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Chairman: Mr. LAMPTEY (Ghana)

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The meeting was called to order at 3.30 p.m.

AGENDA ITEM 137: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-FIFTH SESSION (continued) (A/49/10 and A/49/355)

1. Mr. RAO (India) said that recent international conflicts, particularly in the territories of the former Yugoslavia, had highlighted the need for the establishment of a permanent criminal court, and India complimented the International Law Commission (ILC) on its work in preparing and adopting the draft articles before the Committee (A/49/355). His delegation welcomed the general scheme of the draft statute, under which only individuals could be prosecuted, and then only upon a formal complaint by a State party. Provision had also been made for the Security Council to refer cases to the court; that power required further consideration, however, and should be approved only within the limits agreed to by consensus.

2. In his view, the most important part of the draft statute was its definition of jurisdiction and, in particular, the status of the crime of genocide. The provisions of article 22 enabled States to indicate the categories of crimes referred to in article 20 in respect of which they would accept the jurisdiction of the court. Under article 23, the court had ipso jure jurisdiction in respect of the crimes referred to in article 20, subject to the determination of the Security Council, and no complaints directly related to an act of aggression could be brought before the court unless the Security Council had first determined that the State had committed an act of aggression.

3. The draft statute had followed a balanced and careful approach and, by focusing on national criminal jurisdiction and requiring the consent of the States actually concerned with the alleged crime, had given priority to the establishment of an international criminal jurisdiction in principle only, leaving the prosecution of the case to the State's own consent regime.

4. The draft statute contained two novel provisions, namely: the special power conferred on the Security Council, acting its powers under Chapter VII of the Charter (article 23 (1)), to refer crimes to the court; and the power of any State party to refer the crime of genocide to the court for investigation (article 25 (1)) and trial (article 20 (a)). The latter power was not sanctioned either by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide or under general international law, and some members had argued that the provision represented a development of international law. While there was universal agreement on the need to deal firmly with the crime of genocide, it was questionable whether precedents in law should be created which totally ignored or even violated existing treaty arrangements: a possible solution was, therefore, to amend the Convention on genocide.

5. While the statute did not deal exhaustively with all matters, it contained provisions on all relevant aspects, including the jurisdiction of the court, investigation of alleged crimes, methods of seeking judicial assistance from States and the rights of the accused. Due emphasis had been placed on the

consent regime of the States concerned as the basis for jurisdiction as well as on the principle of cooperation. In addition, the statute was inextricably linked with the draft Code of Crimes against the Peace and Security of Mankind currently under consideration by the International Law Commission, together with which it would form the basis for the establishment of a comprehensive international criminal justice system.

6. India believed that the draft articles required very careful consideration, and their adoption should not be rushed, particularly since the court would not in itself be effective in deterring serious crimes against international peace and security. A general debate on the issue should be pursued both within and outside the Organization before a formal decision could be taken on convening a conference of plenipotentiaries to adopt the statute.

7. Mr. STANCZYK (Poland) said that Poland had always supported the idea of a permanent mechanism for an international criminal jurisdiction, especially since so much energy was expended by the international community on the establishment of ad hoc mechanisms for the prosecution of those accused of international crimes, with a consequent risk of jurisprudential inconsistency. Before such a court became operational, however, certain complex issues remained to be resolved.

8. Poland fully supported the basic principles on which such a court would come into existence, sharing the general consensus that its legal basis should be a multilateral treaty, that its jurisdiction should complement national jurisdiction in criminal matters and that it should sit when and as required. In addition, his delegation believed the court should have a close relationship with the United Nations, to ensure that it performed its judicial functions with universality, authority and effectiveness. In considering the options suggested in the ILC report for that relationship, States should bear in mind, at the legal level, the court's competence stemming from the action of the Security Council reflected in article 23 of the draft statute and, at the practical level, the modalities of financial support for the court.

9. While the scheme proposed by the Commission in its 1994 report (A/49/10) was a considerable improvement on earlier proposals, the central issue of the admissibility of crimes under general international law into the scope of the court's jurisdiction remained unresolved and would have to be closely considered in future debates on the issue. In view of the Commission's continuing doubts concerning the applicability of general international law relating to the submission of cases of genocide, he reiterated Poland's support for the proposal in the 1992 ILC report limiting the subject-matter jurisdiction of the court to crimes defined in treaties in force.

10. He noted the growing support for the view that the court's jurisdiction over genocide should be treated apart from other crimes enumerated in article 20, indicating that a proper balance had been struck between the current willingness of States to accept compulsory jurisdiction, and the need to ensure that the court could have "inherent" jurisdiction, limited to a small - but most abhorrent - area of its subject-matter jurisdiction. Since the draft statute

was not a source of substantive law, any criticism that article 41 failed to meet the requirements of nulla poena sine lege was invalid.

