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1953 COMMITTEE ON INTERNATIONAL CRIMINAL JURISDICTION

SUMMARY RECORD OF THE EIGHTH MEETING

Held at Headquarters, New York,
on Wednesday, 5 August 1953, at 10.30 a.m.

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53-21981

PRESENT:

Chairman:	Mr. MORRIS	(United States of America)
Rapporteur:	Mr. RÖLING	Netherlands
	Mr. GARCIA OLANO	Argentina
	Mr. LOOMES	Australia
	Mr. DAUTRICOURT	Belgium
	Mr. WANG	China
	Mr. DONS-HOEILER	Denmark
	Mr. SAMI	Egypt
	Mr. MERLE	France
	Mr. NAPMOR	Israel
	Mr. de la OSSA	Panama
	Mr. MAURTUA	Peru
	Mr. MENDEZ	Philippines
	Mr. VALLAT	United Kingdom of Great Britain and Northern Ireland
	Mr. MAKTOS	United States of America
	Mr. PEREZ-PEROZO	Venezuela
	Mr. NINCIC	Yugoslavia
Secretariat:	Mr. STAVROPOULOS	Principal Director in Charge of the Legal Department
	Mr. LIU	Secretary of the Committee

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

The CHAIRMAN said that the Committee would examine item 4 of its agenda and that the draft statute would be considered article by article. He asked the Members for their observations on article 1.

Mr. ROLING (Netherlands) read his Government's comments on the drafting of that article (A/AC.65/1). He proposed that the text should be deleted from the words "as may be provided in conventions" onwards. The phrase was useless and superfluous because it duplicated the more accurate and detailed provisions of article 26, and because the draft statute provided elsewhere for a possible screening at the moment a case was brought before the court (article 33).

Mr. MERLE (France) also read his Government's observations on article 1 (A/AC.65/1). He suggested replacing the present text by a definition referring to acts rather than to persons, which would better define the court's competence, and he therefore proposed that the present text, after the words "to try", be replaced by:

"Offences under international law;

"Offences under municipal law, the prevention and punishment of which is recognized as a matter of international concern by a convention giving the court competence to deal with them;

"Offences under municipal law in cases where a State, whose own courts have competence to prevent and punish them, agrees to refer such offences to the court under a special agreement or by a unilateral waiver of competence."

Mr. DAUTRICOURT (Belgium) pointed out that, if the French amendment were adopted, article 1 would no longer mention the fact that the court would try persons, i.e. natural persons, exclusively. Moreover, he agreed with Mr. Merle that the court's competence should be extended to the offences under national law which were of international interest, it being understood that such competence wou

take effect in the circumstances provided for under article 26: by convention, by special agreement or by unilateral declaration. He therefore proposed the following amendment: that the present text, after the words "international law", be replaced by:

"or of offences under national law which are of international interest, within the limits provided for under article 26".

Mr. MERLE (France) declared that, to clarify the debate, he would withdraw his amendment and support that just put forward by the Belgian representative.

Mr. LOOMES (Australia) considered that the joint Belgian and French amendment would be more in place in chapter III, which dealt with competence. Fundamentally, the amendment introduced a new and dangerous idea. The idea of "offences under national law which are of international interest" was too vague. It might, for instance, be extended to certain crimes under maritime law. Who would be empowered to decide that there was an international interest? It seems to follow from the text of the draft statute that the court should confine itself to applying international law to crimes generally recognized as such by the community of nations.

Mr. MAKTOS (United States of America) pointed out that the amendment just submitted by the Netherlands representative had been rejected by the Committee which had met at Geneva in 1951. If a text based upon the ideas put forward by Mr. Röling, or jointly by the representatives of Belgium and France were adopted, the United States Government would be unable to support the draft.

