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SUMMARY RECORD OF THE 28th MEETING

Chairman: Mr. ESCOVAR-SALOM (Venezuela)

later: Ms. WONG (New Zealand)
(Vice-Chairman)

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The meeting was called to order at 10.05 a.m.

AGENDA ITEM 147: ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT (continued) (A/49/10 and A/51/22, vols. I and II)

1. Mr. SZÉNÁSI (Hungary) said that his delegation had considered from the outset that the elaboration of the statute of an international criminal court would make an important contribution to the maintenance of international peace and security. The timeliness of the undertaking had been demonstrated by the grave violations of international humanitarian law committed during the past few years.

2. The court should be established by a multilateral treaty, despite the fear that it might thus never have a universal character, for its legitimacy and independence could be guaranteed only by such a treaty. In any event, the other available options also had their drawbacks, even though the court should be brought into a close relationship with the United Nations, as envisaged in article 2 of the International Law Commission's draft statute.

3. His delegation could accept the compromise contained in article 4, paragraph 1, to the effect that the court should be a semi-permanent body, but its permanent nature should be reinforced by the creation of certain working offices, leaving open the possibility of making the court permanent at a later stage. As for the qualifications of judges, there was no need for an inflexible distinction between the criteria of criminal trial experience and competence in international law, although greater emphasis should be given to the former consideration. The relevant draft articles would have to be slightly amended in that respect. His delegation supported the idea of an age limit and was open-minded on the requirement of gender balance.

4. The court's jurisdiction should be limited to the so-called core crimes, which must be defined clearly in the statute. The crime of genocide should be included, together with the definition contained in article II of the 1948 Genocide Convention. The extension of the definition to include social and political groups could be addressed in connection with crimes against humanity. His delegation would prefer not to include the provision on ancillary crimes (article III of the Genocide Convention) but to deal with such crimes in a general provision.

5. Serious violations of the laws and customs applicable in armed conflict should also be brought within the court's purview. His delegation could accept the combined title "War crimes" introduced by the Commission in article 20 of the draft Code of Crimes against the Peace and Security of Mankind. In any event, the category should include the crimes covered both by the 1907 Hague Convention and by the 1949 Geneva Conventions, as well as comparably serious violations of other relevant conventions. Common article 3 of the 1949 Geneva Conventions and Additional Protocol II, relating to non-international armed conflicts, should also be included in the category. Crimes against humanity likewise met the criteria for inclusion within the court's jurisdiction and should be defined in the statute along the lines of the definition contained in the statutes of the tribunals for the former Yugoslavia and Rwanda and in the

draft code of crimes, which were based on the notion that crimes against humanity could not be limited to actions in time of war. However, the widespread and systematic nature of such offences should be made part of the definition so as to distinguish them from ordinary crimes under national laws. The definition should include a list of crimes, and a solution could surely be found to the question of the "open-endedness" of the list which would satisfy both the principle of nullum crimen sine lege and the need to avoid limiting the court's jurisdiction.

6. His delegation had not yet reached a final position on the inclusion of the crime of aggression. In view of its gravity and the precedents of the Nürnberg and Tokyo trials there was merit in inclusion, but it would be difficult to find a balance between the court's right to establish individual criminal responsibility and the primary responsibility of the Security Council for the maintenance of international peace and security. If that problem could not be solved, the main goal of establishing the court in the foreseeable future might dictate acceptance of the position of the opponents of the inclusion of aggression. If the General Assembly decided to incorporate the draft Code of Crimes in the statute of the court, serious consideration should be given to the inclusion of crimes against United Nations and associated personnel in the category of core crimes.

7. His delegation reiterated its support for the establishment of a review mechanism. Although it understood the rationale behind the criticism of such a move, it was important not to lock the door against the inclusion of the crime of aggression and possibly other serious crimes. Hungary had indeed originally welcomed the inclusion of the category of treaty-based crimes and called for the enlargement of the list of such crimes. However, any attempt to add more crimes to the court's jurisdiction at the current stage would only lead to further delay.

8. Since only core crimes should fall within the court's jurisdiction, the proposal to extend its inherent jurisdiction to all of the core crimes deserved serious consideration. Inherent jurisdiction was not identical with exclusive jurisdiction or inconsistent with complementarity, sovereignty and State consent. In that connection, the number of States whose consent was needed for the court to exercise its jurisdiction should be kept to a minimum. Since article 22 in its current form would leave the court with a very narrow field of competence, it should be amended. With respect to the role of the Security Council (draft article 23), his delegation supported paragraph 1, which enabled the Council to refer matters to the court when acting under Chapter VII of the Charter. No final position could be taken on paragraph 2 until a consensus was reached on the inclusion of the crime of aggression. It was not certain that paragraph 3 served the role envisaged for it, and an attempt should be made to reformulate the text. All parties should be entitled to lodge a complaint with the prosecutor, and article 23 should be amended accordingly. The role of the prosecutor as set out in article 26 was too restrictive, but the proposed extended role would have to be harmonized with the roles of States parties and the Security Council.

9. Despite the difficulties involved, the compilation of proposals on procedural and other issues could bridge the gap between the common law and

civil law approaches and would facilitate further work towards consensus. On one such issue, his delegation believed that the accused should be present during the trial. However, in view of the gravity of the crimes in question, it could accept a limited possibility of trial in absentia or at least for certain procedures to be followed, as provided for in article 37, paragraph 4. Such recourse should be available only when the accused attempted to prevent the court from exercising its jurisdiction by refusing to be present at the trial - a more limited exception from the general rule than the one contained in draft article 37, paragraph 2 (c). Even in such limited cases the rights of the accused must be vigorously respected.

10. The Preparatory Committee had made great progress, and the date for the diplomatic conference must be set at the current session of the General Assembly in order to avoid losing the momentum gained. The remaining issues could be divided into two categories: the procedural or technical ones could be addressed during the nine weeks of further work recommended by the Preparatory Committee; and the substantive issues requiring high-level political decisions could be finally resolved only at the conference. Accordingly, his delegation did not envisage a ceremonial conference but rather a working one lasting for several weeks. It supported the Preparatory Committee's recommendation that the conference should be held in 1998.

