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1953 COMMITTEE ON INTERNATIONAL CRIMINAL JURISDICTION

SUMMARY RECORD OF THE SIXTH MEETING

Held at Headquarters, New York,
on Monday, 3 August 1953, at 10.30 a.m.

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53-21801

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-MOELLER	Denmark
	Mr. SAMI	Egypt
	Mr. MERLE	France
	Mr. MARMOR	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. NINCIC	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 (continued)

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

RELATIONSHIP BETWEEN AN INTERNATIONAL CRIMINAL COURT AND THE UNITED NATIONS AND ITS ORGANS

The CHAIRMAN invited the Committee to settle, by a vote, the question of the method of establishing the future international criminal court. He recalled that the Committee had three proposals before it: (1) establishment by multilateral international convention; (2) establishment by a General Assembly resolution; (3) establishment by a General Assembly resolution followed by a multilateral international convention.

Mr. RÖLING (Netherlands) proposed that the Committee, before voting, should carefully consider the implications and consequences of establishing an international criminal court and the relationship of the court to the United Nations and its organs. In that way the Committee would be able, if the occasion arose, to decide on the method of establishing the court after carefully weighing the pros and cons of each of the proposed methods.

There being no objection, the CHAIRMAN accepted the proposal.

Mr. GARCIA OLANO (Argentina) said that he had refrained from speaking earlier on the implications and consequences of establishing an international criminal court because his delegation had explained its view before, at the seventh session of the General Assembly. But the discussion in the Committee had brought home to him that the problem of establishing an international criminal jurisdiction was so complicated that the question of the consequences of establishing the court could not be considered apart from the method of establishing it.

The Argentine delegation agreed that, theoretically, it would be desirable to establish an international jurisdiction. It would not therefore object to its establishment, though that position in no way prejudged the question of recognizing the mandatory nature of the jurisdiction of such a court or the

implementation of whatever decisions it might adopt. Accordingly, while his delegation felt that, at the current stage of international relations, an international criminal court could hardly operate effectively, it was prepared to co-operate actively in studying the matter.

He recalled that the Committee had been established by resolution 687 (VII) of the General Assembly, following resolution 489 (V) which had established the 1951 Committee to consider how to give effect to an earlier resolution whereby the Assembly had recognized that, in the course of development of the international community, there would be an increasing need for an international judicial organ. The Argentine delegation thought that the Committee was not competent to decide on any method of establishing an international criminal court but that it should limit itself to studying the implications and consequences of the establishment of such a court and the various possible methods of establishing it, leaving the General Assembly to take the final decision. His delegation took that view, not only because it did not wish the Committee to exceed its terms of reference but also because of the extreme complexity of the problem and the close relationship between the questions of method and principle which had become apparent during the previous week's discussion. At one moment the Committee had contemplated as many as seven different methods of establishing an international criminal court. It was therefore not in a position to decide by a vote on the method of establishing an international criminal court; it should concentrate on the general question whether the court in question should be established.

Mr. PEREZ PEROZO (Venezuela) said that, before considering the relationship of the international criminal court with the United Nations and its organs, he wished to comment on the United States proposal on the method of establishing the court (A/AC.65/L.2). The Venezuelan delegation shared the view expressed by the Israel representative at the previous meeting that the United States proposal should be regarded as one of the possible methods of establishing the court by a General Assembly resolution and not as a new and additional method. Subject to that observation, it was clear from the United States proposal that the General Assembly would not in fact establish the court, since it was expressly stated that it would be established only when a certain number of States conferred jurisdiction on it. Accordingly, the General Assembly would only be indicating a possibility, but would not be establishing the court, for the latter's existence would depend

on the will of States. The proposal to establish a court by a General Assembly resolution as a subsidiary organ under Article 22 of the charter also did not solve the problem for, unless accepted by States, a court established by the General Assembly could not operate effectively. The question therefore was what was the best method of establishing an international criminal court by a convention under United Nations auspices. In the past, the General Assembly had applied two different methods for the conclusion of conventions prepared under its auspices. The first had been to open immediately for signature a text which it had adopted, as in the case of the Constitution of the International Refugee Organization, the Convention on Genocide and the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others; the second method had been to convene a conference of plenipotentiaries and to submit to it for consideration and approval the instrument in a version which it had approved. Such was the case of the Convention on the Declaration of Death of Missing Persons and the Convention relating to the Status of Refugees. The real difference displayed by the United States proposal was that the resolution itself was to specify that the court would not come into existence until States had conferred jurisdiction upon it. Actually, however, that condition should appear in the final clauses of the convention and not in the resolution. In its resolution the General Assembly should merely state that, having approved a draft convention on the establishment of an international jurisdiction and the relevant statute, it was submitting the texts in question to States for approval and was convening an international diplomatic conference for the purpose. If the United States proposal was accepted, the mistaken impression would be created that the General Assembly itself had established the court. The opponents of the establishment of an international criminal court would certainly seize the opportunity of calling the court unconstitutional. At all events, the United States proposal seemed preferable to that for establishing the court by an international multilateral convention. Some representatives had asserted that few States would accept the jurisdiction of a court established under the auspices and on the recommendation of the General Assembly. Others had objected that an international criminal court established by a General Assembly resolution would be very unstable, as the General Assembly might bring the court to an end or amend its statute by another resolution. But those objections did not apply to the United States proposal, for it provided that the court would not come into being

