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1953 COMMITTEE ON INTERNATIONAL CRIMINAL JURISDICTION

SUMMARY RECORD OF THE EIGHTEENTH MEETING

Held at Headquarters, New York
on Friday, 14 August 1953, at 9.30 a.m.

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53-23468

PRESENT:

Chairman:	Mr. MORRIS	United States of America
Rapporteur:	Mr. RÖLING	Netherlands
Members:	Mr. GARCIA OLANO	Argentina
	Mr. LOOMES	Australia
	Mr. DAUTRICOURT	Belgium
	Mr. WANG	China
	Mr. SAMI	Egypt
	Mr. MERLE	France
	Mr. ROBINSON	Israel
	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. LIU	Secretary of the Committee

RE-EXAMINATION OF THE DRAFT STATUTE PREPARED BY THE 1951 COMMITTEE ON INTERNATIONAL CRIMINAL JURISDICTION (A/2136, A/AC.65/1, A/AC.65/L.7) (continued)

The CHAIRMAN invited further consideration of the Drafting Sub-Committee's recommendations (A/AC.65/L.7).

Article 33 (continued)

The redraft of article 33 was tentatively adopted.

Article 36 (continued)

Mr. DAUTRICOURT (Belgium) recalled his proposal that, at the end of paragraph 1, the words "... and, as far as possible, of the States of which the victims are nationals." should be added.

Mr. LOOMES (Australia), supported by Mr. MAKTOS (United States of America), doubted the usefulness of such an addition. The only purpose in notifying States was to enable them to take some action such as challenging the court's jurisdiction. In any case the court's proceedings would be adequately publicized.

Mr. DAUTRICOURT (Belgium) remarked that one effect of his amendment would be that the States in question would send observers to the trial.

Mr. ROBINSON (Israel) said that it would be inconsistent, if article 27 were retained as it stood, to adopt the Belgian amendment, as the category of States to which the amendment referred was not included in article 27.

Mr. RÖLING (Netherlands) intimated that the Standing Drafting Sub-Committee had invited the Israel representative to submit certain amendments on the lines of Israel's comments as contained in document A/AC.65/1, page 31, paragraph 1.

Mr. DAUTRICOURT (Belgium) withdrew his amendment provisionally pending a decision on article 27.

It was agreed to return to article 36 after a decision had been reached on article 27.

Article 37 (continued)

It was decided to omit the word "NO" in the title of article 37.

Mr. VALLAT (United Kingdom) remarked that the words "instrument by which the accused is subjected to the jurisdiction of the court" might give the erroneous impression that it referred to an indictment or warrant of arrest.

Mr. ROLING (Netherlands) suggested that the phrase should be amended to read "instrument by which jurisdiction over the accused is conferred upon the court."

The Netherlands amendment was adopted.

The redraft of article 37, as amended, was tentatively adopted by 9 votes to none, with 4 abstentions.

Article 27 (continued)

Mr. ROBINSON (Israel) said that two basic notions were dealt with in article 27: the protection of national sovereignty and the principle of territoriality in criminal jurisdiction. As drafted, the article favoured national jurisdiction, but the question of the conflict could not be ignored and left to a ruling of the court under article 24. He suggested that no decision should be taken for the time being on whether a rule concerning conflict of jurisdiction should be included in article 27 or elsewhere.

Mr. ROLING (Netherlands) recalled that he had proposed the deletion of the words "... and by the State or States in which the crime is alleged to have been committed."

Mr. MAKTOS (United States of America) considered the Netherlands suggestion unwise. Most criminals would remain in the States in which they had committed their crimes and those States would therefore be deeply concerned about the crimes. The State, of which the criminal was a national, on the other hand, was of no importance. Moreover it was not clear what the idea of

nationality implied. In many countries, for instance the United States, the law applied to citizens and aliens alike. Crimes of the type to which the draft statute was intended to apply would usually prejudice the interests of the State in which they had been committed and much more rarely those of the State of which the offender was a national. If the text were retained as it stood, many States would be hesitant to accede.

Mr. NINCIC (Yugoslavia) remarked that, to make the statute acceptable to many States, the principle of territoriality in article 27 must be retained.

Mr. MERLE (France) recalled that it had been decided the previous day to include in article 26 certain restrictive provisions which States might wish to specify. It would be advisable, before deciding on the Netherlands amendment, to consider whether the restrictive provisions were adequate for the purposes of article 27.

