINSON (Israel) thought that, in essence, only three methods existed: amendment of the Charter, a convention and a General Assembly resolution.

In so far as amendment of the Charter was concerned, there were four possibilities: introducing a provision in the present statute of the International Court of Justice for the creation of a criminal chamber, the inclusion in the Charter of the United Nations of a provision envisaging the possibility of the establishment of an international criminal jurisdiction, amending Article 7 of the Charter, adding to the now existing "principal" organs an international criminal jurisdiction, and the inclusion in the Charter of a new article similar to article 14 of the League of Nations Covenant. The main obstacle to amending the Charter was that it could not be regarded as feasible at the moment or in the near future.

The Netherlands and United States representatives had different approaches to the method of establishment by a General Assembly resolution. The former wished the machinery of the court to be created as soon as possible, whereupon the court could remain in abeyance until called upon to convene as the result of certain events. The latter felt that General Assembly action should be confined to adopting a resolution recommending the establishment of the court. He failed to see how such a resolution would bring the establishment of the court any closer. The statute, considered in the light of the United States proposal, had certain disadvantages. First, there were provisions presenting problems, the solution of which was left to the future, such as articles 1, 26, 27, 28, 31, 40, 41, 42, 52 and 55. Secondly, there were gaps in some of the existing provisions, such as article 21. Thirdly, there was a noticeable omission of any article to cover the political screening of a given case.

Fourthly, among the so-called purely technical articles, which under the United States proposal were to be accepted in toto or rejected by subscribing States, were certain articles of the greatest importance which could not be dealt with so peremptorily. Article 24, for instance, adopted the Anglo-Saxon approach to the rules of procedure of the court and to the principles governing the admission of evidence, which differed from the continental European concept that such matters should be left to the legislature. Again, certain countries might well take exception to article 25. Article 30 would enable States not accepting the court's jurisdiction to interfere with its proceedings. Articles 38, 43, 50, 51, 52, 53 and 54 were others which some States might consider unsatisfactory. In other words, the text of some fifteen articles was such that unless States were free to express reservations they would find it difficult, if not impossible, to accept the draft statute. It should be noted, in that connexion, that provision for reservations was made in the Genocide Convention and other international instruments referred to during the debate.

With regard to the Chairman's proposal that at its next meeting the Committee should decide the method by which the international criminal court should be established, he felt that the decision should not be taken until members had discussed the relationship between the court and the United Nations more fully. The two questions were intimately related.

Replying to a point raised by the Peruvian representative at an earlier meeting, he said that support of the theory of State responsibility as opposed to individual responsibility need not preclude the establishment of an international criminal jurisdiction. United Nations law, which was based on the concept of State responsibility, should not be interpreted in its narrow sense in the field of international criminal jurisdiction.

The Philippine representative had asked for clarification of his views on the relationship between justice and the maintenance of peace. The fact was that the Committee was somewhat exaggerating the importance of the relationship between maintenance of peace and the individual responsibility of leading persons in government. So long as those persons remained in power, their actions would be taken in the name of their government. The aggression in Korea was a case in point and an example of the collective responsibility of the State as opposed to the individual responsibility of leaders.

Finally, he did not think that the interests of justice and of the maintenance of peace would conflict in more than a few cases.

The CHAIRMAN said that he would not press for a vote on the draft resolutions he was submitting.

Mr. MERLE (France), replying to a question from the Netherlands representative, said that the disadvantages of a close relationship between the proposed criminal court and the United Nations outweighed the advantages because international relations in the United Nations had not developed sufficiently to permit of the establishment of an international criminal jurisdiction.

For that reason, his delegation attached considerable importance to the selection of the method by which the proposed court should be established.

Establishment by a General Assembly resolution would mean a close organic link between the court and the United Nations. The Netherlands delegation thought that such a link was most desirable. The French delegation was unable to agree.

The United States proposal, while somewhat different from the Netherlands position, required clarification on one major point - the exact provisions of the proposed convention, as distinct from the content of the General Assembly resolution.

Mr. DAUTRICOURT (Belgium) believed that consideration should be given to every prospect of maintaining peace and of arriving at an equitable settlement of international disputes. The mere existence of a permanent international criminal jurisdiction, however limited in scope, could be a factor in the maintenance of peace by providing for a means of prosecuting and punishing international crimes without necessarily resorting to war.

The establishment of an international criminal court would hasten the development of international penal law, to which jurisprudence had contributed since the Nuremberg trials. Until recently, governments had considered themselves the sole judges of the legality of their actions and orders. The time had come to develop a plan whereby governments would accept the principle that both the governing and the governed should answer for their actions and orders before a permanent international jurisdiction established by agreement.