or have any juridical existence until States had conferred jurisdiction upon it. Consequently, a revision of the statute would involve the parties, not the Assembly. The remaining question was whether it would be preferable for the General Assembly to open directly for signature the texts of a convention and statute which it had adopted, or whether it should convene an international conference with a view to their acceptance. The Venezuelan delegation advocated the second solution. Obviously the instrument prepared would in both cases eventually be submitted to States for signature, but, in the first case, States could only register objections by making reservations to the statute and would not be able to include those reservations in the statute itself. On that point he recalled that Professor Pella, in his Memorandum concerning the Establishment of an International Criminal Court (A/AC.48/3), had argued that to admit reservations to the statute of the court was bound to paralyse the court's functioning. Furthermore, States not Members of the United Nations would be very reluctant to become parties to an instrument in the drafting of which they had not taken part. It appeared therefore that the method of establishing the court by multilateral international convention would offer greater flexibility, permit those attending the conference to amend the draft statute proposed by the General Assembly, and have the merit of giving the court greater independence. That was very important, not only from the point of view of the court's authority and dignity but also because Member States opposed to its establishment were anxious that, if it was to be established, at least its links to the United Nations and its organs should be as tenuous as possible.

He then turned to the question of the relationship between an international criminal court and the United Nations and its organs. That relationship would depend on the method of establishing the court, whether by amendment of the Charter, or by General Assembly resolution or by international convention. If the court was established by amendment of the Charter it would become a principal organ and form an integral part of the United Nations. If it was established by General Assembly resolution there were two separate possibilities to be considered, corresponding to the two methods which had been considered, namely that recommended by the United States of America and that of establishing directly, by resolution, a subsidiary organ of the Assembly. In the latter case the relationship would be that between a principal and a subsidiary organ, or a hierarchical relationship.

However, that did not mean that the Assembly would keep the court completely under its own control or constantly assign work to it as in the case, for instance, of the International Law Commission. To preserve the court's prestige a certain distance would have to be maintained between it and the General Assembly. It had also been said that the General Assembly might establish the court not as a subsidiary organ under Article 22 of the Charter but as an auxiliary organ to discharge its responsibilities in the maintenance of peace under the "Uniting for Peace" resolution (377 (V)). However, whether the court was constituted as a subsidiary or as an auxiliary organ, that in no way fundamentally changed the question of its relationship with the United Nations, but it would be difficult to admit that the Assembly would be setting up the organ for the purpose of maintaining peace for the court's principal function would be to administer justice.

Lastly, he discussed the relationship between the court and the United Nations in the event of the court's being established by multilateral convention; it would take the form of "responsibilities", some of which would be specified in the actual statute of the court. The "responsibilities" might be those provided for in articles 28 and 52 of the draft statute for an international criminal court drawn up by the 1951 Committee. If the contracting parties wished to institute a closer relationship between the court and the United Nations they could insert suitable provisions in the statute. The objection had been made that the nature of a relationship thus established between the United Nations and the court would be determined by a convention to which not all the Members of the United Nations would be parties and to which some non-member States might be parties. One answer to that objection was that the General Assembly itself was free to determine in advance what the relationship between the United Nations and the future international criminal court was to be. But the real crux of the problem was that there would be States which would not wish to share in responsibilities with respect to an international body of criminal jurisdiction the establishment of which they opposed.

