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Chairman: Mr. ZARIF (Islamic Republic of Iran)

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The meeting was called to order at 3.10 p.m.

AGENDA ITEM 129: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-FOURTH SESSION (continued) (A/47/10, A/47/95, A/47/441-S/24559)

1. Mr. TUERK (Austria) said that progress towards the establishment of an international criminal jurisdiction was contingent on the development of international relations, which had improved tremendously during the previous years, although it would be an illusion to believe that the world had become a more peaceful place. At the same time, there was a growing awareness among the members of the international community that it was intolerable to let gross violations of human rights and of the norms of international humanitarian law, including war crimes and crimes against humanity, go unpunished. There was also a growing recognition of a common international responsibility to investigate such crimes and to see to it that their perpetrators were brought to justice. He wished to draw attention, in that regard, to the recent recommendation by the Council of Europe on the establishment of an international court to judge war crimes by means of a multilateral convention to be drafted by an international diplomatic conference convened under the auspices of the United Nations. His delegation had consistently supported the establishment of such an institution, since it seemed doubtful whether a code of crimes against the peace and security of mankind unaccompanied by an international jurisdiction would really have the desired effect. The lack of an international organ charged with the prosecution and trial of crimes of an international character constituted a gap to be filled in contemporary international relations. While his delegation had thus far expressed scepticism regarding the possibility of establishing such an organ in the near future, the international community had recently edged closer to that goal.

2. His delegation strongly advocated that the International Law Commission should be given a renewed mandate at the current session of the General Assembly to draft a statute for an international criminal court along the lines suggested in the report of the Working Group on an International Criminal Jurisdiction. An essential precondition for the establishment of such a court in the forseeable future would be a clear separation between the international legal instruments establishing the court and the draft Code of Crimes against the Peace and Security of Mankind, since it seemed even more difficult to achieve general agreement on the Code. The court's statute and the Code should therefore constitute separate instruments and a State should be able to become a party to the statute without thereby automatically becoming a party to the Code. His delegation, however, had certain doubts as to whether it should be left to the discretion of States to determine the crimes for which they would confer jurisdiction on the court. At least in its first phase, the draft Code might be elaborated as a code of conduct which might become a binding instrument later on. The Commission should therefore opt for a more modest initial approach and confine the court's jurisdiction to those crimes which were already defined in existing international conventions. The court's jurisdiction should only extend to individuals and the question of responsibility of States should be dealt with in another context.

(Mr. Tuerk, Austria)

3. The Working Group's view that the court would essentially have to be a facility for States parties to its statute without having compulsory or exclusive jurisdiction and without being a full-time body was justified in that there seemed to be a choice between a court of a limited nature or no court at all. The broad international support required for the concept of an international criminal court, if such an institution was to serve any useful purpose, could only be achieved by adopting a modest but evolutionary approach which would permit the expansion and strengthening of the system in the light of the experience gained and the further development of international relations.

4. With respect to the structural and jurisdictional issues raised in the report of the Commission (A/47/10), his delegation believed that the only feasible method of establishing an international criminal court would be the conclusion of an international treaty containing its statute. Assuming that the court would not be a full-time body, judges might be chosen from an existing list, analogous to the procedure of the Permanent Court of Arbitration. The experience of, inter alia, the European Court of Human Rights, demonstrated that independence and impartiality were also guaranteed if a court was not composed of full-time judges. Such a part-time court would certainly need an appropriate administrative backup which could perhaps be provided by the Registry of the International Court of Justice. His delegation, however, did not favour an approach whereby the judges of that Court would also act as judges of an international criminal court, since the qualification and experience required for the respective tasks were quite different.

5. Even if, following the precedent of the International Court of Justice, the acceptance by States of the jurisdiction of an international criminal court were to be based on an optional clause, States should, nevertheless, be expected to at least recognize the jurisdiction of that court with respect to certain categories of offences which might be extended at a later stage. An ad hoc acceptance of the court's jurisdiction by States not parties to its statute would, of course, be highly desirable, but his delegation would prefer a system of compulsory jurisdiction.

6. The court's jurisdiction should be limited to crimes defined by treaties in force, which would thus invalidate any legal objections on account of the principle of the non-retroactivity of criminal law. Furthermore, the court should be competent to try only the most serious offences and not just any violation of the respective treaties, particularly since its jurisdiction would be predominantly concurrent with that of national courts. The problem of concurrent jurisdiction might be resolved by a stipulation that the international criminal court would only be activated if national courts did not institute proceedings, for instance, with regard to illicit trafficking in narcotics. The Special Rapporteur's suggestion that the international criminal court should have exclusive jurisdiction over certain specified crimes, such as genocide, would also be acceptable to his delegation. It did

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not, however, agree with the suggestion that the court should be given jurisdiction to review the decisions of national courts. The court might, nevertheless, be empowered to examine the decision of a national court with respect to conformity with the international court's statute.

7. The personal jurisdiction of an international court was one of the most difficult technical issues to be faced. The approach of the Working Group had been to build on the existing principle of jurisdiction under the various treaties and thus to provide that the court had personal jurisdiction in any case where a State party to the statute had lawful custody of an alleged offender, where that State had jurisdiction to try the offender and where it consented to the court exercising jurisdiction instead. The consent of the States concerned to the court's jurisdiction should not, however, be required in those cases where neither the State where the crime had been committed nor the State of nationality of the alleged offender instituted criminal proceedings. In such a case, the State party to the statute in whose territory the alleged offender had been found should be obliged to hand him over to the international criminal court.

8. With regard to the general rules of criminal procedure, an international criminal court would have to rely heavily on national law and the applicable international conventions. A defendant should therefore not be placed in a disadvantageous position simply because he was to be tried by an international court instead of a national court. That would not only hold true with respect to procedural questions, but also to the possible punishment. Furthermore, any State handing over an alleged offender to an international criminal court which would not have to apply the same kind of guarantees as a national court in conformity with that State's international obligations, such as the International Covenant on Civil and Political Rights, would be in breach of those obligations.

