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CONTENTS

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. HOLMBACK (Sweden) stated in the first place that neither the International Law Commission nor the Committee on International Criminal Jurisdiction had been able to agree unanimously on the advisability of establishing an international criminal court. While some members had thought it was not possible to establish such a court, others had held that it was not even desirable to do so. Still others had considered that any action to that end would hamper progress in international understanding and co-operation.

2. The Committee had not, indeed, recommended that an international criminal court should not be established; but neither had it recommended that it should. The Committee had expressed no opinion on the point. In those circumstances, and in view of the serious doubts voiced during the discussion with regard to the advisability of establishing the court, it would have been most useful to know the points of view of the various governments on the definite proposals which had been submitted to the Committee. Only thirteen of the sixty Members, however, had replied to the Secretary-General's request for comments, and of those thirteen two had stated that they had no comment to make.

3. Reviewing the observations made by the other eleven governments, he noted that some them felt serious doubts as to the advisability and possibility of establishing an international criminal court. Furthermore, while other governments might possibly be in favour of the establishment of such a jurisdiction, they did not seem to take a very keen interest in the matter, since they had made no comments on the Committee's report.

4. It was indispensable to ascertain the views of more governments before any further steps were ordered with a view to the preparation of drafts relating to the establishment of an international criminal court. For that reason the Swedish delegation had submitted a draft resolution (A/C.6/L.261) urging "the Member States which had not yet done so to make their comments and suggestions on the draft statute, in particular if they are of the opinion that further action should be taken by the General Assembly with a view to the establishment of an international criminal court". It was only after receiving those comments that the Committee could decide whether a special committee should be established or not.

5. The Swedish delegation thought the time had not yet come to establish an international criminal jurisdiction. Hence a special committee, as proposed in the joint draft resolution (A/C.6/L.260) should not be established immediately. Furthermore, according to the statement presented by the Secretary-General (A/C.6/L.263), a session of that committee in Geneva would cost $33,700. If to that were added the travelling expenses and subsistence allowances of the members of the committee, the total would be a considerable sum, which, after all, would in the last resort be paid by the taxpayers of the Member States.

6. Mr. SPIROPOULOS (Greece) said he would like first to point out that his country, which had always been in the forefront of progress, and which, in the League of Nations, had been one of the promoters of numerous new ideas and institutions, was a supporter of the idea of establishing an international criminal court. That did not mean, however, that Greece was in favour of establishing such a court immediately. A complete study of the various aspects of the problem, and of its legal and political implications, was needed first.

7. The representative of the United Kingdom (324th meeting) had given a brilliant account of the difficulties which would beset the establishment, and above all the operation, of an international criminal court. Mr. Spiropoulos made no secret of the fact that, at any rate in principle, he shared the views of the United Kingdom representative on that point. A court of that kind would have to deal, not with crimes under the

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

ordinary law, but with political crimes such as wars of aggression, armed invasions for political purposes, activities organized for the purpose of fomenting civil war, acts of terrorism—in other words, with crimes committed, encouraged or tolerated by governments themselves, so that the question arose how the offenders were to be brought before the court. The Nürnberg trials had been possible only because of the complete defeat of Germany, the allied forces having succeeded in seizing the persons of the criminals. In the report which, in his capacity as Rapporteur on the question of the draft code of offences against the peace and security of mankind, he had presented to the International Law Commission,[1] he had already had occasion to point out that, as a general rule, political crimes could not be committed in an organized State unless they were tolerated by the government of that State, and in such a case, it was hardly likely that the offenders would be brought before an international judicial organ.

8. He was not, however, quite so pessimistic as the representative of the United Kingdom, whose criticisms, though just, were too categorical. Actually, cases might occur in which it would be possible to bring the offenders before an international court. Apart from the case of the total defeat of the aggressor and the occupation of his territory—and in that case the existence of a jurisdiction established before the act of aggression would forestall the criticisms which the establishment of an *ad hoc* tribunal set up by the conquerors to try the conquered was bound to encounter—there was the case of armed bands which, acting for political purposes, invaded the territory of a State and were captured on the territory of a third Power. There was also the hypothetical case of a government, to avoid being held responsible for acts of genocide committed on its territory against its will, bringing the offenders before an international tribunal. Lastly, a State might conceivably agree to hand over to an international criminal court persons who, in the treatment of prisoners of war, had violated the laws of war, since an international court would provide more guarantees of objectivity than its own courts.

