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1953 COMMITTEE ON INTERNATIONAL CRIMINAL JURISDICTION

SUMMARY RECORD OF THE ELEVENTH MEETING

Held at Headquarters, New York,
on Friday, 7 August 1953, at 10.30 a.m.

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53-22652

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. THORSEN	Denmark
	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. 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 (continued)

Article 17

The Committee tentatively adopted article 17 as worded in the draft statute.

Article 18

Mr. MAURTUA (Peru) pointed out that the title of article 18, "Dismissal of judges", did not correspond to the purport of the article, which did not refer to either guilt or punishment.

The CHAIRMAN explained that the Committee's vote did not bear on the titles of articles, which were for reference purposes only.

The Committee tentatively adopted article 18 as worded in the draft statute.

Article 19

The Committee tentatively adopted article 19 as worded in the draft statute.

Article 20

The Committee tentatively adopted article 20 as worded in the draft statute.

Article 21

The CHAIRMAN noted that the headquarters of the court had not been specified because it would depend mainly on the States which subscribed to the statute.

The Committee tentatively adopted article 21 as worded in the draft statute.

Article 22

Mr. DAUTRICOURT (Belgium) recalled that the 1951 Committee had opposed the principle that the remuneration of the judges should be paid separately from their allowances. He therefore proposed the deletion of the sentence "Each judge shall be paid an annual remuneration."

The CHAIRMAN recalled that the Geneva Committee had expressed the opinion that the remuneration should be symbolic.

Mr. ROBINSON (Israel) remarked that the only fee which judges of the International Court of Justice could receive was their salary as judges of the Court, but that it had not been considered advisable to maintain such a total discrepancy in the case of the international criminal court. In order not to impede the election of some of the most competent judges, an attempt had been made to find a compromise between remuneration including allowances and a fixed annual salary. It had always been understood that the annual remuneration would be mainly symbolic.

Mr. PEREZ PEROZO (Venezuela) wondered whether the Belgian representative's amendment might not raise difficulties in connexion with the remuneration of officials of the court who were permanent employees.

The CHAIRMAN pointed out that article 23 took that situation into account.

The Committee tentatively adopted article 22 as worded in the draft statute, by 5 votes to 1, with 7 abstentions.

Article 23

Mr. RÖLING (Netherlands) thought that the members of the Committee who favoured a close relationship between the international criminal court and the United Nations wished the latter to be responsible for financing the court. The cost would be small.

He proposed that article 23 should be replaced by a statement that the cost of the court would be borne by the United Nations.

Mr. MAKTOS (United States of America) recalled that the United States proposal that States which had accepted the statute should elect the judges of the court had brought up the question whether the United Nations would be prepared to assume such responsibility. Although there was reason to believe that most Members of the General Assembly would be ready to accept certain obligations connected with the operation of the court, it was doubtful whether they would accept any financial obligation. The Netherlands proposal might lead some delegations to vote against any proposal to link the court closely to the United Nations.

Mr. WANG (China), referring to the alternatives before the Committee, noted that, according to the Geneva Committee's text, the court would be established by convention, whereas the Netherlands representative's wording obviously implied that the court would be established by a General Assembly resolution.

Mr. MERLE (France) thought that, before deciding on the substance, the Committee would have to know whether it contemplated the inclusion of an alternative text of article 23 in the statute or whether the adoption of the Netherlands proposal would necessarily exclude the existing text.

Mr. RÖLING (Netherlands) agreed to submit his proposal as an alternative text of article 23.

Mr. LOOMES (Australia), supported by Mr. MAURTUA (Peru), feared that the court's independence was not compatible with financial dependence on the United Nations. If the court were financially dependent the Fifth Committee or the General Assembly might paralyze it by refusing to vote the necessary appropriations.

Mr. MAKTOS (United States of America) did not consider that argument to be cogent. Once the United Nations agreed to finance the court, there was no reason to believe that it would neglect its responsibilities. It had never refused the appropriations required for the operation of the International Court of Justice or the International Law Commission.

The CHAIRMAN felt that adoption of the Netherlands proposal might strengthen the arguments of States opposed to the establishment of an international criminal court.

