UNITED NATIONS

GENERAL ASSEMBLY

GENERAL

A/2186
16 September 1952

ORIGINAL: ENGLISH

Seventh session

INTERNATIONAL CRIMINAL JURISDICTION

COMMENTS RECEIVED FROM GOVERNMENTS REGARDING THE REPORT OF THE COMMITTEE ON INTERNATIONAL CRIMINAL JURISDICTION

Table of Contents

Note by the Secretary-General

1. The General Assembly, on 12 December 1950, adopted resolution 489 (V) on the subject of international criminal jurisdiction. The resolution established a committee of representatives of seventeen Member States, which should meet in Geneva on 1 August 1951 for the purpose of preparing one or more preliminary draft conventions and proposals relating to the establishment of an international criminal court. The resolution also requested the Secretary-General "to communicate the report of the committee to the governments of Member States so that their observations may be submitted not later than 1 June 1952, and to place the question on the agenda of the seventh session of the General Assembly."

2. The Committee on International Criminal Jurisdiction met from 1 to 31 August 1951 and prepared a report containing a draft Statute for an international criminal court.[1/] The Secretary-General, by a letter of 13 November 1951, transmitted the Committee's report to the governments of Member States, requesting their observations thereon.

3. By 10 September 1952, observations had been received from the Governments of Australia, Chile, France, Israel, the Netherlands, Norway, Pakistan, the Union of South Africa and the United Kingdom of Great Britain and Northern Ireland. These observations are reproduced below. Also, the Government of India informed the Secretary-General, by a letter dated 10 May 1952, that it did not wish to make any comments at present on the proposal contained in the report, and the Government of Iraq stated, in a letter dated 7 June 1952, that it had no comments. Any additional observations that may be received will be reproduced as addenda to the present document.

1/ A/2136, Official Records of the General Assembly, Seventh Session, Supplement No. 11.

1. AUSTRALIA

Letter from the Permanent Representative of Australia to the United Nations

/ORIGINAL: ENGLISH/

New York, 3 June 1952

.....

You will recall that, at the fifth regular session of the General Assembly, the Australian delegation expressed the view that the taking of steps to establish an international court of criminal jurisdiction would be premature both for political reasons and in view of the dearth of positive law which such a court could apply. The work of the Committee has not served to change this view.

However, should the requisite majority of Member States decide at the seventh regular session of the General Assembly that steps should be taken to set up the court, the Australian Government would regard the report of the Committee as a satisfactory working paper upon which the Assembly's discussions of the questions following from such a decision might be based.

(Signed) W.D. FORSYTH
Permanent Representative
of Australia to the
United Nations.

2. CHILE

Letter from the Permanent Representative of Chile to the United Nations

/ORIGINAL: SPANISH/
New York, 1 June 1952

.....

I am pleased to inform you, on the instructions of my Government, that the draft is generally acceptable to Chile and that it contains no provisions which conflict with our public law.

I reproduce below the Chilean Government's comments on three articles of the said draft:

(1) According to article 25, the court shall be competent to judge natural persons only, including persons who have acted as Head of State or agent of government. It seems almost unnecessary to state that only natural persons may be judged, because so-called legal persons or entities are mere fictions the purpose of which is to make certain aspects of the social structure more easily understandable. However, the explicit statement made in this article is desirable in order to avoid attempts by persons accused of offences to evade their responsibility on the pretext that they were acting as representatives of entities distinct from themselves and that, since it is impossible to establish the responsibility of these bodies because of their very nature, those who carry out their decisions are also not punishable or juridically accountable for those acts.

The last part of this article, which states that "persons who have acted as Head of State or agent of government" are included among the persons under the court's jurisdiction, is ambiguous as it might be taken to mean that those persons can only be punished after they have ceased to act as Heads of State or agents of government. The expression "have acted" may also be taken as referring only to their participation in the punishable act in question, in regard to which they "have acted" in that capacity,

regardless of whether they still possess this status.

It would therefore be useful to make it absolutely clear, by suitable wording, whether the Heads of States are to come under the court's jurisdiction while they are exercising their constitutional functions or whether juridical action may only be initiated against those who "have acted as Head of State" and are no longer acting in that capacity at the time when the proceedings are initiated.

(2) Article 33 is intended to establish the Committing Authority and article 34 the Prosecuting Attorney.

If the Committing Authority issues a certificate for trial, a Prosecuting Attorney is to be elected (article 34). This official is elected by a panel of ten members, elected in its turn at the meetings and in the manner provided for the members of the court (article 11). This panel or body has no other function.

The existence of this panel seems unnecessary and its sole function can perhaps be adequately performed by the Committing Authority itself. When this body considered that the suit should be proceeded with, it could at the same time appoint the Prosecuting Attorney, which would simplify the procedure and dispense with machinery for which there seems to be no justification.

(3) It would be desirable to expand the provisions of article 54 which establishes the Board of Clemency, a special body which would have the powers of pardon and parole and of reduction and other alteration of a sentence of the court.

This body would consist of five members elected by the States parties to the statute. There is no indication of the qualifications required of the persons appointed nor of the way in which the States are to elect them. It would therefore be necessary to indicate what conditions must be fulfilled to become a member of the Board and the way in which its members are to be elected.

(Signed) Hernán SANTA CRUZ
Permanent Representative of
Chile to the United Nations

/3. FRANCE

3. FRANCE

Letter from the Ministry for Foreign Affairs of France

/ORIGINAL: FRENCH/
Paris, 2 July 1952

In your letter ..... dated 13 November last, you asked me to communicate to you the French Government's comments on the report of the Committee on International Criminal Jurisdiction established under General Assembly resolution 489 (V) of 12 December 1950.

I have the honour to transmit herewith a note setting forth the comments to which the report gives rise on the part of my Government.

(Signed) Maurice SCHUMANN

COMMENTS OF THE FRENCH GOVERNMENT ON THE DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT

The French Government approves the general lines of the draft statute prepared by the United Nations Committee on International Criminal Jurisdiction.

It feels bound, however, to offer the following comments:

(1) Procedure to be followed in establishing the court

The projected international criminal court cannot be established by virtue of a mere resolution of the General Assembly, like a subsidiary organ of the United Nations.

The French Government approves the Committee's recommendation -- and the grounds on which it was based -- that the court should be established by convention following a conference organized for that purpose by the United Nations.

(2) Nature of the crimes or offences in respect of which jurisdiction may be conferred upon the court (articles 1 and 26 of the draft statute)

In the opinion of the French Government, it should be made clear, by a more precise wording of articles 1 and 26, that the function of the court is to try:

Offences under international law;

Offences under municipal law, the prevention and punishment of which is recognized as a matter of international concern by a convention giving the court competence to deal with them;

Offences under municipal law in cases where a State, whose own courts have competence to prevent and punish them, agrees to refer such offences to the court under a special agreement or by a unilateral waiver of competence.

It appears from the records of the meetings and from the Committee's report that, though the court's competence to deal with these various offences is not denied, the draft in its final form fails, for reasons which are obscure, to embody the accepted ideas in sufficiently express language.

(3) Approval of the court's jurisdiction by the United Nations (article 28)

The safeguard expressed in article 28 seems likely to complicate needlessly

slow down the procedure for prevention and punishment in cases where jurisdiction is conferred on the court under a special agreement or by unilateral waiver of competence. In such cases there is no reason why the decision to confer jurisdiction on the court should be held up by this clause.

Moreover, since two or more States may at any time establish a court in which they vest jurisdiction respecting their mutual relationships, it is difficult to see any valid reason for ruling out a convention which, as between two or more States, would have no further effect than to confer additional jurisdiction upon a world court.

(4) Law to be applied by the court (article 2)

Article 2 is not felicitously drafted. The international criminal judicial authority will obviously apply international criminal law. It is unnecessary to mention this, and to mention it parenthetically seems almost odd.

It is also not desirable to refer to the court's possible application of national law, especially when the text does not specify in which cases. In fact, in applying international criminal law, the court will as a matter of course apply national law whenever the rules of international law, including the provisions of the court's statute, refer to national law or logically require its application.

(5) Right of access to the court (article 29)

If the General Assembly of the United Nations were recognized as having the right to refer cases to the court, the same right would surely also have to be granted to the Security Council, which under the Charter has primary responsibility for the maintenance of international peace and security.

The French Government, however, is of the opinion that this right should be reserved for States exclusively.

In so far as a majority in the General Assembly or Security Council consists of States which are parties to the statute of the court and which have recognized the court's competence in respect of the acts to which the charges relate, it is difficult to see why these States should seek a collective decision when they are able to institute proceedings individually. In so far as the majority consists of States which are not parties to the statute of the court or which have not recognized the court's competence in respect of the cases in question,

/such States

such States are hardly qualified to deny competence to a judicial authority by which they are not bound.

