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1953 COMMITTEE ON INTERNATIONAL CRIMINAL JURISDICTION

SUMMARY RECORD OF THE FIFTEENTH MEETING

Held at Headquarters, New York
on Wednesday, 12 August 1953, at 10.30 a.m.

CONTENTS

Re-examination of the draft statute prepared by the 1951 Committee
on International Criminal Jurisdiction (continued)

PRESENT:

<u>Chairman:</u>	Mr. MORRIS	United States of America
<u>Rapporteur:</u>	Mr. ROLING	Netherlands
<u>Members:</u>	Mr. GARCIA OLANO)	
	Mr. LAUREL)	Argentina
	Mr. LOOMES	Australia
	Mr. DAUTRICOURT	Belgium
	Mr. WANG	China
	Mr. DONS-MOELLER	Denmark
	Mr. MERLE	France
	Mr. ROBINSON)	
	Mr. MARMOR)	Israel
	Mr. MAURTUA	Peru
	Mr. MENDEZ	Philippines
	Mr. VALLAT	United Kingdom of Great Britain and Northern Ireland
	Mr. MAKROS	United States of America
	Mr. PEREZ PEROZO	Venezuela
	Mr. NINCIC	Yugoslavia
<u>Secretariat:</u>	Mr. LIU	Secretary of the Committee

RE-EXAMINATION OF THE DRAFT STATUTE PREPARED BY THE 1951 COMMITTEE ON
INTERNATIONAL CRIMINAL JURISDICTION (continued)

Article 35

The Committee tentatively adopted article 35 as worded in the draft statute.

Article 36

Mr. ROLING (Netherlands) proposed that the Committee should defer consideration of the article pending a decision on the wording of article 27. If the Committee decided to delete the words "and by the State or States in which the crime is alleged to have been committed." from article 27 it would also have to delete the words "and of the State in which the crime is alleged to have been committed" from article 36, paragraph 1.

Mr. DONS-MOELLER (Denmark) felt that the wording of article 36 should be retained irrespective of the decision taken with regard to article 27.

Mr. DAUTRICOURT (Belgium) suggested that provision should be made for notice of the indictment to be transmitted also to the State of which the victim of the international crime was a national.

Mr. MAKROS (United States of America) proposed that in paragraph 2 the word "or" should be replaced by "and", and the words "as the case may be" omitted.

The CHAIRMAN suggested that, in accordance with the Netherlands representative's proposal, those points should be taken up after the Committee had decided on the wording of article 27.

It was so agreed.

Mr. ROBINSON (Israel) hoped that the drafting sub-committee would, in considering article 36, take the Israel Government's views (A/AC.65/1, page 31) into account.

Article 37

Mr. MAKTOS (United States of America) proposed the addition of the words "except where otherwise provided in the convention, special agreement or unilateral declaration by which the accused is subject to the jurisdiction of the Court." The amendment would enable States recognizing the system of trial by jury to accede to the statute.

Mr. MENDEZ (Philippines) observed that the legislation of some States which had not adopted the system of trial by jury provided for the attendance of assessors at trials. That was the case in the Philippines. Cases were tried by a judge sitting alone but the parties to the action could decide to avail themselves of the services of two or more assessors to be selected from a panel of reputable independent laymen or jurists. The assessors had no voice in the decision but acted as observers. They examined the facts of the case and submitted their report. It was usual for the judge to take their views into consideration before rendering his judgment.

He wondered whether the United States amendment covered that point.

The CHAIRMAN too, it to be the Philippine representative's view that provision for the employment of assessors should be made in the convention, special agreement or unilateral declaration by which the accused person was subject to the jurisdiction of the international criminal court. He himself felt that the point was covered in the United States amendment.

Mr. MENDEZ (Philippines) asked the Rapporteur to include that interpretation in the Committee's report.

Mr. LOOMES (Australia) pointed out that the wording suggested by the United States representative might have to be amended to bring it into line with the terminology used in other articles of the statute.

Mr. ROLING (Netherlands) asked the United States representative for particulars concerning the operation of the jury system under his proposed amendment. Would the details be laid down in the instrument conferring jurisdiction upon the international court?

