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Chairman: Mrs. FLORES (Uruguay)

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The meeting was called to order at 10.25 a.m.

AGENDA ITEM 143: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-FIFTH SESSION (continued) (A/48/10, A/48/303 and A/48/170-S/25801)

1. Mr. MULLER (Germany) endorsed the statement by the representative of Belgium, on behalf of the European Community, on the establishment of an international criminal court. General Assembly resolution 47/33, requesting the International Law Commission to undertake the elaboration of a draft statute for an international criminal court as a matter of priority, had marked a turning-point in efforts to establish such a tribunal.

2. The Commission's report proved convincingly that the difficulties in establishing an international criminal court could be overcome. Furthermore, the establishment of such a court was a political necessity which did not lend itself to further delay. On 25 May 1993, the Security Council, acting under Chapter VII of the Charter of the United Nations, had decided by resolution 827 (1993) to establish an international tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. The establishment of that ad hoc tribunal had a number of political implications. First, it allowed for the prosecution of international crimes which, in the absence of such a tribunal, might give rise to threats against international peace and security. Second, the establishment of the tribunal underlined the urgent need for a mechanism to prevent such situations from building up. Third, the process of establishing the ad hoc tribunal underscored the need for a permanent court. Although the Legal Office and the Security Council had acted with admirable efficiency and speed, the ad hoc tribunal for the former Yugoslavia would not open its proceedings for some time. Germany welcomed the establishment of the ad hoc tribunal but felt that it would be a mistake to assume that emergency measures such as those contained in Security Council resolution 827 (1993) provided an answer to the underlying problem: the general lack of prosecution of international crimes. That lacuna needed to be filled by a permanent tribunal, which would not need to meet all the time but could be convened when necessary.

3. Turning to chapter II of the Commission's report, he wondered whether the future tribunal could be regarded as a judicial organ of the United Nations. The reply would obviously be affirmative if it were possible to establish the tribunal under the Charter of the United Nations, but if not, an appropriate treaty would have to be elaborated. In the course of discussions in the International Law Commission, it had been suggested that Articles 22 and 29 of the Charter of the United Nations might provide a legal basis for the permanent tribunal. In his Government's view, however, the Charter would probably not support such a proposal, and it would be preferable to conclude a convention. The German Government would not argue against the tribunal's being as closely linked to the United Nations as the International Court of Justice. In theory, such a linkage would best serve the common objective of attributing a truly universal role to the future tribunal. It might, however, be impractical to envisage an amendment to the Charter to make the tribunal a judicial organ of the United Nations, and the establishment of the tribunal by a separate treaty did not have to imply a separation from the United Nations system. In fact, as

(Mr. Muller, Germany)

was apparent from the draft statute, there were various ways of linking the tribunal to the main organs of the United Nations. Article 25 of the draft statute, for example, would give the Security Council the right to refer cases to the future court.

4. Articles 22 and 26 of the draft statute contained criteria for jurisdiction. First, the court would have jurisdiction over the crimes defined in international treaties as set forth in article 22. The treaties listed in article 22 covered most of the crimes which called for international prosecution. It was somewhat surprising, however, that the crime of torture as defined in article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was not included in the list. Second, the court would be competent to try crimes under general international law as stipulated in article 26 (2) (a) of the draft statute. The German Government shared the Working Group's concern that the prosecution of certain crimes which were outlawed by international customary law but not covered by article 22 might be excluded from the jurisdiction of the court. However, the principle nullum crimen sine lege required clarity and precision in the definition of crimes in the statute, an aspect which was perhaps not sufficiently taken into account in the present wording. Third, the court would have jurisdiction over crimes under national law giving effect to international obligations as defined in article 26 (2) (b) of the draft statute. His delegation doubted whether observance of the principle nullum crimen sine lege seemed to be warranted in that case.

5. Turning to the draft Code of Crimes against the Peace and Security of Mankind, he said that his delegation agreed with the approach taken in the draft statute, which separated the establishment of the tribunal from the finalization and entry into force of the draft Code. However, that approach should not distract attention from the preparation of the Code of Crimes. Articles 23, 24 and 26 of the draft statute, on acceptance by States of the jurisdiction of the court, enabled States to become a party to the statute without actually implementing the court's decisions. Of course, those provisions reflected political realities, since Governments approached new avenues of international adjudication with considerable circumspection. However, the court would not be judging the behaviour of States, but of individuals. There was no reason to perceive the tribunal as being directed against the sovereignty of States, since it would be seeking to prevent individuals from escaping their responsibility for international crimes affecting the international community as a whole. Consequently, the provisions of the draft statute on not accepting the court's jurisdiction might appear overly circumspect and should be looked at more thoroughly at the following session of the International Law Commission.

6. Regarding the method to be adopted for completing the preparation of the draft statute, Germany supported the suggestions appearing in chapter II of the Commission's report, to the effect that Governments should be asked to submit written comments by 15 February 1994, in order to enable the Commission to complete the elaboration of the statute at its forty-sixth session in 1994.

