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

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

[Item 52]*

1. Mr. BARANOVSKY (Ukrainian Soviet Socialist Republic) recalled that, by its resolution 489 (V) of 12 December 1950, the General Assembly had established a committee composed of the representatives of seventeen States to prepare a draft convention and proposals relating to the statute of an international criminal court. The delegation of the Ukrainian SSR had at that time criticized the decision as doomed to failure because it was based on false premises. The establishment of an international criminal court was indeed incompatible with the principle of non-interference and respect for the sovereignty of States. The administration of justice was one of the most important functions of the State, and the State's territorial jurisdiction was an undeniable right. No State could agree that the punishment of crimes committed on its territory should be entrusted to another authority. An international criminal court would constitute a weapon which would permit interference in matters reserved to States, and such interference would conflict with Article 2, paragraphs 1 and 7, of the Charter.

2. The statements of representatives in favour of the establishment of the court proved that such an institution would be in flagrant contradiction to the principles of non-interference and sovereignty. In particular, the representative of the Netherlands had spoken at the previous meeting in favour of the renunciation of sovereignty. He had averred that in future the formation of economic groups like the European Coal and Steel Community in Europe would lead to a surrender of sovereignty on the part of States, and he had quoted that as evidence in support of requesting States to recognize the competence of the court with respect to their nationals. The representative of the Netherlands had thus admitted that the Schuman, Pleven and other plans tended to subordinate the European economy to United States monopolies. His statement reflected the ideological preparation of Powers who were ready to capitulate before the economic strength of a greater Power. He was surprised that the representative of a State which had fought so hard for its independence should speak in such a way and that his country should be prepared to relinquish its sovereignty.

3. Others, by contrast, like the representatives of the United Kingdom, Brazil and Venezuela, did not seem prepared to follow the representative of the Netherlands along that course, and stated that the establishment of an international criminal court was at the moment impossible. They had justly criticized several of the provisions of the draft statute. The draft itself, as well as the report of the Committee on International Criminal Jurisdiction (A/2136) justified the attitude adopted by those representatives. The Committee had indeed expressed the view that the draft statute was only a preliminary study which should be subjected to further consideration and that the establishment of the court was not possible at the moment. That admission proved the total failure of attempts to establish the court on solid foundations. For example, articles 1 and 26 of the draft statute showed that the Committee had not succeeded in solving the essential question of the court's competence. Those articles were without real content, no definition being provided, in particular, of the expression "crimes under international law".

At 11 a.m., at the suggestion of the Chairman, the Committee observed one minute's silence on the occasion of the anniversary of the Armistice of 11 November 1918.

4. Mr. BARANOVSKY (Ukrainian Soviet Socialist Republic) said the Special Committee seemed to have assumed the existence of the court even before the question of its competence had been decided. It appeared from paragraph 60 of its report (A/2136) that the Committee had been afraid to reveal the contradiction between the rights of States and the com-

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

petence of the court; hence the meaningless provisions of articles 2, 31, 40 and 52 of the draft statute.

5. The representatives of the Netherlands and the United States of America had maintained that the Committee had too little time, and they therefore proposed that study and research should be continued. But the Committee's failure was not due to a fortuitous cause; the whole purpose of the undertaking was alien to sincere international co-operation in the matter of preventing and punishing offences against peace and security.

6. The establishment of the court would be incompatible with the principles of Nürnberg, which the General Assembly had recognized and confirmed by its resolution 95 (I), and with the Agreement for the Establishment of an International Military Tribunal for the prosecution and punishment of the major war criminals of the European Axis, signed in London on 8 August 1945,[1] which was based on absolute respect for the sovereign rights of the parties and for their right to try the crimes committed on their territories. Those principles had also been enunciated in the Moscow Declartion of 30 October 1943. Articles 4 and 6 of the Agreement of 8 August 1945 clearly proclaimed those principles and emphasized the inalienability of the right of sovereignty. The draft statute of the international criminal court, however, was in direct conflict with the principles of Nürnberg, since it impaired the sovereign rights of States. Article 27 of the draft statute in particular represented an attempt to avoid the application of the Nürnberg principles. If the court had had to try the crimes committed by the great Nazi criminals, it would have been able to deal with them only if the Nazi Government had previously recognized the court's competence and if the crimes had been committed on the territory of a State which itself had recognized the court's competence. Under such a procedure, the Nazi war criminals could not have been brought to trial.

