



Dual Distribution

COMMITTEE ON INTERNATIONAL CRIMINAL JURISDICTION

First Session

SUMMARY RECORD OF THE SECOND MEETING

held at the Palais des Nations, Geneva,
on Thursday, 2 August 1951, at 9.45 a.m.

CONTENTS:

Pages

- | | |
|---|---------|
| 1. General discussion (item 2 of the agenda)
(continued) | 3 - 32 |
| 2. Election of officers (item 1 of the agenda) | 32 - 33 |

Present:

Chairman: Mr. MORRIS

Members

Australia	Mr. WYNES
Brazil	Mr. AMADO
China	Mr. WANG
Denmark	Mr. SÖRENSEN
Egypt	MOSTAFA Bey
France	Mr. de LACHARRIÈRE
Iran	Mr. KHOSROVANI
Israel	Mr. ROBINSON
Netherlands	Mr. RÖLING
Pakistan	Mr. MUNIR
Syria	Mr. TARAZI
United Kingdom of Great Britain and Northern Ireland	Sir Frank SOSKICE
United States of America	Mr. MAKTOS
Uruguay	Mr. PINEYRO CHAIN

Secretariat:

Mr. Kerno	Assistant Secretary-General in charge of the Legal Department
Mr. Liang	Secretary to the Committee

1. GENERAL DISCUSSION (item 2 of the agenda)(continued)

1. The CHAIRMAN invited the Committee to resume the general discussion.

2. Sir Frank SOSKICE (United Kingdom) commended the Secretary-General on the useful study (A/AC.48/1) which he had submitted to the Committee and from which the United Kingdom delegation had derived considerable assistance.

3. He was not quite sure as to the precise scope of the discussion in view of the Committee's terms of reference laid down by the General Assembly. The Chairman might consider that those terms of reference required the Committee to formulate proposals, and rule that they did not require it to consider whether or not it was possible to work out some practical scheme. He hoped that the latter view would be taken, because in stating the United Kingdom Government's view he wished to bring to the notice of the Committee some fundamental difficulties which his Government had felt when considering the proposal to establish an international criminal court.

4. Whatever the ruling from the Chair, he would submit that such general difficulties would be relevant to any discussion upon which the Committee might embark, because if the objections he was about to bring were well founded it would be necessary to try to find some way of overcoming them. Even if it were out of order to argue that the proposal to set up an international criminal court was an impractical one, the Committee would note that the General Assembly had referred the matter to it on the understanding that any scheme for the constitution of the court would be impossible unless based on specific proposals. He hoped therefore that the arguments he would adduce would be considered, first, as tending to show that the project was impossible to realize, and secondly that, even if the Committee were committed to formulating such a project, the latter would have no real value unless such fundamental difficulties were disposed of. It would be readily agreed that the Committee's proposals to the General Assembly must be strictly practicable.

5 While stressing the ideal of international co-operation, of which the United Nations was a symbol, he frankly admitted that, after deeply pondering the proposal, he would prefer that no international court with criminal jurisdiction should be set up at that stage in the development of communal effort and purpose between the nations of the world, which, in the considered view of his Government, were not yet ready for such an important and ultimately highly desirable development in world affairs. His Government had by its actions repeatedly shown its faith in the United Nations, and had always taken a leading part in bringing causes of dispute in which it was concerned to the arbitrament of the International Court of Justice. In the proposal to set up an international criminal court, however, there were, in his view, very real dangers at the present stage to the further development of international good-feeling and joint endeavour. For that reason, he felt that the Committee should report against the setting up of such a court. The following were some of the reasons why his Government had come to hold that view.

6. First, it had to be considered in what circumstances such a court might be called upon to function; what persons were likely to be accused of offences against international law; and what the likely effect would be of an attempt to bring such persons before an international criminal court. In the past, there had been dangerous ideological movements clearly offending against, and urging others to offend against, the rules of international law and conduct. In country after country deadly doctrines had been preached by and centred upon the personality of an individual or individuals whose activities had been forced upon the notice of peoples of other nations, and who through influence, oratory and the play of political and social circumstances had been able to carry with them the thoughts of large numbers of their fellow citizens and to urge the latter to courses of action which civilized persons could not but condemn as international crimes.

7. Sometimes such a figure emerged as a revolutionary force in defiance of the government of his country; sometimes he was actually a spokesman, an agent

or a representative of that government. Taking the latter category first, let the case be imagined of a government led by such individuals and pledged to some violently anti-social policy. The government did not generally seize upon the imagination of the people and control its thoughts, except at periods when the people of the country were in a great emotional disturbance, perhaps as the result of some great revolutionary upheaval. History periodically showed how war and the extermination of races and similar international crimes could become the avowed objects of governmental policy so that the whole nation concerned passed through a period when its passions were distorted and infused with bitter malevolence, impelling it to commit war crimes on a large scale. Much as they were to be deplored, such episodes might recur. To function properly, an international court of criminal jurisdiction would have to possess the means of bringing before itself the protagonists of such an ideology. If it was powerless to do so, it would inevitably become an object of contempt and utterly fail in its function. The United Kingdom Government had asked itself what would happen if such turbulent individuals, generally gifted with powers of oratory and a capacity to excite passions and prejudices, again appeared on the scene. If an international criminal court existed, its duty would be to try and condemn such persons, if properly brought before it. It was virtually certain, however, that any attempt to bring them before the court would never be made with the consent of the government concerned, or without violent objection by the people which supported them. The upshot would be that the court would become a battleground of political passions rather than a forum of justice operating in that atmosphere of calm and dignity which was of the very essence of any system of justice. In his view, there would be but few cases where such a situation would not obtain. If that view were sound, the court, instead of promoting the ideal of a single civilized world bent on asserting and enforcing uniform standards of international conduct, would become a focal point of international discord; and that would be a cogent reason for reporting against the desirability of setting up such a court at the present stage when the peoples

of the world were still divided by international stresses and strains. And even if that were not a good reason for reporting against the project altogether, he hoped the Committee would agree that there would be no value in suggesting a scheme to the General Assembly which failed to take full account of, and provide a solution for, that difficulty.