7. Mr. TCHIVOUNDA (Gabon) said that mankind was entering a new stage of development in which sovereign States were fiercely resisting the strong trend towards solidarity permeating the international community. Since the goal of

(Mr. Tchivounda, Gabon)

international law was to be a catalyst for that movement, it should be unnecessary to ask whether the International Law Commission was in a position to propose a framework to the international community for helping it adapt to the new times. Yet, the question was a timely one, given the report of the International Law Commission on the work of its forty-fifth session, especially chapter II and the annex containing the report of the Working Group on a draft statute for an international criminal court.

8. The eleventh report of the Special Rapporteur, on which the Working Group had based itself in preparing the statute for an international criminal court, should have been included in the Commission's report to provide it with a basis for comparison. Although the draft statute as elaborated contained some useful elements, it did not represent the fulfilment of the mandate entrusted to the Commission by the General Assembly. A reading of the draft under review had left him somewhat perplexed. First, the International Law Commission had been restricted by the mandate entrusted to it by the General Assembly. It hardly bore repeating that the Sixth Committee had felt that the draft Code of Crimes against the Peace and Security of Mankind would not be viable unless there was machinery to guarantee that its provisions were implemented. Therefore, the draft statute for the court should have been linked to the draft Code of Crimes. However, the International Law Commission had prepared a draft statute for a court which would be entrusted with enforcing a series of conventions, without making sure that the court could be established in accordance with those conventions. The draft statute under review therefore represented the death of the draft Code at the hands of the Commission itself. Second, his delegation was astonished to see that the draft statute provided for the establishment of a tribunal whose operation would be dependent on the good will of States and whose freedom would be hampered by those same States and by the Security Council.

9. For his delegation, there was no validity to the argument that, if the court was set up under a statute, only the States parties to that statute would have obligations. The court would be a means of upholding international public order, which was why its constituent instrument would have an objective character and erga omnes effects. Moreover, the draft statute lacked principles capable of guiding the international community in the establishment of a new world order. Its narrow scope and lack of vision of the future were regrettable.

10. The role assigned by the International Law Commission to the Security Council in determining the jurisdiction ratione materiae of the court lacked a proper judicial basis. It should be noted that criminal judicial bodies applied instruments of general scope which defined the offences they were to try. That was the meaning of nullum crimen sine lege. However, there was no instrument of that kind which defined aggression and required States or empowered the Security Council unilaterally to define aggression as a criminal act. It was surely not possible, therefore, that in criminal proceedings a statement made by the Security Council with other purposes in mind could be considered applicable law. The International Law Commission had furthermore intended that, without amendment of the Charter, the Security Council should become an immense centre of international power, authorized to legislate and having the functions of a department of public prosecution.

(Mr. Tchivounda, Gabon)

11. For the reasons stated, the International Law Commission should reconsider the draft statute for an international criminal court and should introduce a new text which would better reflect the aspirations of the international community.

12. Mr. XU Guangjian (China) said that, as it had stated at the preceding session, his delegation had doubts about the necessity and the feasibility of establishing an international criminal court. It was nevertheless ready to contribute actively to a debate on the question.

13. The court should be of a permanent nature, which however should be distinct from that of the International Court of Justice, at least in the early stage of its development, since it would probably have a light caseload. When the statute was drawn up the need to keep down costs and encourage savings should be taken into account without, however, impairing the independence and impartiality of the court or the rights of the accused.

14. The court should be set up by means of a special international convention, leaving States to choose whether or not to accept the statute in the jurisdiction of the court. Article 2 of the draft statute provided for the possibility that the court might become a judicial organ of the United Nations, which would however entail amending the United Nations Charter and imposing on Member States automatic acceptance of the statute. His delegation therefore preferred the second alternative wording of the article, which would link the tribunal with the United Nations as provided for in the statute. The possibility of a special agreement between the court and the United Nations along the lines of Articles 57 and 63 of the Charter might also be studied.

15. The Court should not have general compulsory criminal jurisdiction, and its jurisdiction should be concurrent with or mutually complementary to national courts. It was essential to distinguish between acceptance of the statute and acceptance of the jurisdiction of the court. For that reason, his delegation was more inclined towards alternative A of draft article 23. In draft article 24, regarding the jurisdiction of the court in the light of draft article 22, reference was made mainly to consent to jurisdiction by the State on whose territory the suspect was found. In order to ensure a fair prosecution and trial, it was essential that such jurisdiction should receive the consent of both the State of which the suspect was a national and the State in which the alleged offence was committed.

16. The question of jurisdiction of ratione personae posed no problems, since it was incontestable that the jurisdiction of the court should be limited to individuals. As for jurisdiction ratione materiae, referred to in articles 22 and 26, the provisions were at variance with the principle nulla poena sine lege. The concept of "a crime under general international law" (art. 26 (2) (a)) was ambiguous and difficult for courts to determine. It should be made quite clear that provision referred in fact to certain offences defined in the draft Code of Crimes against the Peace and Security of Mankind, and that there was no reason to completely disconnect the draft statute from the draft Code. Initially, the court might exercise jurisdiction over other crimes, but, once the draft Code came into force, its provisions should fall within the court's jurisdiction ratione materiae. His delegation was willing to continue consultations with other delegations on the subject.

