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SUMMARY RECORD OF THE 21st MEETING

Chairman:	Mrs. FLORES	(Uruguay)
later:	Mr. NEUHAUS (Vice-Chairman)	(Australia)
later:	Mrs. FLORES (Chairman)	(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. KOLODKIN (Russian Federation) said that the progress made by the International Law Commission in elaborating a draft statute for an international criminal court showed that that important task had been approached with unprecedented vigour. Current changes in the system of international relations augured well for putting into effect the old idea of establishing an international criminal court. The new Russia supported that idea and was prepared to participate in working towards its earliest possible realization.

2. As for the draft statute itself, his delegation considered that the term "tribunal" was the most appropriate for an institution which would be made up of a "court", a "registry" and a "procuracy". Further, he shared the view that the tribunal should not be an organ of the United Nations, inasmuch as that would require a reform of the Charter and as the United Nations already had a principal legal organ, the International Court of Justice. Nor should it be a subsidiary organ, since in that case its independence would be rightly called into question. His delegation believed that the relationship between the tribunal and the United Nations ought to be similar to that between the United Nations and the specialized agencies.

3. In its initial phase, at least, the court should meet whenever necessary, whereas the Procuracy and the Registry could act as the permanent organs of the tribunal. The composition of chambers could be determined annually, following the principle of rotation. It was essential that the criteria for the selection of judges should be included in the court's statute. His delegation had some difficulty in accepting article 15, paragraph 2, and would prefer that in the removal from office of either the Prosecutor or the Deputy Prosecutor standards similar to those governing their election should apply.

4. Part 2 was undoubtedly the most important section of the draft statute. The court's jurisdiction should include not only the crimes defined in the relevant international treaties, but also common crimes and crimes under general international law, referred to in article 26, paragraph 2. It would, however, be appropriate to consider that aspect of the delimitations of the court's jurisdiction ratione materiae. Equally important was the recognition of the role to be played by the Security Council in certain cases (articles 25 and 27). In that connection he found the ideas put forward by some members of the Commission regarding matters which might well be submitted to the court by the Council to be interesting. However, the crime of genocide and serious breaches of the Geneva Conventions and their Additional Protocols would be covered by both paragraphs 2 (a) and 2 (b) of article 26.

5. With regard to its jurisdiction, if the court functioned as a permanent organ it might at least reduce the need to set up ad hoc international tribunals. For that to happen it was essential that its jurisdiction should not be too optional. In other words, careful consideration would have to be given to the question of whether or not States parties to the statute could choose to

(Mr. Kolodkin, Russian Federation)

accept the court's jurisdiction ratione materiae or ratione personae in cases of aggression, genocide or serious violations of human rights or of international humanitarian law.

6. Lastly, he turned to two questions of interest to his delegation. First, he believed that the criteria adopted by the Working Group with regard to trials in absentia (article 44, paragraph 1 (h)) were fully justified. The accused had an incontrovertible right to be present at the trial, but his deliberate absence should not prevent the trial from proceeding. Secondly, there should be a separate Appeals Chamber, as also laid down in 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.

7. The statute drawn up by the Commission was separate from the work on the draft code of crimes against the peace and security of mankind; both projects should continue to be pursued with all speed. While the establishment of the tribunal was not, of course, dependent on adoption of the code, the latter's entry into force would greatly enhance the effectiveness of international criminal justice.

8. Mr. POLITI (Italy) said that in addressing the agenda item, and especially chapter II of the Commission's report, his delegation would confine itself to an examination of the draft statute for an international criminal court. The matter was generally perceived to be more urgent than the related question of the draft code of crimes against the peace and security of mankind. Once the code was adopted, however, the crimes it covered should be placed under the jurisdiction of the court.

9. The Committee's consideration of the question was currently marked by two new elements: a draft text, prepared with exemplary speed by the ILC, and a growing international consensus on the need for war crimes and crimes against humanity to be brought to justice, as evidenced by the recent establishment of the ad hoc International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia.

10. In general, his delegation shared the views expressed by the representative of Belgium on behalf of the States members of the European Community. Italy believed that it would be appropriate to establish a formal link between the United Nations and the court, which should be an additional United Nations judicial organ; that would provide it with legitimacy and authority. Its impartiality and independence must also be guaranteed. The Working Group's proposal that the court be subdivided into three bodies, and the provisions of article 9 and article 13, paragraph 4, appeared to be acceptable. However, his delegation would prefer for a separate article to be included, dealing with the prosecutor's independence not only from the court and from Governments, but also from any other type of interference.