Mr. MAKTOG (United States of America) replied that the circumstances governing a trial by jury would be settled by the States concerned. The United States amendment was intended to add elasticity to the operation of the court by allowing it to try a case by jury if the States concerned so desired. They might do so in the case of specific crimes such as genocide. However, there was no element of compulsion in the proposal.

Mr. MAURTUA (Peru) felt that provision for trial by jury would complicate the court's work. Moreover, there was a close relationship between articles 35 and 37. Any amendment of the latter along the lines suggested by the United States representative would have a bearing on the provisions of article 35 paragraph 1.

Mr. MERLE (France) agreed with the Peruvian representative. It was dangerous to make provision in the statute for alternative methods of trial. Moreover, the introduction of a jury system might lead to results which were the opposite of those the Committee was attempting to achieve. He would therefore vote against the United States amendment.

The CHAIRMAN observed that the present wording of article 37, "Trials shall be without a jury" would preclude some States from conferring jurisdiction upon the international criminal court. The United States amendment was being proposed as an escape clause, designed to facilitate their accession to the statute.

Mr. ROLING (Netherlands) said that while trial by jury was not recognized in the Netherlands, some States felt very strongly on that point. He would therefore vote in favour of the United States amendment.

Mr. MENDEZ (Philippines) observed that trial without a jury seemed to be the practice in most countries. Adoption of the United States amendment might make them reluctant to accede to the statute. Moreover, trial by jury in an international criminal court would give rise to numerous complications. For instance, from what country would the jurors be selected, assuming that the prosecuting attorney represented the complaining State?

Mr. MERLE (France) said that, in view of the Chairman's explanation, he would not vote against the United States amendment but would abstain. He still preferred the text of the article as contained in the draft statute.

Mr. PEREZ PEROZO (Venezuela) concurred in the French representative's views. Trial by jury under domestic legislation implied trial of an accused person by his peers, in other words by persons who had the same background as the accused. That would not be the case in an international trial, where a person might be tried in one State for a crime committed in another State. Moreover, while the international court might conduct a trial outside its permanent seat, that would be the exception rather than the general rule.

He could not see any justification for the United States proposal but, in view of the Chairman's explanation, would abstain.

Mr. GARCIA OLANO (Argentina) said that he too would abstain.

Mr. NINCIC (Yugoslavia) felt that, in addition to the difficulties mentioned by previous speakers with respect to the United States amendment, the introduction in the draft statute of elements of the criminal procedure applied in a particular State would complicate the drafting of a logical statute for an international court. It was his understanding, however, that trial by jury would be the exception rather than the rule. He would therefore abstain from voting on the United States amendment.

Mr. MAKTOŠ (United States of America) observed that the difficulties referred to by several representatives, for instance the question of the selection

of the jurors, could be settled by the parties in the convention or special agreement. It would be for them to decide how the trial of a particular crime should be conducted.

The Committee was faced with the problem of choosing between an ideal statute, to which many States might not accede, and a realistic one which would commend itself to a majority of States. The United States delegation preferred the latter. In fact, during the drafting of the Convention on Genocide at Geneva, the United States had won an important point but had not hesitated to change its position when informed that several Latin American States would find it difficult to accede to the convention if the destruction of political groups was considered an act of genocide. They had pointed out that the repression of a political revolution might require the destruction of a political group. The United States had conceded that point and the wording of the relevant article had been amended. The United States delegation had thus deferred to the wishes of several delegations for the sake of making the convention acceptable to as many States as possible. The Committee was faced with a similar situation.

The CHAIRMAN put article 37, as amended by the United States, to the vote.

Article 37, as amended, was tentatively adopted by 4 votes to none, with 10 abstentions.

Article 38

Mr. MENDEZ (Philippines) suggested the inclusion of a provision guaranteeing the personal safety of an accused person. That was implicit in domestic jurisdiction. A person accused of a crime under international law might have to proceed to the seat of the court for trial; he should be protected during the journey.

The CHAIRMAN suggested that the point was covered by article 42, which provided for the maintenance of order at the trial.

Mr. WANG (China) felt that the protection of the accused when not actually in court was a matter for the police.

Mr. DAUTRICOURT (Belgium) proposed the addition of the words "provided that, by his action, he does not hinder the course of justice" in article 38, paragraph 2(a). An accused person might wish to sabotage his own trial.