Several guiding principles should govern the establishment of the international criminal court. In the first place, the court should be set up, even with limited jurisdiction. It should be established under United Nations auspices and in accordance with the procedure provided for in the Charter. It should not be organically linked to an essentially political body. It should in so far as possible be an autonomous body. Unity of international justice should be sought, and for that reason the rules which governed the organization of the International Court of Justice should be applied unless there were obvious and compelling reasons for not doing so.

Mr. NINCIC (Yugoslavia) said that he had not been encouraged by the discussion, in which emphasis had so far been placed on the disadvantages of each of the proposed methods of establishing the international criminal court.

It had been almost unanimously agreed that the establishment of the court by amendment of the Charter was not feasible for the time being, not so much because of a possible veto but rather because an amendment of the Charter in that sense would entail a fundamental change in the structure of the United Nations to which Member States would not agree for some time to come.

Establishment of the court by a General Assembly resolution also entailed serious difficulties of a constitutional nature since it would require a revision of the Charter with respect to the powers of the General Assembly.

Establishment of the court by a multilateral convention had the advantage of realism. The court could be set up at a reasonably early stage. However, it was unlikely that more than a limited number of States would accede to the convention. The court would therefore lack stature and prestige. There was also the danger that in some cases its authority might come into conflict with the general policies of the United Nations.

The method proposed by the United States was an ingenious effort to overcome the many difficulties to which the establishment of an international criminal jurisdiction gave rise. It had the major defect that it was of doubtful value to create a court which would remain an empty shell, at least in the foreseeable future. The views expressed by governments indicated that they would hesitate to confer jurisdiction upon a court established in accordance with the method proposed by the United States; even if they voted for the General Assembly

resolution, they would not feel bound to accede to the subsequent convention. In practice, therefore, there might be an interval of several years between adoption of the resolution and establishment of the court.

Although the discussion in the Committee so far had not been conducive to a solution of the problem of the method by which the international criminal court should be established, the Yugoslav delegation maintained an open mind on the question, despite the fact that conditions hardly seemed ripe for a successful application of any of the methods proposed.

Mr. MENDEZ (Philippines) maintained that establishment of the court by an amendment of the Charter creating a criminal chamber in the International Court of Justice was a method which should not be rejected out of hand. Moreover, an amendment of article 34 of the Statute of the International Court of Justice did not necessarily entail a revision of the entire structure of the United Nations.

The establishment of a criminal chamber within the International Court of Justice would mean that (1) the administration of international criminal justice would be vested in the principal judicial organ of the United Nations, thus obviating the serious difficulty of having a criminal court subsidiary and, it may well be, subservient to a political body like the General Assembly; (2) the judicial powers of the United Nations would be integrated rather than dispersed; (3) the jurisdiction would be as permanent as the International Court of Justice itself; and (4) the work of creating the chamber would be less complicated and less expensive than if a new and separate body were to be organized.

For the reasons given, he felt that the Committee should consider the inclusion in its report of all the arguments invoked in favour of establishing a criminal chamber in the International Court of Justice.

The CHAIRMAN reminded the Philippine representative that it was the Rapporteur's function to ensure that ideas ventilated in the Committee were reflected in its report, and that the question of a criminal chamber of the International Court of Justice could be further discussed under item 4 of the agenda.

Mr. ROBINSON (Israel) explained, in reply to a question from Mr. MAKTOŠ (United States of America), that, if the method of establishment of the court by convention were used, the necessary conference of States would have before it the alternatives of prescribing rules of evidence and rules of procedure for the court there and then or of leaving the court to make its own rules. Compromise was possible. For instance, the conference could prescribe some rules of evidence and leave the remainder for the court to deal with. Whatever solution was reached, it ought to reflect the wishes of those who were seeking to establish the court.

Answering questions from Mr. ROBINSON (Israel), the CHAIRMAN said that the method proposed by the United States (A/AC.65/L.2) did not involve States which might ratify conventions in wholesale acceptance of the draft statute as it stood; the General Assembly resolution would specify such provisions of the statute as were mandatory to the functioning of the court, but States would be at liberty in making the conventions to exercise reservations on other articles of the statute.

Mr. ROBINSON (Israel) observed that that improvement in the United States proposal made it much more acceptable than before. However, a statute drawn up by a convention of States would contain a smaller proportion of articles not acceptable to all States than would a statute annexed to a General Assembly resolution, as there would be more common ground among the States making an ad hoc convention than among the sixty Members of the General Assembly.

