

UNITED NATIONS
GENERAL
ASSEMBLY



Distr.
GENERAL

A/AC.65/SR.7
24 August 1953
ENGLISH
ORIGINAL: FRENCH

1953 COMMITTEE ON INTERNATIONAL CRIMINAL JURISDICTION

SUMMARY RECORD OF THE SEVENTH MEETING

Held at Headquarters, New York,
on Tuesday, 4 August 1953, at 10.30 a.m.

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<u>Rapporteur:</u>	Mr. RÖLING	Netherlands
<u>Members:</u>	Mr. GARCIA OLANO	Argentina
	Mr. LOOMES	Australia
	Mr. DAUTRICOURT	Belgium
	Mr. WANG	China
	Mr. DONG-MOELLER	Denmark
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	Mr. de la CSEA	Panama
	Mr. MAURTUA	Peru
	Mr. MENDEZ	Philippines
	Mr. VALLAT	United Kingdom of Great Britain and Northern Ireland
	Mr. MAKTOG	United States of America
	Mr. PEREZ PEROZO	Venezuela
	Mr. NINCIC	Yugoslavia
<u>Secretariat:</u>	Mr. STAVROPOULOS	Principal Director in charge of the Legal Department
	Mr. LIU	Secretary of the Committee

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

Mr. ROLING (Netherlands), Rapporteur, wished to make a few remarks on the historical background before he dealt in detail with the problem of the relationship between the international criminal court and the United Nations. The debate so far seemed to indicate support for the establishment of an international criminal jurisdiction by means of a convention. It might therefore be useful to go back to the beginning, in other words to the Nuremberg and Tokyo trials. At those trials individuals had been sentenced for violations of the rules of international law and the tribunals had made it clear that they were applying the rules of international law without amending them in any way. To some, those trials, particularly the Nuremberg trial, had been a milestone in the history of international law. Statements to that effect had been made by Mr. Henry L. Stimson and Sir Hartley Shawcross.

As Judge Biddle had said, the conclusions drawn from the Nuremberg trial would not be of real significance unless the necessary measures were subsequently taken.

The measures were, first, a clear codification of the law applied at that time, and next, the establishment of international criminal jurisdiction. With regard to the first point, the General Assembly had affirmed the principles of Nuremberg, the International Law Commission had formulated the principles invoked at the Nuremberg trial and had formulated a draft code of international criminal law. As to the second point, the question of the establishment of an international criminal court had been raised in 1947 by Mr. Donnedieu de Vabres, French representative on the Committee on the Progressive Development of International Law and its Codification. The question had been referred to the International Law Commission for study, then to the Geneva Committee in 1951 and now to the 1953 Committee. Being a general question, it should be settled within an international organization, in other words within the United Nations. It could not be solved by the drafting of a convention to which only some States would accede.

However, the present state of international relations was known to all. Not all the States would be willing to agree that an international court should take cognizance of crimes committed by their nationals and the United Nations could not compel them to do so. Therefore, the only remaining solution was the establishment of an international criminal court within the United Nations and to provide for the possibility of voluntary submission to jurisdiction of the Court. As amendment of the Charter was a method which must be put aside for the time being, the only method was apparently that of a resolution, which had the advantage of ensuring a link between the international criminal court and the United Nations, and of being the most suitable way to establish the frame of universality in which, on a small scale, according to present state-inclinations, international criminal jurisdiction would be realized.

It should be borne in mind that people had become used to the level of present domestic jurisdiction, whereas relations between States were still extremely primitive. The modern State was somewhat like the free man - in other words, the individual - of the fifth to the eighth century in Europe. The only jurisdiction he recognized was his own, and the attitude of the present State was similar. Caution and patience should therefore be observed. Present international criminal jurisdiction could only be jurisdiction on a primitive level. The court ad hoc was one of the indications of the primitive nature of international relations. The next step would therefore be the establishment of a permanent court, but it must not be forgotten that the various States must voluntarily recognize its jurisdiction. Another unusual feature at the present stage of international relations was the development of regional jurisdiction, such as in the European Coal and Steel Community.

Yet the time had come for the global approach to international criminal jurisdiction, that would mean within the framework of the United Nations. It would be desirable to ensure strong ties between the Court and the United Nations.

The following links between the international criminal court and the United Nations should be established in the statute:

1. The United Nations should appoint the judges.
2. The United Nations should not appoint the prosecutor, one of the consequences of the primitive stage of international criminal jurisdiction being that the complainant State would take care of the prosecution.