11. Ms. Wong, New Zealand, Vice-Chairman, took the Chair.

12. Mr. WENAWESER (Liechtenstein) said that the Preparatory Committee had made substantial progress towards a universally acceptable legal instrument on which the international criminal court should be based. Liechtenstein remained committed to the early establishment of the court, which should be vested with the authority necessary to interrupt the vicious circle of impunity and violations of human rights and international humanitarian law.

13. Many aspects of the draft statute required further discussion, but the proper place for such discussion was the Preparatory Committee. Some of the outstanding issues were of crucial importance, and no one could deny the complexity of the task, but the most important factor was the emerging consensus regarding the necessity of the court. His delegation believed that the court should be effective and independent, with competence limited to the most serious crimes under international law. The statute should contain provision for a review mechanism by means of which the initial list of core crimes could be extended. The shortness of the list of core crimes should ensure that all States parties would accept the court's jurisdiction over such crimes, and inherent jurisdiction of the court would contribute to its effectiveness.

14. The crimes must be defined clearly, and to that end the Commission's draft Code of Crimes should be taken fully into account during the further work of the Preparatory Committee. The provisions of the statute concerning complementarity must be drafted carefully and guarantee a balance with national jurisdictions. The court should be financed from the United Nations regular budget.

15. It seemed possible that a statute could be adopted by a conference of plenipotentiaries in the very near future. Although the Sixth Committee must proceed with both flexibility and determination, the current momentum must not

be lost. His delegation therefore supported the proposal that a decision to convene a conference in 1998 should be taken at the current session of the General Assembly. A flexible approach must also be taken to the future work of the Preparatory Committee. At the fifty-second session the General Assembly would be able to take further decisions in the light of progress during 1997.

16. Mrs. FLORES (Mexico) said that, although the establishment of an international criminal court had been on the multilateral agenda for some decades, only now was the United Nations involved in concrete negotiations to create such an institution. Mexico supported the undertaking and was convinced that only a joint effort would guarantee the success of the court. The preparatory work had identified a number of issues for which generally accepted solutions had not yet been found. Notwithstanding the mandate contained in General Assembly resolution 50/46, the Preparatory Committee had not moved on to the negotiation phase as such. The 300-odd pages of often conflicting proposals, and indeed the draft Code of Crimes against the Peace and Security of Mankind, would have to be considered during the next nine weeks of the Preparatory Committee's work.

17. The General Assembly would have to take a decision on the future course of the work. Her delegation believed that a plenipotentiary conference should be convened only when the foundations for its success had been laid, but it was not yet clear how the difficulties would be resolved in the Preparatory Committee or whether the possible consolidated text of a draft convention would secure broad acceptance by States. While it was important not to drag out the work unnecessarily or let the current opportunity slip, progress must be measured but sure. Her delegation therefore supported the conclusions of the Preparatory Committee set out in its report (A/5122). It was now necessary to enter a negotiating phase of up to nine weeks, and the date of a conference of plenipotentiaries should be decided by the General Assembly at its fifty-second session in the light of the progress of the preparatory work. Ways must be found of ensuring that as many States as possible were involved in the Preparatory Committee's future work, in which her delegation would continue to participate in a constructive spirit.

18. Mrs. CUETO MILIÁN (Cuba) said that her delegation supported the delicate consensus achieved at the Preparatory Committee's August 1996 session on the possibility of convening a conference of plenipotentiaries in 1998, following negotiations on substantive issues which as yet had barely begun.

19. The court's independence and authority, and respect for the principles of sovereign equality of States and their free consent, could be guaranteed only through a multilateral treaty opened for signature by all States, whose entry into force would require a large number of ratifications. The court must be an independent judicial organ; its independence must be defined clearly in its statute and its jurisdiction must be limited to crimes against humanity, war crimes and genocide. The administration of justice at the international level must not conflict with the internal legal order of States and the jurisdiction of their national courts. The principle of complementarity would be an essential element in the exercise of the court's functions vis-à-vis national courts. Policing and the application of criminal law were the prerogatives of sovereign States; the jurisdiction of the court would, by definition, be an

exception to those prerogatives to which there should be recourse only where the internal justice system had broken down.

20. The court must be closely linked with the United Nations, although that relationship must be based on the independence of the court and the universal character of the Organization. The Security Council must not interfere in the court's internal affairs. The precise nature of the relationship could be defined only when the international community had reached consensus on the nature of the court and the scope of its jurisdiction.

21. The definition of the crimes falling within the court's jurisdiction would have to be worked out at a later stage in the drafting of the statute. The draft Code of Crimes against the Peace and Security of Mankind adopted by the International Law Commission in 1996 could serve only as a basis for future work on the definition of those crimes. The statute should codify customary international law, and should not undertake the progressive development of international law in that area. Treaty law practice should not be the subject of loose interpretations in the statute.

22. The court must exercise jurisdiction in accordance with applicable law, under the terms of its statute. Like any judicial organ, it had no legislative capacity. The establishment of the court should not be detrimental to the international system for the settlement of disputes, and, in particular, to the functions accorded to the principal organs of the United Nations by the Charter. As an international legal organ, the court should deal solely with the criminal responsibility of individuals committing serious crimes, as defined in its statute.

23. Mr. FATOUROS (Greece) said that his country associated itself with the statement made by the representative of Ireland on behalf of the European Union, and that his comments must be understood as a further elaboration thereon. Persons responsible for genocide, aggression, crimes against humanity and war crimes should be brought to trial. It was therefore a matter of deep satisfaction that the long process of preparation for the establishment of an international criminal court was drawing to a close. That enterprise represented a sharp departure from traditional ways of thinking and acting in international law, and it was thus not surprising that full agreement had not been reached on all issues. The relationship between the court and the United Nations, for instance, was difficult to determine precisely, for the relationship between political and judicial organs was a delicate matter even in a national context.

