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Chairman: Prince WAN WAITHAYAKON (Thailand).

Tribute to the memory of Mr. Abraham Feller

1. The CHAIRMAN paid a tribute to the memory of Mr. Abraham Feller, General Counsel of the United Nations and Acting Assistant-Secretary General of the Department of Legal Affairs, who had died in tragic circumstances on 13 November 1952 and whose loss would be felt by the whole Organization. He conveyed a message of condolence and profound sympathy to Mrs. Feller and the late Mr. Feller's family.

2. Mr. SALAMANCA FIGUEROA (Bolivia) and Mr. MAKOTOS (United States of America) associated themselves, on behalf of their respective delegations and the many friends of the late Mr. Feller, with the tribute paid to him and with the condolences expressed. They recalled Mr. Feller's devotion to the ideals of the United Nations and his brilliant qualities as a distinguished jurist. They moved that the Committee should observe one minute's silence in his memory.

3. Mr. STAVROPOULOS (Secretary of the Committee) spoke of the dismay which Mr. Feller's death had caused in the Department of Legal Affairs, where more than in any other Department Mr. Feller's penetrating intellect and talent had been admired. It could truly be said that self-imposed overwork had led to his untimely death.

The Committee observed one minute's silence in memory of Mr. Feller.

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

[Item 52]*

4. Mr. LACHS (Poland) recalled that the question of international criminal jurisdiction, which the Committee was studying for the third time, had been con-

sidered from the theoretical and from the practical standpoint. In view of the way in which some delegations approached the question he felt bound to point out that the General Assembly had never committed itself to taking any decision whatsoever on the principle of setting up an international criminal court. The texts of the General Assembly resolutions 260 B (III) and 489 (V) proved that. The General Assembly had taken the view in 1950, as in 1948, that the question was still at the preliminary study and research stage. Nothing had changed that situation. It would therefore be premature and out of place to study the manner of setting up a court when a decision had not been reached on the principle itself. For that reason the Polish delegation would confine its comments to the basic preliminary question. Some might think that by adopting that attitude the Polish delegation wished to delay the discussion, but that was not so. Only if the fundamental aspect of the question were considered could it be discussed in its proper context.

5. He had explained his point of view at the previous session, but having noted the serious doubts, hesitation and fears of many delegations, he felt he should outline it once again. The Polish delegation's attitude was founded on its conception of the bases of contemporary international law. He recalled that the argument of the USSR and Polish delegations, among others, that the establishment of an international criminal court would infringe the sovereignty of States, had been described as out-of-date by the Netherlands representative at a meeting of the Committee on International Criminal Jurisdiction at Geneva in 1951.

6. Poland's reason for upholding the principle of sovereignty was not that it feared to see its interests merged with those of mankind as a whole. Its actions proved the contrary. It was no secret that in the modern world there was sometimes a tendency to restrict and even to suppress the sovereign rights of States. Those tendencies had already found expression in actions. Certain States were forcing others to renounce their sovereign rights. It was claimed that sovereignty would hamper peaceful international co-

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

operation. In that connexion he discussed the fundamental characteristics of contemporary international law. The sovereignty of States was closely bound up with the principle of the right of peoples to self-determination. The principle of the equality of nations derived its binding force from that of sovereignty. In that connexion he quoted the advisory opinion of the Permanent Court of Arbitration and a recent opinion by an eminent British jurist. Sovereignty was the basis of all contemporary international relations and the source of the principles of personal and territorial jurisdiction. Genuine international co-operation was impossible if the idea of sovereignty was denied. That denial was the cause of the current difficulties in international relations. The Charter contained numerous references to the principle of sovereignty and many documents based on the Charter confirmed it. The decisions of the International Court of Justice mentioned it frequently. Sovereignty protected national interests and served the cause of international co-operation.

7. It was inconsistent with the truth and with the principles of law to claim that the defence of sovereign rights was incompatible with democratic principles and with progress. Contrary to what the Netherlands representative had said, Poland by defending its sovereignty and that of other States was defending its own and other nations' interests. It defended the cause of international co-operation.