3. A committing authority need not be established, as that would make the organization of the court too complicated. The court itself should perform that function.

4. The United Nations, which was called upon to maintain the peace, should be empowered to prevent the court from being seized of a case if it was felt that a trial might endanger peace, for instance, by making the peaceful settlement of a dispute difficult. The decisions in such a case should be taken neither by the General Assembly nor by the Security Council. A special organ consisting of States members of the Security Council must therefore be set up. It might be called a board of supervision

5. Article 54 of the draft statute provided for the establishment of a board of clemency. Its functions could be performed by the above-mentioned organ, which would then be called a board of supervision and clemency. The function of the United Nations would thus be to establish the court, appoint the judges and set up the board of supervision and clemency.

6. Under article 28 of the draft statute, no jurisdiction could be conferred upon the court without the approval of the General Assembly of the United Nations. In view of the fact that under article 1 the court's function would be to try persons accused of crimes under international law, it would be better to provide that the General Assembly could, whenever it thought it necessary, refuse to confer competence upon the court.

7. Article 29 of the draft statute should be retained as it was, but a new article should be added under which the board of supervision would, in the interest of maintaining peace, be able to withdraw a case being tried by the court.

Finally, if the General Assembly established the court by resolution, and if the court's relationship with the United Nations was such as he had just described, the principles invoked at Nuremberg and Tokyo could be applied and international relations could be developed.

Mr. ROBINSON (Israel) said that it was pointless to consider the relationship between the international criminal court and the United Nations without basing the discussion on one of the three or four methods proposed for

establishing the court. He could not accept Mr. Röling's assertion that the only way of establishing a link between the court and the United Nations would be to establish the court by a General Assembly resolution. Many international groups had been established outside the United Nations and nevertheless maintained close relations with it. Some of those groups were constituted differently from the United Nations. Some were broader (e.g. the membership of the "community" of the International Court of Justice) while others were narrower (e.g. the Refugee Convention group).

A distinction must be made between the questions to be settled by the General Assembly, on the one hand, and the decisions adopted by convention, on the other. He could not accept the French representative's proposal that any relationship between the international criminal court and the United Nations should be avoided.

So far as the basis of discussion was concerned, he preferred to take into reconsideration the draft statute as it stood without, however, neglecting the observations and proposals of governments.

The problem of the relationship between the international criminal court and the United Nations presented three aspects: the part to be played by the United Nations in establishing the court; the functions devolving upon the United Nations under the statute to be adopted at the future diplomatic conference; co-operation between the court and the United Nations.

The first point raised no serious problem: it must be decided whether it was desirable to establish the court on the basis of the statute to be submitted to the General Assembly for consideration. If the General Assembly favoured the establishment of the court, it would have to invite the Secretary-General to call a conference to complete the drafting of the statute and of other instruments which would make it possible to confer competence on the court and to facilitate its work. The group represented at the conference would also have to ask the United Nations to assume certain responsibilities. Those measures were all in accordance with Article 13 of the Charter.

The decision to call the diplomatic conference would have to be adopted by a two-thirds majority: it would thus be possible to ascertain whether Member States were really prepared to encourage the establishment of the international criminal court. Moreover, that was certainly an important question in the sense of

Article 18 of the Charter. An additional reason for insisting on that majority was the fact that the diplomatic conference would raise budgetary problems; it should be recalled in that connexion that the budget was adopted by a two-thirds majority.

The time when the conference was to be called must also be decided. Again, the question of participation of non-member States in the conference and of Member States as observers, would have to be taken into account. He proposed that before inviting Governments to participate in the conference, the Secretary-General should make sure that the conference would be attended by at least half the States Members of the United Nations. If that figure was not reached, it must be concluded that the majority of States were not yet prepared to establish the court and that the General Assembly was not ready to assume the responsibilities which would devolve upon it as a result of the establishment of the court.

The conference would have to complete the court's statute, draft the instruments conferring competence on it and make provision for the measures which Member States would have to adopt to ensure its operation. But the United Nations would still have to assist the court in the initial stages of its existence. Among other things, the General Assembly would be asked by the diplomatic conference to give the Secretary-General the necessary powers in connexion with the depositing of the instruments of ratification and of accession. It would also have to give him the authority necessary for fulfilling the functions devolving upon him under articles 8, 9, 11, 12, 18 and 19 of the court's statute.

He reserved the right to return later to the committing authority, which appeared to him to have been too vaguely conceived.