Whatever the Committee's decision, it would be logical to replace the words "States parties to the present statute", in the existing text of article 23, by the wording which the United States representative had proposed for article 7.

Mr. LIU (Secretary of the Committee) observed that, if the Committee decided that the cost of the court should be defrayed by the United Nations, it should, under rule 152 of the General Assembly's rules of procedure, attach an estimate of expenditure to its report.

The Committee tentatively adopted the Netherlands proposal to include an alternative text of article 23 in the draft statute by 6 votes to 5, with 1 abstention.

The CHAIRMAN asked the Drafting Sub-Committee to draft an alternative text of article 23 along the lines suggested by the Netherlands representative.

Article 24

The Committee tentatively adopted article 24 as worded in the draft statute.

Article 25

Mr. MENDEZ (Philippines) said that he would vote for the article in its present form. Extension of the court's jurisdiction to legal entities would be contrary to the basic principle of individual criminal responsibility.

Mr. MERLE (France) also favoured retention of the present text, both as to style and as to substance. The idea of collective responsibility had, in fact, given rise to many difficulties after the Second World War and although it had been recognized in the statute of the Nuremberg tribunal, the tribunal's judgment had interpreted it in a very narrow sense, which practically amounted to a return to the principle of individual responsibility.

Mr. LOOMES (Australia) nevertheless proposed an amendment to article 25 to deprive the court of jurisdiction in respect of heads of States and to confer jurisdiction upon it in respect of private corporations.

Mr. DAUTRICOURT (Belgium) supported the Australian proposal in so far as it related to the non-applicability of criminal law to heads of States. It was was, in fact, stated in article 63 of the Belgian Constitution that the King's person was inviolable and that his Ministers were responsible. Recalling the position which the Belgian delegation had taken during the drafting of article IV of the Convention on Genocide, he felt that the real purpose of article 25 was to submit to the court's jurisdiction not the heads of democratic States - who did not in fact have any responsibility - but responsible rulers. As for dictators and usurpers, they should come under the court's jurisdiction since they exercised effective authority. He therefore proposed that the term "actual or constitutionally responsible ruler" should be used instead of "Head of State" in article 25.

Mr. RÖLING (Netherlands) asked the Belgian representative whether he would agree so to amend his proposal as to bring the new text of article 25 into line with the wording of article IV of the Convention on Genocide. If so, the words "whether they are constitutionally responsible rulers, public officials or private individuals" would be used instead of "including persons who have acted as Head of State or agent of government".

The Convention on Genocide had been ratified by 48 States and it was therefore desirable for the court's statute to conform to the provisions of the convention whenever possible."

Mr. DAUTRICOURT (Belgium) observed that his text had the advantage of applying to de facto rulers and to usurpers. He therefore maintained his proposal and asked for a vote on it. If the Committee rejected it, he would support the Netherlands proposal.

Mr. ROBINSON (Israel) felt that the text proposed by the Belgian representative was an improvement over article IV of the Convention on Genocide, at least in so far as the English wording was concerned, because the words "constitutionally responsible rulers" would not apply to dictators and usurpers.

Mr. MAURTUA (Peru) thought that the reservations which States had made to the Convention on Genocide should be borne in mind. Under the constitution of some States the Head of State was not responsible. Hence, such States could not accept a provision authorizing any court to try the Head of State.

Mr. MENDEZ (Philippines) submitted a formal proposal that the Committee should defer its decision in order to allow representatives to study the positions their Governments had taken in similar cases.

He did not think that there was adequate justification for the Australian proposal. Private corporations fell strictly within the jurisdiction of domestic courts, which conferred certain privileges upon them. Moreover, should a private corporation engage in criminal activities, the individual responsibility of its officers could easily be determined.

Mr. VALLAT (United Kingdom) observed that the purpose of article 25 was not to ascertain under what circumstances persons accused of a crime should be held responsible, but to decide which persons could be held responsible. The Belgian proposal, however, introduced into article 25 the question of responsibility which States could invoke to raise the preliminary question.

The CHAIRMAN put the Philippine proposal that the Committee should defer its decision to the vote.

The Philippine proposal was adopted by 14 votes to 2.