24. Other issues of comparable importance and difficulty included the need to define accurately the terms of the complementarity between the exercise of national and international jurisdiction and the exact scope of the court's jurisdiction. Fortunately, the draft Code of Crimes against the Peace and Security of Mankind and the relevant provisions of the draft articles on State responsibility submitted to the Sixth Committee by the Commission in its latest report (A/51/10) were of direct relevance in that regard.

25. Over the years, national constitutional and legal systems and international texts had developed principles and practices concerning the protection of human

rights. However, given the absence of a long tradition in that regard, the statute of the court must fully reflect those principles, including protection of the rights of the accused. Rather than including lengthy procedural provisions, it might be more appropriate to refer succinctly but comprehensively to those principles, thereby providing the Court with the opportunity to develop their precise contents thereafter.

26. Three or four sessions of the Preparatory Committee would be necessary in order to prepare a full report by early 1998. Some of the more difficult and important problems would be resolved only through the give and take of the diplomatic conference. The establishment of an international criminal court should be one of the international community's important achievements at the close of the United Nations Decade of International Law (1990-1999): the conference should therefore be convened no later than June 1998.

27. Mr. SIDI ABED (Algeria) said that the establishment of a permanent international criminal court, rather than the hasty creation of ad hoc tribunals, was the most appropriate means of dealing with crimes abhorrent to the conscience of humankind. There was currently a real chance of establishing such a court, but its success would depend on the extent to which politicization of that process could be avoided. Imposition of temporal constraints on the negotiations would only jeopardize universal support for the court and adversely affect its ability to prevent and punish the most serious international crimes.

28. The purpose of the exercise was to establish an independent and impartial court, immune to external influence. Its statute must take account of the basic assumption that the administration of justice within its territory was a fundamental obligation of each State in the exercise of its sovereignty. Account must therefore be taken of the law and practice of the various legal systems in existence.

29. On the competence ratione materiae of the court, only those offences that incontestably constituted crimes against the peace and security of mankind should fall within its jurisdiction. However, his delegation did not favour a highly restrictive approach including only genocide, aggression, war crimes and crimes against humanity. In the future work of the Preparatory Committee, it would insist on the inclusion of acts of terrorism, a crime the seriousness and international character of which were beyond doubt. As for treaty-based crimes, offences punishable under international treaties concerning terrorist acts must be included among international crimes.

30. The statute must refer explicitly to the draft Code of Crimes against the Peace and Security of Mankind, and the two texts must be mutually compatible. The draft Code, and in particular the list of crimes contained therein, could make a considerable contribution to the determination of the court's jurisdiction. The fact that acts of terrorism figured in the list of crimes contained in article 20 of the draft Code upheld his delegation's position on that question.

31. The court's international criminal jurisdiction must also be based on the consent of States, and there could be no exception in respect of the crime of

genocide or any other crime, since the court could be effective only with that consent.

32. On the trigger mechanism, his delegation wondered whether, in view of the risk of politicizing the functioning of the court, article 23 of the draft statute should not be deleted. The distinction between permanent members, non-permanent members and non-members of the Security Council called into question the whole doctrine of equality before the law, and might also undermine confidence in the court's impartiality.

33. On the principle of complementarity, national courts must continue to have primary jurisdiction. The international criminal court must have jurisdiction only when national jurisdiction was absent or when it was not in a position to try certain clearly defined exceptional crimes. The principle of complementarity ruled out any hierarchy between national jurisdiction and that of the court. The latter would not have jurisdiction in matters concerning the quality, nature, legitimacy or efficacy of national courts.

34. The time was ripe for the establishment of an international criminal court. The Preparatory Committee should continue its work on the basis of consensus, taking account of the concerns already voiced by States. That was a prerequisite for the convening of a diplomatic conference, and his delegation would support any efforts to that end. If those conditions were fulfilled, it was reasonable to regard the end of 1998 as a feasible date for that important event.

35. Ms. WILMSHURST (United Kingdom) expressed her delegation's support for the statement made by Ireland on behalf of the European Union.

36. Her delegation confirmed its support for the establishment of an international criminal court to try some of the most serious crimes of concern to the international community and to exercise a deterrent effect. The Preparatory Committee had done a great deal of work, particularly in compiling the proposals received, but much remained to be done. The numerous proposals submitted to the Preparatory Committee deserved very careful and detailed consideration in advance of any conference. Though there were a number of issues which would no doubt only be resolved at a conference, many areas needed further discussion and a narrowing of options before final decisions could be taken on the relevant provisions of the statute. In particular, in-depth discussion was still required in the case of the definition of the crimes within the jurisdiction of the court, the elements of crimes and the principles of criminal law, the organization of the court and its procedure, and the provisions on cooperation by States with the court. Her delegation supported the recommendation of the Preparatory Committee that up to nine more weeks were required for preparatory work and believed that the General Assembly should set a date for a conference in 1998 at its current session and review the progress made by the Preparatory Committee at its fifty-second session.

37. Her delegation's views on the key features of the court had been set out in its statement to the Sixth Committee in 1995 and in the statement made on behalf of the European Union during the current debate. Her delegation wished to emphasize, however, that one of the essential elements of a future international

criminal court was its relationship with national jurisdictions; that would be one of the most important factors in the acceptability of the court to Governments, and thus in its success. Her delegation had put forward proposals with a view to incorporating the generally agreed principle of complementarity in the statute in a clearer and more detailed way. Resort should be made to the court only when national systems were unavailable or ineffective. The court should respect all proper decisions by national authorities in matters of interest to it, but it should be able to take action when national decisions were not in good faith or national jurisdictions were unavailable.

38. She urged delegations to work towards consensus in preparing a draft convention which would serve as the basic text for the conference, so as to ensure that the statute had the maximum chance of achieving general support.

39. Mr. ENKHSAIKHAN (Mongolia) said that his delegation supported the creation of an international criminal court. The Preparatory Committee's compilation of proposals on substantive and procedural issues constituted a useful basis for future work towards that end.