8. Sovereignty had two aspects—a territorial and a personal aspect. The establishment of an international criminal court would interfere with the latter. States used their domestic legislation to punish criminals, administer penal justice and maintain peace within their frontiers as well as in their international relations. In the case of the *Lotus* the Permanent Court of International Justice had expressly recognized the principle of the personal jurisdiction of States, a principle which had its source in their sovereignty. In his dissenting opinion, Judge Moore himself had said that no one disputed the right of a State to subject its citizens abroad to the operations of its own penal laws.¹

9. Clearly, therefore, learned authorities as well as practice bore out the assertion that criminal jurisdiction was part of the sovereign rights of States. Any attempt to set up an international criminal court would be equivalent to depriving States of one of their fundamental rights and to transferring that right to another level, which was neither desirable nor compatible with contemporary international law.

10. Some had claimed that an international criminal court was justified by the precedents of Nürnberg and Tokyo. That argument overlooked an essential feature of the Nürnberg and Tokyo trials. As the representative of the Ukrainian SSR (324th meeting) had emphasized, the principle of territorial jurisdiction had been fully respected in both cases and, besides, had been recognized in the Moscow Declaration of 1943.² Under that declaration persons guilty of atrocities, massacres and executions were to have been returned to the coun-

tries where they committed their crimes, for trial and punishment in accordance with the laws of those countries. Only persons guilty of crimes which could not be associated with a specified geographical area were to have been tried by special international tribunals.

11. Moreover, the Allied Control Commission had played a significant part in the organization of the Nürnberg Tribunal and in enforcing the Tribunal's judgments. The principle of territoriality in penal matters had not been waived at Nürnberg or at Tokyo. Indeed, it could not have been waived. That was not a criticism. The value of the accomplishment of the Nürnberg Tribunal was, rather, that it had declared unlawful and severely punished crimes against peace and mankind and war crimes. The significance of those trials was that the crimes dealt with were crimes against international law. Hence the precedents of Nürnberg and Tokyo could not be relied upon in the case of the international criminal court.

12. He explained that he was not opposed to the creation of *ad hoc* tribunals when the need arose. He opposed the establishment of a permanent court which would permanently restrict the rights of States. It was the duty of States to administer justice and to prosecute persons guilty of acts defined as crimes either by municipal or by international law. The actual law, the principles on which the Charter of the Nürnberg Tribunal and other international documents were based, should be applied. The application of the law should, however, be a matter for States. A State which did not fulfil its obligations in that respect would be held responsible by the United Nations, and liable to the normal sanctions of international law. Accordingly, it was for the States to prevent and punish crimes and to perform the function proposed to be conferred on an international criminal court.

13. He then referred to the type of crimes with which the court was supposed to deal. The representative of France had suggested that it should deal with the white-slave traffic, obscene publications and other questions covered by international conventions in force. All those conventions defined the crimes, but left it to the judicial authorities of the signatory States to punish them. In certain cases the parties had agreed to supplement their domestic legislation in case it proved inadequate. Those conventions went back as far as 1910, 1921 and 1925. They had been tested by time and practice and had attained the object for which they were drawn up. It would therefore be unnecessary to make an international court responsible for dealing with the crimes and offences covered by those conventions.

14. It had been said that the court could act as an appellate tribunal in the case of judgments passed by national courts. That was a dangerous idea. Such supervision would be incompatible with the nature of national judicial authorities. National courts were capable of performing their function and of dealing with crimes against international law. States like Poland and the Union of Soviet Socialist Republics had enacted special legislation for the punishment of any actions calculated to produce another world war.

15. In conclusion he said that what was needed was not a pessimistic or fatalistic attitude but rather an optimistic and realistic approach. Peace and international co-operation could be maintained, and by virtue of the

¹ See *Collection of Judgments, Publications of the Permanent Court of International Justice, No. 10, The Case of the S. S. "Lotus"*, A. W. Sijthoff's Publishing Co., Leyden, 1927.

² See *United States Department of State Bulletin*, November 6, 1943, Vol. IX, No. 228, Publication 2021, pp. 308-309.

Charter any possible crises could be dealt with. The Security Council was equipped to take decisions, provided that they were taken in the proper way. The establishment of an international criminal court would conflict with the fundamental principles of international law and would not facilitate the work of those anxious to maintain world peace. Moreover, any attempt to create such a court by a General Assembly resolution would violate the Charter. If the principal organ could merely make recommendations to States, powers which would encroach upon the sovereignty of States could not be conferred on a subsidiary body.

