United Nations

GENERAL ASSEMBLY

SEVENTH SESSION

Official Records

SIXTH COMMITTEE, 321st

MEETING

Friday, 7 November 1952, at 10.30 a.m.

Headquarters, New York

CONTENTS

Chairman: **Prince WAN WAITHAYAKON (Thailand).**

Tribute to Mr. Pella

1. Mr. SPIROPOULOS (Greece) wished, before the Committee began to discuss the item on international criminal jurisdiction, to pay a tribute to the memory of Mr. Vespasian Pella, who had passed away a few months earlier. Mr. Pella had been a life-long advocate of international criminal jurisdiction, and it had been due to his initiative that the League of Nations had adopted the Convention for the Prevention and Punishment of Terrorism,[1] which had contemplated the establishment of an international criminal jurisdiction. Although he had been unable to participate in the work of the United Nations since his country, Romania, was not a Member of it, much of the material collected by Mr. Pella would be very useful to the Sixth Committee.

International criminal jurisdiction: report of the Committee on International Criminal Jurisdiction (A/2136, A/2186, A/2186/Add.1)

[Item 52]*

2. The CHAIRMAN, opening the debate, said the real issue before the Committee was whether an international criminal court should be established at that juncture, or whether further study was required. He suggested that the question should be discussed on the basis of the draft statute proposed by the Committee on International Criminal Jurisdiction (A/2136, annex I).

3. Mr. ROLING (Netherlands), after reviewing the events preceding the establishment of the Committee on International Criminal Jurisdiction at the fifth session of the General Assembly, said that it must now be decided on the basis of that Committee's report and governments' comments whether or not an international criminal court should be set up. It was possible that a number of members had been discouraged by the misgivings expressed by some governments—notably that of the United Kingdom—and had come to the conclusion that the whole matter should be dropped. It would therefore be more logical and save time if the Committee, before going into the details of the creation and structure of the court as discussed in the report, first decided whether work on the international court should continue at all.

4. If it was decided that a court should be set up, then the method by which that could be done—whether by decision of the United Nations or by multilateral convention, as proposed by the Committee on International Criminal Jurisdiction—could be considered. It was only after settling that important issue that the Sixth Committee could deal with the details of the structure, jurisdiction and functioning of the court.

5. The CHAIRMAN said the Netherlands representative's suggestion and his own were not incompatible.

6. Mr. DE LACHARRIERE (France) recalled that at its fifth session the General Assembly had considered it impossible to settle the question of international criminal jurisdiction in the abstract and had therefore set up a Committee which was to submit one or more drafts, mapping out in a more specific way the general outlines of the future institution.

7. It would be useless at the present moment to go into all the organizational details and to resume all the discussions that had taken place at Geneva in the special Committee. The French Government had sent in its written comments on the draft convention (A/2186). He considered that the Committee had on the whole performed useful work, much of the credit for which was due to Mr. Morris, its Chairman, and Mr. Sorensen, its Rapporteur.

8. It was only the broad lines of that work that should be considered in the examination the Sixth Committee was to make.

9. If the Geneva draft was reduced to its basic provisions, three main ideas would be retained.

10. The first concerned the establishment of the court, which would be done by multilateral convention. The Committee had considered the possibility of

[1] See *League of Nations, C.546(1).M.383 (1).1937.V.*

* Indicates the item number on the agenda of the General Assembly.

setting up the court by an amendment of the Charter, but that idea had been discarded as impracticable in the present circumstances. It had also rejected the possibility of setting it up by a General Assembly resolution. It had seemed unsuitable from a political point of view and contrary to the spirit of the Charter, if not to its letter, to make the court a subsidiary organ of the General Assembly under Article 22, since it was to be a new institution, completely independent of political organs and responsible for work that was not in any way accessory to that of the General Assembly but was entirely different.

11. Secondly, the Committee had proposed that the competence of the court should not be drawn from its statute but from other special conventions to which the statute would refer. The disadvantage of that provision was that it did not complete the task at one stroke, but it had the advantage of allowing for progressive construction and in that way it was probably in keeping with a more realistic and more cautious attitude.

12. Finally, the Committee had considered that access to the court should be open to States and to the United Nations General Assembly. Mr. de Lacharrière thought that if that right were given to the General Assembly, it would be irregular not to give it also to the Security Council. In the opinion of the French Government, however, it would be enough if States were given that right. There was no need for any United Nations organ to intervene and such intervention would have the disadvantage of introducing a kind of political trial, which provided no safeguards for those to be tried, before the real trial, which it would prejudge.