Mr. ROLING (Netherlands) agreed with the Israel representative that two ideas were involved. The question of national jurisdiction would be covered by a stipulation whereby no person could be tried before the court unless jurisdiction had been conferred by the State of which he was a national. It was illogical to include the territorial aspect of national jurisdiction while at the same time omitting other aspects.

The CHAIRMAN put the deletion proposed by the Netherlands representative to the vote.

The Netherlands amendment was rejected by 5 votes to 1, with 7 abstentions.

Mr. ROBINSON (Israel) remarked that it would reflect on the post-war procedure adopted by the victorious Allies in connexion with the Nürnberg and Tokyo trials and would also have unfortunate future consequences, if article 27 were not qualified by a proviso such as "Subject to the international law of war."

Mr. MAURTUA (Peru) objected to the Israel representative's suggestion. It was not fitting to include such a proviso, which referred to a very special type of case in the draft statute.

Mr. PEREZ-PEROZO (Venezuela) said that to associate the law of war so abruptly with an instrument of justice would appear offensive. In the event of war the proviso would have no meaning, because the victorious country would not confer jurisdiction upon the court to try its nationals, while the defeated State would have no choice but to submit.

Mr. MAKTOS (United States of America) felt that the Israel suggestion was unnecessary and dangerous. In the case of the unconditional surrender of a vanquished State, the question of the consent of the State in which the crimes had been committed did not arise. Few States would be willing to confer jurisdiction upon a court whose statute referred to such vague concepts as the "international law of war". The 1951 Committee had felt that the inclusion of a provision such as that in article 27 did not exclude the possibility of holding war trials. In any case war was neither a legal nor illegal but an extra-legal concept.

Mr. MERLE (France) said that the Israel suggestion was not of an ideological but of a technical nature; it could not be overlooked in drafting a provision on the attribution of jurisdiction. As it stood, article 27 conflicted with the positive law of war under which military occupation authorities had jurisdiction over the territory which they occupied. Provision should be included in the draft statute for the possibility of the international law of war being applied.

Mr. ROLING (Netherlands) interpreted the Israel amendment as seeking to vindicate before world opinion the work of the Nürnberg and Tokyo Tribunals. Subjection to the international law of war might include subjection to law covering, besides violations of the laws of warfare, crimes against peace and against humanity; in other words, almost all the court's work would thus be subjected to the proposed exception.

The CHAIRMAN pointed out that both sides in Korea at present retained prisoners of war alleged to have committed crimes while in captivity; he wondered what, if the court were already in being and the statute embodied the Israel

proposal, the rights of one side would be with regard to charging before the court a prisoner who was a national of a State which had not conferred jurisdiction upon the court; or, conversely, a national of a State which had conferred such jurisdiction but which relied on the subjecting clause of the Israel text to deny the court jurisdiction over the case.

Mr. MAKTOS (United States of America) added that, if the one side did charge a prisoner before the court and the consent of that prisoner's country was not sought, public confidence in the court would be destroyed, whether that side was within its rights or not.

Mr. ROBINSON (Israel) said that the problem raised by the Chairman involved, not a conflict between two jurisdictions, but a conflict between the Geneva Convention and the armistice agreement; but the present problem was to decide whether the law of war included, besides ius belli, ius ad bellum; if that question were not answered in the affirmative, the court would have nothing to do.

In reply to a question raised by the Philippine representative at a previous meeting as to whether violations of the laws of war as defined in the Regulations to the Fourth Hague Convention could be regarded as criminal acts, he quoted a finding of the Nürnberg Tribunal as reproduced in document A/CN.4/5, pp.44-45:

> "To that extent the same is true with regard to the laws of war contained in the Hague Convention. The Hague Convention of 1907 prohibited resort to certain methods of waging war. These included the inhumane treatment of prisoners, the employment of poisoned weapons, the improper use of flags of truce, and similar matters. Many of these prohibitions had been enforced long before the date of the Convention; but since 1907 they have certainly been crimes, punishable as offences against the laws of war; yet the Hague Convention nowhere designates such practices as criminal, nor is any sentence prescribed, nor any mention made of a court to try and punish offenders. For many years past, however, military tribunals have tried and punished individuals guilty of violating the rules of land warfare laid down by this Convention."