40. His delegation wished to comment on some of the major issues being dealt with by the Preparatory Committee. The court should be an independent, permanent judicial institution closely linked to the United Nations, with balanced representation and the ability to make decisions independently. It should have a clearly defined jurisdiction, enjoy the firm support of States, and be established by a multilateral treaty, and the largest possible number of States should be parties to its statute. In order to provide an additional guarantee for the court's independence and universal acceptance, the operative part of the statute should contain an article setting forth the purposes of the court and the fundamental principles of international law and general principles of criminal law and procedure that would guide its proceedings.

41. Most of the draft prepared by the International Law Commission was acceptable to his delegation. In particular, it agreed with draft article 25, which provided that under certain conditions, any State party, and not only those with a specific interest in the case, had the right to lodge a complaint with the prosecutor. Draft articles 34, 35 and 36 would provide adequate safeguards against any abuse and the statute could envisage that complainant States must also have accepted the court's jurisdiction in respect of the crimes for which they were lodging a complaint.

42. There should be a specific provision in the operative part of the statute devoted to the principle of complementarity which would define the nature and scope of cooperation between the court and national judicial systems, and the obligation of States parties to cooperate with the court in an effective and speedy manner. Criteria for determining whether the international court or a national court should deal with a specific case might include the gravity of the crime and the ability of national courts to conduct fair trials, but the international court should retain the power to decide whether national courts had proved effective or not.

43. The court's jurisdiction should be limited to the most serious crimes of concern to the international community as a whole. The crime of aggression

should be included as currently reflected in the International Law Commission's draft. The court's jurisdiction should also include such crimes as genocide, crimes against humanity, serious violations of the laws and customs applicable in armed conflicts, and some of the treaty-based crimes, including perhaps the crimes under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Convention on the Safety of United Nations and Associated Personnel. It could also include serious crimes related to drugs and terrorism when national courts were unable to prosecute their perpetrators. In order to strengthen the court's independence, its inherent jurisdiction should be extended, the prosecutor should be given somewhat broader powers, and the Security Council's role in its proceedings should be limited. Grave threats to the environment with serious and long-lasting consequences should be included among the core crimes, either in draft article 20 or in the annex to the statute, as a legal lacuna existed in that regard. The draft Code of Crimes against the Peace and Security of Mankind should be taken into account in defining the core crimes. Penalties should be severe enough to have a deterrent value and even include the death penalty in certain cases. The court would have to be financed from the United Nations regular budget; care should be taken to avoid unduly burdening third countries with financial obligations. The statute should envisage a mechanism for ongoing reviews to allow the court to adapt to changing circumstances.

44. His delegation supported the Preparatory Committee's recommendation that it should meet three times up to a total of nine weeks in order to prepare a widely acceptable consolidated text of a convention for the court prior to a plenipotentiary conference in 1998.

45. Mr. VAN-DUNEM (Angola) said that an international criminal court could play a key role in preventing and repressing the most serious crimes threatening international peace and security. The time was ripe for deciding on a final date for convening the conference of plenipotentiaries. Given the urgent need to establish the court, issues such as its status, its relationship with the United Nations and its functioning should be resolved in the near future.

46. There must be close cooperation between the court and other United Nations organs, always provided that the independence and autonomy of the former, which were the sole guarantees of equity and justice in its judgements, were not jeopardized. Moreover, in accordance with the principle of complementarity, the court would intervene only when the national criminal justice system was shown to be ineffectual. The court should have jurisdiction over the most serious crimes, such as genocide, aggression, war crimes, apartheid and crimes against humanity. Candidates for the post of judge at the court should be selected exclusively by Member States, but need not be nationals of States parties to the future convention. The principle of equitable geographical representation should be observed, and the main judicial systems represented, in the process of nominating judges. In concluding, he expressed his delegation's gratitude to the Government of Italy for its offer to host the diplomatic conference.

47. Mr. BERROCAL-SOTO (Costa Rica) said that the most serious crimes against humanity should not remain unpunished due to the ineffectiveness or non-existence of the appropriate legal mechanisms. The establishment of ad hoc tribunals by the Security Council, such as those for the former Yugoslavia and

Rwanda, had been an important step but did not constitute a definitive solution as their establishment had been subject to political decisions within the Security Council. It was necessary to establish a permanent, independent instrument to prosecute and punish such crimes.

48. His delegation recognized the major technical difficulties involved in the constitution of such a court, which involved striking a careful balance between procedural concepts and political interests, and ensuring that both the procedural rights of the accused and the right to justice of the victims and the international community were taken into account. However, the rapid establishment of an international criminal court was indispensable. His delegation therefore expressed its formal support for the convening of a plenipotentiary conference in June 1998 to conclude and approve a convention on the establishment of such a court, with a view to establishing the court in 1999, and thanked the Government of Italy for offering to host the conference.

49. There were still several substantive matters that caused his delegation some concern. First, there should be due respect for the human rights of the accused, who should be guaranteed due process, in accordance in particular with the principles of nullum crimen sine lege and in dubio pro reo; and sentencing should respect the human rights of the guilty. Costa Rica had abolished capital punishment almost 120 years ago and could not support a court which could impose it. Second, the court would only have political legitimacy and legal validity if it was independent and impartial. The Security Council's role in the court's activities should be severely limited, and the prosecutor should be able to initiate investigations ex officio, independently of the source of the complaint. In that regard, his delegation supported the proposal to establish a chamber which, once the prosecutor had initiated the investigation, determined whether the charge should be pursued. Future discussions should distinguish clearly between the attributions and jurisdiction of the prosecutor and those of the Security Council, as established in the Charter of the United Nations. Third, a practical mechanism should be established to transfer the resources already invested and the experience already acquired in the ad hoc tribunals for the former Yugoslavia and Rwanda to the new court. Lastly, his delegation fully supported the draft resolution submitted by the Preparatory Committee to the Sixth Committee.

50. Mr. SCHEFFER (United States of America) said that his delegation supported the establishment of a permanent international criminal court because those who committed serious and widespread violations of international humanitarian law must no longer act with impunity. The ad hoc tribunals for the former Yugoslavia and Rwanda had been critical first steps, but a permanent court was needed that deterred such heinous crimes globally and could investigate and prosecute their perpetrators.