There was also a major objection to the proposed amendments. The texts lost sight of the principal aim, the very intention of the statute. They introduced new ideas, and widened the court's competence inordinately, whereas it was expedient only to include a few essential points in the statute, so as to make its adoption easier and promote the main objective: the establishment of an

international court. The court's competence would be defined later, by subsequent agreements. There was nothing in the text under consideration which prevented the wishes of Belgium, France, and other countries from being complied with later on. But it was useless and dangerous, for instance, at that early stage, to insert in the text a list of the crimes which might be within the court's competence. Such a list might be almost indefinitely prolonged without there being any certainty of its being exhaustive. Moreover, article 26 of the draft did not comprise a definition of the court's competence, but merely specified the methods which would make its jurisdiction compulsory for States.

Mr. RÖLING (Netherlands) pointed out that at Geneva, in 1951, the text he had proposed had been rejected only by 5 votes to 5, with 3 abstentions. Moreover, paragraph 35 of the Geneva Committee's report (A/2136) stated that the phrase which the Netherlands representative proposed to delete had been included in fairness to an accused so that he should know exactly what he was charged with. But the court would not have any power until States had conferred competence upon it by definite instruments: the accused would therefore have all the necessary information, and the so-called guarantee in article 1 was superfluous. Article 1 defined the general purpose of the court, and subsequent articles should define its competence.

The CHAIRMAN asked Mr. Röling whether, in his opinion, adoption of the Netherlands amendment would imply a stand on the question whether the court shoul be established by a convention or by a General Assembly resolution.

Mr. RÖLING (Netherlands) said that that would not be the case. The only purpose of his amendment was to avoid unnecessary repetition in the texts of articles 1 and 26. He would like the authors of the joint Belgian and French amendment to explain the distinction they made between the two types of crimes under national law mentioned in their text.

Mr. MERLE (France) explained that paragraphs 2 and 3 of the amendment referred not so much to different offences as to different methods of referring cases to the court. In the first case, jurisdiction normally belonging to the State was delegated by a convention (for instance, a convention on the prevention of terrorism) to the international criminal court. In the second case, the competent State transferred its jurisdiction unilaterally to the court. That was so in the case of war crimes. Provision should be made for the adoption of either procedure.

In reply to Mr. MAKTOS (United States of America), Mr. MERLE (France) pointed out that he had not enumerated the crimes but had defined categories of crimes, which States could fill in later by stating in conventions or through unilateral declarations the list of crimes they wished to have included. Like the Belgian representative, he thought it was essential to provide for the possibility of a unilateral decision to waive jurisdiction, particularly in view of certain touchy problems connected with the prevention and punishment of war crimes.

Mr. PEREZ-PEROZO (Venezuela) supported the United States representative's arguments in favour of the text of article 1 as drafted by the Committee on International Criminal Jurisdiction.

Although it was true that the phrase "crimes under international law" was very general, that should not be considered a drawback. First, the term included all the categories which the representatives of France and Belgium would like to have enumerated and, secondly, the competence of the court must in any case be defined by a convention or protocol which would enable States to list and classify all the offences and crimes they intended to submit to the court. The two types of crimes under international law which the French representative would like to include in article 1 were only the minor offences under international law - being crimes under common law, the prevention and

punishment of which was of international interest and crimes under international law which involved the obligations of one State towards another. The prevention and punishment of criminal acts of the first kind, such as the traffic in narcotic drugs or in persons had always been satisfactorily carried out by the national jurisdictions, whereas crimes offences of the second kind, such as acts of terrorism or of violence towards diplomatic representatives, were relatively infrequent and could easily be dealt with by normal diplomatic procedure. Such matters could not be referred to an international court without infringing the sovereignty of States. Lastly, in the case of acts endangering international peace and security the competent body was obviously the Security Council.

He was therefore in favour of the existing text of article 1. Even if the question of the conventions or special agreements concluded between States parties to the statute was referred to in article 26, there was no harm in referring to the subject in the first part of the statute.

Mr. VALLAT (United Kingdom) endorsed the ideas expressed by the representatives of the United States, Australia and Venezuela. He did not find the arguments of the French and Belgian representatives convincing, for, even if from the viewpoint of strict interpretation article 26 was sufficient to complement article 1, it was nevertheless well to maintain the full text of article 1 to show at the outset that the jurisdiction of the court would become effective only with the consent of States.