17. Mr. PASTOR RIDRUEJO (Spain) said that the establishment of an international criminal court was regarded as being imperative for the international community. His delegation fully supported the establishment of a permanent international criminal court, with general authority to prosecute international crimes. The draft statute which was under examination provided a sound basis for consideration by the General Assembly at its current session.

18. His Government having already stated that, initially at least, the drafting of a statute for an international criminal court should be approached with caution and flexibility, he was pleased to note that in general such had been the case. For example, although the draft statute provided for a permanent body, it assumed that the court would sit only when required to consider a case submitted to it, while the judges would be appointed on a part-time basis and would be paid a daily allowance for the period during which they performed their functions.

19. His delegation had previously maintained that the court should be established by means of a treaty approved within the framework of the United Nations, in order to be fully representative as well as to have the political and moral authority which the United Nations enjoyed. The draft statute had not resolved the question of the court's relationship to the United Nations. One proposed wording of article 2 made the court a judicial body of the United Nations, a provision which might be incompatible with Article 7 of the Charter. The second proposed wording left the question of the relationship between the court and the United Nations to be established by the statute itself, in which case the court would not enjoy the aforementioned degree of universality and authority. It was his delegation's opinion that the problem could be solved if the statute was adopted at a conference convened by the General Assembly of the United Nations and if the necessary references to the United Nations were made in its preamble.

20. With reference to jurisdiction ratione materiae, set forth in article 22 and supplemented in article 41 of the draft, the statute complied fully with the principle nullum crimen sine lege and in its articles 22, 23 and 24 established that the jurisdiction of the court, the judicial body, would be optional. Such an approach was praiseworthy, since it was essential that jurisdiction should be accepted by the State which, under the relevant treaty, had jurisdiction to try and sentence a particular suspect. In the medium and long term, an authentically compulsory jurisdiction would be desirable. As specific wording for the acceptance by States of the jurisdiction of the court, article 23 proposed three alternatives. His delegation preferred alternative B, whereby a State, by becoming a party to the court's statute, would automatically confer jurisdiction on the court over the crimes listed in article 22, although it would have the right to exclude some crimes from such jurisdiction by written declaration. Given that compulsory jurisdiction would be preferable, the aforementioned alternative was the one which best mitigated the optional nature of the jurisdiction of the court. Lastly, his delegation supported article 25, whereby the Court would have jurisdiction over cases submitted to it by the Security Council.

21. With respect to the issue of trials in absentia, Spain believed that the formula contained in the draft was balanced, in that it excluded such proceedings in principle, but allowed them if the court concluded that the

(Mr. Pastor Ridruejo, Spain)

absence of the accused was deliberate. In such instances, the court could reopen the case if the accused appeared at a later time, in order to safeguard his right to present a defence.

22. Another sensitive issue was the principle of the legality of penalties. Spain, a strong supporter of the exclusion of the death penalty, wished to point out that in principle draft article 53 concerning applicable penalties could be incompatible with article 15 of the International Covenant on Civil and Political Rights, which prohibited the imposition of a penalty heavier than the one that was applicable at the time when the criminal offence was committed. Draft article 53, paragraph 2, indicated that the chamber could have regard to the penalties provided for by the law of the State of which the perpetrator of the crime was a national, the State on whose territory the crime had been committed, or the State which had custody and jurisdiction over the accused. In Spain's view, the chamber not only could but should also consult such law, in order to avoid the imposition of a heavier penalty. Spain therefore proposed that the following should be added at the end of article 53 paragraph 2:

> "In no case may a penalty involving imprisonment of greater duration than that specified in any of the law referred to in subparagraphs (a), (b) and (c) or a fine exceeding that specified in any such law be imposed on the accused."

Obviously, the wording could be different.

23. Appeal and review should be permitted on the grounds laid down in the draft, and the right to lodge an appeal or apply for revision of a judgement should be granted not only to the accused but also to the prosecutor, in observance of the principle of the equality of the parties.

24. Mr. MOMTAZ (Islamic Republic of Iran) said that, with the drafting of the statute for an international criminal tribunal, the International Law Commission had reached a new and decisive stage.

25. With regard to the legal nature of the relationship between the tribunal and the United Nations, he said that, since the tribunal would be established by an international treaty, it would have its own legal personality and therefore could not be considered a subsidiary organ of the United Nations. His delegation thus favoured the second formula proposed for article 2. The statute should include a clause similar to that found in the constituent instruments of the specialized agencies of the United Nations system. The tribunal could enter into an agreement linking it to the United Nations under Article 57 of the Charter, which would be submitted for approval to the General Assembly. For that purpose, article 4, paragraph 2, of the draft statute should be changed in order expressly to give the tribunal the legal capacity to become a party to such an agreement with the United Nations or other international organizations.