(Mr. Politi, Italy)

11. With regard to Title II of the draft, which raised crucial issues, he wished to make the following comments. First, his delegation endorsed the Working Group's basic approach with regard to the court's competence ratione materiae. Nevertheless, the list of crimes in article 22 should perhaps also include torture, a particularly serious crime which was envisaged in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Furthermore, despite the difficulty of defining the customary rules of international law, his delegation preferred to retain the reference to them in the draft, since to omit it would be tantamount to denying the possibility that State practice might in the future produce customary rules for the defence of the international community. With regard to drug-related crimes, Italy believed that the Commission should continue to examine the issue, which was still of concern to many delegations.

12. Secondly, in respect of the acceptance by States of the court's jurisdiction, his delegation believed that the Working Group's proposals were sound, provided that the sum of individual States' declarations would not excessively limit that jurisdiction. Accordingly, Italy preferred Alternative B of article 23, which provided for an "opting out" system based on the possibility of excluding some crimes. Furthermore, his delegation believed that the provisions of article 24, paragraph 2 and article 26, paragraph 3 (a), required further consideration.

13. Thirdly, Italy agreed that the Security Council should be empowered to submit cases to the court (article 25), on the understanding that such cases would normally involve situations of aggression. In that connection, the solution proposed in article 27 might raise doubts as to its impact on the court's prerogatives, especially because of the difficulties entailed by the Council's determination that an act of aggression had been committed, and the reference made in the article to crimes "directly related" to an act of aggression.

14. Fourthly, with regard to applicable law, the wording of article 28 (b) was fully consistent with that of article 26, paragraph 2 (a), under which the court could legitimately have recourse to customary law in judging important matters not regulated by the statute.

15. Overall, his delegation agreed with the approach taken in Titles III and IV of the draft. In particular, it endorsed article 29, which established a universal mechanism more consistent with the international community's interest in punishing international crimes wherever they occurred. Article 38 should be re-examined at a later stage. It might be preferable to establish that only States with a direct interest in a case should have the right to challenge the court's jurisdiction.

16. With regard to trials in absentia, article 44, paragraph 1 (h), was different from the corresponding provision in the statute of the International Tribunal for the former Yugoslavia; it was unclear whether such a difference was justified. It was necessary to avoid, at all costs, giving the impression of a purely declamatory justice. While article 44 would apply only in cases where the absence of the accused was "deliberate", the fact that the accused was completely unaware of the proceedings might be sufficient to exclude sentencing.

(Mr. Politi, Italy)

17. The system of penalties defined in articles 53 and 54 appeared to be sufficiently balanced. It might also be appropriate to consider the related question of the court's competence to award compensation to the victims of the crimes referred to in the statute. Other issues which required further study were, for example, the prosecutor's power to appeal the court's sentences, the establishment of a separate appeals chamber, as provided for in the statute of the International Tribunal for the former Yugoslavia, and the questions raised by article 63.

18. There was a general feeling of optimism with regard to the possibility of an effective international criminal court being established at last. His delegation, which had always supported such an undertaking, shared that optimism.

19. Ms. McDONALD (New Zealand) said that the Commission's goal was to ensure that the draft statute of an international criminal court had the support of the largest possible number of States. Such support would constitute a solid foundation for expanding the court's jurisdiction.

20. Her delegation agreed that the court should be established by means of a treaty and should be a judicial organ of the United Nations, with a status higher than that of the specialized agencies. All States parties to the treaty should automatically be deemed to have accepted the court's jurisdiction; there was no reason why recognition of jurisdiction must be effected by means of a separate act. Moreover, acceptance by States of the court's jurisdiction over the crimes listed in article 22 should be effected in accordance with Alternative B of article 23. The question of jurisdiction, which formed the central core of the draft, would require further careful consideration. The court should not have exclusive jurisdiction, except in respect of very serious crimes. Accordingly, New Zealand agreed with the Special Rapporteur and the Working Group that jurisdiction should be concurrent, and that each State should have the option of either trying the case or referring an accused person to the international criminal court. The court's jurisdiction ratione personae should be limited to individuals. However, the statute should make it clear that the accused should not be able to claim in his defence either that he was performing official functions or that he had acted pursuant to an order of a superior.

21. The court should have jurisdiction ratione materiae only over the international crimes defined in the treaties mentioned in the statute. However, it should be recognized that customary international law might also provide a basis for jurisdiction. On the other hand, the reference in article 28 (b) to the rules and principles of general international law was insufficiently precise.

22. The treaties listed in the draft statute as sources of law in respect of the definition of crimes had not been drafted at a time when the establishment of an international criminal court had been envisaged. Accordingly, it was important for the statute to establish an appropriate link with those treaties.

(Ms. McDonald, New Zealand)

23. In her opinion, the establishment of an international criminal court should not depend on the adoption and entry into force of the Code of Crimes against the Peace and Security of Mankind, since that would constitute an unnecessary obstacle. Once the Code had been adopted, however, it should be added to the schedule of treaties determining the crimes over which the court had jurisdiction.