In view of the French text of article 1, he thought it would be better to replace the word "persons" in the English text by the word "individuals" in order to avoid any confusion.

If the joint Belgian-French amendment were accepted, the text might be interpreted to mean that the reference to article 26 applied only to crimes under national law the prevention and punishment of which was of international interest and not to crimes under international law.

In addition, the hope had been repeatedly expressed that the court would be an instrument for the codification of international criminal law. By giving the court jurisdiction in respect of crimes under national law, there was the obvious risk that the fundamental objective would be lost sight of or, at least, that it would become extremely difficult to achieve. It should also be borne in mind that certain Member States which, while not members of the Committee on International Criminal Jurisdiction although represented in the General Assembly were quick to consider any reference to domestic jurisdiction as interference and went so far as to oppose the very idea of an international criminal court on that ground. The result of the joint Belgian-French amendment would be to strengthen those delegations' opposition.

Finally, it might be asked how judges who were selected for their competence in international law could be equally familiar with the law of every country in the world.

Mr. WANG (China) thought no attempt should be made to define the competence and jurisdiction of the court in article 1. If the draft statute were to contain a chapter specially devoted to the jurisdiction of the court, there was nothing to prevent the Committee from drafting article 1 in fairly general terms.

While international criminal law was created by conventions - the only method contemplated in the existing draft of article 1 - custom was also a source of international criminal law. Thus, in respect of the traffic in narcotic drugs, the right to wage war, and the traffic in persons, certain principles had finally been imposed on all States, regardless of whether they had signed special conventions. In order not to exclude the customary aspect of international criminal law and its subsequent development in that direction, he thought the last part of article 1 should be deleted, as the Netherlands had proposed. Such an amendment should not give rise to any practical difficulty, for in interpreting the statute greater attention would be paid to article 26, which was more detailed.

With regard to the joint Belgian-French amendment, whatever decision the Committee might reach, it would be ill-advised to adopt a wording of article 1 referring to article 26.

Mr. NINCIC (Yugoslavia) thought the existing text of article 1 was satisfactory. It was useful to specify the way in which the statute would be applied at the outset and to provide that States would enumerate the crimes to fall within the jurisdiction of the international criminal court. He was opposed to the amendment submitted by France and Belgium, which might change the character of the statute entirely by infringing the sovereignty of States.

Mr. MAKTOS (United States of America) said that the comments of the representatives of Australia, Venezuela, the United Kingdom, and Yugoslavia had convinced him that the last part of article 1 was not a mere superfluous repetition of the provisions of article 26. Moreover, as everyone agreed that in the absence of a convention States would not be committed to anything, he did not see why the principle could not be clearly enunciated in article 1. In any case, in the absence of that clause the United States Government would be unable to approve the statute of the court.

Mr. RÖLING (Netherlands) maintained that the last part of article 1 said nothing which did not appear in article 26. It was essential to avoid such repetition, which would inevitably give rise to confusion, for the statute would be interpreted on the supposition that it contained no repetition. There was also a contradiction between the texts of article 1 and article 26, which provided for the conferring of competence by a unilateral declaration, which was something not accepted in article 1. The Chinese representative had raised the problem of the role that custom played in international criminal law. The wording of the last part of article 1 might suggest that all international criminal law had been formulated in conventions. That was not so; part of international criminal law had both a conventional and customary origin, for example war crimes which were violations of the rules and usages of war. A further example of that dual origin was to be found in the Hague Convention which provided that it was only applicable in wars where all the belligerants were parties to the convention. At Nürnberg the court had stated that by custom the convention had become universally valid.

Mr. de la OSSA (Panama) was of the opinion that it was essential to define the competence of the court before it was set up. The principle of the

legality of crimes, which had already been invoked against the judgment given by the Nürnberg Tribunal, should be respected. Similarly, it was difficult to recognize the concepts of customary law, as many countries categorically rejected the principle that the validity of a custom might be established automatically. Accordingly, article 1 should refer to crimes under international law "recognized in the constitutions of the States which were a party to the statute".