26. For the smooth operation of the tribunal, the prosecutor, the deputy prosecutor and the registrar should hold office for the same term as the judges. The judges' term of office should be shorter, like that stipulated in the Statute of the International Court of Justice. Likewise, the prosecutor and

(Mr. Momtaz, (Islamic Republic of Iran)

deputy prosecutor should be elected by the States parties to the statute, with a view to their greater independence and impartiality.

27. He expressed reservations with respect to article 15 on removal of judges from office, since the qualifications they must possess in order to be appointed would mean that they could rarely be found guilty of misconduct or in serious breach of the statute. Nevertheless, it was justifiable to retain a provision concerning loss of office, and the preferable formulation would be that of article 18 of the Statute of the International Court of Justice, by virtue of which no member of the Court could be dismissed from office unless in the unanimous opinion of the other members he had ceased to fulfil the required conditions.

28. With reference to the jurisdiction of the court, jurisdiction ratione materiae must be based fundamentally on the draft Code of Crimes against the Peace and Security of Mankind, which defined with great precision some crimes not covered by the treaties in force. The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances should be added to the list in article 22.

29. The Working Group should adopt some general criteria for defining crimes of a truly international character, in such a way that the court could expand its jurisdiction as international criminal law developed. In that respect, the formulation adopted by the Commission as part of the draft articles on State responsibility appeared to be a good basis for reflection.

30. The court's jurisdiction ratione personae gave rise to major difficulties. A question of jurisdiction could arise not only between the various States that might have a legitimate interest in prosecuting a suspect, but especially if one of the States decided to bring a case before the court. In order to resolve that question of jurisdiction, it should be recalled that the idea of establishing an international criminal tribunal had arisen out of the desire to see that crimes of a certain degree of gravity were severely punished and did not go unpunished. To prevent a State in which a suspect of its nationality was present from opposing the jurisdiction of the court in order to avoid his punishment, it must be ensured that the State was prepared to try him before its own courts. In practice, the draft allowed the State to oppose trial before the court without providing any such guarantee. Furthermore, whatever the suspect's nationality, there was always a danger that States could remove suspects from the jurisdiction of the court for ideological or political reasons.

31. With respect to acceptance of the jurisdiction of the court, his delegation favoured alternative A for article 23, which better reflected the idea that acceptance of the statute was separate from acceptance of the court's jurisdiction, or that it should be based on a declaration very similar to an optional declaration of recognition of compulsory jurisdiction under article 36 of the Statute of the International Court of Justice. The jurisdiction of the court should be concurrent with that of national tribunals. It was not appropriate to establish compulsory and exclusive jurisdiction with respect to certain crimes, because that would be contrary to the relevant provisions of conventional law. In general, draft article 26 concerning special acceptance of

(Mr. Momtaz, (Islamic Republic of Iran)

jurisdiction by States in certain cases appeared to be acceptable, with the exception of the crimes covered in the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. Furthermore, States must be permitted to accept the jurisdiction of the court on an ad hoc basis. The court would intervene ex post facto when an offence covered in the statute of the tribunal was involved.

32. With respect to the jurisdiction of the court, his delegation believed that the Security Council, in view of its primary responsibility for the maintenance of international peace and security, should be able to refer cases to the court; articles 25 and 27 were thus justified. The General Assembly also should be able to refer cases to the court, since it had specific jurisdiction in respect of the maintenance of international peace and security. That question should be examined in greater detail.

33. The requirements for complaints laid down in article 29 were fully justified. While it was true that the statute did not make any pronouncement in favour of a public right of action, in practice the right of the Security Council to refer cases to the court was equivalent to a type of public right of action in the name of the international community.

34. Lastly, as to the conduct of the trial, his delegation felt that in some instances it could be justified for the court to pass sentence by default, in the interests of the international community and notwithstanding respect for the principle set out in article 14 of the International Covenant on Civil and Political Rights that everyone charged with a criminal offence should be entitled to be tried in his presence. In order to avoid any contradiction with that Covenant, provision could be made for the possibility of not enforcing the sentence until the accused appeared before the court and, if appropriate, of reviewing the sentence.

35. Mrs. KUPCHINA (Belarus) said that important progress had been made in the work of the previous session that would enable a genuine mechanism for international criminal justice to be established. The structure of the draft statute for an international criminal tribunal elaborated by the relevant Working Group seemed basically acceptable, as was its wording and most of its provisions.

36. Her delegation agreed in general with the Working Group's conceptual approach to the establishment and functioning of the tribunal. In her view, the tribunal should be a permanent body even though it met only when necessary to judge a case submitted to it. Her delegation believed it should be established by a multilateral treaty concluded under United Nations auspices. For the tribunal to function effectively, the ideal would be to have the largest possible number of States participate in it. Her delegation favoured establishing it as a legal organ of the United Nations, and therefore preferred the first alternative given in article 2.

37. It agreed that a clear mandate to the tribunal would signal the general recognition of the principle of the criminal responsibility of the individual

(Mrs. Kupchina, Belarus)

before the international community and would give the tribunal the necessary and indispensable authority to function effectively and promote the interests of all.