8. There was then the question of the proper method of bringing such an individual or group of individuals before the court, often against the wishes of the government concerned and in the teeth of opposition from many of the individual's countrymen. Would force be used? If so, would the duty of bringing them before the court by force be vested in the Security Council? And what would then happen if the veto was exercised in the Security Council? It would surely be most unfortunate and a great source of international ill-will and misunderstanding if some countries could, by the exercise of the veto, prevent their own nationals being brought before the court, while other countries not being members of the Security Council, would be unable to do so. What other body could be entrusted with the duty of hailing a person before such a court? Even the International Court of Justice had no power to execute its own judgments, the enforcement of which was left to the Security Council. On the other hand, if the proposed court was not in a position to insist on an accused person being brought before it, it would be placed in an impossible position; lawless countries would be free to flout its jurisdiction, and the more lawless the country the more impotent would the process of the court be to dispense justice; and it was in such lawless countries that persons guilty of international crimes would be most likely to be found.

9. Again, the question of national laws relating to extradition required careful consideration. The domestic systems of law in many countries did not allow those who had taken refuge there to be extradited for the commission of political offences, and it would be a matter of very acute controversy among the citizens of such countries as to how far they should agree to change their domestic laws so as to make it possible to hand over such political refugees. That might not prove an insuperable difficulty, for international crimes might

possibly be so defined as to differentiate the doctrines upon which they reposed from the category of subjects on which civilized persons might have strongly opposed views. It would, however, be a matter of very considerable difficulty to formulate crimes so as not to infringe unduly upon the limitations of extradition embodied in domestic systems of law.

10. Another problem for consideration was the question of the rules of procedure by which such a person would be tried. Many peoples, like the British people, had great faith in the criminal code to which they were accustomed, certain basic principles of which were regarded as of great importance, as, for instance, in the United Kingdom, the principle that in general an accused person was presumed to be innocent until he had been proved guilty. The United Kingdom had the strictest rules of evidence; matters of hearsay were in general excluded; there were most rigid requirements as to the proof of the content of documents, and very great importance was attached to cross-examination of the accused by counsel. Not all countries agreed with some of those principles. He was sure that in the administration of its own criminal law each country had fundamental doctrines, the rigid observance of which was regarded as indispensable and even sacrosanct. Those doctrines differed from country to country, and even although in their broad essentials they might resemble one another, they none the less had basic points of difference.

11. Any code adopted by an international criminal court would in the very nature of things have to represent a compromise between different systems of criminal law. Thus, when a popular, influential figure was brought before an international criminal court, it might be considered an iniquity by some that he was to be tried by rules of procedure alien to and different from the rules followed in his own country. But a compromise code of criminal procedure ran the risk of satisfying no-one.

12. In the past, much thought had admittedly been given to the question of reconciling different codes into a single common code, and the Nürnberg trial itself had been made possible as the result of a remarkable success in that

direction. The Nürnberg Court, however, could not be regarded as a parallel to a permanent court of international justice conceived as being constantly available and, when necessary, in session.

13. The next question was, to whom would the execution of the sentence of the court be entrusted? Should a convicted person be sent back to his own country to suffer punishment, perhaps even capital punishment? And what would happen if his country did not countenance capital punishment, especially if the convicted person had been tried against the will of a large majority of his countrymen and in accordance with a code of procedure differing from their own and in which they had little confidence? Supposing his fellow citizens refused to punish the condemned person (and the more lawless the country the less likely would its citizens be to carry out the behest of the court), would power be vested in the court to enforce the execution of its own decree or would it again be a matter for the Security Council, and hence subject to the veto? Alternatively, in such circumstances, would some alien authority be called upon to execute the sentence upon the condemned person? There was no escape from a choice between those alternatives, and those who favoured the proposal to set up such a court ought to give answers to the questions he had put. To any contention that in the mouth of a sincere supporter of the ideal of international co-operation his remarks were defeatist and unhelpful, and that the greater the difficulties the greater must be the effort to overcome them, he would reply that he had earnestly sought to find answers to those objections and that, in fact, the more he had studied them, the greater had become his conviction that the court, instead of being a source of good, would almost inevitably be turned into a fount of evil.

14. As to the position of the judges of the court, he believed it possible that, if they were to be appointed on a permanent basis and to forsake all other occupation, malevolent tongues would argue that their existence was not justified - because in the nature of things few cases would be brought before them - and that there was no reason to keep them idle while drawing substantial salaries. Where again were they to live when not in session? Were they to be

subjected, in a country which ex hypothesi was torn by passions which might give rise to the emergence of a personality such as he had described, to all the influences and pressures which might conceivably be brought to bear upon them? Would it not be said with great force that there was no need or justification for setting up such a court except in circumstances such as those in which the Nürnberg Tribunal had been set up?

15. As he had said, no parallel could be drawn between the proposed permanent court of criminal justice and the Nürnberg Court, great as had been the advance brought about by the latter in the formulation of international law and procedure and of the principles of international conduct. The Nürnberg Court had been set up to try persons at the end of a world war for which the conduct of those persons had been responsible. It had been possible for the purposes of the Court to bring together their countries which were unfortunately at the present time passing through a period of very strained relations. That tribunal had been established by the Allied Powers in territory under their occupational jurisdiction and in which they had enjoyed full judicial and administrative powers. They had been in a position to apprehend the accused, to bring them before the Tribunal, to bring all the necessary witnesses and other evidence, and finally themselves to execute the sentences imposed. In fact, in all those ways the Nürnberg Tribunal had functioned very much like an ordinary domestic tribunal, and it was for those reasons that it had been able to function effectively and to do what an international criminal court established in peacetime in some city like Geneva or the Hague would not have been able to do without the voluntary concurrence and assistance of the authorities of a large number of States, and even then only with considerable difficulty. Even in the case of the Nürnberg Tribunal there had been the problem of harmonizing the different forms of criminal procedure; and that problem had only been overcome by concessions on the part of each of the participating countries. Such were not the circumstances in which a permanent court would have to carry out its duties. Should such conditions return - and he sincerely hoped that they would not - it might be necessary for a new Nürnberg Court to condemn those who individually or collectively transgressed international law, but that was far from saying that a

permanent court should remain in existence over the many years which, on the most pessimistic view, might elapse before any such conditions would return.