24. Bearing in mind the primary responsibility of the Security Council for the maintenance of international peace and security, her delegation agreed in principle that the Council could refer cases to the court, since, otherwise, investigations could only commence in response to complaints from States. The question of the Security Council's power of referral was complex and more careful consideration should be given to the nature and scope of that power. Further consideration should also be given to extending such power to the General Assembly.

25. Without any question, judges of the court should be independent and impartial, should have the highest competence and should represent the world's major legal systems. It was vital that the appointment process should not excite the same political rivalries as many other elections held within the United Nations, in which national prestige and regional interests prevailed over the individual merits of the candidates. Furthermore, New Zealand considered that, while the tribunal should be a permanent institution, for the time being it did not need to sit on a regular basis, but only when required to consider a case submitted to it.

26. New Zealand strongly opposed the provision in the statute for trials in absentia, in conformity with the position it had held when 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 was established. As certain members of the International Law Commission had noted, trials in absentia raised serious questions regarding impartiality and respect for the fundamental rights of the accused. New Zealand's position in that regard was consistent with the provisions of article 14 of the International Covenant on Civil and Political Rights.

27. New Zealand also expressed its concern with regard to draft article 45, paragraph 2 (a), relating to double jeopardy. Although such a provision was to be found in the statute of the International Tribunal for the former Yugoslavia, it was an excessive derogation from the principle of non bis in idem.

28. In conclusion, she believed that, in view of the importance of the establishment of an international criminal court, the Commission should complete its elaboration of the draft statute at its forty-sixth session.

29. Mr. SZENASI (Hungary) said that the draft statute for an international criminal court constituted a good basis for the work of the International Law Commission and the Sixth Committee. Hungary believed that the court should be established by a treaty and, as a first step, should be a semi-permanent body which would only meet when necessary, although the ultimate aim was to establish a permanent body. It was vital to guarantee the court's independence and

(Mr. Szenasi, Hungary)

impartiality and its members, albeit necessarily linked with the United Nations, should maintain their independence vis-à-vis the Security Council, the Secretary-General and the other organs of the United Nations. In that respect, the legal status of the court should be similar to that of the International Court of Justice.

30. With regard to jurisdiction and applicable law, he considered it appropriate for article 22 to contain a list of crimes defined by treaties. Careful consideration should, however, be given to articles 23 to 26 and the different alternatives which they offered.

31. As far as the place of trial was concerned and without prejudice to any decision taken regarding the seat of the tribunal, it was important that the court should be able to meet in a place other than the permanent seat, if it so desired, namely, in the place where the crime was committed. With regard to the applicable penalties, his delegation welcomed the fact that the death penalty had not been included in draft article 53.

32. The draft statute dealt with the issue of a fair trial in a rather general way. That issue should be subjected to a more systematic and extensive consideration. In that context, it should be noted that there were a number of international treaties, such as the International Covenant on Civil and Political Rights, the European Convention on Human Rights and the Convention against Torture, which established machinery for the protection of the accused and for the purposes of ensuring a fair trial. As a result, Hungary recommended that those instruments and the jurisprudence resulting from their application should be considered with a view to improving the text of the draft statute.

33. Mrs. ŠKRK (Slovenia) said that the establishment of an international criminal court served the same purpose as that 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. That common purpose was to prosecute the perpetrators of the gravest crimes against the human race and thus contribute to the elimination of the most brutal violations of human rights and the restoration of law and order in the international community.

34. Slovenia favoured the establishment of a permanent international criminal court on the basis of a treaty, which would not necessarily require an amendment of the Charter of the United Nations. The court should be linked to the United Nations, but without being one of its organs. The composition of the tribunal as envisaged in the draft statute, including the establishment of a procuracy as a separate organ, was satisfactory. As for article 19 on the rules of the tribunal, her delegation shared the view of certain members of the Working Group that the basic procedure for the rules of evidence should be contained in the statute rather than in the rules themselves. Furthermore, to guarantee the independence of the procuracy, that body should be governed by its own internal rules.

