



**United Nations**

**United Nations  
Diplomatic Conference  
of Plenipotentiaries  
on the Establishment  
of an International Criminal Court**

**Rome, 15 June – 17 July 1998**

**Official Records**

**Volume II**

**Summary records of the plenary meetings  
and of the meetings of the Committee of the Whole**



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## INTRODUCTORY NOTE

*The Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court* consists of three volumes.

Volume I contains the Rome Statute of the International Criminal Court, as corrected by procès-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002, as well as the Final Act, with an annex containing the resolutions adopted by the Conference. The Statute entered into force on 1 July 2002. The volume also contains a complete table of contents for volumes I, II and III.

Volume II contains the relevant General Assembly resolutions, the agenda, the Rules of Procedure, the lists of delegations, Officers of the Conference and its Committees and the secretariat of the Conference, as well as the summary records of the plenary meetings of the Conference and of the meetings of the Committee of the Whole.

Volume III contains, in sections A to D, the reports of the Credentials Committee, the Preparatory Committee, the Committee of the Whole and the Drafting Committee.

Volume III also contains, in section E, the documents of the plenary and, in section F, the documents of the Committee of the Whole (proposals, working papers, recommendations, reports and other documents). The documents in section F are arranged in relation to the relevant part of the draft Statute and the draft Final Act and are organized according to the body to which they were submitted and the numerical order of the document symbols. The corrigenda and addenda to the various documents have been incorporated in the respective documents and, where necessary, the footnotes have been renumbered accordingly. The numbers of the articles contained in these documents correspond to those of the draft Statute submitted by the Preparatory Committee and not those of the Rome Statute adopted by the Conference.

Volume III further contains a complete index of the documents relevant to the proceedings of the Conference, a list of documents arranged by article and a list of documents submitted by delegations.

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The summary records of the plenary meetings of the Conference and of the meetings of the Committee of the Whole contained in volume II were originally circulated in mimeograph form as documents A/CONF.183/SR.1 to 9 and A/CONF.183/C.1/SR.1 to 42, respectively. They include such editorial changes as were considered necessary.

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Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.



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## General Assembly resolutions relative to the Conference

### 51/207. Establishment of an international criminal court

*The General Assembly,*

*Recalling* its resolutions 47/33 of 25 November 1992 and 48/31 of 9 December 1993,

*Recalling also* that the International Law Commission adopted at its forty-sixth session a draft statute for an international criminal court<sup>1</sup> and decided to recommend that an international conference of plenipotentiaries be convened to study the draft statute and to conclude a convention on the establishment of an international criminal court,<sup>2</sup>

*Recalling further* its resolution 49/53 of 9 December 1994, in which it decided to establish an ad hoc committee, open to all States Members of the United Nations or members of specialized agencies, to review the major substantive and administrative issues arising out of the draft statute prepared by the International Law Commission and, in the light of that review, to consider arrangements for the convening of an international conference of plenipotentiaries,

*Recalling* its resolution 50/46 of 11 December 1995, in which it decided, in the light of the report of the Ad Hoc Committee on the Establishment of an International Criminal Court,<sup>3</sup> to establish a preparatory committee, open to all States Members of the United Nations or members of specialized agencies or of the International Atomic Energy Agency, to discuss further the major substantive and administrative issues arising out of the draft statute prepared by the International Law Commission and, taking into account the different views expressed during the meetings, to draft texts, with a view to preparing a widely acceptable consolidated text of a convention for an international criminal court as a next step towards consideration by a conference of plenipotentiaries, and also decided that the work of the Preparatory Committee should be based on the draft statute prepared by the International Law Commission and should take into account the report of the Ad Hoc Committee and the written comments<sup>4</sup> submitted by States to the Secretary-General on the draft statute for an international criminal court pursuant to paragraph 4 of General Assembly resolution 49/53 and, as appropriate, contributions of relevant organizations,

*Noting* that the Preparatory Committee continued the discussion of the major substantive and administrative issues arising out of the draft statute and initiated consideration of draft texts, with a view to preparing a widely acceptable consolidated text of a convention for an international criminal court,

*Noting also* that major substantive and administrative issues remain to be resolved,

*Noting further* that the Preparatory Committee, in the light of the progress made and deeply aware of the commitment of the international community to the establishment of an international criminal court, recommended that the General Assembly reaffirm the mandate of the Preparatory Committee and give further directions to it,

*Recalling* that in its resolution 50/46 it resolved to decide, in the light of the report of the Preparatory Committee, on the convening of an international conference of plenipotentiaries to finalize and adopt a convention on the establishment of an international criminal court, including on the timing and duration of the conference,

*Noting* that the Preparatory Committee, recognizing that this is a matter for the General Assembly, and on the basis of its scheme of work, considered that it was realistic to regard the holding of a diplomatic conference of plenipotentiaries in 1998 as feasible,

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<sup>1</sup> See *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 10 (A/49/10)*, para. 91.

<sup>2</sup> *Ibid.*, para. 90.

<sup>3</sup> *Ibid.*, *Fiftieth Session, Supplement No. 22 (A/50/22)*.

<sup>4</sup> See A/AC.244/1 and Add.1-4.

Aware of the necessity to maintain some flexibility in the organization of future work in order to ensure the success of the conference of plenipotentiaries,

Expressing deep appreciation for the renewed offer of the Government of Italy to host a conference on the establishment of an international criminal court in June 1998,

1. Takes note of the report of the Preparatory Committee on the Establishment of an International Criminal Court,<sup>5</sup> including the recommendations contained therein, and expresses its appreciation to the Preparatory Committee for the useful work done and the progress made in fulfilling its mandate;

2. Takes note also of the various views of Governments expressed during the consideration of the report of the Preparatory Committee in the Sixth Committee during the fifty-first session of the General Assembly;

3. Decides to reaffirm the mandate of the Preparatory Committee, and directs it to proceed in accordance with paragraph 368 of its report;<sup>6</sup>

4. Decides also that the Preparatory Committee shall meet from 11 to 21 February, 4 to 15 August and 1 to 12 December 1997, and from 16 March to 3 April 1998, in order to complete the drafting of a widely acceptable consolidated text of a convention, to be submitted to the diplomatic conference of plenipotentiaries, and requests the Secretary-General to provide the Preparatory Committee with the necessary facilities for the performance of its work;

5. Decides further that a diplomatic conference of plenipotentiaries shall be held in 1998, with a view to finalizing and adopting a convention on the establishment of an international criminal court;

6. Urges participation in the Preparatory Committee by the largest number of States so as to promote universal support for an international criminal court;

7. Requests the Secretary-General to establish a special fund for the participation of the least developed countries in the work of the Preparatory Committee and in the diplomatic conference of plenipotentiaries, and calls upon States to contribute voluntarily to that special fund;

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<sup>5</sup> Official Records of the General Assembly, Fifty-first Session, Supplement No. 22 (A/51/22), vols. I and II.

<sup>6</sup> Paragraph 368 of volume I of the report reads as follows:

"The Preparatory Committee wishes to emphasize the usefulness of its discussions and the cooperative spirit in which the debates took place. In the light of the progress made and with an awareness of the commitment of the international community to the establishment of an international criminal court, the Preparatory Committee recommends that the General Assembly reaffirm the mandate of the Preparatory Committee and give the following directions to it:

"(a) To meet three or four times up to a total of nine weeks before the diplomatic conference. To organize its work so that it will be finalized in April 1998 and so as to allow the widest possible participation of States. The work should be done in the form of open-ended working groups, concentrating on the negotiation of proposals with a view to producing a draft consolidated text of a convention to be submitted to the diplomatic conference. No simultaneous meetings of the working groups shall be held. The working methods should be fully transparent and should be by general agreement in order to secure the universality of the convention. Submission of reports on its debates will not be required. Interpretation and translation services will be available to the working groups;

"(b) To deal with the following:

"(i) Definition and elements of crimes;

"(ii) Principles of criminal law and penalties;

"(iii) Organization of the Court;

"(iv) Procedures;

"(v) Complementarity and trigger mechanism;

"(vi) Cooperation with States;

"(vii) Establishment of the International Criminal Court and its relationship with the United Nations;

"(viii) Final clauses and financial matters;

"(ix) Other matters."

8. *Decides* to include in the provisional agenda of its fifty-second session the item entitled "Establishment of an international criminal court" in order to have the necessary arrangements made for the diplomatic conference of plenipotentiaries to be held in 1998, unless the General Assembly decides otherwise in view of relevant circumstances.

*88th plenary meeting  
17 December 1996*

## **52/160. Establishment of an international criminal court**

*The General Assembly,*

*Recalling* its resolutions 47/33 of 25 November 1992, 48/31 of 9 December 1993, 49/53 of 9 December 1994 and 50/46 of 11 December 1995,

*Considering* that, in its resolution 51/207 of 17 December 1996, it decided to reaffirm the mandate of the Preparatory Committee on the Establishment of an International Criminal Court and decided also that the Preparatory Committee should meet from 11 to 21 February, 4 to 15 August and 1 to 12 December 1997, and from 16 March to 3 April 1998, in order to complete the drafting of a widely acceptable consolidated text of a convention, to be submitted to a diplomatic conference of plenipotentiaries,

*Recalling* that, in its resolution 51/207, it further decided that a diplomatic conference of plenipotentiaries should be held in 1998, with a view to finalizing and adopting a convention on the establishment of an international criminal court,

*Recognizing* the importance of concluding the work of the conference through the promotion of general agreement on matters of substance,

*Noting* that, at its fifty-first meeting, on 21 February 1997, the Preparatory Committee welcomed the offer by the Government of Italy to hold the conference at Rome and recommended to the General Assembly that, pursuant to Assembly resolution 51/207 and after consideration by the Committee on Conferences, a decision in accordance with the offer should be made when dealing with the necessary arrangements for the conference, on the understanding that the organization of the conference at Rome would proceed on the basis of the usual practice concerning the funding of such events taking place away from United Nations Headquarters or other United Nations offices,<sup>7</sup>

*Taking note* of the report of the Committee on Conferences,<sup>8</sup> in which the Committee recommended to the General Assembly that it should adopt the draft biennial calendar of conferences and meetings for 1998–1999 contained in the report,

*Welcoming* the steps taken, and the suggestions made, by the Government of Italy following its offer to host the conference in June 1998, including the proposal to hold the conference during the period from 15 June to 17 July 1998 at the headquarters of the Food and Agriculture Organization of the United Nations at Rome,

1. *Accepts with deep appreciation* the generous offer of the Government of Italy to act as host to the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court;

2. *Requests* the Preparatory Committee on the Establishment of an International Criminal Court to continue its work in accordance with General Assembly resolution 51/207 and, at the end of its sessions, to transmit to the Conference the text of a draft convention on the establishment of an international criminal court prepared in accordance with its mandate;

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<sup>7</sup> See A/AC.249/1997/L.5, annex III.

<sup>8</sup> A/52/32 and Add.1–3. For the final text, see *Official Records of the General Assembly, Fifty-second Session, Supplement No. 32*.

3. *Decides* that the Conference, open to all States Members of the United Nations or members of specialized agencies or of the International Atomic Energy Agency, shall be held at Rome from 15 June to 17 July 1998, with a view to finalizing and adopting a convention on the establishment of an international criminal court, and requests the Secretary-General to invite those States to the Conference;

4. *Requests* the Secretary-General to prepare the text of the draft rules of procedure of the Conference, to be submitted to the Preparatory Committee for its consideration and for recommendations to the Conference, with a view to the adoption of such rules by the Conference in accordance with the rules of procedure of the General Assembly, and to provide for consultations on the organization and methods of work of the Conference, including rules of procedure, prior to the convening of the last session of the Preparatory Committee;

5. *Urges* participation in the Conference by the largest number of States so as to promote universal support for an international criminal court;

6. *Notes with appreciation* the establishment by the Secretary-General, pursuant to resolution 51/207, of a trust fund for the participation of the least developed countries in the work of the Preparatory Committee and in the Conference, welcomes the decision by a number of States to make contributions to the trust fund, and encourages States to contribute voluntarily to it;

7. *Requests* the Secretary-General to establish a trust fund for voluntary contributions towards meeting the cost of participation in the work of the Preparatory Committee and the Conference of those developing countries not covered by the trust fund referred to in paragraph 6 above, and invites States to contribute voluntarily to this trust fund;

8. *Also requests* the Secretary-General to invite to the Conference representatives of organizations and other entities that have received a standing invitation from the General Assembly pursuant to its relevant resolutions<sup>9</sup> to participate, in the capacity of observers, in its sessions and work, on the understanding that such representatives would participate in the Conference in that capacity, and to invite, as observers to the Conference, representatives of interested regional intergovernmental organizations and other interested international bodies, including the international tribunals for the former Yugoslavia and for Rwanda;

9. *Further requests* the Secretary-General to invite non-governmental organizations, accredited by the Preparatory Committee with due regard to the provisions of part VII of Economic and Social Council resolution 1996/31 of 25 July 1996, and in particular to the relevance of their activities to the work of the Conference, to participate in the Conference, along the lines followed in the Preparatory Committee, on the understanding that participation means attending meetings of its plenary and, unless otherwise decided by the Conference in specific situations, formal meetings of its subsidiary bodies except the drafting group, receiving copies of the official documents, making available their materials to delegates and addressing, through a limited number of their representatives, its opening and/or closing sessions, as appropriate, in accordance with the rules of procedure to be adopted by the Conference;

10. *Decides* to include in the provisional agenda of its fifty-third session the item entitled "Establishment of an international criminal court".

*72nd plenary meeting  
15 December 1997*

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<sup>9</sup> Resolutions 253 (III), 477 (V), 2011 (XX), 3208 (XXIX), 3237 (XXIX), 3369 (XXX), 31/3, 33/18, 35/2, 35/3, 36/4, 42/10, 43/6, 44/6, 45/6, 46/8, 47/4, 48/2, 48/3, 48/4, 48/5, 48/237, 48/265, 49/1, 49/2, 50/2, 51/1, 51/6, 51/204 and 52/6.

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Mr. **Nguyen Ba Son**, Director, Department of  
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Mr. **Tran Van Do**, Judge, Central Military Court

Mr. **Nguyen Cong Hong**, Expert, Administrative and  
Criminal Legislation Department, Ministry of Justice

Mr. **Pham Truong Giang**, First Secretary, Permanent  
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Ms. **Pham Thi Thu Huong**, Expert, Department of  
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## Yemen

### Representatives

Mr. Mohamed **Al Badri**, General Attorney (Head of  
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H.E. Mr. Mohamed **Abdullah Elwazir**, Ambassador,  
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Dr. Jafar **Qassim**, Undersecretary, Ministry of Justice

Mr. Hameed Mohamed **Al-Shaibani**, Minister  
Plenipotentiary, Legal and Treaty Department, Ministry of  
Foreign Affairs

Mr. Omar Mohamed **Musaid**, Legal Department,  
Ministry of Foreign Affairs

Mr. Luai Ismail **Elwazir**, Secretary, Minister for Justice

Ms. Maria Alessandra **Aprile**, Secretary, Embassy to Italy

## Zambia

### Representatives

Mr. B. C. **Mutale**, S.C., Attorney-General, Ministry of  
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Mr. Mpundu **Kanja**, Assistant Senior State Advocate,  
Ministry of Legal Affairs

Mrs. Encyla Tina **Sinjela**, First Secretary, Legal Affairs,  
Permanent Mission, New York

## Zimbabwe

### Representatives

Hon. E. D. **Mnangagwa**, Minister for Justice, Legal and  
Parliamentary Affairs (Head of Delegation)

H.E. Mr. S. H. **Comberbach**, Ambassador, Embassy to  
Italy (Alternate Head of Delegation)



Mr. B. Patel, Legal Adviser, Attorney-General's Office  
Ms. M. Msika, Legal Adviser, Ministry of Justice, Legal and Parliamentary Affairs  
Ms. A. Guvava, Legal Adviser, Attorney-General's Office  
Mr. Godfrey Dzvairo, Head of Legal and Consular Section, Ministry of Foreign Affairs

Ms. E. Chibanda-Munyati, First Secretary, Permanent Mission, New York

Ms. G. Manyarara, Counsellor, Embassy to Italy

Ms. Mugobogobo, First Secretary, Embassy to Italy

Ms. S. Nymudeza, First Secretary, Embassy to Italy

## II. United Nations programmes and bodies

### International Law Commission (ILC)

#### Representative

Mr. James Richard Crawford (Australia), Member

### International Tribunal for Rwanda

#### Representatives

Hon. Judge Laïty Kama, President

Mr. Agwu Uklwe Okali, Registrar

Mrs. Rosette Muzigo-Morrison, Legal Officer

Mr. Zhu Wen-qi, Legal Adviser, Office of the Prosecutor

Mr. Bocar Sy, Officer-in-Charge, Press and Public Affairs Unit

### International Tribunal for the Former Yugoslavia

#### Representatives

Judge Gabrielle Kirk McDonald, President

Mr. Joseph David Tolbert, Senior Legal Officer

Mr. Morten Bergsmo, Legal Officer

### Office of the United Nations High Commissioner for Human Rights (UNHCHR)

#### Representatives

Ms. Mary Robinson, United Nations High Commissioner for Human Rights

Mr. Lyal S. Sunga, Observer

### Office of the United Nations High Commissioner for Refugees (UNHCR)

#### Representatives

Mr. Soren Jessen-Petersen, Assistant High Commissioner

Mr. Dennis McNamara, Director of the Division of International Protection

Mr. Fazlul Karim, Representative, UNHCR Branch Office in Italy

Ms. Wei Meng Lim-Kabaa, Senior Legal Adviser, Standards and Legal Advice Section, Division of International Protection

Ms. Isumi Nakamitsu, First Officer, Liaison Office, New York

Ms. Debbie Elizondo, Deputy Representative, Branch Office in Italy

### United Nations Children's Fund (UNICEF)

#### Representatives

Ms. Carol Bellamy, Executive Director

Mr. Stephen Lewis, Deputy Executive Director

Ms. Marta Santos-Pais, Director, Division of Evaluation, Policy and Planning

Ms. Guillemette Meunier, Programme Officer on Child Rights, Division of Evaluation Policy and Planning

Mr. Emilio Garcia-Mendez, Regional Adviser on Child Rights

### United Nations Commission on Crime Prevention and Criminal Justice

#### Representative

Ms. Djoeka van Beest

### United Nations Office at Vienna Office for Drug Control and Crime Prevention

#### Representative

Mr. Pino Arlacchi, Executive Director

### World Food Programme (WFP)

#### Representatives

Mr. Namanga Ngongi, Deputy Executive Director

Mr. Jean-Jacques Graisse, Assistant Executive Director

Mr. Tun Myat, Director, Resources and External Relations Division

Mr. Tony Dowell, Chief, Insurance and Legal Branch

Mr. Scott Green, Inter-Agency Affairs Officer

### III. Intergovernmental organizations and other entities having received a standing invitation to participate in the sessions and the work of the General Assembly

#### Agence de coopération culturelle et technique (ACCT)

##### Representatives

Mr. Hervé Cassan, Special Adviser to Mr. Boutros Boutros-Ghali, Secretary-General, International Organization of la Francophonie

Ms. Christine Desouches, Delegate General for Legal and Judicial Cooperation

Mr. Ridha Bouabid, Permanent Observer for the International Organization of la Francophonie to the United Nations

Mr. Mohamed Ali Bathily, Deputy Delegate General for Legal and Judicial Cooperation

Mr. Taïmour Mostafa-Kamel, Chief of Cooperation Projects

Ms. Martine Belmant, Administrative Attaché

Ms. Awa Camara, Administrative Attaché

Ms. Massaran Diallo, Administrative Attaché

#### Asian-African Legal Consultative Committee (AALCC)

##### Representatives

H.E. Dr. Wafik Zaher Kamil, Ambassador, Deputy Secretary-General

H.E. Mr. Bhagwat-Singh, Ambassador, Permanent Observer to the United Nations

#### Council of Europe

##### Representatives

Mr. Guy de Vel, Director of Legal Affairs

Mr. Alexey Kozhemyakov, Head, Division of Public and International Law

Mr. Bosse Hedberg, Special Adviser to the Secretary-General

Mr. Candido Cunha, Principal Administrative Officer, Directorate of Legal Affairs

#### European Community

##### Representatives

H.E. Ms. Emma Bonino, Member, European Commission (Head of Delegation)

Ms. Daniela Napoli, Head of Unit, Human Rights

H.E. Mr. Gian Paolo Papa, Ambassador of the European Commission to the International Organizations in Rome

Mr. Leonardo Schiavo, Deputy Head of Cabinet of Ms. Bonino

Mr. Nicola Annecchino, Member of Cabinet of Ms. Bonino

Mr. Filippo Di Robilant, Spokesman of Ms. Bonino

Mr. Ricardo Gosalbo Bono, Member of Legal Service

Ms. Sara Gualandi, Second Secretary, Permanent Representation of the European Commission to the International Organizations in Rome

Mr. Niklas Reuter, Expert, Human Rights

Mr. Gerardo Mombelli, Director, Representation of the European Commission in Italy

Mr. Roberto Santaniello, Press Officer, Representation of the European Commission in Italy

#### European Court of Human Rights

##### Representatives

Mr. Rudolf Bernhardt, President

Mr. Herbert Petzold, Registrar

Mr. Carlo Russo, Italian member of the Court

#### Inter-American Institute of Human Rights

##### Representatives

Mr. Pedro Nikken, President

Mr. Juan E. Méndez, Executive Director

Mr. Francisco J. Cox, Adviser to the Executive Director

#### International Committee of the Red Cross (ICRC)

##### Representatives

Mr. Yves Sandoz, Director, International Law and Policy (Head of Delegation)

Ms. Louise Doswald-Beck, Head, Legal Division (Alternate Head of Delegation)

Mr. Cornelio Sommaruga, President

Mr. Daniel Thürer, Member

Mr. Jean-Philippe Lavoyer, Deputy Head, Legal Division

Ms. Marie-Claude Roberge, Legal Adviser

Ms. Helen **Durham**, Legal Adviser

Mr. Kim **Gordon-Bates**, Editor, Press Division

Ms. Béatrice **Megevand Roggo**, Press Officer

#### **International Criminal Police Organization (Interpol)**

##### **Representatives**

Mr. Raymond E. **Kendall**, Q.P.M., M.A., Secretary-General

Mr. Souheil El **Zein**, Director, Legal Affairs

Ms. Françoise **Nocquet**, Assistant Director, Legal Affairs

Mr. Laurent **Grosse**, Legal Reports Officer

#### **International Federation of Red Cross and Red Crescent Societies**

##### **Representatives**

Hon. Mrs. Mariapia **Garavaglia**, Vice-President, International Federation c/o The Italian Red Cross

Professor **Benvenuti**, President, Commission for International Humanitarian Law, Italian Red Cross

Ms. Isabelle **Küntziger**, Legal Adviser and Head of the Humanitarian Law Division, Belgian Red Cross

Professor Eric **David**, Chairman, International Humanitarian Law Committee, Belgian Red Cross

Ms. Arianne **Acke**, Head, Humanitarian Law, Belgian Red Cross

Mr. Christophe **Lanord**, Legal Officer, Legal Affairs, International Federation

##### **Advisers**

Major Piero **Ridolfi**

Dr. Annarita **Roccaldo**

Mr. Gerardo **Di Ruoco**

Dr. Luisa **Vierucci**

Dr. Paola **Gaeta**

Ms. Paola **Pamapana**

#### **International Humanitarian Fact-Finding Commission**

##### **Representatives**

H.E. Mr. Erick **Kussbach**, Ambassador and Doctor of Law

Mr. Marcel **Dubouloz**, Senior Medical Consultant

#### **Inter-Parliamentary Union**

##### **Representatives**

Mr. M. A. **Martínez**, President of the Inter-Parliamentary Council (Head of Delegation)

Mr. A. B. **Johnsson**, Secretary-General

Mr. D. **Novelli**

Mr. V. **Giuzzi**

Mr. S. **Benvenuto**

#### **League of Arab States**

##### **Representatives**

H.E. Dr. Hussein **Hassouna**, Ambassador, Permanent Observer to the United Nations

H.E. Mr. Mohamed **Sharif Mohamud**, Head of Mission, Rome

H.E. Mr. Mohamed **Redouane ben Khadra**, Head, General Department for Legal Affairs

Mr. Khaldoun **Roueiha**, Counsellor

#### **Organization of African Unity (OAU)**

##### **Representatives**

Dr. Solomon **Gomes**, Deputy Permanent Observer to the United Nations

Professor T. **Maluwa**, Legal Adviser, OAU Secretariat

#### **Organization of American States (OAS)**

##### **Representative**

Mr. Enrique **Lagos**, Assistant Secretary for Legal Affairs

#### **Organization of the Islamic Conference (OIC)**

##### **Representatives**

H.E. Mr. Mohammad **Peyrovi**, Ambassador, Deputy Permanent Observer to the United Nations

H.E. Mr. Mohamed **Saleh Zaimi**, Ambassador, Director, Cabinet of the Secretary General

H.E. Dr. Sayed **Anwar Abou Ali**, Ambassador, Director, Department of Legal Affairs

**Sovereign Military Order of Malta (SMOM)**

**Representatives**

H.E. Count C. **Marullo di Condojanni**, Grand  
Chancellor (Head of Delegation)

H.E. Mr. J. **Linati-Bosch**, Ambassador, Vice-Chancellor,  
Permanent Observer to the United Nations

H.E. Mr. L. **Koch**, Ambassador, Secretary for Foreign  
Affairs

H.E. Baron G. **Di Lorenzo Badia**, Ambassador to Italy

Mr. C. **Drzydzinski**, First Secretary, Embassy to Italy

Baron M. M. **Marocco Trischitta**

Mr. **Enrico Caratozzolo**

**IV. Other organizations**

**Palestine**

**Representatives**

Mr. Nimer **Hammad**, General Delegate to Italy

Mr. Marwan **Jilani**, Counsellor, Permanent Observer  
Mission, New York

**V. Specialized agencies and related organizations**

**Food and Agriculture Organization of the United Nations  
(FAO)**

**Representatives**

Mr. G. K. **Moore**, Legal Counsel

Mr. L. M. **Bombin**, Chief, General Legal Affairs Service

Mr. G. **Pucci**, Senior Legal Officer

**International Atomic Energy Agency (IAEA)**

**Representative**

Mr. Larry D. **Johnson**, Legal Adviser

**International Fund for Agricultural Development (IFAD)**

**Representative**

Mr. Fawzi Al-Sultan, President

**International Labour Organization (ILO)**

**Representative**

Ms. A. M. **La Rosa**, Freedom of Association Branch,  
International Labour Standards Department

**United Nations Educational, Scientific and Cultural  
Organization (UNESCO)**

**Representative**

Mr. J. **Kusi**, Director, Office of International Standards  
and Legal Affairs

## **Officers of the Conference and its Committees**

### **President of the Conference**

Mr. Giovanni Conso (Italy)

### **Vice-Presidents of the Conference**

The representatives of the following States: Algeria, Austria, Bangladesh, Burkina Faso, Chile, China, Colombia, Costa Rica, Egypt, France, Gabon, Germany, India, Iran (Islamic Republic of), Japan, Kenya, Latvia, Malawi, Nepal, Nigeria, Pakistan, Russian Federation, Samoa, Slovakia, Sweden, the former Yugoslav Republic of Macedonia, Trinidad and Tobago, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America and Uruguay

### **General Committee of the Conference**

*Chairman:* The President of the Conference

*Members:* The President and Vice-Presidents of the Conference, the Chairman of the Committee of the Whole and the Chairman of the Drafting Committee

### **Committee of the Whole**

*Chairman:* Mr. Philippe Kirsch (Canada)

*Vice-Chairmen:* Ms. Silvia Alejandra Fernández de Gurmendi (Argentina), Mr. Constantin Virgil Ivan (Romania) and Mr. Phakiso Mochochoko (Lesotho)

*Rapporteur:* Mr. Yasumasa Nagamine (Japan)

### **Drafting Committee**

*Chairman:* Mr. Cherif Bassiouni (Egypt)

*Members:* Cameroon, China, Dominican Republic, France, Germany, Ghana, India, Jamaica, Lebanon, Mexico, Morocco, Philippines, Poland, Republic of Korea, Russian Federation, Slovenia, South Africa, Spain, Sudan, Switzerland, Syrian Arab Republic, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela

The Rapporteur of the Committee of the Whole participated ex officio in the work of the Drafting Committee in accordance with rule 49 of the rules of procedure of the Conference.

### **Credentials Committee**

*Chairman:* Ms. Angela Hannelore Benjamin (Dominica)

*Members:* Argentina, China, Côte d'Ivoire, Dominica, Nepal, Norway, Russian Federation, United States of America and Zambia



## Secretariat of the Conference

Mr. Hans Corell, Under-Secretary-General, Legal Counsel  
*(representing the Secretary-General of the United Nations)*

Mr. Roy Lee, Director of the Codification Division of the Office of Legal Affairs  
*(Executive Secretary of the Conference)*

Mr. Manuel Rama-Montaldo *(Secretary of the Drafting Committee)*

Ms. Mahmoud H. Arsanjani *(Secretary of the Committee of the Whole)*

Mr. Mpazi Sinjela *(Secretary of the Credentials Committee)*

Ms. Christiane Bourloyannis-Vrailas *(Assistant Secretary of the Conference)*

Ms. Virginia Morris *(Assistant Secretary of the Conference)*

Mr. Vladimir Rudnitsky *(Assistant Secretary of the Conference)*

Mr. Renan Villacis *(Assistant Secretary of the Conference)*





## **Agenda\***

1. Opening of the Conference by the Secretary-General.
2. Election of the President.
3. Adoption of the agenda.
4. Adoption of the rules of procedure.
5. Election of Vice-Presidents.
6. Election of the Chairman of the Committee of the Whole.
7. Election of the Chairman of the Drafting Committee.
8. Appointment of the Credentials Committee.
9. Appointment of the other members of the Drafting Committee.
10. Organization of work.
11. Consideration of the question concerning the finalization and adoption of a convention on the establishment of an international criminal court in accordance with General Assembly resolutions 51/207 of 17 December 1996 and 52/160 of 15 December 1997.
12. Adoption of a convention and other instruments deemed appropriate and of the final act of the Conference.
13. Signature of the Final Act and of the Convention and other instruments.

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\* Adopted by the Conference at its 1st plenary meeting, on 15 June 1998.



# Rules of Procedure\*

A/CONF.183/6

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\* Adopted by the Conference at its 1st plenary meeting, on 15 June 1998.

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CHAPTER I

**Representation and credentials**

*Rule 1. Composition of delegations*

The delegation of each State participating in the Conference shall consist of a head of delegation and such other accredited representatives, alternate representatives and advisers as may be required. Unless otherwise specified, the term "representative" in chapters I to X and XII refers to a representative of a State.

*Rule 2. Alternates and advisers*

The head of delegation may designate an alternate representative or an adviser to act as a representative.

*Rule 3. Submission of credentials*

The credentials of representatives and the names of alternate representatives and advisers shall be submitted early to the Executive Secretary and, if possible, not later than 24 hours after the opening of the Conference. Any later change in the composition of delegations shall also be submitted to the Executive Secretary. The credentials shall be issued either by the Head of State or Government or by the Minister for Foreign Affairs.

*Rule 4. Credentials Committee*

A Credentials Committee shall be appointed at the beginning of the Conference. It shall consist of nine members, who shall be appointed by the Conference on the proposal of the President. It shall examine the credentials of representatives and report to the Conference without delay.

*Rule 5. Provisional participation in the Conference*

Pending a decision of the Conference upon their credentials, representatives shall be entitled to participate provisionally in the Conference.

CHAPTER II

**Officers**

*Rule 6. Elections*

The Conference shall elect the following officers: a President and 31 Vice-Presidents, as well as the Chairman of the Committee of the Whole provided for in rule 48 and the Chairman of the Drafting Committee provided for in rule 49. These officers shall be elected on the basis of ensuring the representative character of the General Committee, taking into account in particular equitable geographical distribution and bearing in mind the adequate representation of the principal legal systems of the world. The Conference may also elect such other officers as it deems necessary for the performance of its functions.

*Rule 7. General powers of the President*

1. In addition to exercising the powers conferred upon him or her elsewhere by these rules, the President shall preside at the plenary meetings of the Conference, declare the opening and closing of each meeting, direct the discussion, ensure observance of these rules, accord the right to speak, promote the achievement of general agreement, put questions to the Conference for decision and announce decisions. The President shall rule on points of order and, subject to these rules, shall have complete control of the proceedings and over the maintenance of order thereat. The President may propose to the Conference the closure of the list of speakers, a limitation on the time to be allowed to speakers and on the number of times each representative may speak on a question, the adjournment or the closure of the debate and the suspension or the adjournment of a meeting.

2. The President, in the exercise of his or her functions, remains under the authority of the Conference.

*Rule 8. Acting President*

1. If the President finds it necessary to be absent from a meeting or any part thereof, he or she shall designate the Vice-President to take his or her place.

2. A Vice-President acting as President shall have the powers and duties of the President.

*Rule 9. Replacement of the President*

If the President is unable to perform his or her functions, a new President shall be elected.

*Rule 10. Voting rights of the President*

The President, or Vice-President acting as President, shall not vote in the Conference, but may appoint another member of his or her delegation to vote in his or her place.

CHAPTER III

**General Committee**

*Rule 11. Composition*

There shall be a General Committee consisting of 34 members, which shall comprise the President and Vice-Presidents, the Chairman of the Committee of the Whole and the Chairman of the Drafting Committee. The President, or in his or her absence, one of the Vice-Presidents designated by him or her, shall serve as Chairman of the General Committee.

*Rule 12. Substitute members*

If the President or a Vice-President finds it necessary to be absent during a meeting of the General Committee, he or she may designate a member of his or her delegation to sit and vote in the Committee. In the case of absence, the Chairman of the Committee of the Whole shall designate a Vice-Chairman of

that Committee as his or her substitute and the Chairman of the Drafting Committee shall designate a member of the Drafting Committee. When serving on the General Committee, a Vice-Chairman of the Committee of the Whole or member of the Drafting Committee shall not have the right to vote if he or she is of the same delegation as another member of the General Committee.

*Rule 13. Functions*

The General Committee shall assist the President in the general conduct of the business of the Conference and, subject to the decisions of the Conference, shall ensure the coordination of its work. It shall also exercise the powers conferred upon it by rule 34.

CHAPTER IV

**Secretariat**

*Rule 14. Duties of the Secretary-General*

1. The Secretary-General of the United Nations shall be the Secretary-General of the Conference. He, or his representative, shall act in that capacity in all meetings of the Conference and its subsidiary bodies.
2. The Secretary-General shall appoint an Executive Secretary of the Conference and shall provide and direct the staff required by the Conference and its subsidiary bodies.

*Rule 15. Duties of the secretariat*

The secretariat of the Conference shall, in accordance with these rules:

- (a) Interpret speeches made at meetings;
- (b) Receive, translate, reproduce and distribute the documents of the Conference;
- (c) Publish and circulate the official documents of the Conference;
- (d) Prepare and circulate records of public meetings;
- (e) Make and arrange for the keeping of sound recordings of meetings;
- (f) Arrange for the custody and preservation of the documents of the Conference in the archives of the United Nations; and
- (g) Generally perform all other work that the Conference may require.

*Rule 16. Statements by the secretariat*

The Secretary-General or any other member of the staff of the secretariat who may be designated for that purpose may, at any time, make either oral or written statements concerning any question under consideration.

CHAPTER V

**Opening of the Conference**

*Rule 17. Temporary President*

The Secretary-General shall open the first meeting of the Conference and preside until the Conference has elected its President.

*Rule 18. Decisions concerning organization*

The Conference shall, to the extent possible, at its first meeting:

- (a) Adopt its rules of procedure, the draft of which shall, until such adoption, be the provisional rules of procedure of the Conference;
- (b) Elect its officers and constitute its committees;
- (c) Adopt its agenda, the draft of which shall, until such adoption, be the provisional agenda of the Conference;
- (d) Decide on the organization of its work.

CHAPTER VI

**Conduct of business**

*Rule 19. Quorum*

The President may declare a meeting open and permit the debate to proceed when the representatives of at least one third of the States participating in the Conference are present. The presence of representatives of a majority of the States so participating shall be required for any decision to be taken.

*Rule 20. Speeches*

1. No one may address the Conference without having previously obtained the permission of the President. Subject to rules 21, 22 and 25 to 27, the President shall call upon speakers in the order in which they signify their desire to speak. The secretariat shall be in charge of drawing up a list of speakers.
2. Debate shall be confined to the question before the Conference and the President may call a speaker to order if his or her remarks are not relevant to the subject under discussion.
3. The Conference may limit the time allowed to each speaker and the number of times each delegation may speak on a question. Before such a decision is taken, two representatives may speak in favour of, and two against, a proposal to set such limits, after which the motion shall be immediately put to the vote. In any event, unless otherwise decided by the Conference, the President shall limit each intervention on procedural matters to three minutes. When the debate is limited and a speaker exceeds the allotted time, the President shall call him or her to order without delay.

*Rule 21. Precedence*

The chairman or rapporteur of a committee or the representative of a working group may be accorded precedence for the purpose of explaining the conclusions arrived at by that committee or working group.

*Rule 22. Points of order*

During the discussion of any matter, a representative may at any time raise a point of order, which shall be decided immediately by the President in accordance with these rules. A representative may appeal against the ruling of the President. The appeal shall be put to the vote immediately and the President's ruling shall stand unless overruled by a majority of the representatives present and voting. A representative may not, in raising a point of order, speak on the substance of the matter under discussion.

*Rule 23. Closing of the list of speakers*

During the course of a debate, the President may announce the list of speakers and, with the consent of the Conference, declare the list closed.

*Rule 24. Right of reply*

1. Notwithstanding rule 23, the President shall accord the right of reply to any representative who requests it. A representative referred to in rules 60, 61 or 62 may be granted the opportunity to make a reply.
2. Replies made pursuant to this rule shall normally be made at the end of the last meeting of the day.
3. No delegation may make more than two statements under this rule at a given meeting.
4. The first intervention in the exercise of the right of reply for any delegation at a given meeting shall be limited to five minutes and the second intervention shall be limited to three minutes.

*Rule 25. Adjournment of debate*

A representative may at any time move the adjournment of the debate on the question under discussion. In addition to the proposer of the motion, two representatives may speak in favour of, and two against, the adjournment, after which the motion shall, subject to rule 28, be put immediately to the vote.

*Rule 26. Closure of debate*

A representative may at any time move the closure of the debate on the question under discussion, whether or not any other representative has signified his or her wish to speak. Permission to speak on the motion shall be accorded only to two speakers opposing the closure, after which the motion shall, subject to rule 28, be put immediately to the vote.

*Rule 27. Suspension or adjournment of the meeting*

Subject to rule 39, a representative may at any time move the suspension or the adjournment of the meeting. Such motions shall not be debated, but shall, subject to rule 28, be put immediately to the vote.

*Rule 28. Order of motions*

Subject to rule 22, the motions indicated below shall have precedence in the following order over all proposals or other motions before the meeting:

- (a) To suspend the meeting;
- (b) To adjourn the meeting;
- (c) To adjourn the debate on the question under discussion;
- (d) To close the debate on the question under discussion.

*Rule 29. Basic proposal*

The draft convention on the establishment of an international criminal court transmitted by the Preparatory Committee on the Establishment of an International Criminal Court shall constitute the basic proposal for consideration by the Conference.

*Rule 30. Other proposals*

Other proposals shall normally be submitted in writing to the Executive Secretary, who shall circulate copies to all delegations. As a general rule, no proposal shall be considered at any meeting of the Conference unless copies of it have been circulated to all delegations not later than the day preceding the meeting. The president may, however, permit the consideration of amendments, even though these amendments have not been circulated or have only been circulated on the same day.

*Rule 31. Withdrawal of proposals and motions*

A proposal or a motion may be withdrawn by its proposer at any time before a decision on it has been taken, provided that it has not been amended. A proposal or a motion that has thus been withdrawn may be reintroduced by any representative.

*Rule 32. Decisions on competence*

Subject to rules 22 and 28, any motion calling for a decision on the competence of the Conference to discuss any matter or to adopt a proposal submitted to it shall be put to the vote before the matter is discussed or a decision is taken on the proposal in question.

*Rule 33. Reconsideration of proposals*

When a proposal has been adopted or rejected it may not be reconsidered unless the Conference, by a two-thirds majority of the representatives present and voting, so decides. Permission



to speak on a motion to reconsider shall be accorded only to two speakers opposing the motion, after which it shall be put immediately to the vote.

## CHAPTER VII

### Decision-taking

#### *Rule 34. General agreement*

1. The Conference shall make its best endeavours to ensure that the work of the Conference is accomplished by general agreement.
2. If, in the consideration of any matter of substance, all feasible efforts to reach general agreement have failed, the President of the Conference shall consult the General Committee and recommend the steps to be taken, which may include the matter being put to the vote.

#### *Rule 35. Voting rights*

Each State participating in the Conference shall have one vote.

#### *Rule 36. Majority required*

1. Subject to rule 34, decisions of the Conference on the adoption of the text of the Statute of the International Criminal Court as a whole shall be taken by a two-thirds majority of the representatives present and voting, provided that such majority shall include at least a majority of the States participating in the Conference.
2. Subject to rule 34, decisions of the Conference on all other matters of substance shall be taken by a two-thirds majority of the representatives present and voting.
3. Decisions of the Conference on matters of procedure shall be taken by a majority of the representatives present and voting.
4. If the question arises whether a matter is one of procedure or of substance, the President shall rule on the question. An appeal against this ruling shall be put to the vote immediately and the President's ruling shall stand unless overruled by a majority of the representatives present and voting.
5. If a vote is equally divided, the proposal or motion shall be regarded as rejected.

#### *Rule 37. Meaning of the expression "representatives present and voting"*

For the purpose of these rules, the phrase "representatives present and voting" means representatives present and casting an affirmative or negative vote. Representatives who abstain from voting shall be considered as not voting.

#### *Rule 38. Method of voting*

1. Except as provided in rule 45, the Conference shall normally vote by show of hands or by standing, but any representative may request a roll-call. The roll-call shall be taken in the English alphabetical order of the names of the States participating in the Conference, beginning with the delegation whose name is drawn by lot by the President. The name of each State shall be called in all roll-calls and its representative shall reply "yes", "no" or "abstention".
2. When the Conference votes by mechanical means, a non-recorded vote shall replace a vote by show of hands or by standing and a recorded vote shall replace a roll-call. Any representative may request a recorded vote, which shall, unless a representative requests otherwise, be taken without calling out the names of the States participating in the Conference.

#### *Rule 39. Conduct during voting*

The President shall announce the commencement of voting, after which no representative shall be permitted to intervene until the result of the vote has been announced, except on a point of order in connection with the process of voting.

#### *Rule 40. Explanation of vote*

Representatives may make brief statements, consisting solely of explanations of their votes, before the voting has commenced or after the voting has been completed. The President may limit the time to be allowed for such explanations. The representative of a State sponsoring a proposal or motion shall not speak in explanation of vote thereon, except if it has been amended.

#### *Rule 41. Division of proposals*

A representative may move that parts of a proposal be decided on separately. If a representative objects, a decision shall be taken on the motion for division. Permission to speak on the motion shall be accorded only to two representatives in favour of and to two opposing the division. If the motion is carried, those parts of the proposal that are subsequently approved shall be put to the Conference for decision as a whole. If all operative parts of the proposal have been rejected, the proposal shall be considered to have been rejected as a whole.

#### *Rule 42. Amendments*

1. A proposal is considered an amendment to another proposal if it merely adds to, deletes from or revises part of that proposal.
2. Unless specified otherwise, the word "proposal" in these rules shall be considered as including amendments.

*Rule 43. Decisions on amendments*

When an amendment is moved to a proposal, the amendment shall be decided on first. When two or more amendments are moved to a proposal, the Conference shall first decide on the amendment furthest removed in substance from the original proposal and then on the amendment next furthest removed therefrom and so on until all the amendments have been decided on. Where, however, the adoption of one amendment necessarily implies the rejection of another amendment, the latter amendment shall not be put to a decision. If one or more amendments are adopted, a decision shall then be taken on the amended proposal.

*Rule 44. Decisions on proposals*

1. If two or more proposals relate to the same question, the Conference shall, unless it decides otherwise, decide on the proposals in the order in which they were submitted. The Conference may, after each decision on a proposal, decide whether to take a decision on the next proposal.
2. Revised proposals shall be decided on in the order in which the original proposals were submitted, unless the revision substantially departs from the original proposal. In that case, the original proposal shall be considered as withdrawn and the revised proposal shall be treated as a new proposal.
3. A motion requiring that no decision be taken on a proposal shall be put to a decision before a decision is taken on the proposal in question.

*Rule 45. Elections*

All elections shall be held by secret ballot unless otherwise decided by the Conference.

*Rule 46. Elections*

1. If, when one person or one delegation is to be elected, no candidate obtains in the first ballot a majority of the representatives present and voting, a second ballot restricted to the two candidates obtaining the largest number of votes shall be taken. If in the second ballot the votes are equally divided, the President shall decide between the candidates by drawing lots.
2. In the case of a tie in the first ballot among three or more candidates obtaining the largest number of votes, a second ballot shall be held. If a tie results among more than two candidates, the number shall be reduced to two by lot and the balloting, restricted to them, shall continue in accordance with the preceding paragraph.

*Rule 47. Elections*

1. When two or more elective places are to be filled at one time under the same conditions, those candidates, in a number

not exceeding the number of such places, obtaining in the first ballot a majority of the votes of the representatives present and voting and the largest number of votes shall be elected.

2. If the number of candidates obtaining such majority is less than the number of places to be filled, additional ballots shall be held to fill the remaining places, the voting being restricted to the candidates obtaining the greatest number of votes in the previous ballot, to a number not more than twice the places remaining to be filled, provided that, after the third inconclusive ballot, votes may be cast for any eligible person or delegation. If three such unrestricted ballots are inconclusive, the next three ballots shall be restricted to candidates who obtained the greatest number of votes in the third unrestricted ballot, to a number not more than twice the places remaining to be filled, and the following three ballots thereafter shall be unrestricted, and so on until all the places have been filled.

CHAPTER VIII

**Subsidiary bodies**

*Rule 48. Committee of the Whole*

The Conference shall establish a Committee of the Whole. Its Bureau shall consist of a Chairman, three Vice-Chairmen and a Rapporteur.

*Rule 49. Drafting Committee*

1. The Conference shall establish a Drafting Committee consisting of 25 members, including its Chairman who shall be elected by the Conference in accordance with rule 6. The other 24 members of the Committee shall be appointed by the Conference on the proposal of the General Committee, taking into account equitable geographical distribution as well as the need to ensure the representation of the languages of the Conference and to enable the Drafting Committee to fulfil its functions. The Rapporteur of the Committee of the Whole participates ex officio, without a vote, in the work of the Drafting Committee.
2. The Drafting Committee shall, without reopening substantive discussion on any matter, coordinate and refine the drafting of all texts referred to it, without altering their substance, formulate drafts and give advice on drafting as requested by the Conference or by the Committee of the Whole and report to the Conference or to the Committee of the Whole as appropriate.

*Rule 50. Other subsidiary bodies*

The Committee of the Whole may set up working groups.

*Rule 51. Officers*

Except as otherwise provided in rule 6, each subsidiary body shall elect its own officers.

*Rule 52. Officers, conduct of business and voting*

The rules contained in chapters II, VI and VII (except rule 34) above and IX and X below shall be applicable, *mutatis mutandis*, to the proceedings of subsidiary bodies, except that:

(a) The Chairmen of the General, Drafting and Credentials Committees may exercise the right to vote;

(b) The Chairman of the Committee of the Whole may declare a meeting open and permit the debate to proceed when representatives of at least one quarter of the States participating in the Conference are present. The presence of representatives of a majority of the States so participating shall be required for any decision to be taken;

(c) A majority of the representatives of the General, Drafting or Credentials Committee or of any working group shall constitute a quorum;

(d) The Committee of the Whole shall make its best endeavours to ensure that its work is accomplished by general agreement. The Chairman of the Committee of the Whole shall keep the President of the Conference informed of the progress of the work of the Committee. If, in the consideration of any matter of substance, all feasible efforts to reach general agreement have failed, the Chairman of the Committee of the Whole shall consult the other members of its Bureau and recommend the steps to be taken, which may include the matter being put to the vote;

(e) Subject to subparagraph (d), decisions on matters of substance shall be taken by a three-fifths majority of the representatives present and voting, provided that such a majority includes at least one third of the States participating in the Conference. Other decisions shall be taken by a majority of the representatives present and voting, except that the reconsideration of a proposal shall require the majority established by rule 33.

CHAPTER IX

**Languages and records**

*Rule 53. Languages of the Conference*

Arabic, Chinese, English, French, Russian and Spanish shall be the languages of the Conference.

*Rule 54. Interpretation*

1. Speeches made in a language of the Conference shall be interpreted into the other such languages.

2. A representative may speak in a language other than a language of the Conference if the delegation concerned provides for interpretation into one such language.

*Rule 55. Languages of official documents*

Official documents of the Conference shall be made available in the languages of the Conference.

*Rule 56. Records and sound recordings of meetings*

1. Summary records of the plenary meetings of the Conference and of the meetings of the Committee of the Whole shall be kept in the languages of the Conference. As a general rule, they shall be circulated as soon as possible, simultaneously in all the languages of the Conference, to all representatives, who shall inform the secretariat within five working days after the circulation of the summary record of any changes they wish to have made.

2. The secretariat shall make sound recordings of meetings of the Conference, the Committee of the Whole and the Drafting Committee. Such recordings shall be made of meetings of other committees when the body concerned so decides.

CHAPTER X

**Public and private meetings**

*Rule 57. Plenary meetings and meetings of the Committee of the Whole*

The plenary meetings of the Conference and the meetings of the Committee of the Whole shall be held in public unless the body concerned decides otherwise. All decisions taken by the plenary of the Conference at a private meeting shall be announced at an early public meeting of the plenary.

*Rule 58. Meetings of other subsidiary bodies*

As a general rule, meetings of other subsidiary bodies shall be held in private.

*Rule 59. Communiqués on private meetings*

At the close of any private meeting, the chairman of the body concerned may issue a communiqué to the press through the Executive Secretary.

CHAPTER XI

**Observers**

*Rule 60. Representatives of organizations and other entities that have received a standing invitation from the General Assembly pursuant to its relevant resolutions to participate, in the capacity of observers, in its sessions and work*

Representatives designated by organizations and other entities that have received a standing invitation from the General Assembly pursuant to its relevant resolutions to

participate, in the capacity of observers, in its sessions and work have the right to participate as observers, without the right to vote, in the deliberations of the Conference, the Committee of the Whole and subsidiary bodies established under rule 50.

*Rule 61. Representatives of other regional  
intergovernmental organizations*

Representatives designated by other regional inter-governmental organizations invited to the Conference may participate as observers, without the right to vote, in the deliberations of the Conference, the Committee of the Whole and subsidiary bodies established under rule 50.

*Rule 62. Representatives of other international bodies*

Representatives designated by other international bodies invited to the Conference may participate as observers, without the right to vote, in the deliberations of the Conference, the Committee of the Whole and subsidiary bodies established under rule 50.

*Rule 63. Representatives of non-governmental  
organizations*

Non-governmental organizations invited to the Conference may participate in the Conference through their designated representatives as follows:

(a) By attending plenary meetings of the Conference and, unless otherwise decided by the Conference in specific

situations, formal meetings of the Committee of the Whole and of subsidiary bodies established under rule 50;

(b) By receiving copies of official documents;

(c) Upon the invitation of the President and subject to the approval of the Conference, by making, through a limited number of their representatives, oral statements to the opening and closing sessions of the Conference, as appropriate.

*Rule 64. Written statements*

Written statements submitted by the designated representatives referred to in rules 60 to 63 shall be made available by the secretariat to delegations in the quantities and in the language or languages in which the statements are made available to it at the site of the Conference, provided that a statement submitted on behalf of a non-governmental organization is related to the work of the Conference and is on a subject in which the organization has a special competence. Written statements shall not be made at United Nations expense and shall not be issued as official documents.

CHAPTER XII

**Amendments to the Rules of Procedure**

*Rule 65. Method of amendment*

These Rules of Procedure may be amended by a decision of the Conference taken by a two-thirds majority of the representatives present and voting.

# Summary records of the plenary meetings

## 1st plenary meeting

Monday, 15 June 1998, at 10.15 a.m.

*Temporary President:* Mr. Kofi Annan (Secretary-General of the United Nations)

*President:* Mr. Conso (Italy)

A/CONF.183/SR.1

### Item 1 of the provisional agenda

#### Opening of the Conference by the Secretary-General

1. The Temporary President declared open the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court.
2. *At the invitation of the Temporary President, the participants observed a minute of silence for prayer or meditation.*
3. The Temporary President thanked the Italian Government for its generosity in hosting the Conference and for its continued strong support of the United Nations.
4. The road leading to the holding of the Conference in the Eternal City had been a long one, passing through some of the darkest moments in human history but also marked by the belief that the true nature of human beings was to be noble and generous. Though most human societies had practised warfare, most had also had some kind of warrior code of honour, proclaiming the need to protect the innocent and to punish excesses of violence. Unhappily, that had not prevented the extermination of indigenous peoples or the barbaric trade in African slaves.
5. With the use of weapons of mass destruction and the application of industrial technology to dispose of millions of human beings, the world had come to realize that relying on each State or army to punish its own transgressors was not enough. All too often, such crimes were part of a systematic State policy and the worst criminals might be found at the pinnacle of State power.
6. After the defeat of nazism and fascism, the United Nations had been set up in an effort to ensure that world war could never happen again. The victorious Powers had set up international tribunals at Nuremberg and Tokyo to judge the leaders who had ordered and carried out the worst atrocities. They had decided to prosecute Nazi leaders not only for war crimes but also for crimes against humanity, including the Holocaust. However, the General Assembly had not considered it sufficient to make an example of a few arch-criminals. It had adopted the Convention on the Prevention and Punishment of the Crime of Genocide in 1948 and requested the International Law Commission to study the possibility of establishing a permanent international criminal court. The cold war had prevented further progress at the time but had not prevented further crimes against humanity.

7. The most notorious example of such crimes in that period had been the killing of more than 2 million people in Cambodia, the organizer of which had recently died without being brought to justice. It was not until the 1990s that a political climate had prevailed in which the United Nations could again consider establishing an international criminal court. Unhappily, the current decade had also brought new crimes to force the issue on the world's attention. Events in the former Yugoslavia had added the dreadful euphemism of "ethnic cleansing" to the international vocabulary. Perhaps a quarter of a million people, mostly civilians guilty only of living on the wrong side of an arbitrary line, had died there between 1991 and 1995. In 1994, there had been the genocide in Rwanda, which had done irreparable damage not only to one small country but to the very idea of an international community. In future, the United Nations and its Member States must summon the will to prevent the repetition of such a catastrophe anywhere in the world, and as part of that effort it must be made clear that such crimes would be punished.

8. Following the events in the former Yugoslavia and Rwanda, ad hoc tribunals had to be set up for those two countries. The tribunals had issued indictments and international arrest warrants. Persons indicted but not yet arrested had become international pariahs who, though enjoying the presumption of innocence, could not travel freely or hold political office. Six weeks before the current Conference, a former Prime Minister of Rwanda had pleaded guilty before a tribunal to the charge of genocide – representing a historic milestone.

9. Whatever their imperfections, the tribunals were showing that there was such a thing as international criminal justice and that it could have teeth. But ad hoc tribunals were not enough. People all over the world wanted to know that, whenever genocide, war crimes or other such violations were committed, there was a court before which the criminal could be held to account, a court where "acting under orders" was no defence, a court where all individuals in a government hierarchy or military chain of command, without exception, must answer for their actions.

10. World public opinion had led to the holding of the Conference, stimulated by the hard work of the Red Cross, of many other non-governmental organizations and of the humanitarian community. The whole world would be watching the Conference, and concrete results would be expected.

11. The difficulties to be overcome in the five weeks ahead should not be underestimated. The work of the Preparatory Committee on the Establishment of an International Criminal Court had shown how complex the issue was and how many conflicting principles and interests had to be reconciled. Some small States feared giving pretexts for more powerful ones to set aside their sovereignty. Others worried that the pursuit of justice might sometimes interfere with the vital work of making peace. Those concerns had to be taken into account. Obviously, the aim must be to create a statute that would be accepted and implemented by as many States as possible. But the overriding interest must be that of the victims and of the international community as a whole. The court must be strong and independent enough to carry out its tasks – an instrument of justice, not expediency. It must be able to protect the weak against the strong.

12. He hoped that the participants, in the long weeks of hard and detailed negotiations that lay ahead, would feel that the eyes of the victims of past crimes, and of the potential victims of future ones, were fixed firmly upon them. The Conference offered an opportunity to take a monumental step in the name of human rights and the rule of law, an opportunity to create an institution that could save lives and serve as a bulwark against evil, bequeathing to the next century a powerful instrument of justice. Future generations would not forgive failure in that endeavour.

#### Address by the President of the Republic of Italy

13. **Mr. Scalfaro** (President of the Republic of Italy) said that his country was honoured to host the Conference. It was aware of the great responsibility entailed and was committed to ensuring the success of the Conference.

14. The basis for the Conference was the 1948 Universal Declaration of Human Rights. The rights therein proclaimed were inherent rights, not something granted as a concession by a State or the United Nations. To deprive persons of such rights was no longer to treat them as persons. The Italian Constitution, in its article 2, recognized the inviolable rights of human beings. "Recognition" implied that the existence of such rights had preceded the establishment of the State; States had been created to give them a legal and constitutional form.

15. In the introductory paragraph preceding the articles, the Universal Declaration of Human Rights called on every individual and every organ of society to strive to promote respect for the rights and freedoms proclaimed. According to article 1 of the Declaration, "All human beings are born free and equal in dignity and rights". Human beings should work together in a spirit of brotherhood, respecting each other's rights; they should obey a universal moral law protecting human dignity and condemning acts against humanity.

16. Since the adoption of the Declaration, there had been countless violations of human rights, including ethnic cleansing, genocide, the denial of the rights of minorities, child abuse and denial of people's right to their beliefs. A supranational body

was needed with the power to examine and punish such violations. The ad hoc tribunals set up for the former Yugoslavia and Rwanda represented positive advances, but they worked only in a limited context. Criminal law should always precede crimes; it should be known that the crimes were punishable by law and what the penalties would be. It should be possible for appeals to be brought. Any tribunal set up should be impartial and competent, the rights of the defendant as well as of the international community should be protected, and it should be borne in mind that justice delayed was justice denied.

17. An international criminal court should not undermine the concept of national sovereignty, but crimes such as those that had been committed in Rwanda and the former Yugoslavia called for qualified supranational judges able to overcome the barriers of national frontiers. Such crimes affected humanity as a whole. A crime committed by a Government or a self-proclaimed authority could be judged only by a court which was set above States and countries.

18. Those were the problems to which a solution was awaited. The Conference would not have an easy task, but he was convinced that, working together, the participants could overcome the difficulties.

*The meeting was suspended at 10.45 a.m. and resumed at 10.50 a.m.*

#### Item 2 of the provisional agenda Election of the President

19. **The Temporary President** said that it was his understanding that Mr. Giovanni Conso (Italy) had been nominated by all the regional groups for the office of President.

20. *Mr. Giovanni Conso (Italy) was elected President by acclamation and took the Chair.*

21. **The President** said that, after the end of the cold war, many States had accepted the principles of democracy and respect for fundamental human rights, and hopes had been raised for lasting peace among peoples and security and cooperation among States. Unfortunately, those hopes had been dashed. Armed conflict had raged in many parts of the world and terrible atrocities had occurred. At that very moment, acts of violence were being committed against innocent civilians. The world could not remain indifferent to such behaviour. Decisive measures were needed to bring such acts of violence to an end. The establishment of an international criminal court would send the unmistakable message to all those responsible for abominable crimes that they could no longer act with impunity and that they would be brought to justice. It would make it clear that no one was above the law and that anyone seen as bearing individual criminal responsibility for such atrocities would be punished.

22. Several attempts had been made to establish an international criminal court since the end of the Second World

War. The achievement of that objective had been hampered in the past by the prevailing political climate, but the world was currently closer to realizing that aim than ever before, and the Conference should not waste the opportunity to achieve its goal.

23. The expectations of mankind must not be disappointed. The court must be universal and independent so that it could prosecute the most serious crimes impartially and efficiently. World public opinion would follow the work of the Conference very closely to see that it completed its essential task of adopting a convention that would lead to the setting up of an international criminal court.

24. The establishment, at the initiative of the Security Council, of ad hoc tribunals for the former Yugoslavia and Rwanda showed that the political will existed and that it was possible to establish a viable international mechanism that was equitable and just. Such a permanent international mechanism could guarantee that there would be no selective justice, but that, whenever odious crimes were committed, wherever they took place, they would be punished.

25. Finally, the establishment of an international criminal court would be the guarantee of a more humane and just world order.

26. He thanked the Preparatory Committee for its excellent work under the chairmanship of Mr. Adriaan Bos, who was unfortunately not able to be present.

27. He would spare no effort to ensure that the Conference could elaborate and adopt a convention establishing an international criminal court. He was sure that the importance of the aims that the Conference was seeking to achieve would be present in the minds of all participants.

#### **Statement by the Director-General of the Food and Agriculture Organization of the United Nations**

28. **Mr. Diouf** (Director-General of the Food and Agriculture Organization of the United Nations) welcomed the participants to the headquarters of the Food and Agriculture Organization of the United Nations (FAO) and said that an objective implicit in the mandates of all agencies of the United Nations system was to secure universal respect for human rights and fundamental freedoms throughout the world. The world's leaders had stressed that objective at the World Food Summit, held in Rome in 1996, in the context of the fight against hunger.

29. FAO was happy to lend its support to the efforts of the Conference to establish a permanent international criminal court as a decisive step forward in the struggle for peace and justice and respect for human rights in conflict situations. He hoped that the work of the Conference over the next few weeks would be fruitful and would set the scene for a new millennium in which the human rights and fundamental freedoms of all people were universally respected.

#### **Item 3 of the provisional agenda**

##### **Adoption of the agenda (A/CONF.183/1)**

30. *The provisional agenda (A/CONF.183/1) was adopted.*

#### **Agenda item 4**

##### **Adoption of the rules of procedure (A/CONF.183/2/Add.2, A/CONF.183/4 and A/CONF.183/5)**

31. **The President** said that some of the draft rules of procedure for the Conference contained in document A/CONF.183/2/Add.2 had given rise to disagreement in the Preparatory Committee. Consequently, the figures contained in draft rules 6, 11 and 49 had been placed in brackets. Draft rules 19, 36 and 52 had also been placed in brackets.

32. However, informal consultations had since taken place and the outstanding questions had been resolved. The results of those consultations were reflected in documents A/CONF.183/4 and A/CONF.183/5. He therefore suggested that the draft rules of procedure contained in document A/CONF.183/2/Add.2, as amended and supplemented by documents A/CONF.183/4 and A/CONF.183/5, be adopted.

33. *It was so decided.*

#### **Agenda item 5**

##### **Election of Vice-Presidents**

34. **The President** said that, in accordance with rule 6 of the rules of procedure, the regional groups had put forward the candidatures of the following States to fill the 31 posts of Vice-President of the Conference: Algeria, Austria, Bangladesh, Burkina Faso, Chile, China, Colombia, Costa Rica, Egypt, France, Gabon, Germany, India, Iran (Islamic Republic of), Japan, Kenya, Lithuania, Malawi, Nepal, Nigeria, Pakistan, Russian Federation, Samoa, Slovakia, Sudan, Sweden, the former Yugoslav Republic of Macedonia, Trinidad and Tobago, United Kingdom of Great Britain and Northern Ireland, United States of America and Uruguay.

35. He therefore suggested that the representatives of those States be elected Vice-Presidents of the Conference.

36. *It was so decided.*

#### **Agenda item 6**

##### **Election of the Chairman of the Committee of the Whole**

37. **The President**, referring to paragraph 4 of document A/CONF.183/4, said that, following consultations, Mr. Philippe Kirsch (Canada) had been nominated by the regional groups as Chairman of the Committee of the Whole.

38. *Mr. Philippe Kirsch (Canada) was elected Chairman of the Committee of the Whole by acclamation.*

**Agenda item 7**

**Election of the Chairman of the Drafting Committee**

39. **The President** said that Mr. Cherif Bassiouni (Egypt) had been nominated as Chairman of the Drafting Committee.

40. *Mr. Cherif Bassiouni (Egypt) was elected Chairman of the Drafting Committee by acclamation.*

**Agenda item 8**

**Appointment of the Credentials Committee**

41. **The President** said that, in accordance with rule 4 of the rules of procedure, a Credentials Committee would be

set up, composed of nine members. It was his understanding that the membership would be the same as that of the Credentials Committee of the fifty-second session of the General Assembly and he therefore suggested that the Credentials Committee should be made up of the representatives of Argentina, Barbados, Bhutan, China, Côte d'Ivoire, Norway, Russian Federation, United States of America and Zambia.

42. *It was so decided.*

*The meeting rose at 11.20 a.m.*

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**2nd plenary meeting**

Monday, 15 June 1998, at 3.10 p.m.

*President: Mr. Conso (Italy)*

A/CONF.183/SR.2

**Agenda item 9**

**Appointment of the other members of the Drafting Committee**

1. **The President** drew attention to rule 49 of the rules of procedure of the Conference concerning the composition of the Drafting Committee. Since Mr. Cherif Bassiouni had been elected Chairman of the Drafting Committee at the first meeting, it merely remained to appoint the 24 other members.

2. He had received the following nominations: Cameroon, China, Dominican Republic, France, Germany, Ghana, India, Jamaica, Lebanon, Mexico, Morocco, Philippines, Poland, Republic of Korea, Russian Federation, Slovenia, South Africa, Spain, Sudan, Switzerland, Syrian Arab Republic, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela.

3. He suggested that the Conference might wish to appoint the representatives of those countries as members of the Drafting Committee.

4. *It was so decided.*

**Agenda item 10**

**Organization of work (A/CONF.183/2 and A/CONF.183/3 and Corr.1)**

5. **The President** drew the attention of the Conference to document A/CONF.183/2 containing the report of the Preparatory Committee on the Establishment of an International Criminal Court and document A/CONF.183/3 and Corr.1 concerning the organization of work. The Conference and its bodies had the necessary latitude to adapt the procedures

recommended in those documents to their needs. He invited the Conference to adopt the draft organization of work as outlined.

6. *The draft organization of work was adopted.*

**Agenda item 11**

**Consideration of the question concerning the finalization and adoption of a convention on the establishment of an international criminal court in accordance with General Assembly resolutions 51/207 of 17 December 1996 and 52/160 of 15 December 1997 (A/CONF.183/2/Add.1 and Corr.1)**

7. **Mr. Downer** (Australia) said that great achievements had been made in the twentieth century but that acts of almost unimaginable inhumanity had also been committed. Against that background, the Conference offered the opportunity to establish a practical, permanent framework to deal with the most serious crimes of concern to the international community.

8. The international community had not acted earlier to see justice done because it had had neither the will nor the mechanism to carry out such a task. However, the Security Council had indeed established ad hoc tribunals to investigate and prosecute crimes committed in Rwanda and the former Yugoslavia, and a draft statute for an international criminal court had also been produced.

9. To make the International Criminal Court a reality, some fundamental issues needed to be resolved. A balance must be struck between the jurisdiction of the Court and that of national justice systems. Australia strongly supported the view that, if national jurisdiction was able and willing to deal effectively with alleged crimes, it should take precedence. However, the



Court must also be able to determine whether a national jurisdiction could effectively investigate and prosecute. Sham investigations or proceedings at the national level could not remain unchallenged.

10. There must be agreement on mechanisms that would trigger the Court's jurisdiction. Australia had long considered that the Court's jurisdiction should be initiated through a complaint by a State party to the Statute of the Court or by the Security Council under its powers concerning the maintenance of international peace and security. He was also prepared to support empowering the Prosecutor to initiate investigations directly. However, the Prosecutor's right to act must be subject to appropriate safeguards, to avoid politically motivated complaints.

11. There must also be a workable relationship between the Court and the Security Council, recognizing the Council's primacy in matters relating to international peace and security.

12. Finally, agreement must be reached on the specific crimes that should fall within the Court's jurisdiction. Clearly, the Statute of the Court must encompass genocide, crimes against humanity and war crimes, but, while there was broad agreement on the definition of genocide, questions of the definition of crimes against humanity and war crimes still had to be resolved. Ethnic cleansing and systematic rape and torture were of such gravity that they must be included in the ambit of the Court's jurisdiction. Discussion and negotiation on those problems would be necessary, but the Conference must not be diverted from its central task of establishing a court that would honour past generations and protect future generations.

13. **Mr. Omar** (South Africa), speaking on behalf of the Southern African Development Community (SADC), said that the Conference was taking place at a time when most brutal and shocking conflicts had occurred throughout the world, highlighting the need to establish an international system of justice under which those responsible for atrocities would be prosecuted and punished.

14. The establishment of an international criminal court would not only strengthen the arsenal of measures to combat gross human rights violations but would ultimately contribute to the attainment of international peace. In view of the crimes committed under the apartheid system, the International Criminal Court should send a clear message that the international community was resolved that the perpetrators of such gross human rights violations would not go unpunished.

15. The Ministers of Justice and Attorneys-General of the SADC region had held discussions on the draft Statute for the establishment of the Court and had affirmed their commitment to its early establishment as an independent and impartial body. It should be an effective complement to national criminal justice systems, operating within the highest standards of international justice. He reiterated the basic principle that the Court should contribute to furthering the integrity of States generally, as well

as the equality of States within the general principles of international law. The Court was a necessary element for peace and security in the world and must therefore have inherent jurisdiction over the crimes of genocide, crimes against humanity, war crimes in international and non-international armed conflicts and aggression. It should also have competence in the event of the inability, unwillingness or unavailability of national criminal justice systems to prosecute those responsible for grave crimes under the Statute, while respecting the complementary nature of its relationships with such national systems.

16. The SADC States believed that the Prosecutor should be independent and have authority to initiate investigations and prosecutions on his or her own initiative without interference from States or the Security Council, subject to appropriate judicial scrutiny. The independence of the Court must not be prejudiced by political considerations.

17. **Ms. Johnson** (Norway) said that two world wars and numerous armed conflicts had brought untold sorrow to mankind. The tide of international opinion was turning against impunity for the worst international crimes. Justice and legal order were increasingly perceived as prerequisites for lasting peace.

18. Ad hoc tribunals might not be an option for prosecuting crimes such as genocide, which made it essential to establish a permanent court. In her opinion, its seat should be in The Hague.

19. A permanent court with unquestionable legitimacy might be more conducive to peace-making than an ad hoc tribunal because no warring party could reasonably portray such a court as being politicized and mass murderers could not expect impunity.

20. Though there was no doubting the magnitude of the Conference's task, no State had contested the need for an international criminal court. The issue was what kind of court it should be. It would have to be strong, with the broadest possible support for its Statute, focusing on a limited list of crimes. Pragmatic concentration at that stage on international crimes which were almost universally recognized would promote wide acceptance of the International Criminal Court. It must also be made clear that adequate rules were needed on sexual violence. On the other hand, attempts to enlarge the list of crimes prematurely might prove a stumbling block. A revision clause could be included to provide an avenue for re-evaluation of the list in the future.

21. She favoured complementarity between the Court and national jurisdictions. Both States and the Security Council must be able to refer situations to the Court, as opposed to complaints about individuals. The threshold requirements must not be too high. Once a situation had been referred, it must be entirely up to the Court to investigate and prosecute individuals on the basis of a truly independent mandate.

22. She advocated giving ex officio powers to the Prosecutor to trigger the Court's intervention, a question that must be fully explored. Confidence-building checks and balances were necessary to establish the independence of the Prosecutor. Protection against prosecutorial bias followed from a number of provisions. Norway perceived the proposal for a pre-trial chamber as a particularly significant step forward compared to the statutes of the existing ad hoc tribunals. Moreover, it must be recognized that States, as well as international organizations, might have legitimate reasons for wishing to protect sensitive information or sources. Adequate procedural safeguards to that effect would be an important improvement.

23. The Court must have the financial resources necessary for its work.

24. Lastly, she rejected the inclusion of the death penalty in the Statute and considered a reservations clause to be totally unacceptable, since the mere possibility of such a clause would significantly diminish the rationale for compromise in negotiations.

25. In the Conference's work, it would be necessary to show pragmatism, compromise and sober realism on some issues, but boundless ambition on others.

26. Norway was committed to the establishment of a strong and independent court. All participants should seize the historic opportunity offered.

27. **Mr. Maharaj** (Trinidad and Tobago) said that his Government had long supported the establishment of a permanent international criminal court that would be independent and have effective jurisdiction to deal with the most serious crimes of international concern. In the light of recent events, he supported the extension of the jurisdiction of the International Criminal Court to internal armed conflicts. The activities of drug traffickers and their armed supporters ought also to be regarded as most serious crimes of international concern.

28. The consensus had been reached during the discussions held at a recent Caribbean and Latin American regional workshop that the Court must be impartial and free from political interference.

29. It was generally agreed that the Court would exercise its jurisdiction only when domestic courts, which had primary responsibility, were unwilling or unable to prosecute. On the question of the trigger mechanism, care should be exercised to ensure that the Court would not have to await a decision by the Security Council before it could launch its investigations. However, the Council had a role to play in relation to the Court.

30. He was satisfied that the rights of suspects and accused persons, and the level of protection to be accorded to victims and witnesses, had been appropriately addressed in the draft Statute. It was vital to set up a Victims and Witnesses Unit within the Registry of the Court. He also supported proposals seeking to ensure that violence against women and children and

the use of children in armed conflicts were punishable. He was convinced that, though the Court would not solve all problems, it would promote the rule of law and help to maintain peace.

31. **Mr. Lloyd** (United Kingdom of Great Britain and Northern Ireland), speaking on behalf of the European Union, the Central and Eastern European countries associated with the European Union, the associated country of Cyprus and the European Free Trade Association countries of Iceland and Norway, said that the year marking the fiftieth anniversary of the adoption of the Universal Declaration of Human Rights and of the Convention on the Prevention and Punishment of the Crime of Genocide was auspicious for the equally historic task of negotiating a statute for a permanent international criminal court. The establishment of such a court had long been debated and the Security Council had set up ad hoc tribunals to bring to justice those responsible for atrocities in Rwanda and the former Yugoslavia. While those tribunals were doing valuable and difficult work, there was no doubt that a truly effective, permanent court would make the world a more just, safer and more peaceful place.

32. The member States of the European Union were firmly committed to certain key principles. The International Criminal Court had to be universal, effective and based on sound legal principles. It must meet the requirements of justice; it must be lasting and it must inspire confidence. It should be an independent institution in relationship with the United Nations, with a sound financial base.

33. The Court should have jurisdiction over genocide, crimes against humanity and war crimes. He shared the widespread desire to include the crime of aggression, properly defined, within the jurisdiction of the Court. That should not, however, detract from the role of the Security Council in maintaining international peace and security.

34. It would be necessary to achieve a generally acceptable definition of war crimes. War crimes within the Court's jurisdiction should include those committed in internal as well as international armed conflicts. Gender-related crimes and the use of children in armed conflict should be explicitly included in the definition of war crimes.

35. The Court would be complementary to national processes, acting only where national systems were unable or unwilling to investigate a crime or to prosecute. Particular attention should be paid to the election of highly qualified judges, whose independence would be best secured by providing for a long tenure of office. The Court should have a strong, effective and highly qualified Prosecutor, independent of Governments.

36. The Court would be dependent on an effective system of State cooperation. States parties should have a solemn obligation to comply with requests for assistance by the Court, which should be given priority over requests from other States. Grounds for refusal based upon national extradition legislation should not be admitted.

37. The Court should have power to award reparations to victims. Its final judgement should be immediately enforceable and a sentence of imprisonment should be implemented without change by States parties which were willing to accept sentenced persons. There must be no provision for a death penalty.

38. The Security Council should be able to refer to the Court situations in which crimes might have been committed, thus obviating the need for further ad hoc tribunals. The Court's procedures should be adapted from the principal legal traditions to ensure fair and effective operation, safeguard the rights of the accused and provide adequate protection and assistance to victims in giving evidence. He supported the establishment of a pre-trial chamber.

39. Those rules of procedure of the Court that were not appropriate for inclusion in the Statute itself should be negotiated by States after the Statute was opened for signature. The Conference should consider favourably the offer of the Government of the Netherlands to host the Court in The Hague.

40. **Mr. Owada** (Japan) said that his Government fully supported the establishment of an international criminal court, which had long been an aspiration of the international community. It was convinced that the International Criminal Court would play a crucial role in bringing to justice those who committed the most heinous crimes against the international community.

41. The Court should be a strictly independent and impartial judicial organ of the international community, independent of any political influence, and its judgements should be given exclusively on the basis of law. It should be formed as an international organization and must therefore have the cooperation of all countries concerned.

42. The guiding principle of operation should be complementarity, in that the Court should have jurisdiction only when national systems of criminal justice were not operational or effective. The Court should be established on the basis of universal participation.

43. The establishment of the Court raised a number of major points of legal significance that required rigorous scrutiny. His Government firmly believed that the scope of the Court should include genocide, war crimes, crimes against humanity and the crime of aggression. It was of the utmost importance to define the constituent elements of those crimes in a precise manner, in view of the cardinal importance, inter alia, of the principle of *nullum crimen sine lege*.

44. War crimes should be those established as crimes against the laws of war that were covered by existing international instruments, as well as those considered to have become part of customary international law. However, crimes that had not become part of customary international law should be excluded, without excluding the development of the law in that area.

45. The crime of aggression should be included, but it should be borne in mind that determination of the act of aggression by a State must lie within the exclusive competence of the Security Council. While the determination of aggression perpetrated by a State was separate from the question of the criminal responsibility of an individual, he considered that determination of an act of aggression by the Council was nevertheless a prior condition to the exercise of jurisdiction by the Court in relation to an individual.

46. The Court should not deprive national courts of their jurisdiction, and the right to refer a case to the Court should be limited to States parties to the Statute and to the Security Council. The Court's power was so great that a proper balance between its power and the legitimate interests of the States parties should be maintained with regard to the mechanism to trigger its activities. He therefore considered it inappropriate to give the Prosecutor the right to initiate an investigation *proprio motu*.

47. The effective functioning of the Court would depend on international cooperation and judicial assistance by States parties, which required a clear definition of the grounds on which a request by the Court for cooperation could be declined by States.

48. The Court should be independent of the United Nations, since it would be advisable to avoid the need for amendment to the Charter of the United Nations. Being independent of the United Nations, the Court should be financed by States parties to its Statute.

49. **Mr. Escovar Salom** (Venezuela) said that the examination of individual international criminal responsibility was a major step forward for international law and for the international community.

50. Though it would be difficult to reflect the various legal systems in the Statute in a balanced way, the Conference must show flexibility and a spirit of compromise.

51. His country had from the outset supported the establishment of a new international criminal court and had played an active and constructive role in the preparatory process.

52. The International Criminal Court should be independent in order to have moral strength and practical value. It would have to decide on its own competence and jurisdiction, exercising the power established under international law. It must have not only jurisdictional but also functional and procedural, and therefore also budgetary, autonomy.

53. The Court would have to be permanent, unlike the ad hoc tribunals. In order to meet future needs, international law must be strengthened so as to forge and consolidate an effective institution.