38. As had already been said, Part 2, on jurisdiction and applicable law, was the core of the proposed draft statute. Her delegation supported the idea that jurisdiction ratione personae should be limited to persons and not extend to institutions or States. With regard to jurisdiction ratione materiae, the ideas underlying draft articles 22 to 26 were acceptable. Not having a code of crimes against the peace and security of mankind complicated the task of defining that jurisdiction with any precision, and therefore the Commission should continue considering the question.

39. To achieve the goal of having the statute accepted by the majority of States, alternative A in article 23 which made provision for a non-automatic system of jurisdiction, seemed preferable. The matter of applicable law (art. 28) deserved more extensive study. In that respect, Belarus shared the concerns expressed by the delegation of France. In addition, it supported the provision regarding the Security Council in article 25.

40. Her Government would make detailed comments on the draft statute at the appropriate time. Some of the difficulties the text posed for it had to do with its own national legal system which, for instance, did not have the legal concept of release on bail. Her delegation also supported the view of the representative of Canada that attention should be given in future work on the topic to ways of applying the relevant provisions of articles 4, 47, 48 and 58 at the national level.

41. She expressed the hope that the final version of the draft statute would be submitted for consideration at the forty-ninth session of the General Assembly and that in the meantime work on the draft Code of Crimes against the Peace and Security of Mankind would continue.

42. Mr. PERERA (Sri Lanka) said that in order to command the necessary international acceptance, the international criminal tribunal must be established as an impartial judicial institution committed to upholding the rule of law and administering justice apart from any political considerations.

43. His delegation was well aware of the problems that had frustrated previous attempts to establish international courts, such as the 1937 initiative of the League of Nations and later attempts, after the Second World War, in relation to the International Convention on the Suppression and Punishment of the Crime of Apartheid and the Convention on the Prevention and Punishment of the Crime of Genocide. The discussions on the current initiative, which had derived momentum from recent political upheavals in different parts of the world, showed that some of the usual problems continued to surface. Those problems needed to be fully addressed and properly resolved.

44. Sri Lanka believed that the proposed tribunal should be formally linked to the United Nations and that perhaps the appropriate mechanism for such a linkage was a multilateral convention concluded under United Nations auspices.

(Mr. Perera, Sri Lanka)

45. Part 2 of the draft statute contained fundamental provisions and raised important issues that required more thought. The list of international legal instruments in article 22 could be expanded to include other treaties like, for instance, the Protocol (Montreal, 1988) to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation. The second strand of jurisdiction set out in article 26 required further consideration and perhaps reformulation. The jurisdiction of the court must, at least initially, be confined to crimes established under multilateral treaties. Furthermore, it was doubtful whether drug-related crimes should be dealt with under the second strand of jurisdiction. The nexus between drug traffickers, terrorist groups and the illicit arms trade posed an ever-increasing threat to world peace and security. That made it necessary for the international community to qualify such activities as crimes under general international law, a term which should actually be defined more specifically in the draft statute. Certainly the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances should be included in the article 22 list. In that connection, his delegation supported the comments made by the representative of Jamaica.

46. With regard to the acceptance of jurisdiction, Sri Lanka favoured retaining alternative A which incorporated an "opting in" procedure in article 23. Article 25 required careful consideration. It would be prudent initially to restrict the right to refer cases to the court to States parties. If, however, the Security Council was to be vested with that power, the General Assembly should enjoy similar powers, as Jamaica had suggested.

47. As others had noted, article 63 raised a series of basic issues that impinged both on the law of treaties and the law of extradition. Particular attention must be given to those issues. His Government was planning to transmit written comments on those and other questions at a later stage.

48. Mr. AHMED (India) said that the draft prepared by the Working Group of the Commission suggested establishing an international criminal court by a statute in the form of a treaty. In the first phase, the court would exercise jurisdiction over private persons only. Such jurisdiction would be limited, moreover, to crimes of an international character defined in specific treaties in force, which would subsequently include the Code of Crimes against the Peace and Security of Mankind on its adoption and entry into force. The court would be a facility for States parties which would be called into operation when and as soon as required. In the first phase of its operation, at least, it would not have compulsory jurisdiction and would not be a standing, full-time body. In any case, the court must guarantee independence and impartiality in all its proceedings.

49. What was envisaged by the Working Group was a set of more or less loose, ad hoc arrangements for the prosecution of international crimes. That fell short of the expectations raised concerning the establishment of an international criminal court vested with the necessary jurisdiction over certain international crimes and the persons suspected of committing those crimes. In his delegation’s view, the desired goals of impartiality, objectivity and

(Mr. Ahmed, India)

uniformity of jurisprudence would be attained only through a permanent, full-time body.

50. It was his delegation's understanding that the statute of the international criminal court, which might be adopted in the form of a treaty, should be adopted by the General Assembly or by an international conference convened specifically for that purpose. The court so established should be associated with the United Nations, which could exercise some sort of supervision, as in the case of the International Court of Justice.

51. Proceedings before the court should be based on the well-known principles of criminal law recognized by national legal systems, such as notification of indictment, the right of the suspect to legal assistance, the right to a fair trial, the principle of nullum crimen sine lege, the prohibition against double jeopardy, the right of appeal, etc.