(Mrs. Škrk, Slovenia)

35. In Slovenia's opinion, the nucleus of the draft statute was its Part 2, on jurisdiction and applicable law. She supported the structure of article 22 enumerating the treaties which defined crimes, as the basis for the jurisdiction ratione materiae of the court. In that way, the principle of nullum crimen sine lege was properly respected. Her delegation noted with satisfaction that the list of instruments contained in article 22 included Additional Protocol I to the Geneva Conventions of 1949, relating to the victims of international armed conflicts. While the two additional Protocols of 1977 to the Geneva Conventions of 1949 had not been universally accepted, they had been ratified by two thirds of all States and could soon be transformed into a customary source of international humanitarian law. Consequently, Slovenia did not agree with the Working Group's view that article 22 should not include Protocol II of 1977 to the 1949 Geneva Conventions because that Protocol contained no provision concerning grave breaches, since Part II of that Protocol did contain very clear provisions concerning acts which could be characterized as serious violations of humanitarian law. Those responsible for preparing the draft statute of the international criminal court should bear in mind that the most brutal violations of humanitarian law and human rights constituted one of the most conspicuous features of armed conflicts which were not of an international character.

36. The Working Group had decided to include in the first strand of the court's jurisdiction ratione materiae the anti-terrorist conventions of universal character that qualified specific terrorist acts as serious crimes and obliged the States parties to act according to the principle aut dedere aut judicare. The Working Group should not however put war crimes and crimes against humanity on the same footing. It should be borne in mind that, most serious war crimes and crimes against humanity were not the subject of a statutory limitation, as stipulated in the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity of 1968. Furthermore, terrorist crimes must be treated in domestic legislation as conventional crimes in order to fit into the already existing bilateral extradition agreements. On the other hand, war crimes and crimes against humanity were to be dealt with by domestic courts on the basis of the principle of universality. She considered that the list of anti-terrorist conventions could be supplemented by the protocol to the Montreal Convention of 1973 for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, which extended the scope of that convention to terrorist acts committed at international airports.

37. Her delegation agreed in principle that an international criminal court should have jurisdiction over drug-related crimes. However, it reserved its position regarding whether drug-related crimes should fall within the group of crimes for which special acceptance of jurisdiction was required under the terms of article 26 of the current draft. As a State party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984, Slovenia supported the position that that convention, too, should be included among the treaties that fell within the jurisdiction of the court. Bearing in mind the acceptance by States of the court's jurisdiction over the crimes listed in article 22 of the draft statute, Slovenia favoured the "opting in" system, under which jurisdiction was not conferred automatically, but required a special declaration.

(Mrs. Škrk, Slovenia)

38. Like many other States Members of the United Nations, Slovenia expressed its reservations regarding the territorial scope of the jurisdiction of the court in relation to its own nationals, who could not be tried outside Slovenia.

39. Regarding the second strand of jurisdiction ratione materiae of the international criminal court, for which special acceptance of jurisdiction was required, his delegation did not accept the position of the Working Group that in the case of crimes not listed in the Genocide Convention, the Geneva Conventions of 1949 and Protocol I, jurisdiction of the court should be subject to special acceptance by States. In his opinion, the international criminal court should have unconditional jurisdiction in dealing with those crimes, as did 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.

40. The fact that the Security Council had to predetermine whether an act of aggression had been committed by a State was in contradiction with the principle of the independence of the judiciary, and the Working Group should therefore carefully consider its position on that issue. The provision on applicable law in article 28 of the draft statute should also be reconsidered, as it did not sufficiently reflect the principle nullum crimen sine lege.

41. In respect of the court's jurisdiction ratione personae, based on individual criminal responsibility, she considered that the draft statute needed further elaboration to take into account the responsibility of government officials, crimes committed at the order of a superior, and other related questions.

42. In her delegation's view, one of the fundamental questions concerning the efficiency of an international judicial system was that of bringing suspects before the court. Her delegation did not totally oppose trial in absentia, although it considered that certain conditions should be met, such as a subsequent trial in the presence of the accused. Pending trial, the procedural standards as set forth in article 14 of the International Covenant on Civil and Political Rights of 1966 should be observed. Furthermore, more attention should be devoted to victims and to witnesses testifying before the court.

43. Regarding applicable penalties, she noted with satisfaction that there was no capital punishment envisaged, since such punishment was prohibited by the Slovenian Constitution. Her country's legal system also did not provide life imprisonment, which should be replaced in the draft statute by a maximum term of imprisonment. The age of the perpetrator of an international crime could not be taken into account as the sole aggravating or mitigating factor, and the Working Group should decide whether perpetrators of international crimes who were under the age of 18 could be tried by the court. Finally, her delegation did not oppose in principle the possibility that the prosecutor too might submit an appeal against or call for reconsideration of the court's ruling.

44. Mr. YOUSIF (Sudan) said that the establishment of an international criminal court involved complex issues and also had political dimensions and connotations; accordingly, the International Law Commission should carefully examine the justification and need for and the feasibility of such a court.