11. While it welcomed the modifications to article 37 and the formulation of the rule excluding trials in absentia as a principal rule, his delegation stressed the need for further consideration of paragraphs 4 and 5 of that article, to avoid any challenge based on international human rights instruments.

12. One solution to the problem faced by those States whose constitution had precedent over treaties, and which accordingly faced constraints in the adoption of the draft statute, was constitutional amendment. That remedy was neither simple nor universally available, however, and constitutional problems were therefore likely to cause such States to reject the statute, or at least to express reservations on it.

13. In view of the lack of consensus on the convening of an international conference of plenipotentiaries to adopt a convention, Poland believed that the sensible next step would be to establish an inter-sessional body, such as a preparatory committee, to consider various options in the provisions of the draft statute and, if possible, to make certain modifications. Provided that such a committee worked expeditiously and confined itself to building on the existing document, momentum would not be lost and the work could be finalized at a diplomatic conference in 1996.

14. Mr. BERMAN (United Kingdom) said that his Government gladly endorsed the two cardinal principles on the basis of which the Commission had operated in completing the draft, namely, that a permanent international criminal tribunal would have to be established by a treaty; and that the invocation of international jurisdiction should be a last resort when national jurisdiction was not or could not be effective. The essential purpose of an international criminal court was to fill a gap in the existing international order, not to undermine - and still less to displace - the primary responsibility of States to bring the perpetrators of the most serious offences to justice.

15. A point of major importance was the link between a new criminal court and the United Nations. There was no realistic prospect of bringing such a court within the Charter, as an organ of the United Nations as such. Besides, the United Nations already had a principal judicial organ, the International Court of Justice, and there should be no confusion between the two bodies, either in their role and functions or in their legal status. There was no doubt, however, that an international criminal court must have a relationship with the United Nations in order to lend it the authority it would need. The Committee would have to reflect on the various illustrative models offered by the Commission. For example, the court's judicial independence could not be compromised by making it subservient to a political body.

16. Consideration also needed to be given to the internal links between such a court and the United Nations at the functional level. One such link was the method of the court's financing. Three further internal links, all with the Security Council, and all having a direct connection either with the court's

jurisdiction or with the conduct of its judicial function, were established in article 23. Those issues were of fundamental importance both for the role and prerogatives of the Security Council under the Charter and for the preservation of the integrity of the judicial process.

17. Another set of issues related to resources - personal, material and financial. Experience with the International Tribunal for the former Yugoslavia, established under Security Council resolution 827 (1993), pointed to some problems in that regard and could suggest some solutions. Many questions were interconnected; for example, the demands on scarce resources for prosecutions and especially for investigations were dependent on the scope and reach of the court's jurisdiction. The Commission had made an ingenious proposal, in article 10, for the transition from a part-time to a full-time court if the need for its punitive function should turn out to be greater than the deterrent effect of its mere existence. However, major demands on resources came from investigation and prosecution (and subsequent punishment), not from adjudication as such. Governments were entitled to know what to expect; his delegation therefore hoped that a first attempt at budgetary estimating would be built into the preparatory process and that the secretariat would be tasked accordingly.

18. The United Kingdom supported the proposal that a process should be established for intensive inter-sessional consultations to prepare for decisions by the General Assembly regarding the convening of an international conference of plenipotentiaries. There seemed to be widespread agreement that some such process was needed; there should not be undue difficulty in finding a formula which would respect the wish of some for rapid results and the general feeling that issues remained to be discussed among Governments that were not within the remit of the Commission as a body of independent experts. A decision should be taken at the fiftieth session. That would also allow an opportunity to learn from the practical experience of the International Tribunal for the former Yugoslavia, and possibly of the tribunal to be established for Rwanda; his delegation hoped that representatives of those tribunals would be associated with the Committee's inter-sessional work.

19. His delegation remained unconvinced about what had been said in the Commission and in the Committee on the relationship between the draft Code of Crimes against the Peace and Security of Mankind and the international criminal court. It could not see any prospect of agreement being reached on a draft code or that the proper functioning of an international criminal court would depend on one.

20. Mr. RIDRUEJO (Spain) said that the establishment of an international criminal court was widely regarded by world public opinion as a vital ethical, legal and political necessity, not only because such a court would make it possible to remedy the consequences of international crimes but also because its mere existence would have a deterrent effect. The tragic events that were currently taking place in some regions of the world demonstrated that neither the principle of universal criminal jurisdiction embodied in some legislations nor the mechanisms of international judicial cooperation were sufficient to

punish the perpetrators of international crimes. The international community could not be insensitive to the pernicious effects of that situation of impunity.