Mr. GARCIA OLANO (Argentina) recalled that during the Committee's consideration of article 1 the Israel representative had proposed the insertion of the word "natural" before "persons" in order to conform to the wording of article 25. The Committee had decided to consider the proposal when it took up article 25. He wondered whether the Israel representative maintained his proposal.

Mr. ROBINSON (Israel) felt that the matter should be left to the Drafting Sub-Committee. He hoped that the Sub-Committee would bear his proposal in mind.

Mr. MAKTOS (United States of America) asked the Secretariat to transmit to the Committee a list of the States which had so far ratified the Convention on Genocide, together with the reservations made by the signatory States.

Mr. ROLING (Netherlands), commenting on the Australian proposal, agreed that private corporations were subject to criminal law. However, the experience of the Nuremberg and Tokyo trials led him to believe that it was premature to extend the jurisdiction of the international criminal court to private corporations. He would therefore vote against the Australian proposal.

Mr. GARCIA OLANO (Argentina) concurred in the Netherlands representative's view.

Mr. LOOMES (Australia), replying to the Philippine representative's objection, observed that the criminal responsibility of private corporations was not excluded either by doctrine or by jurisprudence. The objection raised by the Netherlands representative was not convincing. The statute of the court would, in fact, remain in force for many years and international criminal law

would be developed during that period. A provision relating to the criminal responsibility of private corporations should therefore be included in the statute now.

The CHAIRMAN put to the vote the Australian proposal to extend the jurisdiction of the international criminal court to legal entities and particularly to private corporations.

The Australian proposal was rejected by 11 votes to 1, with 4 abstentions.

Mr. DAUTRICOURT (Belgium) said that the word "only" in article 25 precluded any judicial action against a State. But the possibility of civil action being taken against a State for compensation for wrong suffered through a crime committed by its responsible rulers and by its organs and agents must be taken into account.

The arguments adduced against the criminal prosecution of the State could not be applied to civil responsibility since a State could only be tried for an offence committed by persons in the exercise of their official functions. The trial of an accused person did not necessarily become the trial of the party responsible under civil law, particularly when the very principle of civil responsibility was unchallenged and unchallengeable, and it was therefore not true to say, as the 1951 Committee had said in paragraph 93 of its report, that the trial would become a trial of a State, not of an individual criminal.

Another objection raised against the court having jurisdiction over such cases was that the great number of victims of war crimes and of crimes against humanity would give rise to serious complications. It would hardly be practicable to allow each of them to become a party to the case. But since individuals today were not specifically covered by international criminal law and did not have access to the court, the only possibility would be for a comprehensive civil action to be instituted by a State in the case of the crimes concerned.

It was also maintained, in paragraph 94 of the 1951 Committee's report, that the examination of the damage suffered by each individual and the calculation of the indemnity he would receive would require the attention of the court for a great length of time. That would not be so if the claim of each victim were to become

an article of a memorial based on a comprehensive schedule and presented by the complainant State, and if a small chamber of the court gave a decision on that matter after the criminal case had been tried. For those reasons the Belgian delegation proposed that the word "only" should be deleted from article 25.

The CHAIRMAN observed that the Belgian representative's proposal would confer civil jurisdiction on the international criminal court.

Mr. DAUTRICOURT (Belgium) explained that in making his proposal his principal intention had been that the Committee should discuss the possibility of establishing the civil responsibility of States.

Mr. GARCIA OLANO (Argentina) said that, if the court did not have jurisdiction over legal entities, the Belgian proposal was meaningless. Whatever the position, there could be no question of anything but the civil responsibility of individuals.

Mr. MERLE (France) thought that the Belgian proposal was justified in substance, but unacceptable in form. It would be better to retain the text of article 25 and add the following provision: "without prejudice to civil actions which may be brought both against individuals and against the collective entities which may be held responsible". That formula would have the advantage of leaving the door open for civil action without conferring jurisdiction over such a case on the court.

The CHAIRMAN, speaking as one interested in common law, considered that it would not be appropriate to introduce the question of civil responsibility, whether of individuals or of collective entities into the statute of a criminal court.

Mr. DAUTRICOURT (Belgium) said that the French proposal corresponded exactly to what he had in mind and even went beyond what he had hoped for. He would accordingly support it.