Mr. LOOMES (Australia) suggested that article 42 would cover that case. The court was empowered to maintain order at the trial.

Mr. MENDEZ (Philippines) observed that article 42 covered the situation referred to by the Belgian representative but not the point he himself had raised.

The CHAIRMAN observed that the Committee, while appreciating the Belgian representative's point, felt that no limitation should be imposed on the right of the accused to be present at all stages of the proceedings; the court would have adequate powers under article 42 of the draft statute to maintain order at the trial.

Mr. DAUTRICOURT (Belgium) wondered whether the implication was that the court might, under certain circumstances, continue the proceedings in the absence of the accused.

The CHAIRMAN replied in the affirmative.

Mr. DONS-MOELLER (Denmark) suggested that the drafting sub-committee should consider the advisability of rewording paragraph 2(b) so as to limit the number of counsels for the defence.

Mr. LOOMES (Australia) agreed, and felt that the point would be covered by the insertion of the word "reasonable" before the word "expenses" in paragraph 2(c).

Mr. GARCIA OLANO (Argentina) pointed out a discrepancy between the Spanish and French versions of paragraph 2(b), which referred to "counsel" in the singular, and the English text, in which the term could be taken as singular or plural.

The CHAIRMAN recalled that the 1951 Committee had drafted the original text in English with the intention that the accused could have one counsel or more. The French and Spanish versions should be amended accordingly.

Mr. RÖLING (Netherlands) felt that the existing text of the draft statute empowered the court to rule, if necessary, on the number of counsel for the defence. Moreover, according to paragraph 2(c), if the court was satisfied that the defence requirements of the accused were adequately met, it would not authorize further expenditure for that purpose.

In reply to an enquiry from Mr. MAURTUA (Peru), the CHAIRMAN said that the 1951 Committee had considered that no accused person could invalidate the court's jurisdiction by failing to attend the trial, except for reasons of force majeure. An absent accused person could only challenge the court's ruling if he had not been notified or if he had been prevented from attending.

Mr. MENDEZ (Philippines) suggested that the word "speak" in paragraph 3 should be amended to read "testify". It was not a question of giving the accused the opportunity of speaking in general but of submitting evidence on his own behalf. The proper interpretation of "speak" was juridical rather than grammatical, otherwise the case of a mute could be cited to negate the literal import of the word in question. A court was not an orators' club but an organ of law. The draft statute said an accused could not be compelled to speak; obviously, it was not logical to compel a person to exercise a right. What was logical was to assure a member of an orators' club that he would not be compelled to speak. The question involved was a fundamental rule of evidence, namely, that when a witness answered a question he subjected himself to questions by the court and could not thereafter refuse to answer. The last sentence of article 38 which said that "should he elect to speak, he shall be liable to questioning by the Court and by counsel" clearly showed that "speech" in that context meant testimony. The liability to questioning obviously could not mean that he would be questioned about a matter totally irrelevant to the issue of his innocence or guilt, for in such a case the court's duty was to stop the irrelevance rather than to encourage it.

Mr. ROLING (Netherlands) recalled that the matter had been exhaustively discussed by the 1951 Committee which had preferred the more neutral term "speak".

Mr. PEREZ PEROZO (Venezuela) pointed out that the Spanish text rightly used the word declarar, which was equivalent to "testify".

Mr. MAURTUA (Peru) remarked that, according to article 38, the accused could refuse to speak. There were courts, for instance in Peru, where a statement by the accused could not be used as proof against him except after verification of the facts. There was a case for attributing some legal value to the testimony of the accused. The matter might be brought out in the Committee's report.

Mr. DAUTRICOURT (Belgium) proposed the addition to paragraph 3 of the words: "He shall not be compelled to swear an oath."

Mr. VALLAT (United Kingdom) said that a substantial risk was involved in using the word "testify". If the term were adopted, and an accused person wished to "testify", then, so far as English law was concerned, the court might have to decide whether what he said was testimony. If the word "speak" were retained, the accused would have wider latitude. It should be remembered that the main purpose of article 38 was to ensure that the accused had a fair trial.