16. The United Kingdom Government also considered that no parallel could be drawn between such a court and the International Court of Justice. In the very nature of things, an international criminal court must always become the centre of prejudices and passions. The more abstract causes which, in general, formed the substance of debate before the International Court of Justice were of a different character. There claims were asserted by one country against another, and many of them depended upon abstract principles of law and the assertion of rights divorced from the element of violent human passion. An international criminal court must, by its nature, be concerned with those very matters, centred upon particular individuals, which gave rise to strong emotion and feeling, and, in contrast to the International Court of Justice, its situation would be quite different and very unenviable.

17. Such were the general considerations which he wished to submit on behalf of his Government. If the Chair ruled that discussion as to whether a court should be set up at all was in order, and if the Committee agreed with his point of view, it would no doubt report back to the General Assembly that the difficulties were overwhelming and that the balance of good and evil to be expected from the setting up of such a court militated against its establishment. If the Committee disagreed with him, however, he felt that it would accept the view that, if a court was set up, account would nevertheless have to be taken of the problems which he had raised. No final answers to those questions had so far been suggested, although the extremely valuable and instructive memorandum submitted by the Secretary-General would greatly facilitate the Committee's study of them.

18. Should the Committee decide against the view that the attempt to set up an international criminal court should not be made, his delegation would loyally co-operate in trying to contribute suggestions for overcoming those difficulties and would most carefully study the suggestions and arguments of the other members of the Committee. He would like to think that the difficulties could be

overcome, but he had to reserve the position of his country with regard to any proposal which might be formulated and submitted to the General Assembly. Whatever view was taken of his submissions, he would express the hope that the dangers to which he had called attention would receive due weight when the Committee's report was being drawn up, if the other members felt that his contentions had some foundation.

19. The CHAIRMAN did not feel that he could give a ruling as to whether it was within the scope of the Committee's terms of reference to consider the desirability and possibility of working out some practical scheme for the establishment of an international criminal court.

20. Mr. de LACHARRIÈRE (France) was of opinion that by adopting its resolution 489(V) the General Assembly had not instructed the Committee to express an opinion as to the advisability of creating an international criminal court, but only to prepare one or more preliminary draft conventions and to make proposals relating to the establishment and the statute of an international criminal court.

21. He did not consider that the Committee had the right to question the utility of that task or to discuss whether or not it was prepared to carry it out. The United Kingdom representative had performed a service in drawing attention to the main difficulties which the Committee would encounter. They did not appear to be insurmountable, but they had to be taken into account. However, to state them should not lead to the Committee's refusing the mission with which it had been entrusted by the General Assembly.

22. He reserved the right to speak again on the substance of the questions so far discussed.

23. Sir Frank SOSKICE (United Kingdom) explained that his doubts about the Committee's terms of reference had arisen out of consideration of the wording of General Assembly resolution 489(V), of which the fourth paragraph of the preamble read "Bearing in mind, further, that a final decision regarding the setting up of

such an international penal tribunal cannot be taken except on the basis of concrete proposals", and in the first operative clause of which it had been decided that the Committee should meet "for the purpose of preparing one or more preliminary draft conventions and proposals relating to the establishment and the statute of an international criminal court". It would be agreed that those two passages were not entirely free from ambiguity, and were wide enough to include the general question of whether it was practicable to set up an international criminal court. The first of those two passages implied that a final decision could not be taken in the absence of concrete proposals, that so far as the General Assembly was concerned the matter was still at the exploratory stage, and that the General Assembly was asking for a statement of the pros and cons of setting up such a court. So far as he could see, the second passage was a request for two things; proposals as to whether an international court should be set up; and a draft statute intended to assist the General Assembly in arriving at a decision. He therefore felt that he had not been out of order in making his point.

24. Mr. KERNO (Assistant Secretary-General) recalled his opening statement at the first meeting,⁽¹⁾ in which he had pointed out that the International Law Commission, which was a body of independent legal experts, had concluded that it was both desirable and possible to set up an international penal tribunal and that, when the matter had come before the Sixth Committee of the General Assembly,⁽²⁾ where, of course, the political element came in, some of its members had adopted the view of the International Law Commission, whereas others had expressed grave doubts as to the desirability and possibility of establishing such a court. The great majority of the members of the Sixth Committee had maintained that concrete proposals must be made before any decision in the matter could be taken. Hence the establishment of the present Committee. It

(1) Summary Record of the 1st meeting (A/AC.48/SR.1), paragraphs 1 to 9.

(2) Official Records of the General Assembly, fifth session, Sixth Committee, 240th to 245th meetings.

was, of course, for the Committee to decide upon its competence. He invited those members of the Committee who had also represented their governments in the Sixth Committee to give their view on the construction to be placed on General Assembly resolution 489(V).

25. Mr. AMADO (Brazil) said he had not intended to speak on the question, as it was one to which he, as well as the other members of the Committee, had already devoted a great deal of attention. He had listened to the United Kingdom representative's statement with great interest, the more so as he had himself expressed a similar opinion in the Sixth Committee.⁽¹⁾

26. At the first session of the International Law Commission, he had proposed the appointment of two rapporteurs to study the question of establishing an international criminal jurisdiction. He had suggested that it would be advisable to appoint one representative from the northern and one from the southern countries. The International Law Commission had adopted his proposal, and had appointed Mr. Sandström (Sweden) and Mr. Alfaro (Panama) as rapporteurs.

27. Contrary to his hopes, there had been no fusion whatever of the ideas of the representatives of the two climates. Mr. Alfaro had submitted a report favouring the establishment of the court⁽²⁾, whereas Mr. Sandström had been against it⁽³⁾.

28. He (Mr. Amado) had supported the attitude taken by Mr. Sandström. He could not understand how it could be considered possible to establish an international criminal court in existing world conditions. Mr. Alfaro's report had contained a long list of individuals who believed in that possibility. Perhaps he (Mr. Amado) was very different from those people, but hitherto no

(1) Official Records of the General Assembly, fifth session, Sixth Committee, 243rd meeting, paragraphs 20 to 27.