9. The Special Rapporteur's recommendation that the statute of a court should provide that transfer to the court was not to be regarded as extradition was an ingenious one which was acceptable to his delegation. The requirements laid down in international human rights instruments in favour of alleged offenders would, however, still have to be met. The question would therefore have to be appropriately resolved in the statute, particularly if it provided that a State which had accepted the jurisdiction of the court with respect to an offence was obliged to hand over an accused person to the court at the request of another State party which had accepted the same obligation.

10. The right to bring a case before an international criminal court should belong to those States that had ratified the statute. The appointment of an ad hoc prosecutor would seem to be a logical consequence of establishing a non-permanent court. Such prosecutors might be chosen by the court from a pre-established list upon consultation with the States immediately concerned. His delegation favoured an approach whereby such a prosecutor would be

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independent and would only issue a formal accusation once he had reached, on the basis of all available evidence, the conclusion that there was a case to answer.

11. With regard to the implementation of sentences, the Working Group had pointed out that the most obvious solution would be for sentences to be served in the penal institutions of the complaining State, under conditions not less favourable to the prisoner than those provided in the United Nations Minimum Standard Rules for the Treatment of Prisoners. Any other international standards accepted by that State should also be fully respected. While the establishment of an international prison facility seemed unrealistic, an international control commission, supervising the implementation of the sentence, was necessary.

12. An international criminal court should also be competent to decide on the question of compensation for the victims of the crime. In that regard, his delegation would not favour a solution providing for the competence of the International Court of Justice.

13. In view of the time factor, an international criminal court established on the basis of the work of the International Law Commission and the General Assembly would not be an appropriate forum for dealing with the numerous reports of atrocities perpetrated against unarmed civilians as well as the abhorrent practice of "ethnic cleansing" in areas of the former Yugoslavia. Serious consideration should therefore be given to the creation of an international ad hoc criminal jurisdiction to deal with the alleged war crimes and crimes against humanity committed in that country. The legal provisions in force in the territory at the time of the commission of those acts seemed to constitute a sufficient legal basis for action to be taken by an international ad hoc tribunal. Such a tribunal could be established by a treaty concluded by the most interested States. In drawing up the treaty the extremely useful deliberations of the International Law Commission on the subject of an international criminal court could serve as an important point of reference.

14. Repeated efforts had been made over the previous decades to provide for the punishment of the most serious crimes under international law. While those endeavours were still under way, the international community was nevertheless called upon to take immediate action regarding the gross violations of international norms in the territory of the former Yugoslavia. Such action should not consist solely of collecting relevant information. With regard to the future, an international criminal jurisdiction which would never need to operate would be the best proof that such an institution was serving its purpose.

15. Mr. PUISSOCHET (France) said that the question of establishing an international criminal court concerned some of the most pressing issues facing the international community. The frequent and grave violations of the laws of

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war and of humanitarian law currently made it imperative to use the law to curb the commission of crime through fear of prosecution and punishment. His delegation therefore supported in principle the early elaboration by the International Law Commission of a draft statute of an international criminal court, in preference to any other approach. The alternative suggestions of international inquiry or fact-finding in some way linked to the trial of persons in a national court, or an official system of observing national trials, deserved further consideration provided that the elaboration of the draft statute of an international court was not thereby delayed. His delegation supported in general the basic propositions of the Working Group, contained in paragraph 396 of the report. It fully supported the view that the statute of the court should be established in the form of a treaty.

16. With regard to the structure and composition of the court, he was in favour of a flexible mechanism which would be "ad hoc not in the sense of an organ created ex-post facto but rather in the sense of a pre-existing mechanism which would be convened when the need arose, the composition of which would be determined, in each specific case, through objective criteria which would ensure the impartiality of the judges". (A/47/10, para. 33) Such an approach seemed to be favoured by a majority of States, since it would be better suited than a permanent organ to the types and volume of cases which would be submitted to the court. On the other hand, he was not in favour of the Working Group's suggestion of drawing inspiration from the system of lists of experts used by the Permanent Court of Arbitration.

17. The question of the composition of the court involved two aspects i.e. the appointment of its membership, on the one hand, and the composition of the court in a particular trial, on the other. On the question of the appointment of the membership, he shared the Working Group's suggestion that each State party to the Statute would nominate, for a prescribed term one qualified person to act as a judge of the court. The specificity of criminal law and the diversity of legal systems were arguments in favour of direct representation not of States but of national legal systems. With regard to the selection of judges in a particular trial, he considered that the States concerned should have the possibility of expressing their point of view. While no inter-State conflict was involved, Article 26, paragraph 2, of the Statute of the International Court of Justice and article 17 of its Rules could provide guidance on the matter. The Working Group's proposal that the President should appoint five judges who would be assisted by the Bureau seemed too rigid a formula.

18. On the question of whether the jurisdiction of the court should be compulsory or optional, his delegation supported the view of the Working Group that acceptance of the statute of the court would be distinct from acceptance of its jurisdiction. It agreed that acceptance of the statute should involve only financial and administrative obligations linked with participation in the operation of the court, while acceptance of the court's jurisdiction would take place in a separate and optional act, States being free to specify the

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crimes in respect of which they accepted its jurisdiction. That second acceptance could take place either at the time of signature, or in a later declaration. It could be an ad hoc acceptance in relation to particular offences committed by specified persons, or could be made in advance for a specified category of offences which fell within the subject-matter jurisdiction of the court; in both cases the acceptance would relate only to persons who were "within jurisdiction" of the State concerned, in the criminal law sense. His delegation opposed the idea of establishing compulsory jurisdiction of the court for offences which, under its statute, would fall within its area of jurisdiction, or even over a limited number of such offences, since it was clear that it would be very difficult to reach agreement on a list of such offences.

19. His delegation supported the view that, since treaties relating to crimes regarded as "international" provided for the competence of national courts, the jurisdiction of the court should be concurrent with that of national courts. The Commission had rightly rejected the idea that the court could play the role of court of appeal against decisions of national courts.

