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1953 COMMITTEE ON INTERNATIONAL CRIMINAL JURISDICTION

SUMMARY RECORD OF THE TWENTIETH MEETING

Held at Headquarters, New York  
on Monday, 17 August 1953, at 9.30 a.m.

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on International Criminal Jurisdiction (A/2136, A/AC.65/L.5)

(continued)

PRESENT:

Chairman: Mr. MORRIS United States of America

Rapporteur: Mr. RÖLING Netherlands

Members:

Mr. GARCIA OLANO	}	Argentina
Mr. LAUREL		
Mr. LOOMES		Australia
Mr. DAUTRICOURT		Belgium
Mr. WANG		China
Mr. SAMI		Egypt
Mr. MERLE		France
Mr. ROBINSON		Israel
Mr. de la OSSA		Panama
Mr. MAURTUA		Peru
Mr. MENDEZ		Philippines
Mr. VALLAT		United Kingdom of Great Britain and Northern Ireland
Mr. MAKROS		United States of America
Mr. PEREZ PERON		Venezuela
Mr. BOZOVIC		Yugoslavia
Mr. LIU		Secretary of the Committee

Secretariat:

RE-EXAMINATION OF THE DRAFT STATUTE PREPARED BY THE 1951 COMMITTEE ON  
INTERNATIONAL CRIMINAL JURISDICTION (A/2136, A/AC.65/L.5) (continued)

Article 49

The CHAIRMAN stated that, as there was no objection, article 49 of the draft statute was tentatively adopted.

Article 50

Mr. MAKROS (United States of America) drew attention to the amendment proposed by his delegation (A/AC.65/L.5). The merit of the suggested addition would be to eliminate any apparent contradiction between article 50 and article 53, the latter providing for revision of judgment.

Mr. RÖLING (Netherlands) said the difference between the appeal mentioned in article 50 and the revision procedure was so great that the amendment was superfluous. He was, however, prepared to stress the distinction in the report.

Mr. MAKROS (United States of America) declared himself satisfied with that suggestion, and withdrew his amendment.

The CHAIRMAN declared article 50 of the draft statute tentatively adopted.

Article 51

Mr. ROBINSON (Israel) thought that it would be desirable to mention, at least in the report, that the provisions of the article applied also to circumstances where jurisdiction was conferred on the court in a specific case.

The CHAIRMAN declared article 51 of the draft statute tentatively adopted.

## Article 52

Mr. ROBINSON (Israel) proposed the deletion of the second sentence of the article. The procedure which it established seemed unnecessary and certainly difficult to apply. If the sentence were deleted, there would be no mention of relations with the United Nations.

Mr. MAKTOU (United States of America) supported the Israel representative's amendment.

The CHAIRMAN put to the vote the oral Israel amendment to delete from the text of article 52 the second sentence, beginning with the words: "In the absence of conventions".

That amendment was adopted by 10 votes to none, with 2 abstentions.

Mr. VALLAT (United Kingdom) referred to his Government's comments on article 52 (A/AC.65/1) to explain why he had abstained from voting.

## Article 53

Mr. RÖLING (Netherlands) repeated the proposal he had made at Geneva to delete article 53. Revision was a normal procedure in domestic law. In an international court, where the cases would concern political questions and the ever-shifting relations among States, it was to be feared that revisions of judgment would be applied for whenever there was a change in international relations. That danger should be avoided. He pointed out that the board of clemency would have the power to apply leniency to persons sentenced. The method was perhaps somewhat clumsy, but that described in article 53 was fraught with danger. Moreover, the statute provided such adequate safeguards for an impartial conduct of trials that the contingency of revision was rather remote.

Mr. MENDEZ (Philippines) appreciated Mr. Röling's arguments, but wondered what the position would be if the particular conditions described in article 53, sub-paragraphs (a) and (b), were present. In that case, revision would be mandatory.

Mr. PEREZ PEROZO (Venezuela) shared the Philippine representative's view. The Netherlands representative had argued strongly in support of his proposal; but, since article 50 eliminated the possibility of appeal and other remedies, if the revision procedure were also dispensed with the proposed judicial system would surely be oversimplified. Article 53 did not leave revision to the arbitrary discretion of States, since strict guarantees were provided for in sub-paragraphs (a) and (b). The provision should be maintained.