Furthermore, to consider the matter from another point of view, discussion in the General Assembly might be tantamount to a kind of pre-trial by a political body and without any of the judicial guarantees and rules, a pre-trial which, by attracting the attention of the Press and public opinion, would operate to the detriment of the accused by bringing him into disrepute before he has a chance to defend himself in a proper court.

(6) Assistance of States in operating the court (article 31)

Any State which is a party to the statute of the court ought ipso facto to have committed itself to collaborate with the court for the purposes both of investigation and of the execution of sentences. To require a special convention for this purpose, as stipulated in article 31, paragraph 2, amounts to a very serious impairment of the implications of accession to the statute. Such a requirement may actually paralyse the court's operation for it would have to wait until all the necessary legal documents have been assembled before it could discharge its preventive and punitive functions.

(7) Committing authority and prosecuting attorney (article 33)

The institution referred to in article 33 corresponds to the jury of accusation (jury d'accusation) which under certain national systems intervenes before the authority trying the case adjudicates. While seeing no objection to this preliminary authority, the French Government considers that another function should be discharged, that of investigation (instruction) in the technical sense of the term. The authority referred to in article 33 might first, as provided, conduct a preliminary enquiry as to whether the complaint is well founded. Then, if the complaints are not dismissed, it would discharge the indispensable function performed by the juge d'instruction under French law and similar legal systems.

(8) Separate opinions of judges (article 48)

The judges in the minority cannot be regarded, unreservedly, as entitled to express dissenting opinions; this right should be most carefully studied from the point of view of the prevention and punishment of international crimes. To recognize such a right might indeed weaken the authority of the sentence. The existence of the right might make it more difficult to form a majority in the court for it would encourage "splinter" opinions ranging all the way from decisions to acquit to decisions to award capital punishment. Lastly, since it would mean that judges would be assuming an individual responsibility, they would run the risk of being involved in controversies in which they might be challenged personally, and perhaps even of subsequent reprisals.

4. ISRAEL

Communication from the Ministry for Foreign Affairs of Israel

/ORIGINAL: ENGLISH/

Hakirya, 25 May 1952

The Ministry for Foreign Affairs of Israel ..... has the honour to transmit its observations on the report of the Committee on International Criminal Jurisdiction, hereinafter referred to as "the Committee".....

2. In preparing its observations on the report, the Ministry for Foreign Affairs has considered whether it should deal with the wider political and sociological elements of the problem or whether it should restrict its remarks to the purely legal aspects. It has reached the conclusion that for the present it should confine itself within legal limits, reserving for subsequent phases of the discussion the formulation of its political attitude on the question of the desirability and the practicability of establishing an international criminal court. Moreover, even within these limits it has decided to confine itself only to matters of fundamental concern, reserving its right to make further observations in the course of the seventh session. In reaching this conclusion, this Ministry has noted with interest that "the Committee does not wish to give (its) proposals any appearance of finality. They are offered as a contribution to a study which in the Committee's opinion has yet to be carried several steps forward before the problem of an international criminal jurisdiction, with all its implications of a political as well as a juridical character, is ripe for decision" (Report of the Committee, paragraph 17).

3. The task imposed on the Committee by its terms of reference falls into two parts. It was to prepare on or more preliminary draft conventions and proposals, which should relate, however, to two distinct matters, that is to say, the establishment of an international criminal court and the statute of such court. Clearly, the method by which the court shall be established is fundamental to the drafting of its statute, as was expressly indicated both in the memorandum of the Secretariat (A/AC.48/1) and in that of Professor Pella (A/AC.48/3). Indeed, this

/is also

is also specifically recognized in the Committee's report itself, e.g. in chapter II and in paragraphs 50 and 58. The Committee's report indicates that several methods of establishment were considered, namely: (a) as a principal organ of the United Nations; (b) by resolution of the General Assembly; or (c) by convention. The first method was felt to be out of the question at the present stage of international relations as it involves an amendment to the Charter. It is agreed that it is not desirable, to-day, to put forward final proposals predicated upon an amendment of the Charter. However, it does not follow from this negative proposition that the idea of creating the court as a principal organ of the United Nations is to be summarily abandoned, for it is necessary to keep in mind that by virtue of paragraph 3 of Article 109 of the Charter, the proposal to initiate amendments to the Charter will be placed at the latest on the agenda of the tenth annual session of the General Assembly, which is due to take place in 1955, and that having regard for the time still undoubtedly required for the successive steps yet necessary to bring to fruition the very idea of an international criminal court, the possibility of ultimately establishing the court as a principal organ of the United Nations, - without impairing the position of the International Court of Justice as its principal judicial organ - is one that can be, and indeed should be, envisaged. As for the other methods of establishing the court, it is noted that whereas the idea of doing so by means of a resolution of the General Assembly was rejected decisively in the Committee by a vote of 3 to 8, with 2 abstentions, the vote in favour of establishing the court by a convention, 6 to 2 with 6 abstentions, cannot be regarded as so decisive. For this reason, then, it is considered that the present phase would have been more fruitful had the Committee presented several alternative drafts and proposals, based upon the several possible methods of establishing the court. Moreover, this seems to be what the General Assembly had in mind in the terms of reference it gave to the Committee. Had this been done, the General Assembly could, in the next stages, have embarked upon a process of elimination from a plurality of texts as part of the process of reaching conclusions on the desirability of establishing an international criminal court. True, the Committee has demonstrated convincingly that it is practical to establish such an institution - if practicability is

/conceived

conceived from the technical juridical point of view. But this had been done before, by States - Nürenberg and Tokyo - and by numerous learned institutions.

4. At this point it is useful to indicate what, in the view of this Ministry, are the principal omissions in the Committee's report, after which some more detailed criticism of the actual contents of the draft statute and of the report will be given.

5. What is perhaps the cardinal omission concerns the relationship between the proposed court and the United Nations, and this expresses itself in several ways. The problem is briefly touched upon in paragraphs 74 to 78 of the report and article 28 of the draft statute which laconically states that no jurisdiction may be conferred upon the court without the approval of the General Assembly of the United Nations. There are several facets to this problem. The integration of the proposed court into the machinery of the United Nations, that is to say, the method by which the proposed court could be brought into a certain relationship, organizational or functional, with the United Nations, gives rise to many constitutional and organizational problems which have to be considered in a double light, that of the United Nations itself and that of the court itself. Furthermore, it is noted that within the United Nations the draft statute refers to two principal organs, the General Assembly (articles 28, 29) and the Secretary-General (articles 8, 9, 11, 12, 18, 19, 52), and at the same time article 33 speaks more nebulously of "the framework of the United Nations". The fundamental characteristic of the proposals of the Committee is that stripped to its essentials, the Court will be created outside the United Nations, but that somehow or other it will become integrated into the machinery of the United Nations by means of some expression of approval by the General Assembly. Firstly it may be asked if, having regard for the functions to be performed by the proposed court, the General Assembly is the proper body for this task, and secondly, assuming that it is, what should be the principal contents and effect of any resolution expressing approval. With what sort of matters should it deal? Furthermore, it may also be asked if the Secretary-General is the proper organ to perform the functions desired to be placed upon him by the draft statute; and whether it can be made obligatory for him to carry out these functions, some of which may be

onerous and delicate; and what would be the position were he to refuse to perform these functions, or perform them in a way regarded as unsatisfactory by all or some of the parties to the convention. These problems must be taken into account in considering the whole question of integration of the proposed court into the United Nations.

6. In the same order of ideas it may be mentioned that the report of the Committee fails to draw a distinction between the role of the General Assembly in the establishment of the court, and the practicability of attributing functions and competence upon the General Assembly in regard to the actual working of the court. It is one thing to move the General Assembly to take the steps necessary to establish the court, or to make its establishment possible. It is quite another thing to deduce from this apparently desirable proposition that the General Assembly is the proper body to exercise certain competences in regard to the court, when the court is actually in a position to function. This Ministry feels that these problems require further careful consideration before it will be possible to come to final conclusions on the Committee's report.

7. There is one further serious lacuna in the report as it now stands. The provisions of article 33 of the draft statute relating to the Committing Authority relate exclusively to the interests of the accused, and the Authority's functions are limited to satisfying itself that the evidence is sufficient to support the complaint. This, of course, is a certain necessity. However, this is not the only preliminary function to be performed prior to trial, as indeed is mentioned in paragraphs 113 and 114 of the Committee's report. Paragraph 113 explicitly mentions the possibility that the political screening process of which it speaks should be performed by the pertinent organ of the United Nations, but no article to this effect appears in the draft statute itself. This omission, which is a serious one, is somewhat closely related to those discussed in the preceding paragraphs of this Note, and could possibly find its solution within the orbit of the solution of the general problem of the relationship between the United Nations and the proposed court.