Mr. de la OSSA (Panama), after thanking the Secretariat for the full documentation which it had prepared and which had greatly assisted the Committee's work, recalled the Committee's terms of reference under General Assembly resolution 687 (VII). The problem of establishing an international criminal court was one of the most complex of all problems in view of the complete absence of precedents. True, the Nürnberg Tribunal had been set up, but it had functioned only in occupied territory within the framework of article 43 of the Hague Convention. The Israel representative had been right to warn the Committee of the danger inherent in regarding the Nürnberg Tribunal as a precedent. At the third session of the General Assembly the Sixth Committee had deleted from the preamble of the Convention on Genocide all reference to the Nürnberg Tribunal, thus drawing a clear distinction between international law in time of war and international law in time of peace. Furthermore, Professor Donnedieu de Vabres, a member of the Nuremberg International Tribunal, and Sir Maxwell Fyfe had both considered it dangerous to invoke the Nürnberg Tribunal as a precedent in time of peace. Professor Donnedieu de Vabres had declared that the existence of a tribunal like that of Nürnberg in time of peace would render international life intolerable and would be a source of international friction. The delegation of Panama did not oppose the establishment of an international criminal court, but simply wished to stress the extreme complexity of the problem.

Discussing the possible methods of establishing an international criminal court, he felt that the best method would be to establish a criminal chamber of the International Court of Justice. That Court enjoyed universal prestige, and its decisions were delivered in a spirit free of all political prejudice. States wishing to see justice prevail should not hesitate to do everything possible to render it perfect. Like religion and morality, justice either rested upon unshakable principles or did not exist at all. It had been pointed out that the establishment of a criminal chamber of the International Court of Justice would require an amendment of the Charter. Still, the United Nations should consider not the quickest but the best possible solution. Before an international criminal court was established its competence and the crimes with which it would deal should be defined, allowance being made at the same time for the possibility of further crimes being added to those over which it had jurisdiction. The uncertainty

prevailing on that point was shown by the fact that some had wished to include piracy among the crimes falling within the jurisdiction of a court. Others had expressed the view that the court should be competent to try crimes against humanity as defined at Nürnberg. In fact, however, there were three requisite elements of a crime against humanity within the meaning of the Nürnberg judgment: atrocities must have been committed; those atrocities must have been committed during an aggressive war or in connexion with an aggressive war. The legal difficulties which would be encountered in bringing before the future international criminal court in time of peace so-called crimes against humanity were thus plain. The definition of crimes against humanity could not be settled until the General Assembly had defined aggression. That question was under study. Lastly, some had expressed the view that the future criminal court would be able to try crimes of genocide. But many States had not yet ratified the Convention on Genocide and it would be premature to give the court jurisdiction in the offences defined by that Convention. Accordingly, his delegation was opposed to the proposal that an international criminal court should be set up by a General Assembly resolution of a political nature. The General Assembly could merely make a recommendation, and any resolution setting up an international criminal court would have no juridical force. The proposal for the establishment of a court by a General Assembly resolution was, in fact, supported by delegations which feared that a convention would not be signed by a sufficient number of countries to bring it into force.

In existing circumstances, the principles stated at the Nuremberg trials could not be applied until they had acquired legal validity, since no person could be punished for the mere infringement of a principle, nor be accused of a crime which was not recognized as such by his own country.

In conclusion, he stated his intention of submitting a working document to the Committee at its next meeting.

Mr. WANG (China) stated that the first method proposed for setting up a court involved amendment of the Charter and was thus not feasible in the present political situation.

The other two methods proposed - an Assembly resolution and an international convention - both had certain limitations. Nevertheless, the United States had proposed (Document A/AC.65/12) a combination of the two methods in order to find a compromise solution.

The Chinese delegation proposed the following procedure: the General Assembly would vote on a resolution recommending governments to adopt the statute of the court, which would then be annexed to the resolution as a draft convention. If the method proposed by the United States were followed, the Assembly would not call on States to ratify the Statute. Why did the United States make no provision for ratification? That method, which was in accordance with normal procedure, should be followed in the setting up of the court.

In conclusion, the speaker requested the United States representative to explain why he considered it preferable that the court should be set up by, and derive its powers from, a convention.

Mr. SAMI (Egypt) wished to make certain observations on the three methods which had been proposed for setting up the court.

The method consisting in the amendment of the Charter had been rejected.

The method consisting in the establishment of the court by a resolution of the General Assembly would strengthen the prestige of the United Nations but the court would be exposed to political influences.

The method of submitting a draft statute for ratification by governments in the form of a convention also had certain drawbacks, since the convention would not be applied unless it were ratified by a large number of countries.

Finally, another method had been proposed: the setting up of a criminal chamber in the International Court of Justice. In that case, too, there were many difficulties to be met; for example, national feelings might frustrate the application of sanctions.