Mr. MAKTOŠ (United States of America) in reply to the Netherlands representative's comment on the uncertainty of establishment of a court if dependent on the ratification of conventions, said that the court was assured of existence on ratification by a prescribed number of States. The delay involved had the merit that the court, at its birth, would have jurisdiction and work to do, and would thus avoid loss of prestige.

Acceptance of the statute annexed to the General Assembly resolution which he proposed did not mean acceptance of the statute drafted by the 1951 Committee, which had been drawn up with the method of establishment by convention in mind. Article 25, for instance, could be amended to take into account the view of Denmark that the Head of the State was not subject to trial. Part II, paragraph A of document A/AC.65/L.2 could be altered so that, instead of States

being required to agree to all the provisions of the statute, they would be required to agree only to essential provisions on which reservations would be inappropriate, such as that dealing with the number of judges. Certain other articles could be subject to the subsequent conventions. For example, he intended to propose that article 37 should be amended to read, "Trials shall be without a jury unless conventions provide otherwise", since the type of crime covered by a given convention might call for trial by jury.

His remark that his proposed method involved States in no moral or legal obligations, to which the Israeli representative had taken exception, had been made in reply to a question from the United Kingdom representative about the obligation which a State imposed upon itself, in voting for a convention, to submit itself to the court's jurisdiction. It was clear from the Charter that Assembly resolutions were not legislative in character, and every State would be quite clear as to its own rights and duties in the matter when such a resolution had been adopted.

The French representative had asked what links there would be between the court and the United Nations. The links would be: election of the judges by the General Assembly; circulation among Members of a request from the Secretary-General for the nomination of candidates for judgeship; election of the committing authority, preferably also by the Assembly. Advantages for the court would include the prestige of being originated by the United Nations, the widely international character of the panel of judges elected by sixty nations, and a greater chance of uniformity in operation than there would be if the court was established by a convention between ten States to which fifty more might later accede.

The Belgian representative had rightly observed that the court should be autonomous. The conventions must define crimes over which the court was to have jurisdiction ; that legislative function could not be delegated to the judicial organ. But neither that function nor the link between the United Nations and the Court would interfere with the independent judges prescribed in article 4 of the draft statute. If six or eight States acceded to a convention establishing a court, they would equally have the task of electing judges, but election either by such a method or by the General Assembly would not impair the court's autonomy.

The Yugoslav representative had questioned the value of an empty shell, and had felt that the method of a convention was more realistic; but in effect the United States proposal amounted to the convention method, with the advantage of drawing on the accumulated wisdom of the 1951 Committee, the Sixth Committee, and the sixty members of the General Assembly. Neither the convention method nor the United States method gave life to the court until a given number of States had ratified a convention. The fact that the statute existed on paper in an Assembly resolution made no difference to that.

Mr. VALLAT (United Kingdom) asked whether in effect the United States proposal was that the court should be established by a convention drafted beforehand in the General Assembly.

The CHAIRMAN felt that such a method had the advantages that the court would have a dignity not possessed by any organ set up outside the United Nations and that the adoption by the General Assembly of a resolution to establish the court would indicate the readiness of the United Nations to perform its essential functions in relation to the court. At the same time, the United Nations could impose no obligations on States to submit themselves to the court's jurisdiction. The method had the virtues of both the resolution and the convention methods, and few of their vices.

Mr. VALLAT (United Kingdom) felt that the work of drafting could be done better without than within the General Assembly. The relative success of the constitution of the World Health Organization as compared with that of the International Refugee Organization exemplified that point. Drafting by a conference composed only of those genuinely interested in its aims did not result in any loss of dignity to the resultant organ and, as the Israeli representative had said, improved the chances of compromise. There was a tendency in the Assembly for the majority to override the valid views of substantial minorities. Moreover, the Assembly had found difficulty in drafting legal documents, where there were basic differences of view, such as existed in the present case; basic differences of viewpoint had reduced the viability, for instance, of the draft convention on freedom of information and the draft covenant on human rights. Further, it was very doubtful whether

the rate of ratification of United Nations covenants was any more rapid than, or indeed as rapid as, that of covenants drafted outside the United Nations.

It was doubtful whether, if, say, fifteen States made a convention which resulted in the court's coming into being, those States would be willing to accept a panel of judges elected by the United Nations.

Mr. MAKTOU (United States of America) observed that, whatever the difficulties encountered in connexion with freedom of information, the Convention on Genocide had been ratified by over forty States. The general capacity of the Assembly to draft legal documents was, however, irrelevant. The 1951 Committee had produced its very useful draft statute in thirty days; there was little additional drafting work to be done, and that little could as well be done by the United Nations as by an international conference.

The meeting rose at 1.5 p.m.

14/8 a.m.