He also read article 3 of the Hague Convention Respecting the Laws and Customs of War on Land, which provided that "a belligerent party which violated the provisions of the...Regulations should...be liable to pay compensation;" but which did not cover the problem of individual responsibility.

Replying to a question from Mr. VALLAT (United Kingdom) as to whether his amendment meant that jurisdiction would be conferred upon the court, when it came into being, also with regard to war crimes, he said that the amendment was based on the assumption that, even in time of war, States would prefer offenders to be tried by the international court; and that it aimed to clarify the fact that the court would not be bound by the special provision or article 26 in cases where the law of war was involved.

Mr. MAURTUA (Peru) observed that, in safeguarding the principle of nationality, article 27 might affect the extradition of criminals and the laws on the status of aliens, which differed in different countries; and that, in the present primitive state of international law on such questions as aggression, crimes against humanity and the like, it would be unwise to extend jurisdiction in fields lacking a basis of positive law.

Mr. MENDEZ (Philippines) suggested that the apparent restrictive effect of the Israel amendment might be corrected by the addition of some such phrase as "if the case should arise".

Replying to two questions from Mr. WANG (China), Mr. ROBINSON (Israel) considered that, without his proposed amendment, there was no guarantee that the laws of war would prevail; and that the taking over of the government by the occupying authority in, for instance, Germany after the Second World War would not have solved the problem of consent, by the State of which war criminals were nationals, to the trial of those criminals by the court if the latter had been in being at the time.

The Israel proposal to introduce article 27 of the draft statute by the words "Subject, however, to the international law of war" was rejected by 4 votes to 3, with 6 abstentions.

Mr. ROBINSON (Israel) felt that, while the principles of nationality and territoriality were both covered by the 1951 Committee's draft of article 27, the principle involved in safeguarding the interests of a State which was the victim of a crime remained to be covered; he proposed that article 27 should be extended

by the addition of a second paragraph. After agreeing to drafting amendments suggested by Mr. RÖLING (Netherlands) and Mr. MENDEZ (Philippines), he suggested the following text for a second paragraph:

"Unless otherwise provided for in the instrument conferring jurisdiction on the court, the rules of jurisdiction of national criminal courts, as defined in the respective criminal laws, shall not be affected."

That paragraph would cover the territoriality principle embodied in the last phrase of the 1951 draft of article 27, as well as other principles embodied in the various countries' legal systems and would also provide for cases in which a State's interests were harmed at long range. In the event of a conflict between national and international courts, the former would prevail unless otherwise expressly stipulated.

Mr. ROLING (Netherlands), while approving the substance, questioned the form of the Israel proposal, which could be misunderstood to suggest that it would be impossible for the international court to try a case if a national court might have jurisdiction over such a case.

Replying to a question from Mr. MENDEZ (Philippines) as to whether the opening phrase "Unless otherwise provided for in the instrument conferring jurisdiction on the court" was necessary, the CHAIRMAN pointed out that its purpose was to make clear that a treaty would prevail over the domestic law of a State.

Mr. ROBINSON (Israel) added that the phrase allowed both for the preservation of the status quo of domestic jurisdiction, and for changes in that status in favour of the international court.

In reply to an observation from Mr. LOOMES (Australia) that the effect of the phrase would be that where jurisdiction over a crime was conferred upon the court by a State the court would have exclusive jurisdiction, he said that, on the contrary, the effect was to allow of the concurrent jurisdiction of both national courts and the international court over a given crime, or of the exclusive jurisdiction of either, whichever was preferred.

The CHAIRMAN commented that the aim of the Israel proposal was to assure the reader of the statute that no domestic criminal jurisdiction was affected by the acceptance of the international court's jurisdiction unless the relevant instrument provided otherwise.

Replying to questions from Mr. VALLAT (United Kingdom), Mr. ROBINSON (Israel) explained that, while article 27 was concerned to make plain that the establishment of the court was not aimed at revolutionizing the legal systems of the world, article 51 aimed to ensure that States would respect the principle of no double jeopardy, as they did in their domestic jurisdiction. He accepted an amendment proposed by the CHAIRMAN, and supported by Mr. VALLAT (United Kingdom) that the words "rules of jurisdiction" should be replaced by "rules determining the jurisdiction".