Mr. ROBINSON (Israel) supported the Netherlands representative's proposal. First, the right to apply for a revision of judgment was not subject to any period of limitation. That would create an uncertainty which would outweigh the advantages of the possibility of revision, especially since it was most improbable that the conditions mentioned in sub-paragraphs (a) and (b) would ever be fulfilled. Secondly, former article 43 - which had been a part of paragraph 4, article 39 - by making it possible for the Court to dismiss a case, constituted an exceptional guarantee which might serve as a substitute for the guarantee of revision.

Mr. MERLE (France) found himself in a difficult position. While like Mr. Röling, he was in favour of deleting article 53, he was also about to propose the deletion of article 54 dealing with the board of clemency. In any case, however, the revision procedure presented more drawbacks than advantages. He pointed out that clemency and revision were two entirely different concepts, since only a trial court could review a case.

Mr. DAUTRICOURT (Belgium) thought that, if article 53 were maintained, a time limit would have to be introduced.

The CHAIRMAN put to the vote the Netherlands amendment to delete article 53 of the draft statute.

That amendment was adopted by 4 votes to 3, with 6 abstentions.

Article 54

Mr. MERLE (France) proposed the deletion of that article. Clemency was a prerogative of sovereignty. In the absence of a sovereign international organ, the item of clemency could hardly be introduced into international law. The board of clemency would in fact be dependent on States. It would be not a sovereign organ, answerable to no one, but a sort of board of appeals or review, which would conduct a second trial. Such a conception would be contrary to the provisions of article 50.

Mr. MAKIOS (United States of America) said that he could not conceive of international justice which made no provision for clemency.

Mr. MENDEZ (Philippines) shared the United States representative's view.

Mr. RÖLING (Netherlands) felt that experience had shown the need to provide for clemency. A court, even an international court, sitting immediately after a war could not remain entirely unaffected by the temper of times. Sentences which would seem justified then might well appear excessive after the first impressions had faded.

Mr. PEREZ PEROZO (Venezuela) thought that if, after eliminating appeal and revision, the Committee also abolished the possibility of clemency, it would be acting too drastically. Moreover, the grant of the right of pardon or clemency might tend to ease international tension.

Mr. MERLE (France) said he had not been convinced by the foregoing arguments. Application for clemency would no doubt be made very soon after the judgment, in other words before public opinion was ready to be more indulgent. Besides, no organ seemed qualified to exercise such powers.

The CHAIRMAN put to the vote the French representative's oral proposal that article 54 of the draft statute should be deleted.

That amendment was rejected by 9 votes to 1, with 3 abstentions.

The CHAIRMAN observed that the draft statute contained no provision for the election of the members of the board of clemency.

Mr. MAKTOS (United States of America) drew attention to the amendment proposed by his delegation (A/AC.65/L.5). The States which by article 7 were empowered to elect the judges might also be empowered to elect the members of the board of clemency, whose function was not more important than that of the judges.

The CHAIRMAN drew attention to the alternatives submitted for articles 7 and 11 and pointed out that the election methods proposed in the United States amendment might be applied to either alternative.

Mr. MERLE (France) thought that, technically speaking, it would be essential to submit two alternatives for article 54.

Mr. MAKTOS (United States of America), supported by Mr. RÖLING (Netherlands), considered that the amendment, which merely referred to article 7 without any other explanation, might be applied irrespective of the alternative adopted for that article.

Mr. MERLE (France) agreed that if the question was merely one of referring to article 7, it might be possible to dispense with an alternative article 54.

Mr. MENDEZ (Philippines) pointed out that the designation of the judges and that of members of the board of clemency involved very different considerations. Members of the board would not have to be jurists or high judicial officers.

Mr. RÖLING (Netherlands) recalled that under one alternative proposed for article 29 a United Nations organ was to be designated which would have certain powers of access to the court. Lest the court's structure become too unwieldy, the same organ might be given act as a board of clemency.