13. Such were the broad lines of the draft submitted to the General Assembly. On the basis of the draft, there were, or would be, two criticisms of the court. Some said that such a court would be unable to function in practice; others feared that it would be prejudicial to good international understanding and peace.

14. The first criticism was very well presented in the written comments of the United Kingdom (A/2186). It consisted of the assertion that States would probably not give the court the consent and co-operation it needed. The answer to that could be an outline of the various hypothetical cases where the court would in fact be in a position to give judgment. It must be remembered that the consent of the State could be given before the crime or could come after, *ex post facto*, for it was not a question of changing the rule of law but the competence to judge of its violation. There was a whole series of concrete cases in which it was not inconceivable that consent would be given.

15. Police action decided upon by the Security Council might, for instance, result in the leaders of a State being brought to justice. Although the Security Council was at present paralysed by the dissent between the great Powers, it must not be thought that it would never again be able to act, and even as things were it might well be that a pirate State would not receive the protection of the veto.

16. Another possibility was that, as a result of war, the conquered State might be forced to accept the jurisdiction of the court and to hand over its former leaders. In that case, recourse to pre-established jurisdiction, of unquestionable impartiality, would be an improvement on *ad hoc* tribunals. The Nürnberg and Tokyo trials had been conducted with the greatest concern for impartiality but they had nevertheless been subject to criticism, which would have been devoid of the slightest appearance of validity had there been recourse to permanent jurisdiction. The leaders of a State could also be handed over to the international criminal court after an internal revolution or a change of government.

17. In all those cases, the court would obviously have to wait until the accused leaders had lost the protection of their State before it could try them. The present structure of society demanded that, but at least a case could be drawn up and officially registered which would serve as a warning to guilty persons.

18. Apart from the great international crimes such as genocide and aggression, there was no reason why the court should not try other crimes of less importance which were of concern to international society. If in an endeavour to deal more effectively with traffic in narcotic drugs, traffic in persons etc., the need was felt for a recourse to international penal jurisdiction, the conventions on those subjects could grant the court special competence.

19. Finally, there were the difficult situations that sometimes arose when States bore the international, moral and even legal responsibility for the functioning of national justice, while in the majority of countries the governments had no means of influencing the decisions of their tribunals. It was easy to imagine such cases as the assassination of a statesman or a foreign personality, when a State might be glad to relinquish its judicial competence in favour of international jurisdiction. Recourse to jurisdiction of an unquestionable impartiality would offer valuable possibilities that would all help towards good international relations.

20. It would be contended that in any event the court would not be called upon to act frequently and that a permanent institution would be set up to function only in quite exceptional cases. That objection was by no means conclusive. Fire brigades were organized on a permanent basis, although fires were, it was to be hoped, exceptional events. The importance of the court lay more in its potential action, its presence and its threat than in its effective functioning. Moreover, there was no need to contemplate a costly organization, with judges who would be paid for doing nothing. The Geneva Committee had been careful to provide that the judges, who would be appointed in advance, would retain their usual occupations and would not receive any remuneration from the court unless they were called upon to serve.

21. A second criticism was that the court might be harmful if it functioned. It was feared that it might evoke complaints of a purely propaganda nature. Above all, there were misgivings lest the jurisdictional machinery might obstruct the political machinery of security.

22. At the present moment, the organization of security was essentially political. Decisions in that connexion were taken by political bodies: the Security Council or the General Assembly. Such decisions were based on political considerations: respect for justice, of course, but also expediency and the interests of peace.

23. If an international penal jurisdiction were set up, whose competence covered the crime of aggression, would not political judgment be replaced by jurisdictional action? Would it not give rise to wars, or at the very least form an obstacle to the peaceful settlement of disputes? In the case of Korea, for example, if the Korean Republic had placed before the court a complaint against the aggressors, would it not be necessary to continue United Nations military action until the aggressors were handed over to the judgment of the court?

24. Such fears were, in actual fact, deceptive. The court, being without force, would not be able to act against States. Decisions involving the use of force would remain political decisions. In the same way, the decision to end a dispute or armed action by the United Nations would be political. In other words, no war would be initiated because of the court, nor would peace be ruled out because of it. Criminal jurisdiction would not all at once establish the reign of law or the reign of judges in the world. If peace were preferred to penal justice, the existence of the court would not prevent that choice; but if war were preferred to excessive injustice, the court would provide the punishment when victory had been won. The court would have nothing to do with that determination, nor would it have any part in the victory.