8. There are a number of other omissions from the draft statute which, important in themselves, are nevertheless of a secondary character:

/(a) The statute

(a) The statute does not contain any provision regarding the admissibility or not as evidence of confessions made by the accused out of court, nor does it contain any provision relating to the examination of the accused by the prosecuting attorney. Paragraph 5 of article 33, which imposes upon the Committing Authority an obligation to give the accused a reasonable opportunity to be heard and to adduce such evidence as he may desire, does not specify how and to what extent such evidence may be used for or against the accused at the trial itself.

(b) For reasons expressed by the representatives of Israel during the meetings of the Committee it is considered that the Prosecuting Authority should be a permanent and not an ad hoc body as is suggested in article 34 of the draft statute.

(c) The statute is silent as to the making and publication of a transcript of the proceedings and the filing of exhibits and documents. It is noted that in the case of the International Court of Justice some of these matters are regulated in the Statute and others in the Rules of Court. It is not made clear whether there are reasons of substance to warrant a different arrangement for the proposed international criminal court.

(d) The statute contains no mention of the right of a State to intervene in pending proceedings, or even to file a brief as amicus curiae. In this connexion, it is felt that article 36 of the draft statute should be expanded by having incorporated in it provisions such as those contained in article 40, paragraph 3, articles 62 and 63, as well as the fundamental ideas of article 66, of the Statute of the International Court of Justice.

(e) Article 47 of the draft statute should also make it obligatory for the judgment to specify the facts which are established by the Court, as to the accused's participation in the offence of which he has been charged, whether he is convicted or acquitted. This is required in order to ensure the precision necessary to determine the scope of the judgment and the operation of the "double jeopardy" rule in criminal proceedings.

(f) The statute is silent as to the payment of any special allowance to the President or Vice-President when acting as President, similar to the

provisions contained in Article 32 of the Statute of the International Court of Justice. Whereas for clearly expressed reasons the provisions regarding the finances of the court (article 23 of the draft statute) are no more than a skeleton, it is considered that this particular aspect should be specifically mentioned.

(g) The draft statute does not contain any provision according to which the court shall not be established until a certain number of States have become parties to the statute and conferred jurisdiction upon it in respect of any one crime. Similarly the draft contains no "reservations" article, a matter particularly necessary in view of the discussions on reservations to multilateral conventions which took place in the fifth and sixth sessions of the General Assembly. These, and other matters, undoubtedly belong to the final provisions discussed in chapter VII of the Committee's report. But these final provisions cannot be regarded as a mere formality, and it is therefore considered necessary to amplify the draft statute in this respect before the present phase of the discussions can be regarded as terminated.

9. Generally speaking and with all reserves as to the matters omitted from it, the report of the Committee can be treated as a statement of reasons of the draft statute. That is to say, it can be made to perform an interpretative function in regard to the draft statute. On the whole, it is found to be a satisfactory document. Its weaknesses are no more than those of the draft statute. However, it is felt necessary to make a few comments on the report itself:

(a) Paragraph 25 of the report states that the permanence (of the Court) should be understood in the sense of organic, not of functional, permanence. This seems to set "functional permanence" in antithesis to "organic permanence" and thus introduces an element of confusion into article 3 of the draft statute which clearly states that "the court shall be a permanent body. Sessions shall be called only when matters before it require consideration". It is suggested that the report would have expressed itself better had it stated that the permanence of the court is "organizational but not operational".

/(b) It is

(b) It is difficult to agree with the proposition implicit in paragraph 26 of the report to the effect that the existence of a permanent court as opposed to an ad hoc tribunal would "complete the substantive rules of international criminal law, which would remain imperfect in the absence of a judicial organ to try criminals". For several reasons this formulation is open to criticism.

(i) It is assumed, though in the context it is not absolutely clear, that the word "which" refers to the "substantive rules" and not to "international criminal law". The difference is rather one of quantity than of quality, but this sentence introduces the following element of confusion. The primary role of the proposed court is not to complete any rules of substantive law, even though, by its mere functioning it would undoubtedly make an important contribution towards completing the substantive rules of international criminal law. Its primary role is rather in the sphere of the enforcement of international criminal law. The framework of international criminal law will be incomplete without a court. The proposed international criminal court is only one way of filling this gap.

(ii) It may be an exaggeration to imply that the existence of a permanent court forms in itself a decisive contribution to the completion either of individual substantive rules or of international criminal law as a whole. Without minimizing in any way the contribution of the Permanent Court of International Justice and the International Court of Justice to the development of international law in general, it cannot be said that their mere existence has contributed towards completing the substantive rules of international law, or, a contrario, that the various ad hoc international tribunals have not made such a contribution; or that the law has not been developed independently of the functioning of these courts and tribunals. The decisive factor is rather acceptance of the notion of the justiciability of actions which are contrary to international

criminal law.

criminal law, just as the acceptance of the notion of justiciability formed the ideological basis for the erection of the Permanent Court of International Justice. In this respect the decisive contribution to international criminal law was made precisely by ad hoc tribunals at Nürenberg and Tokyo. The whole argument is certainly a powerful one for the creation of a judicial organ, though not necessarily of a permanent judicial organ.

(iii) Even accepting the assumption that international criminal law can be developed by a system of "case-law" (using this expression in the least technical sense) is it not an exaggeration to suggest that such case law can complete the substantive rules of international criminal law when obviously it can do no more than supplement them? Moreover, this formulation might obscure the function of international treaties in the development of substantive rules of international criminal law.

(iv) In the same sentence it is undesirable to speak of trying "criminals" when what is meant is trying "accused persons".

(c) Paragraph 62, particularly in its second sentence, exhibits a significant lack of clarity in discussing the various methods of conferring jurisdiction upon the Court. The problems could, it is believed, have been set forth more clearly had it been indicated that the real antithesis is between the general and the particular, and between the ante factum and the post factum.

(d) Paragraph 73 of the report fails to deal with the case of statelessness.

(e) Paragraphs 74-77 of the report, construed as a statement of reasons to article 28 of the draft statute, are deficient for the reasons outlined elsewhere in these observations.

(f) In paragraph 79 in fine the phrase "over and above that of the accused" may be ambiguous in the sense that it predicates some sort of connexion between the right of the accused to challenge the jurisdiction of the court and the right of the State to do likewise. These two rights clearly exist independently of each other. A similar ambiguity appears in article 30 of the draft statute.

/(g) Paragraph

(g) Paragraph 83 of the report, which relates to the possibility of the proposed criminal court seeking advisory opinions from the International Court of Justice, is perhaps over-concise, and rests upon a dialectical assumption which may not be correct. The assumption is that where an individual challenges the jurisdiction of the court, the matter could be decided by the court, but that where a State challenges the jurisdiction of the court, the matter could, were the constitutional difficulties to be overcome, be referred to the International Court of Justice for an advisory opinion. But the question arises whether this differentiation between the procedure on challenge by an individual, and the procedure on challenge by a State, upon which this dialectical assumption is based, is itself justified. It is the accused that is being tried and the State appears as intervening party. We may recall the observation of the International Court of Justice in the Haya de la Torre Case that "every intervention is incidental to the proceedings in a case" (I.C.J. Reports, 1951, 71 at page 76), an observation which appears to be fully applicable to the procedure envisaged in the draft statute. That being so, it would appear to follow that a challenge by a State should be disposed of by the same procedure as that operative in relation to a challenge by an individual, as, indeed, is implicit in the assumption just mentioned. From this basis we proceed to ask whether in both cases it is not possible to conceive of a procedure whereby the advisory competence of the International Court of Justice could nevertheless not be invoked. Clearly, subject to conformity with paragraph 2 of Article 96 of the Charter, such a procedure can be envisaged if the proposed criminal court is brought into the correct constitutional relationship with the United Nations, and the General Assembly could then define the conditions upon which the criminal court could request an advisory opinion from the International Court of Justice, for example by "stating a case", limited, however, to the question of jurisdiction.

(h) The penultimate sentence of paragraph 83 raises two disconnected arguments, neither of which seems to be conclusive. The first is that a State might raise the question of jurisdiction at an advanced stage of

/the trial.

the trial. This difficulty could be overcome by prescribing the time-limits within which this challenge must be made along lines similar to those found in article 62 of the Rules of Court of the International Court of Justice. The second argument, which is quite unrelated to the first, is that a reference to the International Court of Justice would require the suspension of the trial for a "considerable time". As to this, several remarks can be made. In the first place, the International Court of Justice can - and indeed has done so - deliver its advisory opinions after a relatively short lapse of time. In this connexion, attention is drawn to paragraph 2 of article 82 of that Court's Rules, under which if the Court is of opinion that a request for an advisory opinion necessitates an early answer, it shall take the necessary steps to accelerate the procedure. Secondly, and what is more fundamental, a serious, as opposed to a frivolous, challenge to the jurisdiction of necessity must lead to a suspension of the main proceedings, and for a considerable time. The separation of challenges to the jurisdiction from the main proceedings is a familiar characteristic of international judicial procedure. It is also a necessary one, having regard to the gravity of the issues involved and the complex structure of the international society. It seems that further reflection is required to see if similar considerations leading to similar conclusions are not operative in regard to international criminal law.