20. On the question of the subject-matter jurisdiction of the court, his delegation believed that it was essential that the statute of the court and the draft Code of Crimes should remain completely separate instruments; it supported the idea of defining the jurisdiction of the court in relation to conventions in force. The instruments should include those that defined the crimes that most appalled the conscience of mankind, for example, the Genocide Convention or the Hague Conventions of 1949. Once a list of conventions had been drawn up, it would have to be determined whether in some cases, only the most serious crimes should be included in order to preserve the authority of the court.

21. The question of the personal jurisdiction of the court, from the practical point of view, was a matter of determining which States' consent was needed for the court to be able to exercise jurisdiction in respect of a particular person. Various States could be concerned in a case: the State in whose territory the crime was committed, the State of which the accused was a national and the State which had been, or whose nationals had been, victims of the crime. Competing interests had to be reconciled in that respect, particularly that of ensuring that a State did not assert its jurisdiction over the jurisdiction of the court solely in order to avoid all punishment for its nationals; ensuring that States were not forcibly deprived of the possibility of exercising the jurisdiction to which they were entitled under the conventions in force; and avoiding a system which would require the agreement of a State for one of its nationals to be brought before the court for an act which was not criminal under its internal law or under the rules of international law it recognized as such. The Commission should continue to study the question of the personal jurisdiction of the court. It was important that the consent of the State of nationality of the accused to the exercise of the jurisdiction of the court should be recognized as necessary,

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regardless of where the crime was committed, if the person concerned was in the territory of that State.

22. On the question of applicable law, penalties and due process, his delegation agreed that with regard to the definition of crimes, the principle nullum crimen sine lege provided support for a system whereby the jurisdiction of the court would be limited to offences defined by the treaties in force specified in the statute, it being understood that it would be for each State party to ensure that the rules applied to the addressees. The question of the general rules of criminal law to be applied in proceedings must be considered in greater depth. Particular attention should be paid to determing the applicable law or laws, especially because of the impact it could have on the question of statutory limitations or the effects of amnesty measures adopted, for example, within the framework of the political settlement of a civil war situation.

23. The Commission would need to draw up more specific proposals with regard to the determination of penalties. The Working Group had referred to the need for a residual provision in the statute of the court, dealing with the question of penalties; obviously it must be ensured that the court did not prescribe penalties which violated human rights. He felt that the death penalty should be excluded. Furthermore, a "residual" system would be liable to undermine the unity of the court's practice. In some cases, depending on the rules for determination of applicable law that were selected, particular difficulties could result if there were many States in whose territory, or against whose nationals, the crime had been committed, or if many States instituted proceedings before the court in respect of the same crime and had taken the perpetrators into custody. His delegation supported the Commission's idea, in respect of due process, of referring to article 14 of the International Covenant on Civil and Political Rights, adding a reference to the double hearing principle.

24. On prosecution and related matters, his delegation supported the view that the court should not try defendants in absentia. As to the modalities of initiation of a case, it agreed that the right to initiate a case should be limited to States. It felt that the idea of limiting that right to a State whose consent was a prerequisite for the court's jurisdiction in a particular case was too narrow and would overrestrict the court's range of activities. However, the idea of allowing all States parties to the court's statute to initiate a case, even if such States did not accept the jurisdiction of the court with respect to the offence in question, would be too broad; a fortiori his delegation opposed the idea that a case could be initiated by any State, since it saw no reason to support an actio popularis of that type. It would therefore prefer the idea that the right to bring a complaint should extend to any State party which had accepted the court's jurisdiction with respect to the offence in question and to any State which had custody of the suspect and which would have jurisdiction under the relevant treaty to try the accused for the offence in its own courts. With regard to the system of prosecution, he

(Mr. Puissochet, France)

agreed that there should be no permanent prosecutorial organ, in view of the non-permanent nature of the court itself; the idea of establishing an independent prosecutorial system, which already existed in the criminal system in some States, should be kept under consideration.

25. The practical problems involved in bringing defendants before a court, particularly custody of the individual and security, had not really been taken up; it had perhaps been envisaged that they would be resolved on a case-by-case basis. However, to the extent that they could raise questions of principle, such as the basis on which the individuals concerned were kept in detention under the authority of the court in the territory of the State in which it operated, they needed to be kept in mind. The question had two particularly sensitive aspects, that of the limits which could be placed on an obligation to bring accused persons to court and that of the conflict between international jurisdiction and existing extradition regimes.

26. His delegation had no difficulty in accepting the idea that administrative links should be established between the court and the United Nations, while complying with the budgetary rules of the United Nations, or that the International Court of Justice, if it agreed, could provide services to the criminal court as required.

27. His delegation was in favor of drawing up a statute for an international criminal court and believed that that task should be a priority of the Commission. It was prepared to adopt the necessary mandate. His delegation had every confidence in the Commission's ability to find appropriate solutions.

28. Mr. CALERO RODRIGUES (Brazil) said that his delegation had consistently expressed doubts regarding the establishment of an international criminal court, not only because of the legal and practical difficulties involved, but also because it seemed unlikely that the court would receive from the international community the general support that would be necessary for it to be a meaningful institution. However, it believed that the Commssion should be requested to elaborate a draft statute for an international criminal court so that the General Assembly could take a decision at the appropriate time. It did not agree that it would be irresponsible to ask the Commission to prepare a draft statute while remaining uncommitted as to the outcome of that work. The Commission would carry out the technical legal work and the General Assembly would take the necessary political decisions. If the international community was able to reach broad agreement on a draft Code of Crimes and on a well-structured court, his delegation might be in a position to join such a consensus. The eleboration of the statute should not be dissociated from the work on the draft Code of Crimes. A criminal court must rely on a clear, unambiguous indication of the rules it must apply so that it could ascertain whether an individual had committed acts which the law defined as a crime and could impose on the individual the penalty indicated by the law. The Code of Crimes must therefore define crimes and set penalties. In paragraph 449 of the report, the Working Group suggested that the court's jurisdiction should