16. Mr. MOLINO (Panama) said that, while most questions of detail connected with the establishment of an international criminal court had been discussed, the question of principle had not yet been settled. As regards the mode of establishing an international criminal jurisdiction, the delegation of Panama felt that it could not be created by a General Assembly resolution. Though Article 22 of the Charter gave the General Assembly the power to establish such subsidiary organs as it deemed necessary for the performance of its functions, the functions of an international criminal court were totally different from the General Assembly's and it certainly could not be argued that the court would be able to assist the General Assembly in the performance of its duties under the Charter. In preference to attempting to amend the Charter, perhaps a criminal chamber of the International Court of Justice should be formed, the offences to be dealt with by that chamber being exactly defined.

17. The same result might be achieved by means of a convention. Numerous conventions relating to international criminal law existed, and he did not agree with those who thought, first, that those conventions had not yielded the results expected, and, secondly, that States would not be ready to consent, by signing a new convention, to any limitation on their sovereign right to decide how acts should be treated under their laws. States had often accepted such a limitation; he mentioned the 1933 Convention of Montevideo,³ under which the American States had recognized the right of the State on whose territory a person had found asylum to decide whether the offence for which extradition was requested was or was not a political offence. Just as individuals accepted, for the sake of society, certain restrictions of their rights, so States might very well agree to surrender some of their rights for the sake of the international community. For example, in the case of crimes against the international community such as the traffic of narcotic drugs or the white-slave traffic, which as often as not consisted of a series of acts committed on more than one territory, States could agree to set up an international penal jurisdiction in order to facilitate investigation, prosecution and punishment.

18. Even if it were doubtful that an international criminal court could be set up in accordance with the broad outlines recommended by the Committee on International Criminal Jurisdiction, and even if some thought that the time had not come to carry out an idea which was still only a project, it would be unfortu-

nate to abandon the studies undertaken. The problem should be studied further, and the crimes to be punished, the competence of the court, the procedure to be followed and the penalties to be imposed should be defined. For that reason the delegation of Panama, in agreement with the Egyptian delegation, proposed that the Swedish draft resolution (A/C.6/L.261) should be amended in such a way that the consideration of the draft statute would be deferred for one year in order to give Member States time to submit the comments requested, the Secretary-General being asked to place the item on the provisional agenda of the 1954 session of the General Assembly.

19. Mr. HOLMBACK (Sweden) agreed to amend his delegation's resolution as suggested by the representative of Panama.

20. Mr. HSU (China), after stating that his delegation would vote for the revised joint draft resolution (A/C.6/L.260/Rev.1), replied to certain questions raised during the debate.

21. He agreed with the representative of the Netherlands that the expressions "principal" and "subsidiary" used in the Charter to define the organs of the United Nations were somewhat elliptic. The subsidiary organs certainly differed radically from the principal organs, in that they could be abolished without an amendment of the Charter and hence did not enjoy the same degree of protection. There was no reason to fear, however, that an international criminal court set up by a resolution of the General Assembly would later be abolished by another General Assembly resolution. The Member States which voted for the establishment of such a court should endeavour to secure its recognition by the largest possible number of States. Moreover, it was the duty of all Member States to see to it that the General Assembly did not act impulsively or destroy what it had itself created.

22. There was likewise no reason to fear that the General Assembly would interfere in the work of a court which would be one of its subsidiary organs. By its very nature, a court was not and could not be subject to outside intervention, and it was axiomatic that, whether permitted or not, intervention depended essentially on the nature of the organ in whose proceedings it was proposed to intervene. That was well-known to the General Assembly, and nothing could threaten the court so long as the principle of the independent exercise of the judicial power was recognized.