51. During the past year, the Preparatory Committee had made progress in the preparation of a draft statute for the court, drawing on the earlier work of the International Law Commission, and with special help from non-governmental organizations. His delegation had actively participated in every aspect of the work, as the United States was committed to the establishment of a fair, effective and truly international criminal court that met all relevant standards

of due process and strengthened both international and national law enforcement and military justice interests.

52. The next challenge was to work intensively through 1997 to develop a consolidated draft statute that would attract the broadest possible consensus. Plans should proceed with a view to holding a relatively short and cost-effective plenipotentiary conference in mid-1998. However, the hardest work lay ahead and if it was not accomplished by early 1998, then proceeding with the conference that year could entail substantial risk for the establishment of the court. No diplomatic conference should be held until the many outstanding technical and controversial issues had been dealt with satisfactorily, so as to ensure that the resulting convention attracted the greatest possible support.

53. His delegation wished to comment on some of the fundamental issues confronting the Preparatory Committee. With regard to the trigger mechanism, the Security Council exercised primary responsibility for the maintenance of international peace and security under Article 24 of the Charter. The establishment of a permanent international criminal court could not amend that Article or any other Article of the Charter, as it was essential that the efforts of the Security Council to maintain international peace and security should not be impeded. Some delegations had argued that the Security Council would politicize the work of the court. His delegation believed that the Security Council should be able to refer a situation to the court; the prosecutor would then have complete independence to investigate and prosecute individual cases relating to that situation. The example of the tribunals for the former Yugoslavia and Rwanda showed that such a role for the Security Council would not interfere with the independent functioning of the court, and that such a procedure would eliminate the need to create ad hoc tribunals in the future.

54. Concern about the Security Council’s role also rested on the premise that the Council was a political body whose actions were therefore wholly suspect, while individual Governments and personnel of the court were objective and non-political. Clearly, however, a Government which could file a complaint with the court against an individual was not only as political as the Council, but possibly even more so. On the other hand, because of its overall composition and responsibilities, the Security Council transcended the individual political views and agendas of its members. For that reason, his delegation believed that an individual State should be able to refer only a "situation" and not an individual case, to the court.

55. The task of investigating and prosecuting individual cases relating to an overall situation should fall to the prosecutor. Since the court’s jurisdiction would be centred on crimes of considerable gravity and a widespread character, it would be important to establish the number and identity of the suspects. His delegation questioned the competency of States parties to identify and prepare complaints against individual suspects. Rather, the competency of States parties lay in identifying situations which merited investigation for individual culpability, and providing the court with the information and assistance necessary to enable it to proceed with a full, fair and independent investigation.

56. There was also a need for checks and balances with respect to the prosecutor's decisions. If the prosecutor had sole discretion to initiate investigations and file complaints - as implied by the concept of "inherent jurisdiction" - the results could be even more political than the decisions of the Security Council.

57. Furthermore, a complaint initiated by an individual Government or even by the prosecutor could directly concern actions taken by the Security Council to address a particular conflict. It was therefore important that any situation of which the Security Council was already seized should not be referred to the court by a State party without the Council's agreement. While a judicial procedure could be viewed as a necessary component of the Council's management of a conflict, that was a determination which must be made by the Council and not by a State party or by the prosecutor.

58. Where a situation referred by a State party was not on the Security Council's agenda, the court would determine whether the matter fell within its jurisdiction. The principles of complementarity and State consent would continue to be applied. Thus, some situations referred by States would require prior approval by the Council, while others would reach the court without having been reviewed by the Council. Referrals by the Security Council were likely to provide the court with a substantial workload, a point that should not be overlooked by those who questioned the linkage between the Council and the court.

59. His delegation continued to have difficulty with the approach taken in the draft to selecting those categories of States whose consent would be required before a case could be investigated and prosecuted before the court. The selection mechanism should be broadened in some respects, so as to take account of the essential interests of other States, and narrowed in other respects, so as to facilitate the effectiveness of the court's jurisdiction.

60. With regard to the definition of crimes, it was critical for the court to have a clear, detailed and agreed definition of the crimes within its jurisdiction. For example, it was insufficient to state that crimes against humanity included deportation, when most countries deported persons legally as a matter of course.

61. An even more difficult concept was aggression. Despite its historical significance, the fact remained that the concept was not adequately defined for the purpose of determining individual criminal responsibility. The primary historical precedent was not aggression, but rather, waging a war of aggression, which was a narrower concept, relating to particular situations.

62. A better approach would be to focus on defining the core crimes of genocide, crimes against humanity and war crimes, which would be difficult enough. It was essential to ensure that jurisdiction over war crimes and crimes against humanity covered internal situations; otherwise, the court would be unable to address many of the situations in which it was most needed.

63. Once a situation had been properly referred to the prosecutor for investigation, the prosecutor should have the authority to decline to

investigate certain cases. The United States regarded the "no possible basis" standard set out in article 26, paragraph 1, of the draft statute to be too restrictive, as the prosecutor would frequently have to decide how to use limited resources to investigate crimes of a massive nature. Under such circumstances, the prosecutor should be able to decline to investigate if the complaint did not, prima facie, provide a reasonable basis on which to proceed, or if the acts concerned were not of sufficient gravity.

64. Another important issue was the extent to which investigations might be subject to judicial review. For example, it was necessary to consider the extent to which notifying the suspect at the investigative stage might increase the likelihood of the investigation being thwarted. Giving judges broad investigative authority would greatly expand their powers and diminish the balancing effect of a truly independent prosecutor. Investigations could proceed most efficiently if directed by the prosecutor with limited judicial oversight.

65. His delegation had serious reservations concerning the circumstances under which trials in absentia could be permitted. On the one hand, there were alternatives to conducting a trial in the absence of the accused in cases of poor health, security concerns or disruptive behaviour; on the other hand, there might be some scope for limited procedures outside the presence of the accused for use in a later trial.