Mr. MERLE (France) felt that article 24 solved the difficulty. The court itself could decide on the interpretation of texts such as that under discussion.

Mr. MAKTOB (United States of America) drew attention to the Netherlands representative's statement, at the sixteenth meeting of the 1951 Committee, to the effect that, since an accused before the court might be a national of a country where the Anglo-Saxon system of law applied, the Drafting Sub-Committee had considered it desirable to afford him the right, within the court's procedure, of making a sworn statement and of being cross-examined.^{1/}

^{1/} A/AC.48/SR.16, page 7.

Mr. DAUTRICOURT (Belgium) agreed that an accused person should be free to swear an oath if he so desired, but it should be made clear in the draft statute that he could not be compelled to do so.

The CHAIRMAN put the Belgian amendment to the vote.

The amendment was adopted by 3 votes to 1, with 10 abstentions.

The CHAIRMAN put the Philippine amendment to the vote.

The amendment was rejected by 10 votes to 4.

Mr. MENDEZ (Philippines) wondered whether the court could arrive at a just decision if the accused had not spoken.

Mr. ROLING (Netherlands) replied that an accused person should never be compelled to co-operate in establishing his own guilt. He felt sure that article 38 as it stood would ensure a fair trial.

Mr. DONS-MOELLER (Denmark) proposed that paragraph 2(c) should be amended to read:

"The right to have the reasonable expenses of his defence charged to the fund referred to in article 23 in so far as the court is satisfied that the accused is financially unable to discharge such expenses."

Mr. LAUREL (Argentina) again referred to the disparity between the English text on the one hand, and the French and Spanish versions on the other, with regard to the number of counsel for the defence (sub-paragraphs (b) and (c)).

Mr. DAUTRICOURT (Belgium) and the CHAIRMAN felt that the French and Spanish versions of sub-paragraph (b) should be altered to conform to the English text which used the word "counsel" and which implied that more than one might be employed. They agreed, and Mr. VALLAT (United Kingdom) concurred, that the Danish proposal disposed of that problem in respect of sub-paragraph (c).

At the suggestion of Mr. VALLAT (United Kingdom), Mr. DONS-MOELLER (Denmark) deleted the word "financially" from the text of his proposal, to allow for contingencies such as the possession of adequate funds which might not be available due to the blocking of the accused's account.

The Danish amendment to paragraph 2, sub-paragraph (c) was adopted by 10 votes to none, with 2 abstentions.

Mr. ROLING (Netherlands) reserved the right to propose some slight changes in article 38, in line with the comment of his Government (A/AC.65/1, page 31, paragraph 2), at a later stage.

Article 39

At the request of Mr. MENDEZ (Philippines), the CHAIRMAN explained that in drafting article 39 the 1951 Committee had had in mind that the court's deliberations should take place in private and its sittings in public; he added that any convention, or unilateral declaration, which stipulated that a certain type of crime should be tried by a jury would specify how the jury was to function.

Mr. DAUTRICOURT (Belgium) felt that there might be an element of contradiction between article 39 and article 48 in that the secrecy of the court's deliberations was difficult to reconcile with a provision for the delivery of separate opinions.

The CHAIRMAN and Mr. ROLING (Netherlands) both felt that there was no contradiction between privacy of deliberations and public delivery of separate opinions.

Mr. VALLAT (United Kingdom) drew a parallel between articles 39 and 48 of the draft statute and Articles 54, paragraph 3, 56, paragraph 1, and 57 of the Statute of the International Court of Justice, which functioned satisfactorily.

Mr. MERLE (France) agreed with the Belgian representative that there was a certain contradiction, and observed that the International Court of Justice was in a different position from an international criminal court so far as the delivery of separate opinions was concerned.

The CHAIRMAN agreed with Mr. MENDEZ (Philippines) that article 48 would not be applicable to a trial by jury, but said that separate opinions would be admissible if the court rendered judgment on a demurrer to the indictment.

Article 39 was tentatively adopted, subject to any modification which the Committee might decide to adopt after considering article 48.

Article 40

In reply to a question from Mr. MENDEZ (Philippines), the CHAIRMAN said that that article was concerned purely with the issue of warrants, the serving or execution of which would be the responsibility of a Government assisting the court.