21. Spain continued to be in favour of the earliest possible establishment of an international criminal court and, in general, supported the draft statute. It fully agreed with article 4, whereby the court would be a permanent body, but meetings would be held only when necessary, and with article 17, whereby the judges would not be required to serve on a full-time basis. That flexible and cost-effective approach seemed the most appropriate for the early establishment of the court, without prejudice to the possibility of determining at a later stage that the judges would serve on a full-time basis, as envisaged in article 17, paragraph 4.

22. The question of relations between the court and the United Nations had not been resolved in a satisfactory manner. It was not sufficient to allow the President, with the approval of the States parties, to conclude an agreement establishing an appropriate relationship between the court and the United Nations (article 2). It must be expressly established that the court would act with the authority and representativity of the United Nations; that idea must be duly reflected in the preamble.

23. On the question of the jurisdiction of the court, his delegation still felt that the ideal would be for the court to have binding jurisdiction, and its preference was for a system of exclusion or "opting out". However, it was aware that the articles proposed by the Commission were more realistic because they would remove some of the obstacles in the way of the early establishment of the court. His delegation supported the provision contained in article 23, under which the Security Council, acting under Chapter VII of the Charter of the United Nations, could refer matters to the court. That assumed a situation, for which there were precedents, of imposed jurisdiction, or breakdown of the principle of voluntary jurisdiction.

24. On the question of trial in absentia, his delegation felt that article 37 contained a balanced formula which was much more elaborate than that proposed in the previous year. However, it was still dissatisfied with article 47, on applicable penalties, which, it felt, did not duly respect the principle of nulla poena sine previa lege laid down in article 15, paragraph 1, of the International Covenant on Civil and Political Rights. Although it was provided in article 47, paragraph 2, that in determining the length of a term of imprisonment, the court could have regard to the penalties provided for by national law, that stipulation did not exclude the possibility of imposing on the accused a penalty that was heavier than the one that was applicable at the time when the criminal offence was committed. The court must be required to refer to national law, in order to avoid that situation. In the previous year his delegation had made a specific proposal to that effect.

25. On the delicate problem of determining the necessary number of ratifications or accessions for the convention to enter into force and for such a court to be established, his delegation reiterated its opinion that an

excessively low number of acceptances would deprive the court of the necessary representativity and authority to act on behalf of the international community, but that an excessively high number could cause undue delay in its establishment. A balanced solution would have to be found, perhaps in setting the number somewhere between one third and one quarter of the Member States of the United Nations.

26. On the question of convening an international conference of plenipotentiaries, his delegation believed that the evolution of events and the dynamics of world public opinion provided adequate momentum at the current session to convene such a conference, and that 1995, when the fiftieth anniversary of the United Nations would be celebrated, was the appropriate year to hold the conference. That would be an excellent contribution to the United Nations Decade of International Law. In order to allay the misgivings of some States, it should be noted that the commitments to be undertaken would be flexible, since the judges would not work full time and the jurisdiction of the court would not be binding; those factors would reduce expenses. However, if a significant number of delegations preferred to allow more time to consider the draft statute and ensure that there was sufficient agreement on it before convening the conference, his delegation would not oppose such an initiative, provided that the period of study had a reasonable time-limit and was motivated by a desire to establish the best possible international criminal court and not to delay and obstruct its establishment.

27. Mr. RAINERI (France) said that events had confirmed the tragic urgency of the matters under consideration. The International Tribunal for the Former Yugoslavia was certainly a precursor of a permanent international court. The International Tribunal would probably not have been established so rapidly if the Security Council had not be able to draw on the work of the International Law Commission. At the same time, some first lessons could be drawn. For example, article 19 of the draft statute under consideration (A/49/355), which provided that the Rules of Court should be submitted to a conference of States parties for approval, was greatly improved. The need for that provision was apparent from the case of the International Tribunal; States which had already adapted their domestic legislation to the establishment of that Tribunal or were currently doing so, like France, would have found difficulty in bringing their domestic law into line with rules of procedure which had already been changed several times since their adoption.

28. On the question of the establishment of the court, most members of the Commission had supported having recourse to a convention, and his delegation was pleased that the draft statute endorsed that solution. The drawbacks of that method could not be overlooked, but, in the current state of law, it was difficult to find an alternative for an institution that would be permanent in nature. Recourse to the General Assembly would not be satisfactory, since General Assembly resolutions did not impose binding legal obligations on States, and one resolution could be superseded by another. Thus, neither the authority of the institution, nor its durability, would be ensured. Other methods of establishment would be considerably more complex and the results would be uncertain.