66. His delegation strongly believed that the court's rules and general legal principles must be formulated in conjunction with its statute and agreed to by States parties prior to the establishment of the court. The conduct of pre-trial investigations, the handling of sensitive information, rules of procedure and evidence and general criminal-law concepts had a fundamental bearing on the court's ability to conduct fair and effective proceedings. The expert members of the Preparatory Committee, who represented a variety of national legal systems, were eminently qualified to prepare a comprehensive and widely acceptable proposal, provided that sufficient time was set aside for that purpose.

67. Mr. WOUTERS (Belgium) said that his country fully shared the views expressed by Ireland in its statement on behalf of the European Union. He also drew attention to a resolution adopted by the European Parliament on 19 September 1996, inviting member States of the European Union to redouble their efforts to establish an international criminal court. The international community must respond to the proliferation of serious violations of the rules and principles of international law by providing itself with impartial and independent instruments with which to punish the perpetrators of the most serious crimes. Belgium had supported the establishment of the ad hoc tribunals for the former Yugoslavia and Rwanda, and contributed to their financing and staffing. It had recently enacted domestic legislation enabling it to cooperate with those tribunals. It had already several times set forth the reasons for its support of the early establishment of an international criminal court. The key words were: prevention and dissuasion, stability and universality, convergence of case law and the need to end impunity.

68. If it was to be a credible organ, the court must from the outset have jurisdiction ratione materiae over certain specific core crimes. In addition to the crimes already listed, Belgium considered that trafficking in human beings should also be included. The court's institutional structure must be equal to its jurisdictional task and it must have the necessary financial resources to function properly. There must be efficient and balanced recourse to the principle of complementarity in the division of tasks and jurisdiction between the court and national courts. The trigger mechanisms put in place must enable the court to assume fully the responsibilities conferred on it by the international community.

69. At its fifty-first session, the General Assembly should decide to renew the mandate of the Preparatory Committee, taking due account of the timetable proposed by its Chairman at the end of the Committee's second session. Adherence to that timetable also constituted a yardstick of the will to establish the court expeditiously by convening the diplomatic conference during 1998. If the General Assembly decided to request the Secretary-General to establish a special fund for the participation of representatives of the least developed countries in the work of the Preparatory Committee and of the diplomatic conference, Belgium would be ready to contribute to that fund, with a view to securing universal participation in the preparation process and the establishment of the court.

70. Mr. GOCO (Philippines) said that the envisaged international criminal court had a true precedent in the Nürnberg Charter and the Nürnberg Judgment. The concept of crimes for which there could be individual responsibility lay at the core of that Charter. Having traced the process whereby individuals had become recognized as subjects of international law, thus ensuring protection of their fundamental rights, he noted that they had also assumed obligations and could be held responsible under international law for crimes which they committed.

71. At a special meeting of the Asian-African Legal Consultative Committee (AALCC) on the establishment of an international criminal court, which he had chaired, a consensus had been reached on various issues. For instance, the participants had unanimously favoured the establishment of an independent and impartial court, whereas some delegations had deemed article 42 of the draft statute concerning non bis in idem unacceptable on the ground that it infringed upon the sovereignty of States. The participants had also agreed that the court's jurisdiction could be limited to the most serious crimes of international concern, notably genocide, serious violations of the laws and customs applicable in armed conflict, and crimes against humanity. Drug trafficking, terrorism and piracy could also be included. It had been pointed out, however, that crimes of aggression and crimes against humanity could not be included until the draft Code of Crimes against the Peace and Security of Mankind had been finalized. It had also been observed that article 23 of the draft statute, concerning action by the Security Council, was not conducive to the development of a uniform, non-discriminatory and impartial international criminal justice system, as it could cloud the objectivity and independence of the court. Nonetheless, the court should maintain adequate respect for Security Council resolutions and decisions in the interest of maintaining international peace and security. Further clarification was requested as to the scope of article 2, particularly concerning the envisaged role of the Security Council in

the proceedings of the court. Many participants had favoured the rules of the court in relation to, inter alia, the conduct of investigations, procedure and the rules of evidence to be drafted in conjunction with the statute. Further clarification was also sought concerning the relationship between investigation, arrest and pre-trial detention by the court and by a State party which was providing judicial assistance. The participants in the AALCC meeting had also approved of the idea that the court's exercise of its jurisdiction should be conditional upon the acceptance of the States concerned in a given case. The consent of the respective States of the accused and the victim was believed to be as important as that of the custodial and territorial States. Lastly, the view had been expressed that the court and sovereign States should be accountable for actions taken or refusals to act. However, any State which refused to cooperate with the court should provide its reasons for so doing.

72. Turning to the views of his own delegation, he said that it supported the establishment of the court, by means of a multilateral treaty, as a permanent body with international legal personality. It also supported article 2 of the draft statute, on the relationship of the court to the United Nations, and maintained that the primary political responsibility of the Security Council to determine the existence of aggression and take the necessary action to maintain international peace and security should not be diminished. The same applied to the independence of the court in determining the responsibility of individuals involved in aggression. Article 26, paragraphs 1, 4 and 5, together with article 23, paragraph 1, and article 27, paragraph 3, sufficiently guaranteed the independence of the court in the performance of its judicial function vis-à-vis the Security Council.

73. His delegation could accept the core crimes listed in article 20 of the draft statute as being within the initial jurisdictional coverage of the court, but emphasized the need to incorporate a provision that would give flexibility to expand that coverage in the future. It could also support the specification contained in the draft statute concerning the treaty bases of the core crimes. Other crimes, such as the plunder of national wealth by former holders of office exercising the highest authority, which his delegation had originally proposed for inclusion, could become the subject of future coverage.

74. Concerning the trigger mechanism, his delegation supported the rule whereby only States parties or, alternatively, the Security Council, could trigger the exercise of the court's jurisdiction. It should be made clear, however, that States parties should act in accordance with the concept of parens patria. A parallel should also be drawn with regional arrangements on human rights, whereby individuals were accorded recognition as "initiators", but not given total access.