54. **Ms. Freivalds** (Sweden) associated herself with the statement made by the representative of the United Kingdom on

behalf of the European Union and said that prosecution before an international criminal court should be readily possible when it was clear that national legal systems had failed to bring to justice those suspected of serious crimes under international law. A consent regime, other than for non-party States, would seriously obstruct justice. Action by the International Criminal Court should be possible when the State where the crime occurred, the State with custody over the suspect, or the State of nationality of the suspect or the victim was a party to the Statute.

55. The Security Council, under Chapter VII of the Charter of the United Nations, should indeed be able to refer to the Court situations in which crimes under the Court's jurisdiction appeared to have been committed but not punished. That would obviate the need to create new ad hoc tribunals. However, referral of a case to the Council should not stop its being brought before the Court, and the Council should be able to delay proceedings before the Court only by a specific decision. States parties should also be able to refer situations to the Court.

56. If the Court was to be effective, the Prosecutor must be able to initiate prosecution of crimes under the Court's jurisdiction that were not being genuinely investigated or prosecuted. After judicial review, an investigation should then be allowed to proceed. The Prosecutor should safeguard the rights of the suspect, and in this context a pre-trial chamber would have a role to play.

57. It should be mandatory for States to comply with the Court's requests for assistance, which must take precedence over mutual assistance requests from States. The system of cooperation with the Court could not be built on national extradition and assistance provisions, and traditional grounds for refusal could not be accepted.

58. Effective measures to protect witnesses and victims were needed and appropriate ways of making reparation to victims must be found.

59. The Court's final judgements must be immediately enforceable and a sentence of imprisonment should be implemented without change in a State party willing to accept convicts. Sweden was emphatically opposed to the death penalty.

60. General agreement was emerging that the Court's jurisdiction should apply only to the core crimes of genocide, crimes against humanity and war crimes, but she also favoured the inclusion of aggression, provided that it was properly defined and treated in a way that respected the role of the Security Council. She also suggested that crimes against United Nations and associated personnel should be added to the list. By becoming a party to the Statute, a State must accept the Court's jurisdiction over all those types of crimes.

61. In view of the constant development of international law, the list of crimes might be reviewed after the Statute's entry into force. The Statute should be flexible to allow for emerging

prohibitions on such means of warfare as anti-personnel landmines. The definition of war crimes should reflect the fact that most modern conflicts were non-international. Gender-related crimes and the issue of child soldiers must be given due attention. She rejected any attempt to impose an arbitrary threshold on the Court's competence to deal with war crimes.

62. **Mr. Axworthy** (Canada) said that the need for an international criminal court was clear and acute. Most conflicts were non-international and most of the victims were civilians. The most pressing priority of international relations was not the security of States but that of individual citizens.

63. An independent and effective international criminal court would help to deter some of the most serious violations of international humanitarian law. By isolating and stigmatizing those who committed war crimes or genocide, it would help to end cycles of impunity and retribution. The International Criminal Court must have jurisdiction over the core crimes of genocide, crimes against humanity and war crimes, and a situation should not be created in which States ratified the Statute without accepting the Court's jurisdiction over a particular crime.

64. The Court would need to have a constructive relationship with the United Nations, while preserving its independence and impartiality. The Security Council could play a useful role in referring matters to the Court, which, however, should not be paralysed simply because a matter was on the Council's agenda. Financing the Court from the regular budget of the United Nations, in the same manner as the human rights monitoring bodies, would ensure broad international support and avoid any financial disincentive to ratification by States parties.

65. The Court should have an independent, highly professional Prosecutor who could initiate proceedings *ex officio* without awaiting a State complaint or Security Council referral. Rape, sexual slavery and other forms of sexual violence must be recognized as war crimes in the Statute, reflecting the landmark decision made at the United Nations Conference on Women. Children were often doubly victimized, as civilian victims of war and as child soldiers. The Court should have a mandate to prosecute those who recruited children under the age of 15 into armies.

66. Finally, the mandate of the Court should deal not only with war crimes committed in conflicts between States but also within States.

67. According to the principle of complementarity, the Court would exercise jurisdiction only where national systems were unable or unwilling to prosecute transgressors. In other words, it would be a court of last resort.

68. Negotiations towards establishing the Court should be as open and inclusive as possible, for which reason Canada had contributed \$125,000 to enable delegations from the least developed countries to participate in all phases of the process. It had also funded the attendance of six representatives of non-

governmental organizations (NGOs), and the Canadian delegation included two NGO advisers. The international community could not wait for another catastrophe before establishing a permanent body to respond to the atrocities that so often accompanied armed conflicts. As one century drew to a close, the creation of an international criminal court would be a fitting legacy for the next century.

69. **Mr. Raditapole** (Lesotho) associated himself with the statement made on behalf of the members of the Southern African Development Community and said that his Government had actively participated in efforts to establish an international criminal court. The need for a permanent court was beyond doubt. In addition to strengthening the rule of law by providing certainty and consistency in international investigations and prosecutions, a permanent court would be a bedrock for the emerging system of international criminal justice.

70. Despite progress, a number of unresolved issues remained. His delegation advocated that the International Criminal Court should be endowed with automatic jurisdiction over the crimes defined in the Statute, without the need for additional State consent. He remained opposed to the so-called opt-in/opt-out approach, which would hamper the effectiveness and independence of the Court. According to the principle of complementarity, the Court would be able to intervene only where a national court was unwilling, unable or unavailable to carry out investigations or prosecutions. The assessment of whether a State was "unwilling, unable or unavailable" to prosecute should be left to the Court itself. However, complementarity should not be invoked with the aim of obstructing justice.

71. The Prosecutor's power to initiate proceedings without awaiting referrals by the Security Council or States would help to assure the Court's independence and ensure that justice was served in cases where the Council or States failed to act. There were many procedural safeguards against the unlikely eventuality that the Prosecutor would "run wild".

72. The relationship between the Security Council and the Court raised difficult questions. Although, in theory, no conflict should exist, the Council's maintenance of peace and security might either complement or frustrate the work of the Court in bringing war criminals to justice and advancing the international rule of law. He opposed any political interference by the Council or States in the affairs of the Court.

73. Finally, the Court would need sufficiently broad powers to ensure that it could request full and timely cooperation from States at every stage of the process.

74. The objective should be to establish a just, fair and effective court that would help to replace the rule of force with the rule of law and foster democracy at the international level.

75. **Mr. El Maraghy** (Egypt) said that the draft Statute was an important step forward.

76. The International Criminal Court should be independent and should not be influenced by political considerations, and precise limits must be set in its relationship with the Security Council. The role of the Council in referring matters to the Court must be clearly defined, but it was for the Court to decide whether to commence prosecution proceedings or not.

77. The Court should not be burdened with cumbersome procedures. The Prosecutor should have the power to commence proceedings *ex officio*, although not as an absolute and unrestricted right. There would have to be some form of recourse against the Prosecutor's decisions.

78. An appropriate financing mechanism for the Court must be found to allow it to pursue its work in an effective and stable manner. According to the principle of complementarity, the Court should commence proceedings only if national courts were unable or unwilling to act.

79. The crime of aggression, the worst crime against humanity, and war crimes should be punishable under the Statute.

80. He attached great importance to the universality of the Convention to be adopted. The possibility of entering reservations might encourage many countries to accede to the Convention. He drew attention to the many options and alternatives contained in the text. Rules of procedure and evidence should be discussed subsequently by a committee to be set up for that purpose.

81. **Mr. Chung Tae-ik** (Republic of Korea) said that a spate of conflicts had led to heinous crimes against humanity, so that the promotion of individual security was becoming as important as the traditional concept of national security. Bringing to justice the perpetrators of crimes of international concern would serve as an effective deterrent. The adoption of the draft Statute would lead to the achievement of that goal. However, the establishment of the International Criminal Court should not conflict with but reinforce the judicial sovereignty of States.

82. The Court should be based on independence, effectiveness, fairness and financial soundness and must have automatic jurisdiction over genocide, war crimes, crimes against humanity, and, particularly, the crime of aggression. The definition of war crimes should also cover internal conflicts.

83. The Prosecutor should be given *ex officio* authority to initiate investigations. Otherwise, the effectiveness of the Court would be seriously eroded and the Security Council might not be able to raise cases owing to the exercise of the veto. Any risk of abuse by the Prosecutor could be countered by introducing effective checks.

84. Although the Security Council should be given the right to refer to the Court a situation in which crimes under the Statute had been committed, that should not compromise the Court's independence. All States parties should also be entitled to enter complaints. The Court must be granted jurisdiction to determine whether the requirement of complementarity with national jurisdiction was met in a specific case. The State party that

raised the question of complementarity should bear the burden of proof before the Court.

85. The rights of the accused must also be protected fully in accordance with international standards. The Statute should provide for special treatment of gender-related violence and for the protection of children, witnesses and victims.

86. The cooperation of States parties in the area of enforcement was also a prerequisite to an effective court. Lastly, the importance of adequate financing should not be underestimated. Initially, the Court's expenses should be met from the regular budget of the United Nations, and subsequently through a system of contributions by States parties.

87. **Mr. Friec** (Slovenia) said that his Government was deeply convinced of the need for a fair, efficient and independent court. The perpetrators of genocide, war crimes and crimes against humanity must be brought to justice and the rehabilitation of individual victims and war-torn societies should be made possible.

88. The International Criminal Court must be an independent and strong judicial institution, but it was important to bear in mind the primacy of States in investigating and prosecuting crimes committed under international law. When they failed to do so, an international mechanism must be available. The Court would thus be complementary to national courts.

89. The Court should have inherent jurisdiction over genocide, war crimes and crimes against humanity. States should therefore accept its jurisdiction by ratifying the Statute, without the need for a later opt-in/opt-out system. He favoured the inclusion of the crime of aggression within the Court's jurisdiction.

90. Proceedings before the Court should be triggered by States, the Security Council or an independent Prosecutor, who should be able to use information from any source – from victims as well as from governmental and non-governmental sources.

91. Contemporary armed conflict disproportionately affected civilians, especially women and children, who required adequate protection, both in international and internal conflicts. The Court should, therefore, also have jurisdiction over war crimes committed in non-international conflicts.

92. Victims and witnesses, as well as suspects or accused persons, needed effective protection based on internationally recognized safeguards. Women and children should be afforded special protection so that the Court could deal effectively with gender-related and sexual crimes. He hoped that States would recognize that 18 was the minimum acceptable age for participation in hostilities.

93. The Court's work would be seriously undermined if States were allowed to submit reservations to the Statute. The examples of ad hoc tribunals clearly showed that close, genuine

and effective cooperation between States and the Court was essential if perpetrators of crimes were to be brought to justice.

94. The Court should be financed from the regular budget of the United Nations, which would not pose a threat to the Court's independence.

95. **Mr. Cassan** (Observer for the Agence de coopération culturelle et technique) said that the French-speaking countries had long attached great importance to the question of international justice and to defending the rule of law, democracy and peace. Although the member States of his organization had different legal systems, they shared the same legal values and were therefore particularly concerned that the future International Criminal Court should respect the diversity of legal systems and cultures, particularly with regard to procedures.

96. His organization had identified crimes falling within the competence of the Court, namely, genocide, war crimes and crimes against humanity. It also believed that war crimes should include crimes committed in non-international conflicts. The relationship between the Court and the Security Council was also a matter of concern.

97. The international community as a whole could be confident that the French-speaking world supported the establishment of an international criminal court able to defend international law.

98. **Ms. Robinson** (United Nations High Commissioner for Human Rights) said that an international criminal court would fight impunity and would make it clear that all those in positions of power and leadership could no longer use terror tactics, systematic rape, ethnic cleansing, mutilation and indiscriminate killing of non-combatants as weapons of war. All individuals, regardless of official rank, were legally bound to refrain from committing genocide, war crimes and crimes against humanity.

99. It had to be admitted that the international community, through the United Nations, had had a poor record in preventing violations of human rights. The means, the political will and an effective weapon against the culture of impunity had all been lacking. To break with the past required the establishment of a court which would be truly fair and compellingly effective and would earn universal respect. The Statute should define with clarity and precision the scope of crimes to come under the jurisdiction of the International Criminal Court. The Court's role must not be restricted to international conflicts, since the worst atrocities took place in internal conflicts. In particular, rape should be included as a crime.

100. She welcomed the proposal to require the Prosecutor to appoint advisers with legal expertise on specific issues, including sexual and gender violence and violence against children, to ensure that those crimes could be addressed without adding to the suffering of the victims. She strongly urged that the Court be directed to ensure that its interpretation and application of law and principles conformed fully to

internationally recognized human rights. The hard-won gains in international human rights law must be safeguarded. Likewise, she looked for provision for the rehabilitation of those convicted by the Court. The aim was to deter and protect, not merely to punish. The Statute should also provide for reparations for victims or their families.

101. She expressed the hope that the Conference would make its own special contribution to the protection of human rights.

102. **Mr. Crawford** (Observer for the International Law Commission) said that the draft Statute for an international criminal court prepared by the International Law Commission set forth six main characteristics of the International Criminal Court.

103. First, it was to be a permanent court, sitting as required.

104. Secondly, it would be created by treaty, under the control of the States parties to that treaty but in close relationship with the United Nations. It would therefore obviate the need for further ad hoc tribunals.

105. Thirdly, it would have defined jurisdiction over grave crimes of an international character under existing international law and treaties. It was, however, recognized that, in certain areas, the law was only partially existent.

106. Fourthly, the Court's jurisdiction, except in the case of genocide, would depend on the acceptance of its jurisdiction by States or on triggering by the Security Council under Chapter VII of the Charter of the United Nations.

107. Fifthly, the Court would be integrated with the existing system of international criminal cooperation. It was not intended to displace existing national systems that were capable of working properly; hence the principle of complementarity.

108. Lastly, it should offer full guarantees of due process.

109. Since the International Law Commission had drafted those six principles, there had been some significant changes. In particular, the revised draft Statute constituted a major effort to consolidate, expand and develop substantive international law, relying only to a very limited extent on *droit acquis*. It was encouraging that the international community, in creating a permanent court for the trial of the worst crimes under international law, was prepared to develop and improve upon the law that the Court was to apply. However, praiseworthy efforts to develop the law ought not to stand in the way of creating a viable and effective court. If necessary, new developments in substantive law, and even new crimes, could be brought within the jurisdiction of the Court as the law progressed.

110. The Commission had always thought that links with the Security Council would be required, in view of the latter's responsibilities under the Charter. There was some conflict between the need for the independence of the Court and the need to prosecute, arrest and punish the guilty effectively. The

Commission's draft article 23 was a conscientious attempt to strike a balance, allowing Security Council reference to the Court but avoiding a veto by the Council except in cases where it was already taking action under Chapter VII of the Charter.

111. The original concept of the Court would inevitably have to be developed and refined at the political level. He hoped that the international community was ready for such substantive advances and that they would not obscure the need for effective international procedures for the investigation of crimes and the prosecution and trial of the accused.

112. **Mr. Pace** (Observer for the NGO Coalition for an International Criminal Court) said that the Coalition was a global network of more than 800 organizations working for the establishment of a just, fair, effective, independent and permanent international criminal court. As the Secretary-General had stated in his opening address, the world had come to realize that relying on each State or army to punish its own transgressors was not enough. The issue was whether it could be ensured that those who committed heinous violations of international law and universal moral principles could be brought to justice.

113. Some Governments were still not ready to accept mandatory national and international action against violations of international humanitarian law. It was up to the majority of nations to mobilize the political will to ensure that a strong treaty and a strong court were created.

114. The Coalition had agreed on a statement of basic principles for an international criminal court, including issues of jurisdiction, complementarity, State cooperation and the independence of the Prosecutor. If the Conference were successful in establishing such a court, it would prevent the slaughter, rape and murder of millions of people during the next century. Global civil society and the non-governmental organizations present would work tirelessly with Governments and international organizations to achieve such a great, historic result.

115. **Mr. Klich** (Observer for the Movimento Nacional de Direitos Humanos) said that the poor, women, children and indigenous peoples of Latin America were the main victims of systematic violations of human rights and had no real access to justice. All too often, amnesties hindered the establishment of the truth. Political pacts on impunity showed the weakness of judicial systems.

116. A permanent body with global jurisdiction, an international criminal court, was therefore needed to complement domestic systems. It would be a serious error if the relations of the International Criminal Court with the Security Council echoed those of many judicial systems vis-à-vis interventionist political powers. Neither should the Court depend on the specific consent of different States before commencing its investigations.

117. The Court would make a great contribution to the cause of peace and reconciliation of humanity because it would establish

the truth. In order to pardon an offender, the nature of the offence had to be known, to forget the past, paradoxically it had to be remembered dispassionately, and to bring reconciliation, individual responsibility had to be established.

118. **Ms. Boenders** (Observer for the Children's Caucus International) said that gross acts of violence against children should be brought within the jurisdiction of the International Criminal Court, which must have expertise in the protection of children, both as witnesses and victims. They were also victims when manipulated by adults to commit acts of war.

119. Despite the Geneva Conventions of 1949 and the Additional Protocols of 1977 and the Convention on the Rights of the Child of 1989, children under the age of 15 were found in national armies and, more commonly, in armed rebel groups. They might also be sexually abused. The definition of war crimes must consider the full range of children's participation and not be limited by the words "direct" or "active". She strongly recommended the inclusion in the Statute of a ban on recruiting and allowing children under the age of 15 to take part in hostilities.

120. The Court would not be an appropriate forum for the trial of children who committed crimes against others. It should have no jurisdiction over persons who were under the age of 18 at the time of committing crimes which would otherwise have come within the jurisdiction of the Court. With its punitive purpose, the Court was fundamentally at odds with the rehabilitative purpose of international standards on juvenile justice. That did not mean that crimes carried out by children would go unpunished. The Court could impose accountability on adults who used children to commit crimes. Where adults deliberately used children to commit crimes within the jurisdiction of the Court, or targeted them as victims, that should be considered an aggravating factor in passing sentence.

121. The protection of children in armed conflict would be achieved only through a strong and effective court, with an independent Prosecutor and universal and inherent jurisdiction over core crimes.

*The meeting rose at 6.10 p.m.*

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### 3rd plenary meeting

Tuesday, 16 June 1998, at 10.10 a.m.

*President: Mr. Conso (Italy)*

A/CONF.183/SR.3

#### **Agenda item 11 (continued)**

**Consideration of the question concerning the finalization and adoption of a convention on the establishment of an international criminal court in accordance with General Assembly resolutions 51/207 of 17 December 1996 and 52/160 of 15 December 1997 (A/CONF.183/2/Add.1 and Corr.1)**

1. **Mr. Rogov** (Kazakhstan) said that his country, which had attained its independence with the collapse of the Soviet empire, was extremely concerned to maintain and consolidate its sovereignty. Because it desired independent protection for its fundamental institutions, Kazakhstan supported the creation of an international criminal court.

2. The representative of the United Kingdom had expressed concern about extradition proceedings in connection with the establishment of such a court. Kazakhstan's Constitution did not entirely rule out the extradition of Kazakh citizens. However, Kazakhstan believed that maximum account must be taken of universal human rights and also of the sovereignty and independence of each State.

3. Kazakhstan supported the creation of an international criminal court as an independent judicial body, with clearly defined jurisdiction and mechanisms for criminal prosecution. It

also supported the proposals for the Statute. The International Criminal Court should be an independent international organization in relationship with the United Nations through agreements adopted by the States parties.

4. The crimes falling within the Court's jurisdiction should be clearly defined and genocide, crimes against humanity and military crimes and aggression should unquestionably be included, but only on the basis of such a clear definition.

5. Kazakhstan considered that extending the Court's jurisdiction to drug trafficking did not accord with the principle of complementarity, since it was not always possible for national judicial systems to punish such crimes. As far as genocide and military crimes were concerned, the Court should take action at the initiative of States and the Security Council. For other crimes, the consent of the State on whose territory or against whose interests the crime was committed would be necessary.

6. The Court should be funded by contributions from States. But, since not all States were able to make such contributions, such costs should be covered in the first stage from the budget of the United Nations with the approval of the General Assembly. Kazakhstan considered it the sovereign right of every State to enter reservations in signing and ratifying the



Statute. But, on questions of jurisdiction, initiating prosecutions, financing and other matters, the right to reservation should be limited, since it might undermine the international jurisdiction of the Court. Each State should be able to decide on the degree to which it should participate in the Court.

7. **Archbishop Martino** (Holy See) said that any international criminal court must protect the dignity of the human person, a dignity shared by all irrespective of age, race, ethnic origin, status as a combatant or non-combatant, sex or stage in life, from the unborn to the elderly. The Statute and the crimes falling within the jurisdiction of the International Criminal Court must reflect that equal dignity.

8. The principle of *sum cuique*, to each person his due, was therefore an important one in the justice dispensed by an international criminal court. In the words of His Holiness Pope John Paul II, the recognition that the human person was by nature the subject of certain rights that no individual, group or State might violate was an essential principle of international law. Those who had been harmed were owed the protection of the law and those responsible for the heinous crimes to be dealt with by the Court must be held accountable in accordance with universal norms. But the Court must be conceived as a means not of seeking revenge but of finding reconciliation. In handing down its sentences the Court must always bear that goal in mind, and the Holy See was convinced that the death penalty had no place in the Statute of the Court.

9. That Statute must also ensure the Court's independence from political concerns and pressures, especially those reflecting the particular rather than the universal, the exclusive rather than the inclusive. All were equal before the law, and the place in the proposed Statute of rules based on political rather than juridical considerations was questionable.

10. **Mr. Muladi** (Indonesia) said that the effectiveness of the International Criminal Court would depend on universal accession by States to the Statute and that, to ensure the acceptability of the Statute, a set of fundamental issues had to be resolved in accordance with the aspirations of a majority of States. Those issues included the definition and implementation of the principle of complementarity, the so-called trigger mechanism, the integrity and independence of the Court and the list of crimes under its jurisdiction.

11. The Ministerial Meeting of the Coordinating Bureau of the Movement of Non-Aligned Countries, held in Cartagena de Indias, Colombia, in May 1998, had emphasized that adoption of the Statute by consensus would be the best way of guaranteeing the Court's universal character. Indeed, the rules of procedure of the Conference stated that the Conference should endeavour to ensure that its decisions were reached by general agreement.

12. In drafting the Statute, the Conference must uphold the principle of respect for national sovereignty and join the emerging consensus that the Court's jurisdiction should be

complementary to that of national courts and based on the consent of the States concerned. The members of the Movement of Non-Aligned Countries considered that the principle of complementarity was fundamental and should apply to all of the provisions governing the Court.

13. The aim of complementarity was to ensure that the Court would act to bring to justice the perpetrators of heinous crimes only when national justice systems were unavailable to do so. However, that principle still had to be defined unambiguously. Further intensive negotiations were still required, notably on when the Court's mechanism should be activated, whether the Court should unconditionally respect the principle of *ne bis in idem*, including decisions already made by national judicial systems, or whether it should be granted the power to act as an international supreme court delivering judgement on the credibility of national courts.

14. Those questions were political, not legal ones. But to safeguard the Court's credibility and impartiality they should be resolved by the Conference, not left to the Court itself to decide.

15. The Court would require both adequate resources and freedom from political intervention if it were to be effective. Without universal support, it would lack the capability and capacity to discharge its mandate or enforce its decisions. The Statute must therefore guarantee that all States parties had equal rights and obligations with respect to the jurisdiction of the Court.

16. At the meeting held in Cartagena de Indias, the members of the Movement of Non-Aligned Countries had reaffirmed that the Court must be independent of political influence of any kind, including that of the United Nations and in particular the Security Council, which must not direct or hinder its functioning. They had also stressed the need to set up a suitable method of funding the Court and to ensure respect for the principle of *nullum crimen sine lege*.

17. **Mr. Bouguetaia** (Algeria) said that there was a clear need for an effective and objective international court to deal with crimes under international law, which would obviate the necessity for ad hoc tribunals. The International Criminal Court had to have guarantees of independence and impartiality.

18. The Court would be more credible and find wider acceptance if its scope was limited. It should therefore focus on the core of serious crimes that threatened international peace and security. Terrorism and drug trafficking should be included in the list of crimes within its jurisdiction.

19. The principle of complementarity would play an important part in arriving at a proper balance between the jurisdiction of the future Court and that of national courts. Clearly, the latter must have the right to exercise their jurisdiction with respect to the crimes listed in the draft Statute in full sovereignty. The Court would replace them only in the event of proven shortcomings.

20. Moreover, the Court would have to cooperate with States, the major players on the international political scene, in strict respect for the authority and competence of each, so as to ensure acceptance and universality.

21. **Mr. Telička** (Czech Republic) said that the International Criminal Court should have inherent jurisdiction over the four core crimes of genocide, war crimes, crimes against humanity and aggression, which were regarded as crimes under customary international law. In accordance with the principle of universal jurisdiction over crimes under international law, no further State consent should be required before the Court could proceed. He proposed that war crimes committed in non-international armed conflict should also come under the jurisdiction of the Court.

22. His delegation supported a mutually complementary relationship between national criminal jurisdiction and the jurisdiction of the Court. Complementarity did not diminish the responsibility of States for the vigorous investigation and prosecution of crimes. His delegation could not accept the idea that, if a national justice system investigated or prosecuted a case, the Court should not be entitled to exercise jurisdiction, for that interpretation of the complementarity principle would seriously undermine the Court's effectiveness. The Court must be equipped with a safeguard against sham investigations and trials.

23. The question of the role of the Security Council had provoked heated debate in the Preparatory Committee on the Establishment of an International Criminal Court. His delegation agreed that an act of aggression might not be prosecuted under the Statute unless the Council had first determined that a State had committed such an act, but could not support the idea that the Council should have the power to prevent proceedings before the Court if the situation was being dealt with by the Council itself under Chapter VII of the Charter of the United Nations. Chapter VII situations were precisely those in which crimes within the Court's jurisdiction were most likely to be committed. The role envisaged for the Council would radically change and indeed undermine the independence of the Court.

24. His delegation believed that the Prosecutor should be empowered to initiate proceedings before the Court of his or her own accord. That would make the Court more effective and would open it up to inputs from various sources, including non-governmental organizations and individuals.

25. One of the most important issues in the Statute was the part which dealt with rules of international cooperation and judicial systems. His delegation considered that the Statute must oblige all States parties to comply strictly with any request for assistance issued by the Court. No exception should be allowed to that fundamental rule; the Statute should contain a provision barring any reservations that would enable States parties to evade that obligation. That was the best way to ensure equality of obligations and to eliminate potential stumbling blocks.

26. **Mr. Kouakou Brou** (Côte d'Ivoire) said that the proposed International Criminal Court must be independent, effective and universal. No State or other body should have the right to interfere in its operations. The independence of the Court would in no way affect the prerogatives of the various organs of the United Nations, which, on the contrary, by remaining outside legal matters, would lose none of their essential functions in the service of international peace and security.

27. With regard to the crimes provided for under the Statute of the Court, his country considered it essential to maintain the principle of complementarity to preserve the sovereignty of States and ensure the universality of the Court.

28. **Mr. Asmani** (United Republic of Tanzania) endorsed the statement made by the representative of South Africa on behalf of the South African Development Community.

29. The International Criminal Court had to be truly independent, effective, impartial and permanent. It must not become a tool for the political convenience of States.

30. The regime of human rights derived its legitimacy from the universality of those rights, and the same would apply to the Court. Some aspects of the idea of sovereignty were a potential bar to the common will to punish heinous crimes, but the Court must ensure that State sovereignty became a concept of responsibility and international cooperation rather than an obstacle to the enjoyment of universal human rights.

31. Useful proposals had been made for balancing the responsibilities of the Security Council under the Charter of the United Nations on the one hand and the role of the Court for the independent determination of individual culpability on the other, and those proposals needed to be pursued seriously. Since the Court was being established to address the most serious international crimes, the customary distinction between international and non-international armed conflict needed re-examination so as not to justify the exclusion from the Court's jurisdiction of the serious crimes frequently committed in internal armed conflicts.

32. The role of the Security Council in relation to the Court had to be approached with great care. The preservation of the Court's integrity must be the overriding concern of the Conference. In that connection, his delegation saw a role for an independent Prosecutor who, subject to specified safeguards, would have ex officio powers to initiate investigations and prosecutions, and whose office, in its integrity, would discourage the submission of frivolous claims.

33. His delegation subscribed to the complementarity regime between the Court and national judicial systems and agreed that primary jurisdiction lay with national courts. However, in view of the events leading to the genocide in Rwanda, it considered that, in the event of a dispute on jurisdiction, the Court should be the final arbiter.

34. His Government looked forward to the establishment of a court that would have the widest support and participation of States and to a close alliance between the Court and the United Nations. He hoped it would be an institution that would be able to act when national courts could not do so or were seen as being ineffective.

35. **Mr. Wang Guangya** (China) said that his Government believed that the International Criminal Court, to be independent and fair, should not be subject to political or other influence, and should not become a tool for political struggle or a means of interfering in other countries' internal affairs. However, it should not compromise the principal role of the United Nations, and in particular of the Security Council, in safeguarding world peace and security. The provisions of its Statute should not run counter to those of the Charter of the United Nations, and the Conference should be prudent in dealing with the relationship between the Court and the United Nations and the role of the Council.

36. His Government believed that universal participation was essential for the authority and effectiveness of the Court. In order to ensure such participation, the Statute should be based on the principles of democracy and equality and should give expression to the positions and views of all countries. It should be adopted by consensus rather than by vote. Maximum flexibility should be exercised in defining the jurisdiction of the Court, the crimes that could be prosecuted, and the modes in which countries accepted the Court's jurisdiction.

37. Complementarity was the most important guiding principle of the Statute and should be fully reflected in all its substantive provisions and in the work of the Court, which should be able to exercise jurisdiction only with the consent of the countries concerned. Its jurisdiction should not apply when a case was already being investigated, prosecuted or tried by a given country.

38. His Government considered that a cautious approach should be adopted when addressing such questions as trigger mechanisms and means of investigation, in order to avoid irresponsible prosecutions that might impair a country's legitimate interests. In carrying out its duties, the Court would rely on the cooperation of the countries concerned but should respect their sovereignty, security and basic principles of law.

39. **Mr. Birkavs** (Latvia) said that, despite the clear need for an international criminal court, the Statute must not be pushed through just for the sake of creating a symbolic entity. The International Criminal Court must be viable and effective, operating in conjunction with other institutions: it must really work.

40. The Statute should clearly define the Court's jurisdiction, spelling out the crimes of a serious nature with which it would deal, including the crime of aggression.

41. The Court should be financed from the regular budget of the United Nations, supplemented by voluntary contributions as

needed. The ability to pay expenses promptly and in full was essential if the Court was to be viable and effective. A diversified source of funds was the best possible guarantee of the Court's financial security and would also ensure its universality by encouraging financially weaker States to become parties to the treaty. The Statute should address budgetary considerations to ensure that all States as well as the Court itself were able to initiate proceedings without incurring undue financial burdens. Justice should be available to all regardless of their financial means.

42. The Court should have the same jurisdiction over core crimes as States currently had under international law, in accordance with the principle of universal jurisdiction. His delegation supported the idea that ratification of the treaty would signify immediate acceptance of the Court's jurisdiction over the core crimes. Since a permanent international criminal court would have no law enforcement capacity at its disposal, cooperation and judicial assistance by States would be vital to its smooth functioning.

43. His delegation fully endorsed the position that the Court was intended to complement national criminal justice systems only in cases where those systems were not available or were ineffective, and agreed that the Court should have the authority to determine whether that applied. The Statute should include a detailed definition of the principle of complementarity and of the procedures to be applied by States and the Court in determining jurisdiction and associated issues.

44. **Mr. Vergne Saboia** (Brazil) said that reaching a minimum common denominator in drafting the Statute was not an acceptable solution. If States decided to create a court, they should give it the power and the means to play a significant role in international life, but the International Criminal Court must in no way weaken or jeopardize existing conventional or customary rules of international law. It was also necessary to encourage universal participation, and the aim should be to achieve a proper balance between different national positions with respect to certain key provisions of the Statute.

45. With respect to the initiation of proceedings before the Court, Brazil considered that, in addition to the rights of States parties and of the Security Council to trigger the Court's jurisdiction, there should be an independent Prosecutor with the authority to initiate investigations *ex officio* or on the basis of information received from various sources. However, to avoid frivolous, politically motivated complaints, the Statute should provide adequate safeguards on the Prosecutor's discretion.

46. The Court's jurisdiction should be limited to the most serious crimes of concern to the international community. Brazil favoured inherent jurisdiction over the crime of genocide, but believed that there were convincing arguments for retaining some kind of opt-in mechanism for the other core crimes. Observance of the distinction between acceptance of the Statute of the Court and its jurisdiction would help signatories to expedite ratification procedures and promote universal acceptance.

47. The Court's relationship with the Security Council remained a matter of concern to many delegations. Brazil believed it necessary to remove justification for the creation of new ad hoc tribunals by the Council, which would require a provision such as article 10, paragraph 1, of the draft Statute. The Court should not, however, act as a subsidiary organ of the Council and must aim for the highest level of judicial independence. Only in exceptional circumstances should it be prevented by the Council from investigating or prosecuting cases when the Council, acting under Chapter VII of the Charter of the United Nations, took a formal decision to that effect. Even in such cases, however, the Court should not be prevented from exercising its jurisdiction for more than a limited period.

48. **Mr. Pakalniškis** (Lithuania) said that his country considered that the International Criminal Court must be given inherent jurisdiction over the crimes listed in the Statute, but only in cases where national courts were unable or unwilling to proceed. The Court should be given the power to decide whether it was able to exercise jurisdiction over certain crimes.

49. The Court's jurisdiction should apply to genocide, war crimes, crimes against humanity and aggression. As a party to the Geneva Conventions of 1949, Lithuania endorsed the list of crimes set out in those Conventions. In negotiations on the laws applying to armed conflicts and the definition of serious violations, it was in favour of recognizing a deliberate change in the demographic situation of occupied territories as a crime. Moreover, rape, sexual abuse and other forms of sexual violations should be recognized as war crimes and crimes against humanity. Lithuania was also in favour of including war crimes committed during internal armed conflicts among the crimes listed in the Statute of the Court.

50. One of Lithuania's major objectives was to include aggression as a crime against peace, since experience showed that an act of aggression often led to genocide, crimes against humanity and war crimes.

51. His delegation was in favour of a short definition including clear legal criteria in determining the substance of a crime. In view of the political sensitivity of the issue, it agreed with the principle of empowering the Security Council to determine aggression.

52. The Conference had to create an institution independent of the political power of States or other bodies and able to adopt fair and impartial decisions. The independence of the Court would be reinforced by empowering the Prosecutor to initiate investigations ex officio. The right to review such investigations should be vested only in the Court.

53. The Security Council, acting in accordance with Chapter VII of the Charter of the United Nations, would play an important role in referring cases to the Court but it should not be able to interrupt or suspend the Court's proceedings; such action should be possible only by the Court's own express decision. That would provide the basis necessary for States to cooperate with

the Court. The Statute should spell out the obligation of States to cooperate with the Court, and at the same time should indicate the forms of cooperation and, if agreed, the grounds for any refusal to cooperate.

54. **Mr. Hermoza Moya** (Peru) said that his country had been involved in the work of the Preparatory Committee; its participation in the Conference demonstrated its support for the establishment of an international criminal court to bring to justice those accused of the most serious crimes.

55. Peru believed that the International Criminal Court should be permanent and independent. It must be complementary to domestic systems of justice. Peru also supported the principle of the broadest possible judicial cooperation. Given the importance of the subject, the agreements to be reached at the Conference should be adopted by consensus.

56. **Ms. Zamfirescu** (Romania) referred to the text of her delegation's statement indicating its position.

57. A permanent, universal, independent and strong international criminal court empowered to prosecute and convict persons responsible for genocide, crimes against humanity and war crimes would not only overcome the disadvantages of ad hoc tribunals but would also act as a potential deterrent.

58. The purpose of the new International Criminal Court was to ensure that persons guilty of the most heinous crimes did not go unpunished. A balance had therefore to be struck between the jurisdiction of the Court and that of national criminal justice systems, in accordance with the carefully worded formula in the draft Statute before the Conference.

59. The efficiency of the Court would depend on the universality of its jurisdiction, based on the will of States to give full cooperation and comply with the Court's requests for assistance and with its judgements.

60. Cost-effectiveness was important, but it was also important not to water down achieved standards of respect for human rights. Unless the Court were independent and strong, it could not be effective. Although separate, it should not, however, be entirely separable from the other bodies of the United Nations system dealing with matters relevant to its activity. It was proper that, under Chapter VII of the Charter of the United Nations, the Security Council should be able to refer to the Court situations in which crimes coming under its jurisdiction appeared to have been committed and gone unpunished.

61. Flexibility and compromise were essential in the current exercise, but she hoped that the Conference would do more than agree on the lowest possible common denominator. Moreover, it was essential to ensure that the Court was given the necessary financial resources to do its work.

62. She hoped that ratification would be swift so that the Court could come into operation as soon as possible, preferably

before the third millennium. Her delegation agreed that The Hague would be the proper seat for the Court.

63. **Mr. Wako** (Kenya) reaffirmed Kenya's commitment to the establishment of an effective, impartial, credible and independent international criminal court, free from political manipulation, pursuing only the interests of justice, with due regard to the rights of the accused and the interests of the victims. For the International Criminal Court to be universal, the remaining unresolved issues must be addressed comprehensively and a proper balance struck. There must therefore be a strong political will on the part of the States parties that would sign and ratify the Statute. Consensus was the only way to guarantee the early establishment of the Court and preserve its integrity and universality. His delegation would support all efforts to that end.

64. The principle of complementarity was central to the basic notion of the international criminal justice system. While primary responsibility for prosecuting those who committed crimes rested with each State and the Court should not act where effective national criminal justice systems were in place, it should certainly do so where such systems were not available or were ineffective.

65. The serious crimes over which the Court would have jurisdiction had to be spelled out clearly and exhaustively.

66. The Prosecutor played an essential role in the Court and his or her functions were critical. The Prosecutor's powers to investigate and initiate prosecutions *ex officio* should be clearly defined in order to avoid the risk of abuse. His or her accountability should be safeguarded by a strict review of procedure conducted by a pre-trial chamber vested with powers to ensure that no charges were brought without good cause.

67. The relationship between the Security Council and the Court needed to be clarified to ensure that the independence and legitimacy of the Court were not undermined. A suitable mechanism for financing the Court had to be set up in order to preserve its independence.

68. Parallel with the attempts to establish an international criminal court, national institutions to preserve and embody the rule of law and effective democratic systems at all levels must be strengthened. The World Conference on Human Rights, held in Vienna in 1993, had called upon the international community to assist developing countries in their efforts to strengthen their institutions in their justice administration systems, including the courts. Since the primary responsibility for enforcing any penal system lay with States, efforts must be made to strengthen such national institutions.

69. **Mr. Sharshenaliev** (Kyrgyzstan) supported the concept of an international criminal court with its seat at The Hague.

70. Such a court should not be used in any country's political interests, and membership should involve full recognition of its

competence. That in no way lessened the responsibility of States to investigate crimes and initiate criminal proceedings.

71. The International Criminal Court should complement national legislative bodies and should have competence in matters of genocide, military crimes and crimes against humanity. Kyrgyzstan supported the proposal to extend the Court's jurisdiction to terrorism, illicit drug trafficking and crimes against United Nations personnel. It also supported the appointment of a strong Prosecutor with powers to initiate proceedings *ex officio* where sufficient grounds existed, and believed that that would not infringe the rights of the Security Council.

72. **Ms. Nagel Berger** (Costa Rica), speaking as a woman and as Minister of Justice of her country, stressed the need to give the International Criminal Court full powers to deal with all crimes in which the dignity of women was violated. The Statute must therefore include the crimes of rape, sexual slavery, prostitution and forced sterilization, as well as the recruitment of minors into the armed forces.

73. The structure and machinery of the Court should be given a proper gender perspective, and provision should be made for adequate representation of both women and men in all its structures. Advisory legal services in matters affecting women and children and a special unit for victims and witnesses were needed if the Court were to function properly.

74. The list of crimes falling within the Court's jurisdiction should cover all serious violations of human rights, including genocide, war crimes and crimes against humanity. The concept of war crimes must include all those committed during internal conflicts and covered by the 1977 Additional Protocols to the 1949 Geneva Conventions. In view of the deplorable experience of Latin America, the Court should also be able to deal with the crime of forced disappearances. Moreover, it should have competence in matters of international terrorism, drug trafficking and crimes committed against United Nations personnel and should be enabled to deal with other crimes, such as aggression, in the future.

75. The Court must be truly impartial and free from political interference, and should therefore not be subordinate to the Security Council. However, the Council should be able to refer situations for the consideration of the Court when peace and security were involved, even when the States concerned did not explicitly accept its jurisdiction.

76. Moreover, the Court should be competent to judge the most serious crimes wherever they might have been committed. Ratification by a limited number of States should suffice to give the Court universal jurisdiction. Her delegation did not agree that ratification by the States directly concerned should be a prerequisite for the exercise of jurisdiction. It was also opposed to additional declarations by such States, either on ratification or in connection with a particular case.

77. The Prosecutor should be truly independent and competent to initiate investigations *ex officio* on the basis of reliable information from any source, including non-governmental organizations, and ways should be explored of enlisting the cooperation of such organizations and of the survivors of serious crimes.

78. The Court must complement the work of national justice systems and should be able to try cases when States were unwilling to adjudicate or when their systems were not independent or impartial. It could not, however, be a substitute for local courts or remove the State's primary obligation to administer justice.

79. The human rights of accused persons, victims and witnesses must be respected; therefore, Costa Rica firmly opposed the death penalty.

80. The Court's judges should be widely versed in criminal and international law, human rights and matters affecting women and children. They must be experienced and mature, and age should be no bar to their election.

81. The Court could be effective only if it had the full support of all States and was given the financial and human resources necessary for its operation.

82. **Mr. Baibourtian** (Armenia) said that, despite the existence of international instruments governing the law of war, there was in practice no real mechanism to punish individuals guilty of war crimes. The International Criminal Court would help to plug that gap and no Government should have the power to intervene or to reduce or reject its sentences.

83. Armenia agreed that the Court should have jurisdiction over genocide, crimes against humanity, wherever committed, war crimes and serious violations of humanitarian law in both international and non-international armed conflict, as well as over aggression and crimes of terrorism. However, a clear definition in the Statute was needed for each of the crimes over which the Court had jurisdiction so as to avoid misunderstandings and differing interpretations in the future.

84. For instance, under Article 51 of the Charter of the United Nations, a State had the right to self-defence, but in some cases that right could be interpreted as an act of aggression. That might also be true when the right of self-determination was asserted by a region within the territory of a State. A clearer definition of aggression was therefore needed.

85. With respect to the definition of acts constituting aggression, Armenia would like to see the definition of blockade expanded to include the blockade of the ports, coasts, territory and air routes of one State by the armed forces of another.

86. Armenia believed that the Court should have automatic jurisdiction over the crime of genocide.

87. The Court should be independent of the Security Council and of any States. States must not refuse to provide the Court

with the information it required and must be obliged to comply with court orders. The Court must have the power to determine whether a State had complied in full with a court order. All States parties must give the Court the same cooperation and assistance that their authorities provided to their national courts. There must be effective guarantees for the protection of witnesses, victims and their families.

88. Since States were rarely willing to hold their own citizens, especially those holding political or military positions, accountable for crimes they might commit, his delegation supported the provision in the draft Statute giving limited but sufficient power to the Court to determine when States were unwilling or unable to act in a specific situation. That did not mean that the Court must act only when a national institution failed to do so, but, if an institution able to exercise jurisdiction existed, it would not be necessary for the Court to intervene. The Court should have the authority to determine whether there was such an effective national court.

89. Armenia was in favour of an independent Prosecutor able to initiate an investigation based on his or her findings or on information obtained from any other source, independently of a Security Council referral or a State complaint.

90. It also supported the idea of establishing a court with an independent international personality but working in close cooperation with the institutions of the United Nations. The United Nations should finance the establishment of the Court, and States parties should assume the financial burden only after a predetermined number had ratified the treaty.

91. **Mr. Ayub** (Pakistan) said that his country supported the establishment of a court which was independent, effective and enjoyed universal acceptance. However, since the International Criminal Court should complement and not supplant national legal systems, Pakistan endorsed the principle of complementarity. The Court should exercise jurisdiction only if national trial procedures were not available or were ineffective, in order to preserve national sovereignty and avoid conflicts between the jurisdiction of the Court and that of the State. The exercise of jurisdiction by the Court should be based on the consent of the States concerned. The principle of complementarity must not be eroded if the Statute were to enjoy universal acceptance.

92. Subject to that principle, Pakistan wished the Court to be impartial and independent of political influence of any kind. It was therefore not in favour of giving a role in the functioning of the Court to any organ of the United Nations, in particular, the Security Council, which was primarily a political body, since that might cloud the Court's objectivity.

93. Pakistan favoured the principle that the trigger mechanism should be activated by the State concerned, since it alone was in a position to determine whether it had the competence to try the offender itself or would refer the case to the Court if it determined that the national jurisdiction would fail to deliver justice.

94. His delegation supported the concept that the Court's jurisdiction should be limited to the core crimes of genocide, serious violation of the laws and customs applicable in armed conflicts and crimes against humanity. However, the scope of those crimes needed clear definition.

95. Adoption of the Statute by consensus would facilitate both universal adherence and early entry into force.

96. **Mr. Al Kulaib** (Kuwait) said that an international criminal court must be effective and independent. It should deal with crimes such as genocide and war crimes, and its mandate, and hence the text of the Statute, must be absolutely clear. The International Criminal Court must be complementary to domestic legal systems and not try to supersede them.

97. His delegation endorsed the views of the speakers who had called for the inclusion of sexual violence, including acts of aggression against women in the course of war crimes, rape, sexual slavery and paedophilia in the Court's terms of reference.

98. The draft Statute was still somewhat equivocal concerning the powers of the Prosecutor. His delegation believed that the Prosecutor must have a broader role but that decisions as to whether or not to prosecute should be open to appeal.

99. His delegation believed that the United Nations should provide permanent financial support for the Court.

100. **Mr. Bernhardt** (Observer for the European Court of Human Rights) said that the offences over which the International Criminal Court would have jurisdiction must be clearly defined in order to achieve the full effect of deterrence, avoid any doubts as to jurisdiction and ensure respect for the principle of legality.

101. He urged the Conference not to accept the option under article 75 (e) of the draft Statute, which envisaged the death penalty.

102. The notion of complementarity called to mind the principle of subsidiarity which lay at the heart of the system of the European Convention on Human Rights. The message of the European Court of Human Rights had always been that subsidiarity was a means of ensuring that national courts played their rightful role as far as possible, thus making adjudication at the international level unnecessary. The true function of complementarity in the proposed system of international criminal jurisdiction should be to encourage the competent national courts to carry out their duties, but, if they failed to do so, to ensure that there was no escape for the perpetrators of atrocities.

103. On the issue of optional jurisdiction, the experience of the European Court showed that an effort should be made to secure agreement on compulsory jurisdiction for core crimes. The effective protection of victims and potential victims required compulsory jurisdiction from the outset.

104. He believed that the principle that the Prosecutor should be allowed to trigger the Court's jurisdiction of his or her own accord was important, if not essential, for the effectiveness and credibility of the institution.

105. **Ms. Kirk McDonald** (Observer for the International Tribunal for the Former Yugoslavia) said that participants in the Conference should draw upon the experience of the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda, which provided a wealth of information concerning the application of international humanitarian and criminal law.

106. An international code of criminal procedure combining aspects of civil law and common law had been created by the ad hoc Tribunals. She urged the Conference to consider the importance of including among the judges persons with prior judicial experience in both national and international criminal trials.

107. Experience in the Yugoslavia Tribunal had shown that the unequivocal obligation to comply with orders, not just requests, by the International Criminal Court was essential. Grounds for refusing to comply should not be allowed. Moreover, it was essential that the Prosecutor and defence counsel be able to conduct interviews and on-site investigations on the territories of States without any unwarranted interference by a national authority.

108. The Tribunal's rules allowing for separate and dissenting opinions had proved highly beneficial to the development of international criminal law, and the availability of differing interpretations of that embryonic body of law had contributed to its maturation. She therefore hoped that there would be a full debate on that matter and that earnest consideration would be given to the bracketed proposal in article 72, paragraph 6, of the draft Statute, which would allow for dissenting opinions.

109. She hoped that the Court would be effective and be vested with the necessary power to ensure that the parties and judges had access to all the relevant and appropriate evidence necessary to reach a just verdict. It was absolutely vital that the Court be endowed with the component of compulsion.

110. **Mr. Kama** (Observer for the International Tribunal for Rwanda) said that his experience had shown it to be important that judges of the International Criminal Court be involved in the adoption of the rules of procedure or have the possibility of amending them, given the practical difficulties they would undoubtedly encounter.

111. The experience of the ad hoc Tribunal showed that most of the evidence received had been in the form of testimony and that it was essential to give adequate protection to witnesses before, during and after the trial to ensure that they would agree to appear in court to answer questions. The protection of witnesses should be left to the Court unless it concerned a State party to the trial.



112. Another issue of major importance was cooperation by States at all stages. It must be possible to draw the Security Council's attention to actions carried out with the support of a State party.

113. He hoped that the establishment of the Court would not involve so many compromises as to make it ineffectual. What was needed was a court independent of political and other outside legal considerations, with a Prosecutor who would act independently.

114. **Ms. Bonino** (Observer for the European Community) said that there was a particular need for an international criminal court at a time when many barbaric local wars were being waged. Conflicts between national armies had been replaced by bloody internal and ethnic conflicts where civilians were not accidental casualties but the primary target of attacks, where crimes against humanity and even genocide were not just a means but a purpose of the conflict, and where the minimum standards of humanity agreed under international humanitarian law were violated as a matter of policy, not by accident.

115. The International Criminal Court should have jurisdiction over a core group of crimes: genocide, crimes against humanity and war crimes, including those committed in the course of civil wars and other internal conflicts. It should have a constructive relationship with the Security Council and other international institutions. Moreover, it should have a strong, effective, highly qualified Prosecutor independent of Governments. It should have adequate procedures to ensure its fair operation, to safeguard the rights of the accused and witnesses. The Statute of the Court should have no provision for the death penalty.

116. **Mr. Martínez** (Observer for the Inter-Parliamentary Union) said that the Statute of the International Criminal Court would be subject to ratification. In most countries that would require action by the national parliament, which embodied the sovereignty of the State and, in a democratic system, was the most legitimate institution, representing civil society as a whole.

117. One of the key issues which parliaments examined when considering the ratification of an international agreement was how and to what extent national sovereignty was affected. Members would therefore pay particular attention to the concept of complementarity governing the Court's relationship with national courts. Most would agree that alleged criminals should normally be tried in their own national courts. It was precisely because that was not always effective that an international court was needed. The draft Statute laid down the principle that the proposed Court was intended to be complementary to national criminal justice systems in cases where such trial procedures might not be available or might be ineffective; that was a very important innovative concept.

118. The intent and content of that principle must be enunciated with the greatest possible clarity. Every State would want to know the circumstances in which its citizens might be brought to justice before an international criminal court. To achieve

early ratification, the Statute must be clear, but every effort should be made to avoid the Court becoming a token mechanism and to make it an effective tool for the defence of the rule of law throughout the world.

119. It was therefore extremely important that the Statute should be clear, unambiguous and juridically perfect. That would condition its chances of gaining the support of national parliaments, which would expect it to be no less high in technical quality than the legislative texts they considered daily; that would ultimately affect the extent of its implementation and the functioning of the Court. He intended to recommend to the governing bodies of the Inter-Parliamentary Union, which would meet in September 1998, that the Union – the world organization of national parliaments – should undertake a campaign amongst all its members to achieve the early ratification and entry into force of the proposed Statute.

120. **Mr. Ferencz** (Observer for Pace Peace Center) said that limited ad hoc courts created after an event were hardly the best way to ensure universal justice: a permanent court was needed for permanent deterrence. Outmoded traditions of State sovereignty must not derail the movement towards establishing an international criminal court. Ever since the Nuremberg judgement, wars of aggression had undeniably been not a national right but an international crime. The Charter of the United Nations prescribed that only the Security Council could determine when aggression by a State had occurred, but it made no provision for criminal trials. No criminal statute could expand or diminish the Council's vested power. Only an independent court could decide whether an individual was innocent or guilty, and excluding aggression from international judicial scrutiny was to grant immunity to those responsible for it.

121. Carefully selected judges and prosecutors subject to public scrutiny and budgetary controls must be given the authority to carry out their task. To condemn crime yet provide no institution able to convict the guilty would be to mock the victims. An international criminal court – the missing link in the world legal order – was within the grasp of the Conference.

122. **Mr. Sané** (Observer for Amnesty International) said that abuses against women had been widespread in the conflict in Bosnia and Herzegovina. To combat rape as a weapon of war and crimes against humanity, Amnesty International called for the establishment of a permanent international criminal court, which should meet 16 fundamental criteria, of which he would highlight 2.

123. First, if the International Criminal Court were to be an effective complement to national courts, it must have the right to exercise the same universal jurisdiction over genocide, other crimes against humanity and war crimes as each of the States parties to the Statute had under international law. Each of those core crimes was now a crime of universal jurisdiction. Any State might and in some cases must permit its courts to exercise jurisdiction over a person suspected of having committed one of those crimes and bring anyone responsible for it to justice, no



matter where the crime was committed. It might do so without the consent of the State with custody of the suspect, the State where the crime was committed, the State of the victim's nationality, the State of the suspect's nationality or any other State. There was therefore no legal reason why the proposed new Court should not have the same powers.

124. Secondly, if the Court were to be effective, its judgements must be accepted as scrupulously fair and impartial by all sectors of the international community. Therefore, the Statute and the Rules of Procedure and Evidence must ensure that suspects and the accused had the right to a fair trial in accordance with the highest international standards.

125. Amnesty International, which had more than 1 million members and supporters throughout the world, agreed with the Prosecutor of the International Tribunal for the Former Yugoslavia and of the International Tribunal for Rwanda that, if the Court were weak and powerless, it would not only lack legitimacy but would betray the very human rights ideas that had inspired its creation. Amnesty International believed that such a court would be worse than no court at all, but it was confident that the Conference would create a court that it could support rather than one that it would oppose.

*The meeting rose at 1.25 p.m.*

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### 4th plenary meeting

Tuesday, 16 June 1998, at 3.10 p.m.

*President: Mr. Conso (Italy)*

A/CONF.183/SR.4

#### **Agenda item 11 (continued)**

**Consideration of the question concerning the finalization and adoption of a convention on the establishment of an international criminal court in accordance with General Assembly resolutions 51/207 of 17 December 1996 and 52/160 of 15 December 1997 (A/CONF.183/2/Add.1 and Corr.1)**

1. **Mr. Minoves Triquell** (Andorra) said that, as a country with a 720-year-old record of peace and a long tradition of democracy, freedom and respect for human rights, one which for centuries had served as a safe haven for refugees fleeing the ravages of war, Andorra was, as a matter of principle, fully committed to participation in the establishment of an international criminal court.

2. In order to ensure the establishment of a court with a strong Statute, a balance must be struck between the jurisdiction of the International Criminal Court and that of the State. The Court must be empowered to take action, on a complementary basis, when national criminal justice systems failed to function effectively. The Prosecutor consequently played a crucial role and should be in a position to initiate investigations, subject to legitimate safeguards. The Court's jurisdiction must apply to all States which accepted its Statute. Regarding the definition of crimes coming within the Court's jurisdiction, Andorra was deeply concerned about acts which affected children and young people in particular. The question of certain crimes whose repercussions were the subject of current debate in many societies should be approached in good faith. Defining the relationship between the United Nations and the Court was important in strengthening and legitimizing the work of the Court. The respective competence of the Court and the Security

Council must be carefully appraised so as to reconcile the former's independence with the latter's prerogatives. Andorra reaffirmed its opposition to the death penalty. On a different matter, it would seek to ensure balanced linguistic access to the work of the Court.

3. That morning, within the context of the Conference, Andorra had joined the group of what had been termed "like-minded States", whose general views in favour of an effective and strong court it shared. It hoped that the establishment of the Court would serve to contain and eradicate the bloody conflicts which debased mankind and caused much unnecessary suffering.

4. **Mr. Yee** (Singapore) stressed the importance of creating a court which dispensed justice in accordance with the highest legal standards and would therefore have the credibility and moral authority essential to its effective functioning. Particular care must be taken to ensure that, while those who perpetrated crimes of grave concern to the international community were brought to justice, fundamental norms of due process, such as respect for the rights of the accused and the establishment of guilt according to strict evidential standards, were upheld. The principle of *nullum crimen sine lege* must apply in defining precisely what conduct entailed criminal responsibility, so that individuals could be fully aware of the consequences of their actions. Whereas the International Criminal Court must be endowed with the flexibility to contribute to the progressive development of legal principles, that must be distinguished from the power to create offences.

5. Realism dictated that the aim should not be to establish a court of human rights of the kind that existed in Europe or the Americas, for other regions were still a long way from establishing such institutions, but rather to give tangible

recognition to the fact that some acts were so universally abhorred that their perpetrators should not escape punishment either by national criminal justice systems or, when they were non-existent or failed to act, by an international judicial body.

6. Since the Court would not have its own enforcement agencies and its effectiveness would depend upon the cooperation of States parties, universal participation should be sought, but at the same time account must be taken of the diversity of regional interests, different stages of development and social and cultural traditions, and the positions of the major Powers, in order to achieve a broad consensus and build an effective, working institution.

7. **Mr. Baja** (Philippines) said that his country aspired to the establishment of an international criminal court that would dispense justice efficiently and effectively; an institution that was ineffective in addressing the problem of impunity of the perpetrators of the most heinous violations of the laws of humanity would not serve justice or help to maintain international peace and security. The position of the Philippines, consistent with its constitutional and legal traditions, was based on those considerations and on its desire to uphold the current evolution of international law.

8. National judicial systems should have primacy in trying crimes and punishing the guilty. The International Criminal Court should complement those systems and seek action only when national institutions did not exist, could not function or were otherwise unavailable. The Court should have jurisdiction over the core crimes of genocide, war crimes, crimes against humanity and aggression, but its Statute should contain an additional provision allowing for the future inclusion of other crimes that affect the very fabric of the international system.

9. The Prosecutor should be independent and be entitled to investigate complaints *proprio motu*, subject to the safeguards provided by a supervisory pre-trial chamber. The use of weapons of mass destruction, including nuclear weapons, must be considered a war crime. The definition of war crimes and crimes against humanity should include special consideration of the interests of minors and of gender sensitivity. The Statute should provide for an age below which there was exemption from criminal responsibility, and persons under 18 years of age should not be recruited into the armed forces. The sexual abuse of women committed as an act of war or in a way that constituted a crime against humanity should be deemed particularly reprehensible. The crime of rape should be gender-neutral and classified as a crime against persons. A schedule of penalties should be prescribed for each core crime defined in the Statute, following the principle that there was no crime if there was no penalty, which would also meet the due process requirement that the accused should be fully apprised of the charges against them and of the penalties attaching to the alleged crimes.

10. The Philippines supported the positions set out by the States members of the Movement of Non-Aligned Countries at the Ministerial Meeting of the Coordinating Bureau of the

Movement of Non-Aligned Countries, held in Cartagena de Indias, Colombia, in May 1998, and was prepared to make the necessary changes to its national laws required by the establishment of the Court.

11. **Mr. Milo** (Albania) said that public opinion was increasingly concerned about the failure of the international community to prevent the continuing serious violations of international humanitarian law and punish those who committed them and the political leaders who were directly responsible for them. The perpetrators of the Serbian massacres in Bosnia were still unpunished, and the same crimes were being repeated in Kosovo, where the genocidal massacres by the Serbian authorities were a consequence of an institutionalized policy of genocide and State terrorism carried out through the military, paramilitary and police machinery against Albanians. The Albanian people of Kosovo were prey to a policy of ethnic cleansing, and their resistance to that policy in self-defence could never be identified with terrorism. The international community's slow or inadequate response to such crimes tended to cast doubt on the effectiveness of international institutions. Security Council recommendations had not only failed to prevent the violence and terror in Kosovo but had even won time for the Serbian authorities to launch large-scale ethnic cleansing operations.

12. For those reasons, Albania strongly advocated investing the International Criminal Court with universal jurisdiction over such crimes as genocide and ethnic cleansing, war crimes, whether international or domestic, aggression and other crimes against humanity. In an era of globalization, a growing range of crimes could be regarded as crimes against humanity and against international peace and security, including institutionalized State terrorism and certain global aspects of organized crime.

13. Albania was in favour of compiling a list of crimes subject to the jurisdiction of the Court in order to discourage all criminal abuses of human rights, create the conviction that such crimes could not go unpunished and support efforts to maintain international peace, security and stability. The Court should be fair, active and effective and should be able to safeguard and re-establish justice, rehabilitate victims of such crimes and assist in the establishment of normality.

14. The Court must have integrity, autonomy and independent jurisdiction on the basis of existing international guarantees and means of coercion such as those provided for by the Charter of the United Nations and also other complementary guarantees, particularly in cases where the principle of complementarity with national law and judicial systems was inapplicable. The efficiency of the Court would depend largely on the political will and cooperation of States and, first and foremost, on the constructive cooperation of the permanent members of the Security Council and their agreement to involve the Court in their efforts to maintain peace and security. They should guarantee the Court's jurisdiction in judging crimes against humanity and their perpetrators, while also ensuring follow-up to the Court's recommendations on post-crisis situations.

15. **Mr. Baudin** (Senegal) said that the creation of supra-national jurisdiction over the crimes of genocide, grave and repeated gross violations of human rights, war crimes and crimes against humanity was the tangible expression of a universal awareness that such crimes should no longer go unpunished. That would open the way to safeguarding the rights of the human person. The Conference, overcoming selfish national interests while taking account of the diversity of judicial systems, should lead to the establishment of an effective, permanent court, independent of any political structures.

16. Senegal subscribed to a number of principles embodied in the Dakar Declaration adopted in February 1998 by a majority of African States. The International Criminal Court should be permanent and universal in character and should embody the fundamental principles of international criminal law. It should be complementary to national courts and be independent of any political structure, including the Security Council and States. It should be effective, just and impartial. The Court should have an independent Prosecutor, who should be able to initiate proceedings *ex officio* and without hindrance, subject to the existence of a pre-trial chamber to guarantee the legality of the prosecution proceedings. The Court's jurisdiction should extend, as a minimum, to genocide, war crimes and crimes against humanity. It should furthermore ensure respect for the rights of the defence and safeguard the interests of victims. Acceptance of reservations to the Statute would undermine the effectiveness of the Court.

17. The values of justice and peace lay at the heart of the initiative to establish an international criminal court – peace as the key to stability and the consolidation of democracy and the rule of law, and justice as a deterrent against acts of revenge committed when crimes were seen to go unpunished. By adopting the Statute of a permanent, independent, effective, transparent and non-selective international criminal court, the Conference would be leaving an enduring legacy to future generations.

18. **Mr. Al Bunny** (Syrian Arab Republic) said that the peoples of the world were looking with trust and optimism to the establishment of an independent international criminal court, the forerunners of which had been *ad hoc* tribunals. The court to be set up should dispense justice, protect rights and equality and spare none of the criminals who had flouted the most basic human values and violated international law. It must be an international judicial body with locally circumscribed competence and an expression of the international will represented in the General Assembly, with a clearly defined relationship to the United Nations, but with independence from the Security Council. The jurisdiction of the International Criminal Court should cover the crime of genocide, crimes against humanity and war crimes committed in international conflicts, in accordance with the Geneva Conventions of 1949 and the Additional Protocols of 1977. The Court should be able to prosecute the perpetrators of aggression, as a crime against peace, but subject only to the definition of the crime of

aggression contained in the annex to Assembly resolution 3314 (XXIX) of 14 December 1974. To include crimes for which there was as yet no accepted definition would be contrary to the overriding principle of *nullem crimen sine lege*.

19. Furthermore, the inclusion of other crimes which came within the jurisdiction of national courts would confuse matters of greater importance with those of lesser importance and also raised the question of complementarity. In order to preserve national sovereignty, the Court should have complementary jurisdiction only when national courts were unable to act. The action taken by the Prosecutor in initiating proceedings must be subject to a special mechanism that would guarantee the legality of proceedings. Transparency, integrity and credibility were crucial attributes of the Court, which must furthermore have full financial independence. It should not be financed from the budget of the United Nations, but by the States parties to the Convention, in accordance with specific criteria.

20. **Mr. Schmidt-Jortzig** (Germany) said that the Conference offered a real opportunity for the world community to take a major step forward. A strong, independent and effective international court, without loopholes in its Statute, was needed to ensure that the worst crimes against humanity could no longer go unpunished. In that context, Germany fully supported the statement made by the United Kingdom as holder of the Presidency of the European Union. Germany was committed to the creation of a court with automatic universal jurisdiction over core crimes, including war crimes in internal conflicts. The principle of complementarity should be observed, and the International Criminal Court should have a strong and independent Prosecutor. Furthermore, all States parties should cooperate without reservation. His delegation proposed that the crime of aggression should be included in the list of core crimes, having due regard for the role conferred on the Security Council by the Charter of the United Nations. In accordance with historical precedent, the definition of that crime should focus on indisputable cases of aggression.

21. Two of Germany's main concerns were automatic jurisdiction over core crimes and the independence of the Prosecutor. In an interdependent, globalized world, States must accept the Court's jurisdiction over the core crimes; sovereignty would be better served by cooperation than by futile attempts to stand alone. The system of complementarity incorporated in the draft Statute would not entail the loss of sovereignty but would help to stop the gaps which had enabled the worst criminals to escape punishment. Germany was committed to the concept of universal jurisdiction over the core crimes in order to promote the rule of law in international relations. No compromise that made it possible for a State to choose where to accept the rule of law and where to disregard it would be acceptable.

22. It should not be left to States alone to decide whether a matter might be investigated. Although provision should be made for proper judicial control in the investigative stages, the Prosecutor should be entitled to initiate investigations without having to wait for a complaint by a State.

23. **Mr. Zalamea** (Colombia) said that it was significant that the Conference was being convened at a time when the world was celebrating the anniversaries of the adoption of major international and regional human rights instruments. The Conference's remit, to adopt the Statute of a permanent international criminal court, would make good one of the major institutional omissions in the international legal order. The draft Statute provided an appropriate legal basis for an effective, independent and impartial court.

24. The jurisdiction of the International Criminal Court should cover the most serious international crimes, recognized as such in international law. The Statute must set out clear and precise rules as to the conditions in which the mechanism for international investigation and prosecution would be set in motion. Such jurisdiction should be complementary to, and not a substitute for, national criminal justice systems.

25. In respect of article 108 of the revised draft Statute, on the settlement of disputes, Colombia proposed that the International Court of Justice at The Hague should be entrusted with the settlement of disputes relating to the interpretation or application of the Statute. However, disputes relating to the competence of the International Criminal Court should be settled by the Court itself.

26. The Conference had a historic responsibility and faced a considerable challenge in meeting the legitimate desire for justice of peoples who had suffered from horrendous crimes such as genocide, war crimes or crimes against humanity.

27. **Mr. Matos Fernandes** (Portugal), endorsing the views expressed by the United Kingdom on behalf of the European Union, said that the establishment of an international criminal court was a necessary guarantee of respect for fundamental human rights. It would show that the lessons of history had been learned and, as the world entered a new century in an era of globalization, would constitute tangible recognition of the need for effective means to bring to justice those responsible for the most serious crimes under international law. The jurisdiction of the International Criminal Court should cover the core crimes of genocide, war crimes and crimes against peace and humanity. It was not a matter of transferring jurisdiction from national courts, but of enabling the Court to intervene wherever national judicial systems were non-existent or unable or unwilling to take action. The Court alone should decide on the verification of such situations.

28. The crimes defined should include sexual abuse, particularly of women, and the use of children as soldiers. Portugal remained flexible with respect to extending the list of violations covered by the Court's jurisdiction, in accordance with established review mechanisms and experience gained, to include other crimes which seriously undermined the fundamental values of humankind. It was in favour of including the crime of aggression, provided that it was clearly defined. The Court's jurisdiction should not, however, be extended unduly, at the risk of detracting from its effectiveness, prestige and authority. The

recent practice of establishing ad hoc tribunals should not be continued. The Statute should enhance the position of its judges by ensuring their total independence and protecting them against all forms of pressure.

29. The Prosecutor should be independent of any organ or entity, should be subject to safeguards of objectivity and legality and should have the power to initiate investigations ex officio. It would not be conceivable for national courts to have wider jurisdiction than that of the Court. Indeed, as interdependence among nations had grown, the concept of sovereignty had evolved significantly. Portugal strongly supported the establishment of a permanent, just and credible court. There should be no provision for the death penalty, and attention should be paid to the position of victims and to the admissibility of compensation. The success of the Court's action would depend on the broadest and most expeditious cooperation possible between the States parties and the Court.

30. A unique opportunity was at hand to provide the international community with the legal means to bring to justice and punish those who practised extermination in the most serious conflicts, including those waged within States. Practical expression must be given to the principle that no one was above the law by creating an instrument which recognized equality among all persons.

31. **Mr. Kafando** (Burkina Faso) said that the Conference, and the Statute of the International Criminal Court that it would be adopting, were of paramount importance in punishing barbarities such as the genocide in Rwanda and the former Yugoslavia. The limitations of the ad hoc tribunals set up in connection with those tragedies had demonstrated the need for a permanent international court, which would also serve as a deterrent to potential criminals.

32. The convening of the Conference was the culmination of a long process of codification of legal rules for safeguarding peace and security and the protection of human rights; non-governmental organizations, particularly humanitarian bodies, had played a catalytic role in the process. Burkina Faso was determined to join others in overcoming outstanding difficulties and ensuring universal accession to the Statute. The establishment of an international criminal court was now a matter of urgency and a duty towards present and future generations.

33. Burkina Faso had proved its commitment to basic human rights through its own institutions and through its steadfast efforts – currently as Chairman of the Organization of African Unity – to seek solutions to the crises affecting the African continent, some of which had given rise to the crimes to be covered by the jurisdiction of the Court.

34. Considerations of particular concern to Burkina Faso were the principle of complementarity with national courts, the Prosecutor's initiative in triggering proceedings, the independence of the Court from any political body, particularly the Security Council, and the Court's competence for the definition of war

crimes. The Court should be financed in accordance with the scale of assessments system in force at the United Nations.

35. **Mr. Tatsiy** (Ukraine), stressing the importance of establishing an international criminal court to further strengthen and develop international law and establish the principle of the punishment of the most serious crimes, said that the draft Statute for the International Criminal Court provided a sound basis for consensus.

36. Ukraine attached particular importance to the principle whereby the Court would be called upon to intervene in cases where national judicial procedures were unavailable or ineffective, but would not be a substitute for national courts. Ukraine agreed that the Court must have jurisdiction over the most serious international crimes against peace and humanity. Ukraine, a once-powerful nuclear State, had voluntarily surrendered its nuclear potential and therefore strongly supported the idea of establishing criminal responsibility for acts related to the use of nuclear weapons. It was also in favour of including crimes against United Nations and associated personnel in the list of crimes covered by the Statute. There should be a large number of ratifications of the Statute to ensure that the Court would be effective and widely recognized. The Court must be funded by the States parties so as to ensure its independence. Ukraine agreed that the Court should be located at The Hague.

37. **Mr. Asamoah** (Ghana) said that the establishment of an international criminal court would be a fitting conclusion to a century in which countless human lives had been lost. There was an urgent need to seek a quick, effective and unbiased international response to crises that had the potential for genocide, crimes against humanity and other such crimes. In Rwanda, as elsewhere, many lives could have been spared if the international community had acted promptly. Ghana urged the family of nations to focus critically on the establishment of criteria for a collective response to crisis situations, but the establishment of an international criminal court should not be regarded as an end in itself.

38. If the International Criminal Court were to be a credible judicial institution, it must be based on a number of essential principles. It must have inherent jurisdiction over the core crimes of genocide, crimes against humanity and war crimes. The requirement of State consent as a precondition to the exercise of jurisdiction would render the Court ineffective and was unacceptable. Crucial to the credibility of the Court and to its universal acceptance were provisions guaranteeing its independence and impartiality. It must not supplant national criminal justice systems or act as a supervisory body over such systems, but should be able to investigate and prosecute where national systems were unable or manifestly failed to act. The Court must be sensitive to gender issues in situations of armed conflict, and relevant provisions must be incorporated into the mainstream of the Court's functions. The principles on which the Court was based should reflect the current state of international law and the reality of international society.

39. The challenge was to create a universally acceptable, fully functional and effective court with a human face which enjoyed the confidence of both the accuser and the accused, met the demands for justice of both victims and the international community and had the capacity to facilitate peace and stability.

40. **Mr. Michalek** (Austria) said that Austria's position was reflected in the statement made on behalf of the European Union. More specifically, he added that the tragedies in Rwanda and the former Yugoslavia had emphasized the need for an international criminal court, since the two ad hoc tribunals were no substitute for a permanent institution. A truly effective, independent and permanent court would play a major role in upholding the principles of justice and the rule of law. A particular advantage would be its preventive role, through its deterrent effect on potential criminals, thereby strengthening efforts to maintain peace and stability in the world.

41. The International Criminal Court should have jurisdiction over the core crimes of genocide, crimes against humanity and war crimes, and also the crime of aggression, although the difficulty of finding a generally acceptable definition of aggression should not delay the establishment of the Court. Austria also supported the inclusion of crimes of sexual violence committed in armed conflict.

42. The Court should be complementary to national criminal justice systems, acting not as a substitute but only where national systems were unable or unwilling genuinely to investigate a crime and prosecute where the facts so warranted. The establishment of the Court did not, therefore, absolve national systems of their primary responsibility to act effectively.

43. An effective, mandatory system of State cooperation was a prerequisite for an effective court; any grounds for refusal of cooperation would have to be explicitly enumerated in the Statute. Requests by the Court should, in principle, be given priority over requests from States, and sentences should be effectively enforced by States parties that had expressed their willingness to accept convicted persons. The procedural provisions must ensure the fair and effective operation of the Court, safeguard the rights of the accused and ease the procedure of giving evidence by victims. Consideration should be given to requiring States parties to secure proof, especially through the preparation and registration of refugee reports.

44. **Mr. Spasov** (The former Yugoslav Republic of Macedonia) said that an international criminal court would fill a gap in the international legal system, would give a clear signal to the perpetrators of serious crimes that they would be brought to justice, and would help to guarantee universal respect for human rights and fundamental freedoms. The criminal justice system in the Republic of Macedonia had all the prerequisites for effective observance of international conventions and for the prosecution of international criminals. It had been agreed in the Preparatory Committee on the Establishment of an International Criminal Court that the Court should be an independent, permanent

institution open to all States and that it should have an international legal personality with the competence to bring persons to justice for the most serious crimes. He hoped that States would demonstrate the necessary political readiness to reach agreement on outstanding issues.

45. The establishment of the Court would also give strong impetus for the further development of international penal law and for international cooperation in combating serious crimes, especially transnational organized crime. His Government accepted the principle that complementary jurisdiction would operate when national courts were unable or unwilling to act, and when it was obvious that a national court's decisions were partial. The Court should be independent of political influence and the influence of States or international bodies and should have jurisdiction over the four core crimes of genocide, crimes against humanity, war crimes and the crime of aggression. Subject to agreement by the Conference, the Republic of Macedonia would accept the inclusion of terrorism and illicit trafficking in narcotic drugs and psychotropic substances in the list of crimes. The Prosecutor should be independent and have the power to initiate investigations *ex officio* on the basis of information from relevant sources. The Security Council should be authorized to initiate investigations before the Court, and its prior decision that an act of aggression had been committed by a State should be a condition for initiating proceedings. The death penalty should be excluded. His Government considered that the basic principles of penal proceedings contained in the draft Statute were consistent with international standards and decisions. States parties should consistently carry out their obligations under the Statute, in cooperation with the Court, and no reservations to the Statute should be allowed after its adoption.

46. The system of international criminal justice should be further elaborated, in particular by developing instruments of mutual assistance in the suppression of crimes and by unifying material and procedural law, thus eliminating obstacles to the effective implementation of international criminal justice.

47. **Mr. Lahiri** (India) stressed India's constructive participation in efforts for the progressive development and codification of international criminal law. The only durable basis for the development of such international cooperation was scrupulous regard for the fundamental principles of the Charter of the United Nations, notably the sovereign equality of States, non-discrimination and non-interference in internal affairs. India fully endorsed the view agreed at the Twelfth Ministerial Conference of the Movement of Non-Aligned Countries, held in New Delhi in April 1997, the declaration agreed at the Meeting of Ministers for Foreign Affairs and Heads of Delegation of the Movement of Non-Aligned Countries and issued in New York on 25 September 1997, and the resolution adopted by the Asian-African Legal Consultative Committee on 18 April 1998, which had stressed that the International Criminal Court should be based on the principles of complementarity, the sovereignty of States and non-intervention in the internal affairs of States, and that its Statute should be

such as to attract the widest support and acceptance of States, State consent being the cornerstone of the Court's jurisdiction.

48. It was unrealistic to conceive of inherent or compulsory jurisdiction for the Court in view of the widely diverging views on the specific elements of certain crimes, the proposed inclusion of elements from multilateral instruments to which several States were not parties and the absence of consensus on the current status of customary international law with respect to several of those crimes. India accordingly favoured the approach of optional jurisdiction adopted by the International Law Commission in its draft of the Statute.

49. It was generally agreed that the Court's jurisdiction should be complementary to the primary jurisdiction of nation States and that the Court could intervene only when a national judicial system was non-existent or unable to deal with the crimes covered by the Statute. That was in conformity with the principles of territorial jurisdiction and the sovereignty of States. It was understandable that the Court should intervene in exceptional situations, but it would be a travesty of the concept of complementarity to expect States with well-established and functioning judicial and investigative systems to have to prove constantly the viability of their judicial structures, failing which they would be overridden by the Court.

50. The competence and authority to initiate the jurisdiction of the Court rested with States, particularly those with a direct interest in a given matter; it was inappropriate to vest an individual Prosecutor with the power to initiate investigations *proprio motu*. A clear distinction should be made between the sovereign authority of States and the professional role of a Prosecutor. The approach of ad hoc tribunals could not constitute a precedent or be considered automatically applicable to a permanent international criminal court.

51. The Court must be entirely impartial and independent of political processes. Legally, the function of the Court was international criminal justice, not the maintenance of international peace and security. There was no legal basis on which the Security Council could either refer matters of peace and security to the Court or veto action by the Court. Any pre-eminent role for the Council in triggering the Court's jurisdiction constituted a violation of sovereign equality and of equality before the law because it assumed that the five veto-wielding States did not by definition commit the crimes covered by the Statute of the Court or, if they did, that they were above the law and possessed *de jure* impunity from prosecution. The anomaly of the composition and veto power of the Council could not be reproduced in an international criminal court.

52. The crimes coming within the jurisdiction of the Court should be defined precisely in the Statute. The function of the Conference was to establish an institution, not to develop and codify substantive international law. Prudence and the requirement of securing universal support dictated that the Conference should not become involved in elements over which there were clearly diverging views. India strongly

supported the inclusion of terrorism in the jurisdiction of the Court.

53. **Mr. Dabor** (Sierra Leone) called for a fair, effective, independent, impartial and unfettered international criminal court. The success of the Conference would lie in its ability to guarantee the independence of the International Criminal Court. It was imperative that the Court should have inherent jurisdiction and that the Prosecutor should be empowered to initiate investigations *proprio motu*, failing which the Court would be subordinated to a generalized veto power. The Prosecutor must be able to receive information from victims and intergovernmental and non-governmental organizations to trigger investigations and prosecutions. The Court must be sensitive to and respect the rights of victims.