7. To make the court a new organ of the United Nations would be contrary to the Charter. That could be done only by amending the Charter in accordance with the procedure provided for in Chapter XVIII. The representatives of the United Kingdom, Brazil and Venezuela, in particular, had confirmed that view, and only the representatives of the United States of America and the Kuomintang had argued that it was possible to establish an international criminal court by a decision of the General Assembly. The Committee had admitted the impossibility of doing so in paragraph 18 of its report, just as in paragraph 21 it had admitted that there could be no question of making the court a subsidiary organ of the General Assembly. It had, on the other hand, considered the possibility of establishing the court by international convention. According to articles 28, 29 and 33 of the draft statute, the court's action would be dependent on decisions of the General Assembly, and chapter II and article 52 even went so far as to assign an important part to the Secretary-General. Those provisions were in flat contradiction with the Charter. The General Assembly could not be responsible for the administration of justice, and the trial of international crimes must be entrusted to international courts established to deal with particular cases.

8. Mr. ABDOH (Iran) recalled that, by its resolutions 260 B (III) and 489 (V), the General Assembly had indicated that it considered the establishment of an international criminal court to be necessary in the near future. The need for the establishment of such an institution was becoming increasingly apparent, for it was certain that actions were being committed which were criminal under international law. There was in existence a draft code of offences against the peace and security of mankind: the prevention and punishment of such offences implied the existence of an international court. International crimes could be committed in connexion with local conflicts. Internal revolutions might give cause for the intervention of the court. The crime of genocide would also provide a sufficient basis for the intervention of such a court, to which States might refer still other crimes.

9. As early as 1937, a convention ratified by thirteen States had contemplated the establishment of an international tribunal to deal with the crime of terrorism.[2] The fact that that convention had not been carried into effect was not due to the ill-will of governments, but rather, it would seem, to the approach of the Second World War.

10. The fact that the court to be established would not have much to do at the beginning was not a sufficient reason for giving up the idea of establishing it. Another objection was based on the assertion that military or special courts were adequate to try war criminals and that such a solution would be simpler and less costly. Yet even the Nürnberg and Tokyo tribunals had been criticized, despite the soundness of their decisions. A permanent court would always be able to avoid the spirit of vengeance and hatred better than a court constituted *ad hoc* to deal with a specified case.

11. By increasing the probability of the imposition of a penalty the existence of the court would be a deterrent to possible criminals. Furthermore, it would contribute to the establishment of a stable body of precedents in international criminal law.

12. With the promulgation of the Universal Declaration of Human Rights, the individual had indisputably become a subject of international law. The concept of liability was strengthened by the growing tendency to apply moral rules in international relations.

13. It could therefore be concluded that an international criminal court would have decisive advantages and that its usefulness was beyond question.

14. The Iranian delegation was not favourably disposed towards the establishment of the court by convention. Such a procedure would be contrary to the essential idea of the universality of international justice, or at all events to the recognition of such justice by the great majority of States. It would raise difficulties which would be overcome, at least partly, if the court were established by resolution of the General Assembly.

15. The court would probably not function perfectly at first. Obstacles would be encountered, especially with

[1] See *International Legislation, Vol. IX, 1942-1945*, pp. 634-636, Carnegie Endowment for International Peace, New York, 1950.

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

regard to the summoning of witnesses and defendants and the enforcement of judgments. The International Court of Justice had also had to face considerable difficulties. It was still frequently dependent upon the co-operation of governments, an essential factor in the successful functioning of any international court, whether civil or criminal.

16. In the case of a criminal court, as in that of the International Court of Justice, a judgment would have considerable moral weight, even it it could not be enforced. Moreover, if the defendants could not be made to appear there would be nothing to prevent the court from rendering judgment *in absentia*, if sufficient evidence of guilt could be obtained.

17. While he had no settled opinion, he thought that it would be better to establish the court under a General Assembly resolution. The Assembly could not delegate to a court judicial powers it did not itself possess. But it would appear that the General Assembly, which was competent to deal with all questions affecting international peace and security, could establish an organ which would have the principal task of preventing and punishing crimes against peace. It had, for example, established an administrative tribunal which had judicial functions and which was not subject to the Assembly's jurisdiction.