45. Mr. Neuhaus (Australia) took the Chair.

46. With respect to the relationship between the proposed court and the United Nations, his delegation considered that as a judicial body, the court should be a distinct entity and not subject to any direct or indirect influence of any other United Nations organ. For that reason it would be advisable to delete the references to the role of the Security Council which were contained in articles 25 and 27, as article 29 of the draft statute had provided for a means of making submissions to the court, thereby rendering unnecessary any provision dealing specifically with submission of cases by the Security Council.

47. His delegation supported the idea that the election of judges and members of the Procuracy should be the responsibility of the States parties, and considered that the Registrar should also be elected by the States parties rather than by the Bureau, in the interests of independence and impartiality. It was essential that the word "impartiality" should be explicitly included in paragraph 4 of article 13, and there must be complete separation of the Procuracy and the court, as in the common law system. He considered moreover that the recognized authority of the court to remove a judge from office undermined the independence of the Procuracy, and accordingly paragraph 2 of article 15 of the statute should perhaps be reformulated. The court could, for example, unanimously decide to recommend to the States parties the removal of the prosecutor from office and the appointment of his successor. It might also be advisable, in the part entitled "Rules of the tribunal", to add another part relating to procedural questions, pre-trial investigations and in particular, the rules of evidence to be used in a trial. In his delegation's view, those rules should be dealt with in the context of substantive law, not in the rules of procedure.

48. As for Part II, "Jurisdiction and Applicable Law", Sudan supported the approach of article 22 whereby jurisdiction of the proposed court would be limited to multilateral treaties which classified specific offences as crimes, without prejudice to the provisions of article 26 on special acceptance by States of the court's jurisdiction. His delegation wished that drug-related crimes and money laundering, as well as the infrequent case of crimes presumed to have been committed by persons enjoying sovereign immunity, should be among offences included in the first strand of jurisdiction. The Commission should examine that issue with the purpose of affirming and strengthening the current practice of that immunity, with the understanding that the court's jurisdiction should be limited to such individuals and not extended to States. It is likewise necessary for the Commission to review once more article 28, paragraph (b), on the rules and principles of general international law which would integrate law applicable by the court and, in particular, study the possible conflicts of jurisdiction between the court and the national courts such as extradition. Moreover, the statute might encourage the court to develop its own case laws. It would, perhaps, be proper to add a provision to that effect in article 28. Lastly, as concerned the issue of special acceptance of the court's jurisdiction by States over cases not covered in article 22, he

(Mr. Yousif, Sudan)

favoured the "acceptance" system appearing in Alternative A of article 23 since that approach pointed out the consensual basis for the court's jurisdiction and reflected the flexible approach desired.

49. In Part III, "Investigation and Commencement of Prosecution", it would be necessary to delete the reference to the Security Council which appeared in article 29 and to underscore that only States parties, and not the prosecutor, would be entitled to initiate an investigation in the absence of a report. Likewise, the issue was raised of determining what would happen if a State not party did not respect the court's request made under authority of article 33, paragraph 4. For the time being, there were no data available for answering that question which also related directly to the issue of sovereign immunity. He encouraged the Commission to take up the question of protection and maintenance of that immunity as a means of promoting broader acceptance of the draft statute.

50. Mrs. Flores (Uruguay) resumed the Chair.

51. As for Part IV, "The Trial", he found it fitting to emphasize the importance of the proposed court's efficiency and that he did not support absentee trials. Among the rights of the accused listed in article 44, it was necessary to indicate the specific right of the accused to be present in the court room at the time of judgement, without the exception indicated in paragraph 1, subparagraph (h), of that article. In addition, he said that article 50 on the quorum and the majority for decisions was defective since for the sake of the vote the number of judges whose presence was required at each phase of the trial should not be even, but uneven.

52. Lastly, he said that other observations on trials, recourse to appeal and international cooperation would be forthcoming at the proper time.

53. Mr. MAJDI (Morocco) said that the international criminal court whose establishment was being planned under a convention should be surrounded by a maximum of safeguards because the decision of States to be a party to its statute would ultimately depend on trust and credibility which that body inspired.

54. Among the elements contributing to that trust and credibility, first and foremost, equitable representation of the principal legal systems should be mentioned, such as respect for strict criteria in the choice of judges in order to ensure their impartiality and independence, and in that way to prevent conflicts from arising among States. Likewise, in the provisions on investigation and commencement of prosecution, the fact that the accused had human rights which had to be safeguarded and respected, despite the seriousness of the crimes committed, had to be considered. That did not imply recognition, however, of a veto right over the court's jurisdiction, and in specific cases when an accused person did not appear before the court, pronouncement of a sentence in absentia had to be recognized. Although the judgement could not be applied, it would, none the less, mean restriction of the accused person's freedom of movement and would give moral comfort to the victims and his relatives.