(2) A/CN.4/15

(3) A/CN.4/20.

argument had been able to convince him. In private conversation, he had asked where an international police force was to be found, how the court would function and so on. He had already considered all the problems the United Kingdom representative had just mentioned.

29. A work on the problem of establishing an international criminal court, which had just been published in Geneva, also contained a list of persons who believed that it was possible to establish such an institution. Amongst them was to be found the name of President Truman, as well as those of many professors. He had once again reviewed the problem and pondered all the difficulties it would run up against: the establishment of an international police force, the existing mental climate of the world, and so on. How could the nations be expected to co-operate in such a venture, if they were not even prepared to collaborate in the solution of immediate economic problems, or in drawing up the agenda for a meeting? Was it conceivable that, in the existing tense world situation, it would be possible to set up a permanent international criminal court, whose judges would remain idle, waiting for a State to bring a criminal before its bar, after surmounting all the internal political difficulties inherent in such a procedure? He himself did not see how that would be possible, and failed to comprehend how eminent men could consider the court as good as established at the Hague. He could not bring himself to take a different attitude from that he had adopted before the General Assembly.

30. From the strictly legal point of view, the judgments rendered by the Nuremberg and Tokio Tribunals did not constitute an example of the functioning of an international criminal court of the type contemplated. Those judgments comprised a characteristic feature of national criminal jurisdiction, namely, the power of coercion exercised by a State over its nationals, or in other words the capacity to bring accused persons to justice. That power, an attribute of sovereignty, the Allied Powers had possessed by virtue of their complete victory over Germany and Japan, followed by their occupation of the enemy's territory. The Allied Powers had had competence to legislate and enforce their laws in the occupied countries, just as they did in their own territory.

31. He wished to make it clear that he in no way denied the legality or the justice of the sentences pronounced at Nürnberg and Tokio. If ever sentences had been deserved, it had been those. Neither did he question the international character of the post-war military courts. They had been set up by international agreement⁽¹⁾, and their structure bore witness to that fact. The point he wished to make was that the Nürnberg and Tokio Tribunals had been strengthened by the prevailing circumstances which would not be the case for the projected court; always provided that it was not proposed to entrust the administration of international criminal justice to the whims of Mars.

32. The Brazilian position was at present the same as that he had adopted in the International Law Commission and the same as that expounded by him in the Sixth Committee of the General Assembly. However, as he felt he might be prejudiced by his personal opinions, he had consulted his Government as to whether he should maintain his previous attitude and his Government had approved the position he had taken up.

33. He proposed to take as small a part as possible in the work of the Committee. Should the latter come to an immediate decision not to discuss the question, and to inform the General Assembly that, in its opinion, the work was not timely, he would be one of the first to vote for such a commonsense, and at the same time, constructive, solution. It was impossible to consider as constructive a procedure that would inevitably be confined to paper and would not correspond to anything concrete. The present world, unfortunately, was not the best possible one.

(1) Agreement regarding the establishment of an International Military Tribunal - London - 8 August 1945.

34. Mr. MAKTOS (United States of America) said that he had listened with great interest to the succinct and pertinent speech made by the United Kingdom representative, and to the Brazilian representative's excellent statement of his point of view. If he (Mr. Maktos) took up some of the points made by the United Kingdom representative, what he said should not be construed as necessarily indicating opposition to the latter's point of view. In fact, he reserved the United States Government's decision as to the course it would ultimately follow. He himself, in the Sixth Committee, had said that a decision could not be taken as to the desirability of establishing an international criminal court unless the text of a convention was made available in order that it could be seen whether or not the obstacles were insuperable.⁽¹⁾

35. He thought that the Chairman had rightly declined to give a ruling as to whether the Committee was in order in considering whether or not it was possible to work out a practical scheme. The Committee would note the second operative paragraph in General Assembly resolution 489 (V), and particularly the words "and proposals". Those words had not appeared in the first draft⁽²⁾ submitted to the Sixth Committee, and had only been included by the Sixth Committee because it had been felt that the authority given to the Committee should extend beyond the preparation of one or more preliminary draft conventions.⁽³⁾ Admittedly, it should be borne in mind that a final decision concerning the establishment of such a tribunal could only be taken on the basis of concrete proposals, but that consideration had not been a guiding one in the drafting of the second operative paragraph of the resolution.

36. With regard to the United Kingdom representative's point that the court must have some means of bringing accused persons to trial, he wondered whether that was altogether essential. The Committee would note that in article 24 paragraph (3) of the preliminary draft statute in annex II to the Secretary-General's memorandum

(1) Official Records of the General Assembly, fifth session, Sixth Committee, 240th meeting, paragraph 44.

(2) A/C.6/L.151

(3) A/C.6/L.158, A/C.6/L.151/Rev.1; 243rd meeting, paragraph 58th and 244th meeting, paragraph 1 and following.

(A/AC.48/1), the proposal was that the court should have jurisdiction to judge "crimes under common law, for the judgment of which the Court has been given jurisdiction by conventions to which the States acceding to this Convention are likewise parties". That would appear to suggest that the crimes over which the Court would have jurisdiction should be left to agreement under some future convention or conventions, and that the Court should exist against the possibility that at some future date States would agree as to which crimes were to be brought before it. In his view, the honour of governments that ratified any such future convention would have as much, if not more, value than force, and the fact that some State might violate such a treaty was no good reason for not having such a convention under which States would have the power to surrender offenders. The question raised by the United Kingdom representative might therefore not prove insoluble.

37. As to the principle of asylum, he hoped that conventions on war crimes would never violate that principle, and he believed that if countries confined themselves to setting up the proposed mechanism, that question should not prove to be an insuperable difficulty either.

38. Turning to the question of rules of procedure, he recalled that the United Kingdom had not considered that the Nürnberg trials had been unfair to the defendants, even though matters of hearsay had not been excluded, and other rules of criminal law applicable in the United Kingdom had not been applied. He believed that it would be possible to frame an international criminal code which would not offend against domestic legal systems. As to the Nürnberg Tribunal, he considered that there was a parallel between it and the proposed international criminal court in so far as the question of a fair trial was concerned. He also submitted that if a permanent international criminal court had been in existence before the Nürnberg Tribunal it would not have been necessary to set up ad hoc tribunals of victors to try the vanquished.