Mr. MENDEZ (Philippines) pointed out that it would be sufficient to add the words "or by unilateral declaration" at the end of article 1 to remove the contradiction which the representative of the Netherlands had noted.

Mr. MERLE (France) said that he was not convinced by the United Kingdom representative's arguments.

In the first place, the objection that the amendment submitted jointly by France and Belgium would be likely to disturb the States which attached great importance to the field reserved was hardly valid, since the court would only be seized of crimes under national law by virtue of a convention or a unilateral declaration.

In the second place, it was unlikely that the fact of submitting crimes under national law to the international court would divert the court from its task. Indeed, it was self-evident that the court would not be seized of all crimes under domestic law, but only of those which were based on international law. That was so particularly in the case of war crimes, the prevention of which was based on international conventional or customary law but implemented by domestic jurisdictions. In other words, whatever national legislation might be invoked, the crimes in question would in fact be crimes in international law punished at the moment by national jurisdictions because of the imperfect development of society and international law at the present time. It could be seen, therefore, that far from hindering the development of international criminal law, the French-Belgian amendment would be likely to encourage it. For instance, it would make it possible to avoid the dilemmas in which the national courts occasionally found themselves. That had been the case at the Oradour trial, which had raised political and legal problems which were practically insoluble under national jurisdiction. The political problems had been due to the fact that the accused included both Germans and Frenchmen and the legal problems had implied a choice

between national law and the precedent created at Nürnberg as regards collective responsibility. The only way of settling that case would have been to refer it to an international criminal body.

It was of the highest importance to include in the statute of the court a clause which would enable the various States to decide of their own free will not to proceed with cases normally submitted to them in the present state of international criminal law and to refer them, either directly or by means of an appeal, to an international criminal court.

Mr. NAUTRICCURT (Belgium) remarked that, as had been acknowledged by the United Kingdom representative, the precise meaning of the French word "individu" was "physical entity" and that it therefore excluded any corporate body, community or State.

To support the argument that it was not advisable for the court to judge crimes under national law which were of international interest, the United Kingdom representative had pointed out that it was difficult for a judge to be sufficiently familiar with the national law of every country. However, article 2 of the statute stipulated that the court should, if necessary, apply national law. The judges of the court would therefore have to be competent in national law.

With regard to the objections to the Belgian amendment, the reference to article 26 in article 1 which he proposed was not in contradiction with the provisions of article 1. The sole aim of that part of the Belgian amendment was to co-ordinate the provisions of article 1 and article 26. If, however, the United States representative made it a question of principle, he had no objection to the re-stating in article 1 of what had already been clearly stated in article 26. If a provision under which it would be possible to confer competence upon the court to deal with crimes under national law which were of international interest were inserted into article 1, it should be noted that, whether the courts were set up under a resolution or a convention, those crimes, like all crimes under international law, would be defined under the conventions, compromises or unilateral declarations conferring competence upon the court.

He proposed the following drafting of article 1 of the statute:

"An international criminal court is hereby set up for the purpose of trying persons accused of crimes under international law or crimes under national law which are of international interest provided for under

conventions concluded or arrangements made between the States which were party to the present statute or under a unilateral declaration".

Mr. MAURTUA (Peru) said he could not understand why there was now a desire to introduce into article 1 the possibility of conferring competence upon the court by unilateral declaration, since the 1951 committee had not accepted the same proposal for the reasons given in paragraph 63 of its report.

Mr. VALLAT (United Kingdom), on a point of order, proposed that for the time being the voting should be confined to the principles raised by the Belgian amendment rather than the actual text of the amendment, which could be referred to a drafting committee.

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

Mr. MAURTUA (Peru) pointed out that the Belgian amendment set forth three principles: (1) the international criminal court was competent to try crimes under international law; (2) it was also competent to try crimes of international interest; (3) competence for those two types of crimes could only be granted to the court subject to the consent of the various States.