29. The links between the court and the United Nations were an essential aspect, to which more consideration needed to be given. A number of approaches had been developed by the Working Group which deserved further study; however, article 2, which provided that the President could conclude an agreement establishing an appropriate relationship between the court and the United Nations, covered all the options. The question could not be resolved finally at the current stage, since it was linked to the nature of the court, which was one of the most controversial aspects. The preamble referred both to "the most serious crimes of concern to the international community as a whole" and to cases of non-availability of national trial procedures. That proposal had some advantages, including that of limiting the jurisdiction of the court to certain types of the most serious crimes, although it would subsequently have to be determined what crimes were envisaged. The concept of "crimes of international concern" required some clarification. It would also have to be determined who would decide that national trial procedures were unavailable or ineffective, and whether the intervention of the court would be limited only to such situations. Additional work would be required on the draft statute to find a formulation that would be less ambiguous than a mere allusion in the preamble.

30. Turning to part 2 of the draft statute, he said that the election of two separate groups of judges on the basis of their professional qualifications was too rigid and would establish an unjustified system of quotas. Such a solution had no precedent among existing international courts.

31. The question of the jurisdiction ratione materiae of the court was extremely complex and merited a cautious approach. Article 20 of the draft statute established the jurisdiction of the court over certain crimes, such as genocide, which were universally condemned and over crimes of international concern. That latter category had not been precisely defined and required further consideration. In that connection, his delegation continued to find unsatisfactory the draft Code of Crimes against the Peace and Security of Mankind. New developments relating to the draft Code had not caused his Government to modify its basic position.

32. By combining in a single article (article 20) certain essential provisions pertaining to the jurisdiction of the court, the draft statute had gained in clarity and rigour compared to the 1993 version. His delegation also appreciated that all references to the peremptory rules of international law had been eliminated. It had emphasized in previous years the disadvantages of referring to unwritten sources of law as the basis for indictment.

33. Article 20, as it currently stood, had two flaws. First, the crimes referred to under that article were listed without any reference to the international instruments in which they were defined. The Statute of the International Tribunal for the former Yugoslavia had adopted a different approach which, while not a definitive solution, was more rigorous: it made reference to a specific instrument or defined certain crimes on the basis of treaty law. Specifying the exact nature of the crime was a fundamental element of criminal law and should be incorporated into article 20. Secondly, the reference in article 20 (b) to the crime of aggression might give rise to

considerable difficulties: aggression was not defined under any treaty and, notwithstanding the views of the Working Group, it concerned States and Governments rather than individuals. Article 23 of the draft statute specified that the Security Council was the competent body to determine whether an act of aggression had been committed; yet, it was not clear how an act for which a State was responsible could be transformed into an act for which one or more individuals was responsible.

34. The list of crimes pursuant to treaties found in the annex, was too long and, in any case debateable. Giving the court such wide jurisdiction might, at least initially, undermine its ability to fulfil its functions at a time when crimes such as genocide and other serious violations of humanitarian law were going unpunished. In any event, the competence of the court was a subject on which it would be difficult to arrive at a consensus. For that reason, it was important to maintain the element of flexibility which permitted States to accept the jurisdiction of the court over all or part of the crimes referred to in its statute. His delegation was strongly in favour of such an "opting-in" system, as it was presented in the current version of the draft statute. In that connection, he recalled that even in the case of genocide, article 6 of the 1948 Geneva Convention provided for a choice between national courts and a criminal court, the jurisdiction of which would be limited to those States which had accepted it.

35. With regard to procedural issues, the new version of the statute had taken due account of the views of States and was consequently more clear and coherent than previous versions. Article 33 (Applicable law) had been transferred from part 3 to part 5. That did not, however, resolve all the problems arising from the text of article 33, which had not been modified. The article provided that the court should apply the statute, applicable treaties, and the principles and rules of general international law. Thus the court would be applying customary law of a too general and too imprecise nature for it to be applied systematically. If the purpose of the article was to set forth general principles of law in the area of criminal procedure, that should have been expressly stated. The mention in article 33 to rules of national law was important, according to the commentary, because some treaties which had been included in the annex explicitly envisaged that the crimes to which the treaty referred were none the less crimes under national law. If the purpose of the article was to emphasize the issue of double jeopardy, that should have been made more explicit.

36. Another important procedural issue pertained to the powers of the Procuracy. Like some members of the Commission, his country was not in favour of the system under which the Prosecutor was responsible for both the investigation and prosecution of an alleged crime.

37. His Government continued to endorse the possibility of contumacious judgements and welcomed the fact that it had been incorporated into article 37 of the statute. The article as a whole provided enough guarantees to reassure those States which were unfamiliar with the system of trials <u>in absentia</u>.

38. The draft statute did not, on the whole, contain any irreparable defects. It was an excellent text which had the merit of proposing solutions to issues which had been the subject of extensive debate. The time had come to move forward and, in that connection, his Government endorsed the convening of a conference of plenipotentiaries and hoped that a decision in that respect would be taken at the current session of the General Assembly. However, if it appeared that there was inadequate support for the convention, it would be best to postpone the decision until the following year.