39. On the question of the execution of the court's sentence, he said that it would be usual to provide that the court should impose penalties and that, if the precedent set up in the Convention on the Prevention and Punishment of the Crime of Genocide

were followed, any State ratifying a future convention on international crimes and being a party to the convention setting up an international criminal court, would be bound to enact the necessary legislation to provide for the enforcement of such a penalty. Another method might be for the United Nations to enter into arrangements with the court, or with States, for the execution of a judgment.

40. It seemed, therefore, that the adoption of article 24, to which he had referred, would go a considerable way towards solving some of the difficulties. What he had said in no way committed his Government but had merely been thrown out for the consideration of the Committee.

41. Mr. SØRENSEN (Denmark) stated that his Government's attitude was very similar to that of the United Kingdom and Brazil; on the whole, he shared the scepticism expressed by the representatives of those two countries. The Danish Government, however, took the view that the Committee had been requested to prepare a draft convention and additional proposals, and although he had no firm instructions in the matter, he knew that his government felt that the Committee should do its best to lay before the General Assembly specific texts which would enable it to appreciate the full scope of the problem. That was the primary task of the Committee, but he recognized that, as its work progressed, it might find that the arguments adduced by the United Kingdom representative against the establishment of an international criminal court were cogent, and that appropriate observations by the Committee as a whole or by individual members should in that event be added to the report.

42. The basic problem before the Committee was the inability of such a court to operate without an executive authority for the apprehension of offenders and the enforcement of judgments over the heads of governments. A possible solution might be for governments themselves to undertake the functions of such an executive authority, in other words, to bring the accused before the court and enforce the latter's judgments. That, however, would be an unsatisfactory solution, since it would not be possible to impose such obligations on governments generally when it was known that many would not be ready to carry them out. In that connexion, it was regrettable that some governments had been unwilling even to explore the field.

It was the task of the Committee to endeavour to solve the many problems, concerning which the United Kingdom representative had given an extremely useful lead, with a view to enabling governments to consider how much further they could go. He himself was not in a position to commit his Government to any definite attitude, and reserved its right to reject anything which he himself might approve.

43. The CHAIRMAN said that the Committee would proceed on the understanding that no representative was committing his Government unless he specifically said so.

The meeting was suspended at 11.15 a.m. and was resumed at 11.35 a.m.

44. Mr. ROBINSON (Israel) had no intention of speaking on the substance of the problems facing the Committee, but as he had taken a part in the discussions in the Sixth Committee⁽¹⁾ he thought that he might be able to clarify the rather obscure wording of the General Assembly resolution under which the Committee had been set up. In the Sixth Committee there had been two opposing views: one to the effect that the question of establishing an international criminal court should be adjourned sine die; the other to the effect that, while the findings of the International Law Commission should not necessarily be endorsed, work towards establishing such a court had begun and should continue. The latter view had prevailed, and had resulted in the adoption of resolution 489 (V). It had been felt, however, that the approach to the problem adopted by the International Law Commission had been too abstract - too much based on a priori arguments; and that it would therefore be desirable to have a more empirical statement of the case. The final resolution expressing the desires of the General Assembly was imperfectly worded, but the gist of the decision was that the question of the establishment of an international criminal court should be left to the General Assembly, but that the latter's decision should be based, not on academic discussion of the pros and cons of the case, but on specific proposals in the shape of draft statutes for the court.

(1) Official Records of the General Assembly, fifth session, Sixth Committee, 240th meeting, paragraphs 59 to 61 and 81 and 82.

45. With regard to the Committee's terms of reference, it had to be borne in mind that the General Assembly resolution requested the Committee to prepare, not only preliminary draft conventions but also proposals relating to both the establishment and the statute of an international criminal court. The words "and proposals" had been inserted to leave the Committee freedom with regard to procedure it might wish to recommend for the establishment of a court.⁽¹⁾

46. The Committee had thus complete freedom to discuss the question in any form it wished, including freedom to debate whether such a court should or should not be established. For that reason, the statements of the United Kingdom and Brazilian representatives should be welcomed, not as reflecting a negative attitude towards the whole problem, but as careful advice which the Committee should keep in mind when dealing with the problems before it.

47. Mr. ROLING (Netherlands) said that during the Sixth Committee's discussion on the International Law Commission's view that the establishment of an international criminal court was desirable, several delegations had said that the Commission had been too abstract in its discussions, and had failed to take full account of the political aspects of the problem.⁽²⁾ For that reason it had been decided that the Committee should be composed, not of legal experts, but of government representatives, and that it should deal with the concrete problem of preparing draft texts. It was meaningless, however, to say that it was desirable to establish an international court, without a precise definition of what was meant, for example, by declaring that such a body was desirable at the present time, or at some unspecified time in the future. It was therefore wholly within the scope of the Committee's terms of reference to discuss the general aspects referred to in the General Assembly's resolution and in the Secretary-General's memorandum.

48. His Government was still studying the Secretary-General's memorandum, and he hoped to express its general views on the question of an international criminal court the following week.

(1) Official Records of the General Assembly, fifth session; Sixth Committee, 244th meeting.

(2) Ibid, 240th meeting, paragraphs 14 to 28 and 78 and 79.

49. Mr. PINEYRO CHAIN (Uruguay) said, without of course committing his Government, that the latter supported in principle the setting up of an international criminal court for the punishment of persons found guilty of a crime against international law.

50. He had listened with interest to the statements that had been made on the task of the Committee. The Committee had been given clear terms of reference. It ought therefore, on the basis of the drafts submitted by the Secretary-General, to prepare a text for submission to the General Assembly. The phase of abstract discussion as to the need for setting up a court now seemed to have passed. The International Law Commission had studied the question and the General Assembly had adopted the Convention on Genocide. The General Assembly expected the Committee to provide a definite draft. It was not possible to revert to the previous question. Difficulties would certainly be met with in studying the organization of the court, and it might even be concluded that the difficulties were too numerous to permit the framing of a draft. But it would be illogical to take a decision without first studying the conditions in which the court could be set up.