54. The Court should have jurisdiction over genocide, war crimes and crimes against humanity, and also over aggression, subject to an agreed definition of the crime. The Security Council should be able to refer situations to the Court but should not be able to exercise any veto or unilaterally cause indeterminate delays to the Court's proceedings. Full and prompt cooperation by States was essential. Trials must be conducted in a speedy and just manner. The Court's independence must also be assured in terms of funding. The acceptance of funding by a particular State would detract from its independence, since it would have to rely on economically stronger States, which might discourage ratifications and would be disadvantageous to smaller and less developed countries. The best solution would be to finance the Court from the budget of the United Nations.

55. For seven years, his country had been undergoing a bloody war in which barbaric acts had been committed by rebel forces; the perpetrators of such acts would not have gone unpunished if there had been an independent international criminal court. Cooperation in the finalization of the Statute, and its ratification, would testify to the common desire to overcome the failures of national legal systems and would provide an opportunity to contribute to international stability and the prevention of atrocious crimes.

56. **Mr. Tjiriange** (Namibia) endorsed the statement made by the representative of South Africa on behalf of the Southern African Development Community. In view of the atrocities the world had witnessed during the previous century and Namibia's own recent history, his Government supported the establishment of an effective and independent international criminal court.

57. The International Criminal Court should not be subjected to political decisions of the Security Council. It must be completely independent, to the same degree as the International Court of Justice. The Council might, however, refer matters to the Court in accordance with its mandate for the maintenance of international peace and security. The Court must have inherent jurisdiction over the core crimes of genocide, crimes against humanity, war crimes in international and non-international armed conflicts, and aggression. A State party accepted the

Court's jurisdiction over those crimes upon ratification of the Statute, and no further State consent should be required for referring a matter to the Court.

58. The independence of the Prosecutor was of great importance to the effective operation of the Court; he or she must be able to initiate investigations and institute prosecutions *proprio motu*, subject to appropriate judicial scrutiny. The effectiveness and credibility of the Court would, finally, depend on cooperation from States parties.

59. **Mr. Abdullah** (Afghanistan) reaffirmed his delegation's support for the establishment of an international criminal court. In the previous 20 years, his country had been a victim of aggression and the theatre of violations of humanitarian law, first by the former Soviet Union and more recently by the Taliban mercenaries with the direct participation of foreign militia and military personnel. The acts committed by the former constituted war crimes or crimes against humanity, while the latter continued to perpetrate war crimes, crimes against humanity and genocide. United Nations resolutions had gone unheeded. Those tragic events were evidence of the need for an independent, credible and impartial court which should not be hostage to a political body. Political considerations and the geostrategic and geoeconomic interests of Security Council veto-holders should not prevent the International Criminal Court from condemning aggressors. The world needed to establish a historical record of major international crimes, if only to establish the truth and to educate future generations, in order to deter potential criminals and avoid the repetition of such crimes. Aggression should accordingly be among the core crimes within the inherent jurisdiction of the Court.

60. The Court should conduct its work independently of the Security Council. Any impediment to the independent exercise of justice would damage the credibility of the Court, especially in the eyes of victims. He warned against the danger of the selectivity and double standards that prevailed in the assessment of human rights in the world. The jurisdiction of the Court should be limited to the core crimes of aggression, genocide, war crimes and crimes against humanity, while leaving open the possibility of broadening the scope of its jurisdiction through periodic amendment of the Statute.

61. The Court should play a complementary role in relation to national courts, and the unavailability and inefficacy of national courts should be properly defined in order to avoid conflicts of competence and infringement of the sovereign rights of independent States.

62. Agreement among the parties to a conflict based on the "forgive and forget" principle for the purpose of national reconciliation should be respected by extra-national institutions, since there were times when even justice might not serve its own purpose. In some cases, amnesties could provide a mechanism to facilitate the restoration of the rule of law and the normalization of situations of conflict and hostility.



63. **Ms. Mariscal de Gante y Mirón** (Spain) said that she attached importance to several issues. She agreed that the International Criminal Court should have jurisdiction over the core crimes that were abhorrent to human conscience. Being aware of the difficulties of including the crime of aggression, Spain remained open-minded to any initiatives that might emerge from the Conference, without calling in question the competence of the Security Council. It strongly supported the principle that the Court should be subsidiary or complementary to national judicial systems and should operate as a court of last resort when a national system was unable to meet its responsibilities. The Court must be free from any suspicion of politicization or partiality; its personnel must be highly qualified and independent. The same attributes were required of the Prosecutor. On the subject of the structure and functions of the Office of the Prosecutor, Spain was in favour of the principle of legality, but would not oppose the inclusion of certain elements of the principles of expediency and timeliness, subject to controls. It was also in favour of States cooperating as closely as possible with the Court, and that included third States, because obligations in the area of human rights formed part of *jus cogens*, which did not entail interference in internal affairs. The Statute of the Court should not depart from those new concepts in criminal law, which went beyond the traditional criminal law framework in terms of relations between the State and the criminal by including the rights of victims. Particular attention should be paid to special situations in which the victims were the most vulnerable sectors of the civilian population, such as women and minors.

64. **Mr. Gómez** (Chile) said that the intended establishment of an international criminal court reflected a clear ethical attitude on the part of the international community to the impunity which had prevailed in so many cases of serious crimes. Existing judicial mechanisms, based primarily on the action of national courts, had shown their limitations, causing scepticism and distrust, particularly among victims. A truly effective international criminal court would help to deter future offenders and enable the law to play its role as an instrument of peace and social order.

65. The International Criminal Court should not be a substitute for national judicial systems but should complement them. It must be independent of any external influence, political or otherwise, whether by States or by international organizations. Its independence would attest to its credibility and effectiveness. Independence should also be ensured by its funding mechanisms. Chile stressed the need for accession by the largest possible number of States to the Statute and hence for a harmonization of different positions, but not at the price of setting up a court which lacked the ways and means for performing its functions effectively.

66. The mechanisms under which the Court would exercise its jurisdiction should be sufficiently flexible. International experience of other judicial bodies had shown that unduly strict requirements of that nature seriously weakened their

effectiveness. The Court should therefore have inherent jurisdiction with respect to all crimes recognized under the rules of general international law. Crimes such as genocide, war crimes, whether committed in international or internal conflicts, and crimes against humanity should fall within its jurisdiction. The list of crimes should also include crimes against women, especially those involving sexual violence, and also the serious crime of forced disappearance of persons. Not only States and the Security Council but also the Prosecutor should be empowered to initiate proceedings. Chile attached great importance to the role of the Prosecutor, and to provisions on cooperation and judicial assistance. The effectiveness of the Court would depend to a large extent on the cooperation of States. Because of its recent history, Chile attached crucial importance to the unrestricted respect for human dignity and to the need to punish effectively crimes that constituted serious violations of that dignity.

67. **Mr. Hassouna** (Observer for the League of Arab States) expressed support for the principle of including the crime of aggression in the list of crimes within the jurisdiction of the International Criminal Court, taking into account the definition of aggression contained in General Assembly resolution 3314 (XXIX) of 14 December 1974 and the distinction between aggression and the right of peoples to armed struggle. The definition of war crimes should include grave violations of the Geneva Conventions of 1949 and of the Additional Protocols of 1977. There being no agreed definition of the crime of terrorism, the League of Arab States would prefer not to see that crime included in the Statute, but, should the Conference intend to include it, it might be guided by the definition of the crime of aggression and the crime of terrorism laid down in the Arab Convention for the Suppression of Terrorism adopted in Cairo in April 1998. To be free from any political influence, the Court must be independent, particularly of the Security Council, whose role should exclude intervention in judicial work and should be confined to lodging complaints and referring them to the Prosecutor, without prejudice to any country's right to file a complaint. The Council should not have the right to interfere in investigations and trial proceedings. The Prosecutor should be fully independent but should not be entitled to trigger proceedings without specific judicial controls. Evidence must be based on legitimate procedures as the best guarantee for the integrity of investigation. Finally, there was no need for a specific provision concerning the settlement of disputes arising from the interpretation or application of the Statute or any reservations to it.

68. **Mr. Sommaruga** (Observer for the International Committee of the Red Cross) said that, by virtue of its mandate to work for the faithful application of international humanitarian law, his organization supported moves to set up effective mechanisms for the punishment of serious crimes. Although States must continue to bear primary responsibility for instituting legal proceedings, and indeed greater efforts must be made to encourage them to meet their existing obligations and bring



suspected war criminals before their own courts, the present system had shortcomings and the impunity of war criminals could no longer be tolerated. Within the complementary roles of the International Criminal Court and national courts, the future Court should be endowed with full powers to discharge its responsibilities. No backward step should be taken in relation to existing international humanitarian law.

69. The Court must have jurisdiction over war crimes committed in all types of armed conflicts, international or otherwise. The war crimes to be listed in the Statute of the Court must include the most serious violations of Additional Protocols I and II to the 1949 Geneva Conventions.

70. The Court should have inherent jurisdiction over genocide, crimes against humanity and war crimes. It should be competent to try such cases when a State became a party to the treaty establishing the Court. By virtue of the principle of universal jurisdiction, any State had the right, and in many cases the duty, to exercise its jurisdiction or extradite suspected war criminals without having to secure the agreement of other States. To require the additional consent of States before a case could be referred to the Court would clearly be a retrograde step in respect of existing law. War criminals should not enjoy legal protection from prosecution.

71. The Prosecutor must be empowered to initiate investigations and institute proceedings *proprio motu*, while complying with the principle of complementarity. Reiterating the firm support of the International Committee of the Red Cross, the custodian of the Geneva Conventions, for the process under way, he said that the establishment of an international criminal court would also send a clear message to the perpetrators and potential perpetrators of such violations and help to promote national reconciliation in countries beset by violence.

72. **Mr. Jessen-Petersen** (Observer for the Office of the United Nations High Commissioner for Refugees), speaking on behalf of the High Commissioner, said that atrocities in Sierra Leone, the former Yugoslavia and the Great Lakes region highlighted the critical importance and relevance of a permanent international criminal court. The United Nations High Commissioner for Refugees (UNHCR) joined other humanitarian agencies through the Inter-Agency Standing Committee in expressing its support for the establishment of such a court, which would crucially complement the work carried out by the humanitarian agencies. Mass human rights violations were today a major cause of humanitarian crises, but the international community's efforts had focused on the consequences of such crises, though little had been done to tackle their underlying causes. Any permanent court could help to prevent future atrocities and also promote reconciliation in societies emerging from conflict.

73. UNHCR believed that the International Criminal Court could ensure more effective implementation of the "exclusion clause" whereby individuals who had committed certain crimes were excluded from international protection as refugees, by

providing more authoritative guidance on the interpretation of that clause and by making sure that those so "excluded" were brought to justice. The Statute of the Court must also cover war crimes committed during internal conflicts. UNHCR urged that the Court's jurisdiction over war crimes should extend to armed attacks against civilians, *inter alia*, in United Nations-declared "safe areas", denial of humanitarian assistance, and forced displacement with the deliberate aim of achieving ethnic homogeneity in a given geographical area.

74. The jurisdiction of the Court should also extend to attacks against humanitarian workers. UNHCR was often the unfortunate witness to atrocities and was committed to cooperating as far as possible with any future court in sharing information which might help to bring the perpetrators to justice, while at the same time it had a responsibility to protect its staff and safeguard its operations. For that reason, it was important that the Court should provide adequately for witness protection and the non-disclosure and inviolability of United Nations records.

75. **Mr. Ouedraogo** (Observer for the Inter-African Union for Human Rights) said that the Inter-African Union for Human Rights joined with its partners in the NGO Coalition for an International Criminal Court in supporting the establishment of an independent, impartial, strong and universal criminal court. The independence of the International Criminal Court was crucial. Its staff must be above suspicion and the Prosecutor must not be subject to any outside influence. The Court must receive sufficient, constant funding, free from any pressures. The Court should be able to intervene unrestrictedly and its jurisdiction should extend to any place at any time. Following the example of the negotiations on the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on Their Destruction, in which neither the Security Council nor the Disarmament Commission had been directly involved, the process to establish the Court should also be free of any such involvement. The momentum created by African regional meetings held in connection with the establishment of an international criminal court and at the summit of heads of State and Government of the Organization of African Unity should help to ensure the establishment of an independent, permanent, universal and accessible court. The Inter-African Union for Human Rights, together with its partners, had organized an international coalition for a criminal court, and a forum had been established by several international non-governmental organizations active in the field of human rights to call for such a court. The Court should fill the gap in national and regional jurisdictions, and its actions should be facilitated and accepted by States. It should be strong but just, impartial and accessible, should have sufficient resources, eradicate impunity, render justice, create scope for freedom and forge trust between citizens and Governments for the real development of States.

76. **Ms. Rishmawi** (Observer for the International Commission of Jurists) said that the International Criminal Court should have

jurisdiction over the three core crimes of genocide, war crimes and crimes against humanity. Although the International Commission of Jurists did not take a position on the crime of aggression, it believed that a mechanism should be established to extend the jurisdiction of the Court, either through an additional protocol to the Statute or through other conventions. While the crimes should be precisely defined, the definitions should be broad enough to apply in situations of both international and internal armed conflict. The thresholds in such crimes should be minimal, and where no thresholds currently existed in law, as was the case for war crimes, no threshold should be added. The Court should have automatic jurisdiction. While the role of national courts was essential in combating impunity, experience showed that national legal systems often protected the perpetrators of such crimes. The addition of lengthy and complex admissibility procedures should therefore be avoided. There must be an independent, full-time prosecutorial organ to bring charges against accused persons and to collect, prepare and present evidence; it should have the power, subject to sufficient checks, to initiate complaints. The Court must be free from political interference. While the Security Council should be able to refer matters to the Court, it should not be able to interfere in the Court's jurisdiction or to protect certain individuals from prosecution. The Court should be a universal body associated with the United Nations and funded from its regular budget. No reservations to the provisions of the Statute should be admissible, nor should the crimes covered by the Court be subject to a statute of limitations. With a view to the speedy establishment of the Court, the Statute should not require a high number of ratifications. In all aspects of the Court's work, whether substantive, procedural or administrative, gender concerns should be taken into account.

77. **Ms. McKay** (Observer for the Victims' Rights Working Group) said that the establishment of an international criminal court was an important symbol for survivors of heinous crimes, but there would be no justice without justice for victims; the International Criminal Court must therefore be empowered to address their rights and needs. There was increasing recognition of the need to take account of victims' rights, both through the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power adopted by the General Assembly at its fortieth session, in 1985, and at the national level, including opportunities for them to obtain various forms of reparation without having to initiate separate legal proceedings.

78. The Court must be able to guarantee protection for victims and other witnesses in the proceedings. That would require a strong and effective victims and witnesses unit. There must be appropriate structures for dealing with women victims, and personnel with gender expertise to ensure their proper respect and treatment. Recognition of crimes against women was itself a crucial aspect of justice and the healing process. Child victims also required specialized treatment and mechanisms. Adequate provision must further be made for the effective participation of victims in the proceedings. The Court must be able to ensure the right of victims and their families to reparation, as defined in the draft basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law elaborated by the Commission on Human Rights. It would be the Court's ability to bring to justice those responsible for the crimes within its jurisdiction that would do most to satisfy the expectations of victims.

*The meeting rose at 6.20 p.m.*

## 5th plenary meeting

Wednesday, 17 June 1998, at 10 a.m.

*President: Mr. Conso (Italy)*

A/CONF.183/SR.5

### Agenda item 11 (*continued*)

**Consideration of the question concerning the finalization and adoption of a convention on the establishment of an international criminal court in accordance with General Assembly resolutions 51/207 of 17 December 1996 and 52/160 of 15 December 1997 (A/CONF.183/2/Add.1 and Corr.1)**

1. **Mr. Dini (Italy)** said that his country had long supported the codification of new rules for international coexistence, ensuring compliance through appropriate instruments. Violence, grievous misdeeds and harassment of individuals and whole peoples were stirring the conscience of societies. Common

sense demanded that instruments should be put in place to prevent and punish the most outrageous crimes against international law, to make it clear that, even in war, conduct was subject to rules and penalties. It was not enough for the international community to reach agreement on defining international criminal offences. An authority was also necessary to prosecute them.

2. The International Criminal Court must be a strong institution, with very broad participation, to make its Statute universal. It must be devoid of partisan pressure, independent, impartial and based on the principle of the right to a fair trial.

3. The Court must effectively complement national courts and have jurisdiction where the latter were either unwilling or unable to act effectively. It was crucial to identify the crimes falling within the jurisdiction of the Court, which should be limited to the most heinous crimes committed in the context of armed conflict, whether international or not. Although the Security Council retained responsibility to ascertain the existence of aggression, the Court should be empowered to prosecute the crime itself. In order to safeguard the responsibilities for peacekeeping and international security vested in the Council, a balance must be struck in its relationship to the Court. The latter should be able to perform its judicial functions in total independence and without hindrance. The Prosecutor must be empowered to institute proceedings independently, as well as at the request of individual States or the Council. The Court's jurisdiction must be triggered automatically and be imposed on States by virtue of accession to the Statute alone. Otherwise, the Court would remain an arbitration tribunal, operating solely according to contingent political will. Every State party must guarantee its total cooperation with the Court in every phase of its work. That was vital to ensure its credibility and effectiveness.

4. **Mr. Valo** (Slovakia) supported the establishment of an international criminal court to punish those responsible for the most serious criminal acts. It should be a strong, independent court and must have authority to ensure punishment of those guilty of the crimes of genocide, war crimes and crimes against humanity. The jurisdiction of the International Criminal Court should also extend to the extremely serious crime of aggression. The principle of complementarity was very important, for the Court should exercise its jurisdiction only when national legislation did not provide for the initiation of proceedings or national bodies were failing to act. His own country's criminal code provided for prosecution of the crimes of genocide, crimes against humanity and war crimes.

5. The Court's jurisdiction should include crimes committed in both international and internal conflicts. It should have authority to prosecute crimes committed in the territory of a State party, without the consent of that State. If the crime occurred in a State not party to the Statute, criminal prosecution would be possible only with the consent of that State. All States parties to the Statute must undertake to cooperate with the Court. The Statute must establish a mechanism for such cooperation, but should not allow reservations.

6. **Mr. Al Noaimi** (United Arab Emirates) said that, on the eve of the twenty-first century, the world had witnessed increasing violations of human rights. The efforts undertaken by the international community to adopt and promote human rights had faced a number of obstacles, owing to the lack of permanent mechanisms to establish deterrent sanctions. The creation of the International Criminal Court would ensure that persons responsible for serious human rights violations would be prosecuted and punished.

7. The particular crimes to be addressed by the Court had to be defined very precisely. The Court must be independent, but the major role of the Security Council should not be ignored, with the result that the Prosecutor should not be able to initiate procedures on his own initiative, but only at the request of a State party or the Council.

8. His country was fully prepared to cooperate with the Court, provided that such cooperation did not affect its national security. The Court should not consider crimes committed in States not parties to the Statute unless such States gave their consent or unless the Council so decided.

9. **Mr. Patricio** (Mozambique) said that the International Criminal Court should be a permanent, independent, universal and efficient instrument to punish serious crimes against international law. Since the principles of sovereignty and non-interference were sacrosanct, the prior consent of a State to confer jurisdiction on an international criminal court was required. The Court must be complementary to national courts in dealing with the crimes of genocide, war crimes, crimes against humanity and aggression, all of which needed to be clearly defined.

10. Coordination and cooperation between the Court and the Security Council should be clearly set out so as to enhance international law and respect for universal human rights.

11. He supported the principle that the United Nations should fund the Court initially until it had sufficient resources of its own. That should not, however, compromise the independence and efficiency of the Court or that of its judges and the Prosecutor. He urged the Conference to reaffirm its commitment to a world where the kind of war crimes committed in Rwanda and in Bosnia and Herzegovina could never be repeated.

12. **Mr. Hashim** (Brunei Darussalam) believed that individuals should be made responsible for grave violations of international law. National courts were often ineffective in enforcing that responsibility and there was as yet no permanent mechanism by which individuals could be held accountable, so that there was a strong case for establishing an international criminal court to prosecute individual lawbreakers and thus break the cycle of violence.

13. The core crimes should be included in the jurisdiction of the International Criminal Court. Aggression could also be included, provided that it was clearly and precisely defined. The impartiality and independence of the Court could be achieved by ensuring that the judges and other officers of the Court were fully qualified in their particular fields. The Court should have jurisdiction in internal as well as in international conflicts, as most war crimes currently occurred in internal conflicts.

14. The Prosecutor should be allowed to perform his or her tasks without unnecessary hindrance, but subject to the control of the Pre-Trial Chamber. Undue delays could deny justice to victims of atrocities. Since the Court must be impartial and independent, and not subject to any political influence,

he supported a close relationship with the United Nations through an appropriate agreement.

15. Complementarity was crucial to the jurisdictional relationship between national justice systems and the Court, which should supplement and not supplant national jurisdiction. States had the primary duty to investigate and prosecute those suspected or accused of committing the crimes which fell within the Court's jurisdiction. Therefore, the Court should not act when States were able and willing to do so.

16. If the Court were to be fully effective, it must cooperate closely with States parties. Provisions relating to evidence and procedure would be more properly set out elsewhere than in the Statute.

17. **Mr. Nazarov** (Tajikistan) said that the world community had been powerless to respond to acts of violence around the world simply because the legal instruments to bring those responsible to justice had not been available. There was an acute need to establish a permanent international mechanism to react promptly to such events and punish those who defied mankind with their crimes. He welcomed the widespread support given to the establishment of an international criminal court. Such a court should have jurisdiction over serious international crimes: genocide, aggression, crimes against humanity and war crimes. Terrorism and drug trafficking should also be included.

18. The International Criminal Court must be independent. The Security Council, with its responsibility for preserving international peace and security, must determine whether a crime of aggression had taken place, and its relevant decision must be binding on the Court for the institution of proceedings against the party declared to be the aggressor. In other cases, decisions of the Council and other international institutions must be regarded simply as recommendations or applications for the initiation of judicial proceedings. The Court must be absolutely independent in its proceedings and decisions. It should only consider cases in which the national courts of the States concerned, for whatever reason, were incapable of rendering justice.

19. **Mr. Fall** (Guinea), recalling the atrocities perpetrated in many parts of the world, said that the creation of an independent, efficient and effective international criminal court would be a great step forward in implementing human rights. The International Criminal Court would have to be fully independent, and the Prosecutor should be empowered to initiate proceedings *proprio motu*, subject only to control by the Pre-Trial Chamber.

20. The complementarity of the Court with national jurisdictions was essential to preserve the sovereignty of States. The Court would exercise its jurisdiction over major crimes such as genocide, crimes against humanity, war crimes and the crime of aggression whenever national jurisdictions did not exist or were unable to prosecute.

21. **Mr. Görög** (Hungary) said that the International Criminal Court should have inherent jurisdiction over the core crimes of genocide, war crimes (whether committed in international or internal armed conflicts) and crimes against humanity. The crime of aggression should also be included, provided that the crime itself and the relevant role of the Security Council could be satisfactorily defined. There should be no requirement for State consent to the Court's jurisdiction, and the Court should have the authority to determine whether the competent national courts were unable or unwilling to exercise their jurisdiction. The Prosecutor should be empowered to initiate investigations and proceedings *proprio motu*, subject only to review by the appropriate organs of the Court itself.

22. States parties must comply with requests for assistance and cooperation by the Court and should not allow national laws and cooperation agreements between States to constitute grounds for refusal. The Court should ensure observance of the highest international standards of fair trial and due process at all stages of the proceedings. There should be no reservations to the Statute, because that would defeat the purpose of the Court.

23. **Mr. Zarif** (Islamic Republic of Iran) said that the establishment of an international criminal court, independent, universal, effective and impartial, would be a milestone towards achieving peace with justice. The crime of genocide, serious violations of the laws and customs of war, and grave breaches of the four Geneva Conventions of 1949, as well as the crime of aggression, should be covered by the Statute.

24. He drew the attention of the Conference to the special declaration of the Meeting of Ministers for Foreign Affairs and Heads of Delegation of the Movement of Non-Aligned Countries issued in New York on 25 September 1997 and to the resolution adopted by the Asian-African Legal Consultative Committee on 18 April 1998, on ways and means of ensuring universal acceptance of the Statute of the International Criminal Court.

25. He agreed that the Court should be complementary to national criminal justice systems. It would act only where domestic trial procedures were ineffective or unavailable. That should ensure cooperation between States and the Court.

26. The Court should be an independent judicial body, free from political influence and interference. The responsibility of the Security Council to determine the existence of aggression should not undermine the role of the Court in ascertaining the existence of a crime. Aggression and the related role of the Council should be defined clearly in the Statute. There should be no suggestion that decisions of the Court were influenced by the Council.

27. The Prosecutor should be independent, with clearly defined powers. He or she should have the means to conduct effective and independent investigations and prosecutions. It would be premature, however, to enable him or her to initiate proceedings before the Court. It was also imperative to decide

the means of election of judges and other officials of the Court so as to represent major legal systems and ensure equitable geographical distribution.

28. **Mr. Mutale** (Zambia) said that recent ethnic conflicts had underlined the need for a permanent international criminal court. Such a court, independent and impartial, would be an effective complement to national criminal justice systems. It must have inherent jurisdiction over the core crimes of genocide, crimes against humanity, war crimes in international and non-international armed conflicts, and aggression.

29. He strongly supported the appointment of an independent and impartial Prosecutor, able to initiate investigations into alleged crimes over which the International Criminal Court had jurisdiction, based on information from any source, without interference.

30. The rights of suspects, accused persons, witnesses and victims should be upheld at all stages of the proceedings. The Court should be funded from the regular budget of the United Nations, which would facilitate its universal acceptance, particularly by smaller, financially weaker States. The Security Council, with its role of maintaining international peace and security, must not be seen to undermine the independence of the Court.

31. **Mr. Hajiye** (Azerbaijan) said that, in the past, special courts had been set up to punish those who had perpetrated international crimes. He reaffirmed his belief in the establishment of an effective, viable, independent and strong international criminal court.

32. The principle of complementarity was very important, since the International Criminal Court should exercise jurisdiction only where national criminal justice systems were not available or were ineffective, and only over the most serious crimes such as genocide, aggression, war crimes and crimes against humanity. There should be no statute of limitations for such crimes. States parties should fully recognize the jurisdiction of the Court over those crimes, provided that their occurrence had been confirmed by the Security Council. States should also have the possibility of addressing the Court directly. States which were not parties to the Statute should also be subject to its jurisdiction. The Court must have an independent Prosecutor, with authority to investigate *ex officio*, but there should be provision for appeal against his or her actions.

33. The death penalty should be excluded, not only for humanitarian reasons but because the objective of the Court was justice rather than retribution.

34. States parties should be responsible for financing the Court.

35. **Mr. Peraza Chapeau** (Cuba) supported the creation of an impartial, independent, effective and free court so as to achieve the humanitarian ideal of justice. Despite its independence, the International Criminal Court could not be separate from the States

that created it, and it could not be an instrument for interfering in the internal affairs of States. The principle that States themselves were responsible for prosecuting and punishing perpetrators of crimes against the laws of war or international humanitarian law should be reaffirmed. The Court must clearly have jurisdiction over crimes such as genocide, aggression, war crimes and crimes against humanity, but it should not act when those crimes were being effectively prosecuted by national courts. A clear definition of such crimes would ensure the application of the principle of *nullum crimen sine lege*.

36. The jurisdiction of the Court in respect of a crime should be based on consent by the States parties to the Statute. Its jurisdiction should cover aggression and the threat or use of force, as a constituent part of aggression. The Court should not be subordinate to the Security Council. The main guarantee of its success lay in the good faith of States parties in fulfilling their commitments. It would need stable financial resources.

37. **Ms. Suchocka** (Poland) said that the establishment of the International Criminal Court would strengthen the rule of law by addressing the individual responsibility of perpetrators of the most serious international crimes. It would constitute a mechanism to combat genocide, war crimes and crimes against humanity. The Court should be complementary to national jurisdictions, but vested with sufficient powers to determine whether or not States parties had properly discharged their responsibilities. It should have automatic competence in respect of core crimes when a State became a party to the Statute. She also fully supported the idea of extending the Court's jurisdiction to the crime of aggression, provided that an acceptable definition could be found. The relationship between the Security Council's competence in determining the existence of an act of aggression and the jurisdiction of the Court should also be clarified. In order to ensure broad access to the Court, States and the United Nations should have the right to bring cases. At the same time, the Prosecutor should have the power to institute proceedings *ex officio*. The Council's role in maintaining international peace and security should not be diminished, but the mere fact that such a matter was on the Council's agenda should not be allowed to obstruct prosecution by the Court. She also supported the creation of a pre-trial chamber to review all indictments and assist the Prosecutor.

38. It was essential that the Statute should include a clearly defined and unconditional obligation on the part of States parties to cooperate closely with the Court.

39. **Mr. Gatti** (San Marino) hoped that the International Criminal Court would be truly independent, efficient and authoritative. Its relationship with national jurisdictions must be based on complementarity and it should intervene only when national legal systems were unable or unwilling to punish those responsible for crimes under the Statute. The Court must be able to determine which cases fell under its jurisdiction. States should not have the option to choose or refuse the jurisdiction of the Court, as that would undermine its effectiveness.

40. He supported the appointment of an independent Prosecutor, able to initiate proceedings subject to appropriate internal control mechanisms. Crimes subject to the Court's jurisdiction must include crimes perpetrated during national as well as international armed conflicts.

41. **Mr. Nasr** (Lebanon) said that the International Criminal Court should contribute to the maintenance of international peace and security. Its role would be complementary to that of the Security Council. While the latter was entrusted with enforcement measures against States, the Court could take similar action against individuals. Sanctions would no longer have to be used against peoples and third-State parties, who collectively bore the brunt of sanctions under existing practices.

42. If the Court were to be impartial and effective, it must reflect differing legal systems, particularly in regard to the Office of the Prosecutor. The concept of complementarity of jurisdiction between the Court and national courts must be clear. That would preclude the possibility of political manipulation in defining the willingness of a State to investigate or prosecute a crime. The Prosecutor must be given clear authority to submit a case to trial at the request of a State whose nationals were the victims of a criminal act expressly described in the Statute.

43. The most serious crimes of concern to the international community, namely, genocide, war crimes, crimes against humanity and the crime of aggression, would come under the jurisdiction of the Court, which should extend to all acts listed under the Geneva Conventions of 1949.

44. **Ms. Hodak** (Croatia) said that international war crimes tribunals such as the International Tribunal for the Former Yugoslavia had given a strong impetus for the establishment of a permanent and universal international criminal court. Experience showed that the establishment of a permanent and universal court was possible only if the conditions for just and equal treatment of all individuals and States were fully met. To a certain extent, that meant abandoning the traditional concept of sovereignty of States, although at the same time the principle of subsidiarity must be fully acknowledged.

45. The International Criminal Court and its Prosecutor must be entirely independent of the political will of individual States. All States, regardless of size or economic or military strength, must cooperate with the Court and implement its decisions in the same manner. There must also be guarantees that cases brought before the Court were of sufficient gravity and significance. The Court must not be burdened with minor violations.

46. **Mr. Raig** (Estonia) said that a permanent, independent, impartial and effective international criminal court was needed, in the light of persistent gross violations of human rights. Such a court would provide the necessary judicial response in cases where national courts were not able or willing to prosecute suspected persons or investigate crimes.

47. He fully concurred with the representative of the European Union. He also emphasized that the International Criminal Court

should have jurisdiction over the core crimes of genocide, crimes against humanity and war crimes and, when properly defined, the crime of aggression. A State that became a party to the Statute must accept the Court's jurisdiction over all such crimes, including those committed in conflicts of a non-international nature. The Prosecutor must be able to initiate proceedings *ex officio* and to receive complaints from the widest range of sources. The Security Council must also be able to refer situations to the Court. However, to ensure that the Court was impartial and independent, the Council should not be able to prevent or delay prosecutions when it was itself dealing with a situation under Chapter VII of the Charter of the United Nations.

48. There should be no provision for the death penalty.

49. The Court should be financed in a flexible manner from the regular budget of the United Nations and from contributions by States parties.

50. **Mr. Leancă** (Republic of Moldova) fully supported the creation of an international body to bring to justice those who had committed the most serious crimes of concern to humanity. Sanctions, embargoes or military force, the usual response to violations of international law by States, affected the innocent civilian population, while the guilty escaped punishment.

51. Provided that it was independent, credible and universal, free from any political influence, the International Criminal Court could make a crucial contribution to peace and security in the world. To make the Court effective, States parties to the Statute must accept the Court's jurisdiction over the crimes covered by the Statute. They must also cooperate and provide the necessary assistance.

52. The principle of complementarity must be respected where national courts were able and willing to prosecute the perpetrators of crimes. The jurisdiction of the Court should cover genocide and war crimes, and, subject to determination by the Security Council, crimes against humanity and aggression. The relationship of the Court with the Council was very important. However, the Council must not be able to halt judicial proceedings other than by a joint decision of all the permanent members. The Prosecutor should have the right to initiate investigations in the absence of any decision by the Council.

53. No reservations should be permitted to the Statute; thus the positions of all States parties would be uniform.

54. **Mr. Gotsev** (Bulgaria) said that Bulgaria had always supported the establishment of a permanent and effective international criminal court with jurisdiction over the most serious violations of international humanitarian law. He shared the view that the International Criminal Court should complement national legal systems, exercising its jurisdiction only when it was not possible to investigate and punish the crimes concerned. Bulgarian criminal law incorporated international norms on the investigation and punishment of crimes against peace and humanity. He supported the principle that the Court should exercise jurisdiction with respect to the

most serious crimes, such as genocide, crimes against humanity, war crimes and aggression. Given that war crimes were frequently committed in internal conflicts, the Court should include those in its jurisdiction.

55. Bearing in mind the role of the Security Council under Chapter VII of the Charter of the United Nations, it was important to maintain the independence of the Court in its relations with the Council.

56. The role of the Prosecutor was very important. He or she should act independently of decisions by the Security Council, otherwise the latter's veto could prevent the proper functioning of the Court. The Prosecutor should also act at the request of States. The Court's independence would largely depend on a sound financial basis and on the mandates of its officers.

57. **Mr. Richardson** (United States of America) said that the creation of an international criminal court would ensure that the perpetrators of the worst criminal assaults on mankind – genocide, serious war crimes and crimes against humanity – did not escape justice. That would send a clear and unmistakable warning to would-be tyrants and mass murderers that the international community would hold them responsible for their actions.

58. The International Criminal Court could be truly powerful and effective only if it were built on a firm foundation of international consensus and support and if it adopted a realistic and workable approach. When national legal systems could not or would not act, ad hoc international tribunals, such as those for the former Yugoslavia and Rwanda, demonstrated that the world could confront evil, secure justice and ensure international peace and security through the application of international law. A similar tribunal should be set up to prosecute the perpetrators of atrocities in Cambodia.

59. The Court must be part of the international order, in which the Security Council, with its responsibility for maintaining international peace and security, must play an important role, inter alia, regarding its trigger mechanism. It must be able to refer critical situations to the Court and instruct countries to cooperate with the Court. The powers of the Council under Chapter VII of the Charter of the United Nations would be absolutely essential to the working of the Court.

60. To achieve the support of the international community, the Court must complement national jurisdictions and encourage national action wherever possible. For that reason, it would be unwise to grant the Prosecutor the right to initiate investigations. That would overload the Court, causing confusion and controversy, and weaken rather than strengthen it. The Prosecutor should not be turned into a human rights ombudsman responding to complaints from any source. The proposal that the Prosecutor should have powers to initiate proceedings was premature. However, he or she should have maximum independence and discretion in prosecuting cases referred by States parties or the Security Council.

61. The jurisdiction of the Court must extend to internal armed conflicts and crimes against humanity, including rape and other grave sexual violence. The Court must have a clear, precise and well-established understanding of what conduct constituted a crime. At the same time, acts not clearly criminalized under international law should be excluded from the definition. It was, therefore, premature to attempt to define a crime of aggression in terms of individual criminal responsibility. Vague formulas that left the Court to decide on the fundamental parameters of crimes should be avoided.

62. The goals of the Conference would be best served by the creation of a court that was physically and administratively independent from the United Nations. However, it should not exist to sit in judgement on national systems and intervene if it disagreed with them. It should focus on recognized atrocities of significant magnitude and thus enjoy near-universal support.

63. **Mr. Hedberg** (Observer for the Council of Europe) said that a permanent international criminal court could have legitimate status only if it were established by the United Nations. The Conference offered a historic opportunity to end impunity for international crimes and deter future atrocities.

64. The Council of Europe strongly supported the creation of the International Criminal Court as a means of consolidating the rule of law at the international level. Its Parliamentary Assembly had frequently called for the creation of such a court.

65. The Court must have the solid support of the international community and be endowed with the powers, procedures and means to be effective, thereby commanding immediate and permanent respect throughout the world. Its judges must be independent and of the highest professional standing. The Court was not, however, a substitute for effective, independent national judicial systems, which should be fully involved.

66. In 1998, there had been no instances of capital punishment in member States of the Council of Europe, the vast majority of which had ratified Protocol No. 6 to the European Convention on Human Rights. The Council of Europe's mechanisms for the protection of human rights offered examples of strong and effective institutions which relied on their preventive and deterrent effect and the respect that had developed over time.

67. **Mr. Dubouloz** (Observer for the International Humanitarian Fact-Finding Commission) said that the Conference was a logical sequel to the 1949 Geneva Conventions, which had defined precise rules to protect human life and dignity in armed conflict. Those Conventions had certainly been most useful, even in the absence of a basic instrument to make them fully effective. The establishment of an international criminal court was certainly the missing element.

68. He had great hopes for the International Criminal Court. His organization could be a first choice as an instrument for establishing the facts, particularly where rapid reaction was necessary in order to conserve evidence. It was also



empowered, under its rules of procedure, to investigate situations of internal armed conflict.

69. **Mr. Kendall** (Observer for the International Criminal Police Organization) said that the establishment of an international criminal court was particularly welcome to his organization, which had responsibility for fighting international crime. The International Criminal Police Organization (Interpol), with its 177 member States, was the only intergovernmental organization able to exchange police information in a rapid, reliable and permanent manner. It was thus in a position to help the International Criminal Court. Its constitution allowed it to assist in tracking down individuals, including political figures, as its assistance to the international tribunals at The Hague and Arusha had demonstrated. That should constitute a precedent in international law which should be developed when establishing a permanent court. Complementarity in relation to national jurisdiction meant that the Court would play an important role where national criminal justice was unavailable or ineffective. The member States of Interpol, which had established conditions for mutual assistance in law enforcement, must respect that complementarity, ensuring the same conditions for assistance to the Court as to national courts.

70. He regretted that the wording of article 86 of the draft Statute implied that recourse to Interpol was a subsidiary means for transmitting requests for cooperation to States. That was a backward step compared with other conventions on mutual legal assistance in criminal matters, which recognized, particularly in urgent cases, that Interpol was the most readily available means of transmission. He had certain improvements relating to international cooperation and mutual legal assistance to propose for inclusion in the draft Statute and requested permission to participate in the working group on part 9 of the draft Statute.

71. **Ms. Obando** (Observer for the Women's Caucus for Gender Justice in the International Criminal Court) urged all delegations to establish a court that would put an end to impunity and guarantee justice and reparation to the victims of the most serious violations of human rights and humanitarian law. It should be structured to reflect the disproportionate impact of such crimes on women.

72. The International Criminal Court should be governed by the principles of independence, effectiveness, universality, comprehensiveness and credibility. It should have inherent jurisdiction over war crimes, crimes against humanity, genocide and aggression, without requiring State consent. War crimes should cover both internal and international armed conflicts and include all acts of sexual and gender violence.

73. Gender balance should be observed in the structure and procedures of the Court. There should be a legal adviser on gender issues in the Office of the Prosecutor to monitor gender compliance, particularly in the investigation of crimes.

74. Victims and non-governmental organizations should be allowed to present complaints prior to an investigation. Effective protection should be granted to victims and persons at risk, inter alia by the establishment of a Victims and Witnesses Unit in the Court to guarantee their safety.

75. **Mr. Busdachin** (Observer for the Transnational Radical Party) said that his organization had long campaigned for the establishment of an international criminal court, which would be a powerful tool to complement political action and diplomacy. He hoped that justice would never again be separated from peace or sacrificed on the altar of realpolitik. What was required was not an "alibi" tribunal, but an effective, fair and independent court that would bring war criminals to justice, a court in which the Prosecutor would be able to initiate investigations. Although funded from the regular budget of the United Nations, it would remain an independent institution within the United Nations system. It would establish the principle of a new dimension of national sovereignty and overcome the principle of non-interference.

76. **Mr. Goldstone** (Observer for the Coalition for International Justice), speaking as the first Chief Prosecutor for the ad hoc tribunals, emphasized the cardinal importance of a politically independent court with an independent Prosecutor. If the International Criminal Court had jurisdiction over widespread and systematic violations of the most serious war crimes and crimes against humanity, and if the Prosecutor were accountable to the judges of the Court, there would be no grounds for fearing that the Prosecutor might "run wild". States parties would have substantial protection if the Prosecutor were accountable and removable by judicial process. In addition, the Office of the Prosecutor would necessarily be staffed by professional lawyers and investigators from many countries, who would inevitably draw attention to any inappropriate action or political bias on the part of the Prosecutor. The rules on complementarity and judicial procedures to allow challenges to a Prosecutor's assertion of jurisdiction would provide further protection.

77. An international criminal court that was not free of political control would certainly not enjoy the confidence and cooperation essential for its success. Most importantly, it was the victims who would suffer the most if the Court were not independent and effective.

*The meeting rose at 1 p.m.*



## 6th plenary meeting

Wednesday, 17 June 1998, at 3.05 p.m.

President: Mr. Conso (Italy)

A/CONF.183/SR.6

### Agenda item 11 (*continued*)

**Consideration of the question concerning the finalization and adoption of a convention on the establishment of an international criminal court in accordance with General Assembly resolutions 51/207 of 17 December 1996 and 52/160 of 15 December 1997 (A/CONF.183/2/Add.1 and Corr.1)**

1. **Mr. Derycke** (Belgium) endorsed the statement made by the representative of the United Kingdom on behalf of the European Union and said that Belgium would advocate seven major guidelines which it considered most likely to guarantee the effective operation of the future International Criminal Court.
2. The Court should have jurisdiction over particularly serious crimes, namely genocide, crimes against humanity, war crimes and aggression. War crimes should include the use of children in armed conflict and crimes of sexual violence. Belgium was in favour of the Court being able to indict for the use of weapons with indiscriminate effect. The jurisdiction of the Court should extend to offences committed in non-international as well as international armed conflict.
3. Belgium believed that the Court should have inherent jurisdiction, which meant that a case could be referred to it without the preliminary consent of a State. However, non-party States would have to declare that they accepted the Court's jurisdiction in order to be bound by the same obligations on cooperation as States parties.
4. Since Belgium had adopted legislation in 1993 under which its courts could prosecute individuals suspected of having committed war crimes, wherever such crimes had been committed or whatever the nationality of the perpetrator, it would be difficult for it to accept an international court without such universal jurisdiction.
5. Any State party to the Statute, the Security Council, and the Prosecutor, by virtue of his power of initiative, must all be able to refer a case to the Court.
6. With respect to the relationship between the Court and the Security Council, Belgium wished to preserve all the powers of the Council, while guaranteeing the necessary independence of the Court.
7. As far as acts of aggression were concerned, Belgium agreed that the Security Council must establish that such acts had been committed before a case could be referred to the Court. However, the Prosecutor must always have the authority to take the necessary provisional measures.
8. Cooperation with States was essential for the smooth operation of the Court. It was therefore necessary to go beyond traditional mutual assistance: binding rules on cooperation and assistance geared to the specific needs of the Court had to be adopted.
9. Belgium believed, and would do all it could to ensure, that the Statute of the Court should make no provision for reservations.
10. Belgium advocated the inclusion in the Statute of provisions allowing it to rule on requests for reparations.
11. The Conference must find a way of allowing the Court to be financed, at least in the initial period, from the regular budget of the United Nations. Other solutions might be found subsequently, including contributions by States parties and supplementary sources.
12. **Ms. Wallace** (Ireland) endorsed the statement by the representative of the United Kingdom on behalf of the European Union and said that the future International Criminal Court should have jurisdiction to prosecute those accused of the core crimes of genocide, war crimes and crimes against humanity. War crimes should include crimes committed during internal as well as international conflicts.
13. Moreover, the Court must have the power to deal with crimes against humanity, whether or not they were committed in times of conflict.
14. Ireland would also support the Court's jurisdiction over the crime of aggression, which should be given a definition by the Conference, an appropriate balance being struck between the role of the Security Council and that of the Court.
15. In becoming a party to the Statute, States parties should accept the jurisdiction of the Court over core crimes. Ireland would find it difficult to accept an opt-in/opt-out approach in relation to those crimes, given their serious nature, or a regime under which State consent was required before the Court could exercise its jurisdiction.
16. The jurisdiction of the future Court was not intended to supplant that of domestic courts: it should be complementary to them. However, the Court must be able to act when national courts were unwilling or genuinely unable to prosecute.
17. The mechanism by which the Court's jurisdiction was triggered would be fundamental to its success. Ireland agreed that States parties to the Statute as well as the Security Council should be able to refer matters to the Court. The ability of the Council to refer situations to the Court would remove the need for individual or ad hoc tribunals to address particular situations.

18. Moreover, the Prosecutor should have the power to initiate investigations and prosecutions on the basis of information from sources other than States or the Security Council.

19. The Court should, of course, be impartial and independent of political pressures, and should not be subject to undue interference.

20. Since the Court would not have the justice administration of a State, it would have to rely on the assistance of States. Thus, the provision in the Statute on cooperation and judicial assistance by States was very important.

21. The Court should have fair procedures of the highest standard which respected the rights of the accused and provided adequate protection to the victims and to witnesses. There could be no provision for the death penalty in the Statute.

22. **Sir Franklin Berman** (United Kingdom of Great Britain and Northern Ireland) said that he would focus on a few issues which were of particular importance for the creation of an effective court, but which might not yet have received the attention they deserved.

23. The first was the need for an electoral system that would ensure that judges and the Prosecutor had the necessary rigorous impartiality and judicial skills, without which no country would feel that the checks and balances in the Statute could be relied upon in practice, and the International Criminal Court would not command the necessary authority.

24. It must not be forgotten that the Court would not simply be a court of appeal, but a court of first instance before which the individual would be tried and the evidence offered by the Prosecutor would be tested. In their own national systems, countries expected citizens accused of crimes to be tried, sentenced and imprisoned by persons trained to weigh evidence, who had a thorough grounding in criminal law and procedures.

25. However, the effect of some of the proposals in the draft Statute would be to put those accused of the most serious crimes against humanity to trial by persons who had never conducted criminal trials in their professional lives. His delegation's firm view was that both the trial and pre-trial functions of the Court must be carried out primarily by those with experience in criminal law and evidence, and in the handling of trials.

26. To ensure that the Court was composed of those possessing those qualifications, the Conference had to pay particular attention to the electoral system and even to the process by which nominations were put forward. His delegation looked forward to discussing those issues with others interested. A system that allowed the politicized election of judges would not meet expectations; the same was true of a system that was not sufficiently proof against even the allegation of political partiality. Much of what he had said about the appointment of judges applied equally to the appointment of the Prosecutor.

27. Another issue of great importance was the obligation of States to cooperate with the Court. That was not simply a matter of surrendering indicted defendants or of the proper operation of the complementarity mechanisms. At least as important was cooperation over the provision of evidence for prosecutions before the Court, including, of course, evidence that might be needed by the defendant himself.

28. The United Kingdom had been able to supply intelligence information to the International Tribunal for the Former Yugoslavia, which had interviewed more than a hundred British servicemen, some of whom had given evidence in court. That was the kind of cooperation that was needed on a permanent basis for the new Court.

29. In his view, the proposals of the United Kingdom were workable and captured the proper balance between the requirements of national security and the needs of an effective system of international justice.

30. Article 15 of the draft Statute was a very good text on complementarity and it would be damaging to re-open discussion on it.

31. **Ms. Halonen** (Finland) said that the exercise of the jurisdiction of the International Criminal Court was limited by the principle of complementarity, based on the acknowledgement that the Court and national courts served the same objective and that the Court would act only in cases where a State was either unable or unwilling to conduct national criminal proceedings. The role of the Court must not be marginalized through further restrictions. It must be given jurisdiction enabling it to act speedily when the need arose, without any additional consent requirements which could block or delay an investigation. If investigation or prosecution could be postponed at the request of a State or of the Security Council, the Court's effectiveness would be impaired. However, her delegation believed that the Council should be given a mandate to refer situations to the Court.

32. Moreover, giving the Prosecutor *ex officio* powers to initiate investigations was essential in order to bring the Court within the reach of civil societies, since victims could submit information directly to the Prosecutor. Appropriate judicial safeguards should be included in the Statute to prevent the Prosecutor from overstepping his powers.

33. In defining war crimes and crimes against humanity, the Conference must bear in mind the increasing vulnerability of women and children to exploitation and sexual violence in armed conflicts. Naturally the Court should also bear that in mind in its day-to-day operation, and special expertise was needed for that purpose, as the experience of the two *ad hoc* tribunals had shown.

34. Since conflicts were often civil and internal in nature, and sometimes no effective national systems were available, the mandate of the Court must be extended to such situations.

35. Finland endorsed the statement made by the representative of the United Kingdom on behalf of the European Union, whose leaders had recently reconfirmed their support for the establishment of the Court.

36. **Mr. Rubinstein** (Israel) said that his delegation endorsed the inclusion of genocide, crimes against humanity and war crimes, including gender crimes and violence against children, within the jurisdiction of the International Criminal Court. However, the involvement of political bodies in the decision-making process presented built-in problems, and he proposed two general principles that might help in finding a solution.

37. The first was that the Court must retain a clear focus on the most heinous of international crimes and the non-availability of national criminal justice. It must be complementary to national criminal justice systems in cases where trial procedures might not be available or effective. Where effective national procedures were available, the establishment of alternative jurisdiction was not only unnecessary but might even diminish the effectiveness of national procedures.

38. The second principle was the need to exercise the utmost caution in trying to ensure the objectivity and impartiality of the Court, not only to ensure its effectiveness but also to encourage States to accept the new body.

39. Inevitably, the fact that complaints were to be filed by States created the possibility that the investigative procedure might be abused for political ends. Though that danger could perhaps not be eliminated entirely, it might be reduced by establishing more stringent criteria for the filing of complaints than were currently proposed in the draft prepared by the International Law Commission.

40. While his delegation supported the strong standing and independent position of the Prosecutor, it felt that that independence should not be jeopardized by giving the Prosecutor the power to initiate *ex officio* investigations, since that might invite undue and improper influence.

41. In view of the dangers of politicization, his delegation was not persuaded that conditions were yet ripe for the inclusion of the crime of aggression in the Statute of the Court. The lack of consensus regarding an acceptable definition of that crime, together with the political sensitivity inherent in any attempt to reach such a definition, gave rise to the fear that it could be too easily manipulated for political ends. That fear was borne out by some of the proposed definitions in the draft before the Conference.

42. Regarding the issue of terrorism, the Conference must find the correct balance between recognizing terrorism as an international crime and focusing on the most practical and effective means of cooperation in bringing international terrorists to justice.

43. **Mr. Kranidiotis** (Greece) endorsed the statement made by the representative of the United Kingdom on behalf of the

European Union and said that his delegation believed that the International Criminal Court should be truly independent and completely free to bring to justice the perpetrators of crimes such as genocide, war crimes, crimes against humanity and aggression. Greece was particularly anxious to include aggression in the list of crimes subject to the jurisdiction of the Court.

44. His delegation attached great importance to certain categories of war crimes, including that of establishing settlers in occupied territories and related crimes, as well as that of attacking buildings dedicated to religion, education, the arts and sciences and, in particular, historic monuments.

45. The Prosecutor should be given the power to initiate investigations *ex officio*, which would ensure that no grave crimes were left uninvestigated and ultimately unpunished when States lacked the interest to refer them to the Court, or for any other reason.

46. The relationship of the Court with the Security Council needed very careful consideration and balancing. While the powers of the Council under the Charter of the United Nations could not be questioned, the Court should in no way be prevented from, or influenced in, exercising its own jurisdiction and powers.

47. **Mr. Ojha** (Nepal) said that his Government believed that the proposed International Criminal Court should be impartial, independent, permanent and effective, a model of excellence meeting the highest standards of justice and fairness. No entities within the United Nations or outside should have the authority to control or unduly influence it in any way. The principle of complementarity to national criminal justice systems should be at the heart of the Statute. The Court should also be able to hold individuals personally responsible for preparing, attempting or conspiring to commit gross crimes under international law. It should be given the necessary power to prosecute individuals in times of war or peace, regardless of whether they were leaders or subordinates, civilians or members of military, paramilitary or police forces.

48. The interests of justice would be served if victims could also be made parties to the trial and be given the opportunity to obtain restitution from the assets of the perpetrator. Moreover, if those assets were derived from the commission of the crime, the Court should be able to seize and use them to compensate the victims, irrespective of whether they were owned or possessed by the criminal or someone of his kin or alliance.

49. The Conference should aim to produce a Statute of the Court that would attract the largest possible majority of States, if not consensus, to ensure the universality of the Statute and its early implementation.

50. **Mr. van Mierlo** (Netherlands) endorsed the statement made on behalf of the European Union and said that his country was in favour of the establishment of an independent and effective international criminal court with strong institutional and organizational links with the United Nations.

51. The jurisdiction of the International Criminal Court should cover genocide, crimes against humanity and war crimes, on the basis of international law as currently applied. The Netherlands would also support the inclusion of the crime of aggression if a generally acceptable solution could be reached on its definition and on the role of the Security Council. It was opposed to bringing any other crimes under the Court's jurisdiction.

52. The Netherlands advocated an overall system for the exercise of jurisdiction by the Court. It did not wish the Court to be dependent upon the ad hoc consent of States.

53. The Netherlands favoured a trigger mechanism which would allow the Court to act when a situation was brought to its attention by States parties, by the Security Council or by the Prosecutor *ex proprio motu*.

54. The Netherlands fully supported the rule of complementarity, which would provide sufficient safeguards for States which had their own effective criminal justice system available.

55. The Statute of the Court should be concise and comprehensive. The Netherlands would oppose the inclusion of the death penalty in the Statute.

56. The Court must be able to adapt its organization, administration and compensation procedures to its caseload. It should be able to deliver justice swiftly to those who deserved it.

57. International cooperation was essential for the Court's effectiveness; for it to be truly universal, no national exceptions should be allowed to the cooperation and assistance requested by the Court. However, in that connection, the Netherlands was in favour of special proceedings before the Court, to safeguard the confidentiality of sensitive national information.

58. The world community should share the burdens involved in operating an international criminal court as well as its benefits. On the other hand, such burdens should never prevent States from becoming parties to the Statute. The nations of the world should share responsibility for the Court on an equitable footing, thus making it truly universal.

59. The Government of the Netherlands had proposed that the city of The Hague be the seat of the Court, and that proposal had already received the support of many Governments. He assured the Conference that the Netherlands would do everything to prove that The Hague was a worthy host to the Court.

60. **Ms. Trotter** (New Zealand) said that, while all delegations accepted that the International Criminal Court would be established, clearly some did not wish to become a party to the Statute unconditionally. But any attempt to withhold agreement for the establishment of the Court would be tragic.

61. In New Zealand's view, the Court must have automatic jurisdiction over the core crimes; its jurisdiction should extend to internal armed conflict and it should not fail to apply the existing standards of international humanitarian law set forth in the Geneva Conventions of 1949 and the Additional Protocols

of 1977. The use of cruel weapons that caused unnecessary suffering must also be prosecuted. Moreover, attacks on United Nations and humanitarian personnel must be covered.

62. The Statute must be forward-looking. Two years previously, the International Court of Justice, in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, had unanimously held that there was an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament under strict and effective international controls. The Statute of the International Criminal Court should be consistent with that ruling.

63. The Court should not be subject to the veto system of the Security Council. Any power of the Council to suspend the Court's action could legitimately be exercised only after public debate and through a formal and public Council decision reflected in a resolution adopted under Chapter VII of the Charter of the United Nations, which would expire after a limited time.

64. Allowing the Security Council to discuss a case behind closed doors in informal consultations only, or allowing the President of the Council merely to request the Court to withhold action, would, in New Zealand's view, be totally unacceptable. As envisaged in the Charter, any decision affecting peace and security (on which permanent members of the Council based their right to engage in the Court's operation) must be made openly and transparently.

65. The Prosecutor needed to be able to initiate proceedings based on information from any source. Procedural safeguards could be put in place to meet concerns about his or her role.

66. The special needs of women, children, victims and witnesses must be addressed. A gender perspective had to be incorporated into the Statute and the crimes of rape and sexual violence enumerated in the Statute needed to be retained without change. The Court should not have jurisdiction over persons under 18 years of age. Using children should be an aggravating circumstance for those sentenced for having committed a core crime.

67. Suspects and accused persons should be guaranteed the highest international standards of fair trial and due process. New Zealand was totally opposed to the use of the death penalty. A robust approach to extradition and to the obligation of States to cooperate with the Court was required.

68. New Zealand considered that the Court must be funded by the United Nations, at least initially, and that no reservation to its Statute should be permitted.

69. **Mr. Frieden** (Luxembourg) said that the following principles should be observed in the Statute of the International Criminal Court:

- The Court must have specific jurisdiction limited to the crimes of genocide, war crimes and crimes against humanity;

- The Court must have universal jurisdiction and be able to act impartially and effectively in international and national conflicts whenever national legal systems were not available or unwilling to prosecute;
- The Court must be independent, and the Security Council, a State or an impartial Prosecutor must be able to refer a case to it at any time. It must also have the power of taking up a case on its own initiative, subject to certain powers of the Council to remove a case from it;
- The Court must be composed of independent and highly qualified judges. The Statute of the International Court of Justice might serve as a guide in that respect;
- The Court must guarantee special protection for women and children, and prosecute and punish sexual crimes and the participation of children in armed conflicts;
- The Court must apply international law and the general principles of law applicable in most Member States;
- The Court must respect the rights of the individual and the rights of the defence. It must give the accused a fair trial and grant reparation to victims. It should not be allowed to pronounce the death penalty.

70. **Mr. Védrine** (France) endorsed the statement made by the delegation of the United Kingdom on behalf of the European Union.

71. France believed that the jurisdiction of the International Criminal Court should, at least initially, be focused on and limited to genocide, crimes against humanity, war crimes and very serious violations of international humanitarian law. It would be advisable to consider an extension of its jurisdiction to cover major drug trafficking offences only at a review conference five or six years after the Court had been established.

72. France supported the concept of complementarity. Establishment of the Court must not relieve States and domestic courts of their primary responsibility for the prosecution of serious crimes. The Court should act only when States were not able to try those responsible or when they attempted to protect them, especially through delaying tactics.

73. The Statute should specify the Court's procedure, define its relationship with States, suspects and defendants and the rights of victims. France had called for original solutions so that the new Court could draw on Romano-Germanic legal tradition as well as on common law and, as suggested by France, it had been agreed that training would be given to the judges, who would participate in investigating cases in cooperation with the Prosecutor from the preliminary stage.

74. France also considered that the Statute should include specific provisions on the access of victims to all stages of the proceedings and on their protection against reprisals – in the light

of shortcomings that had become apparent in the International Tribunals – and in connection with their right to reparations.

75. Once the Statute contained clear provisions on the functioning of the Court, France was in favour of an agreement between the Prosecutor and the Pre-Trial Chamber on the initiation of proceedings.

76. The Court would exercise its jurisdiction in respect of States parties. To enable it to act effectively, the State on whose territory the crimes were committed and the State of nationality of the perpetrators of the crime would have to be parties to the Statute.

77. The jurisdiction of the Court should be automatic for the crime of genocide and crimes against humanity as soon as the treaty entered into force. The question of war crimes was different, since such crimes, as defined in the 1907 Hague Conventions and in the 1949 Geneva Conventions and the 1977 Additional Protocols, might be isolated acts. Some States opposed the idea of applying the definition of war crimes in domestic conflicts, but such a restriction would be retrograde. An appropriate solution to that question would have to be found.

78. Coordination between the Security Council and the Court was necessary. Singapore had proposed earlier that, when a matter with which the Council was dealing came before the Court, the Council should have the power to request that the Court should withdraw. France believed that the Court must not become a political arena where frivolous complaints were brought with the sole aim of challenging decisions of the Council or the foreign policies of the all-too-few countries that agreed to the risk of peacekeeping operations. The independence and authority of the Court would not survive that. The permanent members of the Council had been at the origin of the establishment of two ad hoc international tribunals that had awakened the concept of international justice. The Court would lose strength and credibility if it were not part of the international institutional system that already existed.

79. France would work constructively and pragmatically to make the Court as universal as possible, emphasizing the concept of an international system forming a unified whole. It was not in favour of adding mutually contradictory elements that might complicate organization and regulation throughout the world. He was thinking in particular of the linkage between national courts and the Court and between the action of the Security Council and that of the Court.

80. **Mr. Al-Maghur** (Libyan Arab Jamahiriya) recalled that his country had submitted five issues to the International Court of Justice (ICJ) and had complied with its decisions in all those cases. A similar conduct had regrettably not been adopted by certain other States, some of which were permanent members of the Security Council and were represented in the ICJ. Moreover, those States had used their influence in the Council to impede the work of the ICJ even before cases had started. He

warned against the adoption of anything in the Statute of the International Criminal Court that might encourage such conduct. The cooperation required under the Statute of the Court must be equally binding on all parties.

81. It was essential to respect the sovereignty, equality and independence of States and to prevent political organs from controlling international life.

82. Addressing such matters was difficult. Moreover, it was not acceptable that the Court's jurisdiction should be confined to matters of interest to some States while ignoring different issues of concern to others. In addition to so-called aggression and so-called terrorism, the Court might deal with drug trafficking, insults to religion, violation of humanitarian values, forbidding of religious rites, white slavery, organized crime, involvement of children in war, violence and prostitution, economic and financial crimes, aggression against the environment and other threats.

83. Western values and legal systems should not be the only source of international instruments. Other systems were followed by a large proportion of the world's population.

84. His delegation could not agree that the Court should be established on the basis of hegemony, and believed that equality between sovereign States could best be assured by the use of persuasion.

85. **Mr. Cabello Sarubbi** (Paraguay) said that the Rio Group advocated the establishment of an impartial and independent court which complemented national systems but was not subordinate.

86. Without prejudice to that statement, Paraguay considered that the issues in the draft Statute concerning the jurisdiction of the International Criminal Court and other matters stemming from a broad concept of complementarity still posed certain problems, while recognizing that the consensus text was a clear expression of the progressive development of international law.

87. In choosing a treaty as the way to establish the future Court, the need to draft an instrument with a minimum of guarantees had clearly prevailed over the idea of a technically streamlined mechanism. Paraguay, as a sovereign State, could accept that idea only if the Court were strictly independent and impartial.

88. The Court should have jurisdiction only over very serious crimes constituting a threat to international peace, and those must be defined, not merely listed, in the Statute. A restrictive approach would not harm the Court's effectiveness but rather would ensure its universality. The Statute must include provisions on the general principles of criminal law including those of legality, *ne bis in idem* and non-retroactivity. For the purposes of international judicial cooperation, inclusion of the principle of *aut dedere aut judicare* was essential.

89. The Statute must contain the fundamental principles of due process and recognize the human rights of the defendant. It

must also regulate the work of the Prosecutor in satisfactory fashion, ensuring his or her independence in acting informally when he or she considered it appropriate.

90. The principle of complementarity should be based on a mechanism that strengthened the action of national systems. In that connection, Paraguay was in favour of a restrictive concept that would make the Court complementary to national systems, enabling it to take action in exceptional cases when, for any reason, national courts were unable to try those responsible for international crimes. However, it should not be converted into a court of higher instance over local courts. A balance was essential to ensure that the future Court was not used improperly to diminish the role of national courts or to interfere in internal affairs. Since the principle of sovereignty was inviolable, the situations in which the Court could exercise its jurisdiction had to be clearly identified. The question of complementarity would be decisive in achieving the objective of universality.

91. Since Paraguay recognized the importance and complexity of including the crime of aggression in the Statute, it had adopted a flexible approach in considering the balance between the action of the Security Council and the political independence of the Court.

92. The Statute and the rules of court must ensure that applications for the posts of judge were received from all regions and legal systems of the world. Candidates must be qualified, honest, impartial and independent. There must be no discrimination in the criteria to be used for the election of judges, and that process must be absolutely transparent.

93. **Mr. Rahandi Chambrier** (Gabon) said that jurisdictional relations between the International Criminal Court and national courts would have a decisive effect on the Court's effectiveness.

94. Gabon endorsed the view that responsibility for investigating and prosecuting persons accused of genocide, crimes against humanity and war crimes rested primarily with the State. However, if a national court failed to meet that responsibility, the principle of complementarity, which underpinned the sovereignty of States, would allow the Court to exercise its prerogative. It would therefore be for the Court and the State party to work to achieve balanced relations.

95. With respect to the respective roles of the Security Council and the Court, Gabon recognized the decisive role played by the Council in maintaining international peace and security, but shared the views of all those delegations that had expressed concern about the basically political nature of the decision-making procedures in the Council.

96. His delegation also considered that the Council should be given the possibility of bringing certain cases before the Court. It was, however, opposed to the principle that the Court could not prosecute persons who had committed crimes in a situation being taken up by the Council by virtue of its powers under Chapter VII of the Charter of the United Nations, unless the Council explicitly authorized it to do so. The exercise of the

Court's jurisdiction must therefore not depend on prior decisions by the Council, a highly politicized body. Any machinery that might allow the permanent members of the Council to use their veto to protect potential accused persons when the interests of their countries were at stake would severely damage the independence and credibility of the Court.

97. The crime of aggression should be included in the jurisdiction of the Court as well as the crimes of genocide, crimes against humanity and war crimes. He agreed that it should be possible that aggression be established by the Council or reported to the Court by States, international or non-governmental organizations, or individuals.

98. It was generally agreed that the Court would not be an organ of the United Nations, though it would cooperate closely with agencies in the United Nations system. Accordingly, his delegation proposed that the Court be financed initially by the United Nations to allow ratification of the treaty without imposing an excessive burden on developing countries which would be parties to it. Once created, the Court would thus be free from financial difficulties.

99. **Mr. Granillo Ocampo** (Argentina) said that the International Criminal Court should have jurisdiction over the crime of genocide, crimes against humanity, including those committed in peacetime, and crimes of war, including those committed in non-international armed conflict. Argentina also wished to see the inclusion of other grave crimes of international importance such as illicit drug trafficking. States should accept the jurisdiction of the Court as soon as the Statute was ratified, without the need for subsequent expressions of consent.

100. There must be an appropriate relationship with national systems so that the Court could complement domestic courts but not be subordinate to them. The Court must be able to act when national systems were unable or unwilling to judge persons responsible for international crimes. Clearly, it would be for the Court itself to determine such inability or unwillingness in accordance with procedures to be set out in the Statute.

101. Once the competence of the Court was declared, States should be obliged to give it full cooperation. Experience in the ad hoc tribunals for the former Yugoslavia and Rwanda had shown that cooperation by States was essential for investigation and trial. Clearly, voluntary cooperation by States was the best way of ensuring a good relationship between States and the Court, but it was essential that there should be a legal obligation to cooperate.

102. An appropriate relationship between the Court and the Security Council was also important. The Council should be empowered to submit matters to the Court, but the Court must not depend on the Council's authorization before it could act.

103. The Court must have a strong, independent and responsible Prosecutor authorized to initiate investigations, not only following

a complaint by a State or referral by the Security Council, but also on the basis of a direct request either from victims or associations representing them, subject to safeguards ensuring the seriousness of the investigations conducted. The Court must guarantee due access to justice for victims.

104. The Court must be effective in prosecuting and punishing the perpetrators of abhorrent crimes, but must respect the rights of the accused. In that connection, his country had noted with satisfaction the inclusion in the Statute of the principles of legality and non-retroactivity.

105. **Mr. Taïb** (Morocco) stressed the importance of basing the new International Criminal Court on sound foundations so that it would be effective in dealing with the conflict situations on the international stage. The Court must address the rights of all peoples. It must be permanent, universal, effective, credible, impartial, and independent of any political approach.

106. He agreed that the Court's jurisdiction should be confined to war crimes, crimes of genocide and crimes against humanity. To include the crime of aggression would be premature. Moreover, in dealing with such crimes, the principle of complementarity between the Court and national courts must be observed.

107. The Court must be independent and free from interference in its work. It should conduct relations only with States. The Prosecutor should have the right of initiative in cases, but there must be adequate safeguards to avoid misuse of his powers and to ensure that the rights of the accused were respected.

108. The Court should be financially independent and independent of the United Nations system, in particular of the Security Council.

109. The relationship of the Court with Member States should be based on trust and cooperation, taking into account national competence in legal matters.

110. **Mr. Nteziryayo** (Rwanda) said that his delegation hoped that the many references made to the genocide that had involved the people of his country in 1994 denoted a desire to bring the organizers of that genocide to justice. The Security Council, recognizing that the extermination of a separate ethnic group in Rwanda was in fact genocide, had established the International Tribunal for Rwanda. While supporting the establishment of a permanent international criminal court, Rwanda believed that its establishment would not obviate the need for ad hoc tribunals, which should retain their jurisdictional competence and continue to receive support.

111. His delegation believed that the crimes falling within the jurisdiction of the International Criminal Court should be confined to genocide, war crimes and crimes against humanity, to the exclusion of other crimes already covered by national, regional or international conventions.

112. The Court should not assume the responsibilities of national courts unless such courts were truly ineffective and

unable to act. Everything should be done to ensure that there was no interference in the work of the Prosecutor, but also to ensure that he was not subject to any manipulation, to avoid which prior authorization of the Prosecutor to act would have to be given by a preliminary chamber of the Court. Rwanda's experience had shown that, when the gravity of the crimes so warranted, the Court should be able to pronounce the death penalty.

113. Victims should be authorized to appear before the Court, which should be able to grant them pecuniary reparation with interest. Witnesses should be protected before, during and after their appearance.

114. Rwanda supported the right of a State to express reservations with respect to certain provisions of the Statute. It hoped that the establishment of an international criminal court would allow prosecution of the planners of genocide who had sought refuge in other States.

115. **Mr. Maluwa** (Observer for the Organization of African Unity) said that the Organization of African Unity (OAU) welcomed the coordinated approaches which its member States had adopted on the draft Statute for the International Criminal Court. The statements made by the representative of South Africa on behalf of the countries of the South African Development Community and by the representative of Senegal on the Dakar Declaration raised a number of critical issues, including that of the independence of the Court, the position and powers of the Prosecutor and the relationship of the Court with the Security Council. Those issues needed to be addressed very carefully and frankly.

116. Africa had a particular interest in the establishment of the Court, since its peoples had been the victims of large-scale violations of human rights over the centuries: slavery, wars of colonial conquest and continued acts of war and violence, even in the post-colonial era. The recent genocide in Rwanda was a tragic reminder that such atrocities were not yet over, but had strengthened OAU's determination to support the creation of a permanent, independent court to punish the perpetrators of such acts.

117. At a recent OAU summit, the Secretary-General of OAU had announced the establishment of an International Panel of Eminent Personalities, to investigate the events leading up to the genocide in Rwanda and the response or lack of response by the international community to those events. That Panel was not a court and did not seek to replicate the work of the International Tribunal for Rwanda. It was, however, intended to go beyond the limitations of the judicial process and to seek answers to the kind of questions that the Tribunal might not be in a position to establish: how had it been possible for the Rwanda genocide to take place when it did and what lessons could Africa and the international community learn from that tragedy? The establishment of the Panel demonstrated OAU's resolution to act in concert with the international community to ensure that such crimes should never again be committed with impunity.

118. The celebration of the fiftieth anniversary of the Universal Declaration of Human Rights provided an opportunity to reinforce the current international human rights system. The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court of Human and Peoples' Rights had been adopted by the Assembly of Heads of State and Government of OAU on 9 June 1998 and immediately signed by 30 member States. He hoped that the same sense of urgency would be accorded to the Statute to be formulated at the current Conference.

119. **Ms. Almeida** (Observer for the International Centre for Human Rights and Democratic Development) said that the International Criminal Court must not be a political tool of any particular State. If some States were able to use it for political motives or if some individuals were beyond the reach of the Court because of their position within a State, the Court would lose credibility, human rights would continue to be violated and democratic development would be stifled.

120. In the view of the International Centre for Human Rights and Democratic Development, granting the Security Council sweeping powers to determine the docket of the Court was incompatible with the establishment of an effective judicial body. The Court required total independence to guarantee that the highest standards of international justice were respected. The Centre believed that the concerns of those States that wished to establish a court controlled by the Council and by States were adequately addressed by other provisions in the Statute.

121. For States concerned that their soldiers stationed around the world might be prosecuted outside their own country, the principle of complementarity provided a full answer. If a State did not wish its citizens to be tried by the future Court, it should investigate reports of genocide, crimes against humanity and war crimes and, if necessary, prosecute the perpetrators.

122. The fear that the Court would work against the efforts of the Security Council were greatly exaggerated. In the Centre's view, the Canadian amendment to the proposal by Singapore would allow the Council to bring about the temporary suspension of legal action when it was attempting to negotiate a peace accord or take other action to resolve a conflict through political means. The Centre recommended that the Court be kept separate from political considerations, including those governing the Council.

123. The Centre was particularly troubled by the proposed option whereby the Court would have jurisdiction over a case only if a large number of interested States all consented. That system would paralyse the action of the Court when it became necessary to obtain the consent of States whose leaders were implicated in crimes. The Centre considered that, in order to operate properly, the Court must have automatic jurisdiction over the three core crimes.

124. **Ms. Poptodorova** (Observer for Parliamentarians for Global Action) said that, although all the statements made had



reaffirmed the view that the International Criminal Court must not be a political instrument or politically motivated, the issues involved were in fact highly political.

125. Her organization agreed that a strong, independent and effective international criminal court was needed, and considered that the Conference should focus on the three core crimes, together with aggression if it was so decided. The Conference should build on the consensus originally achieved, remembering that the Court's credibility was crucial.

126. The issue of ratification was of special interest to her organization. The Conference would have to determine the number of ratifications without reservations that would be needed for the entry into force of the treaty. That number should not be prohibitively large, but should, at the same time, be large enough to demonstrate genuine international support.

127. Active support from elected lawmakers would be essential for the acceptance of the permanent Court by Governments and international legal institutions. Parliamentarians were crucial players and could be useful in exercising political persuasion and pressure, where necessary.

128. At a recent conference in Port-of-Spain, parliamentarians from the Latin American and Caribbean region had reached consensus on the principle of a permanent, independent and effective international criminal court associated with the United Nations. The relevant resolution had stressed the fact that the Security Council must be precluded from being able to veto action by the Court, and mentioned the need for an independent

Prosecutor. That resolution had been circulated to her organization's network of parliamentarians, and many signatures of support had been reaching United Nations Headquarters from all regions of the world.

129. **Mr. Baudouin** (Observer for the International Federation of Human Rights Leagues) recalled that, in many Western countries, public opinion had shown that it would no longer allow the independence of judges to be damaged by State interference with investigations and prosecutions, which should be a matter solely for the judicial authorities. It would clearly be paradoxical, therefore, to include in the Statute of the International Criminal Court principles that might make it possible for States or the Security Council to intervene in the Court's affairs, paralyse investigations conducted by the Prosecutor or stop a trial.

130. Any suspension by the Security Council of court proceedings must be exceptional in nature and apply for a limited duration; the prior consent of the Court should be necessary, and exceptions should be confined strictly to the execution of arrest warrants. The investigations necessary to avoid losing evidence must never be hampered by a vote in the Council.

131. Experience in the two recently established ad hoc tribunals showed that time was on the side of the slaughterers. It was therefore essential that the Prosecutor should be able to gather preliminary evidence for their prosecution even if action on a case were suspended for a limited period.

*The meeting rose at 6 p.m.*

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### 7th plenary meeting

Thursday, 18 June 1998, at 10.05 a.m.

*President: Mr. Conso (Italy)*

A/CONF.183/SR.7

#### **Agenda item 11 (continued)**

**Consideration of the question concerning the finalization and adoption of a convention on the establishment of an international criminal court in accordance with General Assembly resolutions 51/207 of 17 December 1996 and 52/160 of 15 December 1997 (A/CONF.183/2/Add.1 and Corr.1)**

1. **Mr. Yassin** (Sudan) said that his country's constructive contributions at all the stages leading to the Conference reflected its strong support for the establishment of a permanent international criminal court whose existence would make it impossible for those who committed monstrous crimes against humanity to escape punishment.

2. According to the draft Statute, the role of the International Criminal Court would be complementary, and not parallel, to

that of national criminal courts. Also, it should not be regarded as a watchdog over national judicial systems.

3. Neither Member States nor international political organs should be permitted to interfere with the Court's activities. In that respect, the International Court of Justice could serve as a model, being a wholly neutral, impartial and independent international judicial body. The Statute of the International Criminal Court should enable it to contribute constructively to peace and security. It would consolidate customary legal principles, while respecting the national sovereignty of States. With the advent of globalization, the aim should be to strengthen international cooperation, while fully respecting the cultural characteristics of each nation. For example, article 3 of Additional Protocol II to the Geneva Conventions of 1949 unmistakably reaffirmed that national judicial organs were

alone responsible for enforcing the principles stipulated in that Protocol and for punishing those who infringed them. That could be guaranteed only if the Prosecutor did not interfere in the affairs of States.

4. He reiterated his commitment to the declarations adopted by the African Permanent Representatives to the United Nations in New York and by the Ministerial Meeting of the Coordinating Bureau of the Movement of Non-Aligned Countries, held in Cartagena de Indias, Colombia, in May 1998, as well as the consensus reached by the Group of Arab States on the establishment of the Court at their meeting of May 1998.

5. **Mr. Güney** (Turkey) said that the draft Statute for the International Criminal Court had been the subject of painstaking in-depth study by the international community for the last decade. The creation of the ad hoc tribunals for the former Yugoslavia and Rwanda had highlighted the need for an international criminal court, since the proliferation of ad hoc tribunals might lead to inconsistencies in the development and application of international criminal law. However, some initial lessons could be drawn from the establishment of those temporary specialized tribunals in approaching the creation of a permanent court.

6. Turkey had, from the outset, supported the creation of a credible, universal, impartial and independent international criminal court to bring to justice the perpetrators of the most serious crimes of concern to the entire international community. The draft Statute should provide assurances that the future Court would complement national courts and that the new regime would not call in question current law enforcement efforts. The Statute should specify the type of act that constituted a crime and the nature and limits of the penalty imposed.

7. Particular care was needed to ensure protection of the rights of the accused, bearing in mind that in most cases the accused would be tried by judges from different cultural backgrounds. Greater thought should be devoted to the obligation of States parties to communicate evidence and extradite criminals within defined limits, and to the principle of *ne bis in idem*.

8. Crimes were listed in the draft Statute without specifying the international instruments in which they were defined. The crime of aggression and crimes against humanity were not defined with the precision required in criminal law. There was, moreover, no generally accepted definition of the crime of aggression for the purposes of determining individual responsibility and there was no relevant precedent. Aggression was primarily related to the action of States and not of individuals.