Articles 40, 41 and 42 were tentatively adopted.

Article 43

Mr. MAURTUA (Peru) observed that the article embodied three possible courses of action open to the court, and that they gave a confusing impression: dismissal of the case which might be taken to mean temporary or permanent dismissal depending on whether the circumstances preventing a fair trial were transitory or lasting; discharge of the accused - in the Spanish version abandono de la acción, which in the strict technical sense was a matter for the parties to the case; and acquittal a priori, in the absence of the possibility of a fair trial, whereas logically acquittal was the outcome of a judgment.

The CHAIRMAN and Mr. MAKTOO (United States of America) explained that the article had been framed by the 1951 Committee to allow the court latitude in deciding how to deal with circumstances, such as the threat of mob violence against the accused, which made a fair trial impossible at the time. The United States delegation to that Committee had favoured the wording "dismissal

without prejudice to further prosecution". The power to acquit had been included in case the evidence for or against the accused should be insufficient for a fair trial owing, for example, to a government's retention of papers which it did not desire to make public.

Mr. MERLE (France) agreed with the Peruvian representative that acquittal was logically the outcome of a trial; it was appropriately provided for in article 44, but he proposed that the words "and may also acquit him" should be deleted from article 43.

Mr. MENDEZ (Philippines), supporting the French proposal, said that article 43 should be read in the light of article 51 which dealt with the question of double jeopardy; since that article spoke of trial and acquittal or trial and conviction, a trial was clearly the fundamental requirement. An accused could not be acquitted without being tried. On the other hand, if he was not tried because there was no case against him, that circumstance should be clearly stated in the order of discharge. The normal rule was that there was no case against a person, and the exception was when a person was acquitted. There was a great difference between the two situations.

Mr. VALLAT (United Kingdom) felt that the question of double jeopardy was so important that the better way to amend article 43 would be to delete the phrase: "discharge the accused and".

Mr. DAUTRICOURT (Belgium) proposed that, instead of amending article 43, as proposed by the French representative, by deleting the last phrase, the Committee should delete the whole of the second sentence of the article. In reply to a question from Mr. VALLAT (United Kingdom) he explained that that would mean that, before the case could be reopened, the prosecutor, or the parties, would have to create the conditions necessary for a fair trial.

In reply to a question from Mr. LOOMES (Australia) as to whether there was a difference in interpretation between the French and the English versions of the term "dismissal", the CHAIRMAN said that the 1951 Committee had

assumed that the court would possess an inherent power to suspend the trial pending the restoration of the necessary conditions for a fair trial, a power which it was unnecessary to specify in the statute; the dismissal mentioned in article 43 meant an actual termination of the case. The Belgian proposal was based on the interpretation of dismissal as suspension of the case, which would render the second sentence of article 43 unnecessary; but if, as intended in the 1951 Committee's drafting, dismissal was final, that second sentence would be needed.

Mr. DAUTRICOURT (Belgium) considered that the need for the provisions of the second sentence was covered by article 44.

Mr. MERLE (France), supporting his own original proposal, observed that the suspension of proceedings favoured by the Belgian representative would give rise to delicate problems and should be avoided.

Mr. ROBINSON (Israel) agreed with the Chairman that suspension was a matter for the court's rules of procedure and could be dealt with under article 24. Article 43, as amended by the French representative, was a necessary provision for cases where the conditions for a fair trial were absent and should therefore be added to article 38. As paragraph 4, article 44 was a necessary provision in the event of there being no case against the accused; it prevented indefinite persecution of the accused, and confirmed that the court alone could discharge or acquit him.

Mr. ROLING (Netherlands) supported the French and Israel proposals, and observed that the provision for acquittal had not formed an original part of the 1951 Committee's conception of article 43. He suggested that the Belgian representative should withdraw his proposal.

Mr. LOOMES (Australia) made a similar statement.

Mr. MAURTUA (Peru) supported the Belgian proposal on the grounds that the absence of the conditions for a fair trial would be due to transitory circumstances.

Mr. DAUTRICOURT (Belgium) requested that an opportunity should be given for him to reach agreement with the French and Israel representatives before a vote on his proposal was taken.

The meeting rose at 1.5 p.m.