51. Some of the difficulties noted by the United Kingdom representative might be solved in the draft. It might be laid down that the court should establish its own procedure, while at the same time being given certain rules for guidance. Again, the principle could be established by which the accused was presumed innocent until his guilt had been established.

52. With regard to the death penalty, he felt he must point out that Uruguay had abolished it. It was laid down in the Constitution that the death penalty must not be inflicted on anyone, but the draft might provide that, where the death penalty had been abolished in the country in which the sentence pronounced by the court had to be executed, the next most severe penalty should be inflicted.

53. In short, it could not be known whether it was absolutely impossible to set up the court until the statute of the court had been studied.

54. At first sight, the most weighty argument of the United Kingdom representative was that the court would have to act without any effective power, but that was a

difficulty which always arose in setting up international bodies. It would be all to the credit of the Committee if it succeeded in resolving that difficulty. Besides, the draft convention which the General Assembly had asked the Committee to draw up would be ratified by States, so that it was to be hoped the Court would obtain the effective powers which it needed. Everything would depend upon the obligations which the States would voluntarily assume.

55. It did not seem right to raise ab initio the problem of setting up the Court; rather its organization should be studied, while attempting to solve problems of a practical nature that would undoubtedly arise. There was no doubt that a draft could be prepared, if not a perfect, at least a perfectible one. That was the only way of proceeding. He therefore proposed that the Committee should take up the study of the draft forthwith, consider the observations submitted and see whether they could be taken into account.

56. Mr. WYNES (Australia) said that he himself had not attended the meetings of the Sixth Committee, but his country's view had been that it would be premature to establish an effective international criminal court at the present juncture in world affairs. His own personal view was that the Committee should act in accordance with the terms of reference given to it by the General Assembly, and should therefore consider in detail whether agreement could be reached on some form of draft statute for the court. The legal system in his country was practically the same as that of the United Kingdom, and the objections raised against the establishment of an international criminal court by the United Kingdom representative were, in his view, of very great importance. It might, however, be premature to decide that an international criminal court was completely impracticable until the possibility of preparing a draft statute had been examined. He therefore agreed with the Danish representative that the Committee should proceed at once to the task of attempting to frame such a draft statute, trying to overcome the difficulties raised by the United Kingdom representative as they arose.

57. The CHAIRMAN suggested that the Committee should at once begin discussion of annex I of the Secretary-General's memorandum, article by article. The Committee could change the wording or order of the articles and add or remove provisions, but the annex might well be used as a starting-point and basis for the Committee's discussions.

58. Mr. KERNO (Assistant Secretary-General), explaining the relationship between the three annexes to the Secretary-General's memorandum, said that the Committee's terms of reference required it to explore the question of a statute for an international criminal court from as many aspects as possible. The annexes had therefore been based on various assumptions; annex I on the assumption that the court would be established by a resolution of the General Assembly; annex II on the assumption that it would be established by an international convention; and annex III on the assumption that it would not be a body of fixed composition but an ad hoc tribunal of judges chosen from the members of the court whenever cases had to be tried.

59. Mr. LIANG, Secretary to the Committee, suggested that the three annexes could not readily be understood except in the context of the issues involved. Those issues were set out in part II of the Secretary-General's memorandum, and the Committee might consider it desirable to consider that part before embarking upon an examination of the annexes. It might not be possible to discuss it paragraph by paragraph, but the issues set out in it seemed to him to be worthy of some discussion. For example, the draft statute contained in annex III was based on the systems followed for the Permanent Court of Arbitration, and the examination of that draft statute might be facilitated by referring to part II chapter II of the memorandum.

60. Mr. de LACHARRIERE (France) said that, with regard to the Committee's method of work, he wished to submit a proposal to which the Secretary's remarks had lent support. Agreement must be reached on the method of work to be followed. If the Committee took one of the texts contained in the annexes and began to discuss

the first article thereof, there would, indeed be some danger that it would not have a sufficiently complete idea of what was to be done. There were several texts annexes I, II and III to the Secretary-General's memorandum before the Committee and, moreover, the order in which the articles were presented, while suitable for drafting, was not suitable for a systematic examination of the question. The Committee would be dealing with an article on organization without having any idea of the jurisdiction to be accorded to the court. It was difficult to go into details of organization without having a clear idea of the functions to be entrusted to the court. The basic idea of the United States representative was that the Committee should determine the organization of the court and leave its jurisdiction to be defined in subsequent conventions. He himself considered, on the contrary, that a decision must be taken on the jurisdiction of the court.

61. During the discussions in the Sixth Committee, it had been the great crimes against humanity that representatives had had mainly in mind; but certain less serious crimes under international law might also be brought before the court, such as counterfeiting, smuggling, breaking of submarine cables, and the like. Moreover, in order to free themselves from international responsibility, certain States might bring before the international court a person who had made an attempt on the life of a diplomat in their territory. There were many views on jurisdiction, but a stand must first be taken on the functions to be entrusted to the court and on how those functions were to be determined. That was the first problem which must be discussed before examining the text concerning jurisdiction. The Committee would then turn to the provisions dealing with the conditions under which cases could be brought before the court. If major crimes were considered, such as preparation for aggression, it would be necessary to examine the very great difficulty so eloquently described by the Brazilian representative. It would be necessary to consider how cases could be brought before the court and how it could ensure the appearance of the accused persons; those problems must be studied before dealing with organization. The Committee's decision on the organization of the court would, in fact, depend on the solutions it found for those problems.

62. He therefore considered that a list of the questions which the Committee must decide should be drawn up, showing the order in which they were to be examined. That list could be prepared by a drafting sub-committee only in the light of the principles established by the Committee. The suggestions he submitted were not very precise, but a little time must be devoted to considering the method of work to be adopted.