52. His delegation supported the proposal that the court should exercise jurisdiction over private persons only in order to avoid conflicts of jurisdiction with the International Court of Justice, which had jurisdiction over States. In addition, a more open linkage should be established between the draft statute and the draft Code of Crimes against the Peace and Security of Mankind. The court should exercise its jurisdiction with the consent of the States concerned in each particular case.

53. The procuracy should be established as a permanent body in order to avoid abuses of the international criminal jurisdiction and provide a bridge between the court and the Security Council in respect of crimes of aggression and others related to the maintenance of international peace and security. His delegation also favoured the inclusion of an optional clause allowing States to accept compulsory jurisdiction of the court on specific terms and conditions. In that respect, his delegation generally favoured alternative A for draft article 23.

54. The relationship between the United Nations and the international criminal court was one issue that had not been sufficiently clarified in the draft statute. That and other questions which had not yet been considered in depth, such as those raised in the report of the Working Group required careful study by States and by the Commission. Like other delegations, his delegation was convinced that much remained to be done in order to develop a universally acceptable statute. It was therefore prepared to continue sharing its ideas with other delegations interested in the matter.

55. Mr. HALLAK (Syrian Arab Republic) said that the question of establishing an international criminal tribunal had been debated ever since the 1940s and that, for many years, no agreement had been reached on it. The current situation, however, was one in which the international community could establish such a tribunal, which would strengthen international law.

56. Before the tribunal was established, the crimes it would prosecute should be characterized. The court's jurisdiction would be defined in terms of the crimes that would be referred to it. The crimes listed in article 22 of the draft statute formed a sound basis, provided that they included those characterized in the Code of Crimes against the Peace and Security of Mankind.

(Mr. Hallak, Syrian Arab Republic)

The international criminal court would thus be able to interpret those crimes objectively and uniformly.

57. In his delegation's view, the text of article 1 of the draft statute should read "There is established an International Tribunal". In order to make it very clear that the tribunal was independent, the first sentence of article 2 should be replaced by the following wording: "Within the framework of the United Nations, there is established an International Criminal Tribunal responsible for prosecuting the crimes characterized in this Statute".

58. Referring to article 23, he said that the jurisdiction of the court would be limited if it depended on the acceptance of the State in which the crime had been committed or of the State of which the suspect was a national. That approach would be inadequate, moreover, in cases where the suspect had dual nationality. However, the fact that a State accepted the jurisdiction of the court over some of the crimes characterized meant that State was waiving jurisdiction ratione personae and, therefore, the linkage of the court's jurisdiction to the State's acceptance was not necessary, even though the suspect might be a national of that State.

59. Referring to article 44, he said that his delegation believed that the functioning of the court might be paralysed if no provision was made for trials in absentia. They should therefore be included, provided that they were accompanied by the necessary guarantees. As to article 56, the number of judges comprising the appeals chamber should be twice that of the judges hearing the case in the lower chamber.

60. His delegation believed that customary law was vague and subject to debate, and should not be applied within the framework of international criminal law.

61. In his delegation's view, the Sixth Committee should take into account the observations formulated as input for the preparation of the final draft on the establishment of an international criminal tribunal at the forty-sixth session of the Commission.

62. Mr. BOS (Netherlands) said that the draft articles under consideration formed a sound basis for discussion and had been generally modelled on the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, whose provisions were of great interest in the context of the effort to establish a permanent international criminal tribunal.

63. His delegation favoured establishing the tribunal by a multilateral convention. That would protect the sovereign rights of each State to contribute to the conclusion of a convention and determine for itself whether it could accept the obligations embodied in the instrument. It would also guarantee widespread acceptance of the convention. His Government endorsed the composition proposed by the Working Group, for it struck a balance between the need for flexibility and the need for continuity. As most States argued in favour of the establishment of a court of first instance and a court of second

(Mr. Bos, Netherlands)

instance, 18 judges would appear to be a reasonable number. Although the question warranted further study, the idea of appointing judges to sit in both the International Court of Justice and the international criminal tribunal should not be ruled out.

64. With regard to the jurisdiction of the tribunal, the Netherlands Government stressed the close relationship which should exist between a number of the crimes covered by the draft Code and the international criminal tribunal. Those crimes should be incorporated in the Code and be covered by the competence ratione materiae of the tribunal only if they fulfilled a number of criteria, i.e., that the offences must constitute a violation of fundamental humanitarian principles, that it should be more appropriate to prosecute them at the international level and that it must be possible to hold an individual personally liable for the offence. To some extent, the Netherlands Government discerned a similar approach in the distinction drawn by the ILC Working Group between crimes covered by article 22 of the draft statute and crimes covered by article 26; the criterion used to determine the competence of the tribunal would be the seriousness of the crime. However, the criteria posited by the Netherlands Government were stricter, which in its view would restrict the tribunal's competence ratione materiae to the crimes of aggression, genocide, systematic and large-scale violations of human rights and serious war crimes, for which penalties already existed under conventions or international customary law. The tribunal's competence could be extended at a later date to cover other crimes. With regard to article 26, it considered that the time was not ripe for acceptance of international jurisdiction over the crimes referred to in paragraph 2 (b) of article 26, notably drug-related crimes, as the question arose of the extent to which the system of aut dedere, aut iudicare laid down for those crimes already afforded sufficient scope for tackling them effectively. That did not apply to the crimes referred to in paragraph 2 (a) of article 26, which included crimes against humanity and those relating to discrimination against certain population groups on grounds of race, ethnic characteristics, religion, etc. Lastly, in view of the universal character of the crimes in question and the close relationship between the Code and the tribunal, the Netherlands believed that it should not be possible to enter reservations concerning the said crimes or the competence of the tribunal, and that the act of becoming party to the statute should entail accepting the tribunal's competence ratione materiae in respect of those crimes.