23. Some of the Netherlands representative's remarks seemed to suggest that justice might be sacrificed for the sake of peace, that the General Assembly would be justified in some cases in preventing the court from taking action and that the court would be bound, irrespective of its own convictions, to accept the decisions of the principal United Nations organs responsible for the maintenance of international peace and security in such matters as the determination of the aggressor. Observing that he had no desire to go into the wholly theoretical question whether peace was more important than justice or whether life was dearer than honour, he said that practical considerations would reveal how dangerous it was to compromise with justice. To accept such a compromise would be to admit defeat in advance. And although everyone readily agreed that every court

³ See *International Conferences of American States. First Supplement, 1933-1940*, (Seventh Conference), pp. 116-117, Carnegie Endowment for International Peace, Washington, 1940.

should allow common sense to influence its deliberations, it could manifestly not remain worthy of its name unless it was wholly removed from the influence of all political bodies of any description.

24. The United Kingdom representative had asked how it would be possible, if the court were established by General Assembly resolution—in other words by a mere recommendation—to compel States to produce the accused before the court. The answer was simple. States would eventually accept the court's statute, not only as a result of efforts to that end but also because the establishment of the court would duly awaken in them or strengthen the feeling that international justice was needed. That feeling was for him the real key to the problem, and an Assembly resolution would more readily succeed in arousing it than the method recommended by the Committee.

25. In conclusion he said he was glad to note that most of those opposing the establishment of the court were animated by caution rather than by indifference. One should indeed make haste slowly, but still there had to be some advance along the road to progress.

26. Mr. TUNCEL (Turkey) noted that the discussion showed distinctly that the issue before the Committee was not the preliminary question of the advisability of establishing an international criminal court, but whether the studies undertaken should be continued or consideration of the problem deferred to a later date. It was also clear from the discussion that governments voting for further preparatory studies were preserving full freedom of action in regard to the problem as a whole.

27. The Turkish delegation, for its part, considered that it would be inadvisable to interrupt the consideration of a problem for which the full relevant data had not yet been collected. The committee contemplated in the revised joint draft resolution (A/C.6/L.260/Rev.1) should not, however, take a decision on the substantive question whether the court should be established; that was a decision for governments themselves, whether or not they were represented on the committee.

28. Mr. WIKBORG (Norway) said that most of the delegations that had expressed their views appeared to be in agreement on the following points: (1) it would be eminently desirable to establish an international criminal court if it could be founded on the solid basis of general agreement among the States; (2) at the moment such a possibility was very slight, if not indeed non-existent; (3) although it was unpredictable when the court might be established, the question should nevertheless receive further study.

29. The Norwegian delegation concurred in those findings and intended to vote for the joint draft resolution in its revised version.

30. He did not think it possible, at that juncture, to establish the court by General Assembly resolution. The Assembly could not confer on a body of its own creation more powers than it held itself, and only those Member States which accepted the Assembly's recommendation would be bound by the court's statute. Moreover, any court established by General Assembly resolution would not enjoy the requisite authority and independence. The Norwegian delegation held that the court would have to be the equal, in every respect, of the

International Court of Justice, which was itself a wholly independent judicial body. The judges, whether belonging to a national or to an international tribunal, should recognize no authority but that of the law and the court might lose prestige in the eyes of the public if it were merely a subsidiary organ of a political assembly.

31. For all those reasons, the court should preferably be established through a multilateral convention. The new committee that was contemplated would have to study all the possible modes of establishing the court. Unfortunately, however, the committee would probably not have enough time to carry out all its prospective work. Accordingly, the committee should be left free (if necessary) to submit a preliminary report and to ask for an extension of the period set for completion of its work.

32. The Norwegian delegation did not share the view that there was no point in establishing a court unless a code of offences had been adopted first. The material for an international penal code already existed—the Charter of the Nürnberg Tribunal and the Convention on Genocide, for instance. Other conventions were in course of preparation and, in general, it was acknowledged that certain crimes came under international law even though they had not yet been codified.

33. The Norwegian delegation hoped that the continuation of the studies undertaken would bring closer a society ruled by justice—the ultimate aim of the United Nations—though it did not underestimate the difficulty of carrying out such a project. The task of the new committee, were it to decide that the difficulties could be overcome, was precisely to find the means to that end.

34. Mr. TABIBI (Afghanistan), after recalling that the Committee on International Criminal Jurisdiction had itself regarded its proposals as in no way definitive, stated that his delegation shared the view that it would not be possible to settle the question of establishing an international criminal court until its political and legal implications had been carefully scrutinized, for the object of such a jurisdiction would be to aid in maintaining peace and justice and in ensuring the application of the principles of law.