Mr. LOOMES (Australia) asked the United States representative whether the reference to article 11 in his amendment (A/AC.65/L.5) applied to both paragraphs of that article.

Mr. MAKIOTIS (United States of America) replied that the reference to article 11 in paragraph 1 of his amendment referred to both paragraphs of that article. The provisions of article 11, paragraph 2, concerning the nationality of the judges would therefore apply to the board of clemency.

In reply to the Philippine representative's remark, he pointed out that the members of the board of clemency would not necessarily be judges of the court.

With regard to the alternative proposed by the Netherlands for article 54, paragraph 1, he asked what would happen if the General Assembly designated the Security Council as the United Nations organ in question. In that case, the members of the Council could use their right to veto.

Mr. RÖLING (Netherlands) replied that it was highly improbable that the Assembly would designate the Security Council. Nevertheless, to meet the United States representative's objection, he suggested the phrase "an organ whose members would be elected by the United Nations".

Mr. MAKIOTIS (United States of America) pointed out that if the organ provided for in the alternative adopted for article 29 were established, it could obviously act as a board of clemency. In the contrary case, however, a special organ would have to be set up, as was provided in paragraph 1 of the United States amendment to article 54. Nevertheless, he was prepared to withdraw his amendment if the Committee would agree to include it in the report as an alternative for article 54, paragraph 1.



Mr. MERLE (France) stated that the discussion had confirmed his opinion that if power of pardon were admitted, it would be extremely difficult to agree what organ should exercise it. There seemed to be a tendency in favour of a collegial organ. Admittedly, the Netherlands proposal had the advantage of being economical, since the organ which would exercise the power of pardon would be the same as that referred to in the alternative article 29. However, that organ would then have two entirely different kinds of powers, that of screening complaints and that of pardoning sentenced persons. Moreover, its decisions would be as important as the court's and it was therefore extremely important to determine the voting procedure of that organ. If the power of pardon were admitted, perhaps the right to exercise it should be vested in a single person, such as the Secretary-General of the United Nations. In that way all the difficulties raised by the question of the composition of the organ and of its voting procedure would be avoided. He submitted a formal motion for the replacement of article 54 by a provision under which the Secretary-General of the United Nations should exercise the power of pardon.

Mr. NINCIC (Yugoslavia) supported the Netherlands proposal concerning article 54, paragraph 1, but thought that the proposal should appear in the report as an alternative article 54. He felt it was not advisable to introduce the power of pardon in the statute of the court at the present time. If the board of clemency were set up by the States parties to the Statute, it might happen that the board's decisions would not be approved by certain States represented on the Committee.

He asked whether the United States amendment to article 54, paragraph 2 (A/AC.65/L.5), meant that States could make reservations on the question of the competence of the board of clemency; if so that board's functions would be crippled.

Mr. VALLAT (United Kingdom) and Mr. RÖLLING (Netherlands) considered that the decisions of the board of clemency would inevitably be swayed by political considerations. Hence, the power of pardon should not be vested in the highest administrative officer of the United Nations for it could conflict with the position and functions.

The CHAIRMAN put to the vote the French oral proposal for the replacement of article 54 by a provision whereby the Secretary-General of the United Nations should exercise the power of pardon.

The proposal was rejected by 9 votes to 1, with 3 abstentions.

Mr. MAKTOS (United States of America) expressed support for the Netherlands proposal and said that he was submitting his own amendment merely as an alternative to article 54, paragraph 1, if the organ provided for in the alternative article 29 proposed by the Netherlands were not set up. He asked that his position should be expressly mentioned in the report.

Mr. WANG (China) said the Netherlands proposal was excellent, for it tended to simplify the court's operation. Nevertheless, the organ proposed to be established under the alternative article 29, necessarily a political body, already had the power to prevent a case from coming before the court. It was now proposed to allow it to exercise the power of pardon. That might result in granting a political organ unduly wide powers.

Mr. RÖLING (Netherlands) said the questions were whether the Committee insisted on not mentioning the organ provided for in the alternative adopted for article 29, and whether it wished to confer on that organ the power of pardon. In deciding the first question, the Committee should adopt either the existing text of paragraph 1 or the United States amendment thereto; in answering the second question it should decide whether paragraph 1 of the existing text of article 54 should be deleted and the board of clemency provided for in paragraph 2 replaced by the United Nations organ referred to in the alternative article 29, which would exercise the functions described in paragraph 2 of the existing article. Hence two alternatives for article 54 were needed.