18. It would be premature to reach any final decision on the question of the court. The Committee's report (A/2136) represented an advance but, as was recognized in its paragraph 17, the study of the question would have to be carried several steps forward. It would be necessary to study other possible methods of establishing the court and to investigate more thoroughly the question of the court's relations with the various organs of the United Nations. Lengthy studies had preceded the establishment of the United Nations and the International Court of Justice. Similar studies should be carried through with courage and perseverance, since the establishment of a criminal court would contribute to the cause of international peace and security.

19. It was with those considerations in mind that the Iranian delegation had associated itself with others in submitting a draft resolution (A/C.6/L.260). The Netherlands representative would later say more about the draft, the authors of which had sought to make it clear that the previous studies did not cover all aspects of the question and, without prejudice to any final decision, had proposed the appointment of a new committee whose terms of reference were defined in the draft resolution.

20. The Ukrainian representative had repeated the well-worn argument that the Charter would be an obstacle to the establishment of an international criminal court within the framework of the United Nations. For his own part, he would merely note that in several documents the General Assembly had, provisionally at least, expressed approval in principle of the court's establishment. Moreover, a normal procedure already existed for the revision of the Charter in 1955. The new committee would have to study all possibilities of establishing the court, even such as implied revision of the Charter.

21. Mr. MITCHELL (Liberia) wished to speak only because certain representatives had already expressed their views on the Committee's report without confining their remarks to the preliminary procedural question, as the Netherlands representative had proposed. The Committee's report (A/2136), although the fruit of much praiseworthy effort, was guilty of a serious omission in not defining either the competence or the powers of the international criminal court. The Committee had mentioned the reasons for that omission in paragraph 60 of its report. In those circumstances, it might be wondered what principles would govern the functioning of the court if it were established. If the multilateral conventions proposed by the Committee contained no provisions enabling the court to act if the parties failed in their duties, its effectiveness appeared to be questionable.

22. Owing to the incomplete nature of the report, no practical steps could be taken to give effect to it. The Liberian delegation, however, considered it essential to establish an international criminal jurisdiction which might, for example, protect the weak against the abuses of the strong. Many factors still had to be reconciled and fresh studies had to be made before the stage of practical realization could be reached. He would support any proposal on those lines.

23. Mr. CALO (Philippines) paid tribute to the work of the Committee on International Criminal Jurisdiction and its report (A/2136). Confining himself at that stage to considering the preliminary question, that of the actual principle of establishing an international criminal court immediately, he felt that further efforts should be made to resolve the practical difficulties which would impede the proper functioning of such a court.

24. The court should function in peace-time as well as in time of war. That idea of organic permanence did not presuppose that the court would function continuously, but implied that it would be able to take effective action in normal as well as in troubled times. It was conceivable, for example, that a particular country might contain forced labour camps in which human life was held of no account. Such forced labour, sometimes given the name of re-education, was imposed not under sentence by due process of law but as the result of policies designed to destroy all opposition. The crimes committed in those camps were crimes against humanity and could be committed in time of peace. Behind impenetrable frontiers, they might remain unknown to the rest of mankind for a long time.

25. As a general rule, the parties liable for international crimes were clearly individuals. Hitler's conquests had largely been made in time of peace. He did not think that if an international criminal court had existed at that time, it would have arrested the criminals. A war had been needed to defeat Nazism, a universal catastrophe had been needed to make it possible for the criminals to be indicted at Nürnberg and Tokyo.

26. If the trial of war criminals were the only problem, the system of establishing *ad hoc* tribunals would be satisfactory. But crimes as heinous as aggression could be committed in peace-time. For the proper administration of justice, the international court had to be given adequate powers, in peace-time as in time of war, to secure the appearance of the defendants before it and the enforcement of its judgments. Because of

the guarantees with which it had to be surrounded, the arraignment of a defendant involved delays, even in domestic trials. Those delays would be much more serious in the case of an international court which would be dependent upon the goodwill of the country of which the defendant was a national in order to secure recognition of its competence and to collect evidence.

27. A further obstacle was the lack of a code of international crimes. It had not yet proved possible to define aggression, and many other crimes had still to be defined. The diversity of legal systems would make that task almost impossible. Nevertheless, the principle *nullum crimen sine lege* was categorical.

28. The difficulties were therefore considerable. The Philippine delegation, however, was not opposed in principle to the establishment of an international criminal court which might be effected under a General Assembly resolution, followed by a convention. If it were supported by a large majority, the resolution would have a strong persuasive effect on States. In conclusion, it was desirable to establish an international criminal court, but further study was necessary if the court was to be able to function smoothly in the future.