35. He would not dwell on the question of the manner of establishing the court, which would have to be given further thorough study. He considered that it would be useful, when instructing the new committee to examine the various aspects of the problem, simultaneously to request private organizations concerned with the study of international law to weigh the matter and express their views on the possibility and manner of establishing an international criminal jurisdiction.

36. His delegation would encourage every effort made to serve the cause of humanity and justice. Hence it would support any proposal likely to overcome the obstacles which as yet hampered the realization of an idea it held dear. It hoped that it would be possible before long to set up an international criminal court which would succeed in administering justice through the application of a codified international criminal law, and so contribute to the maintenance of peace. For that purpose further studies were admittedly required. Accordingly he would vote for the joint draft resolution. If that was rejected, he would vote for the Swedish

draft resolution (A/C.6/L.261), amended as suggested by the representative of Panama.

37. Mr. SHAWWAF (Saudi Arabia) wished first to commend the Committee on International Criminal Jurisdiction for the excellent work it had done on so highly controversial a matter.

38. In agreement with other delegations, in particular that of Syria, his delegation was not opposed in principle to the establishment of an international criminal court. It would be unwise, however, to take the Committee's proposals as a basis, first in view of the vagueness of international law and, secondly, of the prevailing political situation, which would hardly permit the court to act. Such a court would merely provoke incidents between the States and would add to international tension.

39. His delegation considered that the problem required more thorough exploration, and would therefore vote for the joint draft resolution, and for the amendments thereto submitted by the delegation of Panama.

40. Mr. PETRZELKA (Czechoslovakia) considered that the findings of the Committee on International Criminal Jurisdiction showed that the time was not ripe for establishing a court. The representatives of the Ukrainian SSR and of Poland had shown that the Tribunals of Nürnberg and Tokyo had not in any way affected the principle of the territorial jurisdiction of States. Competence to deal with crimes and political offences was one of the basic attributes of sovereignty. Any State accepting the jurisdiction of an international criminal tribunal would be surrendering a substantial part of its own jurisdiction and hence of its sovereignty. If, in addition, it were to form part of a so-called regional economic community, it could no longer be regarded as having all the attributes of a real subject of international law.

41. The principle of sovereignty was the legal and political basis for international co-operation, and peaceful international relations were inconceivable unless founded on international law, in particular on sovereignty. Recognition of the interests, needs and rights of sovereign States was the very foundation of a strong international legal system. To set up an international criminal court and accept its jurisdiction would likewise be to contravene the principle of non-intervention in the domestic affairs of States, as laid down in Article 2, paragraphs 1 and 7 of the Charter; those paragraphs would have to be rescinded if it were proposed to amend the Charter as some had advocated.

42. The semi-autonomous units which would grow up as a result of any encroachment upon sovereignty and of any acceptance of foreign interference would so seriously weaken international law as to make it virtually inapplicable.

43. Like the Syrian representative, though for different reasons, he opposed the establishment of a court by a General Assembly resolution. The United Nations could not sponsor the establishment of such a court because that would be tantamount to endorsing the fallacy that there could be more than one type of subjects of international law, an idea conflicting with the theory of sovereignty. Professors Lauterpacht and Scelle had wanted to extend that doctrine to the United Nations, but the actual terms of the Charter proved conclusively

that the United Nations was an organ of co-operation between Member States of sovereign and equal rights, not a supra-national authority. The United Nations was based on the united will and action of its Members and no State could be bound against its will and without having signified its will, in accordance with Article 2, paragraph 7, of the Charter.

44. It had been claimed that the international criminal court would have great value as a moral authority. Moral principles could not take the place of law, which was a means of coercion, and furthermore, as had already been stressed, it would not be possible to execute the decisions of the court. Hence, without the backing of sanctions the court would not possess any moral authority. Moral principles, though an important social factor, could not constitute justification in international law and no tribunal had ever been established on purely moral grounds.