Mr. MAURTUA (Peru) pointed out that, according to the United States amendment to article 54, the powers of the board of clemency would depend on the instruments by which States would have accepted the jurisdiction of the court. Those powers could not include the power to reduce the penalties imposed by the court, since the board could not alter the court's judgments.

Mr. MENDEZ (Philippines) did not agree with the Netherlands and United Kingdom representatives that the functions of the organ provided for in the alternative article 29 would be political in character. The power of pardon might well be exercised independently of any political consideration. Moreover, the reduction of a sentence awarded by the court presupposed a revision of the court's judgment; the Committee, however, had just dropped the principle of revision of judgment by tentatively deleting article 53.

Mr. MAURTUA (Peru) thought article 54 might provide that the board of clemency could reduce sentences but not vary them in any other way.

Mr. RÖLING (Netherlands) agreed with the Philippine and Peruvian representatives. It would be enough if article 54 referred to the board's powers of pardon and parole.

Mr. DAUTRICOURT (Belgium) considered that the Committee should submit the existing text of article 54 as the first alternative.

Mr. LOOMES (Australia) agreed with the Chinese representative with regard to the Netherlands proposal. The political organ envisaged in the Netherlands text could be given the power to prevent a case from coming before the court, with a view to the maintenance of international peace, but in his opinion should not be given the power to amend the court's decisions by means of clemency measures which would involve quite different principles and criteria. For that reason he would vote against the Netherlands text.

Mr. MAURTUA (Peru) thought it should be left to the States parties to the statute to decide what powers should be given to the board in the matter of clemency. The United States proposal would make that possible.

Mr. MAKTOŠ (United States of America) stressed that the following two questions were at present before the Committee: first, to ascertain whether the right of clemency should be entrusted to the organ envisaged in the alternative to article 29 proposed by the Netherlands; secondly, to decide within what limits the body in question could exercise that right. He did not consider it advisable to extend the powers already conferred on the United Nations organ by the alternative to article 29. In any event, whatever might be the nature of the organ exercising the right of clemency, it would be better for the Committee to discuss that organ's powers when it considered article 54, paragraph 2.

The CHAIRMAN thought that the Committee should first of all vote on the question whether it would be advisable to entrust the powers envisaged for the board of clemency to the organ mentioned in the alternative to article 29, as the Netherlands proposed, or to a board elected by the States referred to in article 7, as provided by the United States amendment to article 34.

Mr. RÖLING (Netherlands) agreed with the Chairman, but stressed that the object of his proposal was to point out one of the consequences of the setting up of an international criminal court within the framework of the United Nations. The Committee was not taking a decision on the substance of the question by providing for an alternative to article 54; it was only acting in accordance with its terms of reference.

Referring to the Chinese representative's argument, he did not consider it dangerous to entrust such extended powers to the organ whose creation was envisaged in the alternative to article 29, since that organ would only act in the interest of the maintenance of peace.

The CHAIRMAN put to the vote the Netherlands proposal for an alternative article 54 reading: "The organ referred to in alternative B in article 29 shall have the power of clemency".

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

The CHAIRMAN thought that the Netherlands representative's purpose would be achieved if the Committee were to decide to adopt the principle that the right of clemency should be exercised not by the organ envisaged in the alternative to article 29, but by an organ of the United Nations to be designated by the United Nations.

The CHAIRMAN asked the Committee to decide on that principle.

The principle was adopted by 3 votes to 2, with 10 abstentions.

Mr. RÖLING (Netherlands) noted that the only remaining difference between article 54, paragraph 1, and the alternative was that in the former the text provided for the board of clemency to be set up by the States parties to the statute, while in the latter it would be set up by the United Nations. Thus it would be sufficient to draft the alternative to article 54 as follows: "There is established a board of clemency, the members of which shall be appointed by the United Nations".

The CHAIRMAN put the Netherlands proposal to the vote.