29. Mr. ROLING (Netherlands) thought that the distorted manner in which the Netherland's delegation's earlier statements had been reproduced by the Ukrainian representative was due to the fact that the latter had not been present when the statements were made. To avoid any further misunderstanding, he was having the complete text of his statement distributed to delegations.

30. Mr. EASTMAN (Australia) agreed that the establishment of an international criminal court was a noble ideal; however it was the Committee's duty to determine whether such a project was realizable in practice.

31. The United States representative had recalled the slow and gradual evolution which had culminated in the establishment of the League of Nations, the United Nations and the old Permanent Court of Arbitration. Great caution should be exercised in drawing any analogy between those organs and an international criminal court. Useful as it might be to set up, without precise commitments on the part of the various States, a consultative body like the United Nations General Assembly or a court of arbitration which derived the authority they needed for their decisions in the one case from the participation of accredited representatives of States in the Assembly's debates, and in the other from the voluntary submission of disputes to the Court's jurisdiction—the same would not be true of an international criminal court. Unlike a court of arbitration, such a court would not be merely a facility to which parties could have recourse if they wished; it would be a judicial authority with a general duty to discourage and punish crime. To that end, it would need to have not only the formal competence to deal with certain categories of the crime and to try certain types of accused persons, but also effective power to summon defendants and witnesses and to ensure the execution of its judgments.

32. Without wishing to under-estimate the work of the distinguished Committee on International Criminal Jurisdiction, he noted that the draft statute prepared by the Committee had no provision concerning the basic question of the court's jurisdiction and powers. The reason for the omission was simple: the Committee had feared that, if the statute contained provisions binding signatories to recognize the court's competence and to aid it in its functions, very few States would be willing to accept it and the court could therefore not be set up. Accordingly, the Committee had provided in its draft for the establishment of the court without powers, in the hope that these would be added to it piecemeal as it came to enjoy general confidence. The representatives of the United States, the Netherlands and France appeared to support the establishment of the court on this basis.

33. The United Kingdom representative, for his part, had said that States which were not prepared to enter into commitments before the court was established would hardly be more likely to accept them afterwards; that no State, no matter what undertakings it might have given, would be willing in practice to surrender its agents for trial and punishment for carrying out government policy; and that consequently in practice the court could exercise its functions only if a victory or a revolution made its possible for the prosecutor to apprehend the guilty parties and bring them before the court.

34. The Committee's report and the United Kingdom representative's remarks raised fundamental questions which had to be resolved before consideration could usefully be given to the method of establishing the court or to other incidental matters. These fundamental questions were, first, whether the court would have work justifying its establishment; secondly, whether States would be prepared, forthwith or in the near future, to confer on the court the necessary jurisdiction and powers to enable it to function effectively; and lastly, if they were not so prepared, when they would be.

35. The answer to the first question depended on how far States were willing to go in accepting the court's competence and endowing it with the capacity to carry out its functions. The United Kingdom representative's view had been that States were not yet, and were most unlikely to become, ready to give the court sufficient powers to permit it to function effectively. In all the circumstances, the Australian delegation was inclined to share that view. The concept of an international criminal court was, however, an important one; it should not be accepted or rejected lightly and fundamental questions such as the United Kingdom representative had raised should receive the most careful consideration.

36. Certain representatives had suggested that some States, although not prepared to join in any general grant of authority to the court at the time of its establishment, might later be willing to confer limited jurisdiction on it on a unilateral or regional basis. They had also suggested that, apart from the question of the major international crimes, some States might be prepared to give the court jurisdiction over minor crimes of international concern, for example, traffic in narcotics, counterfeiting and damage to submarine cables. It would be of doubtful wisdom to establish a high-sounding court if it were to have only minor jurisdiction on a limited regional basis and were to

be powerless to deal with major international crimes. In any event these suggestions were based only on speculation and no one State had yet indicated its own willingness, now or in the future, to confer any jurisdiction or power on the court. He considered that it would be unsound to establish a court on a basis of mere speculation or hope, before any agreement had been reached on a code of offences or a definition of aggression, and before there was any clear indication that States would be willing to confer any jurisdiction and powers on it. Furthermore jurisdiction and powers conferred on paper would be worthless unless there were some assurances that the court would be enabled to exercise them in practice.