63. Mr. TARAZI (Syria), who had taken part in the work of the Sixth Committee⁽¹⁾ said that he would not speak on the substance of the issue, but on the order in which the Committee should deal with the questions before it. He pointed out that in the Sixth Committee two extreme attitudes and one of conciliation had manifested themselves. Exponents of the first of those extreme views desired the establishment of the court and considered it possible and probable; exponents of the second considered that no such court could exist in the present state of international law. The United Kingdom representative had been in the second group and in that respect he had been in agreement with representatives of the Soviet Union, Czechoslovakia and Poland. Poland and the Soviet Union had been elected members of the Committee, but had affirmed that in view of the present state of international law the Committee could not be set up, since there were many obstacles to the establishment of the court. The representatives of the United Kingdom and Brazil had taken a more conciliatory attitude. They considered that the establishment of the court raised political problems, but that there was no reason why the Committee should not be set up to study the establishment of the court and submit suggestions on that matter to the General Assembly. It was in the light of those facts that representatives should interpret General Assembly resolution 489 (V). The Committee would submit to States Members of the United Nations a draft convention on which they would present their views and which the General Assembly would examine in 1952.

64. He believed that the Chairman had taken a wise decision. The views of members of the Committee would be their personal views, and it would therefore function as a committee of experts. Moreover, that was what resolution 489 (V)

(1) Official Records of the General Assembly, fifth session, Sixth Committee, 241st meeting, paragraph 46; 243rd meeting, paragraphs 41 to 48; 245th meeting, paragraphs 53, 54 and 56.

had provided, since the governments represented would be able to accept or reject the Committee's report. Besides, even if they signed the convention, governments would be free to ratify it or not, as in the case of the Convention on Genocide, which many Governments had not signed and others had not ratified.

65. The Committee was faced with the clear-cut difference between the attitudes of the United Kingdom and United States representatives and with the French proposal that it should examine the principles to be adopted in preparing the draft convention. He would go further than the latter, since in view of the conflicting attitudes adopted by the United Kingdom and the United States representatives, each member of the Committee must be left to take up a stand on those two views before considering the principles to be followed in preparing a preliminary draft convention.

66. If he had understood the United Kingdom representative correctly a question of competence had been raised, and if the Committee were to apply the General Assembly's rules of procedure when faced with what might be called a denial of competence, its first task must be to decide on its competence; that it could only do by examining the problem itself.

67. He suggested that the Committee should first discuss the basic principles underlying the establishment or non-establishment of the court. If the members insisted on a vote, the Committee could take a decision on its competence. If it decided that it was not competent, work would cease forthwith. If it decided, on the contrary, that it was competent to prepare a draft convention, it could examine the French proposal and study the basic principles which would govern the organization of the court. A number of sub-committees might be set up to prepare several draft conventions.

68. Sir Frank SOSKICE (United Kingdom) said that the competence of the Committee was not at issue. He had explained his country's view that the Committee should report to the General Assembly that it was undesirable that an international criminal court should be established. However, the difficulties in the way of establishing an international criminal court could not be fully

appreciated until they were tackled individually. He suggested, therefore, that the Committee should not vote on the question of the desirability of the court until it had examined the various texts provided in the annexes to the Secretary-General's memorandum; it could then conclude by a discussion and vote on whether it would recommend that the court should or should not be established.

69. Mr. ROLING (Netherlands) supported the suggestion made by the French representative. Members of the Committee should be given an opportunity to express their general views, as the United Kingdom representative had just done. When all the general views had been heard, a working party might be set up to formulate the fundamental issues for preliminary discussion, and to ensure that every problem was examined at the appropriate time. When the main issues had been settled, the preliminary drafts of the statute could be taken up.

70. Mr. WANG (China) thought a general discussion would be useful, particularly for those members who had not participated in previous discussions on the subject. He supported the idea that the Committee should first take a decision on the main principle, and that a sub-committee should draw up a list of questions for further consideration.

71. Mr. MUNIR (Pakistan) considered that the Committee's task would be simplified if the preliminary discussion were confined to the question of how the international criminal court should be set up, namely, whether it should be set up by an international convention, by a resolution of the General Assembly, or by a combination of both. When that question had been decided, the Committee could take up the relevant annex article by article. The problems relating to such questions as jurisdiction would arise in their proper place during discussion of the preliminary draft.

72. Mr. WYNES (Australia) suggested that the various ideas expressed could be combined if representatives were first to make general statements, if they so desired, and then a working party was instructed to draw up a list of fundamental questions and the order in which they should be discussed. The general statements would also be useful for the working party in the carrying out of its task.

73. Mr. MAKTOS (United States of America) referring to his experience with the committee which had examined the first draft of the Convention on Genocide, said that questions of a general nature had been raised in that committee and had been discussed at the beginning of its session. When the text had eventually been taken up, the same questions had arisen again and had again been discussed at length, so that much time had been lost. He therefore agreed with the Pakistani representative that the Committee should begin by deciding whether the international criminal court should be set up by international convention or by a resolution of the General Assembly. He did not agree, however, that it would be of value to set up a working party to formulate general questions; it would be preferable to discuss them as they arose during examination of the relevant preliminary draft.

74. The CHAIRMAN felt that the Committee was faced with the same problem as the General Assembly had been: either the question of the establishment of an international criminal court could be examined abstractly or in vacuo, or it could be examined upon a concrete basis. The General Assembly had decided that there must be specific proposals to work upon, and he proposed that the Committee follow suit by deciding at once whether the court should be established by resolution or by convention, and whether it should be permanent or impermanent in character. Then the relevant annex could be taken up and examined article by article. Most of the general problems the Committee would have to face would arise from consideration of the articles in the annex, and if others arose they could be dealt with as and when they arose. But the Secretary-General's drafts provided a set of specific proposals to which the Committee could always return.

75. MOSTAFA Bey (Egypt) doubted very much whether the Committee was qualified to take any decision regarding its own competence, since its terms of reference had been established by General Assembly resolution 489 (V). It must discharge its tasks in accordance with the terms of reference laid down in that resolution.

76. Reference had been made to certain difficulties, but difficulties always arose when it was a case of international collaboration, and it would be to the credit of the Committee to find a solution to them.

77. The French representative had suggested that the Committee should begin by determining its method of work. He agreed with that view. There was a close connexion between the organization of the court and its jurisdiction. It was necessary to know what its jurisdiction would be before taking up the question of organization.