25. In conclusion, Mr. de Lacharrière said that his Government approved the broad lines of the draft statute, convinced as it was that the progress of the international organization called for a penal jurisdiction. The French delegation realized, however, that there were still many questions to be settled. It noted, moreover, that only a very few governments had shown their interest in the question by sending in their comments on the Committee's report. Without, therefore, abandoning the principle of the establishment of such a court, it would have no objection to further studies being undertaken and to a further period for reflection.

26. Mr. FITZMAURICE (United Kingdom) agreed with the Netherlands representative that there was a preliminary question before the Committee, namely the desirability and possibility of establishing an international criminal court. In considering that question, the Committee should not allow itself to be unduly influenced by the fact that a draft statute for such a court had been prepared. That draft had been prepared because many delegations at the fifth session of the Assembly had maintained that it was impossible to discuss the question in the abstract, but the existence of a draft statute should not be interpreted as in any way prejudging the question of principle. The Committee on International Criminal Jurisdiction had kept very carefully within its terms of reference and had held that it was not expected to express an opinion on the advisability of creating an international criminal court (A/2136, paragraphs 11 and 17). The Assembly was therefore in no way committed to the project and any delegation which considered the idea impracticable was free to say so.

27. His Government in fact considered that nothing could have brought out the extreme impracticability of the whole project so vividly as the report and the draft statute annexed thereto. It did not in any way intend that comment as a disparagement of the Committee's work, but rather the contrary. There were indeed numerous passages in the report which showed that the members of the Committee had themselves realized the extraordinary difficulties of the project, and had also realized that their own proposals were not really capable of providing any final solution to the difficulties.

28. It was often argued that in spite of the difficulties, there could be no harm in establishing an international criminal court, and that if the experiment were made it might prove successful. Such an attitude had in fact just been taken by the representative of France. However, that was not altogether a responsible attitude. Important international institutions were not set up simply as an experiment; they were set up because there was a real need for them. They were set up to meet a need, not to create one. The question was not what harm such a court would do, but rather what good it could do. In his opinion, unless such a court could and would do definite good it must inevitably do harm. To set up high-sounding international institutions which thereafter remained moribund because there was no work for them to do, or proved completely impotent because they lacked all enforcement powers and governments were unwilling to take the action which alone would make them function, would be harmful not only to the prestige of such institutions themselves, but also to that of the United Nations and indeed to the whole principle of international co-operation. The fate of the international criminal tribunal which was to have been set up in 1937 under a convention made between a number of European States to deal with cases of terrorism should serve as a warning. That convention had been drawn up after the most exhaustive discussions, but it had never been ratified and the tribunal had never functioned.

29. Before any decision was taken to set up an international criminal court, it should be possible to give affirmative and satisfactory answers to two questions: whether there was any real need for such a court and whether, if established, it could actually function in practice. On the first point, his Government would not consider it justifiable to set up all the machinery of an international court to deal only with rare and occasional cases. There must be a reasonable expectation of a fairly steady flow of work before the establishment of such a court could be justified.

30. The question of practicability involved such points as the manner of bringing cases before the court, how the accused would be brought before it, how the witnesses would be compelled to appear, how the sentences would be carried out, and so forth. The report referred to those practical difficulties, but only, in effect, for the purpose of admitting that the Committee itself had been unable to solve them. For that, the Committee was in no way to blame, because it was quite obvious that those difficulties could only be solved by the co-operation of governments and their willingness to exercise the necessary compulsion. The court itself could clearly possess no direct compulsory powers of any kind. The consent of governments was therefore the cardinal issue. His Government believed that both of the basic questions he had posed must be answered in the negative, because, whatever they might do on paper, it seemed extremely doubtful that governments would in practice be willing to provide the necessary co-operation or exercise the necessary compulsion.

31. The draft statute before the Committee imposed no obligations whatsoever on governments as regards bringing cases before the court or taking any compulsory action to make it work. The explanation was that the special Committee had quite obviously believed that, if any such obligations were imposed on governments under the statute, hardly any government would be willing to sign the statute and the court would never be set up. Accordingly, the draft statute provided for the establishment of the court and for what might be called the internal economy and procedure of the court, but all the practical issues were left to be dealt with by separate conventions which had not of course been drawn up, and quite possibly never would be. The section of the report entitled: "Should States parties to the statute be obliged to execute warrants of arrest issued by the court and carry out requests for other assistance?" was particularly illuminating. In paragraphs 104 and 105, it was admitted that "unless the accused could be brought before the court, it would not be possible to carry through a trial" and that "the court, in order to fulfil its functions, would have to rely upon the assistance of governments in many respects, in particular, in regard to the taking of evidence and the appearance of witnesses". He agreed; but surely the logical conclusion was that a statute which simply established the court without requiring governments to supply the necessary assistance would be useless.