After a discussion of further drafting changes, in which Mr. ROBINSON (Israel), Mr. VALLAT (United Kingdom), the CHAIRMAN, Mr. MAKTOS (United States of America), Mr. ROLING (Netherlands), Mr. MENDEZ (Philippines), Mr. MAURTUA (Peru) and Mr. DAUTRICOURT (Belgium) took part, Mr. MAKTOS (United States of America) proposed that the second paragraph proposed by the Israel representative for article 27 should be amended to read:

"Unless otherwise provided for in the instrument conferring jurisdiction on the court, the rules of a State determining national criminal jurisdiction, as defined in the respective criminal laws, shall not be affected."

He accepted a suggestion from Mr. ROBINSON (Israel) that the phrase "as defined in the respective criminal laws" should be omitted.

Mr. RÖLING (Netherlands) asked whether the Israel proposal was intended to replace that portion of article 27 which read "and by the State or States in which the crime is alleged to have been committed."

The CHAIRMAN replied in the negative. The clause would remain, a Netherlands motion for its deletion having been defeated earlier.

Mr. ROBINSON (Israel) disagreed. Adoption of his proposal would entail a consequential amendment, namely the deletion of the clause to which the Netherlands representative had referred.

Mr. MAKTOS (United States of America) had understood the position to be the reverse. It had been his view that the Israel proposal merely involved the addition of a paragraph to article 27 as worded in the draft statute. In view of the Israel representative's explanation, he would vote against the proposed addition. A motion to delete the final clause in article 27 had already been defeated. He requested a separate vote on the Israel proposal.

Mr. VALLAT (United Kingdom) was not clear as to the meaning of the words "shall not be affected" at the end of the proposed additional paragraph.

Mr. ROBINSON (Israel) explained that the rules of jurisdiction of national criminal courts would not be affected by the conferment of jurisdiction upon the international court.

Mr. RÖLING (Netherlands) suggested the addition of the words "of that conferment" immediately after "shall not be affected".

Mr. ROBINSON (Israel) accepted the amendment.

The CHAIRMAN put the additional paragraph proposed by Israel to the vote.

The paragraph was adopted by 10 votes to none, with 4 abstentions.

Mr. ROBINSON (Israel) proposed, as a consequential amendment, the deletion of the words "and by the State or States in which the crime is alleged to have been committed" from article 27, paragraph 1.

The principle embodied in that clause was protected in the Israel proposal which had just been adopted.

Mr. MAKTOS (United States of America) disagreed. There was no connexion between paragraph 2 of article 27 and the clause contained in the last part of paragraph 1. He felt very strongly on that point and would be compelled to advise his Government against acceding to the statute if the Committee agreed to the deletion proposed by Israel.

The CHAIRMAN found the construction which the Israel representative placed on article 27, paragraph 2, difficult to understand. The point was that the national jurisdiction of a State should not be affected by the establishment of the international criminal court unless the instrument conferring jurisdiction upon the court expressly so provided. That was entirely different from the concept that a case should not be tried before the court unless jurisdiction had been conferred upon it by the State in which the crime was alleged to have been committed. The essence of all criminal jurisdiction was the preservation of order within a community, that being the purpose of the prosecution and punishment of an offender. The contention that the State in which a crime had been committed was no longer concerned because jurisdiction had been conferred upon the international criminal court would outrage the sense of dignity of every State.

He put the Israel proposal to delete the words "and by the State or States in which the crime is alleged to have been committed" from article 27, paragraph 1, to the vote.

The proposal was rejected by 7 votes to 3, with 4 abstentions.

Article 29

Mr. MERLE (France) proposed the deletion of sub-paragraphs (a) and (b), and referred to his Government's written comments on the draft statute (A/AC.65/1, pp.24 and 25). The General Assembly should not have access to the court even if it established a close relationship with that body.

Mr. NINCIC (Yugoslavia) felt that sub-paragraph (a) should not be deleted until the question of the method by which the court might be established was settled.

He supported the French proposal to delete sub-paragraph (b). That sub-paragraph should be eliminated whatever the decision taken with respect to sub-paragraph (a).

Mr. RÖLING (Netherlands) agreed that a decision on sub-paragraph (a) should be held over until the question of the court's relationship with the United Nations had been settled. If the court were to be established within the framework of the United Nations, that Organization should have access to the court through one of its organs, but not necessarily the General Assembly. That principle should not be excluded as yet.