9. True, such cases might not be very frequent, but, unlike the representative of the United Kingdom, he felt that it would nevertheless be useful to establish an international criminal jurisdiction to deal with them. Persons who committed offences against the ordinary law were not invariably arrested by the police and brought before the national courts; hence it was not reasonable to be more exacting in the case of an international tribunal. Even the imperfect functioning of such a tribunal might prove satisfactory, at least in the beginning.

10. With regard to the important question of how the court should be established, establishment by international convention would be the ideal and only legally sound solution. The adoption of that method, however, would involve the danger of producing a court which was accepted by only a very small number of States, whereas a jurisdiction of that kind should be governed by the principle of universality. The court should therefore be established within the structure of the United Nations.

[1] See document A/CN.4/144.

11. A revision of the Charter, which was a necessary condition for making the court one of the principal organs of the United Nations, seemed doomed to certain failure in view of the divergences of opinion between the Eastern and Western Powers.

12. There remained the solution proposed by the delegation of the United States of America, to establish the court by resolution of the General Assembly. The delegation of Greece supported that proposal, though fully realizing the difficulties which such a solution would meet with and without pretending that the functioning of a court established by resolution of the General Assembly would be entirely dependent on the goodwill of the States Members.

13. The representative of France had remarked that the provisions of Article 22 of the Charter could not be construed as empowering the General Assembly to establish the court. It was, however, undeniable that political offences affected international peace and security, and he personally thought that the powers of the General Assembly in respect of the maintenance of peace were so broad that they should include the right of prevention and punishment.

14. A General Assembly resolution establishing an international criminal court would indeed be only a recommendation and would not have binding force. Such a court, however, would not be completely without its uses; it might contribute to the prevention of political crimes, and, for example in case of the defeat of an aggressor, it would be the tribunal of the community of nations before which the offenders would be brought.

15. In any event, before a decision was made, the political repercussions of the establishment of an international criminal court within the structure of the United Nations had to be weighed, not least among them the fact that, as pointed out by the representative of France, the decisions of the court and the decisions of the political organs of the United Nations might conflict. Similarly, the important, if as yet neglected, question of the law to be applied by the court also remained to be studied.

16. In conclusion, he said that his delegation, less pessimistic than that of the United Kingdom, though not so optimistic as that of the United States of America, considered that the idea of establishing an international criminal court should not be abandoned. On the contrary, all aspects of the problem would have to be given further study so that a considered decision could be reached on the question whether such a court should be established or whether a more propitious time ought to be awaited for giving effect to one of the noblest ideas of the age.

17. Mr. ROBINSON (Israel) noted that the discussion had brought out a whole series of problems: the question whether or not to establish an international criminal court, to which the United Kingdom representative had replied in the negative and the Netherlands representative in the affirmative; the method by which to establish the court; the category of crimes within its competence; the law it would apply; and finally the procedure for the examination of the question. Since the proposals and amendments before the Committee concerned that last point only, he would confine himself to that and would not touch

upon questions of substance except for the purpose of explaining his position.

18. As the French representative had pointed out, only eleven Governments, eight of which had been represented on the special Committee, had as yet submitted comments on the Committee's report (A/2186 and A/2186/Add.1). When the Sixth Committee had first taken up the question, at the fifth session of the General Assembly some members had expressed their *a priori* enthusiasm, while others had shown complete pessimism. The result of the discussion at that time had been to decide that the court could not be established until all the data requisite for a thorough study of the problem had been brought together. That still appeared to be the Sixth Committee's opinion, for it did not want to take a decision unless it was thoroughly familiar with all the facts.