(Mr. Calero Rodrigues, Brazil)

extend to specified existing international treaties creating crimes of an international character. The problem there, besides that of selecting the instruments, was that the instruments in question did not indicate penalties. The Working Group noted in paragraph 502 of the report that the court would have to rely on applicable national law, or on principles common to all nations, and suggested that a residual provision might be needed in the statute, dealing with the question of penalties. His delegation did not see how national law could be invoked, which national law would be implied, or which principles common to all nations could be found for the determination of penalties. An authorization given to the court to have recourse to those two sources would in fact be an authorization for the court to apply the penalty it thought adequate; such action would contravene the principle nulla poena sine lege which was embodied in article 15 of the International Covenant on Civil and Political Rights and was a fundamental principle of criminal law. A properly drafted Code of Crimes would presumably include all the crimes that, due to their seriousness, should fall under the jurisdiction of the court: consequently, reference to other instruments would become unnecessary.

29. The question of the basis on which the Commission should undertake the project seemed rhetorical in nature since the report of the Working Group analysed a very large number of issues and suggested an even larger number of possible solutions. His delegation had no problem with the idea of a facility or an available legal mechanism which would be called into operation by States if and when they felt it necessary, rather than a more substantial institution, since doubts were likely to remain as to the possibility of the effective operation of an international criminal court. As to the suggestion that the court should not have compulsory jurisdiction and that its jurisdiction would be predominantly or entirely concurrent with that of national courts, his delegation foresaw considerable difficulties in establishing a coherent system of conferment of jurisdiction and of ensuring that there were no conflicts between the jurisdiction of the court and national jurisdictions. Difficulties were likely to arise whatever the approach taken; his delegation therefore felt that it would be pointless to suggest modifications to the basis that the Commission intended to adopt for the elaboration of the statute; as the work developed, the General Assembly and the Commission would be able to see whether the basis adopted was allowing the desired progress. Thus the Commission should proceed on the basis of its own choice, as outlined in its report.

30. Mr. SHEARER (Australia) said that Australia had already indicated its support of the proposal to establish an international criminal court, and specifically of directing the Commission, as the latter itself had requested, to proceed with the preparation of a draft statute.

31. The question arose as to whether other factors such as conflicting national policies, constitutional inhibitions and diversified standards, which had impeded the establishment of an international criminal court for some 40 years, still applied. The end of the cold war, interdependence among

(Mr. Shearer, Australia)

States and recent examples of armed conflict all led to the conclusion that the creation of an international criminal jurisdiction was now feasible. The approach outlined by the Working Group had several features which his delegation considered to be of particular importance, including the separation between the statute of the court and the draft Code of Crimes against the Peace and Security of Mankind and the proposals that in the first phase of its operations, at least, a court should exercise jurisdiction only over private persons, as distinct from States, that its jurisdiction should be voluntary and concurrent with that of national courts and that the court itself should not be a standing full-time body.

32. With regard to the subject-matter jurisdiction, Australia generally supported the Working Group's approach. The offences subject to the jurisdiction of the court should be those defined in existing international treaties, including the draft Code of Crimes, subject to its adoption and entry into force.

33. The question of illicit trafficking in narcotic drugs should be approached along the lines suggested by the Working Group in paragraph 450 of document A/47/10. The court should not be overwhelmed with routine cases. The concept of a "large-scale" narcotics offence should be interpreted in a flexible manner, taking into consideration the ability of the State whose interests were most affected by such offences to deal with them itself. The international criminal court should be empowered to exercise discretion in responding to requests from affected States.

34. The personal jurisdiction of the court required more detailed consideration. In principle, the notion of "ceded jurisdiction" appeared to be applicable to the proposed scheme, in that the court would exercise concurrent, not exclusive, jurisdiction. The cases described in paragraphs 454 and 455 of the report were likely to be the more common forms of ceded jurisdiction and should not require the consent of any other State, not even the State of nationality of the alleged offender. In cases where the State ceding jurisdiction was neither the State in whose territory the offence had been committed nor the State of nationality of the offender, but whose title to prosecute rested on some other connection, or on mere custody, the consent of the territorial State or the State of nationality should be required only if those States had agreed to prosecute in the event of extradition.

35. As to the question of an international criminal trial mechanism other than a court, it might not be appropriate, for the reasons outlined in paragraphs 473 to 487 of the report, to provide for such an institution in the statute of the court. Consideration might be given, however, to making provision in the draft Code of Crimes for an international fact-finding body of the kind contemplated in article 90 of Additional Protocol I of 1977 to the Geneva Conventions of 1949. If the international criminal court was prevented from trying offences against the Code by the failure of the relevant States to

(Mr. Shearer, Australia)

accept its statute, the fact-finding facility would constitute a potent means through which the international community could express its concern. Moreover, there did not appear to be such strong reasons as in the case of Additional Protocol I for making the competence of a fact-finding body dependent on the consent of interested States.

36. The question of bringing defendants before a court, and the constitutional inability of some States to surrender their own nationals, had been referred to in the Working Group's report, but not resolved. It might possibly be resolved on the basis that surrender to an international court was not, strictly speaking, extradition, or by treating the court as sui generis. Alternatively, there could be a prior agreement that if a State surrendered a defendant of its nationality for trial, or agreed to the surrender of its national by another State, that defendant would, if convicted, be returned to the national State for execution of sentence.

37. With regard to the implementation of sentences, there was an additional consideration, namely, the possibility that the imprisonment of an offender in a foreign country where there could be differences in language, climate, culture and social and economic conditions, might constitute a supplementary, gratuitous punishment unrelated to the offence. That had led a number of countries in recent years to conclude mutual repatriation agreements covering nationals of one State who were convicted and sentenced in the courts of the other State. Accordingly, consideration might be given to including in the draft statute a provision allowing the State of nationality of the convicted offender to implement the sentence, if it so wished.