(Mr. Majdi, Morocco)

55. The question of applicable law raised difficulties, especially since the Draft Code of Crimes against the Peace and Security of Mankind had not even been approved. Had it been, that instrument would constitute the applicable law, but since it had not, recourse to the appropriate provisions of national laws was needed. His delegation supported the comment in paragraph 85 of the Commission's report on the territoriality of criminal law since, as indicated in the paragraph, that criterion would avoid the possibility of imposing "à la carte" sentences.

56. The subject of the court's jurisdiction was extremely complex and should be taken up carefully. As the Commission's Special Rapporteur had wisely stated in his eleventh report, the court's jurisdiction, except for the crime of genocide and apartheid, should be limited to offences for which broad agreement among States already existed, as implied in paragraphs 22 and 26 of the statute. None the less, it should be remembered that acceptance of the statute did not entail absolute recognition of the court's jurisdiction and, in that regard, he supported Alternative A of article 23 which better reflected the consensual basis on which the court's jurisdiction was founded.

57. As for authority to submit matters to the court, the draft statute granted to the Security Council the initiative of sending to the court what it deemed necessary, without the need for establishing special courts. That authority should be used wisely, and, in any case, it was not unreasonable to wonder why the right was granted only to the Security Council and not to the General Assembly.

58. Lastly, as for the relationship between the court and the Organization, he recalled that the court's operation as a United Nations agency would afford it certain logistical and administrative support but would require modification of the Charter. The better solution, perhaps, would be to establish cooperative ties between the court and the United Nations through agreements between both institutions.

59. Mr. MONTES DE OCA (Mexico) said that his delegation praised the method of establishing a permanent international criminal court which would not be excessively bureaucratic. Nevertheless, it was proper to evaluate the will of States realistically as far as establishment of the court was concerned. One possible indicator would be the example of a crime whose international character was universally recognized, i.e. genocide. His delegation desired to call to the attention of the Commission the fact that more than 50 States were still not parties to the convention against genocide and that some of those that were had expressed reservations. Consequently, it was legitimate to state the appropriateness of encouraging ratification and universal accession to that instrument in the initial stage of review of a possible statute for an international criminal court.

60. The more viable method for establishing a jurisdictional authority, like the one set forth, was through an international treaty in which the consent of the State would be converted into the driving force of the arrangement.

(Mr. Montes De Oca, Mexico)

61. Referring to article 2 of the draft statute, he pointed out that because of the consensual nature of that authority and the type of jurisdiction it had been granted, it would not be feasible to establish it as a subsidiary agency of the United Nations. However, since its permanence and independence needed to be ensured, his delegation considered it more acceptable to link it to the United Nations through a cooperative agreement.

62. The provisions of the draft Procuracy greatly limited its independence. It would be preferable for the Prosecutor to be able to avail himself of the right to appeal and for States so choosing to be able to separate him for his office should serious causes so justifying be shown to exist.

63. He then expressed serious reservations regarding the concept of trial in absentia. While he appreciated some of the Commission's comments on the subject, the strict principles underlying criminal law as well as the fact that many legal instruments enshrined the right of the accused to be present during judgement prompted him to question the validity of the concept. Likewise he expressed reservations regarding the abolition of the custom of judges issuing dissenting opinions, which formed part of international legal practice.

64. With regard to jurisdiction and applicable law, a distinction should be drawn between international crimes provided for under treaties and exceptionally serious crimes which constituted a violation of general international law, including customary law. In setting up an international criminal court the idea had been precisely that it should have jurisdiction solely over international crimes which were inarguably of an international character, namely those defined as such in the international treaties. In the opinion of Mexico, only those crimes listed in article 22 should fall within the jurisdiction of the court.

65. Nor did the Mexican delegation agree with the rationale behind article 25 of the draft statute, according to which the Security Council could refer cases to the court. The draft did not explain how a body whose jurisdiction depended on the consent of Member States could be reconciled with the binding nature of a mandate issued by the Security Council.

66. With regard to international cooperation on judicial matters, procedural guarantees and the jurisdiction of the court, he recommended that when dealing with those topics, the Commission should bear in mind the various statements reflecting changing international legal thinking on the subject.

67. So far as bringing the accused to trial was concerned, he stressed the need to establish flexible mechanisms which would both facilitate the court in the exercise of its duties as well as observing the guarantees for a fair trial and the principle of legality recognized for persons under different legal systems.

68. Lastly, with regard to challenging the jurisdiction of the court, he recommended that a broader approach be adopted, in line with the rejection of the concept of mala captus bene judicatus.

69. Mr. THAM (Singapore) said that he had mixed feelings with regard to the draft statute for the International Criminal Tribunal. Although the present draft served as an acceptable basis, he pointed out that a good criminal justice system required much more than the establishment of a tribunal.