9. The crime of terrorism, which was linked with transnational organized crime, had already been legally delimited, but the international community had failed to develop a general definition. However, a series of agreements dealing with

specific categories of acts which were unanimously condemned had been concluded.

10. States must refrain from organizing or encouraging terrorist activities in the territory of other States and from tolerating activities in their own territory directed toward that end.

11. Systematic and prolonged terrorism was a crime of international concern. A systematic terror campaign waged by a group against a civilian population would be a crime under international law, and, if inspired by ethnic or racial motives, would fall under article 5 of the draft Statute. Terrorism was often sustained by large-scale drug trafficking, which had an undeniable international impact. Those two crimes should therefore be covered under article 5.

12. It should be possible to accept the Court's jurisdiction for all or only some of the crimes referred to in this Statute. He therefore fully supported the opt-in/opt-out approach.

13. The right to lodge a complaint should be reserved for States and the Security Council, pursuant to Chapter VII of the Charter of the United Nations. A more liberal system might deter States from becoming parties to the Statute or from accepting the competence of the Court, out of fear of abuses by other States. The prevailing opinion in the Preparatory Committee on the Establishment of an International Criminal Court had been that the Prosecutor should not be empowered to initiate proceedings *ex officio*. The independence of the Prosecutor went without saying under international law and merely strengthened the principle that investigation and prosecution should be triggered by complaints.

14. The move to authorize only limited reservations might considerably reduce the number of States parties acceding to the Statute, so that a more flexible attitude must be adopted. If that were not done, the incorporation of Statute provisions in domestic law would certainly raise basic constitutional problems during ratification or accession procedures. Entry into force on the basis of a very few ratifications and accessions might deprive the Court of the authority necessary to act on behalf of the international community. A balanced solution fixing the number at a minimum of one third of the States Members of the United Nations should therefore be found.

15. A flexible and realistic approach must be taken to the establishment of the Court in order to ensure the support of the international community. Efforts should be made to work out the best possible Statute, not the ideal Statute, so that a large number of States could support it, which was the essential precondition for the legitimacy of the Court and its universal character.

16. **Mr. Sangiambut** (Thailand) said that tribunals set up to deal with specific situations did not offer an appropriate means of prosecuting all international crimes. He hoped to see the establishment of a permanent, independent and truly impartial international criminal court.

17. The International Criminal Court should in no way supersede national courts but must complement national judicial systems, trying a person only where a national court had proved to be genuinely ineffective or unavailable.

18. The Court could be a credible alternative mechanism in the suppression of crimes relating to narcotic drugs, since cooperation through bilateral agreements or Interpol was ineffective. His country had therefore proposed that illicit traffic in narcotic drugs and psychotropic substances should fall within the jurisdiction of the Court.

19. To ensure the early, effective and continuous functioning of the Court, it should be financed initially from the budget of the United Nations. Thereafter, when the number of States parties was adequate, they should assume responsibility for financing the Court.

20. **Mr. González Gálvez** (Mexico) recalled that efforts to create a permanent international criminal court could be traced back to the Codification Conference held at The Hague in 1909. Those efforts had not been very successful, and, if the current Conference were to avoid a similar fate, realism and a spirit of cooperation to find common ground would be required.

21. He fully supported the creation of a permanent court, which would have clear advantages over the ad hoc tribunals established by such organs as the Security Council. The International Criminal Court should be independent and, unlike the International Court of Justice, should not be linked to the United Nations. Its impartiality and the legal certainty of its decisions must be guaranteed, and its Statute must provide essential guarantees of due process, including those specified in article 14 of the International Covenant on Civil and Political Rights.

22. The success of negotiations at the Conference would depend on how the principle of complementarity was formulated. While it could not be based on the consent of States, there must be clear safeguards to prevent the infringement of national sovereignty. He would, therefore, submit proposals concerning article 15 of the draft Statute. At the same time, he announced the withdrawal of the alternative formulation of that article contained in the report of the Preparatory Committee. The purpose was to give a clear definition of cases when the Court could act, by stating that the Court was not established to replace national judicial systems but to complement them in punishing the international crimes set out in the Statute.

23. Initially, the jurisdiction of the Court should be limited to genocide, crimes against humanity and war crimes, which should include crimes against women and children, especially those involving sexual assault.

24. Individual responsibility for the crime of aggression would be acceptable to his country only if it were not linked to the contention that only the Security Council could determine the existence of aggression. The Court's jurisdiction should

apply only to individuals and not to States. It should be financed independently by the States parties.

25. **Mr. Zamir** (Bangladesh) said that the Conference offered a rare opportunity for the international community to put in place a system of justice to redress unspeakable crimes. The International Criminal Court must be independent and free from possible interference in its judicial process. It should have inherent jurisdiction over core crimes and also enjoy a wide measure of acceptance and support. His country already had a comprehensive law for the punishment of crimes against humanity and breaches of the Geneva Conventions of 1949.

26. He strongly supported giving full effect to article 3 common to the Geneva Conventions. The distinction between international and non-international conflicts was becoming increasingly irrelevant, viewed in terms of universal peace and security. Attacks on humanitarian workers and international peacekeeping personnel should be included within the jurisdiction of the Court. Systematic sexual violence and gender crimes during periods of conflict should be defined in explicit terms as crimes against humanity and as war crimes. Finally, he believed that the list of war crimes should be expanded to cover the use and threat of use of nuclear weapons and expressed his support for the position of the Movement of Non-Aligned Countries on nuclear proliferation.

27. High standards of international criminal law and justice demanded that the crimes to be included in the Statute should be defined with clarity and precision for the sake of deterrence and the integrity of the new process.

28. The Court should be financed in the initial stages from the regular budget of the United Nations to ensure global participation.

29. **Mr. Imbiki** (Madagascar) said that it was the legitimate concern of the community of nations to ensure that atrocious crimes did not go unpunished. He called on government leaders and all peace-loving and justice-loving men and women in civil society to use their influence to bring about the establishment of an international criminal court. International law would then prevail, so that no State or military leader would feel free from prosecution and punishment for acts against humanity and human rights.

30. The International Criminal Court should be independent, impartial and effective and should respect the rights of self-defence according to internationally accepted standards and standards of sovereignty. It must have jurisdiction to rule in the interest of victims and to ensure the safety of witnesses. To ensure its lasting credibility, its composition must reflect a well-balanced geographical distribution. The Hague, with its experience of international justice, should be the seat of the Court.

31. He shared the general agreement that the crimes of genocide, aggression, war crimes and crimes against humanity should be included in the Statute, and also, in view of their

exceptional gravity, trafficking in narcotic drugs and psychotropic substances, the deposit of toxic or nuclear waste within the territory of a State, and the sale of arms or munitions to Governments not recognized by the international community or to military leaders, except in cases authorized under international law.

32. It might be argued that including the latter offences would make the Court ineffective. However, one of the Court's objectives was to deter criminal acts leading to the mass destruction of human lives. Therefore, if his proposal was not accepted, he would propose that the Final Act of the Conference include a review clause, so that the subject could be taken up at a later time.

33. The Court should take up cases only on the basis of complementarity. As long as a State had the capacity to undertake an investigation and initiate proceedings itself, the Court should not intervene. However, its intervention would be fully justified when Governments prosecuted their predecessors in office out of motives of revenge.

34. Failure by the Security Council to determine aggression, or deal in such determination, had led to massacres. For reasons of efficiency and to separate prosecution before the Court from the political concerns of the members of the Security Council, the independent Prosecutor should have the power to trigger prosecution, without prejudice to the right of the Council or a State party to refer crimes to the Prosecutor. However, safeguards should be provided. For example, the Prosecutor's action could be made subject to authorization by the judges. On the other hand, the intervention of the Council would be necessary to compel States parties to enforce the sentences of the Court.

35. **Mr. Kellenberger** (Switzerland) said that the goal of the Conference was to establish a permanent international court to punish crimes such as genocide, war crimes, and crimes against humanity committed by individuals, whenever national courts could not or would not perform their duty. The emerging concept of individual international responsibility, foreshadowed by the Nuremberg and Tokyo trials, had been confirmed by the establishment of the ad hoc tribunals for the former Yugoslavia and Rwanda. The task of the Conference was to consolidate that advance by creating a permanent international criminal court with the greatest possible effectiveness and universality.

36. However, the International Criminal Court must have the means for the effective performance of its task. It should have mandatory jurisdiction over the States parties to its Statute without being subject to reservations or the consent of States or organs of the United Nations. Otherwise, it might be reduced to the level of an *à la carte* tribunal, a sham institution incapable of taking effective action.

37. The acts within the competence of the new Court must be defined in terms of contemporary international law. Such definition was necessary because the barbaric acts that had

characterized many modern international or internal conflicts or even situations that could not count as armed conflicts must not go unpunished. However, he shared the view that, in order to preserve the distinctiveness of the new institution, it must focus on the most serious acts: genocide, war crimes and crimes against humanity.

38. Enforcement at the international level against those three types of crime was of concern to the whole human community. Not only States and the Security Council but also the Prosecutor, whose duty it was to represent that community, should therefore be able to trigger enforcement.

39. The establishment of the Court should not relieve national courts of their duty to punish individual acts that contravened the law of nations. Those authorities should be set aside only where they were not discharging their duty or were doing so inadequately. He therefore supported the principle of complementarity, but not if it were formulated in such a way as to encourage impunity.

40. **Mr. Simelane** (Swaziland) fully associated himself with the statement made at an earlier meeting on behalf of the Southern African Development Community. The resurgence of crimes against humanity had once again underscored the need to establish an effective judicial mechanism to end impunity and bring the perpetrators of heinous crimes to justice. He attached great importance to the success of the Conference in helping to create a world in which peace and justice reigned supreme.

41. In keeping with the principle of sovereignty of States, the jurisdiction of the International Criminal Court should not replace that of national courts, but should be applicable only in respect of core crimes where national judicial systems had collapsed or were unable to act. To be truly effective, the Court should have inherent jurisdiction over all of the core crimes. A requirement for the consent of States would render it ineffective.

42. To guarantee its universality, impartiality and independence, the Court must be free of political motivations. He hoped that an acceptable solution would be found regarding the role of the Security Council in the discharge of its obligations under Chapter VII of the Charter of the United Nations.

43. Furthermore, the independence and effectiveness of the Court would depend largely on its ability to exercise jurisdiction when a national criminal justice system had failed. He therefore fully supported the view that the Prosecutor should be able to initiate proceedings *ex officio* and need not rely on a complaint by a third party in order to proceed. Information obtained from a source considered reliable by the Prosecutor should be sufficient basis for the initiation of proceedings.

44. He emphasized that, to enhance the Court's permanence, legitimacy and authority, it should be established by a multilateral treaty, and not be made a subsidiary organ of the Security Council or the General Assembly. However, as an expression of the international community's resolve to suppress

the crimes covered by the Statute, it should be linked with the United Nations.

45. **Mr. Vengadesan** (Malaysia) said that, in principle, he supported the establishment of an international criminal court.

46. He agreed that the International Criminal Court should complement and not replace national courts. In setting up a court to judge those who had committed very serious crimes abhorred by the international community, the national sovereignty of all nations must be upheld.

47. It was of paramount importance that the Court be truly independent, fair, effective and efficient, so that it could dispense justice in accordance with principles acceptable to the international community, bearing in mind diverse legal systems and cultures.

48. The core crimes of genocide, war crimes and crimes against humanity should be included in the Statute, though his delegation had expressed certain reservations during the Preparatory Committee meetings. He did not, however, support the inclusion of the so-called treaty crimes because they were best left to the national courts.

49. The question of the trigger mechanism was inevitably related to the question of acceptance of the Court's jurisdiction and would have implications for the jurisdiction of national criminal courts; hence, sovereignty should always be upheld. To protect sovereignty, he could consider supporting the opt-in mechanism or the case-by-case approach. The consent requirement should not be extended to the State of nationality of the victim or the accused.

50. Whilst the Prosecutor should be able to act independently in discharging his duties, it was equally important that he should not be empowered to initiate an investigation *proprio motu* in view of the principle of complementarity and the danger of adverse effects on the integrity and credibility of the office and possible accusations of bias. Furthermore, effective investigation by the Prosecutor would depend on the full cooperation of States, especially of those which had a direct interest in the case.

51. **Mr. Nyasulu** (Malawi) fully endorsed the statement made on behalf of the Southern African Development Community.

52. The idea of establishing a permanent international criminal court had long been on the international agenda. It was now time to conclude work on the Statute and make the international order complete and secure for present and future generations. However, while he supported the early establishment of a permanent international criminal court, he pointed out that certain aspects should not be ignored.

53. First, the International Criminal Court must be independent and able to command the respect of all nations and of those on whom it would sit in judgement, being immune from outside influence.

54. Secondly, it must be impartial, dispensing, and seen to be dispensing, international justice. The Court must be fair and just.

55. Thirdly, it must be an effective court with adequate power to fulfil its mandate and, as the final outcome, bring an end to impunity. It would complement rather than compete with national criminal justice systems.

56. The Court would make the fate of victims one of its principal concerns and would have powers to order rehabilitation or reparations.

57. He supported the proposal by the Netherlands to host the Court.

58. **Mr. Slade** (Samoa) said that the aspiration to establish a permanent international criminal court had occupied the international community for much of the twentieth century, which had experienced the horrors of two world wars and the atrocities of countless civil conflicts. The time was ripe for the establishment of such a court. Ad hoc measures were never sufficient, as the tribunals for the former Yugoslavia and Rwanda had shown. A court of international criminal justice would contribute significantly to the maintenance of international peace and security. With clear provisions relating to its powers and jurisdiction, such a court would constitute an effective global deterrent. It was unacceptable that very serious crimes should go unpunished.

59. The International Criminal Court should have inherent jurisdiction over the core crimes of genocide, crimes against humanity and war crimes, no matter where they were committed. It should be an effective complement to national courts when the latter were unable or unwilling to bring to justice those responsible for grave crimes.

60. Methods of warfare such as the use of nuclear weapons or of weapons which were inherently indiscriminate should also be covered in the Statute of the International Criminal Court, bearing in mind the recent advisory opinion of the International Court of Justice concerning the *Legality of the Threat or Use of Nuclear Weapons*.

61. There was now significant consensus in customary international law regarding the protection of women and children, so that gender-related crime should be included in the Statute. The Court would not be best equipped to deal with the needs of young persons and should not have jurisdiction over persons under 18 years of age. There should also be provision for the special needs of victims, including payment of compensation, as well as provision for the welfare and security of witnesses.

62. An independent Prosecutor would be essential. The Prosecutor should have the power to initiate investigations *proprio motu*, based on information from any source, subject only to appropriate judicial scrutiny. Effective judicial independence must be ensured. No political body, including the

Security Council or States themselves, should be allowed to stop or delay an investigation or prosecution.

63. A State that became a party to the Statute must accept the Court's jurisdiction without reservation. The Court should be funded through the regular budget of the United Nations according to the set scale of contributions. Voluntary contributions could also be made. That held out better prospects for universal participation and for the Court's long-term financial security.

64. **Mr. Al-Thani** (Qatar) said that mankind categorically condemned war crimes, crimes against humanity and genocide, yet very few of the perpetrators had been prosecuted. The day when the United Nations established war crime tribunals for Bosnia and Herzegovina and Rwanda was the beginning of a process leading to the establishment of a permanent international criminal court, which aimed not only to ensure the victory of truth and justice and the prosecution of criminals but also to spread peace and stability throughout the world.

65. He looked forward to the establishment of a permanent, independent, effective court, empowered to discharge specific tasks, yet not a substitute for national courts. His aspiration was for a court that would effectively put an end to the crimes of aggression, genocide, and war crimes and bring justice for all communities.

66. The role of the Prosecutor should be confined to receiving complaints from the Security Council or from the Member States; he or she should not be empowered to initiate proceedings *proprio motu*.

67. **Mr. Sayyid Said Hilal Al-Busaidy** (Oman) said that he looked forward to the establishment of an international criminal court which would help to put an end to bloodshed and prosecute those responsible for such heinous crimes as ethnic cleansing, aggression, genocide, torture and the forcible transfer of defenceless civilians. It was heartening that the issue was no longer whether it was possible to establish an international criminal court but rather how to establish a highly effective court.

68. The lessons of the ad hoc tribunals for the former Yugoslavia and Rwanda had confirmed the need for the establishment of an international criminal court. By helping in the development of international law and procedures, however, those tribunals had paved the way for the establishment of a highly effective court. He paid tribute to the part played by non-governmental organizations in that effort.

69. The International Criminal Court should have jurisdiction to prosecute the perpetrators of brutal crimes and to administer justice to all without distinction. Its sphere of competence should be made clear. He supported the inclusion of genocide, crimes of war and crimes against United Nations personnel in the jurisdiction of the Court, as well as the crime of aggression as defined in General Assembly resolution 3314 (XXIX) of 14 December 1974. A distinction should be made between

aggression and the right to armed struggle in exercise of self-determination. Crimes against humanity should be clearly defined.

70. The Court should be complementary to national courts, replacing them only when it was determined that an effective national system of justice was unavailable. Only States and the Security Council should be permitted to bring a case to the Court. The Prosecutor should not have the right to institute an action in the Court *proprio motu*. The Court should be technically and financially independent, although it must be linked to the United Nations. He saw no justification for the inclusion of a statute of limitations with regard to heinous crimes.

71. Allowing States to voice reservations as called for by the Vienna Convention on Diplomatic Relations of 1961 would make possible more accessions to the Statute.

72. **Mr. Soares** (Cape Verde) said that, in the course of the century that was drawing to a close, the world had witnessed a series of events which constituted an affront to humanity. It was unacceptable that some crimes continued to go unpunished and that fundamental human rights were disregarded. For those reasons, Cape Verde had, from the very beginning, supported the idea of establishing an international criminal court.

73. The new International Criminal Court should have well-defined jurisdiction and powers to prosecute crimes against humanity which were not prosecuted by existing institutions. Such a court should not focus exclusively on crimes at the international level but should also prosecute crimes committed in a national context which were not dealt with in the most effective way at that level. The Prosecutor should enjoy independence so that the institution could have the necessary credibility.

74. He supported the establishment of a permanent, independent international criminal court based on the principle of complementarity and with jurisdiction over war crimes, genocide, crimes against humanity and the crime of aggression, in both international and internal armed conflicts.

75. He welcomed the offer by the Netherlands to host the Court in The Hague.

76. **Mr. Adamou** (Niger) said that his delegation subscribed to the institution of a permanent, independent, impartial and effective international criminal court, which should have jurisdiction to prosecute crimes against humanity, war crimes, the crime of aggression, and genocide. The Prosecutor must be independent and must be able to initiate proceedings *proprio motu*.

77. The International Criminal Court should not abide any interference. The Security Council and States must in no case delay or interrupt investigation and prosecution by the Court.

78. The Court should take up cases within its jurisdiction only if national courts were not able to bring to justice those

responsible for such crimes. The role of the Prosecutor and the rules of procedure and of evidence should be specified in the Statute.

79. To make the Court independent and impartial, it should be financed through the United Nations system, on the basis of the prorated contributions of Member States to the regular budget of the United Nations.

80. **Mr. Nguyen Ba Son** (Viet Nam) welcomed the establishment of the International Criminal Court because it was widely recognized that international criminals should not go unpunished but that few of the many efforts to deal with international criminal offences had proved adequate, effective or comprehensive. He fully supported the declaration of the Movement of Non-Aligned Countries on the establishment of an international criminal court. The Court must be independent, fair, impartial and effective. As an international judicial body, it must not be influenced by political, financial or other considerations. Its independence and impartiality would not only ensure its effectiveness in fulfilling its mandate but also attract accessions from Member States.

81. The principle of complementarity should be set forth clearly in the Statute, which meant that the Court should not replace national judicial systems. In principle, States would have prior jurisdiction over all relevant cases, and the Court's jurisdiction should be limited to the core crimes of genocide, aggression, crimes against humanity and war crimes. He strongly supported the inclusion of aggression as an international crime.

82. The principle of the primacy of national jurisdiction, namely, the rights and obligations of States concerned to investigate and prosecute crimes falling within their jurisdiction, had been broadly accepted in international law. Any action by the Court without the prior consent of the States concerned would constitute an encroachment on State sovereignty.

83. International cooperation and judicial assistance by the States parties to the Statute were also of great importance. The Court could effectively fulfil its mandate only through effective cooperation with the States in which the crimes had been committed or the States of nationality of the offenders or the victims.

84. The principle of equitable geographical distribution should be reflected in the composition of the Court, with appropriate representation of different areas and different legal systems. With the aim of promoting the Court's universality, the Statute should be adopted by consensus. He was in favour of the inclusion of a provision on reservations.

85. **Mr. Ibrahim** (Nigeria) said that his country supported the creation of a permanent international criminal court to deal with serious crimes such as genocide, crimes against humanity, war crimes and the crime of aggression. However, its jurisdiction must be properly defined and its Statute must be drafted so as to

preserve the cardinal principle of sovereignty of States. The judicial functions of the International Criminal Court must not be prejudiced by political considerations or by actions of the Security Council.

86. He was convinced that an effective international criminal justice system complementary to national systems would contribute towards the maintenance of international peace and security. The use or threat of use of nuclear weapons, the use of anti-personnel mines and other weapons of mass destruction should be defined as war crimes. Similarly, crimes related to international terrorism, money-laundering, drug trafficking and crimes against the United Nations and associated personnel should come under the jurisdiction of the Court. Those were of as much concern to the international community as the four core crimes.

87. He had a reservation about the proposed role of the Security Council. While there should be a relationship between the United Nations and the Court under an agreement, he was opposed to conferring on the Council the exclusive right to determine when aggression was committed and to refer such cases to the Court. The Court should not be encumbered at the outset by avoidable political influences. The power of the Council under Chapter VII of the Charter of the United Nations should not extend to the Court.

88. He also had a strong reservation to the ex officio powers of the Prosecutor under article 12 of the draft Statute. Giving the Prosecutor such power without any safeguards might entail the risk of political manipulation, which would not augur well for the independence of the Court.

89. He endorsed the proposition that the Court should be complementary to national criminal justice systems and should operate in cases where trial procedures did not exist or might be ineffective. However, it was not yet clear who should determine how and on what criteria a national system would be assessed to be ineffective. In that connection, he reiterated his full support for the collective African position set out in the declaration on the establishment of an international criminal court adopted by the Organization of African Unity at Ouagadougou in June 1998. That declaration stressed, inter alia, that the cardinal principle of the sovereignty of States should be preserved in the Statute of the Court and that the Court should be complementary to national criminal justice systems and be based on the consent of the States concerned. A similar declaration had been made in May 1998 by the Ministerial Meeting of the Coordinating Bureau of the Movement of Non-Aligned Countries in Cartagena de Indias, Colombia.

90. An effective, independent and impartial international criminal court must enjoy the confidence of States parties. It was therefore imperative to observe the principle of equitable geographical distribution in the composition of the Court. It must be free from political influences of any kind and be independently financed.

91. **Mr. Ruberwa** (Democratic Republic of the Congo) said that, despite the existence of texts to protect and promote human rights, the world had witnessed unprecedented depths of barbarity. The international community had proved powerless to prevent atrocities or even punish the perpetrators. Indeed, his own country had suffered the influx of millions fleeing from the genocide in Rwanda. His delegation therefore believed that the creation of an international criminal court was an imperative.

92. As a member of the Southern African Development Community, his country shared that organization's position as set forth by the representative of South Africa. In particular, he supported the creation of an effective, independent, impartial, efficient, universal international criminal court. Its composition should reflect equitable geographical distribution. General principles of criminal law should be observed, namely, non-retroactivity, *ne bis in idem*, *nullum crimen sine lege*, *nulla poena sine lege*, respect for the rights of the defence, and the presumption of innocence. There should be complementarity between the International Criminal Court and national courts, cooperation between States and compensation of victims.

93. In addition, the Court should be able to function without interference from any other organ, especially the Security Council. The Prosecutor should be sufficiently independent and protected from outside influence, integrity and competence being essential qualifications. The Court should have jurisdiction to deal with genocide, war crimes and crimes against humanity and other offences to be defined by the Conference. He supported the candidature of The Hague as the seat of the Court.

94. **Mr. Lewis** (Observer for the United Nations Children's Fund) said that the establishment of an effective and fair international criminal court would send the unequivocal message from the international community that heinous violations of human rights could not go unpunished. He associated himself with the views expressed by the Secretary-General and the United Nations High Commissioner for Human Rights.

95. The rights of children and women, overwhelmingly the primary targets in conflicts as victims, witnesses and manipulated and abused participants, were a matter of great concern to the United Nations Children's Fund (UNICEF), and should be recognized under the Statute. There was growing evidence that sexual abuse and gender-based violence had become an intrinsic strategy in armed conflicts. Events in Rwanda, the former Yugoslavia and, recently, Sierra Leone illustrated the horrifying levels of violence against women and girls, including rape, mutilation, forced pregnancy, sexual slavery and forced prostitution.

96. In keeping with the Convention on the Rights of the Child of 1989, the recruitment of children under 18 years of age into armed forces or groups, or their direct or indirect participation in hostilities, should be considered war crimes under the

jurisdiction of the International Criminal Court. Violence, rape and inducement or coercion into prostitution or other forms of sexual exploitation in respect of children should be considered war crimes.

97. The Court should have no jurisdiction over persons under 18 years of age, since it could not provide the rehabilitative emphasis which juvenile justice required. Moreover, the commission of serious crimes by children was often the result of indoctrination and manipulation by adults, who should be held accountable. The death penalty, life imprisonment or long periods of deprivation of liberty must not be applicable to children under 18 years of age. However, the Statute should promote measures for the rehabilitation and psychosocial recovery of child victims, whatever their age, in application of the Convention on the Rights of the Child. UNICEF further believed that schools, churches and hospitals should never constitute military targets and that the laying of anti-personnel landmines should be considered a war crime. The Court should also have jurisdiction over attacks against humanitarian personnel when working in situations of potential violations of human rights.

98. **Mr. Linati-Bosch** (Observer for the Sovereign Military Order of Malta) said that his organization had devoted itself for 900 years to humanitarian aid, without distinction as to race, religion or nationality. He could not, therefore, remain indifferent to the creation of a new organ that would strive to prevent and punish international crimes, whether they originated from armed conflicts or not. Such a permanent international court would make an important contribution to public international order. The competence of the International Criminal Court should cover genocide, war crimes and the protection of human life. Its composition and its relations with sovereign States and the United Nations would need the most careful consideration in order to ensure that the Court would be permanent, effective, independent, efficient, credible and trustworthy.

99. **Mr. Maharaj** (Trinidad and Tobago), speaking on behalf of the member States of the Caribbean Community (CARICOM), said that he attached great importance to the establishment of a strong, independent, impartial and effective court.

100. No judicial body could achieve and maintain respect if it was subject to political interference. While recognizing that the responsibilities of the Security Council under the Charter of the United Nations could not and should not be undermined, he emphasized that the International Criminal Court must be free from any political interference by the Council.

101. The Statute of the Court must strike a balance between the desire to achieve justice on an international plane and full respect for the fundamental principle of the sovereignty of States. The principle of complementarity was most important; indeed, the Court should be empowered to act only where a national court was unwilling or unable to exercise jurisdiction.



102. While the Prosecutor should have a strong and independent position, it was of vital importance that proper safeguards be put in place to prevent any misuse or abuse of power.

103. He supported the inclusion of aggression within the jurisdiction of the Court, provided that an acceptable definition of that crime could be agreed upon. In view of the threat posed by the international drug trade, he urged the Conference to give serious consideration to the inclusion of drug-related crimes within the jurisdiction of the Court.

104. Many CARICOM States would have difficulty in accepting penal provisions which ruled out the death penalty for capital offences. Their concerns should be taken fully into account in the deliberations of the Conference.

105. He hoped that due consideration would be given to gender balance and equitable geographical distribution in the composition of the principal organs of the Court.

106. **Mr. Roth** (Observer for Human Rights Watch) said that if the International Criminal Court was to realize its deterrent potential against genocide, crimes against humanity and war crimes, it must be strong and independent. Allowing States to prevent the Court from exercising jurisdiction on a case-by-case basis would paralyse it and effectively turn the Security Council into the only trigger mechanism, with the attendant risk of vetoes by permanent members. No court that was seen as an arm of the Council would enjoy the credibility it needed to operate effectively. While the Council would have an active enforcement role, in practice enforcement would depend much more often on State cooperation, which in turn would depend on the Court's credibility and legitimacy.

107. To ensure that those responsible for all serious atrocities were brought to justice, even when individual States found it inconvenient, the Court must have an independent Prosecutor authorized to investigate and prosecute serious crimes wherever and by whomever committed.

108. The Court must have jurisdiction over the full range of serious crimes, including war crimes committed in internal armed

conflicts, which constituted the vast majority of contemporary atrocities, as well as abuses specific to women and children.

109. There was widespread support for an independent, effective, impartial court throughout Africa, Latin America and the Caribbean, Europe and Asia. However, in the light of the very strong guarantees against frivolous or unfounded prosecutions which were to be enshrined in the Statute, he hoped that no country would insist on what amounted to immunity from prosecution. All States should remain true to their principles and create an effective tribunal with real deterrent impact. It would be wrong to accept a weak Statute in the unrealistic hope that it would be improved in the future.

110. **Ms. Bedont** (Observer for the Women's International League for Peace and Freedom) said that, since its formation in 1915, her organization had been strongly committed to promoting world disarmament and the peaceful resolution of international conflicts. She shared the belief that the proposed International Criminal Court could be a tool for the promotion of peace worldwide. Lack of accountability for violations of human rights spawned a cycle of vengeance and violence that prevented the achievement of genuine and lasting peace. The Court had the potential to break the cycle of violence by providing a means of redress for atrocities and by deterring heinous crimes. The Statute of the Court must be equitable, so that the Court would have credibility and could provide an effective deterrent against heinous crimes.

111. The prohibition of weapons systems under the Statute should take a generic approach and should cover all weapons that caused unnecessary suffering, superfluous injury or that were inherently indiscriminate. A non-exhaustive list of weapons could be added, including landmines, laser weapons and nuclear weapons, which would allow judges flexibility to include present or future systems which fitted the general criteria. However, if the addition of the non-exhaustive list was too controversial, a statement of the general principles against indiscriminate and excessively injurious weapons would be a reasonable compromise.

*The meeting rose at 1.05 p.m.*

## 8th plenary meeting

Thursday, 18 June 1998, at 3.10 p.m.

President: Mr. Conso (Italy)

A/CONF.183/SR.8

### Agenda item 11 (*continued*)

**Consideration of the question concerning the finalization and adoption of a convention on the establishment of an international criminal court in accordance with General Assembly resolutions 51/207 of 17 December 1996 and 52/160 of 15 December 1997 (A/CONF.183/2/Add.1 and Corr.1)**

1. Mr. Jensen (Denmark) said that the Conference was a historic opportunity to create an effective, independent and fair international criminal court that would act as a deterrent and bring to justice persons responsible for the most serious crimes under international law when domestic criminal justice systems failed. Complementarity being vital, the International Criminal Court should not act when national systems were able and willing to do so, but should have the authority to determine when national systems were unable or unwilling to act.
2. The Court's jurisdiction should be limited to the so-called core crimes under general international law, including genocide, crimes against humanity, war crimes and aggression. Without the inclusion of aggression, the Statute of the Court would be incomplete, although a balance would have to be struck between the need of the Court to be free from political influence and the need to take the Security Council's responsibilities into account.
3. The Statute should make provision for a review mechanism to allow the addition of other crimes in the future. The Court must also have jurisdiction over crimes committed in internal armed conflicts. Rape and other crimes of sexual violence committed in armed conflicts should be properly defined and explicitly listed as war crimes in the Statute. The recruitment of children under 18 years of age into armed forces or groups should also be included as a war crime.
4. States acceding to the treaty must accept the Court's jurisdiction over all the crimes listed in the Statute and must cooperate with it. States' consent should not be required before individual prosecutions or investigations could proceed. All States parties to the Statute should be able to trigger action by the Court. In addition, the Security Council must be able to refer situations to the Court under Chapter VII of the Charter of the United Nations. The Prosecutor should have the power to start investigations *ex officio* on the basis of information obtained from any reliable source, including non-governmental organizations. The Statute must provide for a fair trial and due process at all stages of the proceedings. There should be no capital punishment, but a maximum sentence of life imprisonment.
5. The Court should have a close relationship to the United Nations and should be financed from the regular budget of the United Nations.
6. Mr. Sadi (Jordan) said that the goal was to create a credible juridical deterrent to those who intended to commit grave breaches of international humanitarian law. If that deterrent failed, those believed guilty could be prosecuted by the International Criminal Court, not only to establish the truth but also to afford some measure of justice to the victims. Grave crimes should be prosecuted, whether they occurred in internal or external conflicts, and whoever committed them.
7. One basic requirement for an effective and independent international criminal court was the *ex officio* power of the Prosecutor to initiate investigations, which would be all the more critical in the light of the State consent regime that was under consideration.
8. There was an inherent risk that the lowest common denominator approach would produce a weak legal institution rather than one enjoying worldwide respect. If the principle of reservations were endorsed by consensus, it should be applied very conservatively. On the vexed issue of the death penalty, he noted that, while international human rights instruments called for the phasing out of capital punishment, they did not yet prohibit it altogether.
9. The attempts by some delegations to pick and choose from the Geneva Conventions of 1949 those elements that should or should not be included in the definition of war crimes were totally unacceptable. The Commission on Human Rights should have the same power as the Security Council to refer cases of gross human rights violations to the Court. While the Council had the primary responsibility for the security-related aspects of aggression, the Court could have concurrent jurisdiction over those aspects that fell within its scope.
10. Mr. Chkheidze (Georgia) said that the establishment of a permanent international criminal court would significantly contribute to strengthening the rule of law. Despite the achievements of civilization, atrocities still remained invariable concomitants of modern warfare and were even more brutal when committed in non-international armed conflicts.
11. The International Criminal Court should have jurisdiction over genocide, aggression, war crimes committed in both internal and international conflicts and crimes against humanity. While he supported the principle of complementarity, he emphasized that the Court should not be reduced to a residual mechanism for dispensing justice. Unless it were truly

empowered to step in where national systems proved incapable or unwilling to punish the perpetrators of serious crimes, and were competent to determine that national systems had failed, it would be of limited value.

12. He agreed that the Security Council should have the power to bring matters before the Court, but the independent Prosecutor should also be able to trigger proceedings at the request of a State party.

13. The Court should be established by treaty, its relationship with the United Nations being dealt with in a special cooperation agreement.

14. **Mr. Agius** (Malta) said that it was vital to establish an international criminal court which must be truly effective and free from political interference and whose Prosecutor would be independent and able to investigate cases and initiate indictments *proprio motu*, without the prior consent of States parties. The International Criminal Court should have inherent jurisdiction over genocide, crimes against humanity and war crimes. Furthermore, subject to finding a proper formula, the crime of aggression should also be included within its jurisdiction.

15. While the principle of complementarity should remain a pivotal point with regard to jurisdiction, the Court must be judge of its own competence on questions of admissibility. Furthermore, despite the role and obligations of the Security Council in maintaining international peace and security, the Court must be able to operate without undue influence on the part of the Council. The duty of States parties to cooperate fully with the Court should be clearly spelled out. Finally, he concurred with the proposals by several countries and by the European Union that the Statute should ensure respect for the rights of victims, the accused and witnesses at all phases of the proceedings.

16. **Mr. Prlić** (Bosnia and Herzegovina) said that the establishment of the International Criminal Court would create a strong instrument for preventing and punishing the perpetrators of serious crimes. He hoped that the Court's independence, its complementarity with national courts and its jurisdiction over the most serious crimes would put an end to slaughter, brutal torture, rape and other crimes against humanity.

17. Despite many obstacles encountered by the International Tribunal for the Former Yugoslavia in apprehending all those indicted for or suspected of war crimes, the overall conclusion was that such tribunals were indispensable.

18. The Court should be a just, fair and effective institution and its Statute should reflect the fundamental principles and expectations of mankind embodied in human rights and other international instruments. The universal jurisdiction of the Court, its effective complementarity to national laws, the independence of its Prosecutor, the cooperation of States parties to the Statute and its independence would ensure its credibility, independence and impartiality.

19. **Mr. Ushakov** (Russian Federation) said that the task was to create a permanent international criminal court to strengthen peace and justice. It was time to put into effect the principle of individual responsibility for the most serious crimes affecting the international community and to take steps to deter such crimes.

20. The International Criminal Court must be perceived as an effective, independent, authoritative body, a guarantor for the proper exercise of justice. It must in no circumstances become an instrument of political manipulation. It must be universal, the participation of all States being an undoubted priority. Its jurisdiction should extend to genocide, aggression, war crimes, crimes against humanity and the most serious terrorist crimes. It would be a major achievement to extend the Court's jurisdiction to serious violations of the Geneva Conventions of 1949 committed during non-international conflicts. The Court should certainly be competent to try sexual crimes in that context.

21. The Court's jurisdiction should complement that of national courts when the latter were ineffective in prosecuting such crimes or failed to act in good faith. Its action should be triggered by a complaint from a State or the Security Council. The Prosecutor should be fully independent in carrying out investigations.

22. To be fully effective, the Court should be incorporated in the existing system of support for international peace and stability, and its Statute should take into account the current status of international law so as to secure universal acceptance; a court not working in close combination with the Security Council would be doomed to failure. The Court should have compulsory jurisdiction in cases referred to it by the Council and with regard to genocide. With respect to aggression, the Council would first have to determine that such an act had occurred. In other cases, the Court would have jurisdiction with the consent of the State on whose territory the crime was committed and of the custodial State. Such consent, in principle, could be given by States when they ratified the Statute.

23. The Statute should provide for full cooperation by States with the Court, without infringing national security. The Statute should unconditionally include fundamental progressive principles of criminal justice such as the presumption of innocence and *ne bis in idem*. The death penalty should not be allowed, in order to ensure the broadest accession by States to the Statute. Likewise, reservations should be permitted to individual provisions of the Statute not relating to points of principle.

24. He supported the proposal to locate the headquarters of the Court at The Hague.

25. **Mr. Opertti** (Uruguay) said that the creation of an international criminal court was of the greatest significance with regard to the development of international law and indeed the international community itself. The concept of individual criminal responsibility for infringements of humanitarian law marked a qualitative change from the traditional view that only States were subjects of international law.

26. The permanent nature of the International Criminal Court did not mean that historic precedents need not be taken into account. However, the Conference must define in abstract terms those forms of conduct that could be criminalized, without abandoning established principles of liberal criminal law, such as the non-retroactivity of criminal legislation, *nullum crimen sine lege* and *nulla poena sine lege*.

27. No international crime such as genocide, war crimes or others of similar gravity could remain unpunished or be concealed by a kind of diplomatic composition of differences that diluted responsibility and ultimately spared the offender from legitimate prosecution. States and individuals must recognize the Court as an inescapable, independent, impartial and effective authority. The greatest problems to be discussed were probably related to achieving the necessary harmony between national courts and the new Court on the basis of complementarity. The appropriate functioning of the internal and international judicial spheres would largely determine the support for and recognition of the activities of the Court as the highest judicial authority of the international community.

28. Another sensitive point was the relationship of the Court to the United Nations system as a whole and particularly to the Security Council. The issue, once again, was complementarity and coordination. The Council, whose competence to preserve peace and security was based on the Charter of the United Nations, acted from a political and institutional perspective, and the relationship between the Court and the Security Council should not be one of dependence or subordination but rather of mutual respect.

29. Finally, in view of the collegiate nature of the Court to be created, a similar structure should be set up with regard to the Prosecutor's ex officio competence to initiate proceedings.

30. **Mr. Dorneval** (Haiti) supported the statement made on behalf of the Caribbean Community by the representative of Trinidad and Tobago, and said that his Government had a very special interest in the establishment of the International Criminal Court and resolutely supported its establishment, in view of his country's experience of slavery and more recent crimes whose perpetrators had gone unpunished.

31. The Court should be independent and impartial, which meant not only that the judges should have freedom of action but also that the institution should be protected against any external influence. It should be impartial in rendering justice to all without distinction or exclusion. To find the support it deserved, the Court must be complementary to national criminal courts, intervening where local courts were unable or unwilling to act.

32. Action by the Court should be triggered by States parties, the Security Council and the Prosecutor, the latter being subject to control by a pre-trial chamber. Cases should be referred to the Court strictly in accordance with Article 39 of the Charter of the United Nations.

33. **Mr. Al-Adhami** (Iraq) said that security and peace could prevail only in a regime of justice; therefore, the Statute of the International Criminal Court should contain clear principles that confirmed its neutrality and objectivity, its independent role and freedom from the political influences of States and international organizations. The Office of the Prosecutor should enjoy the same guarantees of neutrality and independence.

34. In order to strengthen the confidence of the international community, the Statute should strike an acceptable balance between the jurisdiction of the Court and that of national courts. The principle of complementarity of jurisdiction did not imply any reduction of the sovereignty of national courts. That should be stated more clearly by placing emphasis on the principles of criminal law as rooted in all contemporary national legal systems. It was important to specify that both the use and the threat of use of weapons of mass destruction, including nuclear weapons, constituted war crimes. The Court should be financed by States parties, thus reinforcing its independence.

35. **Mr. Al Badri** (Yemen) said that the sufferings that had been inflicted upon mankind had prompted the international community to set up ad hoc criminal tribunals and in turn to recognize the need to create an international criminal court.

36. A court that would prosecute the most serious crimes against humanity must be independent and effective and must be created on the basis of complementarity; it must be a court of last resort that would take action when national courts proved unable to do so. Only States parties should be entitled to refer cases to the International Criminal Court and the penalties should include deterrents consistent with the crimes, even including capital punishment. The Prosecutor should be independent, but his decisions must be subject to review by the Court. The Court's role was strictly judicial, and the Security Council, as a political organ, should not exert any influence over it. The Court must remain free from political considerations but, equally, must not interfere in the internal affairs of States.

37. Action by the Court must not conflict with international instruments, in particular the Charter of the United Nations. States should be allowed to define the crimes to be included in the Statute. The Statute should respect the sovereignty of States and their constitutional rules so as to avoid difficulties in ratification.

38. **Ms. Drozd** (Belarus) said that the establishment of an international criminal court to try aggression, genocide, war crimes and crimes against humanity would be a global response to horrific events such as those in Cambodia or Rwanda. Accession to the Statute should logically imply recognition of the jurisdiction of the International Criminal Court over those crimes. However, the Court should have competence with regard to other crimes listed in the initial draft Statute, under a regime of optional jurisdiction. She favoured the principle of complementarity as a means of ensuring a close tie between the Court and national justice systems.

39. While realizing the need to ensure the independence of the Court, she advocated a strong link with the Security Council in initiating proceedings on aggression. The Court could prosecute individuals suspected of committing aggression after a corresponding decision had been taken by the Council or if such a decision had been put to the vote in the Council but not adopted. With respect to other crimes within the jurisdiction of the Court, it would be acceptable if the Council had the power to decide on a temporary suspension of proceedings in the Court. An essential preliminary condition for the Court's exercise of its jurisdiction was acknowledgement of its competence by the State with jurisdiction over the suspect. However, that should not apply to cases referred to the Court by the Council.

40. The Prosecutor could be given powers to initiate proceedings *proprio motu*, subject to the provisions of the Statute as a whole and based on the principle of complementarity and the absence of any exclusive jurisdiction by the Court with respect to any category of crimes. She therefore proposed the possibility of reservations to that provision of the Statute. However, reservations should refer only to the trigger mechanism and the substantive jurisdiction of the Court, and their number should be strictly limited.

41. She was convinced that the effectiveness, stability and universality of the Court could be attained only if its activities were financed from the regular budget of the United Nations.

42. **Ms. Kleopas** (Cyprus) said that the establishment of a permanent international criminal court was an absolute necessity. She aligned herself with the statement made by the European Union Presidency.

43. If the International Criminal Court was to be effective and able to dispense justice, it must have an independent Prosecutor empowered to act *proprio motu*.

44. The list of crimes over which the Court should have jurisdiction should include all crimes of international concern: genocide, aggression, war crimes and crimes against humanity. Failure to include aggression would deprive the Court of one of its primary functions and would also discriminate against victims. War crimes should be defined as including the establishment of settlers in an occupied territory, changes to the demographic composition of an occupied territory and the deportation or transfer of all or parts of the population of the occupied territory within or outside that territory. The destruction of cultural sites should also be considered a war crime.

45. **Mr. Abdullah Bin Khalid Al-Khalifa** (Bahrain) said that the purpose of establishing an international criminal court was to act as a deterrent against the commission of war crimes during armed conflict. The ad hoc tribunals had provided models for such a criminal justice regime.

46. In order to respect national sovereignty, the jurisdiction of a permanent and independent international criminal court

should be complementary to national jurisdiction and should encompass genocide, aggression, war crimes and crimes against humanity. The elements of those crimes should be defined very precisely to satisfy the principle of *nullum crimen sine lege*.

47. The International Criminal Court should be independent and free from any political interference that would affect its impartiality or hamper its work. For the exercise of his or her mandate, the Prosecutor, whose action should be subject to precise legal rules, should be empowered to initiate proceedings on the basis of complaints by States or a decision of the Security Council. The Court should have the power to award compensation to victims as well as to pass sentence on those convicted. The word "extradition" should be retained, rather than "transfer" or "remand", because it had an established legal sense in international customary law and was accepted by all national constitutions and laws.

48. Reservations to the Statute should not be permitted. It should be left to the general rules of the law of treaties to guarantee the greatest possible number of accessions to the Statute.

49. **Mr. Nze** (Congo) said that, in view of large-scale human rights violations, it was necessary to establish an international criminal court so that those who committed such crimes would not go unpunished. The jurisdiction of the International Criminal Court should also extend to acts such as terrorism.

50. The Court should be available to States parties and the Security Council. It should also be empowered to act on its own initiative, but only if it was independent of political influence.

51. The independence of the Court should be guaranteed in its Statute and must be respected by the Security Council and States, in order that the judges could perform their duties in complete impartiality while ensuring due respect for the rights of the defence. To avoid the delays characteristic of international courts, the Court should enjoy financial autonomy. It should also provide compensation to victims.

52. **Mr. Abreu** (Angola) said that, in keeping with the statement made on behalf of the Southern African Development Community, he supported the establishment of an international criminal court to prosecute grave crimes of concern to the international community.

53. An international criminal court should not have fewer guarantees of independence and impartiality than a national court in determining what crimes and criminals it would try. In no case, therefore, should the initiation of judicial action be subject to a veto or a decision of the Security Council or to the will or interests of States where the crimes were committed or whose nationals were the accused.

54. Similarly, the Prosecutor's freedom to investigate crimes or institute prosecutions should not be limited. States must cooperate with the Prosecutor and not impede his work.

55. It should be possible, despite the concerns expressed by certain countries, to find ways of guaranteeing respect for the rights of the accused to defence, avoiding abuses and ensuring that unfounded accusations did not reach the trial stage.

56. He supported the inclusion of aggression within the Court's jurisdiction.

57. Since his country's Constitution prohibited capital punishment, he could not agree to the inclusion of the death penalty in the Statute.

58. **Mr. Nyabenda** (Burundi) said that his country had suffered for almost five years from genocide and attacks by bands of terrorists against innocent people; he requested that an ad hoc international criminal tribunal be set up for Burundi in order to help in national reconciliation efforts.

59. He welcomed the plan to establish a permanent international criminal court, which should be independent, strong and impartial, and linked with the United Nations through a special agreement to guarantee its universality and authority. It should be created by means of a treaty. Burundi favoured complementarity between the International Criminal Court and national courts, which should retain the primary responsibility for investigating and prosecuting crimes.

60. The Court should be competent to deal with the crimes specified in article 5 of the draft Statute. No State should be entitled to refuse recognition of the Court's competence. The Court itself should determine its power of intervention.

61. **Mr. Larrea Dávila** (Ecuador) said that the International Criminal Court should be established in accordance with the purposes and principles of the United Nations and international law. Its independence, effectiveness, universality, impartiality and permanence should be guaranteed in order to protect the basic values of the civilized world community.

62. The Court should have broad jurisdiction over crimes such as genocide, war crimes, crimes against humanity, violations of human rights and the crime of aggression, if consensus could be reached on a definition of aggression, and also over crimes committed during internal armed conflicts and crimes against humanity committed in times of peace. The Statute should be open to the future inclusion of other crimes of universal concern. The Court should have universal jurisdiction, and signature of the Statute should imply acceptance of its jurisdiction, which would be complementary to that of national legal systems. The Court should be empowered to intervene when it was determined that national legal systems had not been able to carry out their primary responsibility.

63. The Court should be free from interference by any political body, thus guaranteeing impartiality in prosecution and adjudication. It should also have a strong and independent Prosecutor empowered to initiate judicial proceedings *ex officio*. All Member States should undertake to fulfil the

provisions and orders of the Court at all stages of the process without delay.

64. The Court would enjoy greater legitimacy if it could not impose the death penalty. It should fully observe the principles of international criminal law, including non-retroactivity, *in dubio pro reo*, *nullum crimen sine lege*, *nulla poena sine lege*, *ne bis in idem*, and, finally, the guarantee of due process.

65. **Mr. Nkgowe** (Botswana) said that the establishment of an international criminal court was long overdue. It should be the purpose of the International Criminal Court to deter all those who harboured the intention of committing genocide, war crimes and crimes against humanity, or to hold those who committed such crimes individually accountable for their deeds. The plea of acting under superior orders could no longer be accepted.

66. There was agreement that the Court should be independent, impartial, fair, just and effective and that it should complement national courts; nevertheless, some questions remained, for instance, regarding the role of the Security Council. The Council was the first port of call in international crises and should be allowed to refer cases to the Court. Any State or member of the Council should also be able to refer cases before it to the Court, and the veto should not be applicable. By the same token, the Prosecutor should have a mandate to initiate action, for example, where the national courts were not in a position to bring the perpetrators of serious crimes to justice.

67. **Mr. Novella** (Monaco) said that, in keeping with his country's long-standing involvement in international humanitarian efforts, including the establishment of a precursor to the League of Nations and groundwork for international Red Cross conventions, his delegation wished to participate in the establishment of the International Criminal Court and to work for the punishment of international crimes.

68. **Mr. Kirabokya Maria** (Uganda) said that a permanent, independent, transparent and effective international criminal court should be established, with unfettered jurisdiction over crimes such as genocide, war crimes, crimes against humanity and aggression, without any distinction between war crimes committed in international and internal conflicts.

69. The International Criminal Court could not and should not replace the various national judicial systems. It should play only a complementary role. On the other hand, the role of the Security Council under Chapter VII of the Charter of the United Nations should not be allowed to influence the acceptability and independence of the Court.

70. He agreed with those delegations and non-governmental organizations that advocated adequate and effective provisions in the Statute for safeguarding children. The prosecution of abduction, rape, enslavement and other forms of child abuse should be prominently reflected in the Statute. Gender concerns should also be taken into account.

71. Any individual, State, non-governmental organization or the Prosecutor, acting *ex officio*, should be allowed to initiate action without undue pre-qualifications. He strongly opposed the admissibility of reservations to the Statute and did not support the opt-in/opt-out approach.

72. In the past, arch-criminals had enjoyed impunity as a result of the lack of international criminal jurisdiction. He hoped that, through the Court's work, there would be no place where such criminals could hide.

73. He welcomed the offer by the Netherlands to host the headquarters of the Court at The Hague.

74. **Ms. Garavaglia** (Observer for the International Federation of Red Cross and Red Crescent Societies) said that, in November 1997, the 175 national societies of the Red Cross and the Red Crescent, the International Federation and the International Committee of the Red Cross had adopted a resolution calling on national societies to promote the establishment of an effective and impartial international criminal court. The 120 million volunteers of the Red Cross and Red Crescent were waiting for a strong political message on the prevention and punishment of violations of international humanitarian law. They should not be disappointed. The establishment of a court meeting the legitimate demands of international justice was within reach.

75. **Mr. Suarez Gil** (Observer for the Latin American Institute of Alternative Legal Services) welcomed the opportunity to engage in a dialogue with a view to establishing an independent, impartial and permanent international criminal court. The murders of colleagues, which had taken place in internal political conflicts, were often not recognized by Governments or were recognized only belatedly. According to a report of the Office of the United Nations High Commissioner for Human Rights, activity by paramilitary groups, displacement of thousands of people and persecution of defenders of human rights were on the increase. Punishing such crimes in cases where domestic judicial systems had no capacity to do so called for a court that had inherent jurisdiction over violations that occurred in internal armed conflicts.

76. The Statute should clearly state that the enforced disappearance of persons should fall within the jurisdiction of the International Criminal Court. Some countries had attempted to modernize criminal justice by establishing non-adversarial proceedings, which were marred by the use of such devices as so-called anonymous judges, who did not respect guarantees of impartiality or due process. In many cases, witnesses, victims, family members and their representatives at trials were persecuted. The future Court should provide protection for such persons.

77. **Mr. Dorsen** (Observer for the Lawyers Committee for Human Rights) said that his Committee had worked for many years to end impunity for the most heinous international crimes. The Conference had the opportunity to create a court that would

prosecute international crimes when national systems were unable or unwilling to do so. An effective court would deter gross human rights violators by confronting them with the real risk of punishment. When national courts could not provide it, the International Criminal Court could offer redress to victims and protection for women, children and witnesses of international crimes. It would strengthen peace by offering justice through law and would contribute to the process of reconciliation.

78. The community of nations had a fundamental interest in contributing to a more stable world by creating an international criminal court that was independent, effective and fair. Indeed, a court without those features would have no deterrent effect. An independent, effective and fair court must be perceived to be a judicial body guided by legal rather than political considerations. Its jurisdiction should be limited to the three core crimes of genocide, crimes against humanity and serious war crimes, unless agreement on the definition of other crimes could be reached.

79. The Security Council should not be able to control the proceedings of the Court; accordingly, the Prosecutor must be permitted, subject to appropriate safeguards, to initiate investigations *proprio motu*. The Court must be empowered to exercise its jurisdiction without the need to obtain State consent before it could proceed. It must adhere to the highest international standards of fair trial and due process. States parties must be obliged to cooperate fully with the Court and to comply with its orders and decisions. The Court should be financed from the regular budget of the United Nations.

80. Judicial independence and judicial oversight of the Prosecutor and judges, who would be of the highest impartiality, integrity and professional competence, would safeguard against the danger that an independent court could become a forum for politically motivated prosecutions. Perhaps the most important safeguard was the basic principle of complementarity. The Court would act only when there was no national judicial system willing and able to prosecute and investigate.

81. **Ms. Sajor** (Observer for the Asian Centre for Women's Human Rights) said that a permanent international criminal court whose aim it was to promote universal justice effectively must incorporate gender perspectives in all aspects of its jurisdiction, structure and operations. The International Criminal Court must be fully accessible, through an independent Prosecutor, to complaints from women survivors; its creation was an essential step in ending the cycle of violence against women in war and armed conflict.

82. Though rape had been clearly listed as a war crime since the end of the First World War, women had to struggle to have the crime of rape listed in the statutes of the International Tribunals for the Former Yugoslavia and Rwanda and to have resources devoted to the investigation of such crimes when those Tribunals were created. The Conference must ensure that

the results of its deliberations would not be yet another setback for women victims of wars and crimes against humanity.

83. The Statute of the Court must reflect the present state of international law. Rape, sexual slavery, enforced prostitution, enforced pregnancy, mass rape and other forms of sexual and gender-based persecution must be specifically listed as war crimes, crimes against humanity and grave breaches of the human rights of women.

84. **Ms. Stobiecka** (Observer for the European Law Students' Association) said that the International Criminal Court must be able, without influence from any political body, to prosecute and punish perpetrators of genocide, crimes against humanity, war crimes and aggression.

85. The independent Prosecutor should be able to commence investigations *ex officio*. It would be meaningless to create a permanent international criminal court with less power than the domestic tribunals of States parties.

86. Justice for victims of gross violations of international humanitarian law and human rights could be achieved only when victims had access to justice in three areas: the right to know the truth, the right to a fair trial and the right to reparation. The underlying legal principle was that, where a wrong existed, there must be a corresponding judicial remedy, as stated in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. Articles 68 and 73 of the draft Statute of the Court were central to justice for victims of atrocities occurring in times of war or times of peace.

87. **Mr. Corell** (Representative of the Secretary-General) said that the protected status of United Nations signs, emblems and military uniforms, first recognized in Additional Protocol I to the Geneva Conventions of 1949, had proved to be both justified and necessary in the practice of peacekeeping operations. The Secretariat strongly supported the idea that the Conference should take a step further in order to criminalize and qualify as a war crime the improper use of the flag, military insignia and uniform of the United Nations by any of the parties to a conflict, when such use resulted in death or serious personal injury.

88. Attacks against United Nations and associated personnel were criminalized under the 1994 Convention on the Safety of United Nations and Associated Personnel, but it was left for the national jurisdiction of each State party to prosecute or extradite. Such crimes should fall within the jurisdiction of the International Criminal Court. However, making the criminalization of attacks against United Nations personnel conditional on their systematic character and large-scale occurrence would be inconsistent with the definition of the crime established in the 1994 Convention, and hardly ever appropriate in the circumstances of peacekeeping.

89. As an organization whose peacekeeping, humanitarian and similar field operations were deployed in areas of conflict, the United Nations would almost certainly be in possession of

first-hand information which could significantly assist the Court in determining the individual criminal responsibility of accused persons. The nature, scope and modalities of United Nations cooperation with the Court in providing oral testimonies or documents would have to be agreed upon between the Organization and the Court. The United Nations, for its part, would be guided by the practice of cooperation with the two *ad hoc* International Tribunals for the Former Yugoslavia and for Rwanda.

90. Consequently, the United Nations would cooperate with any proper international criminal court, whether a tribunal of the kind established for the former Yugoslavia and Rwanda, whose orders and requests were binding under Chapter VII of the Charter of the United Nations, or a treaty-based court whose requests must be complied with by the United Nations on the basis of mutually agreed procedures.

91. The United Nations Secretariat understood that cooperation embraced all stages of the legal process, from the investigation to the trial phase, and all organs of the Court, including the defence, which, while not strictly speaking an organ of the Court, was nevertheless an indispensable element in the administration of justice.

92. An agreement between the United Nations and the Court as foreseen in the draft Statute would be subject to approval by the General Assembly. The following principles would guide the Secretariat in negotiating such an agreement.

93. The principles of the 1946 Convention on the Privileges and Immunities of the United Nations should also apply in relation to the Court. Accordingly, when requested to waive the immunity of any of its officials in order to enable them to appear in court, or when requested to disclose any information which had not yet been made public, the Secretary-General would balance the need to cooperate with the Court with the protection of the internationally recognized interests of the United Nations. The Secretary-General would consider the relevance and specificity of the request for information, the gravity of the charge under consideration, the confidentiality of the documents requested, the risk that their disclosure might entail for the safety of United Nations staff and the interests of the Organization, and whether, in such a case, sufficient guarantees and protective measures could be provided.

94. The notion of the confidentiality of documents and information in the United Nations context needed clarification. Where a request for disclosure of documents entailed an examination of deliberations of closed meetings of the Security Council, United Nations records of meetings with representatives of Member States, including troop-contributing States, a decision to permit such an examination of the activities of the Council and individual Member States would raise serious questions equivalent to the national security of States. Any provision in the Statute for the protection of sensitive national security information should, therefore, be made applicable to the United Nations *mutatis mutandis*.



95. In that context, he drew the attention of the Conference to the communication from the Inter-Agency Standing Committee which appeared in document A/CONF.183/INF.4. Ultimately, of course, it was for Member States to strike the appropriate balance between the competing interests.

96. In conclusion, he said that, while it was clear that there was not agreement on some issues, what was more important was the true sense of commitment towards fulfilling the mandate of the Conference, namely, to finalize and adopt a convention on the establishment of an international criminal court. The debate conveyed a message of confidence and determination and a clear sense of responsibility. The Secretariat would do its utmost to support the Conference.

#### **Agenda item 8 (continued)**

##### **Appointment of the Credentials Committee**

97. **The President** said that, since Barbados and Bhutan were unable to serve on the Credentials Committee, two new members must be elected. It was his understanding that, following informal consultations between the regional groups, Dominica and Nepal had been nominated to fill the vacancies. He asked whether the Conference wished to approve those nominations.

98. *It was so decided.*

*The meeting rose at 6.20 p.m.*

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### **9th plenary meeting**

Friday, 17 July 1998, at 10.35 p.m.

*President: Mr. Conso (Italy)*

A/CONF.183/SR.9

#### **Report of the Credentials Committee (A/CONF.183/7 and Corr.1 and 2)**

1. **Ms. Benjamin** (Dominica), speaking as Chairman of the Credentials Committee, introduced the report of the Committee contained in document A/CONF.183/7 and Corr.1 and 2, which should not require any further explanation since it was based on United Nations practice. The Committee recommended that the Conference adopt the report, including the draft resolution contained in paragraph 15.

2. **The President** asked the Conference if it wished to adopt the report of the Credentials Committee.

3. *It was so decided.*

#### **Agenda item 11 (concluded)**

**Consideration of the question concerning the finalization and adoption of a convention on the establishment of an international criminal court in accordance with General Assembly resolutions 51/207 of 17 December 1996 and 52/160 of 15 December 1997**

#### **Report of the Committee of the Whole (A/CONF.183/8 and A/CONF.183/C.1/L.92 and Corr.1)**

4. **Mr. Kirsch** (Canada), speaking as Chairman of the Committee of the Whole, introduced the report of the Committee (A/CONF.183/C.1/L.92 and Corr.1) and said that the Committee had completed the mandate entrusted to it by the Conference and had adopted the draft Statute for an international criminal court. The report of the Committee was composed of four chapters. Chapter I described the proceedings

of the Committee relating to the various parts and articles referred to it by the plenary, chapter II contained the complete text of the draft Statute for the International Criminal Court, chapter III contained a list of the written proposals and working papers submitted to the Committee and its working groups, and chapter IV contained the text of the draft final act of the Conference.

5. He commended to the plenary, for consideration and adoption, the draft Statute for the Court and the draft final act of the Conference contained in the report of the Committee.

6. **The President** asked the Conference if it wished to take note of the report of the Committee of the Whole contained in document A/CONF.183/C.1/L.92 and Corr.1.

7. *It was so decided.*

#### **Agenda item 12**

**Adoption of a convention and other instruments deemed appropriate and of the final act of the Conference (A/CONF.183/8)**

8. **Mr. Scheffer** (United States of America) asked for a vote on the adoption of the Statute as a whole, in accordance with rule 36 of the rules of procedure. He was not asking for a recorded vote.

9. **The President** invited the Conference to vote on the adoption of the draft Statute for the International Criminal Court.

10. *The Statute was adopted by 120 votes to 7, with 21 abstentions.*

11. **Mr. Lahiri** (India) said that he had always had in mind a court that would deal with truly exceptional situations, where the State machinery had collapsed. However, the scope of the Statute had been so broadened that it could be misused for political purposes or to address situations for which the International Criminal Court was not intended.

12. His fundamental objections to the Statute were that it gave the Security Council a role in terms that violated international law. It had been argued that a role for the Council must be built into the Statute because it had set up ad hoc tribunals, but the Charter of the United Nations did not give the Council the power to set up courts. What the Council had received through the Statute was the power to refer, the power to block proceedings and the power to bind non-party States. All three were undesirable.

13. The power to refer was unnecessary. The Security Council had set up ad hoc tribunals because no appropriate judicial mechanism had existed to try such crimes at the time, but, with the establishment of the Court, States parties would have the right to refer cases to it. The Council did not need to refer cases, unless its referrals would be more binding on the Court than other referrals, which would clearly be an attempt to influence justice. Furthermore, members of the Council that did not plan to accede to the Court would have the privilege of referring cases to it. That, too, was unacceptable.

14. The power to block proceedings was even harder to accept. On the one hand, it was argued that the Court was to try crimes of the gravest magnitude, yet, on the other, it was argued that the maintenance of international peace and security might require that those who had committed such crimes should be permitted to escape justice, if the Council so decreed.

15. Under the law of treaties, no State could be forced to accede to a treaty or to be bound by the provisions of a treaty it had not accepted. The Statute violated that fundamental principle. The Security Council would almost certainly have among its members some non-parties, and such States, working through the Council, would be given the power to bind other non-parties. Moreover, the inclusion in the Statute of the concept of universal or inherent jurisdiction made a mockery of the distinction between States parties and States not parties, thus straying sharply from established international law.

16. The Statute had not explicitly banned the use of nuclear weapons as a crime. As a nuclear weapon State, India had tabled a draft amendment to list nuclear weapons among those whose use was banned for the purposes of the Statute. To his very great regret, that had not even been considered, and the Statute did not list any weapons of mass destruction among those whose use was banned as a war crime.

17. For those fundamental reasons of principle, with very great regret, the Government of India would not be able to sign the Statute.

18. **Mr. Paolillo Núñez** (Uruguay) said that he had voted in favour of the Statute, not to give unconditional support to a text which, like all compromise texts, was not completely satisfactory, but rather as a renewed manifestation of his country's will to contribute to the development and strengthening of international law through the establishment of judicial institutions.

19. Various issues in the Statute, particularly regarding admissibility, had not been resolved in a completely satisfactory manner. In addition, the powers given to the Prosecutor had not been made subject to adequate controls, which might have the opposite effect to that desired. In other areas the Conference had not had sufficient time to elaborate more satisfactory solutions, but he had voted in favour of the Statute because it marked a historic step closer to the ideal of a more just and free international society.

20. **Mr. Peeroo** (Mauritius) said that the achievements of the Conference should not be underestimated. Laying the foundation of international criminal law had meant, at one and the same time, inventing international criminal law, setting out international criminal procedure, creating international criminal institutions and defining international criminal offences. He was happy to have played a part in such an ambitious enterprise and announced that Mauritius would sign the Statute.

21. **Mr. Ebdalin** (Philippines) said that the Statute contained the vital elements of an international criminal court, with jurisdiction over genocide, crimes against humanity and war crimes, gender-based and sex-related crimes and acts committed in non-international armed conflicts. The Prosecutor could initiate proceedings *proprio motu*, independently of the Security Council.

22. The restrictions on admissibility had been reduced to an acceptable minimum. The principle of complementarity was assured, giving due regard to the national jurisdiction and sovereignty of States parties. Finally, there were provisions for restitution, compensation and rehabilitation for victims.

23. On the other hand, some provisions detracted from those strengths. Some new definitions of war crimes constituted a retrograde step in the development of international law. The applicability of the aggression provisions had been postponed pending specific definition of the crime, and States parties had the option of reservations on the applicability of war crimes provisions. Finally, the Security Council could seek deferral of prosecution for a one-year period, renewable for an apparently unlimited number of times.

24. Nevertheless, he was confident that the International Criminal Court could succeed with the support of the international community and had therefore decided to vote in favour of the Statute.

25. **Mr. Fife** (Norway) fully supported the establishment of the Statute of the International Criminal Court. It was a compromise solution, elements of which did not reflect fully his

position. Nevertheless, it would achieve the shared objective of creating a truly independent and effective court, credible in the eyes of the world and enjoying the broadest possible support. His country would undertake the necessary national preparations to adopt the Statute.

26. **Mr. Onkelinx** (Belgium) said that he had voted in favour of the Statute of the International Criminal Court. While he was happy at the consensus achieved, he had some concerns about the results. In particular, Belgium would watch closely the application of the provisions of article 12, paragraph 2, because they were not in keeping with its consistently held conception of the automatic competence of the Court.

27. Secondly, articles 1 and 111 bis constituted a disturbing juridical construct, which would be limited by time constraints. His comments in no way detracted from his country's willingness to contribute actively to setting up the Court.

28. **Mr. Scheffer** (United States of America) said that he did not accept the concept of universal jurisdiction as reflected in the Statute of the International Criminal Court, or the application of the treaty to non-parties, their nationals or officials, or to acts committed on their territories. The only way to bring non-parties within the scope of the regime was through the mandatory powers of the Security Council under the Charter of the United Nations. For those reasons, he had voted against the Statute.

29. The Statute envisaged including aggression as a crime, once there was an amendment "defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime", with the proviso that such amendment should be "consistent with the relevant provisions of the Charter of the United Nations". It must be taken into account that not all acts of aggression entailed individual criminal responsibility, and any definition must clearly state what acts, under what circumstances, constituted crimes. Such a definition must also clearly refer to the Security Council's exclusive role under the Charter to determine that aggression had taken place, as a pre-condition to the exercise of the judicial authority of the Court.

30. With respect to article 16, it was unwise as a matter of policy, and questionable as a matter of law, to purport to specify that Security Council action was effective only for a limited period of time such as 12 months. The Council had the primary responsibility for the maintenance of international peace and security, and the Conference should not seek to constrain the activities of the Council under the Charter.

31. He could not support resolution E in annex I to the Final Act because it seemed to reflect the view that crimes of terrorism and drug crimes should necessarily be included within the jurisdiction of the Court, subject only to the question of defining them. Conferring such jurisdiction on the Court might hamper essential transnational efforts at effectively fighting such crimes.

32. **Mr. Vergne Saboia** (Brazil) said that he had voted in favour of the Statute because he strongly supported the establishment of an international criminal court. However, he expressed concern that article 87 regarding the obligation to surrender persons to the International Criminal Court might not be compatible with the provision of the Brazilian Constitution that prohibited the extradition of nationals. As regards article 75, paragraph 1 (b), the Brazilian Constitution prohibited the penalty of life imprisonment. He understood, however, that the provision contained in article 100, paragraph 3, concerning review of sentences after 25 years of imprisonment met that concern to some extent.

33. **Mr. Nathan** (Israel) said that, although his country had long called for the establishment of an international criminal court as a vital means of ensuring that criminals who committed heinous crimes, such as the Holocaust, would be brought to justice, he had reluctantly voted against the Statute. His country had actively participated in the preparation of the Statute at all stages, not imagining that it would ultimately become a potential tool in the Middle East conflict.

34. Article 1 of the Statute clearly referred to the most serious crimes of concern to the international community as a whole. The preamble spoke of unimaginable atrocities and of grave crimes which deeply shocked the conscience of the whole international community. He questioned whether it could really be held that the action referred to in article 8, paragraph 2 (b) (viii), ranked among the most heinous and serious war crimes. Had that provision not been included, he would have been able to vote in favour of adopting the Statute.

35. **Mr. de Saram** (Sri Lanka) said that he had abstained because, while recognizing the great importance of establishing an international criminal court, he was concerned that the Statute moved into areas of international law that were still unclear. That concern included extending the jurisdiction of the International Criminal Court in relation to national jurisdictions, without national consent and, on occasion, in a manner inconsistent with the law of treaties. In particular, he regretted that the crime of terrorism had not been included within the jurisdiction of the Court.

36. **Mr. Liu Daqun** (China) said that his delegation had always held that the International Criminal Court should be judicially independent, but that, at the same time, care must be taken to ensure that investigations did not affect the legitimate interests and sovereignty of national judicial systems. The Statute did not entirely resolve his concerns in that regard.

37. Complementarity and State consent should be the legal basis of the Court's jurisdiction. However, the Statute granted universal jurisdiction to the Court over three core crimes, although article 12 had provided that, in exercising its jurisdiction, the Court should obtain the consent of the State where the crime was committed or of which the accused was a national. However, that did not mean that consent by a State was a *sine qua non* of the Court's jurisdiction. That imposed an

obligation upon non-parties and constituted interference in the judicial independence or sovereignty of States, which he could not accept.

38. The definition of war crimes and crimes against humanity had already exceeded commonly understood and accepted customary law. He opposed the inclusion of non-international armed conflicts in the jurisdiction of the Court and the reference to crimes against humanity.

39. The Prosecutor's right to conduct investigations or to prosecute *proprio motu*, without sufficient checks and balances against frivolous prosecution, was tantamount to the right to judge and rule on State conduct. The provision that the Pre-Trial Chamber must consent to the investigation by the Prosecutor was not an adequate restraining mechanism.

40. The formulation and adoption of the Statute of the Court had been based on democracy, equality and transparency and it should have been adopted on the basis of consensus, not of voting. The history of negotiating international treaties had proved that no convention adopted by a vote would be assured of universal participation. For those reasons, he had been obliged to vote against the Statute.

41. **Mr. Güney (Turkey)** said that, although Turkey had always supported the creation of an international criminal court, the final outcome was not in keeping with its expectations. Terrorism should have been included among crimes against humanity, since it was often the root cause of such crimes.

42. The jurisdiction of the International Criminal Court should be subject to the explicit consent of States or to an opt-in/opt-out mechanism. The executive exercise of jurisdiction and the gravity of the crimes within the Court's jurisdiction would fully justify requiring such explicit consent.

43. Article 8, paragraphs 2 (c) and (d), on war crimes were not satisfactory. The Court should have competence to take cognizance of war crimes only in the context of policies or as part of a series of analogous large-scale crimes. The future Court should have nothing to do with internal troubles, including measures designed to maintain national security or root out terrorism.

44. Conferring a *proprio motu* role on the Prosecutor risked submerging him with information concerning charges of a political, rather than a juridical nature. To make the Statute universal and effective, reservations should at least have been permitted on certain articles on which the Conference was deeply divided. For those reasons, Turkey had been unable to approve the Statute and had found itself obliged to abstain.

45. **Mr. Yee (Singapore)** said that, to be effective, a good court must be built upon strong foundations, commanding universal respect and acceptance.

46. The final text of the Statute of the International Criminal Court seemed to reflect the result of negotiations in which many

small States were not involved, resulting in a series of compromises, mostly appearing at the eleventh hour, which weakened the institutional framework of the Court.

47. There were already signs that expediency, rather than faithful adherence to core principles of criminal justice, was governing issues such as the composition of the Court and the trial process. The provisions on the acceptance of jurisdiction and the preconditions to its exercise had appeared for the first time at the very end of the Conference, rendering full study of all the implications impossible for his delegation.

48. He was dismayed that chemical and biological weapons had been deleted from the list of prohibited weapons in the definition of war crimes. He wondered what signals would be sent out by failing to qualify the use of such weapons as war crimes.

49. He regretted the non-inclusion of the death penalty because of the ambiguous message which its absence sent in relation to the gravity of the crimes within the Court's jurisdiction, especially in parts of the world where the deprivation of liberty was not an adequate deterrent. The decision not to include the death penalty in the Statute did not in any way affect the sovereign right of States to determine appropriate legal measures and penalties to combat serious crimes effectively.

50. For those reasons, he had abstained in the vote.

51. **Sir Franklin Berman (United Kingdom of Great Britain and Northern Ireland)** said that the United Kingdom interpreted the reference to aggression in article 5 and, in particular, the last sentence of paragraph 2 of that article, which mentioned the Charter of the United Nations, as a reference to the requirement of prior determination by the Security Council that an act of aggression had occurred.

52. Resolution E on drug trafficking and terrorism, which had been included in deference to the arguments of some delegations, did not, however, prejudice in any form a decision to be taken in due course within the review procedure as to whether either terrorism or drug trafficking should be included within the jurisdiction of the International Criminal Court.

53. **The President** read out the following declaration concerning a new article 79 bis on the non-inclusion of the death sentence in the Statute:

"The debate at this Conference on the issue of which penalties should be applied by the Court has shown that there is no international consensus on the inclusion or non-inclusion of the death penalty. However, in accordance with the principles of complementarity between the Court and national jurisdictions, national justice systems have the primary responsibility for investigating, prosecuting and punishing individuals, in accordance with their national laws, for crimes falling under the jurisdiction of the International Criminal Court. In this regard, the Court

would clearly not be able to affect national policies in this field. It should be noted that not including the death penalty in the Statute would not in any way have a legal bearing on national legislations and practices with regard to the death penalty. Nor shall it be considered as influencing, in the development of customary international law or in any other way, the legality of penalties imposed by national systems for serious crimes."

54. In the final text, the relevant articles would be renumbered appropriately.

### Agenda item 13

#### Signature of the Final Act and of the Convention and other instruments

55. *Signature of the final document commenced with Zimbabwe, drawn by lot.*

#### General statements

56. **Mr. Corell** (Representative of the Secretary-General) said that he was honoured to convey to the Conference the Secretary-General's congratulations on its great achievement. He thanked all participants for their efforts.

57. The Statute of the International Criminal Court which had just been created would fill what had long been recognized as a gap in the international legal system. The Conference had deliberated with great care and patience, and had successfully resolved questions that had posed a challenge to the United Nations for over 50 years.

58. No doubt many would have liked to see the Court vested with even more far-reaching powers. The breakthrough achieved should not be underestimated, but should be recognized as a genuine step forward in safeguarding human rights and the rule of law. It was now for States to sign and ratify or accede to the Statute, and he hoped that in the next few months there would be a concerted movement of support for the Court as soon as the necessary constitutional requirements were fulfilled at the national level.

59. He paid tribute to the very important contribution made to the negotiating process by the intergovernmental organizations and, in particular, the non-governmental organizations.

60. **Mr. Vattani** (Italy) said that Italy, as host to the Conference, was particularly pleased to welcome the creation of the Statute of the International Criminal Court, an event of historic importance and a decisive step forward in the development of international criminal law and in the prevention and punishment of crimes which were an offence to the conscience of mankind. The text adopted would provide a satisfactory basis for the Court's operations by guaranteeing its independence, an essential requirement for any judicial body. He was glad to note that its jurisdiction would include aggression and endangerment of the lives of women and

children, notably in armed conflicts. He hoped that, with the cooperation of all States parties, the Court would eventually become an efficient universal instrument, thus fulfilling the hopes placed in it by the international community.

61. **Mr. Hafner** (Austria), speaking on behalf of the European Union and of Bosnia and Herzegovina, Hungary, Iceland and Norway, said that the European Union had always been committed to the creation of a permanent judicial institution which would make the world a more just, safer and more peaceful place, and had always affirmed that the Statute of the International Criminal Court must be generally acceptable if it was to become effective. A number of extremely sensitive issues related to national criminal jurisdiction, national security and sovereignty had been resolved at the Conference, and concessions had been made on all sides to enable an acceptable result to be reached. The success achieved was an event of historic importance.

62. Work had still to be done within the Preparatory Commission for the International Criminal Court, and a sufficient number of ratifications had to be received before the Court could begin work. The European Union was ready to do all it could to ensure that that task was successfully accomplished.

63. **Mr. Rodríguez Cedeño** (Venezuela) said that, although the Statute of the International Criminal Court now being adopted was not perfect, it was a balanced one which responded to the concerns of the international community as a whole.

64. His delegation wished to place on record that the Constitution of Venezuela prohibited the death penalty, and that, although it had accepted the provision on the subject contained in article 75, on applicable penalties, it had done so out of a desire to achieve consensus and on the understanding that, in considering whether to apply the death penalty, the gravity of the crime, as well as any future review of the applicability of the death penalty, must be taken into account.

65. **Mr. González Gálvez** (Mexico) said that Mexico believed that the creation of a permanent, independent international criminal court was essential in order to provide a legal framework which would eliminate impunity for the authors of serious international crimes. The package just approved offered a good basis for pursuing that objective, although it was clear that much more work would have to be done before it could be considered a consensus document. His delegation had therefore abstained in the vote just taken.

66. Though consultations should have continued until a genuine consensus text had emerged, the Statute of the International Criminal Court did include an adequate amendment mechanism. He regretted the inclusion of a clause prohibiting reservations. Contrary to some arguments, the entering of reservations would enable countries to commit themselves to the objectives of the Court without violating their national legislation, and would not invalidate the contents of the Statute or detract from the responsibilities and obligations assumed by States parties.