32. In paragraph 106 of the report, the Committee recorded that there had been a divergence of views regarding the obligations to be imposed on States under the draft statute and, in paragraph 107, the reason for the Committee's decision not to include in the statute any provisions which would impose obligations on governments as regards the practical functioning of the court was clearly and frankly stated. The reason was that "States which would otherwise be ready to accept the statute might be deterred from doing so if the statute imposed obligations of this kind". The only possible conclusion from such a statement was that the establishment of the court under the statute would be nothing but a paper exercise which would have no practical result. If governments would not be willing, by means of the very statute under which they set up the court, to assume the elementary obligations necessary to make it function, it was hardly likely that they would subsequently be willing to impose those obligations on themselves by means of particular conventions. The adoption of the Committee's scheme would only mean that a number of governments would sign the statute in the comfortable knowledge that by so doing they were obtaining credit without committing themselves to any practical obligation at all. The special Committee had in fact been fully aware of the dilemma: if the statute were to impose obligations governments would not sign it, and if it did not impose obligations the court would be unable to function in practice.

33. For his part, Mr. Fitzmaurice would certainly not blame governments for feeling very hesitant about committing themselves to any definite obligations in regard to an international criminal court. He would blame them, however, if they were to set up such a court without in fact being prepared to give it the necessary co-operation and to undertake the necessary obligations.

34. The type of cases with which an international criminal court would be supposed to deal fell into the two main categories of war crimes and crimes against peace and humanity. War crimes could be dealt with reasonably well by national tribunals, or by *ad hoc* international tribunals, such as the Nürnberg and Tokyo tribunals. It was sometimes argued that a permanent war crimes tribunal would be more satisfactory than an *ad hoc* tribunal. He doubted that, however, because countries might not be able to spare their highest quality judges for permanent membership of an international court unless, like the International Court of Justice, it had a fairly constant flow of work.

35. It was also argued that *ad hoc* international tribunals were unsatisfactory because they were set up by the victors. Yet that difficulty would not be overcome by having a permanent tribunal. It was only the victors in a war who were normally in a position to bring war criminals (belonging of course to the other side) before a tribunal, so that it would make no difference whether the tribunal was an *ad hoc* or a permanent one. The real objection to *ad hoc* tribunals was that the judges were often persons of the nationality of the victors, but that could easily be overcome by setting up a neutral *ad hoc* tribunal, or at any rate one which was not composed of persons of the nationalities concerned. For that purpose, an *ad hoc* would be more satisfactory than a permanent tribunal, because the nationality of the accused or the accusers could not be foreseen in advance.

36. It might well be that if a permanent international criminal court actually existed it would, from time to time, be able to deal with certain cases of war crimes. But the advantages of such a court were hardly sufficient to justify its establishment for that purpose alone. In fact, there were certain respects in which such a tribunal might prove a less efficient instrument for dealing with war crimes than the national or *ad hoc* tribunals that had been utilized hitherto. Consequently, the real case for an international criminal court must depend on the question of its ability to deal with crimes against peace and humanity.

37. There, one of the basic difficulties immediately arose. In the first place, criminal responsibility was essentially individual responsibility and, on that point, the special Committee had come to what he considered the only possible conclusion, namely that the only crimes which an international criminal court would be able to deal with would be international crimes committed by individuals, where not the State but the individual would be before the court as the accused.

38. That being so, it was rather startling to find that in fact crimes against peace and humanity were normally committed not by individuals but by States. When they were committed by individuals they were not committed in the individual's personal capacity but in his capacity as a representative of the State. For example, it would be virtually impossible for an individual to commit an act of genocide or to plan and carry out a war of aggression acting on his own and in his private capacity. It must therefore be admitted that such crimes were normally committed as a result of the policy of the government or at any rate with the connivance of the government.