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

The CHAIRMAN put to the vote the United States amendment (A/AC.65/L.5) to article 54, paragraph 1, forming the second alternative text of that paragraph,

The amendment was adopted by 5 votes to none, with 8 abstentions.

Paragraph 2

Mr. RÖLING (Netherlands) suggested that the Committee should adopt the text of paragraph 2 as it appeared in the draft statute, preceded, in accordance with the United States amendments, by the clause: "subject to the provisions of the instruments by which States shall have accepted the jurisdiction of the court."

Mr. MAURTUA (Peru) proposed that the words "reduction and other alterations" should be deleted.

Mr. RÖLING (Netherlands) proposed that everything after the word "suspension" should be deleted. Stay and reduction of sentence were in fact clemency measures. Besides the proviso, "provided that the board shall make no pronouncement respecting the guilt of the accused", which applied only to alteration of the sentence, became unnecessary.

Mr. MAKTOŠ (United States of America) thought that the word "pardon" implied that the defendant was not guilty. Moreover, a stay of sentence was only a form of parole. He was prepared to accept the amendments proposed by the Netherlands representative.

Mr. VALLAT (United Kingdom) wished to point out that pardon was the remission of an offence; it did not mean that no offence had been committed.

Mr. RÖLING (Netherlands) proposed that in the English text the word "pardon" should be replaced by the word "clemency" for "pardon" might be construed as implying that the defendant was not guilty.

Mr. ROBERTSON (Israel) thought that if parole was not a measure of clemency it should find its expression in the text.

Mr. RÖLING (Netherlands) stated that in all national legal systems clemency and parole were two entirely distinct ideas. Parole was a judicial institution intended to assist the offender's social rehabilitation. For example, the Statute of the Tokyo tribunal made a clear distinction between measures of clemency and parole procedure.

Mr. ROBINSON (Israel) proposed that article 54 should therefore be entitled "Board of Clemency and Parole".

Mr. VALLAT (United Kingdom) asked that a vote should first be taken on the words "subject to the provisions of the instruments by which States shall have accepted the jurisdiction of the court". While he would be able to vote for the principle of the creation of a board of clemency, he would be obliged to abstain from voting on the clause quoted.

The Committee tentatively adopted for article 54, paragraph 2, the text "subject to the provisions of the instruments by which States shall have accepted the jurisdiction of the court" by 5 votes to none, with 10 abstentions.

Mr. DAUTRICOURT (Belgium) asked that the word grâce should be translated into English by the word "clemency", which, like the French word grâce, simply meant a procedure for the reduction of sentence.

The CHAIRMAN asked the members of the Committee to express their preference as between the words "pardon" and "clemency".

There were 3 votes in favour of the word "clemency".

There were 2 votes in favour of the word "pardon".

The word "clemency" was adopted.

Mr. MERLE (France) agreed with the Israel representative that parole and clemency were distinct functions, the former exercised normally by the court and the latter by the executive. He proposed that the words "and parole" should be deleted.

The French amendment was rejected by 5 votes to 3, with 6 abstentions.

The Committee tentatively adopted the text of article 54, paragraph 2, as amended in accordance with the United States and Netherlands proposals, by 9 votes.

New paragraph 3

Mr. RÖLING (Netherlands) proposed the adoption of a new paragraph 3, drafted as follows: "Before deciding upon a petition of clemency or parole the Board shall request the advice of the court".

Mr. DAUTRICOURT (Belgium) and Mr. MENDEZ (Philippines) supported that proposal.

The CHAIRMAN explained that the court's advice would not bind the board, which would remain responsible for its own decision.

The Committee tentatively adopted the text of the new paragraph 3 proposed by the Netherlands representative by 10 votes to none, with 5 abstentions.

Paragraph 4 (formerly paragraph 3)

The Committee tentatively adopted the text of paragraph 4 as it appeared in the draft statute.

Article 55

Mr. MAKTOU (United States of America) proposed that, as article 55 was purely negative, it should be deleted. It went without saying that nothing in the statute prejudiced the right of States to agree to set up special tribunals.

Mr. LOOMES (Australia) also thought the article superfluous.