45. The law to be applied by the court would be very ill-defined, since the code of offences against peace and humanity did not yet exist and since the establishment of the court would remove the grounds for the existence of many international conventions, a circumstance which would tend to weaken further the concept of State sovereignty. In that connexion, he cited Professor Bourquin, Mr. Emery Reves and Mr. Jessup on the future of international law; they foresaw the disappearance of sovereignty. If that theory were followed up, the United Nations would be exalted into a super-State. Such a tendency to depart from the international law in force appeared in certain United Nations documents, specifically in the Convention on Genocide, article XII; he also cited Professor Hyde of Columbia University, who found the dependency of some nations *vis-a-vis* others a perfectly normal thing. Apparently States which respected existing international law were regarded as backward by those upholding so-called new theories which, under the ostensible sense of legality, sought to deprive certain States of their political and economic independence. The Czechoslovak delegation refused to countenance such manoeuvres and would vote accordingly.

46. Mr. MOROZOV (Union of Soviet Socialist Republics) said that some of the previous speakers had lightened his task by showing that the establishment of an international criminal court was not compatible with the principles of sovereignty and non-intervention, and that provisions of the draft statute were contrary to the Nürnberg principles and to the Charter of the United Nations.

47. No one had rebutted the Ukrainian representative's arguments. The Netherlands representative had claimed that the criticisms addressed to him were based on inaccurate quotations, but that claim would not stand up to examination. The Polish and Czechoslovak as well as the Indian representatives had shown that the establishment of an international criminal court would prejudice international co-operation, and the Egyptian representative had stressed that the court would be an instrument for propaganda and hence would not enjoy any authority.

48. As the Australian and Argentine representatives had pointed out, a body could not be created unless its competence was defined, and none of those endorsing the establishment of the court had committed his country

in advance to recognition of the court's jurisdiction. In those circumstances, the idea of establishing an international criminal court was doomed to failure. That view was borne out by the work of the special Committee and the discussions that had taken place in the Sixth Committee.

49. The Netherlands and Greek representatives had tried in vain to defend the scheme by claiming that the court would ensure the continuation of the work of the Nürnberg Tribunal. The establishment of the court, however, as the representatives of the Ukrainian SSR and Poland had shown, conflicted with the Nürnberg principles and hence was not consistent with the maintenance of international peace and security. Had the draft statute of the court been in force, the Hitlerite criminals would undoubtedly have escaped punishment.

50. The Netherlands representative, who was now defending the Nürnberg principles, had taken an entirely different stand during the fifth session of the General Assembly; he had then stated that the Nürnberg principles were open to question, that the trial of aggressive acts after a war was a superhuman task and that it was hardly possible to establish the criminal nature of an aggressive act on solid grounds. The Netherlands representative, at the 232nd meeting of the Committee,⁴ he recalled, had gone so far as to offend the memory of those who had sacrificed their lives in the struggle against Nazism and to insult the heroes who had died for the people. In those circumstances, to argue that the establishment of the international criminal court would ensure the application of the Nürnberg principles was actually tantamount to an attempt to destroy them. Such an attitude was in keeping with the behaviour of those who were seeking world domination.

⁴ See *Official Records of the General Assembly, Fifth Session, Sixth Committee*.

51. Moreover, the Charter did not provide for the establishment of an international criminal court as an organ of the United Nations. The Netherlands representative had claimed that it could at least be made a subsidiary organ under Article 22 of the Charter. The Netherlands representative, by citing the precedent of the Interim Committee, had himself demonstrated the falseness of his thesis since that Committee was itself an illegal body. The Netherlands representative had also declared that the General Assembly's task was to concern itself with every question relating to the maintenance of international peace and security, that that would be precisely the function of the court and that it could therefore be established by General Assembly resolution. That was sophistry. The United Nations as a whole was there to serve peace and security and hence the Charter had had to make provision for different organs, which would perforce be affected by the establishment of the court. The General Assembly had no judicial function and the United Nations no penal function. The Greek representative's arguments in support of the establishment of the court under Article 22 of the Charter were equally inaccurate and the examples cited by him were tendentious.

52. He stressed that General Assembly resolutions 260 B (III) and 489 (V) did not in any way prejudge the establishment of an international criminal jurisdiction.

53. The USSR delegation accordingly considered that it was not possible to establish an international criminal court and that hence there was no point in exploring the matter further and courting fresh failure.

54. For the reasons stated, he would vote against the revised joined draft resolution for the establishment of another *ad hoc* committee (A/C.6/L.260/Rev.1).

The meeting rose at 1.10 p.m.