39. Mr. VAN BOHEMEN (New Zealand) said that his Government strongly endorsed the establishment of an international criminal court, which was vital for the effective suppression and prosecution of crimes of international concern. Recent atrocities had underscored the need for a universal judicial body to bring perpetrators of international crimes to justice.

40. It was ironic that at that very moment the Security Council, which had established the International Tribunal for the former Yugoslavia the previous year, was currently considering whether to establish a second ad hoc tribunal to deal with the serious crimes committed in Rwanda. The fact that the Security Council had taken steps to establish two ad hoc bodies of that nature was dramatic evidence that the international community wished to ensure that the perpetrators of serious international crimes were brought to justice. At the same time, establishing ad hoc tribunals was a difficult process and might give rise to inconsistencies in the elaboration and application of international criminal law. It would be far better for the international community to have recourse to a single international criminal court.

41. With the draft statute, the international community was able for the first time to appreciate fully the legal and political issues arising in connection with the establishment of an international criminal court. The International Law Commission had performed an invaluable service by clearing away many of the conceptual and procedural difficulties that had clouded earlier considerations of the subject. The draft statute, as it currently stood, represented on the whole a careful balance of the various interests of Member States.

42. Article 2 left open the issue of the specific nature of the relationship of the court to the United Nations. Such an approach had the merit of flexibility; however, it was ultimately unsatisfactory to leave that important question unresolved.

43. Article 6 was a great improvement on the earlier version. He welcomed the fact that the term of office for judges had been reduced from 12 to 9 years, thereby bringing the draft statute into line with equivalent provisions contained in the Statute of the International Court of Justice and in those of the ad hoc tribunals established or under consideration by the Security Council.

44. In respect of article 20, his Government welcomed the fact that torture had been added to the list of crimes pursuant to treaties, contained in the annex, and that serious violations of the laws and customs applicable in armed conflict had been added to the list of crimes within the jurisdiction of the court.

45. With regard to article 22, his Government had earlier favoured the "opting-out" system for accepting jurisdiction as an approach which would lead to a solid and certain jurisdictional basis for the court. It did, however, concede that the currently proposed "opting-in" approach would at least have the advantage of encouraging a greater number of States to become parties to the statute.

46. With regard to article 37, his country had in the past been opposed to the possibility of trials in absentia. It welcomed the general rule set forth in article 37 (1) that the accused should be present during the trial. It would not comment on the rest of the article until it had had time for further consideration of that matter.

47. Generally speaking, there was need for further reflection before a convention on the establishment of an international criminal court could be finalized and adopted. His Government was in favour of the convening of a conference of plenipotentiaries for the purpose of elaborating and adopting such a convention and felt that a decision on that matter should be taken at the current session of the General Assembly.

48. In his view, the conference should be convened in 1996. It would also be advisable to set up a consultation process prior to the conference so that States could exchange views on the draft articles and, to the extent possible, eliminate any remaining areas of difficulty. Although still open to other ideas, his Government endorsed the suggestion that an ad hoc committee on the matter might meet between the forty-ninth and fiftieth sessions of the General Assembly.

49. The entire set of procedural questions should be resolved in a manner which would encourage consensus and ensure the greatest support possible for the establishment of an international criminal court.

50. Ms. SKRK (Slovenia) noted with satisfaction that in its work on the draft statute for an international criminal court, the Commission had taken into consideration comments made by her delegation, which had always supported the establishment of such a court. As it currently stood, the draft statute provided a sound basis for convening a diplomatic conference to finalize and adopt a convention. The establishment of a permanent criminal court would be a landmark in relations between States and an invaluable contribution to strengthening international cooperation in dealing with crimes of an international character, a step which was essential to international peace and security.

51. Slovenia favoured an agreement between the court and the United Nations along the lines of that envisaged for the International Tribunal of the Law of the Sea. That approach would obviate the need to amend the Charter and would best preserve the independence of the future court.

52. The preamble to the draft statute represented a significant improvement over the 1993 version. Particularly noteworthy was the third preambular

paragraph, which emphasized that the court was intended to be complementary, rather than superior, to national criminal justice systems.

53. Part 2 of the draft statute had also been improved. Her delegation endorsed the composition of the court, including the establishment of the Procuracy as an independent organ (article 12 (1)). However, in order to maintain its autonomy, the Procuracy should be governed by its own internal rules, rather than being subject to Staff Regulations being drawn up by the Prosecutor, as currently envisaged under paragraph 7 of article 12.