He supported the proposal to delete sub-paragraph (b) but felt that provision should be made to authorize the General Assembly to allow an international organization to have access to the court. He therefore proposed that a new sub-paragraph should be inserted, reading: "(b) Any international body so authorized by the General Assembly of the United Nations."

He had in mind an international organization such as the Red Cross which, being concerned with the establishment and application of rules of warfare, would have great interest in bringing a case before the court in which it claimed that such rules had been violated. Its purpose would be not so much to secure an offender's punishment as to obtain a decision from the court as to the alleged violation of the laws of war.

Mr. MENDEZ (Philippines) felt that the Red Cross was not competent to prosecute an alleged offender merely for purposes of seeking a declaratory judgment from the court.

Mr. MAURTUA (Peru) and Mr. PEREZ PEROZO (Venezuela) supported the French proposal.

Mr. VALLAT (United Kingdom) said that he would abstain from voting on sub-paragraph (a) because the question whether the General Assembly should have access to the court could not be settled until the method of establishing the court was decided.

Mr. MAKTOS (United States of America) was unable to support the French proposal. The United Nations had broad authority to maintain international peace and security. It should have access to the court if a majority of its sixty Members desired to institute proceedings in respect of a particular case. The consent of the State of which the accused person was a national would still be required in order for the court to proceed.

He agreed with the United Kingdom representative that it was premature to take a decision on the question of the right of the General Assembly to institute proceedings before the court.

The CHAIRMAN put the French proposal to delete sub-paragraph (a) of article 29 to the vote.

The French proposal was adopted by 8 votes to 2, with 4 abstentions.

The CHAIRMAN put the French proposal to delete sub-paragraph (b) of article 29 to the vote.

The French proposal was adopted by 9 votes to none, with 5 abstentions.

The substitute sub-paragraph proposed by the Netherlands was rejected by 11 votes to 1, with 2 abstentions.

Mr. LOOMES (Australia) said that he had abstained from voting on sub-paragraph (a) for the same reasons as those given by the United Kingdom representative.

Mr. PEREZ-PEROZO (Venezuela) said that his vote in favour of the deletion of sub-paragraph (a) did not mean that he refused to recognize the General Assembly's right to make representation to the international criminal court with a view to preventing proceedings which might endanger peace.

Mr. RÖLING (Netherlands) suggested, as a drafting amendment, the deletion of the words "party to the present State" in sub-paragraph (c) of paragraph 29.

The amendment was agreed to.

Mr. RÖLING (Netherlands) formally proposed that the following paragraph should be added to article 29: "In the interest of the maintenance of peace, the General Assembly may prevent a particular case from being brought before the Court."

His proposal involved a question of principle. The General Assembly, or whatever United Nations organ had competence in the matter, should be in a position to prevent proceedings from being instituted before the court if, in its view, such proceedings would endanger the maintenance of international peace and security. The competent organ would be determined at the time when the final statute was drawn up.

Mr. WANG (China) pointed out that the Committee had already disposed of that issue by deleting article 28 from the draft statute. The Netherlands proposal was merely another form of political screening. In his view there could not be any conflict between the maintenance of peace and the punishment of an international crime. The Committee should not emphasize the virtues of appeasement for the sake of maintaining peace at any price.

Mr. NINCIC (Yugoslavia) supported the Netherlands proposal. The deletion of article 28 made it all the more necessary to provide for "political screening" in specific cases. Moreover, the proposal would remove one of the major objections to the method of establishing the court by convention - fear of a possible conflict between the court's action and that of the United Nations.

Mr. ROBINSON (Israel) wondered whether the objective which the Netherlands representative had in mind could not be achieved with less publicity through a smaller United Nations organ. In that connexion, he called attention to the procedure suggested by his own delegation in paragraph 4 of its working paper on the relationship between the international court and the United Nations (A/AC.65/L.4).

Mr. RÖLING (Netherlands) was quite prepared to accept the Israel representative's suggestion. He would agree to replace the words "General Assembly" in his proposal by a term such as "the relevant organ of the United Nations". He agreed that it should be a small body.

The CHAIRMAN suggested that the representatives of Israel and the Netherlands should confer with a view to re-wording the Netherlands proposal.

The meeting rose at 1 p.m.