19. The special Committee had not exhausted the subject and a number of questions remained to be settled. In addition, there seems to be in certain quarters a desire to reopen questions on which tentative agreement had been reached in Geneva. In view of its terms of reference, the special Committee, which was a technical body, had not been able to deal with the philosophical aspect of the question. It would be well, however, to consider whether the establishment of the court would be justified only in anticipation of a world catastrophe and whether it should deal only with war crimes. It would be necessary to inquire whether it was possible to forecast human behaviour, as Spengler and Toynbee maintained. While it would be dangerous to be drawn too far in that direction, it was a point that should not be neglected. Another point to be taken into account was whether to consider that the court would have enough cases to try or whether it would be enough for it to exercise, as it were, a prophylactic action.

20. The work of the special Committee had in any case made it possible to give a final answer to two questions. It was admitted that the court should be a permanent body but should function only in case of need, and that it would be concerned with individuals, not bodies corporate. Three basic problems had yet to be solved: the method whereby the court was to be established, the class of offences over which it would have jurisdiction and the law it would apply.

21. The special Committee had proposed that the court should be established by international convention, but that there should be no hesitation in the forming of links between the court and the United Nations; on the contrary, the Committee had given the General Assembly and the Secretary-General an important role. The part to be played by the General Assembly raised the question whether it could assume responsibilities under a multilateral convention to which not all States Members of the United Nations were parties and to which some non-member States acceded. Some speakers had tried to draw a comparison with the establishment of the present system in Trieste, but he did not think that provided a relevant precedent. There was also the question what form such intervention on the part of the General Assembly would take. As for the role of the Secretary-General, the question whether he had the power to perform international acts outside the United Nations and independently of the General Assembly or the Security Council would need consideration.

22. The Netherlands and Greek representatives had considered that the court could be set up by a General Assembly resolution. Such a proposal required a lengthy inquiry to determine whether the traditional concept of the responsibility of States, upon which the United Nations was based, was compatible with the principle of the responsibility of individuals, upon which the draft statute was based. If those two doctrines should not be incompatible, the next question would be which organ of the United Nations would be the most competent to establish an international criminal court. It would not necessarily be the General Assembly, especially if the Security Council emerged from its present state of paralysis. If it were the General Assembly, the exact scope of Article 22 of the Charter would have to be considered, as also the question whether the fact that General Assembly resolutions were only recommendations represented a genuine difficulty. Another matter to be considered would be whether the fact that the court would be a subsidiary organ of the General Assembly would affect its structure and its operation; there were also the precedents to be considered, some of which, such as the Interim Committee, were not very encouraging. The proper meaning of the terms "principal" and "subsidiary" in connexion with organs of the United Nations needed additional analysis. It would furthermore be useful to take into consideration the experience of the United Nations in the matter of tribunals, namely the Administrative Tribunal and the Eritrean Tribunal. Finally, the implications of the doctrine of the "Living Charter" developed with force by A. Feller in his book, *The United Nations and the World Community* for the problem should be explored.

23. The possibility of an amendment of the Charter as provided in Article 109 should not be disregarded. It might be possible to amend Article 22 more easily than other Articles or to add a new Article providing for the establishment of new United Nations organs which would be neither subsidiary nor principal organs. There was already a problem regarding the hierarchy of the organs mentioned in Article 7.

24. With regard to the compromise suggestion put forward by the United States representative, to the effect that the court might be established by a General Assembly resolution and the statute of the court then opened for signature, Mr. Robinson thought that the precedents were not very propitious and that the chances of such a method being successful in the present case would need very careful study.

25. There was another series of problems that should be thoroughly studied. Some representatives, including the French representative, had thought that the competence of the court should not be limited to international crimes but should be extended to lesser crimes involving the responsibility of States and to so-called crimes of international concern. That question raised the point whether it was really necessary to refer domestic crimes that gave rise to a dispute concerning jurisdiction to an international criminal court. If the competence of the court was broadened to that extent, there would surely be a risk that all the crimes which caused States any embarrassment might be brought before it. It would then be necessary to consider how to protect the

court against an undue influx of cases and whether the qualifications required for judges to try crime under international law and crimes of international concern were the same.