Mr. DAUTRICOURT (Belgium), in reply to a question from the representative of Venezuela, stated that his amendment did not modify in any way the principle, laid down in article 1, that competence could be granted to the court only for crimes under international law under conventions concluded or arrangements made between States which had been a party to the statute.

The CHAIRMAN put to the vote the amendment proposed by Belgium to article 1 of the draft statute.

By 10 votes to 4, with 2 abstentions, the Belgian amendment to article 1 was rejected.

The CHAIRMAN called upon the Committee to vote on the amendment proposed by the Netherlands to article 1, which consisted in deleting the words "provided in conventions or special agreements among States parties to the present Statute".

Mr. MERLE (France) wished to know to what extent the Netherlands amendment allowed States to avail themselves of the possibility provided by article 25 of the Statute of conferring competence on the court by means of a unilateral declaration.

Mr. RÖLING (Netherlands) replied that this possibility remained intact by virtue of article 26. Under article 1 of the statute the court's function was to judge crimes under international law. If the court was in any doubt about its competence it would refer to article 26, i.e., to the conventions and special agreements among States and unilateral declarations. Thus the competence of the court would be submitted to a three-fold test: at the time of the granting of competence to the court, at the time that the matter was laid before the court, and finally when the court had to give a ruling on its own competence.

The CHAIRMAN put to the vote the amendment to article 1 of the draft statute proposed by the Netherlands.

By 6 votes to 4, with 5 abstentions, the Netherlands amendment to article 1 was rejected.

Mr. RÖLING (Netherlands) pointed out that the English text of article 1 did not make it sufficiently clear that the court could only try individuals. The word "persons" could indicate both natural and legal persons.

Mr. MARMOR (Israel) thought that the English text of article 1 should correspond to the text of article 25. The word "natural" should therefore be inserted before the word "persons" in article 1.

Mr. GARCIA OLANO (Argentina) pointed out that article 1 and article 25 would partly duplicate each other.

The CHAIRMAN said that in general the first articles of a convention or of a statute stated general principles. It might happen that subsequent articles would repeat those principles in one form or another. The important thing was that those articles should not be in contradiction with the principles stated at the beginning.

Mr. LOOMES (Australia) said that if the Israel proposal was put to the vote, he would abstain from voting on it. The word "persons" included companies and he asked that it should be mentioned in the summary record of the meeting that he was in favour of that interpretation.

Mr. GARCIA OLANO (Argentina) considered that the 1951 Committee had been right to draft article 1 in general terms. The question of the competence of the court with regard to individuals could be examined in connexion with article 25.

Mr. RÖLING (Netherlands) shared that view.

Mr. MAKTOS (United States of America) said he would vote for the Israel proposal if it was put to the vote; it was essential that the texts of the various articles should be harmonized so far as possible.

Mr. VALLAT (United Kingdom) agreed that the question of competence with regard to persons should be examined in connexion with article 25.

Mr. MARMOR (Israel) explained that he was referring only to the principle of consistency in the terms to be used in articles 1 and 25, but not to the substance of the matter which might be discussed later, namely whether or not the jurisdiction of the court should extend to corporations and juridical persons.

Mr. GARCIA OLANO (Argentina) pointed out that article 1 resolved the problem ratione materiae. Article 25 resolved it ratione personae. It was therefore unnecessary to introduce into article 1 a definition of the court's competence with regard to persons.

Replying to an enquiry by the CHAIRMAN, Mr. MARMOR (Israel) agreed to defer the problem of "persons" and "natural persons" until the Committee re-examined article 25.

The CHAIRMAN proposed that the Committee should appoint a standing drafting sub-committee with the Netherlands representative (Rapporteur) as

Chairman and consisting of the Argentine, Australian, Belgian and Philippine representatives. The Chairman would sit on the sub-committee ex-officio.

It was so decided.

PROGRAMME OF WORK

After a discussion in which the Chairman and the United Kingdom and Australian representatives took part, the Committee decided to meet on 6 August at 2.30 p.m. and to sit morning and afternoon for the whole of the following week.

The meeting rose at 1.10 p.m.