Turning to the legal grounds that could be adduced for asking the United Nations to provide the court with those various services, he admitted that there was no provision in the Charter to that effect. However, that did not mean that the General Assembly or the Secretary-General lacked authority to assume such responsibilities. Furthermore, a misconception about the Charter should be corrected. Contrary to frequent assertions, the Charter was not a code of international law. On the other hand, its Articles did not strictly limit the

functions of the principal and subsidiary United Nations organs. The Peace Treaties concluded with the European Satellite Powers of the Axis provided that the Secretary-General would have authority to appoint a third arbitrator in the case of disagreement among the parties. The General Assembly could therefore, and a fortiori by resolution, assign to the Secretary-General all the functions provided for in the statute.

In regard to the matter of co-operation between the court and the United Nations, it was rather curious that those who thought that the administration of international penal justice was a factor in the maintenance of peace supported the view that proposed trials should be screened by a competent body in order to determine whether such trials were compatible with the maintenance of peace. He welcomed the idea of a political screening of complaints but it seemed that the United Nations had been for some time yielding too easily to the constant tendency to establish new subsidiary bodies, the multiplication of which might create confusion. There was no reason why the function should not be assigned to the Peace Observation Commission, which seemed to be the body best qualified to determine whether a complaint before the court was liable to endanger peace. Such a screening process was in full accord with the Charter and the functions of the General Assembly in maintaining peace.

The Netherlands representative had listed the duties which the General Assembly would have to perform on behalf of the court after establishing it: adoption of the court's statute, election of the judges, action to ensure States representation, a fair trial, and application by the court of world law. While it might be possible to speak of international law, it was not possible to speak of world law since there was no legislative organ to define it.

With regard to the statute of the court, he agreed with the United Kingdom representative that a conference of plenipotentiaries would be better qualified than the General Assembly to draw it up, for two reasons: first, the political reason that a conference of plenipotentiaries had a sharper sense of responsibility; secondly, the legal reason that a political conference was usually composed of experts specially qualified in the subjects under consideration.

With regard to the election of the judges, it should not be forgotten that the development of international law was a sinusoidal process, subject to rises and falls, to phases of enthusiasm and of skepticism. If the task of electing the judges of the international criminal court were entrusted to the General Assembly, he wondered whether that would not discourage some governments which were not fully convinced of the usefulness of the court and which were hesitant about becoming parties to the new community. If States could influence the composition of the court without assuming any responsibilities in regard to it, there was no reason for them to do more than lip service to the court.

The United States proposal had some excellent features, but the suspending clause which was its linchpin presented a serious difficulty. The United States plan meant in effect that the General Assembly would establish the court by a resolution but that the court would only come into being when fifteen States had conferred competence upon it. Now, it might happen that the conventions adopted by those fifteen States had no common feature; one, for instance, might confer upon the court competence in the crime of genocide, another competence in the crime of aggression, another competence to determine the responsibility of States, and so on. In the circumstances, he wondered whether it would be possible to consider the suspending clause operative.

To sum up, while the United Nations might not be the parent body proper of the new-born court, it would be the midwife and nurse and would always remain its guide and friend.

Mr. MERLE (France) explained that, in pointing out at the last meeting the contradiction between the United States proposals and the ends they sought to achieve, he had not meant to prejudge the substantive question of the future relationship between the United Nations and the international criminal court. His remark had been concerned simply with a matter of procedure and technique.

Either the resolution would in fact have binding force with a suspending provision, or the convention concluded among a few States would create unilaterally rights and duties incumbent on the United Nations and its Members. The United States appeared to prefer the former interpretation. In that case the General

Assembly would be the real creator of the court and that was the idea he opposed, because he considered it illogical. Contrary to what the United States representative appeared to believe he himself felt that all Member States would be bound and he could not accept that because it was inadmissible that a General Assembly resolution should have binding force, even indirectly.

To the two methods so far proposed, that of the United Nations establishing a United Nations organ - which raised the problem of a prior amendment of the Charter - and that of establishment by convention - which did not seem to require links between the United Nations and the court - the Israel representative had just added a third solution. It was an able compromise solution, maintaining the initiative and supremacy of the United Nations, but supplying solid guarantees in application.

The system put the mechanism in lower gear. First, the General Assembly would decide by resolution to call an international conference. Then, the conference would draw up, possibly with United Nations assistance, a convention and annexed instruments. Lastly, governments would have to accept or reject the convention and its annexes. It was proposed to include powerful enough guarantees to make it possible to regard the court as a United Nations organ. At all events, the diplomatic community would decide upon the relationship to be established between the United Nations and the international criminal court.