(i) It is observed, moreover, that these paragraphs of the report may have overlooked the pattern of jurisprudence developed by the International Court of Justice in dealing with certain challenges to its own jurisdiction to give advisory opinions based on the ground that the treaty being construed provides for another mode of settling disputes. This jurisprudence, which will be found in the advisory opinions of 30 March 1950 on the Interpretation of the Peace Treaties (I.C.J. Reports 1950, 65 at page 71) and of 28 May 1951 on Reservations to the Convention on Genocide (I.C.J. Reports 1951, 15 at page 19), may mean that whereas the proposed court may not itself be able to request advisory opinions, another body duly authorized by or under Article 96 of the Charter may be able to do so, if

/it can

it can satisfy the Court that it has a permanent interest of direct concern in the proper functioning of the proposed international criminal court. This jurisprudence can, it is believed, be summarized as being that the Court will not regard itself as precluded from exercising its advisory competence merely by virtue of the fact that a treaty provides for some other mode of settling disputes arising out of it, if it is established that the General Assembly has its own interest and concern in the effective functioning of the treaty. The advisory opinion of 28 May 1951 is particularly important, for it indicates in a manner which might have a direct application to the proposed international criminal court, what might be the constitutive elements of the interest and concern of the United Nations. The effect of this may well be that despite the intention of the Committee, the advisory competence of the International Court of Justice may not in fact be excluded.

(j) The first sentence of paragraph 90 of the report may, by use of the expression "responsible ruler", contradict the intentions of the Committee as expressed in the second sentence of this paragraph. It is therefore sug suggested that the statement of reasons of article 3 of the draft Code of Offences against the Peace and Security of Mankind[2/] is happier.

(k) It is noted that the report several times uses connecting phrases such as "for these reasons" (paragraphs 42, 71, 95, 128), "for similar reasons" (paragraph 72), "on the basis of these arguments" (paragraphs 67, 80), "in view of these considerations" (paragraph 84), "therefore" (paragraph 89). However, closer perusal of these paragraphs leads to doubts as to whether such connecting phrases do not constitute too strong an implication of motives behind the respective articles, and thus lead to interpretative difficulties. On the other hand, it is admitted that there is no consistency in this matter.

10. Finally, a word about the documentation to be presented to the seventh session. It is considered desirable that the documentation relating to the problem of the international criminal court should now be made available in a

---

2/ See report of the International Law Commission covering the work of its third session,(A/1858), chapter IV, Official Records of the General Assembly, Sixth Session, Supplement No. 9.

final and permanent form, possibly by means of a supplement or new edition of document A/CN.4/7/Rev.1. This volume should include both the deliberations of the International Law Commission, and those of the Committee itself, including the various attendant documents, and should be properly indexed. Such a volume would be of inestimable value to all persons who are interested in the establishment of an international criminal court.

/5. NETHERLANDS

5. NETHERLANDS

Letter from the Permanent Representative of the Netherlands to the United Nations

/ORIGINAL: ENGLISH/
New York, 11 July 1952

..... I have the honour, upon instructions received, to enclose herewith two copies of the observations by the Netherlands Government on the draft statute for an international criminal court, framed by the Committee on International Criminal Jurisdiction which met at Geneva from 1 to 31 August 1951.

These observations are based on the report of a commission of experts specially appointed by the Netherlands Government for this purpose. This commission was constituted as follows:

Prof. Dr. J.P.A. François	Special Adviser on International Law of the Ministry for Foreign Affairs (President)
Prof. J.M. van Bemmelen	Professor at Leyden University
Mr. B.H. Kazemier, L.L.D.	Special Adviser of the Ministry of Justice
Dr. M.W. Mouton	Adviser on International Law to the Ministry of the Navy
Dr. C.L. Patijn	Director of the Department of International Organizations of the Ministry for ForeignAffairs
Prof. W.P.J. Pompe	Professor at Utrecht University
Prof. B.V.A. Röling	Professor at Groningen University
Maj. Gen. J.D. Schepers, L.L.D.	General Staff, Royal Netherlands Army
Prof. A.J.P. Tammes	Professor at the Amsterdam Municipal University
Mr. H.J. Eversen, L.L.D.	Official of the Ministry for Foreign Affairs (Secretary)
Mr. C.A. Pompe, L.L.D.	(Second Secretary)

These observations constitute the preliminary opinion of the Netherlands Government. The Netherlands Government reserve their right further to define their opinion at a later stage.

(Signed) D.J. von BALLUSECK

/Observations

Observations by the Netherlands Government on the draft statute for an international criminal court framed by the Committee on International Criminal Jurisdiction

The Netherlands Government welcome the efforts already made by the United Nations to make a thorough study of the question of the establishment of an international criminal court. The Government quite appreciate that many difficulties will still have to be overcome before the establishment of such a court can be materialized. The Government are, however, of the opinion that the time is now ripe to subject this problem to a thorough examination and to prepare a solution for it.

Now that after the Second World War various cases of international criminal jurisdiction have occurred, it appears to be necessary that steps should be taken for the further development of internaticnal criminal law. Although as regards the trials held by the international military tribunals of Nürenberg and Tokyo there is room for criticism, yet these trials constituted a further stage of development of the international sense of justice in this field. This line of action should be extended. It is not to be expected that international criminal jurisdiction at this early stage will immediately come up to the requirements of national criminal jurisdiction. The imperfections which for the time being will be peculiar to international criminal jurisdiction must be accepted; they may not, however, constitute a reason to arrive at the conclusion that the development of international criminal jurisdiction should not be proceeded with.

The question arises whether in view of the present state of international criminal law an international criminal court will be able to function satisfactorily. The Government believe that this question should be answered in the affirmative; already a number of international offences accepted as such are existing, forming a sufficient basis for international criminal jurisdiction. Nevertheless, the Government would welcome the establishment of the court to be coupled with the codification of international criminal law.

The Government - being of the opinion that international criminal jurisdiction must be founded on the international sense of justice - consider that the court should not be established by a limited number of States, as

/proposed

proposed by the Committee on International Criminal Jurisdiction, but by resolution of the General Assembly of the United Nations. The General Assembly is the organ in which nearly all States are represented and where the international sense of justice comes most to the fore. The question has arisen whether a criminal court could be a subsidiary organ of a political organ. The Government believe this to be possible. The General Assembly has already established other tribunals. The court should be, therefore, a subsidiary organ of the General Assembly within the meaning of Article 22 of the Charter.

If, however, it should be decided not to establish the court by resolution of the General Assembly, then the General Assembly ought to convene a plenipotentiary conference for the drafting of the statute, which conference shall as far as possible be representative of the international sense of justice.

The court to be established should be of a world-embracing nature. However, the possibility could be left open that in connexion with the organization of this court regional chambers might be established, composed in such a manner that the political basis and the legal systems of the regions concerned would find expression in these chambers. In that case it could be made possible that the States which confer jurisdiction upon the court could do so on condition that this jurisdiction will be exercised by the regional chamber concerned.

In examining the statute the Government mainly devoted attention to the most important articles. The Government are aware that also regarding the articles on which they do not make any comment below, many observations could be made; the Government refrained from doing so because the statute framed by the Committee on International Criminal Jurisdiction should be regarded as an initial effort.

Purpose of the court (article 1)

The Government have given ample consideration to the question whether jurisdiction should be conferred upon the court immediately at its establishment. They came to the conclusion that it will perhaps be impossible to grant this jurisdiction by the statute itself; this will probably have to be done by separate conventions. But the Government consider that there is a point in establishing a court even before these separate conventions have been concluded as being a first step towards the final objective. The existence of the court

/could

could of itself already increase the urge to confer jurisdiction upon it. Should a considerable majority of States be prepared to establish the court by resolution of the General Assembly, it may be taken for granted that there will be willingness on their part to confer jurisdiction upon the court. Besides, the existence of a permanent instrument for international criminal jurisdiction with definite rules of procedure would be important in itself.

The question arises whether in article 1 the term "crimes under international law" is not too vague and whether reference should not be made to the Code of Offences against the Peace and Security of Mankind. An argument in favour of mentioning the Code would be the reference to a number of clearly defined offences so that in that case there will be no uncertainty as to the question whether a particular case is or is not a crime under international law. An argument against the mentioning of the Code is, however, that reference would be made to a document which is still in a stage of preparation. Weighing the advantages and disadvantages against each other, the Government come to the conclusion that such a reference is not recommendable, also on the ground that this document as well as the principles of Nürenberg will constitute or already do constitute a part of international law.