Doubts had been expressed regarding the effectiveness of such a court since certain countries might refuse to accept adverse judgments. Clearly, if a government recognized the international criminal court it ought to undertake to assist its operation by agreeing, for example, to extradite offenders.

Another question was the definition of crimes. The International Law Commission had already stated that the court must not have competence to define crimes; yet no punishment could be inflicted unless the crime in question had been defined. Any hasty action empowering the court to define crimes and punishments, in conflict with the principles stated by the International Law Commission, should therefore be avoided.

In the opinion of Mr. METTLE (France) the trend of the discussion showed that the question how the court should be set up was closely connected with the question of relations between the court and the United Nations. He had already objected in principle to the association of the court with that Organization. He wished to present some comments on the technical juridical aspect to show that there was a discrepancy between the procedure suggested by the United States delegation and the consequent linking of the court to the United Nations.

The United States proposal comprised two juridical instruments, a regulating act (resolution and convention) and a conditional act (signature and ratification). In his view, there was no difficulty if the regulating act concerned only the contracting states; but if that act contained provisions binding not only the contracting states but also the United Nations and those of its Members who did not accede to the statute, as, for example, provisions concerning the election of judges by the United Nations or the competence of the General Assembly in bringing cases before the court etc., then the whole question would have to be reconsidered. Such a procedure would be irregular and at variance with public international law.

It must be admitted either that the resolution was indirectly mandatory (subject to the suspensive condition that the fifteen States should subsequently reach agreement) or that the fifteen States subscribing to the statute would be able unilaterally to create obligations to be assumed by third parties (United Nations and Members not subscribing to the statute). Apart from the irregularity of both those procedures, the situation which would result from their adoption would be paradoxical and dangerous: all the Members of the United Nations would assume certain rights and duties in respect of the court, even though they were not

parties to the statute. It could be asked what use they would make of those rights if the majority still objected to the court in principle. Moreover, the States parties to the statute would find themselves dependent, as far as the court work was concerned, on decisions adopted by organs in which they were the minority. It was doubtful whether the opponents - and the supporters - of the court would accept those possibilities which were implicit in the United States proposal.

The comparison with the International Court of Justice, the main judicial organ of the United Nations, was extremely interesting. Under Article 93 of the Charter, all Members of the United Nations were ipso facto parties to the Statute of the Court and must, even though they did not accept the Court's jurisdiction as far as they themselves were concerned, participate in the election of judges, recognize the validity of the Court's decisions and participate in any executory measures prescribed by the Security Council under Article 94 of the Charter. The same result was desired for the international criminal court, but the whole difference resided in the fact that, in the first case, the rights and duties assumed by States were based on a conventional arrangement (signature and ratification of the Charter), whereas, in the second case, it would be based solely on the General Assembly resolution.

The only effect of the United States proposal, on the other hand, was to amend the Charter by implication. If the Member States were to be confronted with all the consequences of their vote, it was very unlikely that they would agree to "cross the Rubicon" even by the detour of a resolution.

There were only two logical methods; the first, which was a theoretical and ideal one, was to make the court one of the organs of the United Nations, but that involved revision of the Charter. The other method, which was not theoretical but practical, was to make the court an intergovernmental organization set up by agreement and having no connexion with the United Nations.

The CHAIRMAN asked the French representative what effect acceptance of the principle that the court should be established by a convention would have on the provisions relating to the function of the United Nations.

Mr. MERLE (France) replied that there was, in fact, a conflict between the establishment of the court by convention and the competence of the United Nations. The French delegation had already referred to that point.

Mr. DAUTRICOURT (Belgium) agreed with the representatives of France, Israel and the Netherlands that the method by which the court should be established could not be considered apart from the court's relationship with the United Nations. Hence the Committee should first consider item 3 of its agenda before reaching a decision on the establishment of the court.

Mr. MAKTOS (United States of America), replying to the French representative's remarks, pointed out that the United States proposal did not contain any provision which would enable a certain number of States automatically to impose obligations upon the others. The General Assembly would authorize them to do so. The French representative had taken the view that some States would be reluctant to accede to the convention if the General Assembly were authorized to elect the judges. That seemed unlikely because, as in the case of the International Court of Justice, States would apparently be willing, on the contrary, to entrust the election of judges to the General Assembly, particularly if they were prepared to submit to the court's jurisdiction.

The court could not render a decision unless the State concerned had signified its acceptance of the court's competence in respect of a particular crime. Hence, the court's decisions could not be challenged by the States concerned if they had agreed, in that particular instance, to confer jurisdiction upon the court.