38. His delegation reaffirmed its strong support for the proposal that the Commission should be given a clear mandate to proceed with the preparation of a draft statute of an international criminal court along the lines indicated in the report of the Working Group. In view of the importance of that task, it should be undertaken as a separate item in the Commission's work programme.

39. Mr. PASTOR RIDRUEJO (Spain) said, that with regard to the proposed establishment of an international criminal court, his delegation shared the views expressed by the United Kingdom representative on behalf of the States members of the European Community. Spain firmly supported the creation of such a court, not only because it would allow for compensation for international crimes, but also because its very existence would have a considerable dissuasive effect. What was now happening in some regions of the world made it clear that neither the principle of conferring universal criminal jurisdiction on the courts of all States nor the existing machinery for international judicial assistance was an adequate solution to the problem of prosecuting persons accused of international crimes. The international community could not be a passive onlooker in the light of such events.

40. While the establishment of an international criminal court would entail both political and technical difficulties, they could be overcome through a

(Mr. Pastor Ridruejo, Spain)

combination of political will, imagination and caution. His delegation noted with satisfaction that the Working Group's general approach reflected those attributes.

41. As noted in paragraph 437 of the report, an international criminal court would be created by a treaty concluded under the auspices of the United Nations. It was important for the court to benefit from the universal representativeness which the Organization enjoyed. In that connection, he drew attention to the problem of determining the number of ratifications or accessions, as appropriate, required for the entry into force of the statute. The number should be neither so low as to detract from the court's representativeness nor so high as to delay unduly the commencement of its functions.

42. Spain agreed with the Working Group's recommendation in paragraph 396 of the report that in the first phase of its operations, at least, the court should not be a standing full-time body. In the future, however, consideration could be given, in the light of experience, to setting up a permanent structure.

43. Likewise, in line with the notion of gradualism, which his delegation supported, the Working Group had proposed that in the first phase of its operations, at least, the Court should not have compulsory jurisdiction. His delegation noted that the European Convention on Human Rights of 1950 also provided for a system of voluntary jurisdiction.

44. Spain also endorsed the recommendation that in the first phase of its operations, at least, the court should exercise jurisdiction only over private persons, as distinct from States.

45. Turning to the question of the international offences over which the court could exercise jurisdiction (A/47/10, para. 449), he said that the Working Group's recommendation that the crimes dealt with should be those specified in existing international treaties, including the draft Code of Crimes, satisfied the principle nullum crimen sine lege.

46. Many other issues of great political and technical complexity had been considered by the International Law Commission and discussed in the Working Group's report. His delegation hoped that, at the current session, the General Assembly would give the Commission a clear mandate to prepare a draft statute of an international criminal court, taking into account the views expressed by Governments.

47. Mr. CISSE (Senegal) said that the International Law Commission had completed the first stage of the task entrusted to it, namely, to undertake a detailed study of the questions relating to the establishment of an international criminal jurisdiction. However, in order to proceed with the second stage - the preparation of a draft statute giving an international

(Mr. Cisse, Senegal)

criminal court jurisdiction over crimes whose perpetrators could not be prosecuted and punished through the means traditionally available to States - the Commission required a clear mandate and guidelines from the international community.

48. Differing views had been expressed in the Commission as to whether the court should be a standing full-time body. The mechanism proposed was one which could be called into operation as required. While that principle was acceptable, his delegation found it difficult to conceive of a court, even one functioning periodically, which would not require a permanent administrative staff, if only to perform registry services and to maintain archives.

49. With regard to the jurisdiction of the court, his delegation believed that it should be exercised only over private persons. The question of the consent of the State of nationality or the territorial State should be considered carefully, with a view to ensuring the impartiality of the court's decisions.

50. As to the subject-matter jurisdiction his delegation believed that it should be limited to the crimes specified in existing international treaties, even though the court's jurisdiction might then not extend to new types of international crimes.

51. Concerning the relationship between the draft Code of Crimes and an international criminal court, his delegation endorsed the view, expressed in paragraphs 462 and 463 of the report, that a State could become a party to the statute without thereby becoming a party to the Code. That would ensure maximum flexibility. Likewise, his delegation held that, regardless of the linkages between them, the statute of a court and the draft Code of Crimes should constitute separate instruments. The General Assembly had, however, underscored those linkages by deciding that the statute of a court and the draft Code of Crimes should be dealt with in the same report. Moreover, the the preparation of a draft statute had been placed in abeyance until one of the most important crimes mentioned in the draft Code, aggression, had been defined. Since many of the offences defined in the draft Code, such as apartheid, State-sponsored terrorism, war crimes, ordered by the leaders of a State and so on, could be tried only by an international criminal court, the Assembly had intended that work on the two topics should proceed concurrently. For that reason, his delegation did not agree with the conclusions set out in paragraph 461 of the report.

52. One of the most difficult questions which the International Law Commission would have to resolve pertained to the relationship between an international criminal court and the Security Council, in view of the Council's responsibilities under the Charter of the United Nations with regard to the maintenance of international peace and security. Conflicts of jurisdiction between the court and the Council should be avoided.

53. Mr. SHI Jiuyang (China) said the establishment of an international criminal court would no doubt be desirable as a form of international cooperation to combat the scourge of international and transnational crime. Desirability, however, did not necessarily translate into feasibility. Any effort to establish such a court would, at the current stage of international relations, run into numerous insurmountable practical difficulties.

54. First, States would as a rule insist on trying the alleged offender in their domestic courts, being reluctant to surrender their criminal jurisdiction or see it diminished. It would be recalled that the International Conventions on the Prevention and Punishment of the Crime of Genocide and on the Suppression and Punishment of the Crime of Apartheid, while envisaging the possibility of trying those crimes before an international criminal tribunal, did not contain any specific provisions for the establishment of such tribunals. The 1953 draft statute for an international criminal court had, for various reasons, been shelved. The most that countries had so far been able to agree on in their joint efforts to combat certain international crimes was universal jurisdiction in the form of "try or extradite".