The words "as may be provided in conventions or special agreements among States parties to the present statute" should be deleted, because this clause contains an unnecessary limitation of the conception of crimes under international law; a limitation all the more unnecessary because article 26 regulates already the conferment of jurisdiction upon the court.

The law to be applied by the court (article 2)

Article 2 being redundant can be deleted. Article 1 already stipulates that the court will have jurisdiction with respect to crimes under international law. However, in article 2 national law and international criminal law are mentioned in addition to international law as sources of law to be applied by the court. National law is only of importance as far as it is necessary to determine the internal responsibility for the offence. Therefore, it may be said that international law refers to these national provisions, and that it is therefore superfluous to mention separately national law as a source of law to be

applied by the court. Likewise it is unnecessary to mention separately international criminal law, being a part of international law.

If, however, it should be decided to retain article 2, then it should be expressly stated in this article that national law may only be applied by the court within the limits indicated above.

Nomination of candidates (article 7)

If the court is to be established by resolution of the General Assembly, then the nominations of candidates for a seat in the court should be made by the Members of the United Nations, whilst at the same time the possibility should be left open to enable non-members of the United Nations who have conferred jurisdiction upon the court to nominate candidates.

All Members of the United Nations should have the right to submit nominations, and, therefore, also those Members who have voted against the establishment of the court.

Election of judges (article 11)

If the court is to be established by resolution of the General Assembly, then this organ should also elect the judges. Therefore, the system should be followed for the election of the members of the International Law Commission.

Those Members of the United Nations who have cast their votes against the establishment of the court should also be able to take part in the election of the judges, as well as the non-members of the United Nations who have conferred jurisdiction upon the court.

Attribution of jurisdiction (article 26)

The words in article 26 "parties to the present statute" should be deleted in order to make the possibility of conferring jurisdiction upon the court as wide as possible.

If the court is to be established by resolution of the General Assembly non-members of the United Nations should be enabled to confer jurisdiction upon the court.

Recognition of jurisdiction (article 27)

If no jurisdiction is conferred upon the court by the statute, article 27 should be retained. It is true that the retention of this article will diminish

/the value

the value of the court because in this way the States will still always be able to prevent their subjects from being tried by the court. In addition, retention of this article may mean that it will not be possible after a new war to have subjects of the victorious country tried by the court if the State concerned has not conferred jurisdiction, and that the right to try subjects of the losing party will be prejudiced. Nevertheless the Government consider it advisable not to recommend deletion of article 27 because in that case there is a great chance that the court will not come into being at all. Besides, the vagueness of the present-day international criminal law (for instance of the notion aggression) as well as the primitive stage of development of international criminal jurisdiction, should be taken into consideration. For the rest the development of international criminal jurisdiction in the future may be trusted to be such that ultimately article 27 can be dropped.

In article 27 the words "and by the State or States in which the crime is alleged to have been committed." should be deleted; it is unnecessary, in addition to the provision of the first part of article 27, to stipulate that the consent of the State where the crime has been committed should also be required.

In connexion with the proposal to delete the last part of article 27, it is advisable to insert the provision of article 27 as a second paragraph of article 26. The Government fear that by dividing the provisions over two separate articles the impression will be given that two different conditions are meant, since article 27 next to article 26 would mean the creation of a right of exception in each special case, whilst in point of fact the one stipulation flows from the other and might even be regarded as superfluous.

Approval of jurisdiction by the United Nations (article 28)

The Government are of the opinion that in addition to the provision of article 1 - under which the court will have jurisdiction only in respect of crimes under international law, which article therefore already contains a certain limitation of the conferment of jurisdiction upon the Court - it is not desirable to require that any conferment of jurisdiction upon the court shall first be approved by the General Assembly. This supervision to be exercised by the General Assembly can better be regulated in a negative sense by assigning to the

General Assembly the right to prevent the conferment of jurisdiction; in this way the General Assembly will be able to prevent jurisdiction being conferred upon the court in respect of offences which are not yet generally recognized as such in international law.

Access to the court (article 29)

The Government can concur with the system followed in the first two paragraphs of article 29, viz., that the General Assembly and regional organizations may institute proceedings.

As regards the third paragraph of article 29 instituting proceedings by a State which has conferred jurisdiction upon the court should also be possible, but it should be prevented from taking place exclusively for propaganda purposes. In order to prevent action being taken on unfounded charges, it is desirable to give a political organ the power to prevent proceedings in cases of strict necessity - for instance when, as a result of proceedings, international peace and security might be endangered. The Government do not consider the General Assembly itself to be the most suitable body to discharge this task properly nor the Security Council, because in the Security Council the permanent members can prevent a decision from being taken in spite of the majority being in favour of it. Consequently this authority should be vested in a Committee of the General Assembly composed of representatives of the same countries which form part of the Security Council.

Assistance of States (article 31)

The general principle should be laid down in the Statute that - proceeding from the thought that the court is to be established by resolution of the General Assembly - the States which have conferred jurisdiction upon the court shall be obliged to render all possible assistance to the court in the performance of its duties, but that this principle should be elaborated in separate conventions. The second paragraph of article 31 would consequently have to be amended and could be formulated as follows: "A State shall be obliged to render such assistance in conformity with the convention or other instrument in which the State has accepted the jurisdiction of the court."

Moreover, the Government venture to observe that nothing in any extradition treaty may derogate from the general principle to be laid down in article 31.

Committing authority (article 33)

It is desirable that before a case can be brought up for trial before the court a summary investigation should take place in order to determine whether sufficient evidence is available to justify a prosecution. This would prevent rash proceedings.

It is not necessary, however, to establish a separate organ for this purpose; in that case the organization of the court would be too complicated. The court itself should be charged with this task, and a committee appointed by the court could be charged to perform this duty. Such investigation, however, should only take place if the accused applies for it.

Prosecuting attorney (article 34)

The development of the international sense of justice is not yet so far advanced that it will generally be accepted that one person acts as spokesman for the whole community. That person will always be seen as a representative of the country of which he is a subject. It should, therefore, be left to the State instituting proceedings to explain its charge. Besides, the plan proposed in article 34 would make the organization of the court too complicated.

The Government would therefore prefer to delete article 34. If necessary, the possibility can always be left open for a panel from which the State instituting proceedings can elect a prosecutor.

Rights of the accused (article 38)

In drafting article 38 account could be taken of articles 105 et seq. of the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949, in which the same subject is regulated and accepted internationally.

Board of Clemency (article 54)

In order to prevent the organization of the court from becoming too complicated, the task of the Board of Clemency should be entrusted to the same committee which will obtain authority to oppose proceedings (see article 29).

It seems desirable to provide that this organ shall only be allowed to amend a judgment after the court has tendered its advice on the subject.

Special tribunals (article 55)

Article 55 can be deleted as superfluous; the Government would regret it if this article would be misused for the trial of major war criminals who are

/subjects

subjects of a State which has lost a war, in case that State has not given jurisdiction to the court.

The trial of the perpetrators of war crimes other than major war criminals, however, will mostly take place by special tribunals, as the international criminal court will be unable to try all war criminals. The international criminal court might possibly function as a court of appeal for these special tribunals.

Interpretation

It seems desirable to insert in the statute a provision by which the competency to interpret the statute shall be assigned to the court itself. The lack of such a provision might give rise to great difficulties.

6. NORWAY

Communication from the Permanent Norwegian Delegation to the United Nations

[ORIGINAL: ENGLISH]
New York, 10 June 1952

The Permanent Norwegian Delegation to the United Nations ..... has the honour to submit herewith a memorandum containing the observations of the Norwegian Government regarding the report of the Committee on International Criminal Jurisdiction.

Memorandum from the Norwegian Government regarding the report of the Committee on International Criminal Jurisdiction

The Norwegian Government is of the opinion that it is not yet expedient to establish an international criminal court of the kind proposed by the Committee on International Criminal Jurisdiction. An international court will, under the present conditions, hardly be able to perform its task in a satisfactory way. Moreover, the existence of such an organ might cause friction and increase the difference between the nations. The Norwegian Government agrees, however, in principle, that preparatory work should continue with the ultimate goal of establishing international jurisdiction also in this field. Considering, however, that an international criminal law is still in embryo, it seems premature to establish a permanent international criminal court with jurisdiction in cases concerning crimes against international law. It would possibly be more profitable to begin with the consideration of the question of international repression in other matters of international interest, such as the questions discussed by the special Committee whether crimes like counterfeit coining, slave traffic and illegal trade in narcotic drugs should fall within the jurisdiction of the court. Suggestions of provisions of this nature cannot, however, easily be made unless necessitated by actual demands. They are, in any case, of little or no interest to Norway.