26. He drew the Greek representative's attention to the fact that the question of the law the court would apply had been examined before and that the special Committee had concluded that prior codification was not absolutely essential. He thought, however, that the question should be considered afresh. There were numerous other questions of detail still to be studied.

27. The Swedish draft resolution (A/C.6/L.261) was not satisfactory, for instead of encouraging governments to send in their comments it was liable to bury the question without providing for possible reconsideration later. Such a draft was premature and would only be justified if general indifference had been shown toward the question. Any proposal that might tend to delay it should be avoided at the present moment and every effort should be made to assemble fresh data upon which to base a decision.

28. The Sixth Committee could choose among four methods. It could decide to continue the studies itself: it had not sufficient time at its disposal, however, and its membership was too large to do work of that kind effectively; it should leave the preparation of detailed drafts to others. Secondly, the question could be referred to the Secretariat for further study. The previous work of the Secretariat had been of great value but the Legal Department's small staff already had too much work; moreover, the neutral attitude the Secretariat was bound to adopt, and its necessarily abstract approach, should rule out that possibility. The contribution of learned societies and research workers might be of great value but, in view of the very few studies elicited by the Committee's report and the draft statute, and of the very nature of the working methods of scholars and private institutions, he feared that that method, too, must be ruled out. The only one left was that of the conference or committee; that method might obtain the maximum results and, by the impact of ideas, bring enlightenment.

29. In conclusion, Mr. Robinson referred to the development of the last 150 years of international justice which had started with the so-called Jay Treaties of 1794 and had found expression in the Permanent Court of Arbitration of The Hague and later in the International Court of Justice. The very fact that the process had been so slow should inspire courage and confidence. Better tools had been evolved; the existence of the United Nations should make it possible to press on with the studies that were still necessary.

30. Mr. ROBERTS (Union of South Africa) expressed gratification at the high level of the discussions on the question of international criminal jurisdiction. His delegation was in complete agreement with the United Kingdom representative's masterly statement, a view which the last part of the Ukrainian representative's speech had served merely to confirm.

31. Nothing had been said which could alter the Union Government's views as set out in the comments submitted to the Secretary-General (A/2186). The ultimate objective was eminently desirable, but the establishment of a court which had no powers would not represent an advance. The peoples were progressing towards a better world, but the process must inevitably be slow. Wise decisions could hasten that progress, but they could not replace the normal process of evolution. The time was yet far distant when the peoples would have sufficient mutual confidence to submit to the judgment of others with the conviction that that judgment would be impartial and just.

32. The nations were not yet ready to accept any sort of world police. Nor would the court constitute a sufficient deterrent to potential international criminals. He could not, however, go along with the Ukrainian representative in his analysis of the motives he had ascribed to those in favour of establishing the court, or in his estimate of how that proposal would affect the freedom of States. Those in favour of establishing the court had the cause of peace and international co-operation in mind. Moreover, the surrender of certain rights would mean increased freedom, since only discipline could ensure freedom. But those rights could only be surrendered in favour of a strong and independent organization.

33. The problem must not and could not be shelved. Nevertheless, a hasty or unwise decision might retard what was an inevitable process of development.

34. It would be premature to make specific plans for setting up an international criminal court. The Brazilian representative had said (323rd meeting) that the delegation of the Union of South Africa was concerned at the cost of further studies. No expense would be too great if it made real progress possible. But any expense was in vain if its purpose was to finance studies from which no real benefit could be expected.

35. He pointed out to the Israel representative that the reason why only a few governments had replied to the Secretary-General's inquiry was that governments had no suggestions to offer. The idea itself was premature. Every philosophical or theoretical consideration having been expressed, the process of evolution must take its course. The South African delegation would not object to certain studies provided that they were carried out in New York.

36. It approved the Swedish draft resolution (A/C.6/L.261) as a whole.

37. Mr. GOMEZ ROBLEDO (Mexico) said that he would confine his statements to the preliminary question as defined by the Netherlands representative, that is, whether to drop the matter or, on the contrary, to persevere in efforts to establish an international criminal jurisdiction. The Mexican delegation considered that it would be useful, and indeed essential, to establish such a jurisdiction when the necessary conditions were fulfilled, despite the considerable difficulties which lay ahead.