67. Specifically, his delegation declared its reservation regarding the deletion of nuclear weapons from the list of prohibited weapons and stated that it intended to raise that issue again when a review conference was convened. In addition, Mexico did not understand the need for a further revision of article 8, paragraph 2 (a), relating to breaches of the Geneva Conventions of 1949, and rejected as inadequate the chapeau of paragraph 2 (b). As a result, it might be obliged to avail itself of the option provided for in article 111 bis when the time came for signature. While his delegation fully accepted the commitments contained in article 8, paragraphs 2 (c) and (d), it could not agree to language that had been drafted in undue haste. Further specific reservations by his delegation pertained to the definition of crimes within the jurisdiction of the Court, which needed to be further developed, and to the powers given to the Court to override national law and authorize the kidnapping of Mexican citizens in order to bring them to trial in foreign countries.

68. In short, the package approved was a compromise one. He believed that the complexity of the subject required the greatest possible transparency in negotiations, and the debate in the plenary had shown that many concerns and differences of opinion remained. He wished to state that, if Mexico had taken part in the vote, it would have had to express reservations with regard to the role of the Security Council and the wording in the chapeau of article 8, paragraph 2 (b), on war crimes.

69. **Mr. Scheffer** (United States of America) said that all Governments represented at the Conference should act in partnership in the pursuit of international justice. Although his delegation was deeply disappointed that some of its fundamental concerns had not been addressed in the Statute of the International Criminal Court, the United States would continue to play a leading role in fulfilling the common duty to bring to justice those guilty of the most heinous crimes. He commended the efforts of all those involved in the Conference, and hoped that they would continue to work together in the future to meet the challenge of establishing international justice.

70. **Mr. Peraza Chapeau** (Cuba) said that his delegation would have liked the Statute of the International Criminal Court to have provided more vigorous measures to punish the perpetrators of genocide and other war crimes. Although it could concur in the adoption of the Statute in the constructive spirit it had shown throughout the process, it greatly regretted that nuclear weapons and other weapons of mass destruction had not been included among those weapons whose use would constitute a war crime. The subordination of the Court to the Security Council would also reduce the Court's independence and efficiency, and would attribute to the Council powers that the Charter of the United Nations did not confer on it.

71. Cuba was grateful to those delegations which had supported its proposal for the inclusion of economic blockades in the list of crimes against humanity listed in article 7. Its support for the Statute did not imply that it was giving up the right to continue to denounce the genocidal war waged against

the Cuban people by an economic blockade. He was convinced that, sooner rather than later, justice would prevail.

72. **Mr. Maharaj** (Trinidad and Tobago) said that the flexibility shown by many delegations in order to avoid impeding the process of establishing the Statute was proof of the political will to create an international criminal court. His own country had shown flexibility by accepting the deferral of a decision on including in the jurisdiction of the International Criminal Court offences related to drug trafficking of a transnational nature.

73. He greatly regretted that Trinidad and Tobago had found itself unable to sign the Statute, largely owing to the lack of consensus regarding the imposition of the death penalty on persons convicted of the most serious crimes. It considered that international law did not prohibit the death penalty, but on the contrary recognized the sovereign right of countries to determine whether or not to impose it. While his delegation was willing to sign the Final Act of the Conference, and would continue to work towards the establishment of an international criminal court, it believed that such a court could be effective only if it had wide support and membership. That wide support could not be achieved unless the Statute recognized the principles of international law and the legitimate concerns of States.

74. **Mr. Alhadi** (Sudan), speaking on behalf of the Group of Arab States, said that the Conference had created a historic document, the signing of which would be a moment of dignity for all humanity. He thanked the Italian Government and all those who had contributed to the establishment of the International Criminal Court.

75. While the Arab States would not stand in the way of the adoption of the Statute of the Court, he felt bound to place on record that they were not convinced by what had been agreed upon. It was regrettable that the Statute included general expressions concerning the crime of aggression, and that it would be many years before the Court could exercise its jurisdiction in that field. The Arab States were afraid that the inclusion of non-international conflicts within the Statute would allow interference in the internal affairs of States on flimsy pretexts.

76. He would have preferred agreement by the international community on criminalizing the use or the threat of use of weapons of mass destruction, including nuclear weapons.

77. The Statute gave the Prosecutor, acting *proprio motu*, a role beyond the control of the Pre-Trial Chamber. The Prosecutor should be under reasonable and logical control, and should not act *ex officio*.

78. The Group of Arab States had expressed their fear that the Security Council might be granted powers that could affect the role of the Court concerning any war criminal, regardless of country, religion, or nationality. The text adopted might increase the powers of the Council over and above those set out in Chapter VII of the Charter of the United Nations. Where the

Council failed to shoulder its responsibilities, the General Assembly should have a role in punishing war criminals. The right to express reservations should also have been granted. The removal of that right by article 109 would be an obstacle to accession.

79. **Mr. Dabor** (Sierra Leone) said that he was happy to note that the Statute preserved jurisdiction over internal armed conflict and provided that the Prosecutor should have *proprio motu* powers. The Conference had achieved a delicate balance that would give the world community a fair and effective permanent court.

80. The success of the Statute would depend on cooperation between States, and he urged all States to maintain the momentum and ensure that the treaty came into force soon.

81. **Mr. Owada** (Japan) said that, after adoption of the Statute, the goal must be to create and foster a court that could function effectively, on the basis of the total confidence of the international community. The task of the Conference had been to reconcile the need to create an objective regime of international justice and the need to construct a flexible system that would enable States to cooperate on a voluntary contractual basis.

82. Accordingly, Japan had sought to introduce under the Statute a transitional regime for the jurisdiction of the International Criminal Court which would apply during the initial period, so that the confidence of States in the impartial and proper functioning of the Court might be built up through experience. That idea, he was happy to see, had been incorporated in article 111 bis of the Statute. His delegation had also contributed to the success of the Conference in the area of financing the Court.

83. The true test of success would ultimately depend upon the cooperation of the international community in making the Court work effectively in practice. The firm political commitment demonstrated throughout the Conference must be further strengthened to secure the future of the Court.

84. **Mr. El Masry** (Egypt) said that his country had been among the first to call for the establishment of the International Criminal Court, because recent history was full of crimes whose perpetrators had gone unpunished. While he supported the text in general, there were some matters that the Statute did not deal with satisfactorily.

85. Nuclear weapons should have been included. He agreed with the statements made by the representative of the Sudan on behalf of the Group of Arab States, and of Lesotho on behalf of the Group of African States. The adoption of article 8, paragraph 2 (b) (xx), meant that any future lists of prohibited arms annexed to the text should include weapons of mass destruction, particularly nuclear weapons.

86. He hoped that a definition of aggression, the basis of all crimes, would be found, and emphasized that the General

Assembly as well as the Security Council should be empowered to determine the existence of aggression.

87. He again stressed the need that the Statute of the Court should contain objective criteria of complementarity. The Prosecutor should not be able to initiate investigations *ex officio*, for practical and legal reasons. With regard to reservations, he hoped that States would be able to agree on a formula which did not affect the main purpose of the Convention.

88. He hoped that the approval of the Statute would mark a new beginning of a human society in which peace reigned, based on justice for all.

89. **Mr. Skelemani** (Botswana) said that, although imperfect, the Statute of the International Criminal Court clearly expressed common values of justice, governing how the human race wanted to live in the future. He had supported the adoption of the Statute because it reflected the consensus of humanity as represented at the Conference.

90. Generations to come should be able to perfect the Statute, and he urged those who felt that the document fell short of their expectations to reflect further and resolve to improve it during the review process.

91. **Mr. Bouguetaia** (Algeria) fully subscribed to the statement made by Sudan on behalf of the Group of Arab States. Algeria had always been committed to the establishment of the International Criminal Court. The text of the Statute of the Court met some, if not all, of his major concerns. He still had some regrets and some fears, but hoped that, with time, those fears would be overcome.

92. **Mr. Saland** (Sweden) speaking on behalf of the Group of Western European and Other States, said that the historic adoption of the Statute of the International Criminal Court marked the realization of an aspiration harboured by humankind for more than 50 years and held out the promise of a better, safer and more just world.

93. **Mr. Ayub** (Pakistan) said that the establishment of the International Criminal Court would, he hoped, act as an effective deterrent to the commission of heinous crimes. It was the duty of every State to see that the perpetrators of heinous crimes committed within its jurisdiction did not go unpunished. However, where there was a total breakdown of State authority, the Court should have jurisdiction to bring the offenders to justice. The Court should, however, complement and not supplant national legal systems or impinge on the sovereignty of the State. However, certain provisions in the Statute were of serious concern to his delegation, as they tended to undermine the basic principle of complementarity.

94. It would also be a negation of the principle of sovereignty if a State's legal system were challenged on the ground that a trial conducted by it was a sham trial intended to protect or shield criminals. Article 89 of the Statute of the Court, dealing with provisional arrest, conflicted with the law of his country.

95. Only a State party, and not the Prosecutor *proprio motu*, should be competent to activate the trigger mechanism, as it alone could determine its competence to deal effectively with cases involving the crimes mentioned in article 5. He was not in favour of any role for the Security Council in relation to the Court, as the Council's influence on the Court would not be conducive to the development of a non-discriminatory and non-selective uniform legal system.

96. It was also essential that reservations should be permitted, for, otherwise, States would be reluctant to become parties to the Statute. He had concerns, too, about the provision on armed conflict not of an international character, as contained in article 8, paragraphs 2 (c) and (d). Such conflicts fell entirely within domestic jurisdiction.

97. While he had serious concerns about the provisions outlined, he did not wish to stand in the way of the consensus that had emerged.

98. **Mr. Westdickenberg** (Germany) said that a strong, effective and independent international criminal court would certainly be established. The world would hear the signal that heinous crimes like genocide, crimes against humanity, war crimes and the crime of aggression would no longer go unpunished.

99. **Mr. Perrin de Brichambaut** (France) endorsed the statement made on behalf of the European Union by the representative of Austria. He would sign the Statute establishing the International Criminal Court because it marked a first, decisive step in establishing a regime of international justice to punish the most serious crimes. France intended to play its full role under all of the provisions of the Statute, including, if the time came, that provided for under article 111 bis.

100. **Mr. Zamir** (Bangladesh) said that he was deeply gratified that the principle of automatic jurisdiction in respect of the core crimes had been vindicated. He welcomed the recognition of sexual violence as amongst the most heinous and repulsive crimes. He was pleased that the basis of harmonious relationship between the International Criminal Court and the organs of the United Nations had been established. However, he regretted that the Conference had not dealt with the question of nuclear weapons and weapons of mass destruction in a way that would respond to the overwhelming concerns of the majority of mankind.

101. He was confident that the Court would help to rally universal support from the international community and help in the move towards an era of peace and justice.

102. **Mr. Gevorgian** (Russian Federation) said that, after more than three years of intense work and effort, an effective, international criminal court had been established that could act fully in accordance with recognized norms and standards of international law and human rights.

103. While noting with satisfaction that a compromise package had been found which he could support, he regretted that it had not been adopted by consensus. Some issues relating to jurisdiction and the Prosecutor, which he and others had favoured, had not been included. He had serious doubts about the 12-month period with respect to consideration by the Security Council. Determination of the existence of aggression must be a matter only for the Council. On the whole, however, he felt that the new International Criminal Court would successfully take its place in the system for the maintenance of international peace and security.

104. **Mr. Bazel** (Afghanistan) said that his country would have suffered fewer atrocities and horrors if such an accord had existed 20 years earlier. Potential aggressors should be aware that they would no longer have impunity. The overwhelming majority of States had spoken in favour of the criminalization of aggression.

105. The Statute of the International Criminal Court offered one way of achieving justice and the rule of law, but he emphasized that a national decision on reconciliation could serve to resolve a conflict and bring normality to a complex situation.

106. **Mr. Idji** (Benin) said that the adoption of the Statute of the International Criminal Court was a major step forward for humanity as a whole and for Africa in particular. Africa had suffered from the most serious violence for decades.

107. He was not entirely satisfied with the text with respect to war crimes, because such crimes were also committed where a State was no longer in place. Where warlords ruled, should those warlords remain unpunished?

108. While not denying the importance of the Security Council's role, he asked whether it was really right and fair that the Council should be able to block international criminal cases.

109. Nuclear weapons should have been outlawed once and for all. He had not gained satisfaction on those points, but nevertheless welcomed the considerable progress achieved. He hoped that all States would work together for the speedy establishment of a strong and credible court.

110. **Archbishop Martino** (Holy See) welcomed the broad agreement on the establishment of an international criminal court to judge the most serious crimes. It was an important step in the long march towards greater justice. He was pleased to note the consensus in introducing the notion of serious crimes into the preamble of the Statute.

111. Consolidation of the rule of law in the international community required a culture of human rights which nurtured the equal dignity of human persons. The establishment of a court to deal with genocide, crimes against humanity, war crimes and aggression must be paralleled by a firm and personal moral commitment to the good of the human family as a whole. The Holy See viewed human dignity as shared by every person, regardless of sex, race, age, ethnic origin or stage in life, from the unborn to the elderly. The Holy See reiterated its condemnation of all violations of international humanitarian law, particularly those aimed at the most vulnerable sections of the civilian population.



112. **Mr. Minoves Triquell** (Andorra) said that the Statute of the International Criminal Court would strengthen the common bonds of humanity. Throughout the centuries, his country had received thousands of refugees from European wars and was aware of the disasters that such wars left in their wake. Hence it had participated vigorously in the Conference. He was greatly satisfied with the result and hoped that it would serve all future generations.

113. **Mr. Sandoz** (Observer for the International Committee of the Red Cross) said that he attached great importance to the establishment of an effective international criminal court. The Statute should make possible effective action by the International Criminal Court against major criminals still at large. Nevertheless, the Statute still needed to be completed, and the possibility of revising it in seven years' time was welcome. He stressed the importance of rapidly drawing up the annex on the use of indiscriminate weapons, especially those of mass destruction. During the first review conference, it should also be possible to introduce punishment for the use of anti-personnel landmines and nuclear weapons.

114. He welcomed the inclusion of non-international conflicts, but regretted the absence of references to the use of famine, indiscriminate attacks and prohibited weapons.

115. The effectiveness of the Court might be impaired, as no war criminal on the territory, or of the nationality, of States that were not party to the Statute could be prosecuted without their agreement. Even for a State party, article 111 bis provided an opportunity, albeit a temporary one, to rule out the competence or jurisdiction of the Court for war criminals.

116. If the Court was to be effective, many States must sign and ratify the treaty. The Court must be given adequate financing, judges, a Prosecutor and personnel of the highest integrity. The key to its success lay in proving its competence and thus gaining the confidence of all. At the same time, efforts must be intensified to implement the universal obligation to prosecute and try war criminals, and to develop national legislation in that area. The International Committee of the Red Cross would continue to provide support through consultative services.

117. **Mr. Pace** (Observer for the World Federalist Movement, on behalf of the NGO Coalition for an International Criminal Court), speaking on behalf of the 800 member organizations of the Coalition, said that the establishment of an international

criminal court would represent a monumental advance, acting as a deterrent and strengthening national legal systems for prosecuting crimes against humanity. It would save millions of humans from suffering unspeakably horrible and inhumane death in the coming decades.

118. **Mr. Sané** (Observer for Amnesty International) said that the common goal of creating an effective, independent, and just international criminal court was much closer to being achieved. There was an independent Prosecutor, empowered to initiate investigations on the basis of information provided by victims. There was a permanent mechanism with competence over the three core crimes. The International Criminal Court would have the power to award compensation to victims. The Statute expressly recognized that rape and other forms of sexual abuse were war crimes and crimes against humanity. However, Amnesty International was disappointed that a few powerful countries appeared to hold justice hostage and seemed to be more concerned with shielding possible criminals from trial than with introducing a charter for the victims.

119. Amnesty International members worldwide would mobilize to ensure that the Court fulfilled its true purpose. They would campaign for universal ratification by opposing interference by the Security Council and by exposing and shaming States which were considering opting out of the Court's competence over crimes committed by their nationals or on their territory. The ultimate goal of an international community dedicated to ending impunity must be universal jurisdiction.

#### Closure of the Conference

120. **The President** said that the Conference had marked a fundamental change in the protection of the human being and the fundamental values of humanity. Only 50 years after the adoption of the Universal Declaration of Human Rights, the international community was warning that it would no longer tolerate those who outraged the individual conscience. On the threshold of the third millennium, participants could take pride in their part in the establishment of the International Criminal Court.

121. He declared the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court closed.

*The meeting rose at 2.10 a.m. on Saturday, 18 July 1998.*



# Summary records of the meetings of the Committee of the Whole

## 1st meeting

Tuesday, 16 June 1998, at 10.20 a.m.

*Chairman:* Mr. Kirsch (Canada)

A/CONF.183/C.1/SR.1

### Opening of the meetings of the Committee of the Whole

1. **The Chairman** declared open the meetings of the Committee of the Whole and welcomed participants. He paid tribute to Mr. Adriaan Bos, Chairman of the Preparatory Committee on the Establishment of an International Criminal Court, for his outstanding contribution to the process that had culminated in the Conference and conveyed to him the Committee's best wishes for a prompt recovery.

### Election of officers

2. **The Chairman** said that Ms. Fernández de Gurmendi (Argentina), Mr. Mochochoko (Lesotho) and Mr. Ivan (Romania) had been nominated as Vice-Chairmen.

3. *Ms. Fernández de Gurmendi (Argentina), Mr. Mochochoko (Lesotho) and Mr. Ivan (Romania) were elected Vice-Chairmen by acclamation.*

4. **The Chairman** said that Mr. Nagamine (Japan) had been nominated for the office of Rapporteur.

5. *Mr. Nagamine (Japan) was elected Rapporteur by acclamation.*

### Organization of work

6. **The Chairman** stressed the need for effective, transparent working methods, involving working groups and informal consultations, in dealing with the more sensitive substantive articles of the draft Statute that still required considerable negotiation, and for flexibility in the planning and execution of the work programme.

### Agenda item 11

**Consideration of the question concerning the finalization and adoption of a convention on the establishment of an international criminal court in accordance with General Assembly resolutions 51/207 of 17 December 1996 and 52/160 of 15 December 1997 (A/CONF.183/2/Add.1 and Corr.1, A/CONF.183/C.1/L.2 and A/CONF.183/C.1/L.3)**

7. **The Chairman** suggested that the Committee should first hear the introduction to part 1 of the draft Statute for the International Criminal Court by the Coordinator for that part, without a discussion, and then proceed to hear the introduction to part 3, followed by a discussion.

8. *It was so agreed.*

### DRAFT STATUTE

#### PART 1. ESTABLISHMENT OF THE COURT

9. **Mr. S. R. Rao** (India), introducing part 1 of the draft Statute, said that that part, covering articles 1 to 4, was not one of the more sensitive, substantive parts of the draft and had not given rise to many differences of view. One outstanding issue, however, was the question of the location of the Court, subject of article 3, which was a policy matter that would require a subsequent political decision.

10. Article 1, a standard provision, differed from that contained in the draft Statute prepared by the International Law Commission to the extent that, on a Norwegian proposal and following informal consultations and agreement, it included a very general reference to the concept of complementarity, in order to meet certain concerns about the symbolism and image of the very first article of the draft Statute. The *nota bene* appended to that article drew attention to the need to maintain drafting consistency throughout the Statute, a point to be borne in mind by the Drafting Committee.

11. Although article 2 on the relationship of the Court with the United Nations was a standard provision that had been left unchanged throughout the drafting process, implicit in it are issues of policy and substance, notably the questions of the Assembly of States Parties and of the financing of the Court, which were dealt with in parts 11 and 12 of the draft Statute.

12. Except on the question of the seat of the Court, there had been general agreement on article 3.

13. Article 4, which had evolved during the drafting process, was an umbrella provision upon which agreement had been reached, establishing in generic terms the international legal personality of the Court and such functional legal capacity as might be necessary, while the specifics of legal personality and questions such as immunities, privileges and structures were dealt with elsewhere in the body of the draft Statute.

14. Subject to any unexpected changes of position, he believed that there was no need for any further consultations on part 1, which, after a decision by the Committee, could be referred to the Drafting Committee.

PART 3. GENERAL PRINCIPLES OF CRIMINAL LAW

15. Mr. Saland (Sweden), introducing part 3 of the draft Statute entitled, "General principles of criminal law", said that the articles under part 3 fell into three categories, those – the majority – which clearly needed more work by legal experts in a working group setting because legal problems had not been analysed in sufficient depth or there was a need for substantial redrafting, those which were ready for the Drafting Committee after a brief discussion, and those which, as a whole or in part, would not benefit from any further technical discussion because they were ripe for bold political decisions; they were those for which an "either/or" option was presented.

16. Article 21 was clearly a case for working group treatment because, although there was agreement on substance, a thorough analysis was still needed on how the principle of *nullum crimen sine lege* would apply to the different types of crimes under the Statute and because there was considerable room for improvement in the drafting.

17. Similarly, more work was needed on article 22, although, again, there was agreement on substance.

18. Under article 23, a major political issue on which political guidance from the Committee was needed was raised in paragraphs 5 and 6, namely, whether legal persons, corporations or criminal organizations, as well as natural persons, should have individual criminal responsibility. Other parts of the article needed further substantive and drafting work. One particular thorny issue was the problem of conspiracy covered by paragraphs 7 (d) and (e) (ii), although he hoped that use of the compromise language of the recently adopted International Convention for the Suppression of Terrorist Bombings might help solve that problem. Finally, as indicated in the *nota bene*, the working group would need to check the references to the mental element in that article; since a position of principle was taken on the *mens rea* in article 29, the general intent would be covered by that article, without any need for mentioning it under article 23. He accordingly suggested that, after a discussion in the Committee, and, if possible, with the Committee's political guidance on the question of legal persons, the article might be referred to the working group.

19. He hoped that the Committee would be able to take a prompt decision on article 24, which was clearly ready for referral to the Drafting Committee. To his mind, it was immaterial whether the two bracketed words were included or deleted.

20. Article 25 referred to the basic question of whether responsibility should extend to military commanders only or to any superior, including civilians. Some political guidance was needed from the Committee in that respect, and once that issue was solved, much of the drafting could readily be dealt with in a working group setting.

21. Article 26 also concerned a difficult issue. There seemed to be a trend in favour of a relatively high age of responsibility.

Some interesting ideas had been put forward about dealing with the matter as a jurisdictional rather than a responsibility issue in the traditional way. A brief debate might give some political guidance on the age-limit question, but the article also needed further consideration in a working group context.

22. Political guidance was also needed on article 27, since the basic question was whether a statute of limitations was included or not. Once that was determined, the drafting could be left to a working group.

23. Under article 28, the role of omission in creating criminal responsibility under the draft Statute raised difficulties because of the very different approaches in the various legal systems. Clearly, more debate was needed among legal experts in the working group or subsequently even in informal consultations.

24. Article 29, which had been the subject of extensive debate in the Preparatory Committee, was a key article and had a bearing on article 23 as well as, for instance, on the definition of genocide. He suggested that article 29, as it stood, might be ready for adoption and forwarding to the Drafting Committee, but submitted that, since the bracketed words "[or omission]" in paragraph 2 (a) referred to the problems arising under article 29, it would be pointless to attempt to solve the problem twice over. The problem might be solved by replacing the words "act [or omission]" in paragraph 2 (a) of the article by "conduct", and by deleting paragraph 4, since it proposed a definition of "recklessness" – a concept which appeared nowhere else in the Statute and was therefore superfluous.

25. The basic question in article 30 was whether both concepts – mistake of fact and mistake of law – should be grounds for excluding criminal responsibility. Since both substantive and conceptual differences were involved, the question needed further discussion among experts in a working group setting.

26. There was now agreement on the use of the term "grounds for excluding criminal responsibility" rather than the term "defences" in the long and difficult article 31. The difficulty in that article and those which followed lay in the very substantial conceptual differences in various legal systems over the definition of such terms as "self-defence" and "necessity". More discussion among legal experts was obviously needed and he therefore urged those interested in the issue to engage in consultations, particularly on paragraphs 1 (c) to (e), so as to assist the working group.

27. Article 32 also clearly required further working group discussion by legal experts.

28. Article 33 was something of an anomaly in that there had never been any textual proposal for the article. It had originally dealt with defences under public international law, such as self-defence under Article 51 of the Charter of the United Nations. There seemed to be growing agreement that the article was not really needed, but he would be willing to continue discussions, perhaps informally, on how to approach it. A focused discussion would be difficult at the current stage, particularly as the issue

was also related to the definition of crimes, and he would therefore suggest returning to it at a later stage.

29. With reference to article 34, in most legal systems there would be a multitude of other grounds for excluding criminal responsibility, some perhaps not even defined; however, for the purposes of the Statute, a "basket" would need to be determined, which could best be done in a working group.

30. Summing up, he suggested that the Committee might wish to focus its discussion on the articles he had indicated as being ready for referral to the Drafting Committee, without prior discussion in a working group setting, especially articles 24 and 29, and on those on which political guidance would be needed, namely article 23, paragraphs 5 and 6, article 25, article 26 and article 27. To save time, the remaining articles should be referred to the working group.

31. The Chairman said he took it that that suggestion was acceptable, on the understanding that all articles except those referred to the Drafting Committee would be extensively discussed in the working group, without the need for enunciating political positions.

#### Article 23. Individual criminal responsibility

##### *Proposal submitted by France (A/CONF.183/C.1/L.3)*

32. Ms. Le Fraper du Hellen (France), referring to article 23, paragraphs 5 and 6, which introduced the concept of the criminal responsibility of legal persons, said that the inclusion of such a concept in the draft Statute had met with resistance on the part of many delegations on the grounds that either the legal systems of their countries did not provide for such a concept or that the concept was difficult to apply in the context of an international criminal court. While understanding that argument, France felt that the Statute should go at least as far as the Nuremberg Charter, which had provided for the criminal responsibility of "criminal organizations"; her delegation was therefore proposing the replacement of the existing paragraphs 5 and 6 by the text before the Committee.

33. The French proposal, which had already been submitted to the Preparatory Committee, was based on five principles. First, the responsibility of a group or organization must be consequent on the previous commission by a natural person of a crime falling within the jurisdiction of the Court. The criminal responsibility of natural persons would not, therefore, be completely dissociated from that of the organization, and the criminal responsibility of criminal organizations clearly did not exclude that of natural persons. There was nothing in the proposal to permit the concealment of individual responsibility behind that of an organization. The second principle, stated in the proposed new paragraph 5, corresponded to a provision in the Nuremberg Charter. The third principle, that a decision by the Court on the criminal nature of an organization was binding on States parties and could not be questioned, would certainly require further discussion. Fourthly, the principle that it was for

States parties to take the necessary steps to give effect to a Court decision to declare that a group or organization was criminal, was also similar to a provision of the Nuremberg Charter. The fifth principle, to which her delegation would return during the discussion on penalties, was that organizations declared criminal by the Court might incur penalties. France proposed that only fines or confiscation of the proceeds of crimes should be imposed. The purpose of her delegation's proposal was to build a bridge between the countries that accepted criminal responsibility for organizations or groups and those that did not.

34. Mr. Sadi (Jordan) expressed support in principle for the French proposal and agreed that organizations behind a criminal act under the Statute should be held responsible and accountable, and also punishable where possible, although he doubted whether the Committee itself could agree on the wording.

35. Mr. Jennings (Australia) said that his delegation was prepared to discuss the interesting proposal with the French delegation. However, although the criminal responsibility of organizations was recognized under domestic criminal law in his country, that was not the case in all countries, and Australia's doubts about the enforcement of any finding of criminal responsibility in relation to organizations remained.

36. Mr. Hu Bin (China) noted that the criminal responsibility of legal persons was reflected in the law of many countries, but urged caution in incorporating such criminal responsibility within the Statute of an international court, and especially in extending the scope of the criminal responsibility of legal persons because of the sensitive political issues involved. In references to the Nuremberg Charter and Tribunal, the Tribunal itself, the specific historical background and the special characteristics of those trials should be taken into account. The inclusion in the Charter of provisions whereby the Tribunal would declare an organization criminal and the fact that it had acted on such provisions had not been intended as a means of prosecuting legal persons or organizations as such. It had, rather, been a special procedure according to which the States concerned, acting upon the Tribunal's declaration, had prosecuted and tried individuals belonging to the organizations declared to be criminal. In the Nuremberg trials, those organizations themselves had not been subject to criminal punishment and the charges had been brought on grounds of individual responsibility. It should also be borne in mind that the trials had been conducted by victorious over defeated countries. The Court under discussion would be established against the background of a complex international political situation that differed sharply from the situation prevailing in 1945. He would therefore be in favour of deleting paragraphs 5 and 6.

37. Mr. Krokmal (Ukraine) said that the French proposal was of great interest to Ukraine, which was prepared to discuss that and any other proposals along similar lines. He was concerned, however, about the implementation of the Court's decision in countries in which the responsibility of criminal organizations was not covered by domestic law, and also about

the implications for the fundamental principle of complementarity on which the draft Statute was built. If paragraphs 5 and 6 were maintained, in whatever form, did that mean that the procedures of countries which could not comply with paragraphs 5 and 6 because their domestic law did not provide for the criminal responsibility of organizations would be considered ineffective or non-existent within the meaning of the complementarity principle?

38. **Mr. Quiróz Pérez** (Cuba) said that the French proposal required further thought because, although his country's legislation accepted the concept of the criminal responsibility of legal persons, the inclusion of such a concept in the Statute of the Court might raise serious problems, in terms of complementarity, for countries that did not. The introduction of the term "criminal organizations" would further raise the question of the interpretation and definition of the terms "legal person" and "criminal organization". He agreed that the Nuremberg Charter and Tribunal must be considered in their historical context. That Tribunal had been created *ex post facto*, at a time when the criminal organizations in question had been identified and accepted as such and had accordingly required no further definition, whereas the Court would be working on a permanent basis to judge acts occurring after its establishment. An accepted, lasting definition of the term would therefore be needed.

39. **Mr. Guariglia** (Argentina) said that his delegation had initially been in favour of the deletion of paragraphs 5 and 6 because the Court was a body directed towards determining individual criminal responsibility. The introduction of the concept of the responsibility of legal persons had proved highly controversial when it had been discussed in the Preparatory Committee and a decision by the Court pursuant to those paragraphs would be very difficult to enforce. However, the French proposal was an interesting one and warranted discussion since it appeared to solve the problem of implementation of the Court's decision by transferring responsibility for implementation to the States parties. It should be noted that in doing so, it would add to the latter's obligations. He agreed with the Cuban contention that a precise definition of a "criminal organization" would be needed.

40. **Mr. Yamaguchi** (Japan) said that his delegation's position was flexible. However, in terms of the punishment of a criminal group, the introduction of the criminal organization concept proposed by France was very welcome. The matter should be further discussed in a working group context.

41. **Mr. Mansour** (Tunisia), welcoming the French proposal, asked whether the criminal organizations in question would be subject to penalties apart from forfeiture of property.

42. **Mr. Onwonga** (Kenya) welcomed the French proposal, which warranted further discussion, notably on enforcement machinery. The existence of legal persons was accepted in all legal systems. Enforcement would depend on who was behind the act in respect of which a complaint had been lodged under the Statute. If an individual were identified, it would be that

individual who would appear on behalf of the legal person, the latter being clearly an artificial creation. Certain organizations that did not have legal status could be regarded as merely providing a cover name under which the individuals were operating, so that those individuals could be held personally liable.

43. **Ms. Bergman** (Sweden) said that her delegation opposed the inclusion in the Statute of the criminal responsibility of legal persons, because the underlying idea of the Court was individual responsibility for criminal acts. The proposal also raised such practical problems as ascertaining who would represent the legal person and what would happen if the representative of the legal person was a natural person who was also indicted for the same act. On the latter assumption, what would be the position if the legal person and the natural person had different interests, and also if the legal person closed down its activities in order to escape criminal responsibility? Such problems would not be solved in a few weeks. With regard to the French proposal, Sweden shared the concerns of other States about problems of enforcement and complementarity.

44. **Mr. Hamdan** (Lebanon) said that his delegation would have great difficulty in accepting the French proposal because the crimes concerned were of a specific and, mostly, political nature and the crimes to be embodied in the Statute were still not clearly defined. Since the responsibility of States had been excluded from the draft Statute, the criminal responsibility of legal persons must likewise be excluded, and responsibility must be restricted to individuals. The political implications of the French proposal would raise difficulties that could not be resolved in the short time available, not to mention the very significant practical problems referred to by other speakers.

45. **Mr. Yee** (Singapore) said he shared the conceptual difficulties of other delegations in following the Nuremberg model. He would rather keep the existing paragraphs 5 and 6, establishing criminal responsibility for legal persons in the same way as for individuals, than adopt the approach of a blanket declaration that an organization was criminal and using that as a basis for the treatment or trial of individuals. The separate treatment of organizations and individuals raised various problems. For example, did the declaration of an organization as criminal subject it to a different regime in relation to certain procedural safeguards built into various parts of the Statute? Several elements of paragraph 6 referred to in the French proposal, especially in relation to the recognition and enforcement of judgements, had counterpart provisions in part 10 of the draft Statute; closer scrutiny was therefore warranted.

46. **Ms. Flores** (Mexico) said that the Court's jurisdiction should extend solely to natural persons, as had always been the understanding; indeed, article 1 of the Statute should be amended to make that clear. The proposed provision to the effect that the Court would determine when a natural person was acting on behalf of a criminal organization would require the establishment of exhaustive standards in order to comply with the principle of

*nullum crimen sine lege*. Furthermore, it would be very difficult for States, especially those in which there was no legal provision for the criminal responsibility of legal persons, to implement a Court decision pursuant to such a provision. Shifting the problem to national legislations would compound the difficulties for States. For practical reasons, therefore, she did not support the French proposal. If delegations considered it important to include the criminal responsibility of criminal organizations in the Statute, a special chapter would be needed, which would be impracticable at so late a stage in the proceedings.

47. **Mr. Niyomrerks** (Thailand) said that the reference to "legal persons" and then "agencies" in the existing paragraph 5 of article 23 was ambiguous and open to different interpretations, raising, for instance, the question of hierarchy in governmental agencies already dealt with in article 25. It would be difficult to adjudicate cases involving legal persons and to impose penalties on such organizations, and the definition of legal persons would vary from one legal system or country to another. Thailand therefore proposed the deletion of paragraphs 5 and 6.

48. With respect to the French proposal, he foresaw difficulties in ascertaining which crimes constituted organized crime or which organizations would be deemed criminal; that would also complicate burden-of-proof requirements.

49. Thailand advocated the inclusion of the crime of trafficking in narcotic drugs in the jurisdiction of the Court and consequently saw the merit of discussing the question of organizations committing such crimes at a later stage in the proceedings.

50. **The Chairman**, summing up the discussion, said that there seemed to be general agreement on the importance of the problem caused by criminal organizations and that most delegations recognized that the French proposal was an improvement over the existing text and warranted some discussion in the working group. Many delegations had difficulty in accepting any reference to "legal persons" or "criminal organizations", the reasons given being the problem of implementation in domestic law, the difficulty of finding acceptable definitions, the implications for the complementarity principle, the possible creation of new obligations for States, and the challenge to what was considered the exclusive focus of the Statute, namely individual criminal responsibility. It had been suggested that article 1 should be more explicit on that subject, and that a distinction should be drawn between the inclusion of the responsibility of criminal organizations in the Nuremberg Charter and the purpose pursued in the Statute of the Court. It was clear that, whatever the ensuing debate, the matter would be discussed further in the working group.

51. **Mr. Rodríguez Cedeño** (Venezuela) expressed misgivings about extending the concept of individual criminal responsibility to legal persons, because not all legal systems accepted that concept and because the purpose of the Court was to bring to

justice natural persons responsible for crimes. He was not sure that replacing the term "legal persons" by "criminal organizations" would solve the problem. He reserved his detailed comments for discussions in the working group.

52. **Mr. Manongi** (United Republic of Tanzania) said that paragraphs 5 and 6 should be retained as they stood, rather than the more broadly worded French proposal. To take a specific example, one of the allegations concerning the genocide in Rwanda was that there had been companies in whose warehouses arms bought with the profits of those companies had been stored and from which they had been distributed, with the full knowledge of the representatives of those companies. Tanzania believed, therefore, that not only should criminal responsibility be attributed to representatives in their individual capacity, but that the entity itself should be held criminally liable, if only by paying fines or by being liquidated.

53. **Mr. Kerma** (Algeria) said that the French proposal was extremely interesting but needed more in-depth discussion in order to clarify certain aspects of the criminal responsibility of criminal organizations.

54. **Mr. Harris** (United States of America) said that his delegation generally endorsed the comments made by the representatives of Sweden, Australia and Singapore. The United States did not necessarily agree that the French proposal, which was broader than the current text, would eliminate the problems in that text; indeed it might create more. His delegation would work towards an acceptable definition of the concepts involved and the establishment of a clear standard of proof in respect of legal persons or criminal organizations, but considered that it would be difficult to reach consensus. Failure to reach consensus must be readily acknowledged in view of the time constraints, and would not in any event seriously undermine the effectiveness of the Court.

55. **Mr. Skibsted** (Denmark), speaking also on behalf of the delegation of Finland, shared Sweden's scepticism about the inclusion in the Statute of the criminal responsibility of legal persons. Denmark's view in principle was that the emphasis in the Statute should be on individual responsibility and that the extension of such responsibility to legal persons would complicate matters unduly, especially with regard to national implementation.

56. **Mr. Al-Sheikh** (Syrian Arab Republic) advocated the deletion of paragraphs 5 and 6 because of the inherent contradiction between the accepted position that States, though legal persons, could not be held criminally responsible and the proposal that other legal persons should be prosecuted. Incorporating the concept of the criminal responsibility of legal persons or criminal organizations into the Statute could create more problems than it resolved, notably in terms of the relevant definitions. The provisions of article 23, paragraph 7, concerning the criminal responsibility of persons aiding and abetting others in committing crimes, would cover the commission of crimes as a whole.

57. **Ms. Daskalopoulou-Livada** (Greece) said that she did not in principle see the need for establishing the principle of criminal responsibility of legal persons under the Statute of the Court, not because Greek law did not provide for the criminal responsibility of such persons, but because there was no criminal responsibility which could not be traced back to individuals. Moreover, she was unconvinced by the argument concerning the precedent set by the Nuremberg trials, since the legal context had been very different.

58. **Ms. Assunção** (Portugal) endorsed the comments made by Greece and Mexico, especially with reference to the principle of *nullum crimen sine lege*. Her delegation would be interested in discussing the issue further in the working group.

59. **Ms. Mekhemar** (Egypt) concurred with those who had referred to the legal difficulties involved. In her view, the criminal responsibility of natural persons might cover that of legal persons, so that the criminal responsibility of legal persons should not be included in the draft Statute. Paragraphs 5 and 6 should be deleted. Although the French proposal was an improvement on the existing text of paragraphs 5 and 6, it did not solve the underlying problems and accordingly did not warrant support.

60. **Ms. Frankowska** (Poland) said she shared the views of Australia, Argentina and Sweden and favoured the deletion of paragraphs 5 and 6. The emphasis in the Statute was on individual criminal responsibility and any extension to legal persons would change its character and would, moreover, raise insurmountable problems in regard to evidence. Substituting "criminal organizations" for "legal persons" would, if anything, be prejudicial, to the extent that it would introduce the vague concept of a group. She also saw inconsistency between acceptance of the responsibility of an organization or group and non-acceptance of the responsibility of States: where would the line be drawn, for example in the case of a one-party Government?

61. **Mr. Penko** (Slovenia) said that if any proposal along the lines of the French draft were accepted, additional provisions would be needed, and not merely one or two paragraphs. Slovenia, for example, had recently introduced the criminal responsibility of legal persons, with some forty provisions on the subject. In view of the time constraints, the only rational solution would be to delete any reference to the criminal responsibility of legal persons and leave the question to future legislators to decide.

62. **Mr. Choi Tae-hyun** (Republic of Korea) expressed support for the French proposal, on condition that the provisions concerning the criminal responsibility of legal persons were strictly limited to two types of penalties – fines and confiscation. In view of the broad scope of the French proposal, more concrete requirements for the punishment of legal persons or criminal organizations should be specified, as should the relationship of the crime to the business carried out by the legal

person and the degree of its involvement in the crimes in question.

63. **Mr. Kellman** (El Salvador) said that, although national legislation in his country provided for the criminal responsibility of legal persons and criminal organizations, he was not in favour of retaining paragraphs 5 or 6. For the reasons given by Mexico, he opposed the French proposal.

64. **Mr. Al-Shaibani** (Yemen) said that he would have difficulty in accepting the French proposal and joined others in seeking the deletion of paragraphs 5 and 6 because of the many difficulties involved in introducing and defining the concept of legal persons or criminal organizations.

65. **Mr. Shariat Bagheri** (Islamic Republic of Iran) said that, although the matter could be given further thought at a later stage, the criminal responsibility of legal persons should not be included in the Statute at the current juncture because of the difficulties arising over definition, interpretation and enforcement. Moreover, since many legal systems had no provision for the concept, its inclusion might discourage accession to the Statute.

66. **The Chairman** said that the debate confirmed the substantive difficulties involved in addressing the criminal responsibility of criminal organizations and said that the matter would now be referred to the working group for consideration.

Article 25. Responsibility of [commanders][superiors] for acts of [forces under their command][subordinates]

*Proposal submitted by the United States of America*  
(A/CONF.183/C.1/L.2)

67. **Ms. Borek** (United States of America), introducing the draft proposal, said that her delegation had had serious doubts about extending the concept of command responsibility to a civilian supervisor because of the very different rules governing criminal punishment in civilian and military organizations. Recognizing, however, that there was a strong interest in some form of responsibility for civilian supervisors, it was submitting a proposal in an endeavour to facilitate agreement. The main difference between civilian supervisors and military commanders lay in the nature and scope of their authority. The latter's authority rested on the military discipline system, which had a penal dimension, whereas there was no comparable punishment system for civilians in most countries. Another difference was that a military commander was in charge of a lethal force, whereas a civilian supervisor was in charge of what might be termed a bureaucracy. An important feature in military command responsibility and one that was unique in a criminal context was the existence of negligence as a criterion of criminal responsibility. Thus, a military commander was expected to take responsibility if he knew or should have known that the forces under his control were going to commit a criminal act. That appeared to be justified by the fact that he was in charge of an inherently lethal force.



68. Civilian responsibility as proposed in subparagraph (b) of the draft was set forth according to a similar basic structure as for military responsibility, with some differences. One was that the superior must know that subordinates were committing a criminal act. The negligence standard was not appropriate in a civilian context and was basically contrary to the usual principles of criminal law responsibility. In addition, civilian supervisors were responsible for their subordinates and the latter's acts only at work and not for acts they committed outside the workplace in their individual capacity, whereas military commanders were responsible for the forces under their command at all times. Lastly, the provision regarding the ability of the supervisor to prevent or repress the crimes took into account the very different nature of civilian accountability mechanisms and the weak disciplinary and administrative structure of civilian authority as opposed to that of the military. In some Governments with well-developed bureaucracies, it was not even possible to dismiss subordinates, and enforcement might be difficult even if they were suspended.

69. **Mr. van der Wind** (Netherlands) endorsed the United States proposal. His delegation proposed in turn to replace the words "intending to" in subparagraph (a) of the existing article 25 by "about to". That terminology was similar to that of the Additional Protocols to the 1949 Geneva Conventions, with which the Netherlands would like to ensure the greatest possible consistency, especially with regard to command responsibility. He understood from informal consultations that there was some support for such an amendment. The text of existing subparagraph (a) would accordingly read: "the commander either knew, or should have known, that the subordinates were committing or about to commit such crimes;".

70. **Mr. Mansour** (Tunisia) said that article 25 was to some extent a repetition of paragraphs 7 (b) and (c) of article 23, and therefore suggested that it should be deleted.

71. **Mr. de Klerk** (South Africa) expressed support for the United States proposal, subject to one comment and a proposed amendment. A commander could have either operational, administrative or complete command. Clearly the reference in article 25 was to operational or full command; he therefore suggested that that aspect should be reflected in the text by substituting "operational commander" for "commander" wherever it occurred and, in subparagraph (a) of the United States proposal, by replacing the words "his or her command" by "such command". With that amendment, a mere administrative commander would be reduced to the level of a civilian superior, whose responsibility was covered by subparagraph (b) of the United States proposal.

72. **Mr. Sadi** (Jordan) expressed support in principle for the main thrust of the United States proposal, commenting that it was necessary to draw a distinction between the *de jure* and *de facto* responsibility of civilian superiors. The hierarchy of civilian superiors could extend as far as the head of State, and the latter could not be made accountable for an act of which

he had no knowledge or for which he did not have direct responsibility. In that connection, there was an inconsistency between the introductory part of subparagraph (b) of the United States proposal, which presumed that the superior was directly privy to the act in question, and subparagraph (b) (ii) which spoke of crimes within the official responsibility of the superior.

73. **Mr. Nathan** (Israel) said he supported the United States proposal in principle, on the assumption that responsibility for the crimes in question should attach equally to military commanders and civilian superiors. Regarding the content of the proposal, he suggested the insertion of the words "or ought to have known" after "knew" in subparagraph (b) (i), thereby establishing the principle that a superior not only had actual knowledge but also what he would term "constructive" knowledge, in other words, being equally responsible for failing to appreciate facts which he or she was in a position to know. He further suggested that the word "activities" in subparagraph (b) (ii) should be replaced by "acts or omissions" because, in the criminal sphere, an omission might be just as criminal as an act itself.

74. **Ms. Wilmschurst** (United Kingdom of Great Britain and Northern Ireland) expressed support for the general thrust of the United States proposal. Her delegation had some detailed substantive points to raise, but hoped that they could be considered in the working group. It supported the proposal of the Netherlands to replace "intending" by "about".

75. **Mr. Penko** (Slovenia) supported the replacement of the original article 25 by the United States proposal. He sought clarification as to whether the criteria listed in subparagraphs (b) (i) to (iv) were cumulative in establishing the criminal responsibility of a civilian superior, or whether they were alternatives.

76. **Mr. Dive** (Belgium) said he supported the United States proposal in principle as a useful compromise suggestion to those delegations, including his own, which favoured equal responsibility for military commanders and civilian superiors. He would reserve his technical comments for the working group discussion.

77. **Mr. Hu Bin** (China), while expressing appreciation to the United States for its proposal, urged a prudent approach to article 25, bearing in mind the very specific conditions that should attach to attributing criminal responsibility to commanders in accordance with the principles of criminal justice. The criminal responsibility of commanders derived from the tribunals resulting from the Second World War, when it had been relatively simple to assess the responsibility of military commanders who clearly had effective control. His delegation was not in favour of expanding the criminal responsibility of commanders to civilian superiors. It would be very difficult, for instance, to make any judgement on the criteria set forth in subparagraphs (b) (ii) and (iii) of the United States proposal. Although precedents for references to the responsibility of superiors existed, for instance in the statutes of the *ad hoc* Tribunals for the Former Yugoslavia

and for Rwanda, they must be seen in a limited time and space context and concerned situations of armed conflict; the word "superiors" in that context could therefore be unambiguously understood as referring to military commanders.

78. **Mr. Dronov** (Russian Federation) said that the United States proposal deserved support for adopting the idea of a differentiated approach to military commanders and civilian superiors; the proposal could serve as a useful basis for discussion in the working group.

79. **Ms. Le Fraper du Hellen** (France) said that the United States proposal was a step in the right direction and constituted an excellent basis for consideration in the working group. The responsibility of hierarchical superiors should cover both military and civilian authorities.

80. **Ms. Flores** (Mexico), commending the United States proposal to further discussion in the working group, said that criminal responsibility should be extended to civilian superiors while differentiating between them and military commanders. Blanket responsibility could not be ascribed to civilian superiors; a direct link must be established between the superior and the person committing the crime in question.

81. **Ms. Ramoutar** (Trinidad and Tobago) expressed support in principle for the United States proposal. Her delegation would

comment further in the course of the working group's discussions.

82. **Mr. Jennings** (Australia) drew attention to the need to bear in mind the work of the ad hoc International Tribunal for the Former Yugoslavia, its statute and the proceedings undertaken in respect of certain persons, specifically Mr. Karadjic and Mr. Mladic. The question had arisen in that Tribunal of the responsibility of a civilian, Mr. Karadjic, and of indictment on the basis of the responsibility of a superior under the relevant article of the statute of that Tribunal. That raised a point that must be addressed in the working group, namely, a situation in which civilians were effectively part of a command structure that involved military or paramilitary forces. The question did not concern a straightforward civilian bureaucracy, but civilians at a high level who were in fact engaged in the command or control of lethal forces. It was important that, in providing for the responsibility of superiors, the drafters of the statute should not omit the possibility of dealing with such persons. With that comment, he welcomed the United States efforts in submitting its proposal.

83. **The Chairman** summed up the discussion, from which it emerged clearly that article 25 was now ready for detailed discussion in the working group.

*The meeting rose at 1.10 p.m.*

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## 2nd meeting

Tuesday, 16 June 1998, at 3.20 p.m.

*Chairman:* Mr. Kirsch (Canada)

A/CONF.183/C.1/SR.2

### Establishment of working groups

1. **The Chairman** said that the Bureau proposed that the following working groups should be established: Working Group on General Principles of Criminal Law, under the chairmanship of Mr. Saland (Sweden), to consider part 3 of the draft Statute; Working Group on Procedural Matters, under the chairmanship of Ms. Fernández de Gurmendi (Argentina), to consider parts 5, 6 and 8; Working Group on Penalties, under the chairmanship of Mr. Fife (Norway), to consider part 7; Working Group on International Cooperation and Judicial Assistance, under the chairmanship of Mr. Mochochoko (Lesotho), to consider part 9; and Working Group on Enforcement, under the chairmanship of Ms. Warlow (United States of America), to consider part 10.

2. *It was so decided.*

### Agenda item 11 (continued)

**Consideration of the question concerning the finalization and adoption of a convention on the establishment of an international criminal court in accordance with General Assembly resolutions 51/207 of 17 December 1996 and 52/160 of 15 December 1997 (A/CONF.183/2/Add.1 and Corr.1)**

#### DRAFT STATUTE

##### PART 3. GENERAL PRINCIPLES OF CRIMINAL LAW (continued)

##### Article 26. Age of responsibility

3. **Mr. Saland** (Sweden), Coordinator for part 3, introducing article 26 on the age of responsibility, said that the issue was complicated by the fact that the age of responsibility varied a great deal from one country to another. Furthermore, in some countries there was a "span" in the later youth years where there was a rebuttable presumption in one direction or the other, or

latitude for the courts to determine responsibility depending on maturity, insight into wrongfulness, etc. Constitutional problems also arose in some countries. From earlier discussions it appeared that it would be easier to agree on a higher age, possibly 18. An interesting suggestion had been to treat the matter not as a responsibility issue but as a jurisdictional one, leaving national legal systems intact, so to speak. It would simply be stated that the International Criminal Court would have no jurisdiction over persons under such and such an age. In order to ascertain the prevailing view of the Committee as a guide to discussion in the working group, he would suggest that delegations should merely indicate their preferences, rather than describing their countries' practices.

4. **Ms. Wilmshurst** (United Kingdom of Great Britain and Northern Ireland) expressed strong support for the "solution" just suggested and proposed stating simply that the Court should have no jurisdiction over persons under the age of 18 at the time of the alleged commission of a crime. That would not prejudice any country's position with regard to the age of responsibility.

5. **Ms. Wong** (New Zealand) said that it was inappropriate for the Court to have jurisdiction over minors, which would require provision for a separate juvenile justice system under the Statute. Supporting the United Kingdom proposal, she stressed that it would not mean that the crimes committed by children would go unpunished or become legalized, but would simply leave national systems intact and enable the limited resources of the Court to be directed towards those who were not minors.

6. **Mr. Sadi** (Jordan) said that the Convention on the Rights of the Child stipulated that children were to be accorded a separate judicial system but did not discuss criminal responsibility. Given the number of people under 18 being recruited or forced into military service in many countries and the mass murders being committed by them, saying that they were not accountable could open the door to abuse.

7. **Mr. Corthout** (Belgium), supporting the proposal that the Court should not have jurisdiction over persons under the age of 18, said that the Court's jurisdiction must be confined to the most essential and important crimes, which would probably not be committed by children.

8. **Mr. Vergne Saboia** (Brazil) said that, in view of Brazilian legislation and the provisions of the Convention on the Rights of the Child, his delegation was in favour of establishing 18 as the minimum age of responsibility, and of excluding jurisdiction for persons under that age.

9. **Mr. Slade** (Samoa) said that the type of provision proposed by the United Kingdom was one which Samoa had consistently supported. His delegation did not think that the Court would be equipped to deal with children.

10. **Mr. Politi** (Italy) said that his delegation had noted the increasing support in the Preparatory Committee on the Establishment of an International Criminal Court for setting the age of criminal responsibility at 18 years, and favoured that

approach for reasons of consistency not only with the principles enshrined in the Convention on the Rights of the Child but also with the essentially punitive rather than rehabilitative function of the Court. The proposal to resolve the problem by treating it as a jurisdictional matter warranted consideration. He drew attention in that connection to footnote 3 to article 75 of the draft Statute.

11. **Ms. Assunção** (Portugal), endorsing the comments of the representatives of the United Kingdom, New Zealand, Brazil and Italy, said that in the light of the Beijing Rules and other international instruments, persons under the age of 18 should be excluded from the jurisdiction of the Court.

12. **Ms. Gartner** (Austria) said that her delegation had difficulties with the concept of 18 years as the age of responsibility, and that treatment of the issue as a jurisdictional matter did not help much. Many of the crimes in question were committed by persons under the age of 18. Her delegation would favour establishing the age of criminal responsibility at 16, with a rebuttable presumption as to the maturity of those concerned for persons between 16 and 18.

13. **Ms. Flores** (Mexico) considered that the right age for criminal responsibility was 18, and supported the proposal to state simply that the Court would have no jurisdiction over minors under that age. A clause could be added to make clear that that was without prejudice to domestic legislation.

14. **Mr. Harris** (United States of America) shared Austria's concern about excluding younger offenders from the jurisdiction of the Court because of recent experience showing to what extent young people were involved in committing the serious crimes covered by the Statute. From a practical point of view, the Prosecutor would in many cases have to prosecute lower-level persons in order to obtain their cooperation in seeking out those who had directed and orchestrated the atrocities, and that might prove very difficult if persons under the age of 18 were being categorically excluded from prosecution by the Court. Should there be no consensus on the type of provision proposed by Austria, however, and in view of the time constraints, his delegation could accept a provision along the lines of that proposed by the United Kingdom, but would not wish to see the age of responsibility set any higher than 18.

15. **Mr. Pérez Otermin** (Uruguay) said that his delegation considered 18 years to be the right age for criminal responsibility. Although the criminal activities of minors under that age had risen very considerably, he agreed with the representative of New Zealand that that should not fall within the jurisdiction of the Court but should be left to national jurisdiction and legislation.

16. **Mr. Guariglia** (Argentina) agreed that the Court should not have jurisdiction over minors under 18 years of age. The exclusion of persons under the age of 18 from the Court's jurisdiction would be a practical way of resolving the difficulties that had arisen in the Preparatory Committee, and the age of 18 did have some international status since it was the age ceiling

specified in article 1 of the Convention on the Rights of the Child. It would be difficult to reach agreement on a lower limit.

17. **Mr. Agius** (Malta) agreed with previous speakers that 18 should be considered the age of criminal responsibility and that minors under that age should be excluded from the jurisdiction of the Court.

18. **Ms. Frankowska** (Poland) said that her delegation joined others in endorsing the United Kingdom's statement, favouring the proposal to treat the issue as a jurisdictional one and considering that 18 would be the right age.

19. **Mr. Strohmeier** (Germany) endorsed the views expressed by the delegations of the United Kingdom, New Zealand and Argentina. The Court's purpose was to try the main perpetrators and instigators of crimes, and it was not fully equipped to deal with juvenile offenders. He agreed that the relevant age should be 18 years.

20. **Mr. Stigen** (Norway) said that his delegation supported the proposal put forward by the United Kingdom.

21. **Mr. Kellman** (El Salvador), supported the United Kingdom delegation's statement. The Court should have no jurisdiction over minors under 18 years of age and should leave national law to deal with any children who committed crimes of the kind in question.

22. **Mr. Koffi** (Côte d'Ivoire) expressed his preference for an age "span". He was well aware that children – some very young – were sometimes used for activities of the kind covered by the Statute, but the primary responsibility then lay with the adults who made use of those children. While he noted with interest the possibilities mentioned by the representative of Sweden, he would favour the text contained in proposal 2 under article 26 of the draft Statute.

23. **Mr. Al-Sheikh** (Syrian Arab Republic) said that his delegation considered that 18 was the right age for criminal responsibility. National legal systems varied in regard to the minimum age of responsibility and penalties for juveniles according to their age. Since international instruments such as the Convention on the Rights of the Child and the Beijing Rules laid down special provisions for minors, the Court should have no jurisdiction over such persons. The Prosecutor would then not need to prove that persons under 18 were aware of the implications of their acts.

24. **Mr. Imbiki** (Madagascar) thought that 18 years should be the age of criminal responsibility, meaning absolute responsibility. However, between the ages of 16 and 18 a perpetrator could be considered as having either "absolute" irresponsibility (and hence not being liable for prosecution) or "relative" irresponsibility, meaning that it was for the Prosecutor to assess whether the alleged perpetrator was able to understand the implications of the crime committed and therefore liable to prosecution.

25. **Ms. Suchar** (Israel) said that a distinction needed to be drawn between responsibility and sentencing. Young people aged 16 were well aware of the wrongfulness of the kinds of crime in question, and the age of responsibility should therefore be 16 so that adults could not take advantage of them and use them to commit such crimes. However, young people between the ages of 16 and 18 should be subject to more lenient penalties than those imposed on adults.

26. **Mr. Al Ansari** (Kuwait) suggested that a comparative table showing the age of responsibility in different States should be produced to give delegations a clearer idea of the situation in different countries. With reference to paragraph 1 under proposal 1, the final clause in square brackets concerning proof that the person knew the "wrongfulness" of his or her conduct was imprecise and would be best deleted.

27. **Mr. Kerma** (Algeria) said that the age of criminal responsibility in his country was 18 and his delegation therefore supported the idea that the Court should not have jurisdiction over persons under that age.

28. **Mr. Niyomrerks** (Thailand) said that his delegation considered that maturity could vary from one person to another, and that whoever committed a serious crime under the jurisdiction of the Court should be convicted and sentenced, with special consideration and mitigation being accorded in the case of a minor. In the interests of avoiding controversy and saving time, however, it would accept the proposal that the Court should not have jurisdiction over minors under 18 years of age.

29. **Mr. Onwonga** (Kenya) said that there seemed to be an emerging consensus that 18 years should be the age fixed, a position he supported because persons below that age might not be acting with full intent and might be under the influence of others, who should be held responsible.

30. **Mr. Choi Tae-hyun** (Republic of Korea) thought that the age of criminal responsibility should be 18. However, some procedure was needed in the case of crimes committed by minors under the age of 18, different from the procedures applied to adult criminals. The Israeli delegation had rightly drawn attention to that issue. The Court could hardly deal with all child criminals, but a solution might lie in giving the Prosecutor discretion.

31. **Mr. Shariat Bagheri** (Islamic Republic of Iran) said that his delegation was in favour of establishing the age of 18 as the age of criminal responsibility, but suggested that, in exceptional circumstances, the Court should be competent to punish persons aged between 15 and 18 who were aware that their behaviour was wrongful. The lower limit should not, however, be below 15 years of age.

32. **Mr. Krokhmal** (Ukraine) expressed support for the United Kingdom proposal. Treating the matter as a jurisdictional one would be an elegant solution to the problem. However, the

relevant provision could perhaps be placed in part 2 of the Statute, concerning jurisdiction.

33. **Mr. Kambovski** (The former Yugoslav Republic of Macedonia) fully supported the principle of excluding persons under the age of 18 from the jurisdiction of the Court, in view of the differences between legal systems and the need, if the Court's jurisdiction over minors was accepted, to include many special substantive and procedural provisions in the Statute, in accordance with the Convention on the Rights of the Child and other international instruments.

34. **Mr. Rodríguez Cedeño** (Venezuela) said that the exclusion of minors under 18 years of age from the jurisdiction of the Court would be the most appropriate approach. The age of 18 was consistent with the definition in article 1 of the Convention on the Rights of the Child. Minors under 18 years of age did indeed commit serious crimes, but there were domestic courts to deal with such cases.

35. **Mr. Al-Jabry** (Oman) said that, although it was true that children were engaged in military activities and use was made of them to commit war crimes, it was those who had command over them who should be responsible for such acts. His own country's legislation had special provisions applicable to juvenile offenders. His delegation considered that the age for criminal responsibility should be 18.

36. **Mr. Piragoff** (Canada) said that the proposal of the United Kingdom to treat the issue as a jurisdictional rather than as a responsibility issue would overcome the many difficulties arising out of differences between legal systems and would enable the debate to be refocused. His delegation associated itself with that proposal.

37. **Mr. Hamdan** (Lebanon) said he shared the views of those who favoured excluding minors under the age of 18 from the Court's jurisdiction. The Court's absence of jurisdiction over minors would not affect the responsibility of juvenile offenders under national legislation. The question of responsibility was distinct from that of the jurisdiction of the Court. He agreed that it would be difficult to reach consensus on wording that would cover all cases of children under the age of 18. He stressed the need for consistency with the various international instruments.

38. **Mr. Hersi** (Djibouti) endorsed the proposal that the Court should not have jurisdiction over persons under the age of 18.

39. **Mr. Sadi** (Jordan) thought that the reference to the age of responsibility in article 26 should be deleted and that the matter should be treated as a jurisdictional issue. The wording of the article should be confined to a simple statement to the effect that the Court would not have jurisdiction over a crime committed by a person under the age of 18.

40. **Mr. Skibsted** (Denmark) said that he agreed with the majority view that the age limit should be set at 18 years.

41. **Mr. Penko** (Slovenia) noted that although many delegations were in favour of setting the age limit at 18, some delegations preferred a limit of 16. Taking into account draft article 9 on the acceptance of the jurisdiction of the Court, a compromise solution might be to provide for the Court to have no jurisdiction over juveniles under 16 years of age, and in article 9 allow States parties to lodge a declaration which would mean that for them the age of responsibility was 18 years.

42. **Mr. Saenz de Tejada** (Guatemala) agreed that the Court should have no jurisdiction over crimes committed by minors under the age of 18, and supported the United Kingdom proposal.

43. **Mr. Díaz Paniagua** (Costa Rica) said he did not think that the suggested addition to article 9 would solve the problem. Costa Rica was inclined to favour the United Kingdom proposal, leaving cases of minors under the age of 18 to domestic legal systems, but the Court should be able to intervene when such systems were ineffective.

44. **The Chairman**, summing up the debate, said that there was a wide diversity in State practice with regard to the age of criminal responsibility and in delegations' preferences regarding article 26. In view of the difficulties, there had been support for the proposal to exclude persons under 18 from the jurisdiction of the Court. Some delegations had disagreed with that idea, but the working group now had a basis for further discussion.

#### Article 27. Statute of limitations

45. **Mr. Saland** (Sweden), Coordinator for part 3, introducing article 27 ("Statute of limitations"), drew attention to the many different proposals contained in the draft prepared by the Preparatory Committee on the Establishment of an International Criminal Court. The fundamental question, in the case of the "core" crimes, was whether a statute of limitations was to be included or not. The majority view seemed to be that there should be no statute of limitations for core crimes, though the picture was more diverse if jurisdiction were to extend to other crimes such as those known as "treaty crimes"

46. **Mr. Imbiki** (Madagascar) said he understood the agreed approach to be that the Court's jurisdiction should come into play only when national jurisdictions were unable or unwilling to judge cases. Practices regarding the statute of limitations varied, and in order to be able to take a decision on the question of a statute of limitations it might be necessary first to decide which matters would fall within the purview of the Court.

47. **Ms. Le Fraper du Hellen** (France) said that her delegation considered that there should be no statute of limitations for genocide and crimes against humanity, but that a limitation period – perhaps of 10 or 20 years – would be appropriate for war crimes as they were defined in the draft Statute. France had been responsible for the proposal given as proposal 4 in the draft text for article 27, but was flexible and thought that proposal 4 could perhaps be combined with proposal 1. She

agreed that it was important to bear in mind the complementarity between the Court and national jurisdictions.

48. **Mr. Choi Tae-hyun** (Republic of Korea) said that, given the grave nature of the core crimes, his delegation considered that there should be no statute of limitations, and accordingly supported proposal 2. However, a statute of limitations would be necessary for offences such as those covered by article 70.

49. **Mr. Al-Sheikh** (Syrian Arab Republic) said that crimes against humanity, which caused lasting suffering and lingered on in the memories of succeeding generations, should not be subject to time limitation. Whether or not such crimes were covered by a statute of limitations in national legislation, the Statute of the Court should maintain the right of humanity to prosecute the perpetrators, irrespective of the principle of complementarity.

50. **Mr. Yamaguchi** (Japan) said that his delegation would not insist on a statute of limitations, but believed that there should be a safeguard such as that provided for in proposal 3, to protect the rights of the accused to a fair trial.

51. **Mr. Mansour** (Tunisia) said that the 1949 Geneva Conventions emphasized the importance and seriousness of crimes against humanity, war crimes and genocide. Such crimes should not be subject to any statute of limitations.

52. **Ms. Shahan** (Libyan Arab Jamahiriya) said that all the crimes which fell within the jurisdiction of the Court were serious crimes that should not be subject to a statute of limitations. Her delegation, therefore, favoured proposal 2. There should, however, be no confusion between crimes falling under national and international jurisdiction.

53. **Mr. Vergne Saboia** (Brazil) said that, although Brazilian criminal legislation provided for varying limitation periods for different crimes, Brazil could accept the proposal that there should be no statute of limitations for crimes within the inherent jurisdiction of the Court.

54. **Mr. Riordan** (New Zealand) said that, as had been pointed out, the crimes in question were very serious ones. Moreover, they were often committed by persons who might, for example, be State officials and therefore have a unique capacity to suppress evidence. Since the purpose of the Court was to put an end to impunity, New Zealand considered that there should be no statute of limitations.

55. **Mr. Quiróz Pérez** (Cuba) said that limitation periods existed for procedural or even humanitarian reasons, but that they could not apply to the most heinous crimes. The principle of complementarity meant that, once a national court had handed down a decision against a person tried, the case could not then come to the Court; when, however, a matter fell within the Court's jurisdiction, there could be no statute of limitations.

56. **Mr. Agius** (Malta) agreed that there should be no statute of limitations on the crimes within the jurisdiction of the Court, for the reasons given, in particular, by the New Zealand delegation.

57. **Mr. Guariglia** (Argentina) expressed support for proposal 2. A single rule should apply to all crimes within the jurisdiction of the Court, without distinction.

58. **Mr. Rodríguez Cedeño** (Venezuela) said that the draft Statute dealt with a unique category of crimes, and that there should be no statute of limitations for such crimes, regardless of any of limitation periods in domestic legislation.

59. **Mr. Kambovski** (The former Yugoslav Republic of Macedonia) said that there should be no statute of limitations on the crimes within the jurisdiction of the Court, in accordance with the United Nations Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.

60. **Mr. Al Awadi** (United Arab Emirates) said that his delegation supported proposal 2, in view of the nature of the crimes in question. National law might provide for periods of limitation, but no limitation should apply to the Court.

61. **Mr. Al Ansari** (Kuwait) said that the crimes which fell within the purview of the Court constituted a threat to peace and there should be no statute of limitations for them. His delegation therefore favoured proposal 2.

62. **Mr. Gómez Méndez** (Colombia) said that his delegation supported proposal 2, because of the seriousness of the crimes in question.

63. **Ms. Connelly** (Ireland) said that the serious crimes under discussion did not include the offences covered by article 70. There should be no time limit on culpability in respect of the heinous crimes within the jurisdiction of the Court. Her delegation supported proposal 2. She was sympathetic to the view expressed by the representative of Japan that the accused's right to a fair trial should be safeguarded, but considered that that issue should be dealt with elsewhere than in article 27.

64. **Mr. Niyomrerk** (Thailand) said that his delegation also favoured proposal 2. The jurisdiction of the Court over core crimes should be universal.

65. **Mr. de Klerk** (South Africa) supported proposal 2 for the reasons given by other speakers. Swift justice was important, but that did not mean that a limitation period was justified. All States with statutes of limitations would do well to look at their statute books to avoid the danger of finding themselves without jurisdiction because of the effect of such limitations.

66. **Ms. Tomič** (Slovenia) agreed that there should be no statute of limitations for the core crimes under the Court's jurisdiction, given the nature and gravity of those crimes.

67. **Ms. Ramoutar** (Trinidad and Tobago) said that her delegation supported proposal 2 and believed that there were sufficient safeguards within the Statute to take care of the rights of accused or suspected persons.

68. **Mr. Sadi** (Jordan) supported the view that there should be no statute of limitations, but suggested that the need for speedy prosecution of persons charged with crimes should be taken into account by wording to the effect that every effort must be made to expedite the prosecution of persons charged with the commission of crimes under the Statute.

69. **Mr. Onwonga** (Kenya) said that his delegation favoured proposal 2. As to whether an accused would have a fair trial, that would be dealt with in the first place by the Pre-Trial Chamber and then by the Prosecutor, who, at the end of his case, might ascertain whether there was evidence to proceed or not. The introduction of a statute of limitations would reward a criminal who went underground for a number of years to escape prosecution.

70. **Mr. Fadl** (Sudan) expressed support for proposal 2.

71. **Mr. Hu Bin** (China) said that he supported proposal 4 on the grounds that, whereas there should be no statute of limitations for crimes against humanity, genocide and the crime of aggression, war crimes were another matter; there should be a statute of limitations for violations of the laws of war.

72. **Mr. Balde** (Guinea) said that one of the purposes of the Court was to ensure that the most odious crimes did not go unpunished. It would be illogical to allow those who committed crimes against humanity to escape prosecution by the Court after the passage of a certain period of time. Proposal 2 was therefore the most appropriate one.

73. **Ms. Flores** (Mexico) said that there should be no statute of limitations for such serious crimes as genocide, crimes against humanity and war crimes. There should be no distinction between war crimes and other core crimes within the jurisdiction of the Court.

74. **The Chairman**, summing up the debate, said that many delegations were opposed to a statute of limitations with respect to core crimes, although some distinguished between war crimes and other core crimes. While some delegations thought that the complementarity principle was relevant to the issue, others disagreed in view of the seriousness of the crimes in question. Related issues such as the need to ensure a speedy and fair trial had been raised, as had the point that offences under article 70 should be dealt with differently.

#### Article 24. Irrelevance of official position

#### Article 29. *Mens rea* (mental elements)

75. **The Chairman** recalled that, at the previous meeting, the Coordinator for part 3 had proposed that articles 24 and 29 should be referred to the Drafting Committee, after a brief

discussion if necessary. Could those articles now be referred to the Drafting Committee?

76. **Mr. Saland** (Sweden), Coordinator for part 3, said that he had proposed replacing the words "act [or omission]" in paragraph 2 (a) of article 29 by the word "conduct" and deleting paragraph 4 of that article.

77. **Ms. Flores** (Mexico) said she thought that the question of deleting paragraph 4 of article 29 required further discussion.

78. **The Chairman** said that open questions would be referred to the working group.

79. **Mr. Harris** (United States of America) suggested that the Drafting Committee should consider whether the problem discussed in relation to "act [or omission]" in paragraph 2 (a) of article 29 also arose with regard to the term "physical elements" in paragraph 1 of that article. Secondly, the language of paragraph 2 (b) and paragraph 3 might be harmonized.

80. **The Chairman** said that those suggestions would be taken into account by the Drafting Committee.

81. **Mr. Hamdan** (Lebanon) asked whether paragraph 4 of article 29 would go to the working group or the Drafting Committee.

82. **Ms. Flores** (Mexico) said she took it that paragraphs 1, 2 and 3 of article 29 would go to the Drafting Committee and that the rest would be discussed in the working group.

83. **The Chairman** said that that was his understanding.

#### PART 1. ESTABLISHMENT OF THE COURT (*continued*)

84. **The Chairman** recalled that part 1 had been introduced by the Coordinator for part 1, Mr. S. R. Rao (India), at the previous meeting.

85. **Mr. van der Wind** (Netherlands) confirmed his country's presentation of the candidacy of the city of The Hague as the seat of the Court and expressed gratitude for the many expressions of support it had received, including that of its European partners. His Government reiterated its full commitment to doing everything in its power to serve as an effective host of the Court. Taking into account the support received and the fact that, to his knowledge, no other candidacies had been submitted, his delegation proposed that the candidacy of The Hague should be reflected in the text of article 3, paragraph 1, of the draft Statute.

86. **Mr. Politi** (Italy) felt that part 1 on the establishment of the Court could be forwarded to the Drafting Committee. Questions of substance would be resolved by the choices made under parts 2, 11 and 12 of the draft Statute, and he stressed the importance of coordination between part 1 and other parts. On article 2, Italy favoured an agreement between the Court and the United Nations rather than the integration of the Court into the United Nations system. The former option was consistent with

provisions adopted in respect of other international jurisdictions and would better safeguard the independence of the Court. Italy also attached considerable importance to article 4, paragraph 2, on the status and legal capacity of the Court. Lastly, it thanked the Netherlands for offering The Hague as the seat of the Court.

87. **Ms. Fernández de Gurmendi** (Argentina) agreed fully with the previous statement and likewise thanked the Netherlands for its offer to host the future Court. With the appropriate addition to article 3, paragraph 1, the whole part could be referred to the Drafting Committee.

88. **Mr. Jennings** (Australia) endorsed the statements made by the delegations of Italy and Argentina.

89. **Mr. Al-Sheikh** (Syrian Arab Republic) said that his delegation also wished to see the reference to The Hague included in article 3 and the whole of part 1 forwarded to the Drafting Committee, subject to some amendment to the wording of the first part of article 1 in the Arabic version, in which the term used for bringing persons to justice was too restrictive.

90. **Mr. García Labajo** (Spain) agreed that part 1 could now be referred to the Drafting Committee, but suggested the addition, at the end of the second sentence of article 1, of a reference to "other provisions" adopted in accordance with the Statute – an implicit reference to the Rules of Procedure and Evidence and the Regulations of the Court.

91. **Mr. Mochochoko** (Lesotho), welcoming the offer of the Netherlands to host the Court, agreed that part 1 could now be forwarded to the Drafting Committee.

92. **Mr. Sadi** (Jordan) suggested that the language of article 1 should be simplified and also that the words "and national" should be inserted before "concern".

93. **Mr. Mansour** (Tunisia) said he agreed with the delegation of the Syrian Arab Republic that the Arabic version of article 1 should be amended.

94. **Mr. Cafilisch** (Switzerland), **Mr. El Masry** (Egypt) and **Ms. Vega Pérez** (Peru) agreed that, with the inclusion of The Hague as the seat of the Court, part 1 could be forwarded to the Drafting Committee.

95. **Ms. Flores** (Mexico) said that some provisions called for further discussion. At the 1st meeting, in connection with article 23, her delegation had proposed that article 1 should be amended to make it clear that the Court's jurisdiction extended only to individuals, or "natural persons". That article should not, therefore, be referred to the Drafting Committee until its scope had been determined. Furthermore, while she agreed that the reference to The Hague should be inserted in article 3, paragraph 1, paragraph 3 of that article also called for further discussion, either in the Committee or in the working group.

96. **Mr. Al Ansari** (Kuwait) agreed that the wording of the Arabic version of article 1 should be amended. He thanked the Netherlands for offering to host the Court in The Hague.

97. **Mr. Skibsted** (Denmark) advocated the referral of part 1 to the Drafting Committee as it stood, and welcomed the offer by the Netherlands to host the seat of the Court.

98. **Mr. Choi Tae-hyun** (Republic of Korea) said that there seemed to be an inconsistency between article 2, which spoke of approval by the States parties to the Statute, implying each and every State party, and article 3, paragraph 2, which spoke of approval by the Assembly of States Parties, implying a majority decision.

99. **Mr. Al Awadi** (United Arab Emirates) welcomed the offer by the Netherlands to host the seat of the Court in The Hague. Article 3, paragraph 3, should be made more explicit before being referred to the Drafting Committee. What exactly were the powers and functions which the Court might exercise on the territory of any State party?

100. **Ms. Daskalopoulou-Livada** (Greece) expressed the view that part 1 as a whole was ready to be sent to the Drafting Committee. Her delegation would strongly oppose inserting the words "and national" in the phrase "crimes of international concern". National concerns were covered by the second part of the sentence, which said that the Court would be complementary to national criminal jurisdictions. It was over crimes of international concern that the Court should have jurisdiction.

101. **Ms. Wilmshurst** (United Kingdom of Great Britain and Northern Ireland) said that her delegation would be in favour of forwarding the whole of part 1 to the Drafting Committee, subject to the completion of article 3, paragraph 1, as proposed. It would prefer to leave the question of a reference to individuals in article 1, as proposed by Mexico, open pending the final drafting of part 3; that need not delay referral to the Drafting Committee. The Mexican delegation had not indicated what changes it wished in article 3, paragraph 3. In that same paragraph, the concern expressed by the United Arab Emirates might be met by inserting "in accordance with this Statute" or "under this Statute" to make it clear that the reference was to the powers given by the Statute. The point made by the Republic of Korea about the discrepancy between article 2 and article 3 was well taken. She assumed that it was the Assembly of States Parties that was intended in both cases, but perhaps the Drafting Committee might consider the matter and make an appropriate recommendation to the Committee of the Whole.

102. **Mr. Madani** (Saudi Arabia) expressed support for establishing the seat of the Court at The Hague. With reference to article 3, paragraph 3, he agreed with the United Arab Emirates about the ambiguity of that paragraph, which should make clear how the Court might exercise its powers and functions on the territory of any State party.

103. **Mr. Quiróz Pérez** (Cuba) said that article 1 was closely related to the articles which defined the crimes within the jurisdiction of the Court. The phrase "the most serious crimes of international concern" would give rise to differences of interpretation, and should be amended to read "the crimes laid



down in the Statute” or “defined in the Statute”. He also had misgivings about the vague wording of article 3, paragraph 3. The “powers and functions” and “special agreement” referred to needed to be specified.

104. **Ms. Willson** (United States of America) expressed support for the articles in part 1 as currently drafted and amended to take account of the welcome offer by the Government of the Netherlands. The representative of the Republic of Korea had rightly drawn attention to a discrepancy between article 2 and article 3 which could be rectified by bringing the wording of the former into line with that of the latter. The proposal to add a reference to “other provisions” deriving from the Statute at the end of article 1 warranted careful examination; any such additional provisions would perhaps need to be spelt out.

105. **Mr. Niyomrerks** (Thailand) expressed support for the establishment of the seat of the Court in The Hague.

106. **Mr. Rodríguez Cedeño** (Venezuela) said that Mexico’s request for the inclusion of a reference to individuals in article 1 was appropriate, but the matter could be left pending until the finalization of part 3. Cuba, too, was right in stating that the crimes referred to in that article were those laid down in the draft Statute and that the current wording might give rise to difficulties, but that was a drafting matter, as was the reference to States parties in articles 2 and 3. Article 3, paragraph 1, should be completed by the reference to The Hague, the Netherlands, and note should be taken of the proposal by Spain to add a reference to provisions deriving from the draft Statute at the end of article 1. Subject to those drafting points, part 1 was ready for referral to the Drafting Committee, with the exception of article 3, paragraph 3, on which Mexico had expressed concerns and the United Kingdom had made a proposal.