75. His delegation supported the two-step approach to becoming bound by the statute; mere ratification or accession did not mean acceptance of the court's jurisdiction in respect of particular crimes, except genocide. A separate declaration accepting each of the crimes specified in article 20 of the draft statute must be made before a party could be subjected to the court's jurisdiction in that respect. As the court should simply complement national tribunals, it should not be permitted under article 42 of the draft statute to pass upon their performance, particularly since double jeopardy could be

pleaded. The question of the transnational reach of jurisdiction was another issue which should be addressed. He urged support for the cooperation arrangements outlined in articles 51, 52, 53, 58 and 59, without which the court would be ineffective.

76. In the interest of ensuring a fair trial, there should be a balance between an effective prosecution and respect for the rights of the accused or suspect with a view to applying the standards set in the relevant human rights instruments. Moreover, the rules of the court should be formally adopted by States parties before they could be applied, with a view to securing the highest standards of justice, integrity and due process. His delegation wished to draw attention to the rights of the suspect or accused to remain silent and to counsel, unless such rights were waived in writing in the presence of counsel, and to the principle of the inadmissibility of evidence obtained in violation of the rights of the suspect or accused. Article 49 of the draft statute, concerning proceedings on appeal, should be further reviewed, as double jeopardy could be invoked or pleaded. The meaning of the word "review" in part 6 of the draft statute should also be clarified, as it should not be directed at errors of judgement that were correctable by appeal. His delegation also supported a witness protection programme, which should include social, financial and medical assistance. Having noted that, under the draft statute, the death penalty could not be imposed, he expressed doubts as to whether countries which imposed that penalty for certain offences would be willing to waive or yield their primary jurisdiction to prosecute and try offenders having committed those offences in their territory. Lastly, it would be preferable for the court to be financed by contributions from States parties, a method which would prove their commitment to the court and preclude the need for increased payments to the United Nations.

77. The time had come to complete the work on the instruments relating to the establishment of the court. Other international instruments which had likewise faced seemingly insurmountable obstacles were currently in place. The resolve to complete the work was such that the court could soon become a reality; its establishment would be a major achievement in the field of international law.

78. Mr. GALICKI (Poland) said that his country was especially conscious of the need to protect the international community against possible repetitions of the crimes and atrocities committed during the Second World War. Poland's history, together with the new challenges that had arisen at the end of the twentieth century, had convinced his Government of the need to establish a permanent criminal court as a strong and effective body, sufficiently authorized by States to perform its duties.

79. The draft statute for an international criminal court adopted by the International Law Commission had provided a useful basis for further work on the issue by the Preparatory Committee. His delegation endorsed the latter's conclusions, as set out in paragraphs 368 to 370 of its report (A/51/22, vol. I), which laid the groundwork for the drafting of a consensus resolution on the agenda item. The next phase of negotiations in the Preparatory Committee should be devoted to the elaboration of a consolidated text of a convention for an international criminal court, to be submitted to a conference of plenipotentiaries. His Government believed that the Preparatory Committee should be able to finalize its work on the draft convention in 1997, so that the

conference could be convened in 1998. The General Assembly should decide on the timing and duration of the conference at the current session.

80. His delegation, which fully associated itself with the views expressed at a previous meeting by the representative of Ireland on behalf of the European Union, was of the view that the court, though closely linked to the United Nations, should be an independent international institution established by a multilateral treaty. It also stressed the importance of the principle of complementarity. It must be clear that the role of an international criminal court was not to replace national judicial systems and national jurisdictions, but to supplement them as and when necessary.

81. His delegation agreed that the jurisdiction of the court with respect to the core crimes of genocide, crimes against humanity and war crimes should be inherent and mandatory, although not exclusive. Such an approach, which was increasingly characteristic of contemporary international practice, would mean that if a particular State accepted the statute of the court and became a party to the convention establishing it, there would be no need for any additional consent by that State to the court's jurisdiction.

82. Furthermore, such jurisdiction should be limited, at least in the initial stage, to the most serious international crimes. Narrowing the scope of the court's jurisdiction could facilitate and accelerate ratifications of and accession to the statute of the court and its entry into force. In any case, crimes under the jurisdiction of the court must be defined precisely in the statute.

83. His delegation also attached importance to the inclusion of treaty-based crimes in the court's jurisdiction. Since the category of such crimes was constantly expanding, it might be reasonable to incorporate a review mechanism into the draft statute which would enable States parties to supplement the list of treaty crimes contained therein.

84. The question of the inclusion of the crime of aggression in the inherent jurisdiction of the court required careful analysis. His delegation, while not opposed to its inclusion, shared the view that a satisfactory legal definition of aggression had not yet been arrived at. It was also difficult to differentiate clearly between acts of aggression on the part of States and of individuals. The proposal to replace the term "aggression" by "war of aggression" in the statute of the court merited further consideration.

85. The exceptional role played by the Security Council in determining the existence of an act of aggression should not be overlooked. In practice, however, the Council had made such a determination in only a limited number of cases, and then only when dealing with acts of States or other parties to a conflict, not of individuals. In resolving that issue, every effort should be made to avoid interference between the spheres of competence of the Security Council and the court.

86. In terms of the trigger mechanism, the Security Council should be empowered to refer a "matter" to the court, but not a case. Moreover, the prosecutor should have the power to initiate investigations ex officio.

87. The statute should contain provisions on the general principles of criminal law, particularly nullem crimen sine lege and nulla poena sine lege. Together with the principle of non-retroactivity, those rules should constitute a fundamental basis for the court's objective and effective functioning.

88. As to penalties, his Government would have substantial difficulties with any proposal to include the death penalty in the statute of the court, as Poland had proclaimed a moratorium on capital punishment.

89. His delegation envisaged the future relationship between the international criminal court and national courts as a complex process of legal and practical cooperation. It agreed that the statute of the court should establish an obligation for States parties to cooperate with the court wherever necessary and feasible.

90. Lastly, by the time of the convening of the diplomatic conference, the draft statute should be generally acceptable to as many States as possible. At the same time, the legitimate interests of all States, including those which still had reservations and doubts, should be accommodated in the consolidated text of the statute.