55. Referring to the view that the changed climate in international relations had brought the idea of an international criminal court closer to fruition, he said that while the possibility of establishing such a court might indeed be slightly greater under the existing circumstances, guaranteeing the independence and impartiality of the court would probably be more difficult, given their susceptibility to the influence of the dynamics of international politics. The problem was not amenable to solution by provisions relating to the court's composition and rules of procedure or to general principles of criminal justice.

56. Should the establishment of an international criminal court nevertheless prove possible, its jurisdiction ratione personae should without doubt apply only to individuals and its jurisdiction ratione materiae should not cover ordinary crimes but should be confined to those constituting the most serious threat to human civilization, such as aggression, apartheid, genocide, State terrorism, serious breaches of the laws of war and serious cases of international drug trafficking. Even then, bringing the accused to trial before the court would encounter serious practical difficulties because most of the crimes mentioned, with the exception of war crimes and international drug trafficking, could only be perpetrated by States. Although criminal responsibility was borne by individuals, those individuals would most likely be members of the State ruling hierarchy. The court could not try the alleged offenders in absentia, since that would violate the basic principles of criminal justice as well as the provisions of the International Covenant on Civil and Political Rights How could a State, even if it was a party to the court's Statute and if the court exercised exclusive and compulsory jurisdiction over the crime in question, be expected to turn over its Head of State or Government or other high-ranking civilian or military leader to the

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court for trial? His delegation shared the view that the example of the Nürnberg and Tokyo Tribunals was not relevant because of their ad hoc nature and because they had been set up under the special international circumstances prevailing at the time. To apprehend fugitive offenders responsible for international crimes and bring them to justice would be virtually impossible without the use of force involving much suffering for the innocent people of the country concerned.

57. Moreover, differences between national criminal justice systems and national philosophies on the subject of penalties would make it extremely difficult to draw up universally acceptable uniform rules on the sentencing of international crimes. If left unresolved, that issue alone could render the proposal for an international criminal court ineffective. Difficulties also arose in connection with the execution of judgements and the enforcement of penalties.

58. The foregoing were only a few examples of the numerous thorny problems connected with the issue. Noting that the Working Group set up at the forty-fourth session to consider the topic had put forward various alternative proposals but that, for internal reasons, the Commission had not formally adopted the Working Group's report, he said that his delegation did not propose to comment on that report at the current stage. It also felt the need to study further the proposals of the Working Group set out in paragraph 396 of the Commission's report which, as stated in paragraph 104 of the report, the Commission had accepted as a basis for its future work. His preliminary impression was that the propositions showed awareness of the extremely sensitive and complex nature of the main issues involved and of the many difficulties involved. The basic approach adopted by the Working Group therefore seemed prudent and the preliminary goals set demonstrated moderation and a desire to take international realities into account. Pending detailed study of the recommendations contained in the report, his delegation could not make any further comments beyond reiterating its appreciation of the Commission's and the Working Group's efforts. It had also not yet formed a definitive opinion on the Commission's conclusion, set out in paragraph 104 (c) of the report, that further work on the issue required a renewed mandate from the General Assembly and needed to take the form of preparing a draft statute. His delegation was ready to join in consultations with a view to reaching a consensus acceptable to all delegations.

59. Mr. RAO (India) remarked that the recommendations of the Working Group appeared to fall short of expectations. Referring specifically to the basic propositions set out in paragraph 396 of the report, he said that his delegation agreed with proposition (i), namely, that an international criminal court should be established by a statute in the form of a treaty agreed to by States parties. The statute should be drawn up by the International Law Commission and adopted by the General Assembly as a resolution or, alternatively, by a conference of States convened for the purpose. The court thus established should be associated with the United Nations, which would

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exercise some form of supervision over it as it did in the case of the International Court of Justice. While agreeing with proposition (ii) that the Court should exercise jurisdiction only over private persons, his delegation wished to emphasize that all the safeguards of law, including due process, provided in the human rights instruments should be accorded to individuals accused of international crimes to be tried by the court. The linkage between the draft Code and the court should, in his delegation's view, be closer than was envisaged in proposition (iii), crimes of an international character defined in other specific conventions being brought within the purview of the court through suitable provisions included in its statute.

60. His delegation endorsed proposition (iv) but, while agreeing that proposition (v) was a logical outcome of the Working Group's assumption that a full-time permanent court would be expensive and politically not very attractive, felt that those assumptions had to be weighed against considerations of the need to ensure impartiality, objectivity and uniformity of jurisprudence. As to the other jurisdictional mechanisms referred to in proposition (vi), his delegation felt that reference to such mechanisms appeared to be unnecessary and indeed inconsistent with the proposition that the jurisdiction of the court should be consensual and should be in the form of a statute adopted by a treaty.

61. With regard to proposition (vii), his delegation was pleased to note the emphasis placed on the need to guarantee due process, independence and impartiality in the court's procedures. However, it strongly felt that those goals could best be achieved through the establishment of a full-time permanent body with a statute based on general principles of criminal justice accepted by the majority of States.

62. Referring to the Working Group's recommendation for an ad hoc independent prosecutorial system (paragraph 509 of the report), he said that the office of prosecutor should also be established as a permanent body with a view to avoiding possible abuses of the international criminal jurisdiction. A permanent prosecutorial office would also serve as a valuable bridge between the court and the Security Council in respect of crimes of aggression and others connected with the maintenance of international peace and security.

63. Noting that the issues raised in the Working Group's report required careful study by States as well as by the Commission itself at an appropriate time, he said that his delegation reserved its position on those issues pending further examination.