107. **Mr. Al-Sheikh** (Syrian Arab Republic) said he shared the concerns of the United Arab Emirates about article 3, paragraph 3. The title of the article was “Seat of the Court”: if what was meant by paragraph 3 was that the Court could hold sessions in a State party, that should be spelt out, but if it was a question of exercising powers and functions in general, they should be specified and included in the appropriate part of the Statute. Article 1 was unduly wordy, and unnecessarily restated what was already in the preamble. It would suffice to say that the Court had the power to bring persons to justice for crimes under the Statute.

108. **Mr. Dronov** (Russian Federation) endorsed the proposed addition to article 3, paragraph 1, to reflect the generous offer of the Netherlands to host the Court. Only minor problems remained to be settled in respect of part 1, which could soon be referred to the Drafting Committee. Article 1 had the merit of having been worded in such a way as to be applicable irrespective of the final decision on part 3, but he would see no difficulty in amending it subsequently to take account of such a decision. The point made by the Republic of Korea was well taken; the reference in both cases should be to the Assembly of

States Parties. Any ambiguity in the wording of article 3, paragraph 3, could be clarified by adding the words “in accordance with this Statute” after “State Party”.

109. **Mr. Cherquaoui** (Morocco) said he shared the views of previous speakers on the need to amend the Arabic version. He would also prefer the crimes referred to in article 1 as being “of international concern” to be specified in order to avoid any misinterpretations. With regard to article 3, paragraph 3, he likewise agreed that clarification was needed as to whether the Court’s exercise of its powers and functions referred to the holding of sessions in other States parties or had some other meaning.

110. **Mr. Palihakkara** (Sri Lanka), while agreeing that the text of part 1 should be sent to the Drafting Committee as soon as possible, with the relevant amendment to article 3, paragraph 1, concerning the seat of the Court, expressed support for Cuba’s suggestion that the crimes mentioned in article 1 should be specified by reference to the Statute. He further supported the United Kingdom’s suggestion to clarify article 3, paragraph 3, by adding “in accordance with this Statute”, although that paragraph was perhaps out of place under article 3 and might be more appropriately inserted under article 4 or as a separate paragraph.

111. **Ms. Wong** (New Zealand) thought that article 2 (subject to the replacement of “States Parties” by “Assembly of States Parties”), article 3, paragraphs 1 and 2, and article 4 could be referred to the Drafting Committee, leaving only article 1 and article 3, paragraph 3, to be debated further.

112. **Ms. Frankowska** (Poland) felt that part 1 was ready to be forwarded to the Drafting Committee. Perhaps article 3, paragraph 3, should be placed after article 4.

113. **Mr. Tran Van Do** (Viet Nam), endorsing the proposal to establish the seat of the Court in The Hague, said that he was in favour of leaving article 3, paragraph 3, as it stood.

114. **The Chairman**, summing up the discussion, said that, although most delegations seemed to feel that part 1 as a whole should be referred to the Drafting Committee, that view was not shared by all delegations. There appeared to be agreement that, subject to the addition of the reference to The Hague, article 3, paragraph 1, could be referred to the Drafting Committee, as could article 4, as well as article 2 and article 3, paragraph 2, in which the question raised did indeed appear to be merely a drafting matter. Positions were evidently divided on article 1 and article 3, paragraph 3, between those who considered that they were settled in substance and could be finalized by the Drafting Committee and those who felt that substantive questions remained to be resolved. He therefore suggested that interested delegations should discuss those issues informally without delay. If those contacts were successful, those matters could then be also referred to the Drafting Committee; if not, it might be necessary to refer the issues to a working group.

*The meeting rose at 6.15 p.m.*

### 3rd meeting

Wednesday, 17 June 1998, at 10.25 a.m.

*Chairman:* Mr. Kirsch (Canada)

A/CONF.183/C.1/SR.3

#### **Agenda item 11 (continued)**

**Consideration of the question concerning the finalization and adoption of a convention on the establishment of an international criminal court in accordance with General Assembly resolutions 51/207 of 17 December 1996 and 52/160 of 15 December 1997 (A/CONF.183/2/Add.1 and Corr.1)**

1. The Chairman said that more time was needed to conclude the informal consultations on certain aspects of part 1 of the draft Statute. The Committee of the Whole would therefore begin its consideration of part 2.

#### **DRAFT STATUTE**

##### **PART 2. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW**

##### **Article 5. Crimes within the jurisdiction of the Court**

2. Mr. van der Wind (Netherlands), acting as Coordinator for part 2, said that discussions in the past had focused on the question of the selection of the crimes to be included within the jurisdiction of the International Criminal Court and on their definition. A consensus had been reached on the inclusion of the crime of genocide and since there seemed to be wide support for the definition in articles II and III of the Convention on the Prevention and Punishment of the Crime of Genocide, of 1948, which was reproduced in the draft Statute, perhaps the Committee of the Whole need only discuss it briefly before referring it to the Drafting Committee.

3. It was still not clear whether the crime of aggression should be included. The number of States accepting inclusion had risen over the years, but much would depend on the definition and the role of the Security Council.

4. With respect to the definition of aggression, there were two precedents: the statutes of the Nuremberg and Tokyo Tribunals and General Assembly resolution 3314 (XXIX) of 14 December 1974 on the definition of aggression, adopted by consensus.

5. On the role of the Security Council, the issue was whether the Court might consider the crime of aggression only after the Council had determined that a State had committed such an act and the Court would then have the duty to look into the criminal responsibility of the person who had ordered it, or whether the Court might also consider a crime of aggression without such a prior determination by the Council.

6. In the text of the draft Statute three options were submitted, but since in preceding discussions it had practically been agreed to drop option 1, the Committee of the Whole should now concentrate on options 2 and 3.

7. He suggested that informal consultations should be held following a brief discussion in the Committee of the Whole.

8. There seemed to be general agreement that war crimes should be included within the Court's jurisdiction. There were many precedents for the definition, ranging from the 1907 Hague Convention Respecting the Laws and Customs of War on Land to the 1977 Protocols Additional to the 1949 Geneva Conventions.

9. There had been discussion of the question of what could be considered international customary law, but no general agreement had been reached on that matter.

10. The definition in the draft Statute contained four sections. Section A dealt with norms applicable to international armed conflict and referred to grave breaches of the four 1949 Geneva Conventions. The text followed that of the 1949 Conventions, and there seemed to be general agreement on its inclusion and on its wording.

11. Section B, also applicable to international armed conflict, was a collection of elements from different sources retaining the language of those sources as far as possible, with certain exceptions to meet the concerns of delegations.

12. The paragraphs for which there was only one option seemed to be generally acceptable, but there were several paragraphs with up to four or five options that would need further discussion.

13. Section C dealt with norms applicable in internal armed conflict and was based on the article 3 common to the 1949 Geneva Conventions, with almost identical wording. Most delegations were in favour of the inclusion of section C, but some States had expressed concern at its inclusion.

14. Section D, also containing norms applicable in internal armed conflict, was a collection of norms from different sources. Here, too, the question of its inclusion was still open: a majority was in favour of including section D in the definition of war crimes but not all States agreed with that view. If section D was included, further discussion would be needed with respect to some paragraphs, certain of which were identical, or practically so, with paragraphs in section B. The result of the discussions on section B might therefore be relevant to section D.

15. In addition to the definition, three further issues relating to the question of war crimes remained outstanding. The three options submitted under the heading "Elsewhere in the Statute" required further discussion. Secondly, discussion was needed on the drafting and scope of article Y reading: "Without prejudice to the application of the provisions of this Statute, nothing in this part of the Statute shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law." Lastly, there remained the question of the need to elaborate "elements of crimes" and of their relationship with the Statute itself.

16. There seemed to be general agreement concerning inclusion of crimes against humanity. The definition was based on several precedents from the Nuremberg, Tokyo, Rwanda and former Yugoslavia Tribunals but it also contained some new elements. The major question to be decided in respect of the definition was whether, in the introductory part of paragraph 1, there was a need to enlarge on the definitions in the subparagraphs, and whether paragraph 2, connected with the "elements of crimes", should be included.

17. There had been proposals to include three additional crimes under the jurisdiction of the Court: crimes of terrorism, crimes concerning illicit trafficking in narcotic drugs. The question of including those crimes had still to be determined, and if it was decided to include them consideration would have to be given to their definition.

18. He suggested that the discussion in the Committee of the Whole should be in three parts: crimes against humanity and if necessary the crime of genocide; the definition of war crimes; and the definition and inclusion of aggression and other crimes. As far as genocide was concerned, perhaps only a brief discussion would be necessary before the text was referred to the Drafting Committee. On crimes against humanity, further discussion was needed on the major issues, either in the Committee of the Whole or in informal discussions. The Committee of the Whole would have to discuss the definition of war crimes, focusing on the outstanding issues he had mentioned, and further informal talks would also be needed. On the question of aggression, discussion in the Committee of the Whole and informal talks were needed. On other crimes, there was a need for a discussion in the Committee of the Whole focusing on the question of their inclusion and perhaps further informal talks.

19. The Chairman agreed with those suggestions and called for comments on crimes against humanity and, if required, on genocide.

*Crime of genocide*

*Crimes against humanity*

20. Mr. Kaul (Germany) said that his delegation considered that consensus with respect to the crime of genocide had already been reached, and the 1948 Genocide Convention contained a generally acceptable definition that could be used in the Statute.

The problems relating to conspiracy to commit genocide, incitement to genocide, attempt and complicity could be more adequately dealt with in part 3 of the Statute, entitled "General principles of criminal law".

21. His delegation considered that crimes against humanity could be committed in times of peace as well as war and that any other proposal would be a retrogression in the development of international humanitarian law. Such crimes could be committed as part of a widespread or systematic commission of such acts. All acts currently listed in paragraphs 1 (a) to (j) under "Crimes against humanity" should be covered. His delegation did not, however, believe that the definitions contained in paragraph 2 should be included in the Statute itself.

22. Mr. Shukri (Syrian Arab Republic) said that his delegation had no difficulty in accepting the inclusion of the crime of genocide since the relevant text corresponded to that of the 1948 Genocide Convention to which it was a party. His delegation could also accept the inclusion of crimes against humanity in the case of international armed conflict, but not in the case of internal conflict, at least for the time being.

23. He considered that the wording "enforced disappearance of persons" in paragraph 1 (i) was unclear because it could be used in reference to liberation movements fighting for their freedom and to regain their territory.

24. Mr. Al Awadi (United Arab Emirates) agreed with the remarks of the representative of the Syrian Arab Republic with regard to the inclusion of the crime of genocide in the Statute and the confining of the concept of crimes against humanity to international conflicts.

25. His delegation had reservations on the wording of paragraph 1 (d), "Deportation or forcible transfer of population", which might not be in line with definitions in international instruments.

26. Mr. Khalid Bin Ali Abdullah Al-Khalifa (Bahrain) said that the current wording of the definition of the crime of genocide should be retained.

27. He associated himself with the comments of the representatives of the Syrian Arab Republic and the United Arab Emirates concerning crimes against humanity.

28. Mr. Sadi (Jordan) joined the consensus on the inclusion of genocide in the Statute. With respect to crimes against humanity, no distinction should be made between international and internal conflicts; that would introduce double standards, which his country could not accept.

29. Mr. Hamdan (Lebanon) supported the definition of the crime of genocide, endorsed the points made by the representatives of the Syrian Arab Republic, Bahrain and the United Arab Emirates, and agreed with the German proposal to drop paragraph 2 defining crimes against humanity.

30. **Mr. Dive** (Belgium) associated himself with the statement of the German representative and welcomed the text on the crime of genocide. He endorsed the point made by the representative of Jordan on the need to include internal conflicts, and agreed that paragraph 2 should be deleted.

31. **Mr. Madani** (Saudi Arabia) endorsed the remarks of the representatives of the United Arab Emirates and the Syrian Arab Republic with respect to the crime of genocide and agreed that the provisions on crimes against humanity should not apply to internal conflicts.

32. His delegation opposed the reference to "enforced pregnancy" in paragraph (*e bis*) of section D under "War crimes" ("Option I"), since his country was opposed to abortion.

33. **Mr. Dhanbri** (Tunisia) agreed with the drafting of the definition of genocide.

34. His delegation interpreted crimes against humanity as taking place only in international armed conflicts; otherwise intervention by the Court would amount to interference in internal affairs contrary to the principles of the United Nations. He proposed deleting the first alternative in square brackets in paragraph 1 under "crimes against humanity" and adopting the second alternative, which was more detailed, with the word "international" added before the words "armed conflict".

35. **Mr. Janda** (Czech Republic) endorsed the statement made by the German representative with regard to genocide.

36. As far as crimes against humanity were concerned, his delegation considered that the wording in paragraph 1 should be "widespread or systematic commission of such acts". It also considered that crimes against humanity should be punishable whether committed in peace or in war. Subparagraphs (*a*) to (*j*) should be retained and all the square brackets removed.

37. He agreed with the representative of Germany that the definitions in paragraph 2 were unnecessary.

38. **Mr. Cherquaoui** (Morocco) supported the statements made by the representatives of the Syrian Arab Republic and the United Arab Emirates with respect to the inclusion of genocide within the Court's jurisdiction.

39. His delegation considered that crimes against humanity should be considered only in the context of international conflict.

40. **Mr. Agius** (Malta) endorsed the positions of the representatives of Germany and Jordan with respect both to genocide and to crimes against humanity. He drew attention to Security Council resolution 808 (1993) establishing the International Tribunal for the Former Yugoslavia. It was clear that crimes against humanity directed against a civilian population were contrary to international law regardless of whether they were committed in an international or internal armed conflict.

41. **Mr. Kerma** (Algeria) said that his delegation was in favour of including the crime of genocide within the Court's remit.

Like the Movement of Non-Aligned Countries, his delegation also endorsed the idea of including the crime of aggression. The definition in General Assembly resolution 3314 (XXIX) was relevant in that regard.

42. He endorsed the position of the representatives of Tunisia and the Syrian Arab Republic with respect to crimes against humanity.

43. As far as other crimes were concerned, his delegation was in favour of including terrorism and illicit drug trafficking.

44. **Mr. S. R. Rao** (India) agreed that the crime of genocide should be included. Discussion on the list of punishable acts should be deferred until the Working Group on General Principles of Criminal Law (part 3 of the Statute) had reported.

45. On crimes against humanity, his delegation considered that the items listed in paragraphs 1 (*a*) to (*j*) would be meaningless unless a chapeau to paragraph 1 were included, as otherwise an individual murder, for instance, would fall within the jurisdiction of the Court, and that was clearly not the intention. His delegation's preference was for "widespread and systematic" rather than "widespread or systematic".

46. As far as the words "in armed conflict" were concerned, his delegation considered that if no distinction were made between internal and international conflict, the Committee would have to consider whether the use of obnoxious weapons listed under war crimes should not also be included in crimes against humanity.

47. His delegation was not in favour of including enforced disappearance of persons in the list of crimes against humanity.

48. He agreed with the representative of Germany that paragraph 2 should be left out of the Statute.

49. **Mr. Vergne Saboia** (Brazil) said his delegation agreed to the inclusion of the crime of genocide and to the definition in the draft. With regard to the text within square brackets following the definition, his delegation shared the view that the references to "conspiracy" and the like should be in another part of the draft Statute.

50. His delegation also agreed with the inclusion of crimes against humanity and considered that the chapeau of paragraph 1 in that section was acceptable. His delegation was in favour of the formulation "as part of a widespread or systematic attack ...".

51. His delegation could agree to defining crimes against humanity irrespective of the existence of an armed conflict. It could also accept the list of crimes in paragraphs 1 (*a*) to (*j*), but would prefer a drafting more closely related to that of existing international instruments.

52. **Mr. Díaz Paniagua** (Costa Rica) said that his delegation did not agree with the representative of India that enforced disappearance of persons should be dropped from the list of crimes against humanity. In view of Latin America's unfortunate experience, it must be included.

53. With regard to the chapeau of paragraph 1, he agreed with the remarks of the Czech representative and could accept the other proposals made. No distinction should be made with regard to the character of the armed conflict in which acts constituting crimes against humanity were committed.

54. **Mr. Skibsted** (Denmark) endorsed the statement made by the German representative and said that he could accept the definition of the crime of genocide as contained in the draft Statute.

55. As far as crimes against humanity were concerned, his delegation believed that the definition in the Statute should cover acts committed as part of a widespread or systematic commission of such acts against any population, whether committed in peacetime or in international or internal armed conflict.

56. As to the specific acts to be listed, his delegation favoured those enumerated in paragraphs 1 (a) to (j).

57. **Mr. Mochochoko** (Lesotho) also endorsed the comments of the representative of Germany. The crime of genocide should be included and defined as in the draft Statute.

58. His delegation also supported the inclusion of crimes against humanity, and would prefer a definition consistent with existing international law requiring that the commission of acts constituting such crimes must be widespread or systematic, and committed in peace or during international or internal armed conflict. He endorsed the proposal to delete paragraph 2 under "Crimes against humanity".

59. **Ms. Daskalopoulou-Livada** (Greece) considered that the definition of genocide posed no real problems and could be sent to the Drafting Committee.

60. As far as crimes against humanity were concerned, her delegation favoured the first alternative in the chapeau of paragraph 1 as being less restrictive than the second.

61. Her delegation would prefer the formulation "or" to "and".

62. It was in favour of retaining all the crimes currently listed.

63. It had no strong feelings concerning the definitions and could accept the proposal to drop paragraph 2.

64. **Mr. Nyasulu** (Malawi) agreed that the question of the crime of genocide could be referred to the Drafting Committee.

65. With respect to crimes against humanity, his delegation had a slight problem with paragraph 1 (h), which contained items which could have been dealt with separately. Nevertheless, it could accept the text as it stood.

66. In the chapeau, his delegation preferred "or" to "and". It did not support the inclusion of the word "international".

67. **Mr. Fadl** (Sudan) agreed that the crime of genocide should be included in the Statute.

68. His delegation considered that crimes against humanity should refer only to international, not to internal conflicts.

69. He agreed with the Coordinator that the crime of aggression required further discussion.

70. **Mr. Al Ansari** (Kuwait), recalling that some countries had used human beings as shields, proposed that such acts should be listed as a crime against humanity, unless paragraph 1 (e) covered the case.

71. He wondered whether paragraph 2 (a) covered acts such as the total elimination of a people's identity. If not, the Committee of the Whole should add the words "or to eliminate their identity" to paragraph 2 (a).

72. **Ms. Li Yanduan** (China) felt that the text on genocide should now be sent to the Drafting Committee.

73. She agreed with the inclusion of crimes against humanity, but wished to point out that there was no international convention as such on the subject.

74. Her delegation considered that the chapeau of paragraph 1 should include the words "armed conflict", taking into account the Charter of the Nuremberg Tribunal, the statute of the International Tribunal for the Former Yugoslavia and the statute of the International Tribunal for Rwanda.

75. Her delegation agreed with the inclusion of the crimes listed in paragraphs 1 (a) to (j) but had some reservations concerning 1 (e). It would be inclined to accept the word "imprisonment", but remained open-minded and ready to hear other views.

76. **Mr. Choi Tae-hyun** (Republic of Korea) agreed that the definition of genocide could now be referred to the Drafting Committee.

77. His delegation believed that the concept of crimes against humanity needed a threshold, as in the wording in the first set of square brackets in the chapeau of paragraph 1. It was not appropriate to limit consideration of crimes against humanity to those committed in armed conflict or on a massive scale, as that would too narrowly limit the Court's jurisdiction. Moreover, the reference to "civilian" population was confusing. His delegation would prefer the word "or" to "and".

78. In paragraph 1 (e) his delegation would prefer the wording "detention or imprisonment in flagrant violation of international law", and would favour deleting paragraph 2.

79. He did not agree that crimes against humanity should be recognized as such only in international conflicts: such crimes deserved the same degree of repudiation when committed in internal conflicts.

80. **Ms. Frankowska** (Poland) agreed that the definition of genocide could now be sent to the Drafting Committee.

81. She agreed that crimes against humanity could be committed in times of peace, and the definition should apply to internal as well as international conflicts.

82. Her delegation considered that paragraph 1 under "Crimes against humanity" should read: "For the purpose of the present Statute, a crime against humanity means any of the following acts when committed as part of a widespread or systematic commission of such acts against any population."

83. It agreed that paragraph 2 should be deleted.

84. **Ms. Chatoor** (Trinidad and Tobago) supported the inclusion of genocide and crimes against humanity within the jurisdiction of the Court. She also endorsed the remarks of the representative of Germany. Account must be taken of the recent confirmation by the International Tribunal for the Former Yugoslavia that crimes against humanity could be committed in the context of any armed conflict, whether international or internal.

85. **Mr. Al-Humaimidi** (Iraq) said that his delegation had no problem with including the crime of genocide within the Court's jurisdiction.

86. He agreed that the commission of crimes against humanity should be limited to international armed conflict and agreed with the representative of the Syrian Arab Republic that paragraph 1 (i) under "Crimes against humanity" was ambiguous.

87. **Ms. Steains** (Australia) expressed her delegation's concern at the argument that a connection with an international armed conflict was required for a crime against humanity. The horrific killings in Cambodia in the 1970s showed that the most heinous crimes against humanity could be committed outside the context of armed conflict, whether internal or international in nature. Her delegation strongly supported those who had argued that there was no requirement for a nexus with armed conflict in the definition of crimes against humanity.

88. With regard to the chapeau of paragraph 1, her delegation was in favour of the formulation "widespread or systematic commission of such acts" and the inclusion of all the elements set out in paragraphs 1(a) to (j).

89. **Ms. Wilmshurst** (United Kingdom of Great Britain and Northern Ireland) said that she, too, was concerned at the insistence of some delegations that there should be a nexus between crimes against humanity and armed conflict, indeed international armed conflict. In international customary law, no such nexus existed. Although, both the Charter of the Nuremberg Tribunal and the statute of the International Tribunal for the Former Yugoslavia referred to armed conflict, in both those cases the instruments had been set up after the event and neither indicated that a nexus existed in international law. Moreover, there was no such nexus in the statute of the Rwanda Tribunal. Had there been, it was questionable whether the Tribunal would have had jurisdiction over the horrific killings that had taken place in that country. Her delegation therefore strongly supported

the removal of any reference to armed conflict in the chapeau to paragraph 1 in the section on crimes against humanity.

90. The reference in the chapeau to widespread and systematic commission of the acts concerned was extremely important. As the representative of India had pointed out, the aim was to distinguish individual acts of murder from the kinds of acts referred to. Her delegation therefore supported the reference to widespread and systematic commission of the acts listed. She pointed out that the article did not cover terrorist offences.

91. Her delegation endorsed the list of crimes set out in paragraphs 1 (a) to (j) but was puzzled by the wish to delete paragraph 2, since some of the definitions in that paragraph might assist the Committee to agree on some of the items listed in paragraphs 1 (a) to (j), for instance, the enforced disappearance of persons. Although that concept was not yet accepted as a crime against humanity in existing instruments, her delegation would be happy to see it included if the definition was clear. She therefore appealed to delegations to consider whether the inclusion of paragraph 2 might not be useful.

92. **Ms. Fernández de Gurmendi** (Argentina) endorsed the point made by the representatives of Australia and the United Kingdom with regard to the lack of a nexus between crimes against humanity and armed conflict.

93. Her delegation would like to see the word "or" rather than "and" used in the chapeau, as otherwise the threshold would be too high for prosecution to be possible.

94. Her delegation favoured the list of crimes in paragraphs 1 (a) to (j). It had no set position on the deletion or retention of paragraph 2.

95. **Ms. Le Fraper du Hellen** (France) said that her delegation believed that crimes against humanity could be committed in peace as well as in war and against all populations.

96. In the chapeau, her delegation was in favour of the words "widespread and systematic" and the words "on political, philosophical, racial, ethnic or religious grounds or any other arbitrarily defined grounds".

97. Her delegation supported the list of crimes in paragraphs 1 (a) to (j). In connection with subparagraph (e), her delegation's preference was for the expression "detention or deprivation of liberty".

98. There had been some surprising hesitation by some delegations with respect to subparagraph (i). The United Nations Declaration on the Protection of All Persons from Enforced Disappearance, adopted by the General Assembly by consensus, had been used as the basis, and the term was generally accepted. The Declaration stated that enforced disappearances of persons "was of the nature of a crime against humanity". Logically, therefore, subparagraph (i) should be retained.

99. Her delegation was in favour of deleting paragraph 2 since the Statute already contained a provision on applicable law in

article 20. She did not think that further discussion would allow progress to be made.

100. **Ms. Cueto Milián** (Cuba), while agreeing that the provisions on genocide in the draft Statute were generally acceptable, thought that they could be expanded by the inclusion of social and political groupings and a reference to intentional conduct.

101. With reference to the German proposal to delete the paragraph 2 of the section on crimes against humanity, her delegation would prefer to await the views of the Working Group on General Principles of Criminal Law before taking a decision. Her delegation agreed that such crimes could be committed both in peace and in war and considered that it would not be prudent to have an unduly high threshold for the concept. Her delegation considered that the list of crimes in paragraphs 1 (a) to (j) was not exhaustive.

102. The Statute should make a clear distinction between extermination and genocide, and the references to deportation or forcible transfer of population, detention or imprisonment, rape or other sexual abuse and persecution against any identifiable group or collectivity were not specific enough and should be expanded.

103. **Mr. Sadi** (Jordan) suggested that it should be left to the Drafting Committee to find a wording for the chapeau of paragraph 1 by referring to relevant human rights case law.

104. While remaining open-minded, his delegation would like to see ethnic cleansing and the destruction of part of a population included in the list.

105. Regarding enforced disappearance of persons, that crime had been defined in human rights case law since the 1970s and the Drafting Committee could flesh out the description if necessary.

106. He questioned the need for a listing of the grounds for an attack in the chapeau of paragraph 1. What was in question was an attack on a population on any grounds. The reference to grounds should be deleted.

107. **Mr. Niyomrerks** (Thailand) said that his delegation agreed that the 1948 Genocide Convention provided the best definition of the crime of genocide.

108. His delegation believed that crimes against humanity should be qualified as widespread and systematically committed. That would ensure that crimes falling within the Court's jurisdiction were of a truly serious nature and differed from ordinary criminal offences. Moreover, his delegation believed that crimes against humanity could be committed both in peace and in armed conflict.

109. **Ms. Tomič** (Slovenia) said her delegation believed that crimes against humanity should be considered as separate from war crimes and that they could be committed in times of war or peace. In a case before the International Tribunal for the Former Yugoslavia it had been ruled that under customary international law crimes against humanity did not require a connection to

international armed conflict. Reference to armed conflict in the chapeau of paragraph 1 should therefore be deleted. The threshold for such crimes should be kept low, and the wording should be "widespread or systematic commission". The International Tribunal for the Former Yugoslavia had also ruled that as long as there was a link with a widespread or systematic attack against a civilian population, a single act could qualify as a crime against humanity. The words "committed on a massive scale" should therefore be deleted.

110. She supported the listing of crimes against humanity in paragraphs 1 (a) to (j).

111. **Mr. Stigen** (Norway) agreed that the text on genocide should be sent to the Drafting Committee.

112. With respect to crimes against humanity, his delegation saw no need for a connection with armed conflicts. In the chapeau of paragraph 1 it would prefer the word "or" to "and". It was in favour of the listing in paragraphs 1 (a) to (j) and saw no need for paragraph 2. The Conference should not try to define crimes against humanity.

113. **Mr. Koffi** (Côte d'Ivoire) thought that the definition of genocide should now be transmitted to the Drafting Committee.

114. With respect to crimes against humanity, his delegation would prefer the wording "as part of a widespread or systematic attack" in paragraph 1. No distinction should be made between the commission of crimes against humanity in peace or in war or between internal and international conflicts.

115. His delegation had no problem with the inclusion of paragraph 2.

116. **Mr. de Klerk** (South Africa) agreed that the definition of genocide could be referred to the Drafting Committee. His delegation supported the inclusion, in the definition, of conspiracy to commit genocide, attempt to commit genocide and complicity in genocide, but he agreed with the representative of India that further discussion should be postponed.

117. With regard to paragraph 1 of the section on crimes against humanity, his delegation was in favour of not linking the offences with armed conflict and preferred the word "or" rather than "and", for the reasons given by previous speakers. His delegation would have some comments on the offences listed in subparagraphs (e), (g) and (h) of paragraph 1 which could be best made in the relevant working group.

118. He agreed that paragraph 2 was unnecessary.

119. **Ms. Mekhemar** (Egypt) agreed that the definition of genocide was satisfactory and could now be transmitted to the Drafting Committee.

120. Her delegation considered that crimes against humanity could be committed in time of peace or war. However, to differentiate them from ordinary crimes, they should be described as systematic and widespread.

121. **Mr. Mahmood** (Pakistan) said that Pakistan opposed the concept of inherent jurisdiction of the Court for the crimes listed in article 5. All those crimes should be subject to the principle of complementarity, which would be violated if the Court were to be given inherent jurisdiction. However, it should not be possible to exclude the "core" crimes from the Court's jurisdiction by a declaration.

122. Concerning the crime of genocide, the 1948 Genocide Convention, to which Pakistan was a party, gave States parties authority to try offenders. Pakistan had no problem with the inclusion of the crime of genocide provided it was subject to the principle of complementarity. Pakistan supported the inclusion of crimes against humanity in the Statute, but would make its comments at a later stage.

123. **Ms. Flores** (Mexico) agreed that the definition of genocide could be referred to the Drafting Committee. References to conspiracy and attempt to commit genocide and complicity in genocide should be discussed by the Working Group on General Principles of Criminal Law.

124. Her delegation considered that crimes against humanity could be committed both in peace and in war and did not agree to their being linked with armed conflict. Such crimes should be qualified as "widespread or systematic" and no grounds needed to be spelt out.

125. Her delegation had no problems with the crimes listed in paragraphs 1 (a) to (i), except that it considered that "persecution" and "enforced disappearance" would benefit from a definition. It did, however, have difficulties with subparagraph (j) ("other inhumane acts"). An exhaustive list was required to satisfy the principle *nullum crimen sine lege*. Moreover, apartheid should have been included in the list.

126. Her delegation would reserve its comments on some of the texts in square brackets for discussion in the relevant working group.

127. **Ms. Shahan** (Libyan Arab Jamahiriya) agreed that the definition of the crime of genocide should be referred to the Drafting Committee.

128. She pointed out that in the draft Statute crimes against humanity were focused on acts violating physical integrity and not moral integrity. Nothing was said about the prohibition on practising religion, for instance.

129. She considered that the expression "political organization" in paragraph 2 (e) was too vague and that a clearer definition was needed. The Court should not invoke crimes of that type as a means of intervening in the internal affairs of States and infringing their sovereignty under the pretext of international legality.

130. **Ms. Trönningsdal** (Finland) said, with respect to crimes against humanity, that she was in favour of the wording "as part of widespread or systematic commission of such acts".

131. She supported the retention of the list of crimes in paragraphs 1 (a) to (j) and could agree to the deletion of paragraph 2 if that was the general wish.

132. **Ms. Vargas** (Colombia) agreed with the definition of genocide in the draft Statute. Like the representative of Germany, she considered that matters such as complicity in genocide would be better dealt with in part 3 of the draft Statute on general principles of criminal law.

133. Her delegation also agreed that crimes against humanity should be covered by the Statute. There should be no link with armed conflict; such crimes could be committed in times of peace. She agreed that all the crimes listed in subparagraphs (a) to (i) of paragraph 1 should be included, but her delegation had the same problems with (j) as the delegation of Mexico.

134. The question of including paragraph 2 should be discussed in a working group.

135. **Mr. Shariat Bagheri** (Islamic Republic of Iran) agreed that the crime of genocide should fall within the jurisdiction of the Court.

136. His delegation considered that crimes against humanity could be committed in times of peace or war. It was in favour of the wording "widespread and systematic attack". It agreed that paragraph 2 should be deleted.

137. **Ms. Borek** (United States of America) believed that genocide should be included in the Statute and that ancillary crimes should be dealt with comprehensively in the section on general principles of criminal law.

138. With respect to crimes against humanity, she wished to point out that if situations arising in times of peace were not covered the Court would be denied jurisdiction over many of the crimes that it should address.

139. Her delegation appreciated the concerns about sovereignty expressed by some delegations, and considered that care needed to be taken to avoid vagueness in the list of crimes; even some of the definitions in paragraph 2 were vague. Her delegation would be submitting a paper on elements of crimes taking account of the many useful comments it had received. Many offences were violations of human rights but could not be called crimes against humanity, which meant only the most atrocious crimes. It was therefore important to elaborate the elements of crimes. The list should be exhaustive to meet the principle of *nullum crimen sine lege*.

140. She agreed that there was no intention to cover terrorism in the list.

141. **Mr. Hersi** (Djibouti) agreed that the text on genocide could now be transmitted to the Drafting Committee.

142. With respect to crimes against humanity, he agreed on the inclusion of all the crimes identified. However, in the chapeau of paragraph 1, he considered that it would be difficult to apply



the requirement that an attack against any civilian population had to be widespread. The Drafting Committee should seek more appropriate wording.

143. **Mr. Effendi** (Indonesia) supported the inclusion of both genocide and crimes against humanity in the Statute. He agreed that the text on genocide should be submitted to the Drafting Committee.

144. With respect to crimes against humanity, his delegation supported the first option in the chapeau of paragraph 1, and would prefer "and" to "or".

145. **Mr. García Labajo** (Spain) said that his delegation agreed that the text on genocide should be sent to the Drafting Committee.

146. He agreed with the German representative that conspiracy, incitement and attempt to commit genocide and complicity in genocide would be more appropriately covered in part 3 of the draft Statute, and specifically in article 23.

147. His delegation endorsed the view that crimes against humanity could be committed both in peacetime and in armed conflict, whether internal or international. Prosecution of crimes against humanity should not be confused with international humanitarian law, as otherwise the victims of atrocities might be left unprotected.

148. The terms "widespread" and "systematic" were not synonymous: the former was a quantitative description whereas the latter was qualitative. His delegation preferred the formulation "widespread or systematic".

149. **Mr. Ivan** (Romania) said his delegation believed that the crimes against humanity covered by the draft Statute should include acts committed in both international and non-international conflicts and also in peacetime. He therefore opposed a nexus with armed conflict.

150. His delegation was in favour of the wording "widespread or systematic" and of the deletion of paragraph 2. It agreed that the text on genocide should be sent to the Drafting Committee.

151. **Ms. Diop** (Senegal) agreed that the text on genocide should be referred to the Drafting Committee and also that conspiracy, incitement and attempt to commit genocide and complicity in genocide should be included in part 3.

152. In view of recent events, her delegation considered that the jurisdiction of the Court should apply to crimes against humanity committed during war or peace, and in internal or international conflicts.

153. **Mr. Palihakkara** (Sri Lanka) agreed that the text on genocide could be sent to the Drafting Committee.

154. On crimes against humanity, the introductory wording to paragraph 1 would be decisive, and informal consultations were therefore necessary. His own delegation's inclination was to have a description that was not situation-specific or motive-related and would be valid in peace and in war.

155. His delegation had no difficulties with the list of crimes in paragraph 1, except that it shared the doubts expressed by the representative of Mexico with regard to subparagraph (j).

156. His delegation believed that paragraph 2 should be deleted; it would be unproductive to spend too much time on definitions.

157. **Mr. Rodríguez Cedeño** (Venezuela) agreed that the text on genocide could be sent to the Drafting Committee.

158. He also agreed that crimes against humanity could be committed at any time and in any context. His delegation would prefer the wording "widespread or systematic attack".

159. In the list of crimes, both subparagraph (e) and subparagraph (i) were necessary and should be retained.

160. He agreed with the representative of the United Kingdom that paragraph 2 should not be deleted without further consideration.

161. **Mr. Politi** (Italy) agreed that the text on genocide should be sent to the Drafting Committee and that conspiracy, incitement and attempt to commit genocide and complicity in genocide would be better addressed in part 3.

162. With regard to crimes against humanity, his delegation agreed that, in the chapeau of paragraph 1, there should be no nexus with armed conflict, whether international or internal. His delegation was in favour of the wording "widespread or systematic attack".

163. As to the list of crimes, his delegation was in favour of including all the subparagraphs. In subparagraph (g), the words "of comparable gravity" were unnecessary. He strongly supported the inclusion of the words "or gender" in (h).

164. The "other inhumane acts" referred to in (j) should also be included, since otherwise new kinds of crime against humanity would go unpunished. "Inhumane acts" had been recognized by the Nuremberg, Former Yugoslavia and Rwanda Tribunals. They were also prohibited by the article 3 common to the 1949 Geneva Conventions and by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

165. His delegation, like others, would prefer the deletion of paragraph 2.

166. **Ms. Connelly** (Ireland) agreed that the text on genocide should be referred to the Drafting Committee.

167. She agreed that, in accordance with international law, crimes against humanity could be committed in times of armed conflict or in times of peace. The representative of Mexico had wished to include apartheid in the list of crimes: that was the subject of a convention in which there was no link with times of armed conflict.

168. The chapeau was clearly needed to distinguish individual criminal acts from the heinous crimes that were to be brought within the Court's jurisdiction. Her delegation was in favour of the wording "widespread or systematic attack".

169. She agreed with the representative of Jordan that there was no need for a reference to "grounds" in the chapeau. The right place for a reference to such grounds was in subparagraph (h). She supported the inclusion of "gender" in that subparagraph.

170. As to the inclusion of paragraph 2, her delegation remained flexible and would wait to hear further comments.

171. **Mr. Güney** (Turkey) agreed that the text on genocide should be sent to the Drafting Committee.

172. As to crimes against humanity, his delegation was in favour of the wording "widespread and systematic attack" in the chapeau of paragraph 1, in line with established case law.

173. His delegation had difficulties with the present wording of paragraph 1 (i), which was confusing and could give rise to divergent interpretations in practice.

174. **The Chairman**, summing up the discussion, said that there seemed to be agreement that the text on genocide could be referred to the Drafting Committee. He suggested that the unbracketed part of the section on genocide might be referred to the Drafting Committee on the understanding that the suggestions concerning elements of crimes would be dealt with in the discussion on crimes against humanity. Some delegations had suggested that the part of the text on genocide in square brackets be included in part 3 of the draft Statute, while others had indicated that they could take no final position until further progress had been made on part 3. He therefore suggested

that the bracketed part of the text should not be referred to the Drafting Committee for the time being.

175. He had noted that all delegations were in favour of including crimes against humanity in the Statute. With regard to the chapeau of paragraph 1 in that section, there were differences of view as to whether the adjectives "widespread" and "systematic" should be joined by "or" or "and", and further discussion on that point was clearly needed.

176. There was a difference of opinion as to whether there should be a nexus between crimes against humanity and armed conflict, and some delegations also wished to limit "armed conflict" to international armed conflict.

177. Questions had been raised as to the interpretation of some of the crimes in the list in subparagraphs (a) to (j) of paragraph 1. Subparagraph (i) on enforced disappearance of persons had given rise to more substantive comments, which would have to be addressed in due course. With regard to subparagraph (j), some delegations would prefer the list of "inhumane acts" to be exhaustive.

178. It had been suggested that the crime of apartheid should be added to the list.

179. With respect to paragraph 2, further discussion would be needed, since some delegations wished to delete it while others considered that at least some of the definitions would be useful in enabling general agreement to be reached.

*The meeting rose at 1 p.m.*

#### 4th meeting

Wednesday, 17 June 1998, at 3.20 p.m.

*Chairman:* Mr. Kirsch (Canada)

A/CONF.183/C.1/SR.4

#### Agenda item 11 (*continued*)

**Consideration of the question concerning the finalization and adoption of a convention on the establishment of an international criminal court in accordance with General Assembly resolutions 51/207 of 17 December 1996 and 52/160 of 15 December 1997 (A/CONF.183/2/Add.1 and Corr.1)**

#### DRAFT STATUTE

##### PART 2. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW (*continued*)

##### Article 5. Crimes within the jurisdiction of the Court (*continued*)

##### *Crimes against humanity (continued)*

1. **The Chairman** invited the Committee to resume its discussion on crimes against humanity.

2. **Mr. Piragoff** (Canada) expressed concern at the suggestion that there needed to be a nexus between crimes against humanity and armed conflict. Canada's position was that no such nexus was required under modern international law, a view supported by the Convention on the Prevention and Punishment of the Crime of Genocide, Allied Control Council Law Number 10 (1945), the statute of the International Tribunal for Rwanda and the draft Code of Crimes against the Peace and Security of Mankind. The decision of the Yugoslavia Tribunal Appeals Chamber in the Tadić case had confirmed that customary international law did not require such a nexus. It would be retrogressive to reintroduce a nexus requirement, which would hamper the ability of the International Criminal Court to deal with crimes against humanity in contexts similar to that of Rwanda.

3. With regard to the chapeau of paragraph 1 in the section on crimes against humanity, the wording "widespread or

systematic” was clearly established in customary international law, as affirmed by the International Tribunal for the Former Yugoslavia and the Rwanda Tribunal. With regard to the wording in square brackets concerning grounds for an attack against a population, Canada’s view was that such grounds were not part of the definition of crimes against humanity under customary international law and that any requirement regarding grounds would unnecessarily complicate the task of prosecution. Moreover, a list of prohibited grounds of discrimination might inadvertently exclude groups which could be the victims of crimes against humanity.

4. **Mr. Balde** (Guinea) said that his delegation favoured the second alternative in the chapeau, subject to the deletion of the reference to armed conflict, since crimes against humanity could well be committed in circumstances other than armed conflict. With respect to the list of acts constituting crimes against humanity, it would prefer “deprivation of liberty” as the broader term in subparagraph (e). It was in favour of retaining paragraph 2 as providing clarification of the acts listed.

5. **Mr. Panin** (Russian Federation) said that his delegation was very much in favour of extending the jurisdiction of the Court to crimes against humanity. The chapeau of paragraph 1 should refer to “widespread and systematic” attacks against a civilian population. There was no doubt that crimes against humanity could be committed during both international and non-international conflicts, and the Court would have jurisdiction over crimes coming under general international law.

6. Concerning the list of acts enumerated in subparagraphs (a) to (j), his delegation would prefer the deletion of (h) and (i), which would be covered by (j). It had no strong feelings about the choice of wording in the first part of (e). He cautioned against any over-hasty deletions from paragraph 2, which had much to commend it.

7. **Mr. Caflisch** (Switzerland) said that his delegation shared the majority view that the definition of crimes against humanity should be applicable to times of both peace and armed conflict, whether international or internal. In the chapeau of paragraph 1, it preferred the first alternative, with the wording “widespread or systematic”. It agreed with the list of crimes enumerated in subparagraphs (a) to (j). Maintaining paragraph 2 might complicate matters and the paragraph might be better deleted, unless it could be simplified.

8. **Ms. Sundberg** (Sweden) said that her delegation did not wish to see any mention of a nexus between crimes against humanity and armed conflict and believed that the former should also cover crimes committed in peacetime and during internal conflicts. It would not favour creating a new threshold for the prosecution of those crimes and would prefer the wording “systematic or widespread” in paragraph 1. It supported the retention of all the crimes listed in subparagraphs (a) to (j), and would reserve its comments on the specifics for the relevant working group. It supported the deletion of paragraph 2.

9. **Mr. Krokmal** (Ukraine) said his delegation had no set position about the linking word between “widespread” and “systematic” in the chapeau of paragraph 1. The definition of crimes against humanity should not be restricted to international conflicts. The enumeration of acts constituting crimes against humanity was acceptable. Since general international law did not provide a very clear definition of the acts listed in paragraph 1, paragraph 2 merited some examination. If there was not sufficient support for maintaining the whole of the paragraph, the matter might be considered further in the working group.

10. **Mr. Shukri** (Syrian Arab Republic) noted that the basis for the Tokyo and Nuremberg Tribunals had been the commission of crimes against humanity in the context of armed conflicts. There was also clearly some overlap between crimes coming under the heading of genocide, crimes against humanity and violations of human rights. It was not enough to engage in rhetoric; the intention was to establish an international criminal court, and the draft Statute must not be jeopardized. There might be some loopholes, but there would be no point in a convention that did not command enough support to secure its implementation.

11. **Mr. Lourenço** (Portugal) said that his delegation, like others, rejected any link between crimes against humanity and armed conflict, whether international or internal. It favoured the wording “widespread or systematic”.

12. **Mr. Al-Shaibani** (Yemen) said that crimes against humanity were committed in time of both war and peace; their specificity was that they were committed on a large scale.

13. **Mr. Pham Truong Giang** (Viet Nam) said that crimes against humanity should come within the jurisdiction of the Court. They could be committed both in peacetime and in time of armed conflict, both internal and international. Concerning paragraph 1, his delegation favoured the wording “widespread or systematic”. It was flexible as to whether paragraph 2 should be retained or deleted.

14. **Mr. van der Wind** (Netherlands), referring to the chapeau of paragraph 1, said that his delegation was in favour of the first alternative, under which there would be no nexus between crimes against humanity and armed conflict of whatever nature, and of the wording “widespread or systematic”, which adequately met the requirement for a threshold. It had serious doubts about the inclusion of motives where crimes against humanity were concerned, important though they were as an element with regard to genocide. It had no difficulty in accepting the acts listed and fully supported the observation made by the Italian delegation at the previous meeting concerning subparagraph (j). With respect to paragraph 2, it saw no need for any further elaboration of concepts in the Statute itself.

15. **Mr. Khalid Bin Ali Abdullah Al-Khalifa** (Bahrain) said that crimes against humanity should include crimes committed in times of peace. However, the Court must concentrate on the

most heinous crimes and refrain from interfering in the internal affairs of States, in line with the principle of complementarity. In principle, the concept “widespread and systematic” should be connected with armed conflicts. His delegation would engage in further discussion with an open mind.

16. **Mr. Fayomi** (Benin) agreed with others that a crime against humanity remained such whether or not it was committed during armed conflict. A link with armed conflict should therefore be discarded as being too restrictive. His delegation was in favour of maintaining paragraph 2, which very usefully defined crimes and their constituent elements; that would be important in bringing charges. Such definitions were regrettably missing in the statute of the Rwanda Tribunal.

17. **Mr. Nagamine** (Japan) said his delegation supported the inclusion in the Statute of crimes against humanity. In the chapeau of paragraph 1, he favoured the wording “widespread and systematic”, and considered that conduct in time of peace as well as war should be covered. With regard to the list of acts, the principle *nullum crimen sine lege* required a clear description of elements of crimes. He wondered whether it was appropriate to disassociate extermination from murder or genocide. Some qualifier was needed for “deportation” to indicate that it did not refer, for example, to transfers of populations in such situations as large-scale natural disasters. Similarly, a qualifier such as “unlawful” was needed before “imprisonment”. More precise wording was also required in connection with the enforced disappearance of persons. Paragraph 2 would be helpful in clarifying the acts listed.

18. **Ms. Tasneem** (Bangladesh) agreed that the Court should have inherent jurisdiction over crimes against humanity, including those committed in times of peace. It had been rightly observed that the key to a broad consensus lay in an agreed chapeau for paragraph 1. Her delegation did not believe that a link should be established between crimes against humanity and armed conflict, and supported the proposal to remove the enumeration of grounds for attacks on populations. It preferred the wording “widespread or systematic”. It agreed with the list in subparagraphs (a) to (j), subject to more precise drafting, and supported the Mexican proposal to include apartheid, which was proscribed as a crime against humanity under the Constitution of Bangladesh. It commended the suggestion to include the use of obnoxious weapons in the list of crimes against humanity.

19. **Mr. Tankoano** (Niger) said that crimes against humanity should fall within the jurisdiction of the Court, whether they were committed in times of peace or war and whatever their grounds. Since the cold war period, most crimes against humanity had been committed in internal conflicts; it should not be forgotten, either, that apartheid had been applied in peacetime. His delegation endorsed the comment made by the delegation of Benin on the constituent elements of crimes. No provisions in the Statute should be open to varying interpretations.

20. **Mr. Cede** (Austria) said that, in the chapeau of paragraph 1, his delegation preferred the first alternative, without any reference to armed conflict, and the wording “widespread or systematic”. It also saw some merit in maintaining paragraph 2 in view of the need for a precise definition of the crimes concerned, in accordance with the principle *nullum crimen sine lege*.

21. **Mr. Pérez Otermin** (Uruguay) expressed support for the inclusion in the Statute of crimes against humanity. The reference to armed conflict under crimes against humanity was inappropriate in the light of recent events, and should be deleted. The use of the word “systematic” was not sufficient to distinguish crimes against humanity from ordinary crimes covered by domestic law. He therefore suggested the wording “systematic and widespread”.

22. His delegation agreed with the list of acts in subparagraphs (a) to (j), except that, for the reasons given by Mexico, subparagraph (j) should either be deleted or made clearer. In principle he would be in favour of retaining paragraph 2, which was helpful in defining the crimes concerned, but he remained flexible on that point.

23. **Ms. Fairweather** (Sierra Leone) said that, in the chapeau of paragraph 1, her delegation favoured the first alternative and the wording “widespread or systematic”, and wished to see no nexus with armed conflict, whether international or internal. It agreed with the inclusion of the acts listed in subparagraphs (a) to (i), but considered, like Mexico, that (j) might violate the principle *nullum crimen sine lege*. It was flexible on the inclusion or otherwise of paragraph 2.

24. **Mr. Nathan** (Israel), referring to the text on genocide, expressed agreement with the suggestion that the enumeration of punishable acts could be included in part 3, since the principle involved affected all crimes within the jurisdiction of the Court, not just the crime of genocide.

25. The concept of crimes against humanity should be differentiated from that of war crimes by specifying that they were crimes committed on a massive scale against any civilian population on political, racial or other grounds to be defined. Under existing customary international law there was no necessary nexus between armed conflict and crimes against humanity, the relevant documents being the Convention on the Prevention and Punishment of the Crime of Genocide, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, Allied Control Council Law Number 10 and the finding of the International Tribunal for the Former Yugoslavia in the Tadić case.

26. With respect to the enumeration of the acts constituting crimes against humanity, the word “unlawful” should precede “deportation” in paragraph 1 (d) because there might be deportations that were lawful under the fourth Geneva Convention of 1949. The words “of comparable gravity” in subparagraph (g) might be dropped and the words “or other similar” before “grounds” in (h) were also too vague. Also

in (h), the final bracketed phrase should be deleted if it was agreed that there should not be a nexus between crimes against humanity, war crimes and other crimes within the jurisdiction of the Court. The words "or gender" could be maintained in that subparagraph. There was no need for all the detailed definitions given in paragraph 2, with the exception of terms needing such a definition, such as extermination and persecution. A distinction should be made between crimes against humanity and war crimes, although a certain measure of overlapping could not be avoided.

27. **Mr. Salinas** (Chile) said that, in paragraph 1, his delegation favoured the first alternative and the reference to the "widespread or systematic" commission of the acts in question. There was no nexus between the existence of an armed conflict and the commission of crimes against humanity, and any introduction of such an element would be retrograde in the light of the development of international law in the previous 50 years. Regarding the enumeration of acts in subparagraphs (a) to (j), greater precision was needed, in particular, in the wording of (e) regarding detention or imprisonment as a crime against humanity. Enforced disappearance of persons should be included as a crime against humanity, as it was still used as a means of repression by authoritarian regimes. Greater legal precision was required for subparagraph (g). The definition of certain types of crimes contained in paragraph 2 was helpful and that paragraph should be retained.

28. **Mr. Mansour** (Tunisia) said that paragraph 2 of the section on crimes against humanity was a crucial component of the Statute. It was important to define offences; indeed, the wording of the paragraph needed to be more specific and he thought that it should be elaborated upon rather than deleted.

29. **Mr. Onwonga** (Kenya) said that there should be no link between crimes against humanity and the existence of armed conflict, whether internal or international. He endorsed the view expressed by the delegation of Austria that paragraph 2 served a useful legal purpose in providing precise definitions.

30. **Ms. Vega Pérez** (Peru) agreed that the crime of genocide should be included as the first crime within the jurisdiction of the Court, drawing attention to articles II and III, in particular, of the Convention on the Prevention and Punishment of the Crime of Genocide. With respect to crimes against humanity, her delegation concurred with the delegation of Uruguay that the order of the words "widespread" and "systematic" should be reversed in the chapeau of paragraph 1, and favoured the deletion of paragraph 2; the conceptual definitions contained therein could perhaps be transferred to a concluding provision broadened to include other such definitions.

31. **The Chairman** recalled the conclusions he had drawn at the previous meeting with respect to crimes against humanity. Clearly, a working group would have to consider the matter in greater detail and submit draft revised provisions. With regard to genocide, he thought that it was agreed that the unbracketed part of the provision should be referred to the Drafting

Committee; the comments made on some parts of the text would be debated in the context of the broader discussion of crimes against humanity. Discussion of the second, bracketed part of the text would be suspended pending further consideration of the issues in the context of part 3 of the Statute.

32. He invited comments on the provisions concerning war crimes.

#### *War crimes*

33. **Mr. van der Wind** (Netherlands), acting as Coordinator of part 2 of the draft Statute, said that the definition of war crimes was divided into four sections, of which sections A and B concerned norms applicable in international armed conflict and sections C and D those applicable in internal armed conflict. The opening clause of section A took account of the fact that under the four 1949 Geneva Conventions the list of grave breaches was not always the same, which meant that protected persons were covered by different grave breach provisions depending on the Geneva Convention applicable to them. The wording of subparagraphs (a) to (h) was that of the Geneva Conventions, and it seemed from discussions in Preparatory Committee on the Establishment of an International Criminal Court that there was general support for the inclusion of that section and for its current wording; further discussion might therefore not be required.

34. Section B contained a long list of norms. Of the two options presented under subparagraph (a), the majority view seemed to favour the first, namely the inclusion of such a text. Views were more divided on (a bis) and further consultations might be needed.

35. Of the four options enumerated under section B, subparagraph (b), the first three differed in their approach to the proportionality principle, with option 3 omitting that principle. Positions were less clear on subparagraph (b bis) and further consultations would be needed. The two options under (c) came from different sources and were worded differently, but were aimed at providing similar protection; an informal exchange of views might resolve the question. Subparagraphs (d) and (e) seemed to be generally acceptable.

36. The difference between the first and second options presented under subparagraph (f) was that the second, whose wording was drawn from that of the Additional Protocol I to the 1949 Geneva Conventions, referred both to the transfer of population and to deportation, whereas the first referred only to the former, the reason being that a reference to deportation was already contained in section A. The only difference between the two options in (g) was the inclusion of buildings dedicated to education in option 2. Judging from discussions in the Preparatory Committee, subparagraphs (h) to (n) seemed to be generally acceptable.

37. There were several differences between the four options in subparagraph (o) concerning prohibited weapons. One was

the reference in the chapeau to weapons which were "calculated" to cause superfluous injury or unnecessary suffering as opposed to those which were "of a nature" to do so. Another difference was reference or otherwise to the weapons as being "inherently indiscriminate". On the question of the list of weapons, option 3 proposed no such list, whereas the others contained either an exhaustive or a non-exhaustive list. Then there was the question, if there was a list of weapons, of which should be mentioned. Options 1, 2 and 4 contained an identical list of weapons in subparagraphs (i) to (v), but option 4 provided for three additional types of weapons.

38. The difference between the two options under subparagraph (p) was that the second referred also to apartheid and other inhuman and degrading practices. Although there had seemed to be wide support for the inclusion of subparagraph (p bis), it now emerged that further consultations would be needed, and the suggestion was to engage in such consultations without a debate in the Committee. Subparagraphs (q), (r) and (s) appeared to be generally acceptable and might need no further discussion in the Committee.

39. With regard to the four options under subparagraph (t), the fourth option proposed that there should be no paragraph relating to children, but that did not appear to be the majority view. The difference between the other three lay in the degree of protection and hence the extent of States' obligations.

40. With regard to section C, the first of the two sections on norms applicable in internal armed conflict, the only issue was whether the whole section should in fact be included in the definition of war crimes; there had been little discussion on the actual wording, which was taken almost literally from article 3 common to the four 1949 Geneva Conventions.

41. Under section D, subparagraph (f), the options were very similar to those proposed in section B, subparagraph (t), the differences in wording stemming from the fact that the norms applicable to international armed conflict and the sources used were somewhat different, as could be seen, for example, in options 2 and 3 which referred to armed forces or groups, and in the reference to allowing children to take part. Then there was an option II relating to section D and proposing the addition of certain provisions to the section, most of them taken from section B on international armed conflict. As to whether sections C and D should be included at all, most, but not all, delegations in the Preparatory Committee had favoured their inclusion.

42. Under the heading "Elsewhere in the Statute", there were three options, the third being that there should be no provision on threshold for the Court's jurisdiction in respect of the crimes in question, the first that it should have jurisdiction "only" when such crimes were committed as part of a plan or policy or as part of a large-scale commission of such crimes, and the second using the words "in particular" rather than the word "only". Lastly, there was a proposed article Y, which was considered by some delegations to require further clarification.

#### *War crimes: sections A and B*

43. **The Chairman** suggested that the Committee should initially focus its discussion on sections A and B.

44. **Mr. Shukri** (Syrian Arab Republic) said that his Government's concern was with international and not internal armed conflict. He suggested that reference should be made to Additional Protocol I of 1977 to the Geneva Conventions in the chapeau of section A. He noted in that connection that some States did not consider the provisions of the four Geneva Conventions to be rules of customary international law. Regarding the various options and paragraphs, he said that, under section A, his delegation accepted all the subparagraphs. In section B, under subparagraph (a), it favoured option 1; under (a bis), it favoured option 1; under (b), it favoured option 3; under (b bis), it favoured option 2; under (c), it favoured option 1; under (f), it favoured option 3; under (g), it favoured option 2. It had no problems with (h), (i), (j) and (k), except that the Arabic version of (j) should be brought into line with the English version. It had no problem with (n), (p bis) or (q), but favoured option 4 under (o), option 2 under (p) and option 1 under (t).

45. **Mr. Sadi** (Jordan) said that there seemed to be a selective approach to the Geneva Conventions. His delegation would, as a matter of principle, oppose any attempts to marginalize one part of the Geneva Conventions, and appealed to all delegations to adopt a holistic approach to the Conventions.

46. Turning to section B, he said that his delegation favoured option 1 under subparagraph (a). The wording "civilian objects which are not military objectives" in option 1 under (a bis) seemed to involve a contradiction, and he sought clarification. In option 2 under (b), the qualification of the damage caused by an attack on civilian targets as being "excessive" in relation to the military advantage anticipated raised serious problems as it implied a subjective standard. Who would determine whether or not the damage was excessive? In any case, attacks on civilian targets should not be justified by military objectives. It would be safer to have no qualification of the type proposed. The same comment applied to the language used in option 1 under (b bis).

47. With regard to (f), the wording "the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies" was acceptable as being consistent with the fourth Geneva Convention, although ideally his delegation would like to see an extension of that principle, encompassing some kind of prohibition against deportation, which might have an ethnic cleansing dimension.

48. **Mr. Hamdan** (Lebanon) endorsed the appeal of the representative of Jordan for a holistic approach to the Geneva Conventions, and expressed support for the options favoured by the Syrian delegation.

49. **Mr. Scheffer** (United States of America) stressed the importance of the principle of *nullum crimen sine lege*. There must be a clear understanding of what conduct was prohibited,

especially in the area of war crimes, where the conduct itself might not be obviously unlawful. The crimes subject to the jurisdiction of the Court should be those clearly recognized as crimes under customary international law and should be precisely defined so as to protect the rights of the accused. Offences which were not universally or widely recognized should not be covered in the Statute. The definitions of war crimes under article 5 were insufficiently precise. They were defined in terms that derived from their law-of-war treaty antecedents. To a certain extent, the substantive offences were duplicative and the definitions traditional and, to the uninitiated, ambiguous. Thus, article 5 did not provide the necessary guidance usually found in a criminal statute, nor even a clear enough statement of the law for practitioners and judges, unless they were experts in the laws of war, which judges and practitioners before the Court might not be. In an environment of legal vagueness, individuals had no clear guide to behaviour and the rights of the accused would be jeopardized.

50. In the Preparatory Committee, the United States delegation had proposed an annex to the Statute on definitional elements for crimes covered in article 5, and intended to submit a revised version of that text to the Conference. Detailed elements of crimes must be established as legally binding requirements with respect to judicial determinations of guilt.

51. His delegation was willing to continue to work with others to identify widely recognized and universally accepted provisions and to ensure that the Statute reflected those crimes that were well established under customary international law. Such crimes included grave breaches of the 1949 Geneva Conventions, as well as the offences involving the "means and methods of warfare" largely codified in the 1907 Hague Regulations respecting the Laws and Customs of War on Land.

52. His delegation was particularly concerned about the list of prohibited weapons contained in section B, subparagraph (o) of article 5. Efforts had been made in previous discussions to confine the list to those clearly and unequivocally banned under customary international law. As the law progressed, there would be opportunities, through future review conferences, to add additional prohibited weapons, but the Statute itself should be amended only when prohibitions on the employment of additional weapons had been universally established. To include "catch-all" provisions in the list would open the door to "collateral amendment" of the Statute when weapons conventions or protocols were amended to add new weapons, prohibitions or regulations. That would, in effect, deprive States parties to the Statute from participating in its revision. To establish an automatic linkage to criminal law could also severely complicate the adoption of other treaties.

53. Specifically, the inclusion of nuclear weapons, anti-personnel mines and blinding lasers was not consistent with the current state of international law but was "legislative" in nature. That was particularly grave in matters involving individual

criminal responsibility. The addition of highly contentious weapons to the list was counter-productive and unhelpful to the negotiating process.

54. While his delegation understood and shared the desire to protect children, the use of children under the age of 15 years in hostilities was not currently a crime under customary international law and was another area of legislative action outside the purview of the Conference.

55. **Mr. Westdickenberg** (Germany) said that there was general agreement that those who committed violations of the laws and customs applicable in armed conflict must be pursued wherever they might be, brought to trial and punished. Where national criminal justice systems were non-existent or unable or unwilling to prosecute a given serious war crime, the International Criminal Court should exercise jurisdiction. It was not the objective of the Conference to act as a legislator and create new norms and rules of humanitarian law. War crimes should be defined on the basis and in the framework of established international humanitarian law, including customary law. Since, however, humanitarian law had as yet no penal provisions but only prohibitions to be implemented by national criminal law, it was reasonable to focus on prohibitions generally considered to form part of customary international law.

56. The objective of adopting criminal norms providing for individual criminal responsibility required a high standard of precision and clarity, so that everyone, especially soldiers, knew clearly what behaviour constituted a war crime under the Statute. The essential elements of the offences and the minimum qualitative and quantitative requirements should be identified in order to safeguard the right of the accused to due process.

57. War crimes committed in non-international armed conflicts must be included in view of their increasing frequency and the inadequacy of national criminal justice systems in addressing such violations.

58. His delegation was in favour of introducing a general disclaimer clause to ensure that existing obligations of States under customary or conventional law would not be increased or diminished by the Statute.

59. It welcomed the fact that a large number of States seemed ready to accept a compromise formula with regard to the issue of a threshold clause. The jurisdiction of the Court should be limited to exceptionally serious war crimes.

60. His delegation advocated a pragmatic and compromise-oriented approach to the issue of war crimes. Efforts by the German delegation in the Preparatory Committee to bridge the gap between various proposals from other participants were reflected in the text now before the Conference. A 1997 German paper entitled "Reference Paper on War Crimes" with the symbol A/AC.249/1997/WG.1/DP.23/Rev.1, pointing the way to a possible compromise, had been made available informally for consultation by delegations.



61. **Mr. Díaz Paniagua** (Costa Rica) said that he would like to see all State practice taken into account in the Statute, including the practice of countries which, like his own, had no army. That all the war crimes listed were indeed crimes was beyond doubt. States had a responsibility to disseminate and abide by article 47 of the first Geneva Convention, article 83 of Additional Protocol I and other relevant rules and to ensure that their soldiers were aware of their provisions. Costa Rica's position was at the opposite pole to that of the United States of America.

62. With regard to the definitions in the draft Statute, his delegation accepted the whole of section A. Under section B, it preferred option 1 under subparagraph (a), option 2 under (a bis), option 2 under (b), option 1 under (b bis), option 2 under (c) and option 2 under (f), on which there was an imperative need to achieve consensus. Under (g) it preferred option 2 and under (o) option 4, although option 2 might be an acceptable consensus formula. Under (p), it preferred the broader formulation of option 1, although possibly the specific elements of option 2 should be considered separately, and under (t) it preferred option 3, although option 2 might be an acceptable consensus formula.

63. **Ms. Shahan** (Libyan Arab Jamahiriya) expressed support for the inclusion of war crimes within the jurisdiction of the Court. With regard to section B, her delegation preferred option 1 under subparagraph (a), option 1 under (a bis), option 3 under (b), option 2 under (b bis), option 1 under (c), option 3 under (f), option 2 under (g), option 4 under (o) and option 2 under (p). Regarding (p bis), rape was a punishable crime under Libyan legislation. Enforced pregnancy was the result of rape and it was the act itself that should constitute a crime. Under Libyan legislation, abortion, too, was a crime. That paragraph therefore warranted further consideration. Under (t), her delegation preferred option 1.

64. **Ms. Wong** (New Zealand) said that, under section B, subparagraph (g) concerning attacks against buildings was of particular concern to her delegation, which had been responsible for the addition of the word "education" in option 2. On the question of weapons, the New Zealand position was that the definition of war crimes must not fall short of existing, widely accepted standards of international humanitarian law as reflected in the Geneva Conventions and Additional Protocols, which, given the large number of States parties thereto, constituted customary international law. The universally accepted prohibition on using cruel weapons which by their very nature caused unnecessary suffering, going back to the 1907 Hague Regulations, must be recognized, and the advisory opinion of the International Court of Justice two years earlier on the legality of the use of nuclear weapons was also relevant. New Zealand's proposal concerning subparagraph (o) appeared in option 3, which did not mention nuclear weapons but reflected the language of the Additional Protocols. An alternative would be to reflect the language of the Hague Regulations. Another issue to which New Zealand attached great importance was that of the safety of United Nations and associated personnel; that aspect of treaty-

based crimes might be included in the definition of war crimes. She endorsed the suggestion that (p bis) might be dealt with elsewhere. Under the heading "Elsewhere in the Statute", New Zealand had proposed option 2. Her delegation was ready to discuss all those issues further at a later stage.

65. **Mr. Qu Wencheng** (China) said that section A was acceptable. Under section B, his delegation preferred option 1 under subparagraph (a), but proposed the addition of "and causing death or serious injury to body or health". Under (a bis), it also preferred option 1, subject to the addition of the same phrase. Under (b) it preferred option 2, and under (b bis) option 1. Under (c), it favoured option 2, with the addition of the word "intentionally" at the beginning and the same phrase concerning death or serious injury at the end. Under (f), it preferred option 2, but with the addition of the words "which is not justified by the security of the population or imperative military reasons" after "into the territories it occupies". Under (g) it preferred option 1. It favoured option 1 under (o), option 2 under (p) and option 4 under (t). It also agreed with the United States suggestion that the Statute should include some elements of crimes so as to give the Court clear guidance in the future and to enable all countries and their soldiers to know what actions and what circumstances would constitute war crimes. By way of preliminary comment on sections C and D, he expressed reservations about the inclusion in the Statute of conflicts of a non-international character.

66. **Mr. Al Awadi** (United Arab Emirates) said his delegation favoured the inclusion of war crimes in the Statute. It had a small reservation concerning the placing of the words "not justified by military necessity" in subparagraph (d) of section A; otherwise section A was acceptable. With regard to section B, it preferred option 1 under (a), option 1 under (a bis), option 3 under (b), option 1 under (b bis), option 1 under (c), option 3 under (f) and option 2 under (g). It favoured option 4 under (o), with the second version of the chapeau, and under (p) preferred option 2. With respect to (p bis), it shared the Libyan delegation's reservations about the inclusion of enforced pregnancy. Under (t) it preferred option 2, but would not object to option 1. It considered that sections C and D should not be included in the Statute.

67. **Ms. Daskalopoulou-Livada** (Greece) said that war crimes clearly fell within the jurisdiction of the Court. Section A was acceptable as being consistent with international customary law as reflected in the Geneva Conventions. On section B, her delegation preferred option 1 under (a) and also option 1 under (a bis). Under (b) it preferred option 3 but could agree to option 2. It favoured option 1 under (b bis), option 2 under (c), option 3 under (f), option 2 under (g), option 2 under (o) and option 2 under (p). It favoured option 3 under (t), although it could see option 2 as a possible compromise. In general terms, it could accept the content of the paragraphs presenting no options. It was prepared to seek compromise solutions, without, however, departing from the basic principles underlying the whole exercise and losing sight of the fundamental purpose, which was to punish grave crimes.



68. **Mr. García Labajo** (Spain) said that the Spanish delegation had submitted a specific proposal to expand the number of persons protected against war crimes. It stressed the importance of complying with the terms of the Geneva Conventions and with customary law as it emerged, *inter alia*, from certain provisions of Additional Protocol I. By proposing to expand the scope of protection to attacks against United Nations or associated personnel or against United Nations installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, Spain was proposing to expand what might be described in modern humanitarian law as the "protection of protectors". Such protection should be provided in relation to both international and non-international armed conflict.

69. **Mr. Pham Truong Giang** (Viet Nam) expressed support for the inclusion of war crimes within the jurisdiction of the Court. Section A was acceptable. With regard to section B, his delegation favoured option 1 under (a), option 1 under (a bis), option 3 under (b), option 1 under (b bis), option 2 under (c), option 2 under (f), option 2 under (g), option 2 under (o), option 2 under (p) and option 1 under (t).

70. **Mr. Khalid Bin Ali Abdullah Al-Khalifa** (Bahrain) agreed that war crimes should come within the scope of the Court. His delegation agreed with all the options chosen by the representative of the United Arab Emirates and with his comments on sections A, C and D. It also agreed with the Libyan delegation's reservations about subparagraph (p bis) in section B and the comment of the United Arab Emirates delegation on that point.

71. **Mr. Daihim** (Islamic Republic of Iran) said that the two questions to be asked in connection with the use of nuclear weapons were whether or not such weapons were covered by humanitarian law and what responsibility States had in that regard. Taking into account developments in regard to chemical weapons, for example, nuclear weapons, which were the most devastating weapons of mass destruction, should be considered for inclusion in the draft Statute. The recent advisory opinion of the International Court of Justice made it clear that nuclear weapons were covered by humanitarian law, and States must respect such law.

72. **Mr. Skibsted** (Denmark) expressed the view that the definitions of the various elements of war crimes in the Statute should be based on the 1949 Geneva Conventions and on both 1977 Additional Protocols. For the Court to be relevant, it must have jurisdiction over crimes committed not only in international armed conflicts but also in internal armed conflicts, which were the theatre of most war crimes committed today.

73. Section A could be directly referred to the Drafting Committee. With regard to section B, his delegation would prefer option 1 under subparagraph (a), option 1 under (a bis), option 3 under (b), option 1 under (b bis), option 1 under (c), option 2 under (f) and option 1 under (g). Under (o), the difficult issue of prohibited weapons, Denmark preferred option 1 as being

consistent with the principle of *nullum crimen sine lege* and with the need for a potential perpetrator to know in advance which acts or omissions would constitute war crimes. It would be preferable to have an exhaustive list of prohibited weapons. It sympathized with the generic approach for political reasons, but defining prohibited weapons should be left to Governments. Agreement on an enumerative list would be difficult to achieve at the Conference, but the appropriate remedy would be an effective review clause allowing for an automatic review of the list of crimes by the Assembly of States Parties, perhaps five years after the entry into force of the Statute. His delegation would like to see anti-personnel mines and blinding laser weapons included in the list contained in option 1. Under (p) it preferred option 2, and under (t) it was flexible as between option 2 and option 3, but wished to see "fifteen years" replaced by "eighteen years".

74. **Ms. Sundberg** (Sweden) endorsed the comments of the representative of Denmark. In order for the Court to be politically relevant, it must have jurisdiction over war crimes as defined in the Geneva Conventions and both Additional Protocols. Section D should therefore be more or less a mirror of section B. As to the effect of using chemical weapons, there was no difference between international and internal conflicts. It was also of great importance to provide for existing prohibitions on weapons or methods of warfare which were of a nature to cause injury or unnecessary suffering or which were inherently indiscriminate. Future prohibitions of conventional weapons should also be included, as should attacks against United Nations personnel.

75. Her delegation was in favour of referring section A to the Drafting Committee. With regard to section B, it favoured option 1 under (a), option 1 under (a bis), option 2 under (b), option 1 under (b bis), option 2 under (f) and option 1 under (g). Under (o) it favoured option 4 but could accept option 2. Under (p) it preferred option 1, and under (t) option 2, but, like Denmark, thought that the prohibition should apply to persons under the age of 18. It supported the inclusion of a review clause for the list of crimes concerned.

76. **Mr. Fadl** (Sudan) said that, as the four 1949 Geneva Conventions, to which there had been near-universal accession, were now an integral part of international law, it was appropriate that they should be reflected in the section of the Statute concerning war crimes. His delegation also supported the inclusion of nuclear weapons and anti-personnel mines. Additional Protocols I and II to the Convention had been ratified by fewer States than the Conventions themselves and Additional Protocol II did not enjoy the status of established international law; it also provided a loophole for interference in the internal affairs of States. His delegation, therefore, had reservations about the inclusion of provisions based on Additional Protocol II. It favoured option 3 – that there should be no provision on threshold – under the section entitled "Elsewhere in the Statute". Given the divergence of views on Additional Protocols I and II, he proposed that the matter should be considered further in a working group.

*The meeting rose at 6 p.m.*

## 5th meeting

Thursday, 18 June 1998, at 10 a.m.

Chairman: Mr. Kirsch (Canada)

A/CONF.183/C.1/SR.5

### Agenda item 11 (*continued*)

**Consideration of the question concerning the finalization and adoption of a convention on the establishment of an international criminal court in accordance with General Assembly resolution 51/207 of 17 December 1996 and 52/160 of 15 December 1997 (A/CONF.183/2/Add.1 and Corr.1, A/CONF.183/C.1/L.1 and Corr.1 and A/CONF.183/C.1/L.4)**

#### DRAFT STATUTE

##### PART 2. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW (*continued*)

##### Article 5. Crimes within the jurisdiction of the Court (*continued*)

##### *War crimes: sections A and B (continued)*

1. The Chairman invited the Committee to continue the discussion on sections A and B of the part of the article devoted to war crimes.
2. Mr. Dive (Belgium) said that his country's attitude had always been that the International Criminal Court should try serious breaches of conventional and humanitarian law. With regard to manifest conventional law, there seemed to be little room for manoeuvre.
3. Section A should be referred in toto to the Drafting Committee.
4. His preferences for the various subparagraphs of section B were as follows: (a), option 1, see article 51 of Additional Protocol I to the Geneva Conventions; (a bis), option 1, see article 52, paragraph 1, of Additional Protocol I; (b), option 2, see article 57, paragraph 2 (b), of Additional Protocol I; (b bis), option 1, see article 56 of Additional Protocol I; (c), option 1. A text similar to subparagraph (c) appeared in many instruments, including the Geneva Conventions.
5. Subparagraphs (d) and (e) should be referred immediately to the Drafting Committee. He favoured option 2 of subparagraph (f), which exactly reproduced the text of article 85, paragraph 4 (a), of Additional Protocol I; with regard to (g), he favoured option 1.
6. Subparagraphs (h) to (n) should be referred immediately to the Drafting Committee as they stood. On subparagraph (o), his delegation had always in principle supported an option that did not contain a list of weapons, since that would avoid a difficult debate. On the whole, he therefore supported option 3, since it was essential to give the Court the power to prosecute

the use of weapons with indiscriminate effects. Even though he might be prepared to accept an option including a list of banned weapons, any such list should include weapons with indiscriminate effects.

7. He supported option 1 of subparagraph (p) and entirely supported subparagraph (p bis), in the light of the latest decrees by the International Tribunal for the Former Yugoslavia. Subparagraphs (q) to (s) should immediately be sent to the Drafting Committee.

8. With regard to the protection of children, the Conference must note the development of customary international humanitarian law based on the 1977 Additional Protocols and article 38 of the Convention on the Rights of the Child. He favoured option 2 of subparagraph (t) but reiterated his delegation's view that the age limit should be raised to 18 in view of negotiations under way in Geneva on the adoption of an additional protocol to the Convention on the Rights of the Child.

9. Mr. Al Ansari (Kuwait) agreed that war crimes should fall within the jurisdiction of the Court. He supported the suggestion that a new paragraph on serious violations of the Geneva Conventions and the Additional Protocols should be inserted.

10. His preferences for the relevant subparagraphs of section B on war crimes were as follows: (a), option 1; (b), option 3; (b bis), option 1; (c), option 1; (f), option 3; (g), option 2; (o), option 4; (p), option 2.

11. The term "enforced pregnancy" in subparagraph (p bis), should be reconsidered because rape was in any case criminalized and it might be considered that pregnancy was an aggravating circumstance of rape. The question of threats to the identity of the civilian population should be considered in a different context.

12. He preferred option 1 of subparagraph (t).

13. Mr. Hamdan (Lebanon) supported the remarks made by the representative of Kuwait. He preferred option 1 of (a bis) and said that the position of neutral forces should also be mentioned. On (f), his delegation preferred option 3 and supported the principle that individual or mass forcible transfers, as well as the deportation of protected persons from occupied territories to the territory of the occupying Power, should be prohibited. Furthermore, the occupying Power should not deport or transfer all or part of its own civilian population into occupied territories. Deportation was also considered a grave breach under article 147 of the Fourth Geneva Convention. Furthermore, a number of resolutions had been adopted condemning the establishment of settlements in occupied territories.

14. He preferred option 4 of subparagraph (o), but had some reservations on the inclusion of anti-personnel mines. As an occupied country, Lebanon had not signed the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on Their Destruction.

15. He drew attention to the opinion of the International Court of Justice that the use or threat of use of nuclear weapons would generally be contrary to the rules of international law applicable to armed conflict and in particular to the principles and rules of humanitarian law.

16. With regard to subparagraph (p bis), he agreed with the reservations expressed by a number of previous speakers concerning the inclusion of "enforced pregnancy". In view of reports on crimes committed in Bosnia and Herzegovina, he suggested that it might be better to refer to forcible pregnancies the purpose of which was to change the identity of a population group.

17. Subparagraph (t) covered a most important issue. While he fully understood the apprehensions expressed on many sides with regard to the recruitment of children in armed forces, he pointed out that many developing countries would have great difficulty in embracing such a provision because of their local culture. It would be unacceptable to his delegation for the Court to have the right to interfere in the internal affairs of such countries. He therefore favoured option 1 and trusted that it would subsequently perhaps be possible to develop it further. His own country did not allow the recruitment of children under the age of 18 into regular armed forces, but different circumstances might apply in the context of a struggle against an occupying Power.

18. **Mr. Choi Seung-hoh** (Republic of Korea) said that he had no problem in accepting section A.

19. With regard to section B, his preferences were as follows: (a), option 1; (a bis), option 1; (b), option 1; (b bis), option 2; (c), option 2; (d) and (e), as drafted; (f), option 3; (g), option 2; (h) to (n), as drafted; (o), option 2; (p), option 2; (p bis) to (s), as drafted; (t), option 3.

20. **Mr. Madani** (Saudi Arabia) associated himself with the position that war crimes within the competence of the Court should include grave breaches of the Geneva Conventions and the Additional Protocols.