70. Referring to the provisions relating to the pre-trial stage, he said that the phrase used in article 22 "grave breaches" created more ambiguity than certainty, and the latter was the cornerstone of criminal law. It was essential to have a body of law which defined jurisdiction ratione materiae, and such laws must be written down. It was impractical to refer to many different conventions, as in article 22, for not all the definitions given in the conventions were sufficiently precise for a code of crimes. The code must also prescribe the penalties incurred for committing the crimes it mentioned. Article 53 of the draft indicated that the court might take account of the sanctions prescribed under the legislation of the three different States: the State of which the perpetrator of the crime was a national; the State in which the crime had been committed; the State with custody of and jurisdiction over the accused. However, problems would arise where the penalties differed in each State, especially in capital cases and where there were lacunae in the legislation. Lastly, in some countries the violation of an international convention did not constitute a crime.

71. Since criminal law involved the curtailment of an individual's right to personal freedom, care should be taken to establish rules that would ensure justice and fairness in the treatment of all such persons.

72. The establishment of a criminal court and the necessary support organs would entail considerable expenditure and the statute made no mention of who would bear those costs. The logical funding body would be the United Nations, however since the Organization already had a heavy financial burden, it should not go ahead in setting up the court until it had been ascertained that the court would play an important role in the maintenance of international peace and security, which was the principal goal of the United Nations.

73. Every accused person had the right to be heard and to a fair trial. In that connection, the draft statute laid down certain fundamental rights which would ensure that justice was done. Mexico would be in favour of allowing the accused to question the prosecution witnesses, which would help in establishing the truth and ensuring the course of justice.

74. An important consideration was that judges should remain independent and hand down judgements without succumbing to the political, social and moral pressures expected in cases of international crimes, which invariably had political overtones.

75. Another delicate issue was the question of national sovereignty vis-à-vis the compulsory jurisdiction referred to in the draft prepared by the Commission. In that connection, it was important to remember that until very recently only 67 Member States had accepted the compulsory jurisdiction of the International Court of Justice, and they would certainly be equally reluctant to agree to the supranational jurisdiction of the International Criminal Court.

(Mr. Tham, Singapore)

76. Although the International Criminal Court provided for a mechanism of appeal, the judges invited to hear the appeal would come from the same body of judges that tried the case, which might lead to accusations that they were reluctant to overturn sentences handed down by their colleagues. That could be remedied by establishing an independent body of judges.

77. In conclusion, he stressed that he was not casting doubts on the merits of the draft statute, since an efficient international criminal court would relieve tensions between States and contribute to international peace and security.

78. Mr. HAHM (Korea) considered that the draft statute for an international criminal court prepared by the working group was a sound basis for further discussion on the subject. In order to ensure the effectiveness of the court, it was essential that the draft statute should receive the broadest possible support for which it should be based on formulations that would meet with the consensus of the international community.

79. The draft statute should lay the foundations and provide the legal guarantees for an impartial and independent judicial body, based on the principle of the primacy of law and so free as possible from political considerations. At the same time it should be pragmatic, realistic and flexible. For that reason it was important to strike a balance between the need for legal and institutional certainty and the application of pragmatic and realistic criteria. It was thus reasonable to suggest that, rather than being a permanent body, the court should sit only as necessary. Moreover, it was legitimate to raise doubts as to the presumption that international crimes should necessarily be dealt with by an international court.

80. As to the relationship between the court and the United Nations, a clear mandate from the Organization would certainly provide the court with the requisite authority and legitimacy, help pave the way for the eventual universal recognition of its competence and secure more easily the support of the international community. However, it was not the only way of linking the court with the United Nations, and other criteria should therefore be considered.

81. The jurisdiction ratione materiae of the court seemed to be the most difficult issue. What was most important in that regard was that the court's jurisdiction should be clearly defined. The principle of nullum crimen sine lege was adhered to by almost all the legal systems; his delegation therefore had some difficulty in accepting that crimes "under general international law" or crimes "under national law ... which give effect to provisions of a multilateral treaty" would be sufficiently well defined to meet the standard of that principle. Moreover, while it was reasonable to enumerate crimes defined by international conventions that would give rise to the court's jurisdiction, it must be determined whether the list was exhaustive.

82. As to the issue of the ways and means by which States might accept the jurisdiction of the court over the crimes in question, in principle, that jurisdiction should be based on the consent of States parties to the draft statute. However, that consensual basis of jurisdiction should not frustrate the very objective of establishing the court, which was to bring to justice persons who had committed crimes covered by the statute. Again, a balance

(Mr. Hahm, Korea)

needed to be struck to make the court a realistic institution. One option would be to combine the so-called "opting in" system with the projected role of the Security Council in referring cases to the court.