38. Strictly speaking, it was possible to conceive of a rule of law which was not backed by sanctions or means of enforcement, but that was a very imperfect conception. Eminent philosophers and jurists, from Spinoza to Kelsen, had considered that the essential feature of any system of law was the possibility of coercion. It was generally held that the judicial function was an essential ingredient of any system of law.

39. The need to set up a suitable jurisdiction offering every guarantee of impartiality was implicit in the

unquestionable fact that international crimes and offences existed.

40. Heartening parallels could be drawn. In the internal order of States, judicial organs had always been the last to emerge after a slow and arduous process of development. At first optional, they had become compulsory and the process had finally culminated in the principle of the binding force of judgment. Mr. Politis had skillfully drawn the parallel between that process in Roman law and the development of international law.

41. The goal was still far distant. Already, however, the possibility of bringing heads of State and their principal agents to justice had been accepted. That was a great step forward, one which had appeared impossible a few years before. There was therefore no reason to despair of completing the last stages in the process. But neither should the results achieve and existing institutions and practices be regarded as satisfactory.

42. There was a growing tendency to transfer war crimes from the jurisdiction of the international criminal court to that of *ad hoc* tribunals. It would be wrong to dispute the legality of the special tribunals on the ground that they allegedly represented the law of the victor imposed on the vanquished. Victory, of course, was the occasion and the essential condition, but the vanquished was subject to the jurisdiction of those courts not by reason of the victory but by reason of the offence. There was always the danger, however, that a special tribunal might not be able to free itself entirely from the influence of the passions and prejudices engendered by the hostilities. In that case, the existence of an impartial third party, in the form of an international criminal court, appeared altogether desirable. He added that his observations were, of course, purely objective and did not apply to the Nürnberg, Tokyo and Manila Tribunals.

43. The Mexican delegation supported any proposal to retain the question of setting up an international criminal jurisdiction on the General Assembly's agenda at future sessions.

44. Mr. FERRER VIEYRA (Argentina) thought that none of the arguments advanced during the discussion, whether for or against the establishment of an international criminal court, was entirely convincing. The problem was both political and legal. The decision of States concerning the desirability and possibility of establishing the court was political. The purely technical Committee which had met at Geneva had been right not to touch upon that aspect of the matter, with which the General Assembly was alone competent to deal. It should, however, be observed that no delegation had as yet declared that its government would agree, at the moment, to recognize the jurisdiction of an international criminal court. The technical difficulties resulted from that lack of agreement. When agreement was reached on the desirability of establishing the court, most of the problems which the Committee had been unable to resolve at Geneva would be settled without difficulty.

45. Theoretically, an organ having the functions which it was proposed to confer on the court would have considerable value. The Argentine delegation could therefore not oppose the establishment of such a court in principle. The criticisms levelled at the Nürnberg and Tokyo Tribunals had not yet been disposed of. From the practical point of view, however, the discussion suggested that it was unanimously agreed that it would be inexpedient to establish the court at the moment. No delegation had opposed the idea of an international criminal court in principle, but the majority had spoken against its immediate establishment.

46. The joint draft resolution (A/C.6/L.260) seemed to take it for granted that in its resolution 260 B (III) the General Assembly had already given approval in principle to the establishment of the court. There was no justification for that view. In its resolution 489 (V), the General Assembly had stated that it had not yet been able to take a final decision regarding the setting up of such a court. It would be a political decision.

47. While he would have liked to be able to support the United Kingdom amendment (A/C.6/L.262), he could not do so because under paragraph 4 of that text, the Committee, a technical organ, was to carry out a political task. The Argentine delegation considered that a further study should be made of the problem, but it did not necessarily have to be made by a new committee, the cost of which would be exorbitant, especially if it met at Geneva. He would therefore support the Swedish draft resolution (A/C.6/L.261), though not objecting in principle to the establishment of a new special committee.

The meeting rose at 1 p.m.

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