21. His preferences with regard to the various subparagraphs of section B were as follows: (a), option 1; (a bis), option 1; (b), option 3; (b bis), option 2; (d) as drafted; (f), option 3; (g), option 2; (h) to (n), as drafted; (o), option 4. With regard to subparagraph (p bis) he reaffirmed his delegation's view that references to enforced pregnancy should be deleted because the law in his country did not allow abortions, except for health reasons established by a doctor and in the event of danger to the mother.

22. **Mr. Dhanbri** (Tunisia) said that he had no objection to the adoption of section A.

23. With regard to the various subparagraphs of section B, his preferences were as follows: (a), option 1; (a bis), option 1; (b), option 3; (b bis), option 1; (c), option 1; (d) and (e), as drafted; (f), option 3; (g), option 2. With regard to subparagraph (g), he asked whether option 2 would imply that it was permissible to attack the sick and wounded when the buildings in which they were accommodated were being used for military purposes. He therefore asked for deletion of that passage, which was in contradiction to the provisions of subparagraph (q). On other subparagraphs, his preferences were as follows: (h) to (n), as drafted; (o), option 4; (p), option 2; (p bis) to (s), as drafted; (t), option 3. In order to ensure consistency with the Convention on the Rights of the Child, the age limit should be raised to 18.

24. **Mr. Niyomrerk** (Thailand) said that, when considering the inclusion of war crimes under the Statute, it was first necessary to see what was established by the Geneva Conventions and what in the opinion of jurists would constitute customary international law.

25. He agreed to the inclusion of section A.

26. His preferences with regard to the various subparagraphs of section B were as follows: (a), option 1; (a bis), option 1; (b), option 1; (b bis), option 2; (c), option 2, since that text coincided with Additional Protocol I and since the establishment of demilitarized zones had to be stipulated by special agreements; (d) and (e), as drafted; (f), option 3; (g), option 2, owing to the inclusion of buildings dedicated to education; (h) to (n), as drafted; (o), option 4, with its extensive list of activities. He was in favour of including the use of nuclear weapons as a war crime, being an active party to the South-East Asia Nuclear-Weapon-Free Zone. He preferred option 2 of subparagraph (p), since it included a reference to apartheid, and could accept subparagraphs (p bis), (q), (r) and (s) as drafted. His preference was for option 3 of subparagraph (t).

27. **Mr. Alabrune** (France) said that he had no comments on section A, which reproduced provisions from the Geneva Conventions.

28. With regard to section B, his delegation supported the principle that belligerents did not have unlimited rights with regard to the weapons that they could use. Accordingly, the list of definitions should reflect the Hague and Geneva Conventions. Some passages in Additional Protocol I could give rise to difficulties with regard to different interpretations of the notion of military necessity. The French delegation was prepared to be more flexible with regard to provisions covering intentional attacks against the civilian population. He accepted subparagraph (d) as drafted and preferred option 1 for subparagraph (g); they reflected provisions of the Hague Convention. He was prepared to accept some flexibility in the drafting of subparagraph (f). With regard to subparagraph (o), he urged the

adoption of a limitative list of prohibited weapons and conduct on the lines of article 23 of the Hague Convention and therefore supported option 1. References couched in terms too general to weapons whose prohibition was not established in current positive law would not be acceptable to his delegation, nor would references to customary international law that was still evolving. A provision prohibiting weapons that would be the subject of a treaty subsequently ratified might be acceptable provided it was clear that it would be applicable only to States that had ratified the treaty in question.

29. With regard to subparagraph (t), he favoured a provision for the protection of children and was prepared to consider an amendment to that subparagraph that would facilitate a consensus.

30. **Ms. Mekhemar** (Egypt) said that she, too, attached great importance to the inclusion of war crimes within the jurisdiction of the Court. She also supported the inclusion of recognized principles of customary international law.

31. Section A should include a reference to the Additional Protocols, which had become a kind of customary international law. She would have comments on that point in the relevant working group.

32. Section A could be sent to the Drafting Committee as it stood.

33. With regard to section B, her preferences were: (a), option 1; (a bis), option 1; (b), option 3; (b bis), option 1; (c), option 1; (d) and (e), as drafted; (f), option 3, a matter of particular importance to her delegation; (g), option 2; (o), option 4; (p), option 2. On subparagraph (p bis), she agreed with previous speakers that enforced pregnancy should be mentioned in the context of rape. She accepted subparagraphs (q), (r) and (s) as drafted and preferred option 1 of subparagraph (t).

34. **Mr. Panin** (Russian Federation) supported the proposal to forward section A to the Drafting Committee as it stood. Section B was a more complicated matter. Its provisions should be brought into line with the spirit and letter of existing international law, since the Conference's mandate did not include the progressive development of international law.

35. His preferences with regard to the various subparagraphs of section B were as follows: (a), option 1; (a bis), option 1; (b), option 1; (b bis), option 2; (c), option 2; (d) and (e), as drafted; (f), option 2; (g), option 1; (h) to (n), as drafted.

36. With regard to subparagraph (o), any list of banned weapons should include nuclear weapons. Since, however, it did not believe that international law contained any direct prohibition of the use of nuclear weapons, the Russian Federation was in favour of option 1. With regard to further paragraphs, his preferences were as follows: (p), option 1; (p bis) to (s), as drafted; (t), option 2.

37. **Ms. Wilmshurst** (United Kingdom of Great Britain and Northern Ireland), speaking on section B, noted that most

delegations preferred option 1 of subparagraph (a). Her preference with regard to subparagraph (a bis) was for option 1, though she noted the very cogent statement by the representative of Jordan. However, the drafting of option 1 could be improved by inserting a comma after the words "civilian objects", and adding the words "that is, objects" before the word "which". On subparagraph (b), she preferred option 2 and pointed out that option 3 was too broad and therefore unrealistic. She advocated the deletion of subparagraph (b bis) as that provision was already covered under subparagraph (b). On subparagraph (c), opinion seemed to be tending towards option 1; she believed that the proposers of option 2 seemed to have been inclined to withdraw it at the most recent session of the Preparatory Committee on the Establishment of an International Criminal Court.

38. With regard to subparagraph (f), she well understood the preference for options 2 and 3 but preferred option 1, because option 2 overlapped with the "grave breaches" provisions of the Geneva Conventions, which were in any event covered by section A, and option 3 made new law.

39. She preferred option 1 of subparagraph (g). Though she did not dispute the principle of protecting schools, it seemed to her to be not only unnecessary but also wrong to specify them in the relevant provision because of the apparent implication that schools could be military objects.

40. Her delegation very firmly advocated an exhaustive list of weapons in subparagraph (o), as it would be wrong to give a criminal court the power to rule *ex post facto* on the legality of weapons systems. She preferred option 1 of subparagraph (p), as option 2 was duplicative. On subparagraph (t), she pointed out that option 2 reflected a possible compromise that had been arrived at after long negotiations.

41. She had great sympathy with the proposals put forward by Spain in document A/CONF.183/C.1/L.1 and Corr.1 but thought that the proposal might have the effect of diverting protection already given under the Geneva Conventions to United Nations personnel, who would not be party to a conflict and would therefore be protected persons. The question also arose whether protection should be limited to United Nations personnel. There were also technical difficulties with regard to the Spanish proposal contained in document A/CONF.183/C.1/L.4, which she intended to discuss bilaterally with the Spanish delegation.

42. **Mr. Jennings** (Australia) supported the generic approach in option 3 of subparagraph (o) and noted that the form of wording had its genesis in the 1907 Hague Convention, which was further developed in Additional Protocol I to the Geneva Conventions. He would respectfully disagree with the view that the generic approach was insufficiently specific and felt that the Court should be well placed to decide the issue, since it would probably consist of judges who were experts in criminal law and international law and would furthermore be guided and assisted by submissions from the Prosecutor.

43. He noted that option 1 of subparagraph (o) used the form of words "calculated to cause superfluous injury" which was taken from the 1907 Hague Convention, while options 2, 3 and 4 used the formulation "of a nature to cause ...", which was taken from Additional Protocol I of 1977. He suggested that the relevant development in the law should be reflected in the Statute, particularly in view of the widespread acceptance of Additional Protocol I, which had already been ratified by some 150 States.

44. **Mr. Vergne Saboia** (Brazil) said that section A presented no problems for his delegation.

45. In section B, subparagraph (a), he preferred option 1 and noted that the word "intentionally" was used throughout the text while the word used in other legal instruments was "wilfully". That point might be examined by the Drafting Committee.

46. With regard to the various subparagraphs of section B, his preferences were as follows: (a bis), option 1; (b), option 3; (b bis), option 1; (c), option 2; (d) and (e), referral to the Drafting Committee; (f), option 2; (g), option 2; (h) to (n), as drafted. Under subparagraph (o), he favoured option 2 because it listed the kinds of weapons that were currently prohibited and left the question of the future inclusion of other categories open. Landmines and blinding laser weapons should already be included and, eventually, nuclear weapons, but he pointed out that international law was still evolving on that question. The words "inherently indiscriminate" should perhaps be added to the chapeau of the subparagraph. His preferences with regard to other subparagraphs were as follows: (p), option 2; (p bis) to (s), as drafted; (t), option 3. He understood that the age of 15 was a compromise but supported increasing the age to 18 in view of the draft optional protocol to the Convention on the Rights of the Child currently being negotiated in Geneva.

47. **Mr. Kerma** (Algeria) said that section A could be sent to the Drafting Committee as it stood.

48. His preferences with regard to the various subparagraphs of section B were: (a), option 1; (a bis), option 1; (b), option 2; (b bis), option 1; (c), option 2; (d) and (e), as drafted; (f), option 3; (g), option 2; (h) to (n), direct referral to the Drafting Committee; (o), option 4; (p), option 2; (q) to (s), as drafted; (t), option 1.

49. **Mr. Rodríguez Cedeño** (Venezuela) supported the proposal to refer section A to the Drafting Committee as it stood.

50. With regard to the various subparagraphs of section B, his preferences were: (a), option 1; (b), an important provision, option 2; (c), option 1; (d) and (e), as drafted; (f), option 2 as being the clearest formulation; (g), option 2; (o), a very important provision, option 4 as being the most comprehensive and referring to other weapons covered by customary international law. His delegation had no definite preference with regard to the options for subparagraph (t), which was nevertheless important to his delegation, but thought that option 3 was perhaps the most appropriate. The matter would have to be given further careful consideration.

51. On sections C and D he agreed with "OPTION I" because crimes against humanity should be defined regardless of the context or their content. Such matters would be taken up specifically in the working group.

52. **Mr. Effendi** (Indonesia) said that, as a strong supporter of a nuclear-free zone in South-East Asia, he preferred option 4 of subparagraph (o). If the new reality could be accepted in the context of defining crimes against humanity, it should also be accepted with regard to the use of nuclear weapons.

53. **Mr. Nagamine** (Japan) said that the provisions should be examined for clarity, precision and reflection of existing rules of international law.

54. On sections C and D, his delegation advocated that the Statute should cover not only international but also internal conflicts.

55. Section A presented no problems.

56. His preferences with regard to the subparagraphs of section B were: (a), option 1, in which context he agreed with the delegation of China that the phrase "which cause death or serious injury to body or health" should be included at the end of option 1. The same remark also applied to subparagraph (a bis), option 1; he was critical regarding subparagraph (b), but preferred option 2 because of its clarity; on (b bis), he preferred option 1, subject to the comments already made on (a); on (c), he marginally preferred option 1; (d) should remain as drafted. With regard to (e), he thought that the improper use of a neutral flag should also be stipulated. Subparagraph (f) should be included as it referred to a grave breach of Additional Protocol I; he was flexible with regard to the options but tentatively preferred option 1. His delegation's position was also flexible with regard to options 1 and 2 of subparagraph (g), while subparagraphs (h) to (n) presented no problems. He drew attention to the importance of clarity, precision and reflection of existing rules of international law with regard to the subject covered by subparagraph (o); his delegation would participate with keen interest and an open mind in the discussion on that very difficult matter. With regard to subparagraph (p), he preferred option 2, as option 1 was not clear enough. Subparagraphs (q) to (t) should all be included.

57. **Mr. Caflisch** (Switzerland) agreed that section A should be referred to the Drafting Committee as it stood.

58. His preferences with regard to the various subparagraphs of section B were: (a), option 1; (a bis), option 1, though he would not insist, provided that option 1 for subparagraph (a) was accepted; (b), option 3, though option 2 would be acceptable as a compromise; (b bis), option 1; (c), option 1; (d) and (e), direct referral to the Drafting Committee; (f), option 2; (g), option 2, though option 1 would be acceptable; (h) to (n), referral to the Drafting Committee; (o), option 4; (p), option 1; (p bis) to (s), referral to the Drafting Committee; (t), option 2.

59. **Mr. Kambovski** (The former Yugoslav Republic of Macedonia) said that he accepted the Preparatory Committee's text of section A.

60. With regard to section B, his preferences were: (a), option 1; (a bis), option 2; (b), option 1; (b bis), option 2; (c), option 1; (f), option 1; (g), option 1; (o), option 2; (p), option 1; (t), option 2.

61. He accepted "OPTION I" for sections C and D. In that general context, his preferences with regard to section D were: (a), option 1; (c), option 1; (f), option 2; (l), option 2.

62. **Mr. Cherquaoui** (Morocco) indicated his preferences with regard to the various subparagraphs of section B, namely: (a), option 1; (b), option 3; (b bis), delete; (c), option 1; (d) to (l), as drafted; (o), option 3; (p), option 2. He understood the concerns of some delegations regarding enforced or involuntary pregnancy and thought that the drafting should be made more specific. He accepted subparagraphs (q) to (s) and preferred option 4 for subparagraph (t).

63. **Ms. Kolshus** (Norway) concurred with the statements made by Denmark on the previous day and invited delegations who wished to ascertain the Norwegian position to contact her delegation.

64. **Mr. Politi** (Italy) said that he attached great importance to the inclusion within the jurisdiction of the Court of serious offences committed in both international and non-international armed conflict. The definitions in sections A and B should be based as far as possible on the texts of the Geneva Conventions of 1949.

65. Accordingly, section A should be sent to the Drafting Committee as it stood.

66. His preferences with regard to the various subparagraphs of section B were: (a), option 1; (a bis), option 1; (b), option 2; (b bis), option 1; (f), option 2; (g), option 2, with the inclusion of attacks against internationally protected cultural property in accordance with an amendment proposed by Spain. The question of subparagraph (o) required further discussion, in which context he would be prepared to work on a solution consistent with the principle *nullum crimen sine lege*; (p), option 1. He would comment later on subparagraph (p bis) and, under subparagraph (t), favoured granting the maximum possible protection to children throughout the Statute, and in particular within the provisions concerning war crimes. His first choice on (t) would be for option 3, but he was working intensively to find a formula on which agreement could be reached.

67. He did not favour the inclusion of a reference to a threshold in the Statute, though the compromise in option 2 under the heading "Elsewhere in the Statute" would seem to be acceptable. He was in favour of a disclaimer clause such as that in the proposed article Y.

68. **Ms. Cueto Milián** (Cuba) considered that the list of definitions of war crimes was selective. Furthermore, her

delegation could not accept the idea of defining as a war crime the use of any kind of weapon causing superfluous injury or indiscriminate suffering unless a distinction were made between the use of nuclear weapons and of certain kinds of conventional weapons which were the only means of self-defence for some developing countries.

69. As to section B, she agreed with the general trend of the discussion concerning subparagraphs (a) and (a bis). She favoured option 1 of subparagraph (b) and of subparagraph (b bis), with the deletion of the words "excessive" and "to civilians" in the third line of the latter. She preferred option 2 of subparagraph (c). With regard to subparagraph (e), she proposed the deletion of the words "resulting in death or serious personal injury". She favoured option 3 of subparagraph (f) and option 2 of subparagraph (g). Option 1 of subparagraph (o) was preferable, with the addition of a new subparagraph (vi) reading "nuclear weapons" and a new subparagraph (vii) reading "blinding laser weapons". On subparagraph (p), she preferred option 2, and on subparagraph (t), option 3, because of the need for maximum protection of children in armed conflict.

70. **Ms. Ünel** (Turkey) agreed to section A as it stood. Her preferences with regard to the various subparagraphs of section B were: (a), option 1; (a bis), option 2; (b), option 3; (b bis), option 2; (f), option 1; (o), option 3. She was opposed to any reference to customary international law such as that in option 4 of subparagraph (o). She preferred option 2 of subparagraph (p) and of subparagraph (t).

71. **Mr. Shariat Bagheri** (Islamic Republic of Iran) supported the inclusion of war crimes in the Statute. Since his country had acceded to the Geneva Conventions of 1949, he agreed that section A should be sent as such to the Drafting Committee.

72. On section B, his preferences were: (a), option 1, though he agreed with the representatives of China and Japan that the words "when these acts bring about serious injury and death" should be added at the end of that option; (a bis), option 1; (b), option 2; (b bis), option 1; (c), option 2; (d) and (e), as drafted; (f), option 2, in which context he supported the proposal of New Zealand for the inclusion of educational establishments; (h) to (n), referral to the Drafting Committee; (o), option 4; (p), option 2. On subparagraph (p bis), he associated himself with previous speakers who considered that inclusion of the wording "enforced pregnancy" might be used as an argument against the prohibition of abortion and should therefore be dropped. He could accept subparagraphs (q), (r) and (s) and preferred option 1 for (t).

73. **Ms. Flores** (Mexico) said that war crimes should be included but that clear definitions based on existing international law were necessary. The text before the Committee was too long and it would be better to have a single list of all forms of conduct to be banned. She was prepared to cooperate in preparing definitions that would be more simple and straightforward without a division into sections, and advocated

the closest possible adherence to the language of the Geneva Conventions and Additional Protocol I.

74. She attached basic importance to subparagraph (o) on the use of weapons and preferred option 3. She disagreed with the approach based on drawing up a list of weapons, but was flexible on that point. In any case, such a list would have to include nuclear weapons, particularly when poisoned weapons were already included.

75. **The Chairman**, summing up the discussions up to that point, said that section A seemed to be generally accepted. In section B, it seemed to be the general view that subparagraphs (d), (e), (h) to (n), (q), (r) and (s) should be sent to the Drafting Committee as they stood. He would seek the advice of the Coordinators before determining how to proceed on those points.

76. On the other hand, other provisions, namely (a), (a bis), (b), (b bis), (c), (f), (g), (o), (p), (p bis) and (t), seemed to require either amendment or more discussion, and in some cases substantially more discussion. Since a coordinator would be appointed with the task of determining how far informal consultations or working group meetings might be needed, and whether the Committee of the Whole would need to discuss those issues again, he appealed to delegations to address only provisions that were in dispute.

77. **Mr. Nathan** (Israel) said that the crimes to fall within the jurisdiction of the Court should be defined with the utmost precision and clarity, on the basis of generally accepted norms of customary international law. It was not the task of the Conference to legislate or progressively develop international law.

78. It was important to include a provision on thresholds on the lines of the chapeau to article 20 of the draft Code of Crimes against the Peace and Security of Mankind prepared by the International Law Commission.

79. He could accept section A. With regard to section B, he noted that many of its provisions were drawn from Additional Protocol I and did not reflect customary international law. Furthermore, that section contained serious omissions and changes when compared to Additional Protocol I, with the result that the balance was altered. Also, certain parts of section B overlapped with section A.

80. His preferences and comments on the individual subparagraphs were: (a), option 1 accepted, subject to amendment; (a bis) should be deleted; (b), option 1 accepted, subject to amendment; (b bis) should be deleted; (c), option 1; (d) and (e), accepted; (f) should be deleted; (g) should be brought into line with either Additional Protocol I or the Geneva Conventions; (h) to (k), accepted; (l) overlapped with the Geneva Conventions; (m) and (n), accepted; (o), option 1 accepted, though subparagraph (v) involved ex post facto legislation and should be reconsidered; (p) was part of common article 3 of the Geneva Conventions and should not appear in section B; there was some overlapping in (r), which should also refer to attacks

resulting in death or personal injury not justified by military necessity; the last part of (s) was not included in the Geneva Conventions and was not an element of customary international law. On (t), he preferred option 1.

81. **Mr. García Labajo** (Spain) presented the proposals of his delegation on sections B and D that had been distributed under the symbol A/CONF.183/C.1/L.4. In subparagraph (g) of section B, it was proposed to add a reference to "intentionally directing attacks against ...internationally protected cultural property". That addition would reflect a provision that appeared in such instruments as Additional Protocol I and represented a widely accepted principle. In subparagraph (r) concerning attacks on buildings and personnel allowed to use the distinctive emblems provided for under the Geneva Conventions, it was proposed to add a reference to attacks against those carrying out activities to protect and assist the victims of a conflict in accordance with the Geneva Conventions. The reference was to articles 8, 9 and 10 of those Conventions. It was proposed that similar wording should be inserted in section D, subparagraph (b).

82. He hoped that those amendments would meet with support, as their general purpose was to reflect the development of contemporary international law as embodied in the various conventions and additional protocols adopted within the framework of the activities of the International Committee of the Red Cross.

83. **Mr. Diop** (Senegal) said that he basically agreed with subparagraphs (b), (b bis), (c), (f), (g), and (p) of section B. His preferences with regard to other subparagraphs were: (a), option 1; (a bis), option 1; (b), option 3, since he had difficulties with options 1 and 2 in relation to the question of military advantage; (c), option 1; (f), option 2; (g), option 2; (o), option 4; (p), option 1, subject to correction of the French version. He reserved his position on (p bis), since enforced pregnancy implied rape. He preferred option 2 of (t). In the latter context, he agreed that it was desirable to raise the age limit to 18 in accordance with the relevant International Labour Organization Convention and the emerging consensus regarding the draft optional protocol to the Convention on the Rights of the Child.

84. **Ms. Tomič** (Slovenia) favoured option 2 of subparagraph (c) in section B, with the addition of a reference to safe areas declared by the United Nations. If the proposer of that option intended to withdraw it, she could accept option 1, plus a reference to United Nations safe areas.

85. With regard to subparagraph (o), she preferred option 3, for the reasons stated by the Australian delegation and with regard to (r) she supported the amendment proposed by Spain. On subparagraph (t), she preferred option 3, but, if it would be easier to reach agreement on option 2, she could concur provided that the word "actively" was deleted. The limit age should be 18 and not 15, in line with the growing agreement regarding the minimum age for criminal responsibility under the Statute.



86. **Mr. S. R. Rao** (India) said that it was of critical importance that war crimes should be defined if the Court were to be established, though the list of such crimes might be condensed. He would state his preferences regarding the various options under section B in the working group and would be flexible on matters of a controversial nature. The maximum protection should be given to women and children under international humanitarian law.

87. With regard to subparagraph (o) of section B, he was in general agreement with the principle that new customary law could not be created by the Conference.

88. He noted the cogent remarks of Denmark and Sweden regarding the inclusion of nuclear weapons, which coincided with the position of the Movement of Non-Aligned Countries. The best way of including nuclear weapons would be under option 1 for (o), in accordance with the opinion of the International Court of Justice that initiation of the use of nuclear weapons was prohibited under customary international law. He would join in a consensus on the subject.

89. **Mr. Tomka** (Slovakia) said that, although several delegations had stated that the task of the Conference did not include the progressive development of international law, it had been convened under Article 13, paragraph 1, of the Charter of the United Nations, which provided for the progressive development of international law and its codification. The Conference should not develop the law of the Hague or Geneva Conventions but it would be a mistake to prevent it from establishing the international liability of persons committing serious crimes which would be prohibited in the future. The previous practice of other tribunals confirmed that several acts, though not specifically prohibited, were qualified as prohibited under customary international law. The principle *nullum crimen sine lege* should therefore be interpreted to mean that acts prohibited by customary international law were also punishable and that the Court should be able to hold offenders internationally responsible, under future treaties, for example.

90. With regard to subparagraph (o) of section B, it was clear that option 1 would not find a consensus since it would not permit holding persons internationally liable for using weapons or systems that later became the subject of a comprehensive prohibition under customary or conventional international law. Though his delegation preferred option 3, he believed that option 2 could provide the basis for a compromise in further negotiations under the chairmanship of the Coordinator.

91. **Mr. Salinas** (Chile) said that section A should refer not only to the Geneva Conventions but also to the Additional Protocols of 1977.

92. With regard to section B, his preferences were as follows: (b), option 1; (b bis) should be deleted, as the question was covered elsewhere; (c), option 1; (f), option 1; on (g), he preferred option 2, since it referred to attacks against buildings dedicated to education; on (o), he preferred option 4, including nuclear weapons, anti-personnel mines and blinding laser

weapons. Since a ban on such weapons was one of the most important items of progress under international law, the Statute should explicitly mention them. Chile would not favour a comprehensive treaty banning such weapons unless the broadest possible consensus could be achieved. Though he preferred option 4, he could accept option 3, which would make it easier to achieve consensus. Option 2 was unacceptable, as it left out certain weapons and mentioned customary and conventional law. On subparagraph (p), he preferred option 1 and, on subparagraph (t), he would accept option 2. However, his preference with the regard to the age limit was 18, in the light of the Convention on the Rights of the Child and other instruments.

93. **Ms. Tasneem** (Bangladesh) voiced her strong support for option 4 of subparagraph (o) in section B.

94. **Mr. de Klerk** (South Africa) drew attention to matters of concern to his delegation and to some extent to the Southern African Development Community.

95. The list of crimes in the Statute should reflect not only the Geneva Conventions but also the Additional Protocols.

96. Nuclear weapons and other weapons causing indiscriminate injury or suffering should be included. He therefore preferred option 4 of subparagraph (o) in section B, particularly as it was an open-ended provision.

97. The use of children in armed conflicts should be criminalized, and he supported option 2 of subparagraph (t). He preferred option 2 of subparagraph (p), which covered the crime of apartheid.

98. **Mr. Al-Humaimidi** (Iraq) said that his positions on the options under section B were flexible, except that he preferred option 4 of subparagraph (o); he suggested that the words "weapons that contain enriched uranium" should be added.

#### *War crimes: sections C and D*

99. **The Chairman** invited the Committee to take up sections C and D.

100. **Mr. van der Wind** (Netherlands), acting as Coordinator of part 2, noted that there was much overlapping between sections B and D. One question that might need further discussion was whether or not to include the four additional elements proposed in "OPTION II" for section D.

101. **Mr. Fadl** (Sudan) opposed the inclusion under section D of crimes dealt with under the four Geneva Conventions and Additional Protocols I and II, as that involved a double standard that might imperil the unity and territorial integrity of States, undermine measures adopted by States to establish peace in non-international conflicts, and hamper efforts towards amnesty and national or domestic reconciliation. If the Court were to deal with war crimes in non-international conflicts, the competence of the State would be set aside. Furthermore, the Prosecutor should not have ex officio powers to conduct investigations in States without the prior consent of those States.



102. Section D was based on Additional Protocol II to the Geneva Conventions, but the provision in that Protocol that it could not be invoked in relation to the need of the State to keep the peace internally or to justify interference in the internal or external affairs of a State had been neglected. Article 3 common to the 1949 Geneva Conventions had widespread international acceptance and, together with other conventions dealing with armed conflict, was sufficient to meet his concerns. Indeed, the International Court of Justice had stated with regard to a case involving Nicaragua that article 3 common to the Geneva Conventions was applicable to both international and non-international armed conflicts.

103. His proposal was all the more valid since Additional Protocol II dealt with internal conflicts between Governments and armed groups but failed to refer to conflicts among or between armed groups themselves.

104. **Mr. Jennings** (Australia) said that it was important to give the Court meaningful jurisdiction in non-international conflicts and broadly supported sections C and D. He would comment on individual paragraphs in a more informal setting.

105. In the section entitled "Elsewhere in the Statute", he preferred option 3. Since adequate provision for thresholds was already present in the preamble, the inclusion of a threshold provision under option 1 or 2 might have the effect of letting crimes that failed to satisfy so-called plan, policy or large-scale commission tests go unpunished. No such provision should appear in the war crimes part.

106. **Mr. Díaz Paniagua** (Costa Rica) said he thought that a single definition of crimes should be applicable to both non-international and international conflicts, but recognized that the present structure of the draft would facilitate agreement. Secondly, it was important to include intentional starvation of civilians as a crime.

107. **Ms. Ünel** (Turkey) opposed the inclusion of sections C and D and said that it was not clear how the Court would decide whether there was an internal conflict or not. Depending on the development of discussions, she would have some proposals concerning the chapeau and on the question of the threshold dealt with under the heading "Elsewhere in the Statute", in which context she would prefer option 2.

108. **Mr. Piragoff** (Canada) said that his delegation was committed to the inclusion of sections C and D.

109. **Mr. Dive** (Belgium) fully supported the Canadian position, and wished to stress the importance of the proposed article Y, to protect the conventional provisions by which States were bound elsewhere.

110. **Ms. Wong** (New Zealand) endorsed the remarks of Australia and Canada with regard to sections C and D. There should be no threshold provision.

111. **Mr. Janda** (Czech Republic) associated himself with the statements by Australia and Canada and thought there should be no threshold provision.

112. **Ms. O'Donoghue** (Ireland) said that her delegation was strongly committed to giving the Court jurisdiction over war crimes committed during internal armed conflicts and also opposed a threshold provision.

113. **Mr. Choi Seung-hoh** (Republic of Korea) supported the inclusion of sections C and D. In the part entitled "Elsewhere in the Statute", he preferred option 2. Article Y should be included in some form.

114. **Mr. Vergne Saboia** (Brazil) advocated the retention of sections C and D. His view on the individual options of those sections was similar to that which he had expressed on section B. His initial preference with regard to thresholds was for option 2, but he was flexible on that point. He supported article Y.

115. **Mr. S. R. Rao** (India) said that there could not be a homogeneous structure of treatment of international and non-international armed conflicts so long as sovereign States existed. He therefore did not favour the retention of either section C or section D. However, the chapeau to OPTION I would be necessary. He did not agree that the presence of a general threshold provision made it unnecessary to include a similar provision later in the Statute. Several other conditionalities had been discussed with regard to the specifics of crimes under article 5. The chapeau was logically justifiable and he supported the provisions in the section "Elsewhere in the Statute", and specifically in option 1. He would be ready to participate in negotiations on those points.

116. **Mr. Matsuda** (Japan) supported option 1 of the section entitled "Elsewhere in the Statute", but was ready to consult with delegations that preferred other options.

117. **Ms. Wilmshurst** (United Kingdom of Great Britain and Northern Ireland) strongly favoured the inclusion of sections C and D.

118. Regarding the section entitled "Elsewhere in the Statute", her previous preference had been for option 1, but she could accept option 2, which she believed would meet the objections of those who did not favour the inclusion of a threshold, since what it contained was merely a guideline; it could perhaps be regarded as a compromise.

119. **Ms. Kolshus** (Norway) wished to place on record her support for the inclusion of sections C and D and favoured option 2 in the section entitled "Elsewhere in the Statute".

120. **Mr. Qu Wencheng** (China) supported the deletion of sections C and D and preferred option 1 in the section entitled "Elsewhere in the Statute".

*The meeting rose at 1.10 p.m.*

## 6th meeting

Thursday, 18 June 1998, at 3.25 p.m.

Chairman: Mr. Kirsch (Canada)

later: Ms. Fernández de Gurmendi (Argentina) (Vice-Chairman)

A/CONF.183/C.1/SR.6

### Designation of Coordinators

1. The Chairman announced the list of Coordinators for the various sections of the draft Statute: preamble: Mr. Slade (Samoa); part 1: Mr. S. R. Rao (India); part 2: war crimes: Mr. van Hebel (Netherlands); crimes against humanity: Mr. Sadi (Jordan); aggression and other crimes: Mr. Manongi (United Republic of Tanzania); jurisdiction: Mr. Kourula (Finland); admissibility: Mr. Holmes (Canada); part 3: Mr. Saland (Sweden); part 4: Mr. Rwelamira (South Africa); parts 5 and 6: Ms. Fernández de Gurmendi (Argentina); part 7: Mr. Fife (Norway); part 8: Ms. Fernández de Gurmendi (Argentina); part 9: Mr. Mochochoko (Lesotho); part 10: Ms. Warlow (United States of America); parts 11 and 12: Mr. S. R. Rao (India); final clauses: Mr. Slade (Samoa).

2. The list was not exhaustive and could be supplemented in consultation with the Bureau.

### Agenda item 11 (continued)

Consideration of the question concerning the finalization and adoption of a convention on the establishment of an international criminal court in accordance with General Assembly resolutions 51/207 of 17 December 1996 and 52/160 of 15 December 1997 (A/CONF.183/2/Add.1 and Corr.1, A/CONF.183/C.1/L.1 and Corr.1 and A/CONF.183/C.1/L.4)

### DRAFT STATUTE

#### PART 1. ESTABLISHMENT OF THE COURT (continued)

3. The Chairman asked for a report on the informal consultations that had taken place.

4. Ms. Wilmshurst (United Kingdom of Great Britain and Northern Ireland) said that two substantive problems had been considered with regard to article 1 of the draft Statute. Many delegations thought that the term "the most serious crimes of international concern" was too vague, and it was proposed that the words "as referred to in this Statute" be added after the words "for the most serious crimes of international concern".

5. It was agreed that article 1 could be sent to the Drafting Committee on the understanding that the use of the word "persons" would be reconsidered in the Committee of the Whole in the light of any agreement reached with regard to

article 23. It was thought that other remarks made about article 1 could be dealt with in the Drafting Committee.

6. A number of suggestions had been made with regard to article 3, paragraph 3. It had been pointed out that the reference to powers and functions of the International Criminal Court was rather wide and it was suggested that that term should be linked to other provisions of the Statute by adding the words "as provided in this Statute" after the words "powers and functions". Some representatives thought the paragraph should not appear in article 3. Since others were still undecided as to its placement, it was proposed that the question should be referred to the Drafting Committee. It was asked whether the word "powers" in article 3, paragraph 3, of was necessary, and it was suggested that the Drafting Committee should be requested to consider that question, without prejudice to further consideration by the Committee of the Whole.

7. Assuming agreement on those amendments to article 1 and article 3, paragraph 3, and on the suggested recommendations to the Drafting Committee, she proposed that the whole of part 1 be sent to the Drafting Committee.

8. Mr. Güney (Turkey) asked to see the proposed amendments in writing before taking a decision.

9. Mr. Sadi (Jordan) said that the words "by special agreement" in article 3, paragraph 3, gave him some concern. The underlying intention should be spelt out clearly.

10. Mr. Shukri (Syrian Arab Republic) drew the Committee's attention to a discrepancy in the wording of article 1. The Arabic phrase used to translate the English phrase "to bring persons to justice" meant to present persons to court. He was not sure whether that was a drafting problem or a matter of substance.

11. Mr. Hamdan (Lebanon) shared the concerns expressed by the representative of Jordan, and asked whether the question of article 3, paragraph 3, could be settled by the Drafting Committee. That point might have important implications for the paragraph as a whole.

12. The Chairman suggested that the amendments be put in writing for comments by interested delegations and for subsequent referral to the Drafting Committee.

13. It was so agreed.

PART 2. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW (*continued*)

Article 5. Crimes within the jurisdiction at the Court (*continued*)

[*Crime of aggression*]

[*Crimes of terrorism*]

[*Crimes against United Nations and associated personnel*]

[*Crimes involving the illicit traffic in narcotic drugs and psychotropic substances*]

14. **The Chairman** said that the Committee would now consider the provisions on aggression and other crimes.

15. **Mr. van der Wind** (Netherlands), acting as Coordinator, said that the crime of aggression had been discussed in the Preparatory Committee on the Establishment of an International Criminal Court, initially on the basis of the definition included in the Nuremberg Charter and of the definition included in General Assembly resolution 3314 (XXIX) of 14 December 1974. During those discussions, it had become clear that neither of the precedents was considered acceptable or appropriate for full inclusion.

16. The relevant section of the draft Statute contained three options. Option 1 was an attempt to combine elements of the Nuremberg precedent and the General Assembly resolution precedent. However, option 3 was later considered to have taken over the role of option 1, though a number of delegations were still in favour of the option 2 approach, in which acts which might constitute aggression were also enumerated.

17. Whatever the option was selected, two elements deserved further consideration by the Committee of the Whole, namely, whether determination of aggression by the Security Council should be a prerequisite for action by the Court, and whether occupation or annexation was also an essential element.

18. Regarding treaty crimes, namely, drug trafficking, terrorism and attacks on United Nations and associated personnel, the major question was whether any of them should be included. He suggested that the Committee might first focus on the question of whether there was sufficient support for their inclusion and, if that were the case, consider the question of definition.

19. **Mr. Westdickenberg** (Germany) said that his country maintained its strong support for inclusion of the crime of aggression in the Statute. His general approach to that issue was set forth in an informal discussion paper available to delegations.

20. In the light of the deliberations at the most recent Preparatory Committee session, consultations and statements in the plenary, he believed that a workable and precise definition of the crime of aggression could be found. During the

Preparatory Committee deliberations, two basic approaches had been taken. Some delegations had favoured a definition based on General Assembly resolution 3314 (XXIX) of 1974, which contained an exhaustive enumeration of acts constituting aggression. The debates and consultations during the work of the Preparatory Committee had also led to the formulation of a definition supported by a large number of delegations which was currently contained in option 3 of the relevant section of the draft Statute. As a compromise, that option mentioned the most important cases of the use of armed force that constituted crimes of aggression, in particular, armed attacks undertaken in violation of the Charter of the United Nations, which had the objective of, or resulted in, the military occupation or annexation of the territory of another State or part thereof.

21. That option should be preferred because it was necessary to limit the crime to undeniable cases of armed attacks committed in violation of the Charter that were of such magnitude as to warrant individual criminal responsibility.

22. The definition must not lend itself to frivolous accusations of a political nature against the leadership of a Member State. Also, the definition must not negatively affect the legitimate use of armed force in conformity with the Charter of the United Nations, the necessity of which could not be ruled out in the future. Furthermore, the definition contained in option 3 was in line with historic precedents such as the Charter of the Nuremberg Military Tribunal. It also met the strict standard of legal precision, clarity and certainty that was necessary for a norm providing for individual criminal responsibility. The broad and enumerative approach of General Assembly resolution 3314 (XXIX) would not command general agreement.

23. It was also necessary to address the role of the Security Council, in which context it was clear that the Statute of the Court could not redraft the Charter of the United Nations and that the primary responsibility of the Security Council for the maintenance of international peace and security had to be taken into account. By virtue of Chapter VII of the Charter, it was the task of the Security Council to determine whether a given State had committed an act of aggression or not. Any attempt to circumvent the responsibilities of the Security Council would run counter to the Charter and would make it impossible for many States, including Germany, to continue to favour the inclusion of the crime of aggression in the Statute. The result might be that the crime of aggression would not be included in the Statute at all.

24. On the other hand, acknowledgement of the role of the Security Council would not and must not endanger the independence of the Court in determining individual criminal responsibility. Accordingly, delegations should decide whether they favoured the inclusion of a workable and realistic definition of the crime of aggression in the Statute of the Court, taking into account the powers and responsibilities of the Security Council under the Charter of the United Nations.

25. **Mr. Shukri** (Syrian Arab Republic) said that the Statute should not cover terrorism, drug trafficking, and attacks on United Nations personnel. Terrorism was not well defined, and to include it would cause confusion. Drug trafficking and crimes concerning drugs should be dealt with by national courts. Attacks on United Nations officials should not be a matter for an international court.

26. Without having seen the text prepared by Germany and reading the alternatives presented in the draft Statute, he pointed out that there was a great difference between determining the occurrence of aggression, which was a political act and a prerogative of the Security Council under Article 39 and other Articles of Chapter VII of the Charter of the United Nations, and formulating a definition of aggression, which was a purely legal matter. There were two widely circulated definitions of aggression: that of the Nuremberg Tribunal, and that of General Assembly resolution 3314 (XXIX). His delegation favoured the definition included in General Assembly resolution 3314 (XXIX) which represented the work accomplished over a number of years.

27. A clear-cut distinction should be drawn between aggressors and freedom fighters. General Assembly resolution 3314 (XXIX), after enumerating acts of aggression, excluded freedom fighters acting in accordance with their right to national self-determination from being labelled as aggressors. No such provision was found in any of the alternatives or options presented to the Committee. His delegation would read the German proposal and would be flexible but preferred to take resolution 3314 (XXIX) of 1974 as a starting point for defining aggression. He reserved the right of his delegation to speak to that point later.

28. **Mr. Nyasulu** (Malawi) supported option 3. While there was no doubt that the Charter of the United Nations empowered the Security Council to determine the occurrence of aggression, it might be argued that the Court might proceed even in the absence of determination by the Security Council. That was the position that Malawi had always espoused. However, it had become clear that some countries would accept the inclusion of aggression as a crime only if there were a role for the Security Council.

29. Inside paragraph 1 of option 3, the brackets might have to be deleted, though that might not allay the fears of many States, particularly on the independence of the Court, considering that the determination of the Security Council would be political in nature. It might therefore be useful to consider reversing the obligation: instead of subjecting the definition to determination by the Security Council, the obligation should be on the Court to seek such determination.

30. Option 3 might therefore have a third paragraph to read as follows: "The Court may seek a determination of the Security Council before proceeding on a charge concerning the crime of aggression." It might also be useful to leave no doubt about the competence of the Security Council under the Charter on

matters concerning aggression. Perhaps a clause could be inserted as a fourth paragraph, to read as follows: "The definition of aggression under the present Statute is without prejudice to the powers and functions of the Security Council under the Charter of the United Nations."

31. A contravention of the Charter, as mentioned in the last part of paragraph 1, need not be qualified by the word "manifest". He would favour deleting the brackets around paragraph 1. Military occupation or annexation was not a condition for aggression to be manifest and for individuals concerned to be found responsible.

32. **Mr. Stigen** (Norway) said that the crimes of terrorism, crimes against United Nations personnel, narcotic drugs trafficking or similar crimes not covered by the so-called core crimes were undoubtedly of international concern. However, in view of very serious and valid concern "for instance, those of Thailand on narcotic drugs trafficking" a revision clause should be included to provide for amending the list in the future.

33. He appreciated the efforts of the German delegation to find a viable compromise on the crime of aggression, which was indeed of major concern, but he doubted whether it would be possible to find a satisfactory definition that would be consensually based, in view of the remarks of delegations that had just spoken, for whom he had high regard.

34. Apart from the issue of definition, there was the question of the Security Council, and he was not persuaded that a consensus on that issue was possible at the current stage, though he would be happy to see any basis for consensus evolving in the course of the discussion.

35. **Ms. Tomič** (Slovenia) said that her delegation strongly favoured the inclusion of the crime of aggression within the Court's jurisdiction and that it would be an unacceptable backward step if agreement could not be reached on that point. Aggression, being essentially a crime against peace, was usually accompanied by the commission of other serious violations of international humanitarian and human rights law. However, in many cases it would prove difficult to trace the commission of the latter crimes directly to the responsible persons in high positions, while the crime of aggression was easily attributable to those persons. Those were compelling reasons for adding a provision on the determination of individual criminal responsibility for aggression in the Statute of the Court. Such a provision should be appropriately brought in line with other provisions of the Statute regarding the role of the Security Council.

36. The definition of the crime of aggression should be precise, clear and preferably short, for which reasons she preferred option 3, which covered the relevant acts in a generic manner. However, it would also be necessary to consider the matter in relation with article 23, paragraph 7 (b).

37. **Mr. Tomka** (Slovakia) said that treaty crimes were definitely of international concern, but nevertheless different in nature from the core crimes. His country was a party to a

number of conventions concerning treaty crimes, but he nevertheless considered that they should not be included in the Statute.

38. His delegation strongly supported the inclusion of the crime of aggression in the Statute and thought it would be a serious mistake not to include it.

39. He agreed with the representative of Germany that option 3 represented the best option concerning definition. Nevertheless, he had some doubts whether the precondition for trying persons for committing the crime of aggression should be a determination by the Security Council. He understood the primary role of the Council in respect of Article 39 of the Charter of the United Nations, but thought that such determination was a precondition for taking action which was binding upon Member States; it would be difficult to imagine that such a precondition was necessary for the Court.

40. Aggression was an objective category and it should be for the Court to determine whether an act of aggression had been committed or not. On the other hand, he accepted some linkage or relationship between the Security Council and the Court and would support the view that the Council had the power to determine that certain acts, although considered *prima facie* as aggression, did not in fact constitute acts of aggression. That was also in line with the role of the Council as envisaged in other parts of the Statute.

41. **Mr. Mahmood** (Pakistan) agreed that the Statute should include the most heinous crimes of international concern but opposed the inclusion of aggression because of its controversial nature. The definition of aggression which had been adopted by the General Assembly in 1974 was considered by many States, including Pakistan, as being of a non-binding nature, and more political than legal. Regarding a role for the Security Council in the matter, any such role would introduce a political element which would undermine the trigger mechanism, and would also run counter to the basic philosophy of complementarity devised to preserve the jurisdiction of national legal systems.

42. Furthermore, aggression was traditionally considered a crime committed by States, whereas Pakistan favoured the principle that the Court's jurisdiction should be limited only to crimes committed by individuals. That raised the complex problem as to how an individual might be prosecuted and punished for aggression, unless the Security Council first determined the existence of aggression, and that then those responsible were identified. In most cases those in authority would be the accused, something which threatened the concept of sovereignty of States.

43. If crimes of terrorism were to be included, selective definitions of terrorism would not be acceptable, and terrorism would have to be considered in all its forms and manifestations.

44. There were already a large number of treaties related to illicit traffic in narcotic drugs and psychotropic substances. Furthermore, States had enacted legislation to implement those

treaties and had assumed jurisdiction over such offences. Consequently, the Court's jurisdiction would apply only if States parties to the Statute had expressly consented to the Court's jurisdiction over such crimes.

45. **Mr. Nathan** (Israel) was aware that the crime of aggression was of paramount concern to the international community, but was not convinced that it should be included in the jurisdiction of the Court. The Statute of the Court provided for penal sanctions against criminal acts or omissions and had to be based on precise and universally accepted definitions. Such a definition of the crime of aggression had not so far been forthcoming, and its absence might lead to the introduction of politically motivated definitions which might affect the independence and non-political character of the Court.

46. Option 1 followed largely the Nuremberg definition of crimes against peace, and option 2 that of General Assembly resolution 3314 (XXIX). However, no enumeration of acts of aggression would be exhaustive, and thus a large number of acts which would qualify as acts of aggression within the meaning of the resolution would not be included in the definition.

47. Option 3 contained in the draft bore witness to the danger of politicization. Its object was obviously to single out as an act of aggression an armed attack aimed at establishing a military occupation, assuming other acts of aggression to be irrelevant.

48. Acts of aggression were committed by States against States and did not belong to the category of offences committed by individuals in violation of international humanitarian law, which was what the Statute was intended to deal with.

49. While upholding his objection to the inclusion of the crime of aggression within the Statute of the Court, he said that, if it should be decided to include it, the exercise of jurisdiction should be subject to determination by the Security Council that an act of aggression had occurred. However, such determination by the Security Council would adversely affect the major defences available to the accused before the Court, and might also affect the standing of the Court as an independent judicial organ.

50. The inclusion of aggression within the jurisdiction of the Court might be left for a future review conference, by which time a definition acceptable to the major part of the international community might have been developed.

51. The crime of terrorism was regarded as an international crime in keeping with the Declaration on Measures to Eliminate International Terrorism, adopted by the General Assembly. His delegation considered that the Conference should strike a correct balance between recognizing terrorism as an international crime, and focusing on the most practical and effective means of cooperation in bringing international terrorists to justice.

52. **Mr. Cherquaoui** (Morocco) agreed with the Syrian delegation that illicit traffic in narcotics, crimes against United Nations personnel and terrorism should not fall within the jurisdiction of the Court.

53. Given the difficulty of finding a precise definition of the crime of aggression and the role of the Security Council, he thought that aggression should be excluded from the list of crimes falling within the competence of the Court. However, if there were to be a consensus for its inclusion, the Syrian proposal should be considered, and an attempt made to find a definition of aggression that was consistent with General Assembly resolution 3314 (XXIX).

54. **Mr. Al-Humaimidi** (Iraq) said that his delegation would prefer the crime of aggression to be within the jurisdiction of the Court, taking into account General Assembly resolution 3314 (XXIX). Because of the lack of any other definition of the crime of aggression, the General Assembly text should be the basis of any subsequent definition. His delegation favoured option 2.

55. His delegation was opposed to including terrorism and crimes committed against United Nations personnel, as well as crimes relating to illicit traffic in narcotics, in the Court's jurisdiction.

56. **Mr. Matsuda** (Japan) supported the inclusion of aggression in the Statute. In his view, option 3, which was a generic approach that had emerged from discussion in the Preparatory Committee, could form the basis for the final text. At the same time, the constituent elements of aggression must be defined as clearly and precisely as possible.

57. Paragraph 1 of option 3 could be improved by making it clear that soldiers of low rank could not be held guilty of aggression. The words "as a leader or organizer" could be added after "an individual who is in a position of exercising control or capable of directing the political and military action of the State".

58. If the Court were to exercise jurisdiction over the crime of aggression, determination by the Security Council of the existence of the act of aggression must be required. He therefore suggested that the square brackets in the first and second lines of paragraph 1 be removed.

59. While he agreed that treaty-based crimes were of international concern, he thought that it was not necessary to include them in the Statute. A framework of cooperation had already been established for the prosecution and punishment of those crimes.

60. **Mr. Koffi** (Côte d'Ivoire) said that his delegation would favour inclusion of the crime of aggression in the Statute if there was a sufficient majority in support of that. On that assumption, he urged that the square brackets be deleted and the text be forwarded to the Drafting Committee. His delegation strongly urged the inclusion of crimes against United Nations and associated personnel within the competence of the Court.

61. It would be premature to include illicit traffic in narcotics in the Statute at the current stage, but the other provisions on treaty crimes could be forwarded to the Drafting Committee.

62. Including acts of aggression within the jurisdiction of the Court would not conflict with the prerogatives of the Security Council under Chapter VII of the Charter of the United Nations, and questions of aggression could be brought before the Court by the Council. His delegation was flexible as to the definition of aggression, which should be based either on General Assembly resolution 3314 (XXIX), or on option 3, which might provide a compromise approach.

63. **Mr. Dive** (Belgium) asked what would be the logic in prosecuting war crimes if the first crime that opened all armed conflict – that is, the crime of aggression – were not prosecuted. Belgium had always strongly supported the inclusion of the crime of aggression in the Statute of the Court. For that reason, he supported option 3, presented earlier by the German delegation.

64. He accepted the specific role of the Security Council, but did not see the need to require that there be occupation or annexation before it could be considered that aggression had taken place, precisely because of the prior role of the Security Council.

65. There were no universally accepted bases for including terrorism, crimes against the safety of United Nations personnel, and traffic in narcotics. He would therefore be in favour of including a revision clause to cover those points, as suggested by the Norwegian delegation.

66. **Mr. Dhanbri** (Tunisia) said that his delegation supported the inclusion of the crime of terrorism, which was becoming more and more of a transnational crime. He did not object to inclusion of the crime of attacks against United Nations personnel and installations.

67. His delegation was in favour of including the crime of aggression within the jurisdiction of the Court and preferred option 2. He did not see the need to establish a link between the Security Council and the competence of the Court with respect to aggression. The Security Council was empowered under Chapter VII of the Charter of the United Nations to determine the occurrence of aggression, but it had a political role and no jurisdictional power.

68. **Ms. Daskalopoulou-Livada** (Greece) said that discussion in the Preparatory Committee and in the plenary of the Conference had revealed a marked increase in the number of States which would like to see the crime of aggression included within the jurisdiction of the Court. Indeed, it would be illogical to ignore aggression and concentrate only on its by-products – war crimes, crimes against humanity and genocide.

69. Greece had consistently maintained that aggression must fall within the jurisdiction of the Court and had expressed its readiness to work for the formulation of a definition. Of the three options that appeared in the draft, her delegation would prefer either option 1 or option 3. Option 3 was applicable not only in the case of military occupation, but also in cases where the objective was to establish military occupation. She could

consequently accept it as a compromise. Although there was a clear linkage between aggression and the role of the Security Council, that linkage did not affect the definition of the crime, and she did not wish to address the question at the current stage.

70. Her delegation was not in favour of retaining the crimes of terrorism, drug trafficking or other treaty crimes in the Statute, because the jurisdiction of the Court should, at least at the first stage, be restricted to the so-called core crimes. Otherwise, it might be necessary to introduce the notion of non-inherent jurisdiction, which would lead to a distinction between two types of crimes.

71. **Mr. Sadi** (Jordan) supported the inclusion of aggression, if a proper legal framework could be worked out. On option 3, the distinction between initiating aggression and carrying it out, as referred to in paragraphs 1 (a) and (b), was not clear. The relationship between the individual mentioned in paragraph 1 and the "State" referred to in the line immediately following subparagraph (b) might also need to be indicated more clearly.

72. Option 3 spoke of aggression undertaken in contravention of the Charter of the United Nations, which could be read as suggesting that there might be aggression conducted in conformity with the Charter. He was sure that that was not the intention. Those points should be clarified.

73. **Ms. Chatoor** (Trinidad and Tobago), speaking on behalf of the States members of the Caribbean Community (CARICOM), said that they could support the inclusion of aggression within the jurisdiction of the Court, provided that there was an acceptable definition. They considered that option 3 was a working basis for arriving at a definition.

74. In the plenary, the head of the Trinidad and Tobago delegation had stressed that the illicit traffic in narcotic drugs was of particular concern to his country. On behalf of CARICOM, he had urged the Conference to give very serious consideration to the inclusion of that crime within the jurisdiction of the Court.

75. She did not object to the inclusion of the two other treaty crimes within the jurisdiction of the Court.

76. **Mr. Choi Tae-hyun** (Republic of Korea) strongly supported the inclusion of aggression in the Statute and the adoption of a definition constituting a compromise between the generic and enumerative approaches, namely option 3, proposed by the German delegation. However, in the first paragraph of option 3, his delegation preferred the deletion of the phrase within square brackets dealing with the role of the Security Council.

77. His delegation did not oppose the inclusion of the crime of terrorism in the Statute but would prefer that the inclusion of the two other treaty crimes should be considered later.

78. **Ms. Shahan** (Libyan Arab Jamahiriya) said that her delegation strongly supported the inclusion of the crime of

aggression in the jurisdiction of the Court, and that the lack of a definition of aggression in a treaty context should not prevent its inclusion, because the international community was still endeavouring to codify all international crimes, including aggression.

79. She did not consider that the Security Council should refer cases. The Security Council had failed to deal with many cases of flagrant aggression – for instance, the attack on her country in 1986. The General Assembly in its resolution 41/38 had declared that to be an act of aggression.

80. The Security Council and its decisions were influenced by the interests and positions of certain permanent members, so that its resolutions were selective and followed a double standard. Her delegation would object to the Court's being paralysed if the Security Council could not decide whether or not there was aggression. She supported the remarks of Syria with regard to the definition of that crime, which should agree with General Assembly resolution 3314 (XXIX).

81. **Mr. Díaz Paniagua** (Costa Rica) said that, in particular for the reasons adduced by Greece, the crime of aggression should be included in the Statute, but that the definition should be discussed in the context of article 10.

82. He supported the remarks of Trinidad and Tobago concerning drug trafficking, and also favoured the inclusion of terrorism and crimes against United Nations and associated personnel, although he noted the points made by the delegation of the United Kingdom of Great Britain and Northern Ireland at the previous meeting with regard to crimes against United Nations staff.

83. **Ms. Fernández de Gurmendi** (Argentina), *Vice-Chairman*, took the Chair.

84. **Ms. Flores** (Mexico) said that it would obviously be desirable for the Court to have jurisdiction over aggression, but doubted whether the problems in that regard could be solved. She believed that the crime of aggression should comprise any armed attack carried out in violation of the Charter of the United Nations. The options in the consolidated text seemed too restrictive; if aggression were included, it would have to be the subject of a far more thorough debate.

85. An even greater problem was related to the link with the Security Council. If aggression were included, the Council would have to play some role, but she was not in favour of granting it an exclusive monopoly. The Court should have universal jurisdiction, and any aggressor should be punished. Granting an exclusive monopoly to the Security Council would open the door to the casting of a veto to give impunity to aggressors. A further problem was the impact on the Court's independence.

86. In view of those difficulties, it would be wise to exclude aggression from the Court's jurisdiction. At the current stage, the Conference should confine itself to the core crimes.

87. **Ms. Sundberg** (Sweden) said that, like the representatives of Norway and Germany, she would favour inclusion of aggression in the jurisdiction of the Court. It would be of great importance to maintain the distinct roles of the Court and the Security Council in that regard.

88. The Court needed a clear and precise definition of what constituted a criminal act, and she favoured option 3. However, she supported the Norwegian suggestion that, if a consensus on defining aggression could not be reached within a reasonable time, its inclusion should be considered at a later stage, and a revision clause should be provided for.

89. She strongly supported the inclusion of crimes against United Nations and associated personnel, but did not support the inclusion of illicit drug trafficking or terrorism, since those crimes were prosecuted at the national level and multilateral cooperation already existed under relevant treaties. If implementation problems should occur, the two latter categories of crime could be considered for inclusion at a review conference.

90. **Ms. Diop** (Senegal) agreed that terrorism, crimes against United Nations personnel and drug trafficking were important and serious, but thought that they should not be within the Court's jurisdiction.

91. She favoured including aggression and, in the light of the statement made by the German delegation, preferred option 3, though she had some reservations regarding drafting. Though the prerogatives of the Security Council could not be denied, a safety net was needed to ensure the independence of the Court and its decisions. Also, a way must be found to oblige the Security Council to discuss acts of aggression promptly, and it would also be necessary to deal with the veto question. The Court would need to be protected from political influence.

92. **Mr. Skibsted** (Denmark) said that his country had always strongly favoured the inclusion of aggression within the jurisdiction of the Court. He agreed with the representatives of Germany and Greece that the Statute of the Court would be highly incomplete without the inclusion of aggression.

93. In defining aggression, a balance must be struck between the Court's need to be unimpaired by political influence and the Security Council's responsibilities under the Charter of the United Nations. In his view, option 3 came closest to fulfilling those objectives and seemed to have the broadest support.

94. Even though treaty crimes were of international concern, the Conference should concentrate on the four core crimes. However, the door for additions to the list of crimes could be kept open by providing for an automatic review of the list of crimes by the Assembly of States Parties.

95. **Ms. Vinogradova** (Ukraine) said that aggression and crimes against United Nations personnel should be included in the Court's jurisdiction. She supported the definition of aggression contained in option 3. The Court should be allowed

to determine whether there had been an act of aggression, and the role of the Security Council should not be decisive.

96. With regard to including such crimes as terrorism and traffic in narcotics, the Court must be complementary to national systems. Assigning terrorism and traffic in narcotic drugs to the jurisdiction of the Court might overburden it with cases that could be successfully dealt with by national courts.

97. **Ms. Borek** (United States of America) agreed with Norway and Mexico that including the crime of aggression raised the problem of definition and the problem of the role of the Security Council. She was sceptical as to whether the Conference would be able to adopt a satisfactory definition for the purpose of establishing criminal liability. General Assembly resolution 3314 (XXIX) did not attempt to define aggression as an individual crime and merely repeated a formula from the Nuremberg Charter.

98. The determination of aggression was a task conferred on the Security Council under the Charter of the United Nations. Only the Security Council could take the forceful measures that were necessary if aggression was to be addressed and remedied. That gave rise to political and other problems that had made it difficult to find consensus in the past; yet the Security Council had an essential role to play.

99. As had been said, inclusion of attacks on United Nations staff and installations would require the elaboration of a second regime. Including terrorism and drugs would distract and overburden the Court, without contributing to the successful control of such crimes.

100. As she had not spoken earlier on sections C and D of the provisions concerning war crimes, she wished to emphasize that it was essential to cover internal armed conflicts, which were the most frequent and the most cruel. That area of law had been developed and clearly established and must be included in the Statute.

101. **Ms. Pibachon** (Thailand) said that she supported what the representative of Trinidad and Tobago had said on the inclusion of the crime of illicit traffic in narcotic drugs and psychotropic substances. To empower the Court to deal with drug crimes would give another chance to the international community to eradicate such crimes.

102. Her delegation favoured including aggression under the jurisdiction of the Court. The Security Council should be given the power to refer cases to the Court and should have the role of determining whether an act of aggression had occurred before the Court adjudicated the case.

103. **Mr. Palihakkara** (Sri Lanka) said that his delegation agreed with the representative of Thailand and supported the inclusion of crimes of terrorism and crimes related to illicit drug trafficking. His delegation believed that an inclusive approach would promote more broad-based support for the Statute and the universality of its jurisdiction.



104. There were technical problems in the inclusion of such crimes in an inherent jurisdiction regime, but it was the task of the Conference to solve such problems. It would be incongruous for the Statute of the Court to make no reference to terrorism and, for example, the use of nuclear weapons while referring to murder and the use of landmines as serious crimes of international concern. His delegation would participate constructively in any working group on that issue, in order to develop a consensus.

105. It would be unrealistic to ignore aggression, which was often the root cause of many other crimes and humanitarian abuses falling within the Court's purview. As had been stated, the increasing support evident for the inclusion of aggression showed the way forward. He had an open mind regarding the options and would help work towards a consensus.

106. **Mr. Panin** (Russian Federation) said that the inclusion of aggression in the jurisdiction of the Court was of particular importance. Crimes against humanity were often committed as part of wars of aggression.

107. He thanked the German delegation for its efforts to develop a definition of aggression and supported the generic approach adopted. The role of the Security Council in the context of aggression was of decisive importance and its powers under the Charter of the United Nations should be fully reflected in the definition.

108. The decisions of an international body operating in accordance with an international treaty with respect to determining the existence of an act of aggression were binding and could not simply be disregarded. Two organs should not have overlapping powers in that area. For that reason also, he supported option 3 in the draft concerning the crime of aggression in documents A/CONF.183/2/Add.1 and Corr.1.

109. It would be premature to include illicit traffic in narcotic drugs or crimes against United Nations personnel in the jurisdiction of the Court. He also had doubts about the provisions on terrorism as they were now formulated, but could see some point in extending the jurisdiction of the Court to the most serious crimes of terrorism that were of concern to the entire international community, subject to a decision of the Security Council.

110. **Mr. Kerma** (Algeria) said that terrorism should be within the Court's jurisdiction. He agreed with the representative of Norway that it was a matter of great concern to the international community, as reflected in the large number of international instruments that had been prepared in order to deal with the various aspects of the phenomenon and in the efforts of States to explore other ways and means of strengthening their cooperation in order to end those acts.

111. With regard to illicit drug trafficking, the idea of creating the Court had been revived as the result of a desire to bring the authors of those crimes to justice. Illicit drug trafficking should be included in the competence of the Court.

112. He agreed to the inclusion of aggression and endorsed the Syrian position that the definition in General Assembly resolution 3314 (XXIX) was still valid.

113. **Mr. Jansons** (Latvia) said that he strongly supported the inclusion of aggression in the Statute of the Court and that option 3 represented the necessary compromise, avoiding excessive definition and interpretation, while preserving the necessary linkage between the jurisdiction of the Court and that of the Security Council.

114. **Mr. Alabrune** (France) said that his delegation could accept the inclusion of the crime of aggression within the competence of the Court on two conditions. The first condition was that it should be possible to agree on a sufficiently precise and clear definition, in which context he concurred with many delegations in congratulating the German delegation on the efforts it had made. Option 3 was acceptable.

115. The second condition was also reflected in option 3: it must be made quite clear both in article 5 and in article 10 of the Statute that the Court could take up a case only if the Security Council had determined that an act of aggression had taken place. It would be in the interests of the Court itself to be able to rely on a prior determination by the Security Council, to avoid having to pass judgement not only on persons but also on States.

116. His delegation agreed with the view that terrorism and crimes involving illicit traffic in narcotic drugs were a matter of legitimate concern, but also that the Norwegian approach was the correct one.

117. **Ms. Wilmshurst** (United Kingdom of Great Britain and Northern Ireland) said that she did not support the inclusion of the three treaty-based crimes, but supported the inclusion of aggression, on two conditions. First, there should be an adequate definition, such as that in option 3. Secondly, there must be a proper link with the Security Council. She agreed with the German delegation that, if the Security Council role was not reflected, aggression should not be included in the Statute.

118. **Mr. Al Awadi** (United Arab Emirates) said that a convention had been signed the previous month by the members of the League of Arab States on action to combat terrorism, including a precise definition of the crime. If the Statute took into account the definitions in that convention, he would not oppose the inclusion of such crimes in the Statute of the Court. It would, however, be premature to include illicit traffic in narcotic drugs and crimes against United Nations personnel.

119. Aggression should be included within the competence of the Court, taking as a basis the definition of aggression contained in General Assembly resolution 3314 (XXIX).

120. **Mr. S. R. Rao** (India) said that it was not premature to consider inclusion of the treaty crimes. In view of the recent

Arab summit on terrorism and several international conventions on terrorism, he fully agreed that that crime should be included. He was open-minded on the inclusion of trafficking in drugs.

121. He was not opposed to the concept of a review conference, but that did not mean that the inclusion of terrorism in the Court's jurisdiction should be postponed.

122. His delegation had no objection to the inclusion of aggression. However, to superimpose the Security Council's role on that of the Court would politicize the Court. Some means must be found whereby aggression could be included without such politicization of the Court.

123. **Ms. Wong** (New Zealand) said that her delegation could support the inclusion of aggression if a definition could be agreed on. It must be borne in mind that the Security Council had primary responsibility for determining the existence of an act of aggression, though the Charter of the United Nations did not exclude the responsibility of the General Assembly.

124. She supported the inclusion of terrorism and strongly believed that attacks on United Nations and associated personnel should also be included. As had been pointed out, the inclusion of a treaty-based crime would require the establishment of a special regime for treaty-based crimes. However, the Spanish proposal in document A/CONF.183/C.1/L.1 and Corr.1 would avoid that problem by including the reference to attacks on United Nations personnel in the war crimes provisions.

125. **Mr. Fadl** (Sudan) said that the Statute should include aggression and supported the view of the representative of the Syrian Arab Republic that General Assembly resolution 3314 (XXIX) should form the basis for defining aggression. He would revert to discussion of the respective roles of the Court and the Security Council regarding determination of aggression when the Committee discussed article 10.

126. **Ms. Sinjela** (Zambia) supported the inclusion of aggression in the crimes under the jurisdiction of the Court. She agreed with those who had argued that it was a primary crime underlying war crimes and crimes against humanity.

127. **Mr. Al-Shaibani** (Yemen) supported the inclusion of aggression in the Statute of the Court. His position on the inclusion of terrorism, crimes against United Nations personnel and illicit traffic in narcotic drugs was fully in accordance with that taken by the representative of the United Arab Emirates.

128. **Ms. Mekhemar** (Egypt) said that her delegation agreed to the inclusion of aggression in the Statute of the Court. General Assembly resolution 3314 (XXIX) should be the basis for its definition, which was why she supported option 2. She was willing to study other wording, and possibly option 3.

129. **Mr. Pham Truong Giang** (Viet Nam) said that it would be unacceptable to his delegation for aggression not to be included in the Statute of the Court.

130. As far as the options were concerned, his delegation would support an option which was clear and precise and reflected the interests and position of a large number of States.

131. **Mr. Hamdan** (Lebanon) said that his delegation also supported the inclusion of aggression, the definition of which should be based on General Assembly resolution 3314 (XXIX). That resolution reflected the basic principles of the Charter of the United Nations, which were not taken into account in the various options before the Committee, including option 3, originally proposed by Germany. He had been in contact with the German delegation to express his concerns, and understood that the link between the Security Council and the Court with regard to aggression would be studied in the context of article 10. There should be cooperation between the Court and the Council, the Court judging individuals and the Council sanctioning States. The Council could be one of the Court's clients, as it were, but there must be total separation of the powers of the two bodies.

132. Consideration of the treaty crimes should be deferred.

133. **Mr. Politi** (Italy) said that his delegation favoured the inclusion of aggression within the Court's jurisdiction, and supported a clear definition of the crime. His preference was for option 2, in which the general definition was accompanied by an enumeration of specific acts constituting aggression.

134. Opinions differed on the various options, and flexibility was necessary in order to find a definition that was acceptable to all. He welcomed the efforts made by Germany in producing option 3. There were still problems with that definition, but the proposal could serve as a working basis.

135. If a Security Council role in determining the existence of an act of aggression by a State was to be recognized in the Statute of the Court, that role should be construed only as a procedural condition for the intervention of the Court. Furthermore, the independence of the Court in the determination of individual criminal responsibility should be fully preserved.

136. He shared the concerns that including treaty crimes might delay the establishment of the Court. At the same time, the Committee should favourably consider the possibility of including crimes against United Nations and associated personnel, and he supported what had been said by the representative of New Zealand.

137. **Mr. Rodríguez Cedeño** (Venezuela) said that treaty crimes could be included in the Statute without the need for separate regimes. However, the Court's jurisdiction need not be static; it could evolve with time, and it would not be necessary to introduce treaty crimes at the current stage. He supported the Norwegian proposal, but the Statute should permit the Assembly of States Parties to decide on the inclusion of such crimes.

138. Aggression should be included within the competence of the Court, on condition that it was clearly defined, and the possible impact studied. The precedents referred to by other delegations should be used in that regard. Option 3 seemed to represent a good basis for negotiation, but it should be developed further. The autonomy of the Court was essential for its effectiveness, and it could not depend on a decision or lack of decision by a political body. A harmonious, balanced text must be found that would give the Court the necessary autonomy without ignoring the powers of the Security Council.

139. **Mr. Madani** (Saudi Arabia) said that aggression should be covered in the Statute, taking account of General Assembly resolution 3314 (XXIX).

140. The convention recently signed by the members of the League of Arab States defined terrorism and could be referred to. His delegation agreed with others that drug trafficking and crimes against United Nations personnel should not be included.

141. **Mr. Kotzias Peixoto** (Brazil) said that he still had serious doubts about the possibility of broad agreement on a definition of aggression as an individual crime and foresaw serious problems related to conflicts of competence between the Security Council and the Court, which would affect the independence of the Court. His delegation therefore did not favour the inclusion of the crime of aggression in the Statute.

142. Treaty crimes should not be under the jurisdiction of the Court either.

143. **Mr. Güney** (Turkey) said that his delegation had doubts about including aggression among the crimes to be considered by the Court. There was no generally accepted definition of aggression and no precedent concerning individual criminal responsibility for acts of aggression. The competent body for considering acts of aggression was the Security Council, which was concerned with actions of States, and it was difficult to see how an act imputable to a State could become imputable to an individual.

144. The suggestion made by the Mexican delegation might offer a solution, or the matter might be covered in a review clause, as mentioned by the delegation of Norway. But it would

be necessary to see the contents of such a clause before any decision could be taken.

145. A number of conventions existed concerning various aspects of terrorism. One of the elements to which he attached importance was that States should refrain from organizing, encouraging or inciting acts of terrorism in the territories of other States or tolerate activities on their own territory aimed at the commission of such acts. According to the International Law Commission, systematic and prolonged terrorism was a crime with international repercussions. A systematic crime against a civilian population would come under article 25 of the draft Statute.

146. *In many instances, terrorist activities were supported by drug trafficking, which fully justified the inclusion of terrorism and crimes related to trafficking in drugs and psychotropic substances in article 5.*

147. **Mr. Alemu** (Ethiopia) said that his delegation strongly supported the inclusion of the crime of aggression in the Statute. The Court would have an effective mechanism for bringing individual perpetrators to justice. However, the power vested in the Security Council for determining whether aggression had occurred should not be disregarded. He preferred option 3.

148. Since treaty-based crimes concerned only States parties to treaties, his delegation did not favour their inclusion.

149. **Mr. Shariat Bagheri** (Islamic Republic of Iran) said that his delegation firmly supported the inclusion of aggression within the jurisdiction of the Court. Failure to include that crime would jeopardize the existence of the Court. The Security Council had encountered many difficulties in defining, recognizing and punishing acts of aggression or the authors of such acts and the Conference was in the course of establishing an international body to try the most serious cases. As had been stated, without competence on aggression the Court would be more symbolic than effective. He thought that the definition contained in resolution 3314 (XXIX) was satisfactory and was adequately reflected in option 2.

150. He agreed with many other delegations that the Statute should cover only the first four categories of crime listed at the beginning of article 5.

*The meeting rose at 6.30 p.m.*

## 7th meeting

Friday, 19 June 1998, at 10.30 a.m.

*Chairman:* Mr. Kirsch (Canada)

A/CONF.183/C.1/SR.7

### Agenda item 11 (*continued*)

**Consideration of the question concerning the finalization and adoption of a convention on the establishment of an international criminal court in accordance with General Assembly resolutions 51/207 of 17 December 1996 and 52/160 of 15 December 1997 (A/CONF.183/2/Add.1 and Corr.1, A/CONF.183/C.1/L.1 and Corr.1 and A/CONF.183/C.1/L.4)**

#### DRAFT STATUTE

##### PART 1. ESTABLISHMENT OF THE COURT (*continued*)

1. **The Chairman** said that it was his understanding that, after further informal consultations the previous day, the remaining questions concerning part 1 had been clarified, and the Committee might now be in a position to send the articles contained in that part to the Drafting Committee. That would be on the understanding that some questions would have to be carefully examined and, in at least one case, a final decision might depend on the outcome of negotiations on other parts of the Statute. In article 1, the term “persons” must be looked at following the conclusion of discussions on part 3, and the phrase “bring persons to justice” must be aligned in all language versions. The Drafting Committee should note that in article 3, paragraph 3, the terms “special agreement” was understood to mean an agreement between the International Criminal Court and the State concerned. With that understanding and the amendments introduced orally at the previous meeting by the representative of the United Kingdom of Great Britain and Northern Ireland, he asked whether part 1 could be sent to the Drafting Committee.

2. **Ms. Wilmshurst** (United Kingdom of Great Britain and Northern Ireland) said she wished to make it clear that her remarks the previous day on article 1 applied only to the first sentence of article 1. The second sentence of article 1 remained unchanged and would also go to the Drafting Committee. With regard to article 3, paragraph 3, she wished to add that the Drafting Committee should also be asked to consider the placing of that paragraph.

3. **The Chairman** asked whether the Committee wished to transmit part 1 to the Drafting Committee.

4. *It was so decided.*

##### PART 2. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW (*continued*)

##### Article 5. Crimes within the jurisdiction of the Court (*continued*)

##### [*Crime of aggression*] (*continued*)

5. **The Chairman** invited further comments regarding the crime of aggression.

6. **Mr. Al-Jabry** (Oman) said that he welcomed the inclusion of the crime of genocide in the text, and had no objection to the inclusion of the section on the crime of aggression. However, he supported the views expressed at the previous meeting by the delegation of the Syrian Arab Republic; the definition of aggression in the General Assembly resolution 3314 (XXIX) of 14 December 1974 was still valid and should form the basis of the Committee’s deliberations.

7. Although he considered terrorism to be a serious crime, he would like to see a more precise definition of that crime than in the text as currently formulated.

8. **Mr. A. Domingos** (Angola) said that aggression was a very serious crime which caused a great deal of suffering and damage to the victim State. It must therefore be covered in the Statute, and the text proposed in option 3 for the relevant section of article 5 was to be preferred. The bracketed words “and subject to a determination by the Security Council referred to in article 10, paragraph 2, regarding the act of a State” in paragraph 1 were out of place and should be deleted. The bracketed word “manifest” should be deleted, because a violation was either a violation or not. The text in square brackets at the end of the paragraph should also be deleted.

9. **Ms. Li Yanduan** (China) said that she could agree to the inclusion of the crime of aggression on two conditions. First, there should be a clear and precise definition of the crime of aggression. Secondly, there should be a link with the Security Council. Discussion of the treaty crimes, on which there was no consensus, should be deferred until a future review conference.

10. **Ms. Benjamin** (Dominica) said that she fully endorsed what had been said at the previous meeting by the representative of Trinidad and Tobago on behalf of the States members of the Caribbean Community (CARICOM).

11. **Ms. Legwaila** (Botswana) said that, in view of the serious nature of the crime of aggression, she supported its inclusion in the Statute. The Committee should not lose sight of the fact that the Security Council was the United Nations organ responsible for the maintenance of international peace and security.

12. **Ms. Tasneem** (Bangladesh) favoured the inclusion of the crime of aggression as a core crime. She preferred the definition in option 1, whose language was closest to the language of the law of Bangladesh on crimes against humanity, genocide, war crimes and aggression. However, she could accept option 3.

13. Regarding the role of the Security Council, unless the Charter of the United Nations itself was amended there was an inescapable link between the crime of aggression and the functions of the Security Council in response to acts of aggression. She was flexible concerning the inclusion of the crime of terrorism, subject to a more elegant and satisfactory definition.

14. **Mr. Slade** (Samoa) said that, with more work on the definition and the role of the Security Council, the crime of aggression should be included in the Statute. He supported Trinidad and Tobago and the Caribbean States in their call for the inclusion of illicit drug trafficking.

15. **Mr. Onwonga** (Kenya) supported the inclusion of the crime of aggression within the jurisdiction of the Court. The definition must be sufficiently precise to satisfy the principle of legality. He shared the view concerning the potential for conflict of jurisdiction, given the pre-existing powers of the Security Council. Its competence to determine the existence of acts of aggression could seriously affect the integrity of the Court as an independent body free from political influence.

16. Regarding the treaty crimes of terrorism, trafficking in illicit drugs and attacks on United Nations personnel, his delegation supported the call by the CARICOM States for the inclusion of the crime of trafficking in illicit drugs.

17. **Ms. Frankowska** (Poland) supported the inclusion of the crime of aggression in the Statute. She preferred option 3, which was better suited for the purpose of individual responsibility than the proposal based on the 1974 definition of aggression.

18. She saw problems in accepting the Security Council's determination of aggression as a prerequisite for triggering the Court's jurisdiction. However, she was aware that, given the realities of the international order, that a prerequisite was necessary. Although she was open to discussion of the inclusion of the treaty crimes in the Statute, she doubted whether the time was right.

19. **Mr. van Boven** (Netherlands) shared some of the concerns expressed by the representative of Norway and others, particularly with regard to finding a satisfactory definition of aggression and to the intricate problem of the relationship with the Security Council.

20. The treaty crimes – terrorism and illicit traffic in narcotic drugs and psychotropic substances – should not fall within the jurisdiction of the Court. Crimes against United Nations and associated personnel might be studied further in the process of reviewing the Statute at a later stage.

21. **Ms. Cueto Milián** (Cuba) was in favour of including aggression in the jurisdiction of the future Court. General Assembly resolution 3314 (XXIX) and option 3 could provide the basis for a suitable definition of the crime of aggression. With regard to the role of the Security Council, total subordination of the Court to the decisions of the Security Council would jeopardize its credibility.

22. She had always favoured the inclusion of treaty crimes, with particular emphasis on international terrorism, which should be defined in precise terms.

23. **Mr. Soh** (Cameroon) strongly supported the inclusion of the crime of aggression in the jurisdiction of the Court. Option 3 would represent a good working basis. He had an open mind concerning the other crimes – terrorism, crimes against United Nations and associated personnel and the illicit traffic in narcotic drugs and psychotropic substances.

24. **Mr. Tankoano** (Niger) said that, if the crime of aggression was to fall within the competence of the Court, the Committee must find a suitable definition. It appeared from the discussions that the overwhelming majority of delegations were in favour of including the crime of aggression in the jurisdiction of the Court. He supported the view that it should be up to the Court to seek confirmation from the Security Council that a crime of aggression had been committed, on the basis of objective facts. To exclude the crime of aggression from the Statute would be out of touch with reality, because since 1945 several crimes of aggression had been committed throughout the world and had gone unpunished.