54. Part 3 was the core of the draft statute. Article 20, by dividing the crimes over which the court had jurisdiction into crimes under general international law and crimes pursuant to treaties, raised some questions that would require further consideration. For example, the fact that the four 1949 Geneva Conventions were listed in the annex under the heading of crimes pursuant to treaties might be misleading. In that regard, her delegation endorsed the position of the Secretary-General that the Conventions embodied the law applicable in armed conflict, which had clearly become part of international customary law. It was also unfortunate that crimes associated with domestic armed conflicts, which were notorious for their brutality and for violating the most basic humanitarian laws, had not been explicitly mentioned as falling within the jurisdiction of the court. It was noteworthy in that connection that under article 5 of its Statute, the International Tribunal for the former Yugoslavia had the power to prosecute persons responsible for crimes against humanity when committed in armed conflict, whether international or internal in character.

55. Her delegation welcomed the fact that, as it and others had proposed earlier, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment had been incorporated into the list of treaties referred to in article 20 of the draft statute.

56. One of the innovations of the draft statute was that it gave the court inherent jurisdiction over the crime of genocide, based on article VI of the 1948 Convention on Genocide. The statute also introduced, in article 22, the "opting-in" system, under which States could accept the jurisdiction of the court in respect of the crimes referred to in article 20. Yet under such a system, a State which was party to the Convention on Genocide and which had ratified the statute of the court did not accept ipso facto its jurisdiction over the crime of genocide. Thus the statute remained ambiguous with regard to the court's "inherent" jurisdiction over the crime of genocide.

57. Her delegation considered that part 4, relating to investigation and prosecution, had been improved and provided a firm basis for the functioning of future international criminal proceedings, although some details remained to be fine-tuned. It also approved of the new rules on applicable law contained in draft article 33, which would ensure the preservation of the nullum crimen sine lege principle.

58. The draft statute contained no provisions on statutory limitations or on their non-applicability. Yet if a permanent international criminal court was to become a reality, the court's jurisdiction ratione temporis would have to be determined in order to preserve the principle of legal safety. She reminded the committee that the crimes listed in anti-terrorist conventions, over which the court had jurisdiction, were outside the category of war crimes and crimes against humanity, for which the non-applicability of statutory limitations was prescribed by the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity and by the domestic criminal legislation of many States, including that of Slovenia. Naturally the court would have jurisdiction ratione personae over natural persons on the basis of their individual criminal responsibility, but no general rules on the matter had been formulated. That was a deficiency, given that the Statute of the International Tribunal for the former Yugoslavia contained provisions regarding personal jurisdiction and individual criminal responsibility, including the responsibility of government officials and responsibility for crimes committed by order of a superior.

59. The provisions regarding trials in absentia had been improved in the new draft: the proposed rules on trial in the presence of the accused and the rights of the accused (articles 37 and 41) were basically acceptable to her delegation. In Slovenia trials in absentia were permitted in exceptional circumstances, if the accused intentionally avoided standing trial and gave pre-trial testimony. It was not, however, permitted in the case of a juvenile perpetrator of a criminal act. She also noted that although her delegation was aware that a fundamental element of an efficient international judicial system was the ability to bring the accused to court, the Slovenian Constitution forbade the extradition of its citizens.

60. She noted with satisfaction that draft article 47 on applicable penalties had been improved by the addition of a provision for imprisonment for a specified number of years as well as for life imprisonment. In her country capital punishment was prohibited and the maximum term of imprisonment was 20 years. Lastly, her delegation shared the view that there was a need to establish a permanent international criminal court and that an international conference of plenipotentiaries should be convened.

61. Ms. FERNANDEZ (Argentina) expressed her delegation's satisfaction that the Commission had completed its work on two issues of great importance for her country, the law of the non-navigational uses of international watercourses and the establishment of an international criminal court, whose permanent establishment she considered essential as a complement to national efforts to punish the most serious crimes against humanity. The draft statute was a significant improvement on the earlier version.

62. Her delegation felt, however, that some major aspects of the draft statute required further reflection and discussion, including the court's jurisdiction in respect of the crime of aggression, the court's supervision of the rights of the accused at every stage of the trial and of those convicted at the enforcement of sentences stage, and the implementation of the court's decisions

in the territory of States. For that reason, Argentina believed that it was probably premature to call a conference of plenipotentiaries for 1995. In that year, a further period should be set aside for consideration of the matter by a preparatory committee for such a conference, which could then be held in 1996. As for the status of the court, Argentina considered that the most realistic approach would be to establish it through an international treaty. It would not, at least initially, be an organ of the United Nations, but closely linked with it.

63. Mr. GONZALEZ FELIX (Mexico) said that the forty-sixth session of the Commission had been particularly fruitful, as was shown by the significant advances made in considering various items on its agenda and its success in responding to the expectations of the international community. Thus, the draft statute for an international criminal court, which was balanced and realistic, took account of the concerns expressed at the forty-eighth General Assembly.

64. The example of the International Tribunal for the former Yugoslavia, and the proposal regarding a special tribunal for Rwanda, had shown the need for a permanent court to try those responsible for crimes against humanity, meeting the concerns and needs of the international community as a whole. The rule of law would not be best served by ad hoc mechanisms. The court must enjoy full legitimacy, and for that reason his delegation believed that it must be set up on the basis of an international treaty.

