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1953 COMMITTEE ON INTERNATIONAL CRIMINAL JURISDICTION

SUMMARY RECORD OF THE TWELFTH MEETING

Held at Headquarters, New York,
on Monday, 10 August 1953, at 10.30 a.m.

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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. DONS-MOELLER	Denmark
	Mr. SAMI	Egypt
	Mr. MERLE	France
	Mr. ROBINSON	Israel
	Mr. BELAUNDE	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) (continued)

Article 27 (continued)

The CHAIRMAN recalled that the Netherlands representative had suggested the deletion of the words "and by the State or States in which the crime is alleged to have been committed".

Mr. ROLING (Netherlands) said that a distinction should be made between the establishment of an international criminal court, in other words of a supra-national authority, and the conferment of jurisdiction on the court. The hostility of certain countries to the idea of establishment was based on fear of the potential power of such a supra-national authority; the Soviet Union had refused even to take part in the Committee's discussion of it. But many States, which, for the time being, were not prepared to confer jurisdiction upon an international criminal court, were not opposed to its establishment or to the granting of jurisdiction by other States.

The court, if established, would be a judicial organ of a certain community, but the community would lack a central authority capable of empowering the court to create a prosecuting agency competent to secure a given criminal, to gather evidence, to produce witnesses and to execute sentences. If the court was to have any power, that power must come, not from the community, but voluntarily from the participating States. By voluntarily conferring jurisdiction upon the court, the participating States would relinquish certain rights which they had once enjoyed and the court would acquire certain rights. The readiness of States to abandon specific rights in favour of an international criminal court might be due to a desire to assist in the development of the community of States, to bring into being an organ more capable of dealing with international crimes or to leave the decision on certain delicate matters to an international body.

The conferment of jurisdiction brought with it certain rights and duties: the right to bring a case before the court; the duty to allow other participating States to bring a case before the court; the duty to recognize

the judgment of the court and perhaps the duty to assist the court in its proceedings. But the granting of jurisdiction did not involve the duty to bring cases before the court nor recognition of the court as the sole arbiter in certain kinds of cases. It did not create a monopoly. Establishment of the court depended also on the readiness of States to relinquish their traditio ideas of sovereignty.

It was unnecessary to provide in article 27 that no person was to be tried unless jurisdiction had been conferred upon the court by the State or States in which the crime was alleged to have been committed. A national of State A might commit an international crime in State B, State A having conferred and State B having refused to confer jurisdiction upon the court. When the questi of prosecuting the criminal before the international criminal court arose, if he was in State B, which did not wish to have him tried before the internationa criminal court, that State could easily prevent the trial by refusing to delive him. The co-operation of State B was thus essential to the exercise of jurisdiction by the international criminal court. But there was no need to make special provision in the draft statute for such a case, since State B woul have no obligation to extradite the criminal. If, on the other hand, the criminal was in State A, his country of origin, or in a third State, there was reason to require the consent of State B for his trial by the international criminal court. If he was in State A, State A could bring him before its domestic courts, or before the international criminal court. If he was in a third State, of which he was not a national and in which the crime had not been committed, that State could have the case tried by its own courts or before the international criminal court, if it had recognized the latter's jurisdiction, or, it could extradite him to State B, where the crime had been committed, or to State A. The action of the third State would depend on its agreements with the other States on the extradition of criminals. State B, not having custody of the criminal and being unable to arrest him, would be unable to bring him to trial and his trial by the international criminal court would not interfere wit any right which State B might enjoy.

If the State in which the crime was committed had custody of the criminal and did not wish to confer jurisdiction upon the court, it would be entitled

to refuse to surrender him. If it did not have custody of him and had no means of obtaining such custody, it could not bring him to trial. There was no encroachment on the rights of the country where the crime was committed if the criminal was tried by the court without that country's consent, the only difference being that the accused would be tried not by a foreign national court but by a foreign international court.

Mr. ROBINSON (Israel) said that the basic principle of an international criminal court was that, by accepting its authority, States would be surrendering to it their jurisdiction over international crimes. Violations of international law had so far been punished by national military tribunals or ad hoc courts set up by the victors, as at Nürnberg and Tokyo. But States should be prepared to confer ante factum jurisdiction on an international criminal court. Supposing that States were ready to take that revolutionary step, the question arose whether the Committee was prepared to make provision for the reservations which acceding States might wish to make.