39. It was no doubt right that the individuals concerned should be brought to trial before a criminal court, but that would never be possible except under abnormal conditions. That difficulty had been recognized by the special Committee, which stated in paragraph 114 of its report: "The lack of a police force at the disposal of the court ruled out the practical possibility of a trial of rulers in power". That applied not only to rulers but to all persons who acted as members, servants, or agents of a State or government. There would be no possibility of bringing such persons before an international criminal court except by the action of the government to which they belonged. Such a possibility would only arise exceptionally, in cases where the protection of the government had been withdrawn from the individual, or where conditions of war, defeat or general disorder made it possible to carry out the arrests of the individuals concerned and to bring them before the court.

40. The representative of France had made a very impressive attempt to deal with that difficulty, but nearly all the cases he had mentioned in illustration of his point were only likely to occur exceptionally. For example, the case of Hitler had been mentioned; but it had taken a world war lasting six years to bring the individuals concerned in that case to trial. Surely an international criminal court could not be established on the assumption that the cases with which it would have to deal would come before it only as a result of similar catastrophes.

41. In its written comments (A/2186, para. 18), the United Kingdom Government had referred to the conclusion reached by the late Professor Donnedieu de Vabres in his report for the Institute of International Law on the subject of an international criminal court.[2] That conclusion was that the scheme proposed by the special Committee, when analysed, was found implicitly to assume that some international catastrophe had to occur before the international criminal court could really function. Moreover, experience had shown that precisely in the most serious and shocking cases of international crimes would it prove most difficult to obtain the surrender of the individuals responsible. The cases where surrender could easily be procured would probably be of a relatively minor character.

42. In the light of all those considerations, his Government felt that the only possible conclusion was that there was no real justification for setting up an international criminal court. The representative of France had admitted that such a court might function only on rare occasions, but he had said that that was no reason for not setting it up. He had buttressed his argument with the analogy of the fire brigades. The function of fire brigades, however, was to prevent the complete destruction of a house by fire, whereas an international criminal court would only be dealing with cases after the event and would have no preventive functions at all. The theory that the existence of such a court would act as a deterrent was unrealistic because it had long been a known fact that those who committed war crimes were liable to be tried and punished, but that knowledge had never been known to prevent the commission of the crimes. The individuals concerned relied on the protection of their governments, and no government would ever start a war of aggression unless it expected to win. In effect, therefore, those who committed war crimes never expected to be called to account.

43. Even if it were assumed that cases could somehow or other be brought before the court, there were all sorts of further practical difficulties which the scheme evolved by the special Committee did nothing to solve, manifestly because those difficulties were by their very nature virtually insoluble. To mention only one specific instance, there was the question of carrying out the court's sentences, a point which was recognized in paragraph 161 of the report "as being essential to the functioning of an international jurisdiction". That vital question, however, like all the other practical issues, was to be left to particular conventions to be entered into by States. The Committee had evidently realized, however, that States might be very unwilling to enter into any commitments on that point, for the report went on to make the extraordinary suggestion that, in the absence of any conventional obligations, the Secretary-General of the United Nations should make the necessary arrangements to enforce the sentences. How the Secretary-General was to arrange for the execution of criminals or for their imprisonment for periods of perhaps ten or twenty years, he, for his part, was unable to conceive.

44. Delegations should beware of laying too much stress on the precedent of the Nürnberg and Tokyo trials, which had taken place under very special conditions where there had been no practical difficulty about arresting war criminals, bringing them to trial, compelling the attendance of witnesses and carrying out the sentences. The case would be very different for an international criminal court with no compulsory powers, which would be wholly dependent on the rather problematic co-operation of governments, when governments might not themselves be in a position to exercise any compulsion.

45. The only possible realistic view was that the time was not ripe for the establishment of an international criminal court. The special Committee itself had recognized that the statute would attract no participants if it imposed upon governments any of the obligations which were essential to the actual functioning of the court, and it must therefore follow that the project involved an attempt to go beyond what governments were really prepared to agree to and hence was premature.

46. Accordingly, he agreed with the Chairman and the Netherlands representative that speakers in the debate should for the time being address themselves not to the details of the statute, but to the essential preliminary question whether there would be any adequate work for an international criminal court and whether such a court would in practice be able to do its work. His delegation felt that that question should be considered and voted on by the Committee as a preliminary issue.

The meeting rose at 12.55 p.m.

[2] See *L'institution d'une cour pénale internationale: rapport et projet de résolution définitive présentés par Henry Donnedieu de Vabres*, Genève, La Tribune de Genève, 1951.

Printed in U.S.A. M—87092—December 1952—2,125