65. Three issues were of particular concern to his country: the court's relationship to the United Nations, its jurisdiction and the convening of a conference of plenipotentiaries. With regard to the first, he reiterated that his country favoured an organ that would be impartial and fully independent, although necessarily linked with the United Nations through a special cooperation and coordination agreement. His country found the formulation of draft article 2 acceptable; the relationship of the court to the United Nations should be modelled on that between the United Nations and the International Tribunal for the Law of the Sea. As for jurisdiction, his delegation shared Brazil's concern that the definition of the crimes to be tried by an international court was not sufficiently precise to guarantee full respect for the basic principles of criminal law, nullum crimen sine lege, nulla poena sine lege. Only crimes of undoubted gravity should fall within the court's jurisdiction. Moreover, its jurisdiction should be complementary to that of States, not a substitute. It should have jurisdiction only over serious crimes such as genocide, aggression and serious violations of the laws and customs applicable in armed conflict, on those occasions when an international court was seen as the best way of dealing with them.

66. It was a matter of priority to set up the court. An international conference of plenipotentiaries was required to ensure intense preparation of the draft statute. With its wide experience, the Committee should set up an open-ended working group to analyse and make recommendations on specific aspects of an international criminal court.

67. Mr. ZHU (China) said that, in view of the seriousness of the international offences covered by the draft Code of Crimes against the Peace and Security of Mankind and the fact that the purpose of the proposed international criminal court was to strengthen international cooperation in dealing with such offences, the offences listed in the draft Code must be placed under the jurisdiction ratione materiae of the court. The Commission had rightly decided that a special mechanism should be set up to harmonize the statute for an international criminal court with the provisions of the draft Code.

68. The concrete proposals concerning the general part of the draft Code made by the Special Rapporteur on the basis of the written opinions of various countries seemed to the point and reasonable. A definition and enumeration of offences, for example, would make article 1 more acceptable. He also felt that deletion of article 4, as suggested by the Special Rapporteur, should be considered. Some complex legal and technical questions, however, needed further study, such as the concept of "attempt" in article 3. Differences also existed concerning the appropriateness of the provisions on the principle of non bis in idem, which might need to be brought into line with the statute of the international criminal court. He hoped that the Commission would study those issues fully at its next regular session.

69. Ms. KUPCHINA (Belarus) congratulated the Commission on its success in completing its work on the law of the non-navigational uses of international watercourses and on the draft statute of an international criminal court, the establishment of which Belarus warmly supported. Her country had made numerous representations in favour of such a court. Many of the draft statutes were an improvement on the earlier version, while others required further consideration and possible amendment. Belarus fully supported the sentiments of the preamble, which stated that such a court was intended to be complementary to national criminal justice systems and existing procedures for international cooperation in criminal matters and was not intended to exclude the existing jurisdiction of national courts.

70. She also welcomed part 1 of the draft statute, particularly article 2, providing for an agreement establishing an appropriate relationship between the court and the United Nations. Such an agreement should be approved by Member States, yet what procedure would be used to obtain such approval was unclear. It was desirable that it should be properly defined by the time the statute was adopted. In her country’s view the court should, as stated in article 4, be a permanent institution, but acting only when required to consider a case.

71. Turning to part 2, she said that article 6 required further discussion, since the requirement for judges to have either criminal trial experience or recognized competence in international law would inevitably lead to the grading of judges, and difficulties were bound to arise, particularly if judges were challenged. She preferred the approach of article 13 of the Statute of the International Tribunal for the former Yugoslavia. Judges of the international court should meet requirements of experience in both criminal and international humanitarian law.

72. As others had stated, the core of the draft statute lay in part 3, dealing with the jurisdiction of the court. She welcomed the fact that the new draft article 20 listed the specific crimes with respect to which the court had jurisdiction. It was particularly to be welcomed that the court should have inherent jurisdiction over the crime of genocide. With regard to article 21, 1 (b), Belarus would have preferred to retain the provisions of article 24 of the 1993 draft statute, under which the court could exercise its jurisdiction if it was accepted by the State which had custody of the accused in the case of a given crime, apart from the exceptions indicated in draft article 23. She particularly supported paragraph 1 of that article, which allowed the Security Council to have recourse to the court as an alternative to establishing ad hoc tribunals.

73. With regard to part 4, her country questioned the appropriateness of providing, under article 29, for a person arrested to have the possibility of release on bail, given the gravity of the crimes concerned. As for part 5, she believed that article 33 (c), relating to the application of any rule of national law "to the extent applicable" needed to be worded more precisely. Similarly, the phrase "any interested State" in article 34 (a) was too vague. All States with jurisdiction in relation to a given crime should be able to challenge the jurisdiction of the court. With regard to draft article 37, she was glad to note the emphasis on the presence of the accused and on the exceptional nature of circumstances in which the trial could proceed in the absence of the accused. As for draft article 42, she stressed the need for more work on the wording of paragraph 2, particularly the phrases "ordinary crime" and "not diligently prosecuted".