65. The relationship between the competence of the tribunal and that of national judicial bodies had not been examined in sufficient detail. Although the non bis in idem principle was embodied in article 45, that did not resolve the problem of the concurrent or preferential competence of the tribunal vis-à-vis national courts. Thus, if more than one State was competent, for example because the State putting the case before the prosecutor was not the State in which the crime had been committed or the State of which the suspect was a national, problems might well arise. The Netherlands was in favour of a system of preferential jurisdiction whereby the tribunal would be competent in the event of conflicting jurisdictions.

66. In connection with investigation and prosecution, the question was that of who had the right to initiate proceedings. The Netherlands maintained that States should have the power to inform the prosecutor of alleged violations or

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crimes coming within the competence of the tribunal and that the prosecutor should then form an opinion on whether prosecution was feasible and desirable. It rejected the notion of an obligatory role for the Security Council in respect of the crime of aggression. A political question submitted to the Security Council should be kept separate from the legal question of whether an individual from a particular country could be held responsible for the crime of aggression. However, given the important contribution made by the Security Council to the establishment of the ad hoc tribunal for the prosecution of crimes committed in former Yugoslavia, it should also be accorded the power to bring a complaint before the prosecutor which should be binding on the prosecutor. Lastly, the Netherlands endorsed the need to respect the fair trial principle and the rights of the defence from the outset of and throughout proceedings.

67. The Netherlands Government largely agreed with the Working Group's proposals concerning how a case should be dealt with during the trial, but would prefer a procedure enabling the accused to challenge the competence of the tribunal before proceedings began. One possibility might be that as soon as the court had determined that a prima facie case against the accused existed, the accused could challenge the competence of the court within a relatively short space of time.

68. The importance of the option of trial in absentia lay in the fact that justice could be administered without the court's competence being frustrated by accused persons or States affording them protection. On the other hand, the authority of the tribunal could be undermined if proceedings were conducted in the absence of the accused while convicted persons were still at large. Moreover, in the event of such trials being possible, proceedings would have to be reopened if a person convicted in absentia were arrested, to enable the convicted person to exercise his rights.

69. With regard to the non bis in idem principle, his delegation would raise the question of whether the exception to that principle referred to in article 45, paragraph 2 (a), was correct, namely that the principle was not applicable if the act in question was characterized as an ordinary crime. In its view, the application of the principle depended not so much on how a particular act was characterized as on whether the act itself was the subject of renewed proceedings.

70. His delegation supported the Working Group's view that the death penalty should not be applied as a sanction. It had no further observations to make on the last three parts of the draft statute, although it felt that a number of topics in the areas covered merited closer examination, including the question of whether appeal and review should be open to the prosecutor as well as the accused or the convicted person and more detailed arrangements in relation to the execution of sentences in national penal establishments. In that connection, elements of the Statute for the ad hoc tribunal on former Yugoslavia might be incorporated into the statute for the permanent tribunal.

71. A striking feature of the report was that article 2 did not adopt a position with regard to the question of whether the tribunal should be a United Nations organ. An answer to that question was nevertheless essential, particularly in connection with all matters not regulated by the draft statute,

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for example in relation to funding for the tribunal, recruitment of staff, etc. If the tribunal was to be a judicial organ of the United Nations it would be best to apply the rules in such matters which governed United Nations organs.

72. Contrary to the provisions of article 35, the Netherlands delegation believed it advisable for the pre-trial detention facilities to form part of the court. Accordingly, the court itself must be regarded as responsible for the detention regime. Article 46 provided that the safety of the accused, victims and witnesses should be the responsibility of the Chamber. In his delegation's opinion, the court and the Prosecutor should take responsibility for that.

73. With respect to perjury, he considered that it should be possible for the court to prosecute it rather than be dependent on States parties to prosecute and try such cases.

74. The wording of article 59 was such that non-parties could cooperate with and assist the court, but it would be better to provide that the court might call on the assistance of non-parties.

75. In his opinion, article 64, paragraph 2, was open to question, as there was no reason why the court should not be able to use evidence assembled for case A in a case against B.

76. Penalties were listed in article 53 but their enforcement was not discussed until article 66, which dealt with prior sentences. It was not clear how fines or confiscation orders were to be executed, particularly in cases where the convicted person was unwilling or unable to pay or to hand over goods declared forfeit.