Mr. MENDEZ (Philippines) approved the underlying principle of the Belgian proposal, but considered that it would have to be left to States to institute any civil action against other States or against individuals.

Mr. MAKTOS (United States of America) recalled that the 1951 Committee had discussed the subject at length and had decided by a large majority to preclude the court from deciding upon the civil responsibility of accused persons.

Mr. VALLAT (United Kingdom) agreed with the United States representative. He thought that the need to amend article 25 on the lines of the Belgian proposal had not been proved.

Mr. RÖLING (Netherlands) said that in his country, as in France and Belgium, the law allowed criminal courts to award damages. However, an international criminal court was in question and the Belgian proposal did not seem to him to be relevant. He would therefore vote against it.

Mr. MERLE (France) explained that neither the Belgian nor the French delegation had ever intended that the international criminal court should be asked to decide questions of civil responsibility. But, as it was acknowledged that civil action might be based upon criminal prosecutions, he did not see why that should not be specifically stated. The purpose of the Franco-Belgian proposal was to preserve the possibility of civil action without binding the parties to the statute.

The CHAIRMAN put to the vote the Franco-Belgian proposal that the words "without prejudice to civil actions which may be brought both against individuals and against the collective entities which may be held" should be added to the text of article 25.

The proposal was rejected by 7 votes to 3, with 5 abstentions.

Mr. ROBINSON (Israel) thought that it would be useful for the Committee to state in its report that the provisions of article 25 did not prejudge the idea of the civil responsibility of States or individuals.

The CHAIRMAN said that Mr. Robinson's suggestion would be referred to the Rapporteur.

Article 26

Mr. MAKTOS (United States of America) pointed out that the text of article 26 should take into account the wording adopted as an alternative for article 7.

The CHAIRMAN said that the Drafting Sub-Committee would bear that point in mind.

Mr. LOOMES (Australia) wished to have a definition of the words "with respect to a particular case". It was not clear to him whether the expression should be taken as applying to an individual case or to a particular kind of crime. The Drafting Sub-Committee should consider the article again, bearing in mind article 36 of the Statute of the International Court of Justice. A State should be able unilaterally to declare that it accepted the jurisdiction of the international criminal court over all crimes under international law.

Mr. RÖLING (Netherlands) also felt that the text of article 26 should be made clearer. Paragraph 63 of the 1951 Committee's report, dealt with the matter under discussion, but was of little assistance in that respect. As the Australian representative had said, it would be advisable first of all to specify whether a unilateral declaration might be general, that is, whether it might accept the jurisdiction of a court over one or more categories of crime. The words "special agreement", which duplicated the word "convention", should be deleted.

Mr. WANG (China) asked whether a unilateral declaration could later be revoked, and what the effect of such revocation would be upon the jurisdiction of the court.

The CHAIRMAN noted that there were several problems requiring study. He felt that the study should be entrusted to the Drafting Sub-Committee.

Mr. ROBINSON (Israel) drew the Committee's attention to the comments his Government had submitted in its observations (section 9e, A/2186).

Mr. VALLAT (United Kingdom) recalled that, when the Committee had decided to submit a second and alternative version of article 7 to the General Assembly, it had agreed that, if that version was adopted, other articles, and in particular article 26, would also require alteration. It would serve no purpose to frame those altered texts at that point; it would suffice for the report to note that the adoption of the second version of article 7 would call for corresponding alterations to the text of other articles.

Mr. RÖLING (Netherlands) thought that it would be clearer to draft the alternatives forthwith and to include them in an annex 2 to the Report.

Mr. MAKTOS (United States of America) wanted the alternatives to be drafted and the draft statute laid out in several columns, with the various alternatives for each article arranged side by side. The report could point out that the adoption of the alternative article 7 would automatically involve the adoption of certain amendments which it was proposed to make to other articles.

Mr. MERLE (France) asked why the United Kingdom representative thought that article 26 would have to be amended in the event of the adoption of the alternative article 7. The present wording of article 26 was not incompatible with article 7 even in its second version.

The CHAIRMAN considered that the alternative proposed by the United States of America (A/AC.65/L.5) was broader than the Geneva text and could accordingly be applied to all situations.