Due to the position taken by the Norwegian Government regarding the establishment of the court, it does not feel itself in a position to comment in detail on the draft statutes for the international criminal court.

/7. PAKISTAN

7. PAKISTAN

Communication from the Minister of Foreign Affairs of Pakistan

[ORIGINAL: ENGLISH]
Karachi, 26 May 1952

The Minister of Foreign Affairs and Commonwealth Relations....has the honour to state that the Government of Pakistan generally agrees with the report of the Committee, [on International Criminal Jurisdiction] on which it was represented.

The Government of Pakistan is of the opinion that the ideal to be aimed at is that of an international court, set up by a resolution of the General Assembly, with jurisdiction to try any offender, in any State, in respect of anything which is an offence under recognized international law; and that the jurisdiction of such an international court should not depend upon the consent of any particular State to submit its nationals to the jurisdiction of the international court. The proceedings and results of the session of the Committee on International Criminal Jurisdiction at Geneva show that a very great deal of progress has still to be made in this regard before the setting up of any such international court of criminal jurisdiction could be regarded as a practical proposition. At present the most pressing need is not so much for any legal clarifications as for assisting the Members of the United Nations to reach, perhaps after several further stages, a practical arrangement regarding the offences with regard to which the international ccurt should have jurisdiction, and for inducing them to agree to submit their nationals to that jurisdiction.

/8. UNION

8. UNION OF SOUTH AFRICA

Letter from the Permanent Delegation of the Union of South Africa to the United Nations

/ORIGINAL: ENGLISH/
New York, 10 June 1952

..... I have the honour to submit, as requested, the comments of the Union Government.

The Union Government is of the opinion that the time is not ripe to consider the establishment of such a court.

They share the view expressed in paragraph 10 of the Committee's report that:

> "At the present stage in the development of international organization any attempt to establish an international criminal jurisdiction would meet with insurmountable obstacles. As an ultimate objective, an international criminal court would be highly desirable, but its establishment at the present stage would involve very real dangers to the further development of international good-feeling and co-operation".

Moreover there is, as yet, no general agreement as to what should be considered as international crimes. Until there is such agreement, there is in the Union Government's view no justification for setting up a court. Establishing crimes by separate conventions has little value unless the great majority of States become parties thereto.

The present state of the world is regrettably such that there is practically no likelihood of reaching general agreement on the working of the court.

Another consideration is that since it is probable that most of the international crimes, still to be defined, will be committed by persons representing their Governments, it is also probable that efforts to bring such persons before the court will be resisted. It is difficult to see how this problem could be overcome in present circumstances.

Having regard to their view that the establishment of an international criminal court is not a practicable proposition in the immediate future the Union Government wishes to refrain from commenting in detail on the draft constitution of the court.

(Signed) J. J. THERON
for the Deputy Permanent
Representative.

9. UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

Letter from the Foreign Office of the United Kingdom

/ORIGINAL: ENGLISH/
London, 5 June 1952

.....

Since the subject of international criminal jurisdiction is one which will doubtless be fully debated at the next (seventh) session of the General Assembly, the United Kingdom Government consider that it will be sufficient for present purposes to indicate their general attitude on the main aspects of the project, without going into the details of the draft statute drawn up by the Special Committee, except for limited purposes of illustration. Moreover, since the United Kingdom attitude is one of scepticism as to the fundamental possibility and desirability of instituting an international criminal jurisdiction on a permanent basis, they consider that it would be inappropriate to spend time in comment on such matters as the method of appointing the judges of an international criminal court, whether the court should be set up by special convention or by Assembly resolution, and other similar questions which can only arise on the presupposition that such a court is to be established. Nevertheless the Government of the United Kingdom reserve the right to make observations of detail later, before the General Assembly or otherwise, should occasion arise.

2. The United Kingdom Government desire first of all to pay tribute to the spirit in which the special Committee on International Jurisdiction approached and carried out its task. The resulting report reflects the objective character of the work accomplished and constitutes a valuable technical contribution to the study of the matter. The United Kingdom Government note that (as is made clear by paragraphs 10-13 of the report and reaffirmed in paragraph 17) the Committee did not intend to prejudge the question of the desirability of setting up an international criminal court. Equally, the fact that a concrete scheme for establishing a court was framed by the Committee in the form of a draft statute does not imply that the establishment of such a court is actually desirable or that it could necessarily function usefully. It is explicitly stated in these

/paragraphs

paragraphs of the report that, although some members of the Committee thought the Assembly should be informed that the setting up of such a court could not be recommended, on account of the practical difficulties involved, it was eventually agreed that the question of policy was for the Assembly itself, and that the Committee's task was to formulate a scheme in the light of which the Assembly could take its decisions. As is stated in paragraph 12 of the report, it was "on that understanding of the task to be performed by the Committee" that it "was agreed to proceed". The same paragraph adds that "it was furthermore understood that no member of the Committee, by participating in its deliberations and voting on any draft texts, would commit his government to any of the decisions which the Committee might eventually adopt".

3. It is thus clear that the draft statute constitutes a purely technical study, the main purpose of which is to show what form an international criminal court might take if it were decided to establish one, but without prejudice to the merits of the latter issue. It is also clear from paragraph 17 of the report, that the Committee regarded its work as provisional, and offered its suggestions "as a contribution to a study which, in the committee's opinion, has yet to be carried several steps forward before the problem of an international criminal jurisdiction, with all its implications of a political as well as a juridical character, is ripe for decision".

4. It is further to be noted that, as is stated in paragraphs 14-16 and elsewhere in the report, the Committee in the course of its work found itself confronted with several difficulties, both theoretical and practical, which (while always latent in the subject) were novel in that they emerged or revealed their full character in the course of the Committee's discussions. If there is any criticism to be made of the report as such, it is that these difficulties, though frankly mentioned as to their existence and nature, tend to be avoided as to their solution. In some cases no solution is offered, in others the problem is skirted and not fully faced. This is not surprising, since some of these problems are both very difficult of solution, if solvable at all, and also of such a kind that, if left unsolved, they must tend to render the project of an international criminal court illusory.

/5. It is

5. It is therefore necessary to consider carefully what purpose such a tribunal would be expected to serve, and how far it would be likely to serve it in practice. The United Kingdom Government have the impression that the matter has hitherto proceeded on the basis of certain assumptions that have never been adequately examined.

6. The basic nature of these difficulties can be indicated quite simply. The foundation of the Committee's scheme, on which the entire edifice is constructed, is the consent and co-operation of the participating States. According to this scheme, their consent, given in one form or another, alone confers jurisdiction on the court; their active co-operation is required for its functioning, e.g. to bring the accused before it, to make the evidence and the witnesses available, and to execute the sentences. In the opinion of the United Kingdom Government, the Committee was perfectly justified in thus postulating the consent and active co-operation of States as necessary to the jurisdiction and functioning of the court; for in the absence of any generally recognized international authority possessed of adequate powers, there is no other way in which such a tribunal could be operated. It must therefore be asked, as one of the central issues involved, whether such consent and co-operation is in fact likely to be forthcoming in practice, and if not, whether there is any point in continuing to pursue the matter. In the opinion of the United Kingdom Government both these questions must be answered in the negative.3/

7. It is to be noted in the first place that according to the Committee's scheme, the competence of the court will be confined to international crimes committed by individuals (see paragraph 89 of the report). The United Kingdom Government entirely agree with this limitation, since in their view (despite some slight extension of the notion of penal liability to juridical entities in the field of private law) it would not be a feasible proposition, either practically

---

3/ By consent and active co-operation, it is of course intended to denote something more than mere accession to the proposed Court's Statute, which according to the Committee's scheme, would not per se appear to involve the acceding States in any positive obligations, either as regards submitting actual cases or classes of cases to the Court, or as regards rendering it assistance, e.g. by apprehending accused persons, making evidence available, etc.

/or doctrinally,

or doctrinally, to "try" entities (and still less States) for international crimes. In the second place the competence of the court, as proposed by the Committee, relates to the category of offences known as "crimes under international law", i.e. (leaving aside such comparatively rare occurrences as piracy jure gentium) war crimes and the class of offences grouped under the head of "crimes against peace and humanity", such as planning wars of aggression, genocide, etc. (see paragraphs 28-34 of the report). It thus appears that the primary object of the court would be to provide an international forum for the trial of individual persons accused of war crimes and crimes against peace and humanity. It must now be considered how far an international criminal court sitting on a permanent basis is either necessary or desirable for this purpose, and how far it could actually be accomplished by such a court, if set up.