77. The defence was not sufficiently regulated. Although the draft statute contained provisions governing the right of the suspect to legal assistance, it said nothing about the status of defence counsel.

78. It was for the international community to demonstrate its willingness to make the statute effective. In that connection, it was important to indicate the number of States required to ensure the entry into force of the statute. His delegation hoped that a sufficient number of ratifications would follow to enable the tribunal to begin its work shortly and to function effectively.

79. Mr. ECONOMIDES (Greece), referring to chapter II of the report of the International Law Commission (A/48/10) and in particular to the draft statute for the international criminal tribunal, expressed the following points of view.

80. The tribunal should be established by means of a treaty concluded within the framework of the United Nations which would closely link the tribunal to the United Nations. The treaty establishing the tribunal should likewise be formally and organically linked to the Code of Crimes against the Peace and Security of Mankind. The tribunal could function provisionally as an independent entity until the Code came into force and then operate within the framework of the Code.

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81. Secondly, his delegation had a preference for alternative B for draft article 23. However, the article should be improved, so that jurisdiction would be automatic. It would suffice to delete from alternative B both the words "unless it makes a declaration provided for in paragraph 2" and the whole of paragraph 2 itself. Thirdly, the crime of aggression, which was covered by article 26, paragraph 2 (a), should also be included in the list in article 22.

82. Fourthly, in article 27, provision needed to be made for an exception in the event that the Security Council could not, because of exercise of the veto, adopt a unanimous decision on a case of aggression. In such circumstances, the court should have direct jurisdiction so that it could deal with the case. Fifthly, it might be wise to exclude from article 44 the option of trial in absentia. Sixthly, the International Law Commission should examine in greater depth the admissibility of dissenting or separate opinions on important points of law, especially those relating to appeals. Lastly, the entire draft should be considered once again at the Commission's following session.

83. Referring to chapter III of the report of the International Law Commission, concerning international liability for injurious consequences arising out of acts not prohibited by international law, he said that the progress made in the prevention of transboundary harm was to be welcomed. A broad meaning would have to be attributed to prevention, which would cover, in addition to strictly preventive measures, liability arising from the failure to fulfil relevant obligations.

84. With reference to the proposals put forward by the Special Rapporteur in his ninth report, Greece's observations were the following: (a) in article 11, the word "major" should be deleted and be replaced by a more moderate word; (b) in the last sentence of article 14, the word "encourage" should be changed; (c) it was appropriate to include article 20, on factors involved in a balance of interests; (d) a provision on the settlement of disputes should also be included, but that issue should be dealt with at a later stage, when the draft was nearing finalization.

85. With regard to chapter IV of the Commission's report, he said that Greece had always considered the question of State responsibility to be by far the most important. At the most recent meeting of legal advisers of the Council of Europe, Greece had proposed the codification of State responsibility as a goal to be achieved by the end of the century. If that goal could indeed be reached, that would be a crowning achievement of the United Nations Decade of International Law as well. In making that proposal to the Sixth Committee also, he hoped that it would be given careful consideration.

86. Referring specifically to the proposal concerning the settlement of disputes, he made the following observations. Firstly, the matter should be taken up at a later stage, at a time when the work on the draft was in its final stages. Secondly, his delegation was in favour of a system for the settlement of disputes which contained compulsory elements, either arbitration or judicial settlement, or both procedures. Thirdly, the system should be implemented uniformly with respect to the application or interpretation of all provisions of the draft. His delegation believed that no special system for countermeasures

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should be adopted. Even where the purpose of countermeasures was to put a stop to an internationally wrongful act, it must be recognized that strict regulation of countermeasures entailed a risk of producing the opposite effect - namely, encouraging the wrongful act.

87. Referring to international crimes of States, he said that his delegation's position was the following. Firstly, it was in favour of including draft article 19 which was a key provision, in keeping with current trends in international law. Secondly, the competence to react to an international crime, particularly aggression, ceased to belong to a particular State - the victim State - and became universal. In such cases, intervention by the Security Council should be mandatory and be the key feature of a responsible regime. Thirdly, the obligation of States not to assist the wrongdoing State and the principle of non-recognition by other States of the outcome of wrongful acts were established rules of customary international law.

88. Referring to chapter V of the Commission's report concerning the law of the non-navigational uses of international watercourses, he made a number of general comments: (a) the set of draft articles had been sufficiently refined and therefore now only required slight amendments; (b) the future instrument should take the form of a framework convention; and (c) the draft should include dispute settlement provisions. His delegation's specific comments were the following: (a) Greece fully accepted the Special Rapporteur's suggestion that the word "appreciable" should be replaced by the word "significant" and (b) was in favour of retaining articles 5, 6 and 7 in their present form and was therefore unable to accept the redraft of article 7 as proposed by the Special Rapporteur.

89. With respect to chapter VI, his delegation accepted the Commission's new topic entitled "State succession and its impact on the nationality of natural and legal persons", whose consideration was fully justified.

The meeting rose at 1.15 p.m.