64. The Commission's decision and conclusions as set out in paragraph 104 of the report amounted to a specific proposal which essentially promoted an ad hoc mechanism. His delegation, as already stated, would prefer a full time permanent mechanism and was not entirely convinced by the arguments opposing such a solution on financial grounds. It believed that, given the political will to refer criminal cases to an international court, a way would be found

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to obtain the necessary finances. In order to ensure the court's impartiality and independence, States should not - and, surely, would not - object to the financial costs involved. The needs of economy could to some extent be met by reducing the number of judges and by establishing the court in a country with a relatively low cost of living and relatively inexpensive infrastructure facilities. The central theme of the proposal should be that States parties would be given the option to accept the jurisdiction of the court on a consensual rather than a compulsory basis, and that the court's jurisdiction would, in the initial stages at least, be restricted to trying individuals only. The court should be integrally linked with the United Nations system, and its mandate in a given case should be organized to complement the powers and functions of the Security Council in the sphere of maintenance of international peace and security. The court should not be projected as a mechanism to bypass or in any way to rival or challenge the role of the Security Council. In other words, its powers and functions should be similar to those of the International Court of Justice.

65. In conclusion, he expressed full agreement with the Commission's view that the general debate stage on the topic was now over. He doubted, however, whether the Sixth Committee was yet in a position to endorse the Commission's proposal in all respects and to mandate the Commission to produce a statute on the proposed basis. His own delegation certainly had some reservations with regard to the proposal. A consensus would have to be achieved before a specific mandate could be given to the Commission. His delegation was prepared to join in any effort to identify that consensus in the hope that its ideas would be given due consideration.

66. Mr. GODET (Observer for Switzerland) said that the recent conflicts had demonstrated the urgent need for a code of crimes against the peace and security of mankind whose fundamental purpose would be to criminalize the actions of those who deliberately jeopardized the peace and security to which mankind was entitled. Reasons of State or obedience to orders could not justify everything, and there were certain acts that could not remain unpunished. It was only proper that individuals whose behaviour met with universal reprehension should be personally accountable for their acts before a national or international jurisdiction. The International Law Commission's work on the preparation of the draft Code was well advanced: it had provisionally adopted a set of draft articles, on first reading and his Government would submit its written observations thereon before 1 January 1993, as requested.

67. Clearly, the preparation of the draft Code was linked to, although not indissociable from, the question of establishing an international criminal jurisdiction, in respect of which the Commission had made considerable progress. The Working Group established by the Commission had put forward a number of propositions on the structure of such a jurisdiction, which the Commission had deemed workable, as it had decided that further work on the issue should focus on a detailed project in the form of a draft statute (A/47/10, para. 104).

(Mr. Godet, Observer, Switzerland)

68. His delegation recognized the need for an international criminal jurisdiction, in particular in cases in which the State called upon to exercise its jurisdiction refused or was unable to prosecute or extradite persons guilty of international crimes. There was no need for such a court to be a permanent full-time body; it should rather be a permanent mechanism which could be convened immediately when necessary. However, the court should have a permanent seat, and should not sit, as the Working Group suggested, in the State in which the alleged offence had been committed, as it might thus be subject to pressure incompatible with the sound administration of justice. The idea of a regional criminal court did not seem compatible with the universal vocation of a jurisdiction set up to try international crimes.

69. The jurisdiction of the future court should be subsidiary to or at the most concurrent with that of national courts. It would be unfortunate to depreciate or even disrupt domestic punitive measures or to weaken the judgements handed down by national courts. It would be paradoxical if the very existence of a court, because of its exclusive jurisdiction, were to demobilize the State judicial authorities who were primarily responsible for punishing international crimes, as the objective was to ensure that such crimes did not remain unpunished. It was also possible to consider entrusting the court with the additional task of deciding conflicts of jurisdiction, either positive or negative, between States. Moreover, the General Assembly had given the Commission a mandate to consider not only the possibility of establishing "an international criminal court" but also the possibility of establishing "another international criminal trial mechanism", the idea being that it was appropriate, parallel to the efforts to establish a court, to reinforce the exercise of national criminal jurisdiction in the case of international crimes. Mechanisms such as a reference procedure, which allowed a national court trying an international crime to ensure that it duly applied the relevant provisions of international law, or an international pre-trial procedure, whereby certain forms of state behaviour could be classified within a given category of international crimes, undoubtedly deserved further consideration, and the Commission's reflections offered interesting prospects in that respect.

70. Most of the members of the Commission seemed to consider that once the principal of subsidiary or concurrent jurisdiction had been accepted, a flexible system should be provided for, whereby ratification of or accession to the court's statute would not ipso facto entail acceptance of the court's jurisdiction with regard to every crime. States parties would be free to specify the crimes or categories of crimes for which they accepted the court's jurisdiction. Although that was undoubtedly a realistic approach, it might be wondered whether the optional nature of the jurisdiction was in conformity with the extreme seriousness of the crimes the court would have to deal with, and his delegation had not yet made up its mind on that point.

71. The Commission had carefully considered whether the jurisdiction of the court should be restricted to the crimes defined by the draft Code of Crimes.

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While strictly speaking, there was no link between the Code and the court's jurisdiction, it was open to question whether that jurisdiction should also extend to acts defined as crimes in other international conventions. Observance of the principle nulla poena sine lege signified that the norm to be implemented needed to be sufficiently precise to provide a basis for a charge. Accordingly, it was necessary to ensure that the crimes defined in certain conventions examined by the Commission met that requirement. Moreover, as the Commission had observed (A/47/10, para. 493), in accordance with the principle nullum crimen sine lege, the alleged wrong-doer must have been obligated to observe the rule in question. It was not sufficient that the rule existed in an inter-State relationship, which in principle created rights and obligations for subjects of international law only; the accused person must have been an addressee of the rule concerned. His delegation was not certain that international conventions other than the Code that would come within the subject-matter jurisdiction of the Court met that requirement. Although the draft Code covered some offences that were not devoid of political controversy, it satisfied the criteria of certainty and predictability without which the penalty would be tainted by arbitrariness and would infringe the fundamental rights of the defence. That concern also raised doubt as to whether the court would be able to base a conviction on international custom or General Assembly resolutions, most of which did not directly address individuals and were not coercive in character. For the same reasons, his delegation could not accept the idea that the subject-matter jurisdiction of the court could extend to offences against general international law which had not yet been incorporated into or defined by existing treaties. Only positive treaty law could provide a foundation for the court's authority to try cases.