8. To begin with war crimes, it is evident that there would be no sufficient object in going to the expense and trouble of setting up a permanent international criminal court merely for the trial of war crimes, the occurrence of which is spasmodic and for which at least reasonably adequate[4/] other methods of adjudication already exist, namely by national military tribunals, or by international tribunals set up ad hoc, as occasion requires and makes possible. If indeed a permanent international criminal court already existed, exercising a wider jurisdiction, it might well be appropriate for it to take cognizance of war crimes also, but the United Kingdom Government could not agree that the setting up of such a court would be justified for war crimes alone. It thus appears that the necessity and justification for the court depends mainly on the jurisdiction it will be supposed to exercise in respect of crimes against peace and humanity. But before leaving the subject of war crimes, it is desirable to note certain other considerations, which in any event make it doubtful whether a permanent international criminal court is the best forum for the trial of war crimes.

4/ That they are not perfect is not in itself a ground for replacing them, unless they are radically deficient, or the replacing tribunal would have overwhelming advantages. Neither appears to be the case.

9. War crimes occur during the process of active hostilities, but a permanent international criminal court would be a tribunal set up in time of peace and sitting in some city such as The Hague or Geneva. If the country in which the court has its seat is involved in the hostilities, the court probably cannot function and must remove elsewhere. Assuming it to be sitting in, or removed to, territory not involved in the hostilities, it would still be a matter of extreme difficulty, under war conditions, to bring the accused, the witnesses and other evidence before the court. It thus appears that in practice the trial of most war crimes would have (as at present) to await the termination of hostilities, and, so far as this point goes, no advance on the present position would be achieved. Indeed, there would be a deterioration in certain cases, for under the existing régime, it is always possible that, where the accused can be apprehended, a trial can take place during the progress of hostilities before e.g. a military tribunal, whereas if it has to be left until afterwards, perhaps several years later, it might never be possible to hold it, or to hold it under the requisite conditions, owing to the death, disappearance or unavailability of witnesses, or of other material evidence.

10. In another important respect also, a permanent international criminal court would constitute but a small advance on (for instance) an international war crimes court set up ad hoc after the termination of hostilities. It is objected against the latter type of court that it is set up by the victors to try the vanquished. Admittedly a permanent pre-existing court would not be set up by the victors: but it would in great part be activated by them, for the cases brought before it on the conclusion of hostilities would, as at present, consist almost exclusively of cases brought by the victors against the vanquished (and which the victors were in a position to bring precisely by reason of their victory, without which it would not be possible to secure the surrender of the accused, or their presence before the court[5/]. Thus, the charge of one-sidedness

---

5/ Anyone who doubts this, need only consider how far (even if a permanent international criminal court had been in existence at the end of the recent world war) it would in fact have been physically, politically or morally possible for Germany or Japan to bring before it accusations of war crimes against allied nationals.

in the whole process of war crimes trials after a war would be scarcely less cogent with a permanent court than with an ad hoc one, and with this added objection, that the prestige of a permanent international court would be particularly engaged, whereas no such special implications would arise in the case of an ad hoc tribunal set up for the purpose by the victors, which would indeed be the natural method to employ in the circumstances.6/

11. A further point is that in so far as the main objection to ad hoc war crimes tribunals is their possible partiality, and the doubt whether the accused can receive a completely fair and unprejudiced trial at their hands, it is not in any way necessary to establish a permanent court as a remedy. This particular objection(which is in fact the only solid objection to ad hoc tribunals of the Nürnberg and Tokyo type) can be got over very simply by appointing neutrals as members of the ad hoc tribunal, or persons not having the nationality either of the accused person or of the accusing State or States. This is further reason for deprecating the creation of a permanent war crimes court; and the upshot of all these points is that there is no sufficient advantage to be gained by setting up a permanent court for war crimes which would outweigh the objections noticed above, or be commensurate with the trouble and expense of its establishment and maintenance.

12. The foregoing analysis suggests that the real case for establishing an international criminal court must rest on the jurisdiction which it will be expected to exercise in respect of crimes against peace and humanity committed by individuals, and that the exercise of this jurisdiction will in fact be the main object and purpose of the court. If therefore it should appear, on examination, that in practice the court is unlikely to be able to exercise much useful jurisdiction in this field, the conclusion will inevitably follow that there are no real grounds for setting it up. The United Kingdom Government believe that this is precisely what a dispassionate examination will show.

6/ There is in fact absolutely no reason to suppose that the trials of the major German and Japanese war criminals would have been any better conducted by a permanent court, had one existed, than they actually were by the Nürnberg and Tokyo war crimes tribunals.

/13. Since

13. Since only crimes commited by individuals are concerned, the case to be considered is that of an individual accused of a crime against peace and humanity. Now it is a matter of common experience that individuals hardly ever commit such crimes in their personal capacity as private citizens and that when they commit them they virtually always do so in a public capacity, either as agents of their State or Government or as one of its directing authorities ("Gouvernants"), whether as head of the State, member of the government, high ranking government official, or high officer of the armed forces, etc. When an individual commits such a crime, he normally does so as an act of State policy, either as an agent executing that policy or as one of those responsible for it.
14. This does not of course affect the international criminal liability of the individual concerned. But it does very much affect the question of the likelihood of any international criminal court being able to exercise any effective jurisdiction in the matter. It has been seen, and it is indeed a cardinal and necessary part of the Committee's scheme, that the jurisdiction of the court would only be exercisable with the consent of the States concerned, given either generally or with reference to the particular case. In the opinion of the United Kingdom Government however, the possibility that States will be willing, either by a general consent or in a particular case, to put themselves in a position in which they might be obliged to surrender for trial before an international court an individual whose alleged offence had been committed by way of formulation or execution of the policy of that State itself, must definitely be ruled out. The United Kingdom Government believe that any State which, by inadvertence, placed itself in this position, would in practice be unable to effect the surrender when it came to the point.
15. Such a surrender would indeed involve and amount to a self-surrender of their own persons on the part of the authorities of the State, or a surrender of persons who had acted under their orders, which is scarcely conceivable. On a realistic view, there are in fact only two cases in which the surrender of individuals who had acted in the execution of State policy, can be regarded as a practical possibility, namely (1) after a major war leading to the total defeat and occupation of the State concerned, and (2) after a political

/upheaval

upheaval in the State, leading to a revolutionary change of government, accompanied by the proscription or flight of the former political leaders and State officials. These difficulties and limitations were evidently realized by the Geneva Committee. In paragraph 104 of the report, for instance, it is justly observed, as representing the feeling of the Committee, that:

> "unless the accused could be brought before the court, it would not be possible to carry through a trial".

Again the point involved in case (2) above was recognized by the Committee, for in paragraph 114 of the report, it is stated that:

> "The lack of a police force at the disposal of the court ruled out the practical possibility of a trial of rulers in power. For all practical purposes, it might be assumed that in cases concerning major crimes under international law only ex-rulers would be brought before the court".

But in actual fact how many cases really occur in peace time of criminal ex-rulers in this position and susceptible of being brought before an international court? There are indeed ex-rulers in the world today: few of them have committed an international crime. There are also international criminals: few are ex-rulers. Nor are rulers in power the only types of potential international criminals whose trial before the court the lack of a police force at its disposal would tend to rule out. The difficulty is one which would in fact arise in all but the most exceptional cases.

16. This being the situation, the United Kingdom Government, for their part, can see no warrant for the establishment, on a permanent basis, of a court the effective exercise of whose jurisdiction would be dependent on fortuitous and unusual combinations of circumstances, and therefore largely hypothetical. The Geneva Committee itself (and quite understandably in the circumstances) had nothing better to suggest, in order to meet the difficulty of bringing the accused before the court, than that the court should have power to issue a warrant for his arrest (see paragraph 104 of the report and article 40 of the draft statute). This of course in no way touches the case. It is easy to issue warrants: the problem is to get them executed. The Committee duly recognized (see paragraphs 104-109 of the report, especially the latter, and article 31 of the draft statute), that for this, the consent and co-operation of States would be required. What is not stated is on what grounds there could be the slightest

expectation that such co-operation would be forthcoming in the type of case (see paragraph 14 above) to which at least ninety-nine per cent of those arising must inevitably belong. There is thus a signal lack of realism in this part of the report. It is indeed very dubious whether, except under special emergency conditions, a prosecution in this type of case could even be started, or could be brought to the point of the issue of any warrant by the court. In such circumstances the jurisdiction of the court could be little more than a fiction. It is surely not desirable that the court should be set up to die of inanition or to see its prestige eclipsed by inability to act.

17. The United Kingdom Government assume that it is not the intention to create an international criminal court as an academic exercise, or merely for ideological reasons, and in the speculative belief or hope that, if the court can once be set up, work will somehow be found for it to do. Such an attitude would not be a responsible one. International institutions are established to meet an ascertained need, not to test a theory or satisfy an emotion; to deal with work, not to provoke it. Unless the project of an international criminal court is based on the postulate of a normal and regular, or at any rate appreciable, field of operation for the court, it is useless to continue to discuss it. It therefore becomes necessary to inquire how it is that, despite the foregoing considerations, which appear to demonstrate that hardly any cases of crimes against peace and humanity would in fact be submitted to the court, save under exceptional and unforeseeable conditions, there are yet a number of persons who, in perfect good faith, believe in and advocate this project.