Certain reservations were already included in the draft statute, for example in articles 26, 27, 32 and 55, but, as it was not possible to foresee all the different kinds of reservations which States might make, he doubted the wisdom of including only some of them. The reservations in articles 27 and 30 went in some respects too far and yet did not in other respects go far enough. Under article 27 it would not have been possible to hold the Nürnberg and Tokyo trials. To retain article 27, in which the question of nationality was an overriding consideration, without leaving the way open for clarification and reservations, might do more harm than good and might discourage States from conferring jurisdiction upon the court. There was just as much reason to retain in article 27 the territoriality principle, which the Netherlands amendment would eliminate, as the nationality principle. There was a third principle which should not be ignored and suitable provision for it should be included: if State A suffered as a result of a crime committed by a national of State B in State C, State A had the right to bring him to trial (the principle of violation of State interests).

The section of the statute dealing with the court's competence should embody three considerations: first, that in place of an attempt to incorporate every possible reservation, the basic principle should be accepted that the jurisdiction of the court was not presumed but required to be stated in a valid legal instrument; secondly, that jurisdiction should be confined to that conferred upon the court by convention, special agreement, or unilateral declaration; and, thirdly, that States accepting the statute of the court should be free to make reservations with regard to jurisdiction.

The CHAIRMAN explained that the 1951 Committee's aim in drafting article 27 had been to express its opinion that no State would be bound by the court's jurisdiction merely because a national of that State was involved or because a crime was alleged to have been committed on its territory; the underlying principle of the 1951 draft statute was that the court's jurisdiction would be confined to that conferred by convention.

Mr. MAKTOS (United States of America), replying to the Netherlands representative, agreed that, if a State in whose territory a crime was alleged to have been committed was not a party to the convention conferring jurisdiction over that crime upon the court, that State would be under no obligation to hand over the accused person to the court for trial. But in 95 per cent of cases, the accused would still be in the country where the crime was alleged to have been committed, and the absence of such obligation upon that State would render the court impotent.

An individual committing an act recognized as a crime by other States in a country where such an act was not recognized as a crime - for instance, an individual committing genocide, recognized as a crime by forty-two States, in the United States, where it was not so recognized - might be a national of a State party to the Convention on Genocide, and would on that ground be subject to the court's jurisdiction; such a case could be dealt with by extradition. Normally, however, the accused's nationality was irrelevant.

He proposed that the Israel representative should join the Standing Drafting Sub-Committee in preparing the section of the statute relating to the court's competence.

It was so decided.

Mr. MERLE (France) observed that the Netherlands and Israel approaches to article 27 differed in that the Netherlands proposed to make reservations binding upon all the States parties to the statute, whereas Israel proposed to leave States free to introduce reservations when signing, or when ratifying, the instrument adopting the statute. A decision between those approaches should be reached before the question was submitted to the Drafting Sub-Committee.

At the invitation of the CHAIRMAN, Mr. ROBINSON (Israel) proposed the following alternative amendments to the Netherlands representative's proposal at the previous meeting: to substitute for the 1951 draft articles 26 and 27 either:

"The jurisdiction of the Court is not presumed. No State is bound to subject its nationals, or a crime committed in its territory irrespective of the nationality of the accused person, or a crime committed in or outside that territory by any person in violation of its interests, to the jurisdiction of the Court except by consent, expressed either ante factum by conventions conferring jurisdiction on the Court in regard to crimes under international law or post factum, with respect to a particular case of such a crime, by special agreement or unilateral declaration."

or: the first sentence of the same article, omitting the three reservations and adding a paragraph reading: "When conferring jurisdiction upon the Court, States are free to make their reservations".

Replying to a question from Mr. LOOMES (Australia), Mr. ROBINSON (Israel) said that the way would still be open for any State to confer jurisdiction upon the court ante factum by means of a unilateral declaration, but that such a declaration would normally follow the establishment of the court by a convention under which several States conferred jurisdiction upon it.

Mr. WANG (China) and the CHAIRMAN felt that the interests of States affected by the commission of a crime should be specifically safeguarded, and suggested that that should be done respectively by provisions of the statute regarding the conferment of jurisdiction, and by approval by the General Assembl

of all conferments of jurisdiction. It was not clear to them how such interests would be safeguarded if the conferment of all jurisdiction was left to conventions into which States would enter.

Mr. ROBINSON (Israel) replied that both the committing authority, or such similar body as might be established in place of it, and the court itself would go into the question of competence very thoroughly.