83. Lastly, his delegation felt that it was very important that the draft statute should be consistent with international standards for due process and human rights, in particular the protection of the rights of the accused. The draft statute needed to be improved in that respect.

84. Mr. VOICU (Romania), referring to chapter II of the Commission's report and, specifically, to the draft statute for an international criminal court, said that his delegation was gratified to see that the research and publications of various specialized bodies, and also individual contributions, had been used in the preparation of the draft. His delegation had had occasion in the past to emphasize the belief of a Romanian lawyer that it would be impossible to envisage international justice without an international judicial organ. It was encouraging to see in the report that the Commission had managed to complete within one session a comprehensive draft statute containing 67 articles along with very useful commentaries.

85. The report of the Working Group deserved careful consideration. Governments would need more time to reflect on each article of the draft statute and to formulate opinions on the various options suggested. It was therefore essential to extend the Commission's mandate so that it could complete the preparation of the draft in 1994. His delegation could make only preliminary observations at the current stage.

86. The establishment of an international criminal tribunal should be achieved by means of a multilateral convention open to all States. That procedure would ensure wide acceptance of the convention, which was a prerequisite for the effective functioning of the tribunal. The two options envisaged in article 2 should be analysed in a pragmatic way, since it would clearly be necessary for the future tribunal to be linked to the main organs of the United Nations. In that respect, article 25 dealt with an important category of cases which might be referred to the court by the Security Council. The drafting of that article could be improved through the inclusion of the understanding expressed in the commentary about the situations that would normally be referred to the tribunal by the Security Council, namely situations of aggression.

87. Articles 22 to 26 reflected an important distinction between treaties which defined crimes as international crimes and treaties which merely provided for the suppression of undesirable conduct constituting crimes under national law. In that context, article 23 was a key article, in respect of which the Working Group provided three options. His delegation was inclined to favour Alternative A, which offered greater flexibility and better reflected the consensual basis of the court's jurisdiction; that would facilitate the accession of a larger number of States.

(Mr. Voicu, Romania)

88. Article 26, paragraph 2 (a) defined what was meant by a "crime under general international law", a definition which was necessary for the understanding of article 28. The distinction between crimes under international law and crimes under national law was crucial: the legal effects of that distinction were expressed in article 26.

89. Without going into detail about the investigation and commencement of prosecution, he said that his delegation agreed with the approach taken by the Working Group in part 3 of the draft statute. The tribunal would be a facility available to States parties to its statute, other States and the Security Council. As to parts 4 to 7, great care would need to be taken to ensure that the detailed and specific provisions in those parts were harmonized with the general rules in other parts of the draft.

90. Once concluded, the draft statute for an international criminal tribunal would be a significant contribution by the Commission to the United Nations Decade of International Law. To that end, the Committee should provide a clear and specific mandate to the Commission to continue and complete its work on the subject.

91. Mr. SOLIMAN (Egypt) said that General Assembly resolution 47/33 was a landmark since it laid the foundations for establishing an international criminal court, an objective which could be achieved despite the difficulties that existed.

92. Referring to the relations between the United Nations and the court, he said that the court would have to be independent in order to be able to perform its functions. Moreover, the structure of the United Nations should be respected, and the court should therefore be established under a cooperation agreement similar to the agreements between the United Nations and the specialized agencies. The General Assembly should be accorded an appropriate role with regard to the election of the judges of the court.

93. Egypt supported the idea that the jurisdiction ratione materiae of the court should be limited to violations and serious crimes committed against humanitarian law and agreed, in general, with the list of crimes in article 22 of the draft statute. With regard to the declaration of acceptance of the jurisdiction of the court by States, a question covered by articles 23 to 26 of the draft, Egypt supported Alternative B of article 23, whereby all States which became parties to the Statute would be deemed to have accepted the jurisdiction of the court over any crime referred to in article 22. Moreover, in that Alternative it was envisaged that, at the time of ratification or accession, or at any time thereafter, any State could indicate, by means of a declaration, that it did not accept the jurisdiction of the court over certain crimes. His delegation was in favour of the second type of jurisdiction in article 26 of the draft statute, whereby States would consent to the court exercising jurisdiction in respect of other international crimes. However, it believed that the crimes referred to in article 26, paragraph 2 (b) of the draft statute, particularly drug-related crimes, should be considered in more detail.

(Mr. Soliman, Egypt)

94. His delegation found it encouraging that, in paragraph 100 of the report of the Commission, it was indicated that the Commission had decided that the draft articles should be transmitted, through the Secretary-General, to Governments, with a request that their comments be submitted by 15 February 1994. That would enable the Commission to take those comments into account when considering the question of an international criminal court at its forty-sixth session, which would be held in 1994.

The meeting rose at 12.55 p.m.