91. Mr. GREXA (Slovakia) reaffirmed his delegation's strong support for the establishment of an international criminal court and said that it associated itself fully with the statement made by the representative of Ireland on behalf of the European Union. The virtual consensus regarding the establishment of the court was cause for optimism. His country's responsible attitude towards the issue had been demonstrated by its early ratification of the Convention on the Safety of United Nations and Associated Personnel. Moreover, it believed that the most serious crimes committed against such personnel should fall within the court's jurisdiction.

92. Notwithstanding the considerable progress achieved so far by the Preparatory Committee, his delegation believed that it would be more realistic to hold the proposed diplomatic conference in 1998 and to organize the work of the Preparatory Committee with a view to its completion in spring 1998, with emphasis on participation by the largest possible number of States. The Preparatory Committee had favoured the same solution.

93. His delegation regretted that the crime of aggression was liable to be excluded from the jurisdiction of the court. Although his delegation acknowledged that the obstacles to its inclusion were more political than legal, it considered that the task assigned to the Preparatory Committee and the court itself would be incomplete if such a core crime were not included in the statute of the court. The delicate issue of defining aggression was not insurmountable and could be addressed again nearer the time of the proposed conference. Another important issue was the universality of the court, which was closely linked to its efficacy. Various delegations had rightly remarked in that connection that the process under way in the Preparatory Committee remained inaccessible to the majority of countries. Universality, however, should not be based solely on the number of countries which were prepared to become parties to the statute of the court. On the contrary, it depended largely on the widest

acceptance of the principles on which the court would be based, without which the court was liable to remain impotent.

94. A third issue of concern was the independence of the court. His delegation agreed that it would be preferable for the court to be established by means of a multilateral treaty and also supported the view that the court should have a close relationship with the United Nations on the basis of equality. It seemed unlikely, however, that an international criminal court would be an exception to the rule that no court enjoyed absolute independence. In his delegation's view, lack of financial resources posed the greatest threat to the independence and impartiality of the court. Although financial considerations alone should not determine its composition or the fulfilment of its mandate, it was essential that the court should be organized in accordance with the principles of simplicity and economy. His Government intended to continue its active participation in the work, with a view to ensuring that the court would become a reality

95. Mr. CHEN Shiqiu (China) said that, while his delegation welcomed the substantial progress made by the Preparatory Committee in elaborating the draft statute for an international criminal court, serious differences of opinion persisted on all major issues, including the scope of the court's jurisdiction, the definition of crimes, the principle of complementarity, the trigger mechanism and the role of the Security Council. Despite the usefulness of meetings of the Preparatory Committee in enabling States to understand each other's positions, it had been unable to prepare a widely acceptable consolidated text of a convention for an international criminal court, in accordance with General Assembly resolution 50/46.

96. With regard to the principle of complementarity, his Government had always maintained that States must bear the primary responsibility for the prevention and punishment of international crimes. In the majority of cases, the judicial system of a State played a leading role which could not be superseded. An international criminal court could function only as an adjunct to national courts. In order to prevent or minimize unnecessary jurisdictional conflicts between the international criminal court and national courts, the future convention should delineate clearly their respective jurisdictions.

97. In accordance with the principle of State sovereignty, his Government had consistently held that the court's jurisdiction must be based on the consent of States. The draft statute adopted by the International Law Commission provided for the court to have inherent jurisdiction (not subject to State consent) over the crime of genocide. His delegation opposed such an approach and was not in favour of expanding so-called inherent jurisdiction to other international crimes.

98. His delegation believed that the General Assembly should adopt a decision at the current session mandating the Preparatory Committee to begin negotiations for the drafting of a consolidated text of a convention. Such a decision would impose a heavy workload on the Preparatory Committee, as a text which could serve as the basis for negotiations did not yet exist. The compilation of proposals issued by the Preparatory Committee (A/51/22, vol. II) was far from constituting such a document, as further comments and additional proposals by

States were required before a consensus could be reached. While his delegation understood the urgent desire of some countries for the early establishment of an international criminal court, and was not opposed to the convening of a conference of plenipotentiaries as soon as possible, it should be recalled that the convening of the conference was not the ultimate goal and that "haste makes waste". Any decision on the matter should be based on the progress reached in the next stage of the Preparatory Committee's work. It was important to have a realistic assessment of the many complex issues which remained to be resolved and the time needed to resolve them. In his delegation's view, the prerequisites for the convening of the conference were the existence of a fully developed text of a draft convention and the completion of negotiations on legal and other technical issues.

99. As universality was the precondition for the success and efficiency of an international criminal court, the international community should endeavour to ensure wider participation in the work of the Preparatory Committee, especially by developing countries. In order to facilitate such participation, a variety of resources should be utilized, including United Nations funds and voluntary contributions by governments, non-governmental organizations and private donors. Furthermore, in making arrangements for future meetings, the Preparatory Committee should seek to ensure that interpretation and translation services were provided to experts and delegates, that no two meetings were held concurrently, that consultations took place with sufficient transparency, and that decisions were adopted by consensus.

ORGANIZATION OF WORK

100. Ms. FLORES (Mexico), reporting on the outcome of consultations among members of the Sixth Committee to determine the forum in which the Committee should consider the question of the implementation of the provisions of the Charter of the United Nations related to assistance to third States affected by the application of sanctions under Chapter VII of the Charter (agenda item 150), said that, despite the efforts which she had made to contact the largest possible number of delegations, it had not been possible to consult with all of them. Furthermore, owing to the diversity of views expressed during the consultations, it was not possible at the current stage to make specific recommendations concerning the choice of the forum. Two options had been considered: the establishment of a working group, and the holding of informal consultations. Both options had been supported by various groups of States, while others had not expressed a preference. One delegation had expressed the view that it was inappropriate to use the Committee's limited time and resources to discuss the topic. Other delegations had expressed concerns relating to the availability of conference services for future meetings.

The meeting rose at 1.20 p.m.