Mr. PEREZ PEROZO (Venezuela) recalled that it was only by a narrow margin that the 1951 Committee had adopted the stipulation in article 26 that jurisdiction might be conferred upon the court only by States parties to the statute. The court could be established by a diplomatic conference adopting a convention conferring jurisdiction upon the court, with the court's statute as an annex to the convention; there was no necessity for the statute to have been accepted by the States before jurisdiction was conferred by the convention. He wondered whether the reservations which a State was free to make under the Israel proposal included one in respect of acceptance of the statute; if so, the system would have the merit of additional flexibility.

Mr. ROBINSON (Israel) replied that his basic assumption was that the court's jurisdiction would be available only to States which had accepted the statute. The final answer to that question, however, would depend on the temper of the eventual diplomatic conference.

Mr. MAKTOS (United States of America) welcomed the Israel proposal and likened it, apart from the distinction of ante factum and post factum therein drawn, to an amendment proposed in the 1951 Committee by the United States delegation (A/AC.48/L.2 of 6 August 1951), which read:

> "The Court shall have jurisdiction over such offences against the law of nations as may be provided in protocols to the present convention which have been concluded pursuant to recommendations of the United Nations General Assembly, provided that no State shall be bound by any such protocol unless that State has accepted that protocol."

Mr. RÖLING (Netherlands) interpreted the Israel proposal to mean that a case could not come before the international court unless jurisdiction had been conferred upon the court by the State of which the accused person was a national, by the State on the territory of which the crime had been committed, and by any State which claimed that its interests had been violated by the crime. In the case of some crimes, such as genocide, practically every State in the world could claim to be affected. Any one of them could therefore prevent the case from coming to trial before the court simply by claiming a violation of its interests.

Mr. ROBINSON (Israel) agreed that States could not remain indifferent to certain crimes, such as aggression or genocide. However, the problem of violation of interest should be considered in a much narrower sense. For instance, a State could claim that its interests would be violated in respect of a crime which, under its domestic legislation, it could try in its own courts.

Mr. RÖLING (Netherlands) felt that it was neither necessary nor desirable to include such a provision in the statute of the international court. Trial by the international court should be subject to the consent of the State of which the accused person was a national, not so much because that State might wish to try him under its own laws but rather because some cases might involve matters of national policy which the State might be reluctant to have aired publicly. A State should therefore be assured that its nationals would not be tried by the international court except with its consent.

The conferring of jurisdiction upon the court merely meant the right to submit a case to it and acknowledgment of that same right in favour of other States.

Mr. ROBINSON (Israel) felt that the Netherlands proposal to restrict the basic reservation to the State of which the accused person was a national was not dictated by considerations present in all crimes under international law. It merely protected a State from a public airing of matters involving its national policy. That was a valid consideration.

The Israel proposal, on the other hand, had been motivated by considerations of a different character and was based on the conflict between national and international criminal jurisdiction.

The CHAIRMAN suggested that the Israel representative should confer with the Drafting Sub-Committee with regard to the wording of his proposal.

Mr. RÖLING (Netherlands) felt that the Committee should be clear as to what it meant by the conferring of jurisdiction upon the international criminal court. He did not consider it to imply the complete surrender of a State's jurisdictional rights and their transfer to the international court. It simply meant that a State was not compelled to bring a case before the court but could not prevent another State from doing so.

The CHAIRMAN, summing up, observed that the Committee had before it the Netherlands proposal to delete from article 27 of the draft statute the words "and by the State or States in which the crime is alleged to have been committed". The Israel representative had submitted an amendment to that proposal, the exact wording of which was left to the Drafting Sub-Committee.

Mr. ROBINSON (Israel) pointed out that he had submitted an alternative proposal under which a general clause respecting reservations would be included in the draft statute in place of the specific clauses it now contained.

With regard to the last point made by the Netherlands representative, he could not quite see the difference between submitting a case to the court, thus actively acknowledging its jurisdiction, and allowing another State to do so, and thus passively conferring jurisdiction.

He agreed with the Chairman that the matter should be considered in the Drafting Sub-Committee and a suitable proposal submitted to the Committee.

Mr. PEREZ PEROZO (Venezuela) proposed that the Committee should not take a decision with respect to article 27 until the Drafting Sub-Committee had considered the Israel proposal.

It was so agreed.

Mr. VALLAT (United Kingdom) suggested that the Drafting Sub-Committee should submit its proposal in the form of an amendment to the present text of article 27.

Mr. RÖLING (Netherlands) proposed that the Committee should defer consideration of the other articles in the draft statute relating to the question of jurisdiction pending submission of the Drafting Sub-Committee's proposal.

It was so agreed.

The meeting rose at 1 p.m.