18. Leaving aside purely theoretical or ideological factors (which however have in the past exercised a disproportionate influence in this matter), it appears to the United Kingdom Government that the belief in the project of an international criminal court, at any rate in its recent and post-war aspects, is largely the result of the deep impression created on the public mind by the successful and striking action of the Nurenberg and Tokyo tribunals. This feeling has not, however, always been accompanied by a corresponding recognition of the peculiar circumstances under which those tribunals functioned, and which alone made their successful operation possible - circumstances which would not obtain for a

permanent court set up and functioning in time of peace and under normal peace-time conditions. It was the fact that these tribunals were set up ad hoc by the victors in an occupied enemy country, in which the decrees of the victors had, or could be given, the force of law, and in which they possessed all the physical and juridical apparatus necessary to apprehend the accused, procure the attendance of witnesses, and carry out the execution of the sentences, which enabled the tribunals concerned to operate as they did. Not one of these facilities would be available to a court operating on a peace-time basis, except (and even then haltingly) with an active co-operation on the part of States which - for the reasons already given - could not in fact be expected, save in special and abnormal conditions. It is for this reason that the distinguished Rapporteur of the Institute of International Law on this subject, the late Monsieur Donnedieu de Vabres, in his report to the Siena meeting of the Institute (April 1952), made the following criticism of the Committee's scheme (page 20):

> "Implicitement, le projet du Comité de Genève donne pour prélude à l'Avènement de la juridiction pénale internationale une catastrophe universelle."

In brief, according to this view, the Committee's scheme, when analysed, is found implicitly to assume the occurrence of an international catastrophe, (a major war or political upheaval) for the emergence of the only conditions under which it could really function. Even if this view is too pessimistic, it contains a considerable element of truth. It is in any case certain that a project which had as its outcome a court that could only function, if at all, under circumstances of emergency or catastrophe could not commend itself to thinking opinion.

19. Nor do the difficulties end with the question of what jurisdiction the court will in fact be able to exercise in normal circumstances, for, even assuming it had cases to deal with, formidable obstacles to any satisfactory handling of these cases would still exist. These are for the most part evaded or only lightly touched upon by the Committee's report - which is not surprising as these obstacles seem virtually insurmountable in the present state of international relations, and in the absence of any central international authority possessed of compulsory powers and the physical means of enforcing them.

/20. For instance,

20. For instance, even leaving on one side the difficulty of getting the accused before the court, there is the crucial question of procuring the attendance of witnesses, or of taking their evidence by some other means. Here again it is clear (see article 31 of the draft statute and paragraph 105 of the report) that everything will depend on the attitude and willingness of the Governments concerned. In the opinion of the United Kingdom Government, even given a co-operative attitude on the part of States, it will still be a matter of great difficulty for a court of this kind, operating under peace-time conditions, to secure the due provision of evidence under really satisfactory conditions, and it will be no easy matter for such a court, working in the circumstances and under the handicaps to which it will certainly be subjected, to inspire the requisite degree of confidence in the efficacity of its proceedings. It would be regrettable if, for instance, the outcome of cases depended very largely on the degree of personal willingness exhibited by the witnesses themselves, leading to divergent results in basically similar cases.

21. The execution of the sentences imposed by the court also gives rise to formidable difficulties. As the Committee stated in paragraph 161 of the report, "this problem....was recognized as being essential to the functioning of an international jurisdiction". To deal with this essential matter however, the Committee could only propose (see paragraphs 161 and 162 of the report and article 52 of the draft statute) that sentences should be executed by States which had assumed the obligation to do so, or, if no such obligation applied in the given case, then by means of arrangements to be made by the Secretary-General of the United Nations. It thus appears that if some State has assumed an obligation to execute the sentence, it can be executed, but otherwise the accused must be set free, unless the Secretary-General can make the necessary arrangements. But supposing, as is far from improbable, that he cannot? This is hardly a satisfactory situation. One criminal is punished, but another, and perhaps worse one, is not. The position of the Secretary-General may also be acutely embarrassing. The report says (paragraph 162): "As the Secretary-General would probably not have the means at his disposal for executing the sentence he would have to make such arrangements with a State". The Secretary-General is therefore

/to find some

to find some State which will be willing to act. In the case of the death sentence, the Secretary-General has in effect to try and persuade some State to undertake the execution of the criminal - an invidious task, and one likely to take time, during which period the criminal would be waiting[7/] under sentence of death, perhaps for a year or two, while the discussions proceeded. This process will scarcely commend itself to enlightened public opinion which is likely, on humanitarian grounds, to demand the release of prisoners so situated. The objections to many aspects of the scheme propounded by the Committee are indeed considerable. Admittedly, it is not easy to suggest solutions which would, in fact, be satisfactory: but the conclusion which the United Kingdom Government draws from this this is that the whole project is fundamentally unsound, except in the special and abnormal conditions that prevailed for the Nurenberg and Tokyo tribunals.

22. It is not an answer to these objections to recommend a process of solvitur ambulando (though in effect that is what seems to be proposed by some advocates of the court) - i.e. that the court should be set up first, and the difficulties dealt with afterwards. The probable outcome for the suggested court would be a fate similar to that of the tribunal set up under the 1937 Convention to deal with persons accused of international terroristic activities. There has been no lack of terrorism in the world since 1937, but the tribunal has remained a nullity and has never sat. A permanent international criminal court ought not to be set up as a speculation, but only if it is reasonably apparent in advance that the necessary conditions for its due functioning exist, and that the practical difficulties involved are capable of solution. To the United Kingdom Government this is not apparent at all; and it is noteworthy that not one of the three bodies which have recently considered the question (namely the International Law Commission, the Sixth Committee of the General Assembly and the Geneva Committee) - despite no lack of good will or technical talent has been able to suggest any real solution. Each has been obliged more or less to avoid the issue.

7/ It may well be asked where the criminal would be confined during this period - at the seat of the court, or at United Nations Headquarters?

The United Kingdom Government are of the opinion that the setting up of the court in the circumstances would be little more than an empty gesture - a paper creation.

23. It may also be noted as a further example of the same defective approach to the matter that both article 24 of the draft statute and paragraphs 132-136 of the report propose to leave the detailed procedure of the court to be settled by rules to be drawn up by the court itself - even on such a vital matter as the admission of evidence. In the case of criminal jurisdiction, however, questions of procedure are so intimately involved in the whole functioning of the system that they ought to be settled before, not after, the court is established. Indeed it is only when the procedure has been settled that the prospects of the court being able to function can be accurately estimated.

24. In conclusion, attention must be drawn to one significant feature of the Committee's report, which runs right through it (see for instance paragraphs 60-68, 70, 107-9, 147, 149 and 161), namely the consistent rejection of all proposals for inserting obligations for States in the statute of the court itself. The reason for this is clear: the insertion of such obligations would diminish the willingness of States to become parties to the statute. This view may be understandable, but it is permissible to inquire whether those who hold it realize its full implications. The implications are that States will not in fact be willing to assume any real, substantive, obligations in respect of an international criminal court or jurisdiction, and therefore to provide for these in the statute would be tantamount to destroying the possibility of the court being set up at all. But of what use would the setting up of the court be in any event, if this is the position? It is not a propitious basis on which to embark on so important a project. The court is to be established by an instrument which will oblige the States parties to it to do absolutely nothing except contribute to its expenses.8/ All the countries of the world could become parties, but still the court would not

---

8/ It is true that there is nothing in the Statute of the existing International Court of Justice, as of the former Permanent Court, which obliges the parties to submit cases to it, but it was always clear that there was a genuine and natural field of work for an international civil court. Moreover, its jurisdiction being civil, hardly any of the practical difficulties exist for it which are attendant on the exercise of criminal jurisdiction.

necessarily have anything to do, there might be no cases any State was obliged to submit to it, and, even if cases were submitted voluntarily, no means of ensuring the necessary process or the execution of sentences. This would merely be an encouragement to States to obtain the credit of nominal adherence to a high sounding project, without the assumption of any obligations which would make such adherence a reality.

25. To the United Kingdom Government this appears to constitute a precise reversal of the correct order of things. If it is clear that an international criminal court would, of all institutions, be the most dependent on the assumption of States of definite and concrete obligations in respect of it, then the assumption of such obligations should be part and parcel of the structure of the court and of the process of its initial setting up. If, on the other hand, it appears (and such seems to have been the Geneva Committee's view) that the result of this would be to prevent participation on the part of many or most States, there can be only one conclusion that the conditions which would alone enable the court to function do not as yet exist, and that the time for its creation is not ripe. Failing this, the court will be set up in name only and not in actuality.