78. He proposed that a group of four or five members, including the representatives of France and of the United Kingdom be set up, to submit a report on the best way of conducting the work of the Committee.

79. Mr. KERNO (Assistant Secretary-General) thought that what the General Assembly chiefly expected of the Committee was that it should produce some concrete proposals. The General Assembly would take decisions on the broad questions of principle, but it wished to do so with a full knowledge of the facts. The task of the Committee was to provide the General Assembly with the material on which to base those decisions. With regard to the important question of the method by which the court should be established, the General Assembly expected the Committee to report that if the procedure of establishment by General Assembly resolution were adopted, a certain course should be followed, whereas if it were decided to adopt the procedure of an international convention, another course would be indicated. The Committee could naturally give the General Assembly its views on the advantages and disadvantages of the various alternatives. It was accordingly for the Committee to supply the General Assembly with the necessary material.

80. Sir Frank SOSKICE (United Kingdom) agreed with the Chairman and the United States representative that it would be preferable to begin at once the examination of a preliminary draft. He therefore opposed the Egyptian representative's proposal.

81. Mr. ROLLING (Netherlands) considered it impossible to discuss a draft statute of an international criminal court properly, before the functions of such a court had been clearly defined. The Committee's first task must therefore be to decide on the court's functions, for otherwise there would be danger of endless

unprofitable discussion on every article. After a general discussion, a working party could be set up to formulate the essential preliminary questions relating to such matters as the functions of the court. To that extent he supported the Egyptian representative's proposal.

82. Mr. LIANG, Secretary to the Committee, hoped to clear up possible misconceptions by pointing out that the question of the establishment of an international criminal court was entirely different from the question of drafting a statute for such a court. The articles in the preliminary drafts of a statute bore no relation to the question of the establishment of the court. On the other hand, all the annexes to the Secretary-General's memorandum were mutually exclusive; wherefore it had first to be decided how an international criminal court was to be established; after that preliminary question had been settled, the relevant annex would be chosen as a basis of discussion.

83. Mr. de LACHARRIÈRE (France) said that, although in entire agreement with the view that something concrete should be achieved as quickly as possible, he felt that mistrust of general ideas should not be pushed to the point of being afraid to define the Committee's intentions before framing a text.

84. So far as the actual drafting was concerned, while the Committee had, it was true, a draft statute before it, it might very well have other ideas. It could not bind itself to a single text. It was in fact not clear why one particular text should be adopted in preference to another. Furthermore, were that method adopted, there would be a risk of the Committee being obliged to go over the same ground again and again. For example, it was possible, to bring all the other articles into the discussion on articles, and the same situation would arise in the case of article 2. He was very much afraid that the Committee would be unable to investigate in a rational manner the question of how many judges should constitute the court until it knew what would be expected of the court; there were many tasks that might be entrusted to it. Why then should the Committee not begin by asking itself a few specific questions? Why should it not seek to determine what persons the court would be called upon to try, how the accused

should be brought to judgment, whether there should be a public prosecutor and a court of preliminary investigation and so on? It was to be noted that the memorandum before the Committee, which he would add, was an excellent one, had not made any suggestions with regard to the procedure of investigation.

85. There were therefore, various difficulties with regard to which it was indispensable to come to some decision before beginning the discussion, otherwise the debate might well prove interminable.

86. The various questions would need to be arranged in some order or other, so as to avoid the unwise procedure of discussing organization before the question of jurisdiction.

87. The CHAIRMAN suggested that a vote be taken upon the Egyptian representative's proposal.

88. Mr. ROBINSON (Israel) speaking to a point of order, proposed that the vote be deferred until the following meeting, in order to give delegations time to reflect on the various suggestions made.

89. Mr. AMADO (Brazil) supported the Israeli representative's proposal.

90. Mr. ROLING (Netherlands) said that although his Government had not yet had the opportunity to study the Secretary-General's memorandum properly, it wished to make a general statement of its point of view on the Committee's task. In his opinion, the fundamental questions that would require settlement would arise from the general statements expressing the views of the governments whose representatives formed the Committee, and he therefore thought that a working party should not be set up until all general statements of views had been made, or at least until Monday, 6 August. He thus formally proposed an amendment to the Egyptian representative's proposal, to the effect that a working party should not be set up until all members of the Committee had expressed the general views of their respective governments, or until Monday, 6 August.

91. Replying to an observation by Mr. MAKTO'S (United States of America), the CHAIRMAN said that no form of resolution was required to enable any member of the Committee to make a general statement whenever he wished to.

92. He put to the vote the Israeli representative's proposal, that the vote on the Egyptian proposal be deferred until the following meeting.

The Israeli proposal was rejected by 6 votes to 5.

93. The CHAIRMAN put to the vote the Netherlands amendment to the Egyptian proposal.

The Netherlands amendment to the Egyptian proposal was rejected by 5 votes to 4.

94. The CHAIRMAN put to the vote the Egyptian proposal that a working group be set up to formulate methods of work.

The Egyptian proposal was rejected by 7 votes to 6.

2. ELECTION OF OFFICERS (item 1 of the agenda)

95. The CHAIRMAN called for nominations for the office of first Vice-Chairman.

96. Sir Frank SOSKICE (United Kingdom) nominated Mr. Munir (Pakistan).

97. MOSTAFA Bey (Egypt), Mr. MAKTO'S (United States of America) and Mr. TARAZI (Syria) supported the nomination.

Mr. Munir (Pakistan) was unanimously elected first Vice-Chairman.

98. The CHAIRMAN called for nominations for the office of second Vice-Chairman.

99. Mr. MAKTO'S (United States of America) nominated Mr. Amado (Brazil) for the office of second Vice-Chairman.

100. Sir Frank SOSKICE (United Kingdom) seconded the nomination.

Mr. Amado (Brazil) was unanimously elected second Vice-Chairman.

101. The CHAIRMAN called for nominations for the office of Rapporteur.

102. Mr. ROBINSON (Israel) nominated Mr. Sörensen (Denmark) for the office of Rapporteur.

103. Mr. RÖLING (Netherlands) seconded the nomination.

Mr. Sörensen (Denmark) was unanimously elected Rapporteur.

The meeting rose at 1.10 p.m.