74. Belarus shared the Commission’s view that an international conference of plenipotentiaries should be convened to study the draft statute and to conclude a convention on establishing the court. Preparatory work was needed, however, during which the draft statute could be discussed, taking into account the conclusions of legal experts, and the financial aspects of the court could be examined. As many States as possible should naturally participate in formulating the convention if the court was to be an effective international body. Lastly, she expressed her country’s support for the need to adopt the draft Code of Crimes against the Peace and Security of Mankind. Work on the draft Code should be concluded with the utmost speed.

75. Mr. SZENASI (Hungary) said that his delegation agreed with the priority accorded by the Commission to the elaboration of the draft statute for an international criminal court, which, it felt, would warn perpetrators of war crimes that they would be relentlessly prosecuted and severely punished.

76. Because the establishment of such a court would require changes in national legislation and legal practice, the question had given rise to much controversy. His delegation felt that the Commission had made the right decisions on the basic issues. His Government had emphasized, for example, that establishing the court on a consensual basis, hence by a treaty, was the only way to guarantee its legitimacy. His delegation also welcomed the decision to dispense with the

term "tribunal" and use the term "court" for the entity as a whole, designating its particular organs by specific names.

77. There must be a close relationship between the court and the United Nations in order for the court to function effectively. With regard to substantive aspects, his delegation agreed that the Security Council should have the sole authority to submit complaints to the court, whose jurisdiction could not depend on the consent of an individual State or States. For political and administrative purposes, too, such a close relationship was essential.

78. As to the manner of establishing that relationship, his delegation preferred the conclusion of an agreement pursuant to article 2, as outlined in part B, I, of appendix III to the draft statute. The precedents mentioned there should be studied carefully and possibly taken into account during the finalization of the treaty.

79. Hungary agreed in general with the draft provisions on the composition and administration of the court, in particular those of article 6 concerning the election of judges. Further refinements were needed, however, regarding the administration of the court as a "semi-permanent" body. While accepting the compromise between a permanent and an ad hoc court reflected in article 4, Hungary was sensitive to the dangers to the stability and independence of a court established as a semi-permanent body. It therefore considered that more safeguards guaranteeing the independence of the court and its personnel might be required in the rules. It agreed, moreover, that those rules should be included in the treaty, not adopted by the judges.

80. The inclusion of a fifth category of crimes established under specified treaty provisions (article 20, (e) of the draft statute) was an important addition. His delegation generally agreed with the list of treaties given in the annex and with the explanation given in the related commentary as to why some treaties had not been included, but felt uneasy about the exclusion of a few important instruments, in particular the Convention for the Protection of Cultural Property in the Event of Armed Conflict and Protocol II Additional to the Geneva Conventions of 1949 and relating to the Protection of Victims of International Armed Conflicts. Despite the fact that they contained neither clauses dealing with grave crimes nor enforcement provisions, they were being increasingly considered as part of international humanitarian law. The list of applicable treaties should therefore be further examined, a process that might also result in the elimination of some treaties from the current list.

81. His delegation considered that more time for reflection was still required before a conference of plenipotentiaries could be convened. It supported the setting up of a preparatory committee or an ad hoc working group to make the necessary changes in the draft statute and submit proposals at the next session of the General Assembly on the convocation of such a conference. It also noted with satisfaction the progress made on the draft Code of Crimes Against the Peace and Security of Mankind.

AGENDA ITEM 108: PROGRAMME PLANNING

82. The CHAIRMAN informed the Committee that he had received a letter from the Chairman of the Fifth Committee, which stated that the Committee for Programme and Coordination had noted that a number of proposed revisions to the medium-term plan for the period 1992-1997 had not been presented to the relevant sectoral and/or functional bodies concerned. It had stressed the need for all proposed revisions to be submitted to the relevant Main Committees of the General Assembly. In that connection, it had invited the Chairmen of the Main Committees to ensure that their programme of work was organized in such a manner as to facilitate their consideration of the proposed revisions prior to the consideration of the item by the Fifth Committee. He requested the Chairman to arrange that the Committee's views on proposed revisions were communicated to the Fifth Committee as soon as possible. It appeared, however, from the report of the Committee for Programme and Coordination (A/49/16 (part II)) that no revisions had been proposed to the programmes of the medium-term plan which might be of relevance to the Sixth Committee, and he therefore suggested that he should inform the Chairman of the Fifth Committee that the Sixth Committee had no views to offer on the matter.

83. It was so decided.

The meeting rose at 6 p.m.