Mr. ROBINSON (Israel) noted that there was no difference of opinion about the meaning of the article, but only about its retention in the statute. He was convinced that it must be retained, because silence on the point might be taken to imply that setting up the court tended to bar the setting up of special tribunals. It would probably be better to include the provision in the statute rather than in the Committee's report. If the article were not included in the statute, it was probable that States would themselves make reservations on that score: it would hardly be desirable to arouse their apprehensions even before the court had been set up.



Moreover, omission of the article might prompt some people to interpret the draft statute as an indirect criticism of the special tribunal set up after the Second World War. Such an inference would be most detrimental to the cause of international penal law, the essential precedents of which were in fact the Nürnberg and Tokyo trials.

Mr. RÖLING (Netherlands) did not object to the idea expressed in the text, but had difficulty in understanding why the conferring of jurisdiction on the court should be considered as restricting the right of States to set up special tribunals.

Mr. ROBINSON (Israel) maintained that the article provided a safeguard which should not be underestimated.

Mr. MENDEZ (Philippines) could not see how deletion of the article would imply a criticism of the Tokyo and Nürnberg tribunals. For example, the fact that the Committee had not repeated article 61 of the Statute of the International Court of Justice had in no way implied that it intended to criticize that Statute.

In reply to a question from Mr. WANG (China), Mr. ROBINSON (Israel) stated that the crimes referred to in article 55 included both those in respect of which jurisdiction had been expressly conferred upon the special tribunals and those in respect of which it had not.

The United States proposal to delete article 55 was rejected by 6 votes to 5 with 4 abstentions.

Mr. RÖLING (Netherlands) pointed out that it would be advisable to replace the words "States parties thereto" in article 55 by "States which shall have conferred jurisdiction upon the Court".

Mr. MERLE (France) observed that the Netherlands representative's remark did not merely raise a matter of form. Some States conceivably might be parties to the statute without conferring jurisdiction on the court. The solution to the problem would depend on how the court was set up.

New text

Mr. MAKPOS (United States of America) proposed that the following text should be added to article 1: "The Court shall come into existence when... States have conferred jurisdiction upon the Court". He thought that provision essential if it was intended to set up a court that was a court in more than name, as would be the case if its jurisdiction were not recognized by a number of States.

Mr. MERLE (France) agreed with the United States representative that a number of States must confer jurisdiction on the court. He drew attention to the fact that the provisions adopted by the Committee as to the number and nationality of judges required the number to be not less than fifteen. It would even have to be appreciably greater, to obviate only a few States not being represented in the court.

Mr. ROBINSON (Israel) also supported the United States proposal, which conformed to the recommendations the Israel delegation had made on the subject. He thought, however, that it would be premature to decide at once upon the minimum number of countries which should confer jurisdiction on the court in order to give it a real existence. He was in favour of accepting the principle, and of drawing attention to the relevant data in the Committee's report.

Mr. LOMES (Australia) shared the Israel representative's opinion.

Mr. RÖLING (Netherlands) remarked that the United States proposal was based on the assumption that the court would be set up by a convention. He therefore proposed the adoption of an alternative in the event of the court being set up by means of a General Assembly resolution. The text would be: "The Court shall come into existence when the General Assembly shall have passed a resolution to that effect".

Mr. MERLE (France) said that the two alternatives had not the same significance; the second defined a method of establishment, whereas the first specified the conditions of establishment. Moreover, the United States proposal held good, however the court might be set up.

Mr. VALLAT (United Kingdom) proposed that discussion of the United States proposal should be postponed, since the matter could only be settled as part of the general discussion of the method of setting up the court.

The CHAIRMAN held the view that the procedure proposed by the Netherlands representative was quite in order. It simply provided for two alternatives, without prejudice to the Committee's final decision.

Mr. MAKTOU (United States of America) confirmed the French representative's statement: his proposal applied to all methods of setting up the court.

Mr. RÖLING (Netherlands) supported the United Kingdom representative's proposal.

It was decided by 6 votes to 1, with 8 abstentions, to postpone discussion of the United States proposal.

The meeting rose at 1.10 p.m.

14/9 a.m.