72. Questions of personal jurisdiction would be among the most arduous to solve, as positive or negative conflicts of jurisdiction were likely to arise. Although the Working Group had not felt the need to go into detail, that task would sooner or later have to be undertaken. At first sight the view that the State of which the accused was a national could not prevent the court from exercising its jurisdiction unless it was prepared to prosecute him before its own courts appeared satisfactory.

73. Every accused person should be entitled to have his case reviewed by a higher court, in accordance with article 14, paragraph 5, of the International Covenant on Civil and Political Rights, which was in general observed at the national level. There was no need for the appeal jurisdiction completely to re-examine a case from the standpoint of both the merits and the law; it could merely ensure that correct procedure had been followed and that the law had been observed.

74. His delegation had noted with interest the suggestions made by the Working Group concerning the manner in which criminal proceedings might be brought before an international court, but would refrain from making any observations at the current stage as the suggestions were only exploratory.

75. Mr. NJENGA (Observer for the Asian-African Legal Consultative Committee (AALCC)) said that the Sixth Committee and AALCC shared a common objective in the progressive development and codification of international law, and that AALCC's modest contribution had always reflected the aspirations of the African and Asian States. The links between AALCC and the Sixth Committee, formalized in 1981, had subsequently become further consolidated, and AALCC had supplemented the efforts of the United Nations, particularly in connection with projects and studies relating to the Decade of International Law, international protection for refugees, international economic cooperation for development and the United Nations Conference on Environment and Development. AALCC had also undertaken to prepare notes and comments on the items on the Sixth Committee's agenda.

76. AALCC had likewise established close links with the International Court of Justice. The AALCC secretariat had prepared a brief on the possible wider use of the International Court, and circulated as document A/40/682, annex, and in 1986 AALCC had organized a colloquium on that subject for the benefit of the legal advisers of its member States. AALCC had always attached great significance to the question of the peaceful settlement of disputes and against the backdrop of the United Nations Decade of International Law, had held a meeting of the legal advisers of its member States on that subject on 8 November 1991.

77. The relations between AALCC and the International Law Commission dated back to 1956, when AALCC had undertaken a systematic examination of the Commission's work from the Asian-African perspective, and AALCC was gratified that the Commission had treated its recommendations with respect and reflected them in its work. At its thirty-first session, in 1992, AALCC had been honoured by the presence of the then Chairman of the Commission, Mr. Koroma, who had given a comprehensive overview of the progress of the Commission's work. In turn, AALCC had been represented by its Secretary-General at the Commission's 1992 session. At its thirty-first session, AALCC had urged the Commission to consider including in its programme of work an item on the legal aspects of the protection of the environment not subject to international jurisdiction (Global Commons) and an item on the progressive development of the concept of the reservation of the international sea-bed area for peaceful purposes. He hoped that those ideas would be taken up in due course.

78. AALCC had also been following with keen interest the progressive development of international law relating to the status and treatment of refugees and in 1991 had organized, in collaboration with UNHCR, a workshop on international refugee and humanitarian law, at which grave concern had been expressed about the situation of internally displaced persons who were in a refugee-like situation, but were not covered by the protection of regional and international legal instruments. The workshop had also emphasized the need for the State of origin to extend all possible humanitarian assistance to such persons and for international humanitarian organizations, including UNHCR, to be allowed to extend their help to them. The workshop had also recommended that AALCC should consider the possibility of preparing draft model legislation to serve as a guideline for the enactment of national laws

(Mr. Njenga)

relating to refugees, a recommendation that had been endorsed by AALCC at its thirty-first session.

79. Concern about hazardous and toxic wastes and their disposal had led to the convening of the United Nations Conference on Environment and Development. The AALCC secretariat had been represented at most sessions of the Preparatory Committee as well as at the Conference itself, the prime objective being to assist its member States to prepare for the United Nations Convention on Environment and Development. In that connection, it had decided to convene a meeting of legal advisers of member States at United Nations Headquarters to strengthen their efforts to meet the objectives of the Conference and the international instruments adopted there.

80. The Trade Law Subcommittee of AALCC constantly reviewed activities in its field and the relations established with UNICTRAL had led to fruitful and effective cooperation, exemplified by AALCC's adoption of an integrated scheme for the settlement of disputes. At its thirty-first session AALCC had also recognized the importance of the relationship between economic development and the harmonization of legal regimes concerned with international trade through the sharing of accumulated experience; a data collection unit had been established at AALCC headquarters at New Delhi, which was expected to lead to the establishment of an autonomous centre for research and the development of legal regimes applicable to the economic activities of developing countries.

81. There were likewise other items on the AALCC secretariat's work programme which complemented the items on the Sixth Committee's agenda: they included the Indian Ocean as a zone of peace, international terrorism, legal elements of friendly and good neighbourly relations, the non-navigational uses of international rivers, the responsibility and accountability of the former colonial Powers, and the United Nations Decade for International Law. In connection with the last topic, AALCC had submitted a report to the Office of the Legal Counsel pursuant to General Assembly resolution 46/53.

ORGANIZATION OF WORK

82. The CHAIRMAN said that he had received a request from the Secretary-General of the International Bureau of the Permanent Court of Arbitration in The Hague to make a statement before the Sixth Committee when it discussed the United Nations Decade of International Law. He reminded the Committee that a similar request the previous year had been answered favourably. He informed the Committee that, with its consent, he intended to reply that although it was not the normal practice of the Sixth Committee to hear statements from organizations which had not obtained observer status with the General Assembly and were not members of the United Nations system, he was prepared to give the floor to the Secretary-General of the International Bureau during the debate on the Decade.

83. It was so decided.

The meeting rose at 6 p.m.