With regard to the method of establishing the court, he felt that the United Nations should play a part since that would enhance the Organization's prestige. On the other hand, if the court was established as the result of a diplomatic conference possibly only four or five States might ratify the convention.

In reply to the Venezuelan representative, he pointed out that under the terms of the United States proposal the General Assembly would, in fact, establish the court. That point might be made clear in the Committee's report.

The Venezuelan representative had said that establishment of the court by a General Assembly resolution to which the court's statute would be annexed might discourage some States because the statute would be somewhat rigid. While it was indeed desirable that the greatest measure of flexibility should be ensured, surely the statute as it was contained provisions which were necessarily rigid, such as those relating to the judges' work. Moreover, it was for the Committee to liberalize, if necessary, the provisions of the draft statute before it. The statute mentioned in the United States proposal was not necessarily that drafted by the 1951 Committee.

In reply to the representative of Panama, he admitted that the listing of crimes within the court's jurisdiction gave rise to serious difficulties. The 1951 Committee had refrained from inserting a list of such crimes in the draft statute in order to enable States to confer jurisdiction upon the court in respect of certain crimes only which were recognized as crimes in their own courts. It was obvious, however, that no State would agree to confer jurisdiction upon the court in respect of a specific crime unless the crime had first been defined. The Panamanian representative had supported the setting up of a criminal chamber within the International Court of Justice. That procedure, to which the United States would not have any strong objection, would require an amendment of the Charter and the representative of Panama himself had admitted that such an amendment could not be considered under present conditions.

In reply to the representative of China, he pointed out that many States which were not prepared at present to establish an international criminal court by convention would willingly submit to its jurisdiction, by accession to the convention, once the court had been established. Ratification of the statute would be the implied consequence of accession to the convention under which States conferred jurisdiction upon the court. Many States would be reluctant, under present conditions, to become parties to a convention which established an international criminal court. The method favoured by the United States - a General Assembly resolution to which the statute of the court was annexed, followed by a convention conferring jurisdiction - would bestow the full prestige of the

United Nations upon the court. It did not commit a State to establish anything. As for the extent to which the court would have work, it was indicated in the draft statute that the court would be in session only when cases were submitted to it.

Mr. PEREZ PEROZO (Venezuela) wished to clear up a misunderstanding. He had not meant that the provisions of the statute were too rigid but rather that the United States proposal would make it impossible for States to make reservations to that statute. Preferably, the court should be established by a convention which States could sign subject to reservations.

Mr. de la OSSA (Panama) felt that the United States representative had misunderstood his position. His remarks had not been meant to refer to the jurisdiction of the court. He had merely said that he could not agree to the establishment of an international criminal court without a previous definition of the crimes with which it would deal.

The CHAIRMAN suggested that, before considering the next item on its agenda, the Committee should take a vote on the method of establishing the court. Consideration of the draft statute would thus be facilitated.

Mr. RÖLING (Netherlands) said that he wished to consider the matter further in view of the very interesting statement made by the French representative.

Mr. VALLAT (United Kingdom) felt that the problem was so complicated that the Committee could not take an immediate decision. He therefore proposed that the Committee should not decide on the method of establishing the court until it had concluded consideration of item 5, just before adopting its report. He submitted a formal motion to that effect. He also felt that a vote was not necessary. The General Assembly expected the Committee to submit an opinion rather than to take a vote.

Mr. GARCIA OLANO (Argentina) supported the United Kingdom motion.

Mr. MAURTUA (Peru) said that even before the discussion he had entertained serious doubts as to the legal interpretation of the word "convention". His doubts had now been confirmed. There might be a close relationship between the proposed convention and the text of the draft statute of the court submitted by the 1951 Committee. The convention would, in fact, depend on the extent of the court's powers and on the relationship between the court and the United Nations. Adoption of a convention might lead to a disguised amendment of the United Nations Charter. Therefore, the method by which the court should be established was a matter to be settled by the Committee at the very end of its deliberations. For the reasons given, the Peruvian delegation supported the United Kingdom motion.

Mr. RÖLING (Netherlands) agreed with the United Kingdom representative's view that a vote was not necessary. The Committee had, in fact, been asked to consider the statute which had been drafted by the 1951 Committee on the assumption that the court would be established by convention. The Committee should continue its consideration of item 3. He intended to refer again at the next meeting to the question of the relationship between an international criminal court and the United Nations and its organs.

The CHAIRMAN put the United Kingdom motion to the vote.

The United Kingdom motion was adopted by 14 votes to none, with 2 abstentions.

The meeting rose at 12.55 p.m.