Mr. RÖLING (Netherlands) thought that it seemed, according to the discussion, that three changes could be made in the text of article 26. Firstly, the words "special agreement" could be deleted. Then, the words "with respect to a particular case" could be deleted or amended. Lastly, the words "by States parties to the present Statute" could be deleted. The last change appeared desirable because it should be made clear that States not parties to the statute were free to confer jurisdiction upon the Court.

Mr. VALLAT (United Kingdom) opposed that view; the idea implicit in the words "by States parties to the present Statute" should be preserved.

Mr. MERLE (France) pointed out that the third change suggested by Mr. Röling was not merely one of form, but raised a question of principle. He was therefore in favour of the retention of the existing wording, which rested on the hypothesis of the Court being set up by convention. He felt that the words "with respect to a particular case" could be left out. On the other hand, he was opposed to the deletion of the words "special agreement", as that would appear to exclude that method of conferring jurisdiction.

The CHAIRMAN suggested that the text of article 26 should be referred to the Drafting Sub-Committee for reconsideration. The Sub-Committee would take account of the suggestions and viewpoints expressed.

It was so decided.

Mr. RÖLING (Netherlands) recalled the observations submitted by his Government (A/AC.65/1); he proposed the deletion of the second part of the article, beginning with the words "and by the State or States....". The first part of the article originated in the principle of the sovereignty of the States. It meant that a State could prevent a trial of one of its nationals by the international court, and thus gave States a protection against the court's dealing with matters of their national policy without their consent. It was acknowledged that such a trial should only be possible if the State had recognized the jurisdiction of the international court.

The first part could therefore be retained. The position was different in respect of the second part, which was based on the principle of territoriality and covered the case in which a national of State A - which was assumed to have accepted the jurisdiction of the Court - committed a crime in the territory of State B. One of two things could happen. Either State B would also have acknowledged the jurisdiction of the Court, in which case there did not exist any problem. Or State B would not have recognized the jurisdiction of the Court. If the accused was in the territory of State A, the country of which he was a national, that State would not surrender him to State B, that is, would not consent to his extradition, but would have the right to try its own national, and consequently, would have the right to bring him before the international court. If State B was in a position to try the accused, it could do so, and was in no way under any obligation to take into account the jurisdiction of the international court, or even its decision in case a judgment had been delivered. The second part of article 27 was therefore pointless.

Mr. ROBINSON (Israel) pointed out that the present wording of the draft statute met two objections to which the setting-up of an international criminal jurisdiction gave rise. The objection on grounds of protection of sovereignty was met by the first part of the article, and that of the principle of territoriality as determining the competence of the State in the repression of crimes by the second part of the text. The Netherlands representative was not taking account of the fact that the scope of the expression "recognizes the jurisdiction of the Court" had not yet been clearly defined. There were crimes the punishment of which was not tied to the notion of territoriality but to the principle of personality or violation of State interests.

The CHAIRMAN thought that article 27 was mainly intended to reassure States which might hesitate to associate themselves with the establishment of the Court on an obvious point.

Mr. WANG (China) said he had been struck by Mr. Röling's remark that a country which had recognized the jurisdiction of the Court would automatically bring a case before it. He wondered whether a State which had recognized the jurisdiction of the Court in respect of certain categories of crime could refuse to refer a matter to the Court in one or several particular cases.

The CHAIRMAN took the view that a State which had conferred jurisdiction on the Court could not have any objection to the Court giving a decision. To allow a country which had accepted jurisdiction to make the referral of a matter to the international criminal court dependent on an appraisal of political considerations would be to set up a very serious obstacle to the court's functioning.

Mr. MAKTOS (United States of America) raised the question of persons in whom the principle of jus soli and that of jus sanguinis were united. In his opinion a crime disturbed the peace of the State in whose territory it was committed. It was that State that was responsible for the maintenance of order. It could not be involved in a matter of which the international criminal court claimed to take cognizance unless it had recognized the jurisdiction of that court

The CHAIRMAN, at the request of Mr. RÖLING (Netherlands) suggested that further consideration of the Netherlands representative's proposed amendment should be deferred until the next meeting.

It was so decided.

The meeting rose at 1 p.m.