37. Both those in favour of and those against the establishment of an international criminal court agreed, however, that the problem deserved attention and required further study. He felt that the study should relate to the basic questions he had mentioned, as the answers would provide a basis for deciding whether or not the project should be carried out. He reserved the right to comment at the proper time on the draft resolutions and the amendment before the Committee.

38. Mr. NISOT (Belgium) remarked that while his delegation was not opposed *a priori* to the idea of establishing an international criminal court, the report of the Committee on International Criminal Jurisdiction had confirmed its doubts regarding the chances of success of such a project, at any rate for the time being.

39. His delegation felt, however, that the question should be fully clarified, and would therefore vote for the joint draft resolution (A/C.6/L.260) as amended by the United Kingdom (A/C.6/L.262), as the draft resolution called for studies which would shed more light on the question.

40. By its affirmative vote the Belgian delegation would in no way prejudge its position on the previous question whether or not an international criminal court should be established, a question to which it would not give its answer until it had carefully weighed the facts, after all the aspects of the problem had been thoroughly studied.

41. He reserved his delegation's position in the Fifth Committee with regard to the financial implications of the joint draft resolution.

42. Mr. FITZMAURICE (United Kingdom) explained that his delegation, which approved of the substance of the joint draft resolution (A/C.6/L.260), had submitted an amendment (A/C.6/L.262) because it felt that the wording of the draft resolution should in no way prejudge the question of the possibility of establishing an international criminal court. As it stood the draft resolution seemed to take for granted that its establishment was possible, since it instructed a special committee to study the various methods of establishing the court, and not the question of principle. The special committee, like its predecessor, the Committee on International Criminal Jurisdiction, might decide that the question of principle was not within its competence; but if its terms of reference were drafted as proposed by the United Kingdom, it would be competent to study the basic preliminary questions raised by the Australian delegation.

43. His Government was certainly not opposed in principle to the idea of an international criminal court. But they would only favour such a court provided it was able to function effectively. For his part, he thought that the court could not do so on the basis of the proposals of the Committee on International Criminal Jurisdiction and that the matter should be studied further.

44. He would give one example of a matter for such further study. He had been criticized for suggesting that it would be a bad thing if the court had no work to do. He had never suggested that. It would not matter if the court was idle for ten years provided during that time no cases of international crimes occurred. What would be undesirable would be if they did occur but the court remained powerless to deal with them. In fact international crimes were of daily occurrence. The representative of the Philippines had given examples, and there were others. Unless an international criminal court was going to be able to deal with such matters it would be better not to set it up.

45. If he might presume to do so he would like to proffer two pieces of advice to those who supported the idea of a court. The first was that no advance would be made by merely drafting paper projects which failed to solve the fundamental preliminary problems such as had been raised in the course of the debate. The second was that the difficulty of accepting the court would be greatly increased for many governments if it was instituted as a subordinate organ of the Assembly under Article 22 of the Charter, on account of the inconsistency with the essential principle of juridical independence that would necessarily be involved in having the court as a subsidiary organ of the Assembly.

46. In any case he failed to see how instituting the court by Assembly resolution would solve the essential problems. A resolution of the Assembly could not do more than set up the court. It could not do more because the Assembly could only make recommendations; it could not impose obligations on member States. Hence it could not compel governments to accept the court's jurisdiction or to bring offenders and witnesses before the court. A court set up by a resolution of the General Assembly would not have any greater powers in the exercise of its functions than one set up by a convention.

47. Miss RUSAD (Indonesia) said the establishment of an international criminal court was a goal to aim at in the sphere of international co-operation, but she wondered whether it was possible in practice at the present time. Article 1 of the draft statute said that the court would try persons accused of crimes under international law, as might be provided in conventions or special agreements among States parties to the statute; but studies were still in progress to define the different categories of crimes under international law, and obviously the crimes within the court's jurisdiction had to be defined before the court itself was set up.

48. Moreover, international relations being what they were, it was unlikely that States would be ready to bring their nationals before an international criminal court. More guarantees would be needed on that score

before a final decision could be taken on the advisability of creating such a court.

49. Lastly, few States seemed anxious to bring the lesser international crimes, such as the traffic in narcotic drugs, before an international tribunal, as national courts were able to deal with them adequately.

50. For those considerations, the Indonesian delegation felt that at the moment the establishment of an international criminal court would be premature.

The meeting rose at 12.55 p.m.

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