The Israel representative's proposal deserved very careful study and he hoped that it would be submitted in definite written form. He would also like the Israel representative to define his views on two points: the election of the judges and the General Assembly's right to file a case with the court.

Mr. ROBINSON (Israel) answered that he would try to submit a definite proposal. He was opposed to the election of the judges by the General Assembly, whose intervention should be confined to the problem of maintaining peace.

Mr. MAKTOU (United States) expressed surprise that the Israel representative, whilst undoubtedly in favour of the creation of an international criminal court, proposed to achieve that end by methods which were ineffective, if not impracticable. In the Israel representative's opinion, states should be asked to use the method of establishment which bristled with most difficulties in order to test the sincerity of their desire to achieve their aim.

He himself, on the contrary, thought that the easiest way should be proposed, and that the goodwill of States should not be tried too far, particularly as the international atmosphere was not on the whole favourable to the proposed innovation. If the two-thirds majority required under Article 18 of the Charter were to be made a condition for the calling of a preliminary conference, many jurists, and he himself among them, might consider that the calling of such a conference was not an "important" question, within the meaning of the Article, and the conference would thus be liable to founder on a point of detail. Care must be taken to remove any pitfalls in the procedure and the aim should rather be to avoid all difficulties and to achieve slow but continuous progress as easily as possible. The Israel representative had used the phrase festina lente, but only the latter word should apply.

In connexion with the figure of fifteen proposed in paragraph 1 B of United States working paper (A/AC.65/L.2), the Israel representative had rather ironically remarked that it was not possible to add unlike quantities and that no serious significance could be attached to fifteen grants of competence if they referred to different and unconnected crimes. The Israel representative failed to appreciate that the only inference which the makers of that proposal intended to draw from the fifteen grants of competence was that a certain number of states were willing to submit to the jurisdiction of the international criminal court, even though on different matters.

With regard to the method of election of the judges, the Israel representative had expressed the fear that some States might refuse to accept the jurisdiction of the international criminal court if the judges were appointed by the General Assembly. He himself was certain that if states, and particularly the United States of America, agreed to confer competence on the international criminal court they would do so for reasons serious and important enough to make the method of appointment of the judges a minor matter.

The Israel representative had referred to certain conventions - that or the Declaration of Death of Missing Persons for example - in support of his argument in the present discussion. But he was losing sight of the fact that there was no possible comparison between the aims in each case, between the problem of establishing an international criminal court and other problems of infinitely more limited scope.

To propose now that a preliminary conference called by a two-thirds majority of the Members of the General Assembly should be entrusted with the drafting of the statute of the international criminal court was to ignore the fact that a draft statute existed and had been found largely satisfactory. Any drafting work done by the conference would be a duplication.

The proposals put forward by the advocates of a convention, those who rejected the idea of a General Assembly resolution, appeared to bristle with difficulties and the objections which they put forward, such as the already too great number of organs of the United Nations, were hardly relevant. The only question germane at the time when any organ was established was the need for it. Any other consideration was quite unimportant.

He reserved his right to return to a number of questions during the discussion of item 4 of the agenda, which it would seem desirable to take up forthwith. He expressed his firm belief that to adopt the solution of establishing an international criminal court merely by way of a convention would be to strike a mortal blow at the very principle of setting up such a court.

The CHAIRMAN proposed that at its next meeting the Committee should begin the study of the draft statute, article by article. That method would not preclude general discussion, but would clarify it.

Mr. ROBINSON (Israel) approved the Chairman's proposal with two reservations. It was not necessary to study the whole draft. The Committee should merely discuss those articles which, directly or indirectly, had called forth comments. Moreover, proposals had been advanced for filling gaps in the statute. The Committee must not neglect that matter, whether it took the proposals in their logical order or considered them at the end of the discussion.

The CHAIRMAN repeated his proposal to discuss the statute article by article. He asked the Rapporteur to take into account not only the observations previously submitted by governments and set out in the Secretariat document (A/AC.65/1), but also any new observations and proposals made during the discussions. Members of the Committee could always bring up the question of gaps.

Replying to a question from Mr. MAKIOS (United States), the CHAIRMAN stated that he would discuss the question of a drafting committee with the Rapporteur.

The meeting rose at 12.50 p.m.