25. **Mr. García Labajo** (Spain) presented his delegation's proposal on article 5 contained in document A/CONF.183/C.1/L.1 and Corr.1. The aim of the proposal, taking into account the note following the introductory section of article 5 in document A/CONF.183/2/Add.1 and Corr.1 concerning the need for a subsequent readjustment of the texts concerning crimes within the Court's jurisdiction, was to propose a suitable structure for the provisions in question. It was suggested that there should first be an article 5 of a general nature, with a paragraph 1 listing the categories of crime falling within the Court's jurisdiction. There would be a reference in each case to the subsequent article defining the particular category of crime. It was suggested that paragraph 1 should list the four categories of crime on which there was general agreement. The inclusion of other categories, such as terrorism and drug trafficking, could be considered at a later review stage.

26. With regard to crimes against United Nations and associated personnel, his delegation was proposing in document A/CONF.183/C.1/L.1 and Corr.1 a text to be included under the

heading "War crimes". Spain would like to see the crime of aggression included in the Statute, subject to finding a satisfactory definition and resolving the question of the role to be played by the Security Council. The definition, as far as possible, should be based on General Assembly resolution 3314 (XXIX). Spain would also work on the basis of option 3 for the relevant section appearing in document A/CONF.183/2/Add.1 and Corr.1, subject to deletion of the bracketed words "with the object or result of establishing a [military] occupation of, or annexing, the territory of such other State or part thereof by armed forces of the attacking State".

27. His delegation supported the view that a balance must be found between the functions and competence of the Security Council, pursuant to the Charter of the United Nations, and the competence of the Court to judge individual conduct.

28. Spain was also proposing the inclusion of a paragraph 2 for article 5, stating that the crimes within the jurisdiction of the Court were crimes under international law as such, whether or not they were punishable under national law. The text was based on the draft Code of Crimes against the Peace and Security of Mankind prepared by the International Law Commission. It was important to emphasize the autonomy of international law in relation to the categories of crime in question.

#### JURISDICTION

Article 6. [Exercise of jurisdiction] [Preconditions to the exercise of jurisdiction]

[Article 7]. Preconditions to the exercise of jurisdiction

[Article 8]. Temporal jurisdiction

[Article 9]. Acceptance of the jurisdiction of the Court

[Article 10]. [[(Action by) [Role of] the Security Council]  
[Relationship between the Security Council  
and the International Criminal Court]

Article 11. Complaint by State

[Article 12]. Prosecutor

[Article 13]. Information submitted to the Prosecutor

29. **Mr. Kourula** (Finland), acting as Coordinator and introducing the question of jurisdiction dealt with in articles 6 to 13 of the draft Statute, said that the issue involved a number of closely interlinked elements. The section of the draft concerning jurisdiction could be looked at in at least two ways. The first alternative would be to divide the issue into two parts: the first part would cover the question of who could trigger the Court's jurisdiction, and the second the question of whose consent was needed for the Court to exercise jurisdiction. The other possibility would be to divide the issues into three: first, to examine the whole question of jurisdiction in relation to individual States; secondly, to examine the matter in relation to

the Prosecutor; and thirdly, to examine the matter in relation to the Security Council.

30. Starting with the first alternative, he would refer to some issues relating to articles 6, 10, 12 and 13, concerning the "trigger mechanism", and articles 7 and 9, concerning acceptance of jurisdiction. One must also recall the central principle of complementarity and the issue of admissibility.

31. With regard to the trigger mechanism, the draft Statute contained three ways of triggering the Court's jurisdiction: by Security Council referral, by State party complaint and by the Prosecutor *proprio motu*. Concerning acceptance of the Court's jurisdiction, no State consent was required for the Court to initiate investigations if the Security Council referred a situation to the Court. When the Court's jurisdiction was triggered by a State or by the Prosecutor, State consent would, according to certain proposals contained in the draft Statute, be needed for the Court to proceed.

32. There were basically four alternative proposals regarding acceptance of jurisdiction. Under the first proposal, referred to as the United Kingdom proposal and appearing in the text for article 7 contained in the so-called "Further option for articles 6, 7, 10 and 11", ratification of the Statute entailed automatic acceptance of the Court's jurisdiction over the core crimes. In addition, the text provided that the Court might exercise jurisdiction only if the territorial and custodial State and the State of nationality of the accused were parties to the Statute. If those States were not parties to the Statute, they must lodge a special declaration of consent before the Court could proceed with an investigation.

33. A second proposal, the so-called German proposal, was found as a "further option" in article 9 of the draft Statute. It differed from the first only in relying on the principle of universal jurisdiction over the core crimes, regardless of any further State consent even for non-parties.

34. The third alternative was the so-called "opt-in/opt-out" proposal found in option 1 for paragraph 1 of the first article 7 in the draft Statute. A State becoming a party to the Statute would not automatically accept the Court's jurisdiction over the core crimes. Additional consent would be required, by means of a special declaration made when the State became a party or later. The declaration might vary in substance and duration, and the following States would have to give their consent before the Court could act: the territorial State, the custodial State, the requesting State, the State of nationality of the accused and the State of nationality of the victim.

35. Fourthly, under the so-called case-by-case proposal contained in option 2 for article 7, paragraph 1, the Court would have to obtain, in each individual case, the consent of the territorial State, the custodial State, the State requesting extradition, the State of nationality of the accused and the State of nationality of the victim.

36. Articles 10 to 13 concerned the role of the Security Council, complaints or referrals by States, and the Prosecutor. Paragraphs 4 to 6 of the first article 10, and paragraph 1 of article 10 in the "Further option for articles 6, 7, 10 and 11", dealt with the relationship between the Security Council and the Court. Paragraph 4 of the first article 10 and paragraph 1 of article 10 in the "Further option" stated in essence that the Court would not have jurisdiction with respect to a crime of aggression unless the Security Council had first determined that the State concerned had committed an act of aggression. The existence of that provision had been referred to as an acknowledgement of the primary responsibility of the Security Council for the maintenance of international peace and security. The contrary view was that such a role of the Council would introduce political considerations and undermine the Court's independence. Under a subsequent proposal from Singapore, the Court could, after a period of time, proceed with prosecutions of crimes within its jurisdiction unless requested not to do so by an affirmative vote of the Security Council (the first article 10, paragraph 7, option 2). The United Kingdom proposal ("Further option for articles 6, 7, 10 and 11", article 10, paragraph 2) also contained a reference to a period of time.

37. With regard to State complaints, the first article 11, paragraph 1, option 1, provided that in the case of genocide a State party that was also party to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide might lodge a complaint with the Prosecutor alleging that the crime of genocide appeared to have been committed. Other crimes required a special declaration to be given. A simplified formula for State referrals was found in article 11 in the "Further option for articles 6, 7, 10 and 11".

38. Finally, regarding the Prosecutor, there was wide support for the idea that the Prosecutor must be allowed *ex officio* or *proprio motu* to trigger the Court's jurisdiction, without any referral by the Security Council or a State party (article 12), but there was also opposition. Argentina and Germany had introduced a proposal providing additional checks on the discretionary powers of the Prosecutor: under article 13 the Prosecutor must seek the authorization of the Pre-Trial Chamber if he concluded that there was a reasonable basis to go ahead with the investigation. Authorization was granted if such reasonable basis existed and a case appeared to fall within the Court's jurisdiction, and taking into account the admissibility provision in article 15.

39. As he had said at the beginning of his statement, a second approach to the whole question would be to divide the issues into three, considering the entire jurisdictional question first in relation to States, then in relation to the Prosecutor and lastly in relation to the Security Council. That might be the better way to organize the discussion.

#### JURISDICTION: THE ROLE OF STATES

Article 6. [Exercise of jurisdiction] [Preconditions to the exercise of jurisdiction] (*continued*)

[Article 7]. Preconditions to the exercise of jurisdiction (*continued*)

[Article 9]. Acceptance of the jurisdiction of the Court (*continued*)

Article 11. Complaint by State (*continued*)

40. **The Chairman** thought that, for the purposes of organizing the discussion, it would be wise to adopt the second approach mentioned by the representative of Finland. The first task would then be to consider the whole jurisdictional question in relation to States. The relevant articles in the original draft were: article 6, paragraph 1 (*b*) and paragraph 2; article 7; article 9; article 11. In the "Further option for articles 6, 7, 10 and 11", the relevant articles were: article 6 (*a*); article 7; article 11.

41. After a brief procedural discussion in which **Ms. Wilmshurst** (United Kingdom of Great Britain and Northern Ireland), **Ms. Le Frapier du Hellen** (France) and **Mr. Mahmood** (Pakistan) took part, **the Chairman** invited the Committee to begin by focusing on the role of States, on the understanding that delegations that preferred the alternative approach could make their statements in the manner they wished.

42. **Ms. Wilmshurst** (United Kingdom of Great Britain and Northern Ireland) drew attention to the section of the draft Statute in documents A/CONF.183/2/Add.1 and Corr.1 headed "Further option for articles 6, 7, 10 and 11". It was an option originally proposed by the United Kingdom with the aim, first, of clarifying the text and secondly of introducing some fairly specific proposals, particularly with regard to acceptance of jurisdiction.

43. In article 6 in that option, her delegation attached importance to the word "situation" in subparagraph (*a*). It was not the task of a State to identify a particular offence and a particular culprit. However, she wished to propose that, in the first line of article 6, the words "The Court may exercise its jurisdiction" should be replaced by the words "The Court shall have jurisdiction".

44. Article 7 would replace the provisions in the first articles 7 and 9. Under paragraph 1, a State becoming a party to the Statute would thereby accept the jurisdiction of the Court. That concerned the core crimes; the proposal did not cover treaty crimes. If treaty crimes were included in the Statute, additional provisions would be needed. For the core crimes, the provision would mean that, in relation to any particular case, a State party had no right either to object to the exercise of the Prosecutor's powers or to object to the Court assuming jurisdiction in relation to that particular case.

45. The difficult question of States that were not parties was dealt with in paragraph 2, which made it clear that the Court must ask for the consent of a non-party before exercising jurisdiction in certain cases. The United Kingdom position was that only the consent of the State on whose territory the offence occurred should be required. In that case, subparagraph (a) could be deleted.

46. Also in paragraph 2, "may exercise its jurisdiction" in the second line should be replaced by "shall have jurisdiction".

47. The only other relevant article was article 11, which concerned the referral of a situation by a State. The United Kingdom proposal, which simply clarified the text, needed no introduction on her part.

48. **Mr. Kaul** (Germany) said that the German proposal in the "further option" for article 9 was based on the following considerations. Under current international law, all States might exercise universal criminal jurisdiction concerning acts of genocide, crimes against humanity and war crimes, regardless of the nationality of the offender, the nationality of the victims, and the place where the crime had been committed. That was not only confirmed by extensive State practice, but also by the Nuremberg Tribunal, and was enshrined *inter alia* in generally accepted international instruments, such as the Geneva Conventions of 1949 or the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. It meant that each State could bring to justice individuals who had committed, for example, acts of genocide in third States, even if the offender and the victim were not nationals of the prosecuting State. The Court would be acting on behalf of the international community as a whole. Since the contracting parties to the Statute could individually exercise universal jurisdiction for the core crimes, they could also, by ratifying the Statute, vest the Court with a similar power to exercise such universal criminal jurisdiction on their behalf, though only of course with regard to the core crimes.

49. Such an approach, based on the legitimate exercise of universal jurisdiction, would also eliminate the real loopholes which otherwise would exist for individuals who had committed such heinous crimes as genocide, crimes against humanity or war crimes. For example, if a massive genocide had taken place, such as in Nazi Germany or, more recently, in Cambodia, and the Security Council did not, for whatever reason, refer that situation to the Court, the question arose whether the individuals who had ordered that genocide could be tried by the Court.

50. Under other jurisdictional models proposed in the Statute, it would be necessary for at least the State on whose territory the crime in question was committed, or even other States, to be a contracting party to the Statute, or it would have to give its consent to the exercise of *ad hoc* jurisdiction. But if the genocide was committed as part of a State policy, it was unlikely that the State would be a party to the Statute, or would consent to the Court exercising its jurisdiction.

51. If there was a contracting party to the Statute which had a direct interest in a given core crime committed, and which therefore legitimately could and would exercise universal jurisdiction, the Court should have the same position. However, third States would be under no obligation to cooperate with the Court. If they so decided, they might agree to cooperate with the Court on an *ad hoc* basis, and that was the meaning of paragraph 2 of his proposal. Thus the application of the principle of universal jurisdiction by the Court would not violate the sovereignty of third States not parties to the Statute.

52. **Mr. Choi Tae-hyun** (Republic of Korea) said that his delegation had some proposals for articles 6, 7 and 9. The notion that the Court would have inherent jurisdiction was incompatible with the principle of complementarity; State consent was indispensable. On the other hand, to allow States parties to withhold consent to the Court's exercise of its jurisdiction in individual cases would render the Court ineffective. By becoming a party to the Statute, a State should be regarded as accepting the jurisdiction of the Court once and for all. The exercise of jurisdiction would then be automatic.

53. For the sake of jurisdictional nexus, there should be a requirement that one or more of the interested States had given its consent to the exercise of jurisdiction by the Court. The interested States should encompass the territorial State, the custodial State, the State of nationality of the accused and the State of nationality of the victim. For one of those States to be a party should be enough: the requirement should not be cumulative but selective.

54. His delegation's proposals, which had been circulated informally, were similar to the proposals of the United Kingdom ("Further option for articles 6, 7, 10 and 11"). However, his delegation's proposals would require consent from only one of the interested States. There was also a conceptual difference: the United Kingdom proposals rested on the premise that the Court had universal jurisdiction over the core crimes; his country's proposals assumed that jurisdiction was conferred on the basis of State consent, pursuant to the provisions of the Statute.

55. **Mr. Shukri** (Syrian Arab Republic) said that he would like to comment on the question of the Security Council's role with regard to the trigger mechanism. The Security Council might politicize cases, actions or complaints referred to it, because by its very nature it was a political and not a legal body. The General Assembly should be empowered to replace the Security Council if it failed to take the necessary measures in respect of an act of aggression because of the veto right enjoyed by some States. Moreover, the Council had sometimes been selective in its application of Chapter VII of the Charter of the United Nations. And the variant in article 6 which would give the Security Council the right to trigger action even with respect to States which were not parties to the Statute would be a violation of the Vienna Convention on the Law of Treaties.



56. Concerning the role of the State, he had no problem in granting a State party, or a State non-party, the right to trigger action. Nor had he any difficulty with article 7, where he preferred option 2, or article 8. In article 9, he preferred option 2 but had no objection to option 1.

57. **Mr. Nathan** (Israel) said that in article 6, paragraph 1 (b), he objected to the proposal to confer on a "non-State Party" the right to lodge a complaint. A State which had decided not to become a party to the Statute should not have the same rights as those States which had decided to become parties to the Statute.

58. Paragraph 1 (c), which conferred the right on the Prosecutor to bring a matter before the Court, could not be supported for reasons he would explain at a later stage in the debate.

59. Paragraph 2 would be unnecessary if it was stipulated that a State that became a party to the Statute thereby accepted the jurisdiction of the Court with respect to the crimes referred to in article 5, and matters dealt with in article 7.

60. Turning to article 7, his delegation believed that, although the crimes falling under article 5 were crimes in respect of which States had universal jurisdiction, the Court should not be able to exercise jurisdiction unless consent was explicitly conferred by the parties to the Statute. To ensure the effective exercise of that jurisdiction, certain specific conditions in respect of the consent required would have to be addressed. Practical considerations would require at least the consent of the territorial State, the State where the crime was committed, and the custodial State as *minimum* and inevitable preconditions for the effective exercise of the jurisdiction of the Court.

61. The term "custodial State" could be replaced by the term "State where the suspect or accused is resident", because at the relevant time the State concerned might not yet have the custody of either the accused or the suspect.

62. The consent of the States referred to in subparagraphs (c) and (d) of paragraph 1 was irrelevant to the exercise of jurisdiction, and should not be regarded as a precondition. The point raised in subparagraph (c) could be dealt with under part 9 of the Statute.

63. Concerning paragraph 3, the Court should not have jurisdiction where a State whose acceptance was required had not indicated whether it gave such acceptance.

64. In article 9, he supported option 1, which provided for the acceptance by a party to the Statute of the jurisdiction of the Court in respect of the core crimes, but his acceptance would depend upon the list of core crimes and their definition. If the core crimes were reduced to genocide, war crimes and crimes against humanity, the provision would be reasonable. Otherwise, he would prefer the opt-in regime under option 2.

65. He could support paragraph 3 of option 1, enabling the Court to exercise jurisdiction in respect of a specific crime where a State whose acceptance was required was not a party to the Statute. The sentence contained in square brackets would be

necessary in order to enable the Court to benefit from the cooperation of that State in matters arising under part 9 of the Statute.

66. He found it difficult to support paragraph 1 in the "further option" for article 9. While States had universal jurisdiction in respect of the core crimes, the Court was a judicial organ, exercising its jurisdiction on a consensual basis, subject to the conditions and limitations contained in the Statute. Moreover, the Court would not be able to function properly without the acceptance of its jurisdiction by the territorial State and the State of residence of the suspect or accused.

67. Paragraph 2 of the "further option" for article 9 was acceptable, but he would prefer the text in option 1.

68. **Mr. Saland** (Sweden) said that his comments would be based on the "Further option for articles 6, 7, 10 and 11", introduced earlier by the representative of the United Kingdom. He had no objection to States parties referring matters to the Court. He also preferred that entire situations, such as a situation involving genocide, be referred rather than individual crimes.

69. As regards the key issue of acceptance of jurisdiction, he fully agreed with article 7, paragraph 1, of the United Kingdom text. He was not fully convinced by the representative of Germany's arguments about inserting the Court fully into the system of universal jurisdiction, even with regard to the core crimes. The Court was being created by a convention, and some regard must be had to that fact. He agreed with what had been said regarding the need for a jurisdictional nexus: that nexus should not necessarily be only with the territorial State. It must be possible to prosecute suspects who were in States other than the one where the crime was committed.

70. It should be sufficient for one out of four categories of States to be a party to the Statute: the territorial State, the custodial State, the State of nationality of the suspect or the State of nationality of the victim.

71. In the case of a Court created by way of a treaty, non-parties could not be automatically inserted into the system. But the Statute should allow a non-party, by declaration, to consent to the exercise of jurisdiction by the Court with respect to a particular crime, as provided for in article 7, paragraph 3, of the United Kingdom text.

72. He supported article 11 of the United Kingdom text. He also welcomed the proposal by the representative of the United Kingdom to replace the words "may exercise its jurisdiction" in articles 6 and 7 by "shall have jurisdiction".

73. The key point was that a State that became party to the Statute thereby accepted the jurisdiction of the Court. A consent regime could not be accepted in relation to the core crimes, although the situation might be different if any of the treaty crimes found their way into the Statute.

*The meeting rose at 1 p.m.*

## 8th meeting

Friday, 19 June 1998, at 3.20 p.m.

Chairman: Mr. Kirsch (Canada)

A/CONF.183/C.1/SR.8

### Agenda item 11 (*continued*)

**Consideration of the question concerning the finalization and adoption of a convention on the establishment of an international criminal court in accordance with General Assembly resolutions 51/207 of 17 December 1996 and 52/160 of 15 December 1997 (A/CONF.183/2/Add.1 and Corr.1, A/CONF.183/C.1/L.1 and Corr.1, A/CONF.183/C.1/L.4 and A/CONF.183/C.1/WGGP/L.4 and Corr.1)**

#### DRAFT STATUTE

##### PART 2. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW (*continued*)

##### JURISDICTION: THE ROLE OF STATES (*continued*)

Article 6. [Exercise of jurisdiction] [Preconditions to the exercise of jurisdiction] (*continued*)

[Article 7]. Preconditions to the exercise of jurisdiction (*continued*)

[Article 9]. Acceptance of the jurisdiction of the Court (*continued*)

##### Article 11. Complaint by State (*continued*)

1. **Mr. Nyasulu** (Malawi) said that he would be speaking on behalf of delegations of countries belonging to the Southern African Development Community that were attending meetings of working groups. Referring to the first article 6 in document A/CONF.183/2/Add.1 and Corr.1, he said that he would prefer the title "Exercise of jurisdiction". In paragraph 1, the square brackets around the words "and in accordance with the provisions of this Statute" should be removed and the words retained. However, it might be better to base the discussion on the text for article 6 in the "Further option for articles 6, 7, 10 and 11". He agreed with the suggestion that the words "may exercise its jurisdiction" in that text should be replaced by "shall have jurisdiction". The word "situation" was preferable to a word such as "matter". The text for article 7 in the "Further option", which would replace the original articles 7 and 9, presupposed that treaty crimes were not included. Article 7, paragraph 2, appeared to be designed to cover States that were not parties. It would be clearer if it read: "Where the provisions of article 6 (a) or 6 (b) should apply to a situation that relates to a State that is not a party to the present Statute, the International Criminal Court may exercise jurisdiction only with the non-State Party's consent (in particular, the Court should seek the consent of the State that has custody of the suspect with respect to the crime, the State on the territory of which the crime in question may have been committed, and the State of nationality

of the suspect)." He would then propose a paragraph 3 to read: "Such a State may, by declaration lodged with the Registrar, consent to the exercise of jurisdiction by the Court with respect to the crime in question; the accepting State shall cooperate with the Court in accordance with the provisions of [insert the relevant reference]."

2. He supported the United Kingdom's views on article 11.

3. **Mr. Salinas** (Chile) said that States that were not parties should have the right to submit complaints to the Court. In seeking universality, it was important not to exclude non-parties. Obviously the exercise of that right had to be subject to certain conditions, and the formula in article 7, paragraph 3, in the "Further option for articles 6, 7, 10 and 11" seemed appropriate. A State not a party to the Statute would consent to the exercise of jurisdiction by the Court with respect to the crime involved by submitting its acceptance to the Registrar.

4. Regarding the conditions for the Court's jurisdiction, acceptance by any one of the countries with an interest in the matter should be a sufficient precondition. As a general rule, the jurisdiction of the Court should be automatic for parties with respect to the crimes referred to in article 5. However, a State not a party to the Statute of the Court should be able to accept, through a declaration deposited with the Registrar, the obligation to cooperate with the Court concerning the trial of those responsible for crimes defined in the Statute.

5. The case of a State not party to the Statute in which heinous crimes had been committed and which had not accepted the Court's jurisdiction should be discussed in relation to the role of the Security Council. Under Chapter VII of the Charter of the United Nations, the Security Council could certainly submit a situation involving a State or its nationals to the Court.

6. In conclusion, with regard to the submission of a complaint by a State, he agreed generally with option 2 of the first article 11.

7. **Mr. Dive** (Belgium) endorsed the statement made by the German delegation on the inherent and universal jurisdiction of the Court. The only way to enable the Court to act effectively was to recognize its inherent and universal competence, whatever the place or nationality of the victim. For that reason, the "further option" for article 9 proposed by Germany fully resolved that problem of the Court's jurisdiction – obviously subject to the principle of complementarity.

8. **Mr. García Labajo** (Spain) said that the proposals of the United Kingdom and the Republic of Korea clarified the issue of jurisdiction. Ratification or acceptance by a State of the

Statute should automatically imply its acceptance of the jurisdiction of the Court for the core crimes. It was neither appropriate nor desirable that a subsequent declaration of consent should be required.

9. Another issue was the possibility for States that were not parties to the Statute to make an ad hoc declaration of acceptance for a given situation, whereby they also accepted all the obligations involved. In view of its solemn nature, the declaration should be submitted not to the Registrar of the Court but to the Secretary-General of the United Nations, as depository of the Statute, so that it could be distributed to all States.

10. A separate issue was the exercise of jurisdiction by the Court. There were two differing positions: one based on a strict and traditional view of the consent of States, and the other based on the principle of universal jurisdiction. The latter approach was attractive but entailed practical difficulties. It would be better to adopt the approach proposed by the United Kingdom, with the adjustments suggested by the Republic of Korea. Thus, in cases of referral by the Security Council, based on Chapter VII of the Charter of the United Nations, the principle of universal jurisdiction would operate. However, in cases of referral by a State party, there would need to be an appropriate jurisdictional nexus. As suggested by the Republic of Korea, there should be a plurality of possible jurisdictional links. The Court would then have a broad range of possibilities for exercising its jurisdiction.

11. A referral to the Court by States parties or by the Security Council should relate to a situation, not an individual case. Individual cases fell within the area of the Prosecutor. A distinction must also be drawn between admissibility and jurisdiction. In regard to jurisdiction, it was important to use the formula "shall have jurisdiction" rather than "may exercise jurisdiction".

12. **Mr. Skibsted** (Denmark) said that all States parties to the Statute should have competence to trigger the Court's action on a particular case. For the reason given by the United Kingdom, he preferred the draft for article 6 (a) in the "Further option for articles 6, 7, 10 and 11", using the same wording in relation to States as in relation to the Security Council: "... a situation ... is referred to the Prosecutor by a State Party".

13. He had certain misgivings with regard to the first article 7 entitled "Preconditions to the exercise of jurisdiction", and article 9. It was essential to an effective and independent Court that States acceding to the treaty should accept the Court's jurisdiction over all the crimes listed in the Statute, rather than "picking and choosing". Furthermore, he strongly believed that State consent should not be required for individual prosecutions or investigations to proceed. His concerns in that respect were well covered by the German proposal, but the United Kingdom proposal was welcome; it was well structured and had legal clarity.

14. He preferred the United Kingdom proposal for article 11.

15. **Mr. Sadi** (Jordan) welcomed the German proposal concerning the universal jurisdiction of the Court. A State, under customary international law, could already prosecute a national or a non-national for the commission of an act of genocide no matter where it occurred, and the Court should at least enjoy similar jurisdictional powers. However, any mention of inherent jurisdiction over core crimes should be in the context of a workable, effective and balanced system of complementarity, whereby the Court would act as a court of last resort. The experience of treaty bodies should be drawn on in that regard. The role of the Prosecutor would also be of prime importance.

16. Concerning article 6, he asked whether, in addition to the Security Council, the Commission on Human Rights could act as a referral organ, since it was the prime United Nations organ dealing with gross and systematic violations of human rights.

17. **Mr. Janda** (Czech Republic) said that the Statute should incorporate three principles if the effectiveness of the Court was to be ensured. The first was that all States parties should be entitled to bring complaints before the Court, without any other conditions. Secondly, the Court should have inherent or automatic jurisdiction over three or four core crimes regarded as such under international law, and a State that became a party to the Statute would automatically accept the jurisdiction of the Court with respect to the core crimes. Thirdly, the Court must be entitled to exercise its jurisdiction without the need for further State consent. He fully supported the proposal introduced by Germany at the previous meeting.

18. **Mr. S. R. Rao** (India) agreed with those who had said that the question of jurisdiction was intrinsically linked to the nature of the crimes in article 5. Secondly, it was linked to the question of a universal or an effective court, and whether those two aims could be constructively matched. Clearly, there was an underlying political element. He was not in favour of designing a court whose structure would be so narrow that it would cater only to a certain group, at the cost of the vast majority of States.

19. He did not accept the idea that the Court should have automatic jurisdiction for States parties to the Statute. That would make the Court an exclusive institution. The jurisdiction of the Court should be based on the consent of States, and only States should have the ability to trigger the jurisdiction of the Court. There should be no political referral or political intervention in the Court's activities, and India did not favour any role for the Security Council in the activities of the Court. Nor should the Prosecutor have powers *proprio motu* to prosecute or investigate.

20. He could not agree with the German proposal. The theory of an established universal jurisdiction was not acceptable to him, and did not provide a legal basis on which all States could agree.

21. State consent should be the foundation and fulcrum of the jurisdiction of the Court, and territorial State consent and

custodial State consent were essential elements. He had an open mind on the consent of other States.

22. **Mr. Krokhmal** (Ukraine) said that the aim must be to find positions acceptable to everyone. The States parties to the Statute should be able to refer specific cases for examination by the Court, as well as whole situations of the type considered by the Security Council. He was also prepared to support the proposal that the Prosecutor should be able to trigger Court action. However, it was important that the Pre-Trial Chamber should exercise judicial control over the actions of the Prosecutor.

23. He saw advantages in the German proposal on jurisdiction, but was prepared to discuss the issues on the basis of other approaches. As to the conditions under which the jurisdiction of the Court would be implemented, there should be no differentiation based on the type of crime.

24. Finally, the role of the Security Council in maintaining peace was very important, but it should not be involved in the activities of the Court. He disagreed with those delegations that argued that to allow the Court to act independently in relation to the crime of aggression would lead to competition with the Security Council. The Court's role should be to deal with individual perpetrators of the crimes concerned. There would be nothing abnormal in the Court and the Security Council considering situations simultaneously.

25. **Mr. Tomka** (Slovakia) thought that the jurisdiction of the Court should cover only the three or four core crimes listed in article 5. The article on acceptance of the jurisdiction of the Court should logically precede the articles devoted to the exercise of jurisdiction. He strongly favoured the proposal according to which, by becoming a party to the Statute, a State would accept the jurisdiction of the Court *ipso facto*. He therefore supported the "further option" for article 9.

26. On the exercise of the Court's jurisdiction, he supported the text proposed by the Republic of Korea, except that "situations" and not "cases" should be referred to the Court by States. He did not agree with the proposal to replace "may exercise its" in article 6 in the "Further option for articles 6, 7, 10 and 11" by "shall have".

27. He supported the proposal of the Republic of Korea on the preconditions to the exercise of jurisdiction. Finally, concerning the referral of a situation by a State to the Court, he fully supported article 11 as proposed in the "Further option for articles 6, 7, 10 and 11".

28. **Mr. Manongi** (United Republic of Tanzania) supported the comments made earlier by the representative of Malawi. States should have referral powers, to the extent that such powers related to a "situation" and not to a "matter". He therefore supported article 6 (a) in the "Further option for articles 6, 7, 10 and 11", and the chapeau as amended by the delegation of the United Kingdom.

29. He strongly subscribed to the idea that a State would accept the Court's jurisdiction with respect to the crimes in article 5 upon ratification of the Statute. No further consent should be required in order to trigger the Court's jurisdiction, as reflected in article 7, paragraph 1, of the "Further option". He was opposed to a selective approach, which would undermine the legitimacy of the Court.

30. **Ms. Daskalopoulou-Livada** (Greece) said that, as she was in favour of "automatic" or inherent jurisdiction for the four core crimes contained in article 5, she considered that paragraph 2 of article 6 (first version) could be deleted. Furthermore, the reference to "interested States" made little sense.

31. She was generally in favour of the idea that it should not be necessary for certain States to be parties to the Statute in order for the Court to act, but thought that general agreement would more easily be reached if the custodial and territorial States were required to be parties to the Statute. She could accept a provision that only one of those two States must be a party to the Statute, although it could prove somewhat impractical.

32. The principle of inherent jurisdiction meant that there would be no need for article 9, apart from the provision allowing non-parties to consent to the jurisdiction of the Court for a particular case.

33. In article 11, she supported option 1, which specified that any State party might lodge a complaint referring a case or a situation, and could also support article 11 in the "Further option for articles 6, 7, 10 and 11".

34. Of the other articles in the "Further option", she was in favour of article 7, according to which States parties accepted the jurisdiction of the Court with respect to the crimes referred to in article 5 *ipso facto*. She did not agree with the chapeau of article 6 in the "Further option", but did agree with subparagraph (a) of that article.

35. **Mr. Stigen** (Norway) said that he favoured the United Kingdom text for articles 6, 7 and 11 as a basis for discussion, in view of its clarity and cogency, although different rules would be needed if crimes other than the core crimes were included. He supported the notion of State referral of situations rather than individual cases, and was comfortable with the United Kingdom proposal in article 6 (a) of the "Further option for articles 6, 7, 10 and 11", which would mean the same kind of referral for States as for the Security Council. In the same context, he fully supported the United Kingdom proposal for article 11, paragraphs 1 and 2, on the mechanism for referrals.

36. Turning to article 7, he saw the force of the argument presented by Germany with regard to inherent jurisdiction. However, if that did not receive enough support, he would be receptive to the United Kingdom approach. The proposal by the Republic of Korea that the consent of one of four possible interested States should suffice might be the basis for a

compromise. He fully concurred with the reasoning of the representative of Sweden in that regard. In any case, State consent should at most be called for once, when a State became a party to the Statute. Any requirements for State consent *in casu* would be totally incompatible with the credibility and effectiveness of the Court.

37. **Ms. Li Yanduan** (China) said that the two ways of accepting jurisdiction were not different in nature, but the requirement that States parties should accept inherent jurisdiction would exclude many countries otherwise willing to become parties to the Statute. The Court would then take a long time to achieve universality. The opt-in system would allow many countries to become parties to the Statute and allow the Court to acquire universality in a very short period of time. After that, the countries concerned could gradually accept the jurisdiction of the Court. The fact that the Court enjoyed universal support would serve as a strong deterrent with regard to the core crimes. She therefore favoured the opt-in system.

38. On paragraph 1 (b) of article 6 (first version), States not parties could be included, but it should be stipulated that they must have made declarations accepting the jurisdiction of the Court. Paragraph 2 of the article could be deleted. In article 7, she favoured option 2 for the opening clause of paragraph 1. On State consent, she supported subparagraphs (a), (b) and (e) of that paragraph and was flexible regarding (c) and (d) and also regarding paragraph 2, but suggested deleting the words "giving reasons thereof".

39. Turning to article 9, she would choose option 2. In article 11, she favoured option 1, but without the words in the first set of square brackets. Paragraph 2 should be deleted for the time being because it related to the treaty crimes.

40. She could accept the United Kingdom proposal for article 6 (a), but not for paragraph 1 of article 7. Paragraphs 2 and 3 of article 7 of the United Kingdom proposal were acceptable and she was flexible concerning article 11.

41. **Mr. Mahmood** (Pakistan) said he had consistently held that, subject to the principle of complementarity, the Court should be independent and free from political influence of any kind. He therefore did not favour any role for the Security Council in the functioning of the Court. The Security Council was primarily a political body, and its decisions based on political considerations rather than legal principles.

42. Closely connected with the principle of complementarity was the trigger mechanism. Proceedings should be activated by the State concerned, which alone was in a position to determine whether it had the competence to try the offender itself, or refer the case to the Court. Investigation by the Prosecutor should be initiated by States, for the same reason. However, once a State had initiated the proceedings, the Prosecutor should be given independence in the investigation process, and the State should cooperate with him in the investigation, in accordance with national laws.

43. Article 7 should refer only to complaints lodged by States, and the role of the Prosecutor in exercise of the Court's so-called inherent powers should be excluded. In article 9, he did not favour the notion of inherent jurisdiction of the Court, as that would violate the principle of complementarity. He did not fully agree with the provisions in option 1 for paragraph 1 of article 11 (first version). He preferred the word "matter" to "situation", which was a wider term and might bring within the jurisdiction of the Prosecutor issues not directly connected with the case.

44. Recalling the statement issued at Cartagena de Indias, Colombia, in May 1998 by the Ministers for Foreign Affairs and heads of delegations of the States members of the Movement of Non-Aligned Countries, he reaffirmed the basic principle of respect for sovereignty of States, emphasizing that the jurisdiction of the Court should be complementary to national jurisdictions and be based on the consent of the States concerned.

45. **Mr. Perrin de Brichambaut** (France) said that he would first comment on articles 6, 10 and 11 concerning referral to the Court. He would base his remarks on the version proposed by the United Kingdom. Article 6 should be formulated in the broadest terms, with referral to the Court of questions, complaints and situations. Furthermore, the Court should be able to have cases referred in three ways: by any State party to the Statute, by the Security Council, and by the Prosecutor. On the referral of a situation by a State party, the simple provisions contained in article 6 (a) in the "Further option for articles 6, 7 10 and 11" were, generally speaking, satisfactory.

46. The proposed article 10 provided an excellent working basis as far as the role of the Security Council was concerned. There must be consistency between the actions of the Court and the actions of the Security Council where there were situations endangering peace. The Statute should provide for the Security Council to be able to ask the Court to defer action in situations coming under Chapter VII of the Charter of the United Nations, as proposed in paragraph 2 of that article. It should be added, however, that it would be possible for the necessary measures to be taken to preserve evidence.

47. Regarding matters taken up on the Court's own initiative, he could accept the idea of a decision taken by common agreement between the Prosecutor and the Pre-Trial Chamber, in line with article 13 of the draft Statute, a provision originally proposed by Argentina and Germany. For the Prosecutor to take such a decision in isolation would not respect the necessary institutional balance.

48. On articles 7 and 9, the international community was perhaps not yet ready for the idea of universal jurisdiction, as put forward by Germany. There was no obligation on States not parties to the Statute to cooperate. Generally speaking, the State on whose territory the crime had been committed and the State of nationality of the accused or the custodial State would have to be parties to the Statute, or have accepted the competence of

the Court, for the Court to be in a position to exercise its jurisdiction. That point was covered well in the United Kingdom version of article 7.

49. France felt that acceptance of the jurisdiction of the Court could be obligatory for any State becoming a party to the Statute with respect to the crime of genocide and crimes against humanity. War crimes, however, as defined in the 1907 Hague Convention and the 1949 Geneva Conventions and Additional Protocols thereto, might be isolated acts. A solution must be found to enable States with particular difficulties in that area to be able to become parties to the Statute. It was not a matter of drawing up an *à la carte* convention, but of allowing some flexibility. There could be a system requiring consent by the State of nationality of the perpetrator, so that the Court could exercise its jurisdiction. An amendment could be made to the United Kingdom version of article 7 or to article 9.

50. **Mr. Dabor** (Sierra Leone) said that he was strongly opposed to the idea of State consent on a case-by-case basis, or any type of consent mechanism that would subject the exercise of jurisdiction to a more or less generalized veto by States parties. He supported the idea of inherent jurisdiction over the core crimes, to be accepted by States by virtue of their becoming parties to the Statute. Regarding the proposal to require the consent of the territorial State, it would not provide sufficient safeguards to ensure the triggering of the Court's jurisdiction. If a consent mechanism was retained, only the State where the person was resident or present should be required to give consent.

51. In the United Kingdom's proposal for article 7 (in the "Further option for articles 6, 7, 10 and 11"), he suggested that the word "crime" in paragraph 3 be changed to "situation". Otherwise a State not a party to the Statute would be able to accept jurisdiction over one crime and not over others forming part of the same situation.

52. He supported the proposal made by the representative of Israel at the previous meeting that the reference to the custodial State should be replaced by a reference to the State where the suspect was resident. The proposals of the Republic of Korea offered a workable compromise. The requirement for consent should not be cumulative.

53. **Mr. Cede** (Austria) said that he would concentrate on the United Kingdom proposals. He noted with satisfaction that, in article 6, the word "situation" had replaced "matter". On the understanding that the new article 7 would replace the first articles 7 and 9, the wording of paragraph 1 was adequate language to address the concept of inherent jurisdiction. He strongly favoured the principle that any State becoming a party to the Statute thereby accepted the jurisdiction of the Court with respect to the core crimes. Making the jurisdiction of the Court over core crimes dependent on acts of acceptance additional to ratification of the Statute would weaken the Court; it would also allow a State to gain the prestige of being a party to the Statute while having no intention of accepting the Court's jurisdiction

at a later stage. An opt-in procedure would be an obstacle to a court with uniform jurisdiction over the core crimes, although it might be of value when considering treaty crimes.

54. In the new article 7, paragraph 2, the words "may exercise its jurisdiction" should become "shall have jurisdiction". Paragraph 2 (a) should be retained. In cases of grave breaches of the Geneva Conventions, it would seem appropriate to have the cooperation of the so-called "custodial State" or of the State of the nationality of the suspect. He was happy with the wording of the new article 11, on the understanding that it was to replace the first article 11.

55. **Mr. van Boven** (Netherlands) agreed that it would be wise to base the structure of the articles on the proposals of the United Kingdom. He shared the widely held view that the Court should have automatic jurisdiction with regard to all States parties in respect of the core crimes: genocide, war crimes and crimes against humanity.

56. The German proposal based on the principle of universal jurisdiction was a compelling proposition, with which he associated himself. However, if a substantial number of delegations were not able to accept it, and favoured some form of jurisdictional link between the crime committed and an interested State, he would have great sympathy for the proposal of the Republic of Korea that the requirement for a jurisdictional link with an interested State should be selective rather than cumulative.

57. **Mr. Matsuda** (Japan) said that the relationship between the State and the Court in terms of acceptance or exercise of jurisdiction remained one of the key issues of the Statute. The State consent mechanism was intertwined with the question of balance between the Court and States parties, as well as with the principle of complementarity. Japan agreed that a State should accept jurisdiction over the core crimes when it became a party to the Statute. On the question of referral of a matter or situation by a State party to the Prosecutor, he was now ready to support option 1 for paragraph 1 of article 11 (first version), allowing any State party to lodge a complaint with the Prosecutor. Japan remained opposed to giving triggering power to States not parties.

58. His delegation had reviewed its position on State consent for the exercise of the Court's jurisdiction, and could now support the idea of dispensing with a consent requirement for States parties. It therefore supported the formulation in article 7 of the "Further option for articles 6, 7, 10 and 11".

59. **Mr. Dhanbri** (Tunisia) said that he fully supported the notion of complementarity in the interests of respecting the sovereignty of States parties and achieving the largest possible number of accessions by States. In article 6 (first version), he would like paragraphs 1 (a) and (b) to be retained. However, paragraph 1 (c) should be deleted, because such autonomous power should not be given to the Prosecutor. Paragraph 2 should also be deleted. In article 7, he favoured option 2 for the

opening clause of paragraph 1 and the retention of paragraph 3. He preferred option 2 for article 9. Paragraph 4 of article 10 should be deleted. In article 11, he preferred option 2. Articles 12 and 13 should be deleted.

60. **Ms. Tomič** (Slovenia) said that she would limit her comments to the text in the "Further option for articles 6, 7, 10 and 11". She fully supported article 6 (a) allowing a State to refer a situation to the Prosecutor; it would then be for the Prosecutor to decide whether to proceed with an investigation or not. The proposal to change "may exercise its" to "shall have" in the chapeau of article 6 should be considered carefully in the context of article 17, which spoke of the Court satisfying itself as to its jurisdiction. It might be better to use the words "has jurisdiction" or retain the original wording.

61. As to the acceptance of jurisdiction, she strongly opposed any State consent or opt-in system for the core crimes, and fully supported paragraph 1 of the United Kingdom proposal for article 7. She agreed with the proposal by the representative of the Republic of Korea for the Court to have jurisdiction over a case when one State out of the relevant categories of States was a party to the Statute.

62. She had no problem in accepting article 7, paragraph 3, concerning States not parties. In article 11, she accepted paragraphs 1 and 2.

63. **Mr. Palacios Treviño** (Mexico) said that, as a general rule, States parties should refer situations, but they should not be prevented from submitting cases involving individual persons. Referrals should be supported by documentation.

64. For the Court to exercise its jurisdiction, it should be necessary for the State where the accused was and the State of nationality of the accused to have given their consent. A State which ratified the Statute thereby accepted the jurisdiction of the Court with respect to the crimes defined in article 5, pursuant to the provisions of the Statute, without the need for any additional consent. States not parties would need to give their consent; he did not agree that jurisdiction was universal. Moreover, questions of cooperation, as far as non-parties were concerned, should be the subject of a special agreement with the Court.

65. **Mr. Caffisch** (Switzerland) thought that the jurisdiction of the Court must be automatic. States could not become parties to the Statute of the Court and appoint judges to judge others unless they themselves submitted to its jurisdiction. A "universal" court must be universal in its jurisdiction. That meant jurisdiction with respect to the most serious crimes of international concern, and if necessary that limitation could be made clear in the relevant provision. He could accept either the German or the United Kingdom approach to the issue of jurisdiction. The proposals of the Republic of Korea established a good balance between those two approaches. The technique of alternative jurisdictional links was often used in criminal law

when the perpetrator of a crime was in a State other than the State where the crime had been committed or his country of origin. If, however, an accumulation of jurisdictional links was required, it could involve only the State where the accused was and the State where the crime had taken place.

66. **Mr. Rodríguez Cedeño** (Venezuela) welcomed the proposal of the United Kingdom ("Further option for articles 6, 7, 10 and 11") as a basis for discussion. There were two important issues. First, the action of the Court should be triggered primarily by States parties. Where States not parties were involved, the role of the Prosecutor or the Security Council could resolve the problem. The Prosecutor's competence would be very important in initiating criminal proceedings.

67. The Court should have universal jurisdiction over all crimes listed in article 5. In becoming a party to the Statute, a State would assume all the obligations inherent in that, which should include acceptance of the jurisdiction of the Court. An additional declaration should not be needed for the Court to take up a particular case.

68. Regarding paragraph 2 of the United Kingdom proposal for article 7, he thought that the original wording, "the Court may exercise its jurisdiction", was quite appropriate.

69. **Mr. Shariat Bagheri** (Islamic Republic of Iran) wished to stress the fundamental importance of the principle of State consent. The consent of the custodial State, the territorial State and the State of nationality should be required. He had no problem with States referring cases to the Court. States not parties should also be able to do so, provided that they deposited a declaration with the Registrar accepting the Court's jurisdiction.

70. He was not in favour of automatic jurisdiction, which would delay the entry into force of the Statute. In the case of the International Court of Justice, only 60 States had so far accepted compulsory jurisdiction. There should be a separate procedure for accepting the jurisdiction of the International Criminal Court, particularly as the list of crimes to be included was not yet clear.

71. **Ms. Vargas** (Colombia) supported the inherent jurisdiction of the Court for the core crimes. Ratification would imply acceptance of the jurisdiction of the Court. Only States parties should have the right to submit complaints to the Court. Universality depended on acceptance of jurisdiction, not on the right to submit a complaint. A State not a party should be able to accept the Court's jurisdiction in a specific case by a special declaration. The most acceptable version of article 7 was that proposed by the United Kingdom in the "Further option for articles 6, 7, 10 and 11". Two States must have given their consent, the custodial State of the accused and the territorial State where the crime had been committed.

72. **The Chairman** said that the discussion of part 2 of the draft Statute would continue at the next meeting.

PART 3. GENERAL PRINCIPLES OF CRIMINAL LAW  
(continued)

*Report of the Working Group on General Principles of  
Criminal Law (A/CONF.183/C.1/WGGP/L.4 and Corr.1)*

73. **The Chairman** invited the Coordinator for part 3 and Chairman of the Working Group on General Principles of Criminal Law to introduce the Group's report (A/CONF.183/C.1/WGGP/L.4 and Corr.1).

74. **Mr. Saland** (Sweden), Coordinator for part 3 and Chairman of the Working Group, said that the text for article 21, entitled "*Nullum crimen sine lege*", was ready, subject to the proviso, mentioned in footnote 1, that an additional provision would be needed if the so-called treaty crimes were included within the jurisdiction of the Court. Article 22 on non-retroactivity was also agreed, with the proviso that paragraph 1 might have to be revisited, depending on what happened to article 8. Any additional language could, however, be placed in a separate paragraph, so the existing two paragraphs could be sent to the Drafting Committee. Article 23 on individual criminal responsibility was mostly complete, but paragraphs 5, 6 and 7 (c) were still under consideration. He drew attention to footnote 5: the reformulation of article 23 would mean that the bracketed paragraph 2 of article 5 could be deleted.

75. Article 24, paragraph 1, was already with the Drafting Committee, and agreement had now been reached on paragraph 2. The former article 26, now provisionally called "Article X", had been drafted as a jurisdictional issue. There was agreement on the text, but it should be moved to an appropriate place in part 2.

76. Concerning article 27, he drew attention to footnote 7 which stated that two delegations were of the view that there should be a statute of limitations for war crimes. He hoped that the two delegations concerned would be flexible and agree that the text could be sent to the Drafting Committee, despite the lack of complete consensus. An addition to the footnote was about to be circulated.

77. Since the adoption of the report, the Working Group had agreed that article 29, paragraph 4, should be deleted.

78. The outstanding issues were article 23, paragraphs 5, 6 and 7 (c), article 25 and article 28, which were still under

discussion, and articles 30 to 34, which there had not yet been time to discuss. He hoped to be able to report on the discussion of those provisions shortly.

79. He commended the agreed provisions for transmission to the Drafting Committee.

80. **Ms. Wong** (New Zealand) thought that footnote 3 should be amended to refer to "discussion of other articles", and not just to article 8, because there *might* be proposals in the final clauses which would have an impact.

81. **Mr. García Labajo** (Spain) said that he had reservations on articles 22 and 24. Article 22 was closely related to article 8 and could be related to the final clauses, and he thought that it could be kept in abeyance for the time being. In paragraph 2 of article 24, it might be better to say, for example, "... jurisdiction in relation to acts for which that person is responsible".

82. **Mr. Güney** (Turkey) said that some delegations had raised the problem of the absence of a statute of limitations from the point of view of complementarity.

83. **Mr. Pérez Otermin** (Uruguay) thought that the Committee of the Whole should have time to consider the report of the Working Group before the provisions in question were passed on to the Drafting Committee.

84. **The Chairman** said that he would ask the Chairman of the Working Group to respond to the questions raised. He hoped that the Committee of the Whole could take a decision on the report at the next meeting.

85. **Mr. Saland** (Sweden), Coordinator for part 3 and Chairman of the Working Group on General Principles of Criminal Law, said that he would have no objection to the correction suggested by New Zealand. His impression was that the concerns of Spain on article 22 could be dealt with in separate paragraphs, without amending paragraphs 1 and 2.

86. There was no universal answer to the issue of complementarity – it would be a question of cooperation with States. He hoped, however, that the delegations concerned would be sufficiently flexible to allow the proposed text to be sent to the Drafting Committee.

*The meeting rose at 6.10 p.m.*



9th meeting

Monday, 22 June 1998, at 10.10 a.m.

Chairman: Mr. Kirsch (Canada)

A/CONF.183/C.1/SR.9

Agenda item 11 (*continued*)

**Consideration of the question concerning the finalization and adoption of a convention on the establishment of an international criminal court in accordance with General Assembly resolutions 51/207 of 17 December 1996 and 52/160 of 15 December 1997 (A/CONF.183/2/Add.1 and Corr.1 and A/CONF.183/C.1/WGGP/L.4 and Corr.1)**

DRAFT STATUTE

PART 3. GENERAL PRINCIPLES OF CRIMINAL LAW  
(*continued*)

*Report of the Working Group on General Principles of Criminal Law (continued)* (A/CONF.183/C.1/WGGP/L.4 and Corr.1)

1. **The Chairman** invited the Coordinator for part 3 and Chairman of the Working Group on General Principles of Criminal Law to give a progress report.
2. **Mr. Saland** (Sweden), Coordinator for part 3 and Chairman of the Working Group on General Principles of Criminal Law, said that paragraph 1 of article 22 on non-retroactivity was not disputed and could therefore be submitted to the Drafting Committee. In informal consultations, it had been agreed that any outstanding issues could be covered by a paragraph 1 bis. Paragraph 1 of article 24 on irrelevance of official position had already been submitted to the Drafting Committee, which could undoubtedly also address the drafting suggestions made in respect of paragraph 2 of that article. Following a discussion on article 27 ("Statute of limitations"), it had been agreed that the issue that had been raised related more to part 9 ("International cooperation and judicial assistance"). Subject to those understandings, the Committee might wish to approve the articles as they appeared in document A/CONF.183/C.1/WGGP/L.4 and Corr.1.
3. **Mr. García Labajo** (Spain) said that he had no objection to the referral of the articles to the Drafting Committee, but it was his understanding that the title of part 3 and the possibility of moving paragraph 1 of article 22 to part 2 remained open.
4. **The Chairman** said he took it that the Committee agreed to refer to the Drafting Committee the following articles: article 21; article 22; article 23, paragraphs 1, 2, 4 and 7, apart from 7 (c); article 24, paragraph 2; article "X" (former article 26); article 27. He further took it that the Committee agreed to the deletion of paragraph 3 of article 23, paragraph 4 of article 29 and the bracketed second paragraph of the definition of the crime of genocide in article 5.
5. *It was so decided.*

PART 2. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW  
(*continued*)

JURISDICTION: THE ROLE OF STATES (*continued*)

Article 6. [Exercise of jurisdiction] [Preconditions to the exercise of jurisdiction] (*continued*)

[Article 7]. Preconditions to the exercise of jurisdiction  
(*continued*)

[Article 9]. Acceptance of the jurisdiction of the Court  
(*continued*)

Article 11. Complaint by State (*continued*)

6. **Ms. Wong** (New Zealand) referred to the "Further option for articles 6, 7, 10 and 11" following draft article 13 in document A/CONF.183/2/Add.1 and Corr.1, and said that her delegation supported the texts proposed there for subparagraph (a) of article 6 and for the second subparagraph (b) (concerning the Security Council) of the same article.
7. The argument against Security Council referral put forward at an earlier meeting on the basis of the political nature of the Security Council was difficult to accept. State referrals would also be political; that was entirely appropriate. The suggestion to provide for referral by the Commission on Human Rights was an interesting idea, and it might be useful to consider creating a nexus between the United Nations human rights machinery and the International Criminal Court.
8. In relation to the further option for article 7, New Zealand supported the option of the Court having inherent or universal jurisdiction without a need for express State consent. The Court would then have jurisdiction over the core crimes which were already crimes of universal jurisdiction irrespective of whether States were party to the Statute or not, and would be able to exercise its jurisdiction regardless of whether the territorial State had accepted its jurisdiction. Under that approach, articles 7 and 9 would not be necessary.
9. The proposal by the Republic of Korea for an expanded list of categories of States, any of which could provide the necessary consent, went some way to creating a legal nexus between the event and the Court. One of the States involved in the event would need either to be a party or to give its express consent, but the action could not be blocked by other States. The requirement for State consent under that proposal would not be cumulative, but her delegation still saw a problem in any approach that required State consent, because the Court would have no jurisdiction over a crime committed entirely within the

territory of a State not party unless that State consented or the Security Council took action.

10. The suggestion by the French delegation that it should be necessary for the territorial State and possibly the State of nationality to consent might create a problem by enabling a State whose national had committed serious crimes in another State to withhold its consent and shield the accused. That would not contribute to enhancing peace and security, which was a major reason for creating the Court. New Zealand consequently favoured the deletion of paragraph 2 of article 7 and an amendment to paragraph 3 of article 7 as proposed by Germany. It might be willing to consider the approach of the Republic of Korea as an alternative.

11. **Mr. Piragoff** (Canada) said that Canada was committed to a court with inherent or automatic jurisdiction over the three core categories of crime: genocide, war crimes and crimes against humanity. An "opt-in" or State consent regime would allow States to veto Court action and would render the Court ineffective. The number of States whose acceptance was required must be kept to the minimum.

12. Article 6 should allow Court jurisdiction to be triggered by any State party, and States parties should refer situations rather than specific cases. Canada supported the further options for articles 6, 7 and 11 as the best bridge between different positions and a basis for real progress.

13. **Mr. Niyomrerks** (Thailand) thought that State consent to the Court's jurisdiction was indispensable for the Court to exercise its function.

14. His delegation supported the proposal made by the Republic of Korea for paragraph 1 of article 6. Regarding paragraph 2 of article 6 as it appeared in the first version of that article in document A/CONF.183/2/Add.1 and Corr.1, the words "only if the States which have jurisdiction over the case in question have accepted the jurisdiction of the Court in accordance with article 9" should be retained.

15. With regard to preconditions to the exercise of jurisdiction, his delegation supported the article 8 proposed by the Republic of Korea. On article 9, his delegation preferred option 1, with inherent jurisdiction remaining intact. On the referral of a situation by a State, his delegation preferred the draft article 11 in the "Further option for articles 6, 7, 10 and 11".

16. **Mr. Hamdan** (Lebanon) said that the Court's powers should be exercised following an initial request by a State. Technical problems would arise if intergovernmental organizations were allowed to bring complaints before the Court. However, under article 8 the Court should be able to consider crimes falling within its competence which began before but continued after the entry into force of the Statute. The phrase "unless these crimes continue" should therefore be added at the end of article 8, paragraph 1.

17. Paragraph 4 of the first version of article 7, under which a State not a party to the Statute could agree to the competence of the Court, was acceptable. With regard to article 10, option 1 for paragraph 4 and both options for paragraph 7 were unacceptable as the Court should not have to wait until the Security Council took a decision on the question of a military threat, act of aggression or breach of the peace.

18. Under article 11, complaints should be submitted on the basis of full information which should first be examined by the Pre-Trial Chamber in accordance with article 13. It was inappropriate to assign any role to non-governmental organizations in articles 12 or 13.

19. **Mr. Politi** (Italy) said that each State party to the Statute should be authorized to lodge complaints. There was much merit in the idea that States parties should refer to the Court situations in which one or more crimes within the Court's jurisdiction appeared to have been committed. It would then be up to the Prosecutor to determine whether one or more specific persons should be charged with the crimes. Both those points were well reflected in the drafts for articles 6 (a) and 11 in the "Further option for articles 6, 7, 10 and 11", and his delegation supported them.

20. With regard to the preconditions to the exercise of jurisdiction and acceptance of jurisdiction in articles 7 and 9 of the draft Statute, including article 7 in the "Further option for articles 6, 7, 10 and 11", Italy strongly supported a system of inherent Court jurisdiction over core crimes under customary international law, and consequently opposed any regime requiring specific consent by the States concerned other than the consent given in becoming parties to the Statute. The German proposal included in the "further option" for article 9 was fully consistent with Italy's approach and would obviate any loopholes in the jurisdiction provisions of the Statute. However, given the major difficulties that a number of States had with the German proposal, it would be more realistic to follow the United Kingdom approach reflected in article 7 in the "Further option for articles 6, 7, 10 and 11". In that connection, limiting the requirements referred to in paragraph 2 of article 7 to the territorial State would be an improvement, but the problem remained that to require the territorial State to be a party to the Statute or to have accepted the jurisdiction of the Court would impose severe restrictions on the Court's ability to intervene in cases of genocide and crimes against humanity. He supported the views of the representative of New Zealand in that regard. The United Kingdom proposal should be amended along the lines suggested by the Republic of Korea, although Italy remained flexible as to whether all the jurisdictional links suggested by the Republic of Korea should be listed in article 7 or only the custodial State and territorial State links proposed by the United Kingdom. What was important was for the criteria to be alternative and not cumulative, in order to ensure a proper balance in the jurisdiction provisions of the Statute and a sufficiently wide opportunity for the Court to perform its functions.

21. **Mr. Scheffer** (United States of America) said that the United Kingdom text for article 6 in the "Further option for articles 6, 7, 10 and 11" was acceptable with the deletion of the bracketed subparagraph (b). Like other delegations, the United States believed that States should refer whole situations and not individual cases, so as to be more comprehensive and fair.

22. Like many other delegations, the United States was inclined to support the United Kingdom text for article 7, paragraph 1, but noted that it was based on the assumption that the definitions for each crime would be satisfactory, including detailed elements in an annex to the Statute. In the light of the continuing concerns of Member States, the United States reserved its position on requiring the consent of States, even if they were parties to the Statute, on a case-by-case basis, as set forth in option 2 in the first version of article 7.

23. With regard to universal jurisdiction, the United States supported the United Kingdom text for article 7, paragraphs 2 and 3. It was essential that the reference to the State of nationality of the suspect as set forth in paragraph 2 (a) should be retained. On that issue, the United States agreed with the view that the universal jurisdiction proposal for the Court would represent an extraordinary principle, in conflict with certain fundamental principles of international law, and would undermine the Statute generally. The proposals by Germany and the Republic of Korea would have the effect of applying a treaty to a State without that State's consent, and in the absence of any action by the Security Council under Chapter VII of the Charter of the United Nations. Even if a State was not a party, the Court would have jurisdiction to judge its official acts and imprison even its head of State. Such a situation could not be justified on the basis of existing law and the United States objected to it in principle. An international treaty could not impose itself in that manner on non-party States; the only solution was to reach out to other States through the Charter and the powers of the Security Council that had been created by States under that separate treaty regime.

24. With regard to the States which must consent, the consent regime must include a non-State Party whose official actions were alleged to be crimes. That might be the State on whose territory a crime had occurred but, in the case of peacekeeping or international conflict, it might be another State: the State which had sent the troops concerned. That State should be responsible for their prosecution or for consenting to their prosecution by the Court.

25. Article 8 was acceptable.

26. **Ms. Cueto Milán** (Cuba) said that States parties to the Statute should be those responsible for initiating Court action, and the principle of consent and complementarity was an essential basis for the jurisdiction of the future Court. Only the application of those principles could foster universal acceptance of the jurisdiction of the Court and promote its credibility and effectiveness. Arguments in favour of inherent jurisdiction were not convincing. The regime of consent would not prevent States

parties from accepting the competence of the Court, by express declaration, in relation to basic core crimes defined in the Statute. An optional regime of acceptance would encourage most States to ratify the Statute and accept the action of the Court as a new international judicial body. In that context, Cuba favoured option 2 in the first version of article 7.

27. **Mr. El Masry** (Egypt) said that his delegation attached great importance to the principle of inherent jurisdiction, which was closely linked to the principle of complementarity, and considered that the State should be the principal mechanism for triggering Court action.

28. Under all the options, "aggression" was seen as aggression against a State or the political independence or territorial integrity of a State, but there could be aggression against a territory that was not an integral part of a State but was under its sovereignty. Previously, for example, Gaza, though not part of Egypt, had been administered by Egypt. The text should therefore also refer to territories.

29. Egypt agreed that the Court's jurisdiction should cover a State that was not a party if that State accepted the jurisdiction of the Court and if the accused came under the jurisdiction of that State or the act had occurred in its territory.

30. **The Chairman**, summing up the discussion so far, said that some States had made the point that the jurisdiction of the Court should primarily be triggered by States. Many delegations had expressed the view that upon becoming a party to the Statute, a State should automatically accept the Court's jurisdiction over the core crimes. Other States believed that an additional jurisdictional link, such as a declaration, was a precondition to the exercise of jurisdiction. Some delegations called for the consent of one or more of the following: the territorial State, the custodial State, the State of nationality of the accused and the State of nationality of the victim. Some States preferred cumulative consent, while others preferred that the consent of one of the States should suffice.

31. It had also been noted that if the States concerned were not party to the Statute, the Court could exercise jurisdiction with their consent. Some delegations had felt that no additional consent was necessary, but there had been objections to that contention.

32. The view had also been expressed that the automatic acceptance of the Court's jurisdiction should only apply with respect to genocide and crimes against humanity, and that war crimes should not fall under that system but be governed by another jurisdictional regime. Some delegations, however, did not favour an automatic acceptance of the jurisdiction of the Court, feeling that not providing for automatic acceptance but allowing States to make declarations of acceptance of the Court's jurisdiction would facilitate the entry into force of the Statute.

33. Most delegations felt that any State party to the Statute should be able to trigger the Court's jurisdiction, but some

delegations thought that only interested States should be able to do so. Some had argued that States not parties should be able to trigger the Court's jurisdiction in exceptional circumstances, while others had felt that that should not be the case.

34. Most States felt that situations should be referred to the Court rather than individual cases, but the possibility of referring matters had also been suggested. It had been agreed that the automatic acceptance system would not apply to treaty crimes if they were included.

35. A number of delegations had referred to the "Further option for articles 6, 7, 10 and 11" and many had suggested that the structure used in that option might serve as a basis for discussion.

36. He invited further comments.

37. **Mr. Effendi** (Indonesia) said that the Court offered a wide range of benefits and that his delegation would return to the articles on jurisdiction at a later stage, after the Committee's deliberations on articles 15, 16 and 17 on admissibility, article 18 on *ne bis in idem* and article 19, which were all closely related to the principle of complementarity which the Court should uphold.

38. **Mr. Cherquaoui** (Morocco) said that Court action should be triggered by a State party. If the Court was to be as universal as possible, States should be allowed to decide whether or not they accepted its jurisdiction, at least during the initial phase following its establishment.

39. Morocco supported the second option in article 8 and option 2 for article 11, paragraph 1.

40. **Mr. Panin** (Russian Federation) said that his delegation could not agree with the proposals of Germany and the Republic of Korea whereby the jurisdiction of the Court triggered by the complaint of a State could also extend to non-parties, as that approach was not consistent with international law. The Russian Federation was also unable to agree that an international treaty could create obligations for third parties which were not party to it. The only way the Court could exercise jurisdiction over a non-party was by means of a Security Council decision.

41. The Russian Federation saw the Court as exercising eminent jurisdiction when a situation was referred to it by the Security Council and when there were complaints from States in connection with the crimes of genocide and aggression. The agreement of the State affected was not necessary in such cases. In other cases, such as crimes against humanity and war crimes, jurisdiction should be exercised with the agreement of the State on whose territory the crime was committed and the custodial State. Such agreement could be general or relate to specific cases.

42. **Mr. Güney** (Turkey), referring to article 6, said that only States parties and the Security Council acting under Chapter VII

of the Charter of the United Nations should be able to refer matters to the Court. In that context, it was more appropriate to use the word "matters" than "situations".

43. With regard to article 7, the exercise of jurisdiction required express State consent. Turkey consequently favoured option 2 for paragraph 1. It considered that paragraph 2 should be deleted.

44. Article 8 ("Temporal jurisdiction") should be retained but Turkey was flexible as to its location. With regard to article 9 ("Acceptance of the jurisdiction of the Court"), Turkey was against inherent and universal jurisdiction and believed that further consent was necessary. In that connection, the German proposal was useful but did not take account of the reluctance or concerns of the international community in respect of obligatory jurisdiction.

45. The proposal made by the Republic of Korea merited consideration and should be carefully and thoroughly examined. Express consent was required at the present stage.

46. **Mr. Díaz La Torre** (Peru) favoured an independent court with jurisdiction over the core crimes. Its action could be triggered by States. States parties had an inherent right to present complaints, and the Court's jurisdiction should only be exercised over States parties to the Statute. Non-parties should consent to the Court's jurisdiction when necessary by means of the declaration referred to in article 7.

47. **Mr. da Costa Lobo** (Portugal) said that, by becoming parties to the Statute, States implicitly accepted the jurisdiction of the Court in relation to all core crimes. There was no need or place for any other form of acceptance. Portugal endorsed the position of the German delegation with regard to States not parties to the Statute. The solution proposed would result in a more effective tribunal and was in harmony with international law.

48. **Mr. Palihakkara** (Sri Lanka) said that the proposals made by the United Kingdom and France provided a useful basis for discussion with a view to finding a middle ground between inherent jurisdiction and consent at each and every stage. An inclusive approach on the important issues of consent and jurisdiction was desirable. In that context, consensus would not be assisted by further expanding the referral provisions in the draft Statute.

49. **Mr. Madani** (Saudi Arabia) said that the words in brackets should be deleted in paragraph 1 (b) of the first version of article 6, and the opening clause of that paragraph should begin "The Court may exercise its jurisdiction ...". His delegation favoured the "option 2" text in article 7, with the deletion of the words in square brackets; it preferred option 2 for article 9 and it favoured option 2 for article 11, with subparagraphs (a), (c) and (d).

50. **Mr. Al Awadi** (United Arab Emirates) said that his delegation would prefer the deletion of the bracketed words "or

a non-State Party” in article 6, paragraph 1 (b), and favoured option 2 in article 7, with certain amendments which would be submitted to the relevant working group.

51. His delegation preferred option 2 for article 9, but had reservations on paragraph 4. In regard to article 11, option 2 was preferable to option 1 provided that the right was limited to the State on whose territory the act had taken place, the State of nationality of the suspect and the States of nationality of the victims. In the text for article 6 in the “Further option for articles 6, 7, 10 and 11”, the opening clause and subparagraph (a) also met his delegation’s concerns.

52. **Ms. Diop** (Senegal) said that her delegation supported the text for article 6 in the “Further option for articles 6, 7, 10 and 11”, and the concept of inherent jurisdiction of the Court in article 7, paragraph 1. It was particularly important that a State’s acceptance of jurisdiction should be totally transparent and complete. Any State becoming a party should accept and respect the obligations and commitments imposed by the Statute. Further express consent or case-by-case consent would not be necessary. In that connection, the proposals of the United Kingdom and the Republic of Korea provided an excellent basis for compromise.

53. On the question of non-parties, Senegal agreed with the proposals of the United Kingdom and the Republic of Korea, which might be merged to allow a non-party to make a declaration of consent or acceptance to the Secretary-General rather than to the Court’s Registrar.

54. Referral to the Court by States and by the Security Council should be based on situations rather than cases. In that connection, Senegal agreed with article 11, paragraphs 1 and 2, in the “Further option for articles 6, 7, 10 and 11”, but not with paragraph 3.

55. **Mr. Pham Truong Giang** (Viet Nam) said that unless the principle of complementarity was adequately and clearly incorporated into the Statute, the Court would face certain difficulties. His delegation therefore favoured the opt-in option, which appeared to be in accordance with international law and practice.

56. With regard to article 6 (first version), Viet Nam would support paragraph 2 if the bracketed words “only if the States which have jurisdiction over the case in question have accepted the jurisdiction of the Court in accordance with article 9 and” were retained. Option 2 for article 7 appeared to be in accordance with international law and practice and was therefore acceptable.

57. **Mr. Kerma** (Algeria) said that his delegation was in full agreement with the statement adopted recently at Cartagena de Indias by the States members of the Movement of Non-Aligned Countries, calling for the Court to be free from political influence of any kind, particularly from the Security Council, and reaffirming that the Court’s jurisdiction should be based on the consent of the States concerned. Those points would be essential in ensuring the success of the Court.

58. Algeria was in favour of article 6, paragraph 1. The Court should exercise jurisdiction not only in respect of the core crimes but also in respect of treaty crimes. Only States parties to the Statute or States with an interest in a situation or case being referred to the Court, in line with the principle “no interest, no action”, should be able to refer matters to the Court. The door should nevertheless be left open to non-parties to refer matters to the Court under certain conditions, some of which were already provided for in the draft Statute. State consent was fundamental. The consent of at least two States should be required: the State of nationality and the State of custody. Algeria had reservations on paragraph 1 (c), but otherwise favoured paragraph 2.

59. Algeria also preferred option 2 for article 9 and for article 11. With regard to article 10, its position was in line with what he had said at the beginning of his statement, although it recognized the essential role of the Security Council in maintaining international peace and security.

60. **Ms. Kamaluddin** (Brunei Darussalam) said that her delegation had no problem with the referral of a situation by a State party in accordance with article 6 in the “Further option for articles 6, 7, 10 and 11”, and was giving careful consideration to the proposal of the Republic of Korea for article 8, in respect of the requirement of State consent.

61. **Mr. Mahmoud** (Iraq) said that only the State concerned should trigger the article 6 mechanism; the sovereignty of the State concerned should be safeguarded, and there must be no outside influence.

62. His delegation was in favour of option 2 for article 7 (first version); it supported article 8, paragraph 1, with the removal of the square brackets; and it preferred option 2 for article 9. With regard to article 10, the Court must be independent of any political body. It was therefore unacceptable for the Security Council to have a role in the Court, bearing in mind the veto right given to certain States and the Council’s membership and method of voting.

63. Iraq favoured option 2 for article 11 and the deletion of paragraph 4.

64. **Mr. Koffi** (Côte d’Ivoire) said that, while the German proposal was attractive, the underlying concept had not as yet gained universal acceptance and therefore could not be supported for the time being.

65. The proposals of the United Kingdom, on the other hand, provided a sound basis for discussion and were acceptable. Non-parties should not have the right to lodge complaints and the word “situation” was more appropriate than “matter”. His delegation had no objection to the Security Council referring a matter to the Prosecutor of the Court, pursuant to Chapter VII of the Charter of the United Nations. Regarding article 7 (see the “Further option for articles 6, 7, 10 and 11”), it supported the acceptance of jurisdiction by States; acceptance by either the

territorial or the custodial State should be required. The requirement should be alternative and not cumulative in nature.

66. Acceptance by non-parties should be the subject of an express declaration, as provided for in article 7, paragraph 3.

67. With regard to article 10, in view of the importance of covering aggression in the Statute, the role of the Security Council in such situations must be reflected and would not prejudice either the independence of the Court or its final decision.

68. **Mr. Fadl** (Sudan) noted that only States could establish an international court, on the basis of a general agreement. His delegation did not object to the proposals for Court action to be triggered by States, but the involvement of the Security Council might detract from the effectiveness of the Court. Two main issues were involved. The first concerned complaints by States. He thought that, in line with a proposal made during the discussions in the Preparatory Committee on the Establishment of an International Criminal Court, the question of acceptance by the complainant State of the jurisdiction of the Court with respect to the crime concerned need not be considered; it would suffice to provide only that the complainant State should be a party to the Statute and an interested party. Furthermore, to give the Court inherent jurisdiction would favour a State that was not a party to the Statute, because in their case the consent of the custodial State or the territorial State or both would be required before the Court could exercise its jurisdiction, whereas in the case of States parties the Court would automatically exercise jurisdiction. That would discourage accession to the Statute.

69. The second point concerned the Security Council. The proposal was that the Council should be allowed to submit complaints to the Prosecutor or refer matters directly to the Court, without the consent of the State concerned being needed. That was dangerous; it was important that the Court should not be weakened.

70. His country supported the statement of the Movement of Non-Aligned Countries concerning the establishment of the Court, adopted at Cartagena de Indias.

71. **Mr. Rogov** (Kazakhstan) said that his delegation could not support proposals to extend the Court's jurisdiction to non-parties. He drew attention in that connection to the principle of non-retroactivity, according to which acts committed before the entry into force of the Statute were not in the Court's jurisdiction. Now under draft article 114, following the entry into force of the Statute it would take effect for each subsequently ratifying State only after such ratification. How then could it be applied in practice to the citizens of non-party States, which had not ratified it?

72. **Mr. Bu-Zubar** (Kuwait) said that jurisdiction should apply to States parties only, and the reference in article 6, paragraph 1 (b) to a "non-State Party" should be deleted. Furthermore, the wording concerning the acceptance by States of the jurisdiction

of the Court should perhaps be made more specific, by referring to the acceptance of jurisdiction with respect to a case that was the subject of a complaint lodged by a State.

73. Article 8 ("Temporal jurisdiction"), as the representative of Lebanon had pointed out, did not cover acts that began before but continued after the entry into force of the Statute. Care should be taken not to bar prosecution for such acts, and the words "unless the crimes continue after that date" should be added at the end of paragraph 1.

74. **Ms. Shahan** (Libyan Arab Jamahiriya) said that the exercise of the Court's jurisdiction should be based on State consent, in order to satisfy the principle of complementarity. The jurisdiction of the Court could not be split in the sense of having an inherent jurisdiction for some crimes such as genocide and an optional jurisdiction for other crimes. Her delegation supported the principle of acceptance of jurisdiction, rather than that of inherent jurisdiction, and was in favour of option 2 for article 9 and of option 2 for both article 7 and article 11.

75. **Mr. Bello** (Nigeria) said that his delegation believed in the principles of consent and complementarity and consequently fully approved the preamble to the Statute, in which the latter concept was clearly set out. It also believed that only States parties should, under article 6, have the power to refer matters to the Court, and was consequently in favour of paragraph 1 without subparagraphs (a) and (c), and of paragraph 2.

76. In setting up the Court, the international community was doubtless mindful of the many problems which had hindered such a move in the past, including the failure of the Security Council to act fairly and decisively in matters of global concern. Without prejudice to the powers of the Security Council under Chapter VII of the Charter of the United Nations, his delegation felt that the Council should have no role whatsoever with regard to referral of matters to the Court.

77. Nigeria was unable to support the power of the Prosecutor ex officio to refer a matter to the Court: the Prosecutor could not be given such wide powers with no checks or balances.

78. The Nigerian delegation preferred option 2 for each of articles 7, 9 and 11; paragraph 4 of article 11 should be deleted.

79. **Mr. Bazel** (Afghanistan) said that, in article 6, paragraph 1 (a), his delegation supported the referral of a "situation" to the Court. The proposal that the Commission on Human Rights should be able to refer matters to the Court was interesting. In addition, his delegation proposed provision for referral by the International Committee of the Red Cross.

80. With regard to State consent, his delegation supported the principle of complementarity. Without the cooperation of the States concerned, the Court would encounter numerous difficulties in carrying out its tasks. Afghanistan therefore supported option 2 in article 7. It also firmly supported the inclusion of aggression as a core crime in the Statute. The Court

should deal with the matter independently and impartially and without pressure from other institutions.

81. **The Chairman** said that the secretariat had taken note of all the positions stated. Delegations that had not already done so were now invited to give their views on the role of the Prosecutor.

#### JURISDICTION: THE ROLE OF THE PROSECUTOR

Article 6. [Exercise of jurisdiction] [Preconditions to the exercise of jurisdiction] (*continued*)

[Article 12]. Prosecutor (*continued*)

[Article 13]. Information submitted to the Prosecutor (*continued*)

82. **Mr. Shariat Bagheri** (Islamic Republic of Iran) said that his delegation believed that it would be premature to give the Prosecutor the power to initiate investigations on his own. The Court would be established on the basis of a multilateral treaty and would be an international criminal court but not a supranational court, justifying the Prosecutor's having ex officio powers of investigation. Moreover, the granting of ex officio power to the Prosecutor might lead to a conflict of competence between the Court and national courts, to international problems between the Court and States and ultimately to undermining the credibility of the Court. For those reasons, of article 6, paragraph 1 (c), and article 12 should be deleted.

83. The initiation of proceedings by the Prosecutor under the supervision of the Pre-Trial Chamber, as proposed in article 13, was not an acceptable formula. The trigger mechanism should be limited to States, individually or collectively, and situations should be referred by the Security Council only.

84. **Mr. Mochochoko** (Lesotho) said that his delegation was in favour of inherent jurisdiction of the Court and was opposed to any State consent regime. If an independent and effective Court was to be established, it was essential that the Prosecutor should have the authority to initiate investigations ex officio. If investigations and prosecutions could only be triggered by States and to some extent by the Security Council, the functioning of the Court would be dependent on the political motivations of those entities and as a result be severely hampered, because in practice States and the Security Council would be reluctant, or unable, to lodge complaints or refer situations to the Court.

85. For the powers of the Prosecutor, Lesotho preferred the bracketed subparagraph (b) of article 6 in the "Further option for articles 6, 7, 10 and 11", as it was more precise than the first article 6. It was not in favour of article 7 in that option, which would constitute a further impediment to the Court's effective functioning as a complement to national criminal jurisdictions. If that provision was intended to cover non-parties, that should be clearly stated.

86. His delegation agreed with the overall tenor of article 12 and believed that it should be up to the Prosecutor to decide whether or not to proceed with an investigation. To preserve prosecutorial independence, the word "may" would be preferable to "shall" in the first line. The contribution of information from victims, in addition to information from other sources, would be particularly significant in bringing perpetrators to justice, and the text allowing the Prosecutor to receive information from any source should be retained.

87. With regard to article 13, a fully independent Prosecutor subject only to judicial confirmation of indictments at the conclusion of an investigation would be preferable. While judicial review of the decision to commence investigations might seem useful in ensuring fairness, such a review might be too great an impediment for the Prosecutor. If necessary, his delegation would be prepared to reconsider its position on that issue but, in order to make it clear that at that stage of the proceedings the Prosecutor was not required to prove a *prima facie* case or probable cause, appropriate wording to that effect should be included in article 13 or elsewhere. Similarly appropriate wording would be required to indicate that the Prosecutor was not prevented from resubmitting a request on the basis of fresh evidence.

88. **Mr. Niyomrerk** (Thailand) said that his delegation could accept paragraph 1 (c) of article 6 (first version), and paragraph 2 with the inclusion of the words "only if the States which have jurisdiction over the case in question have accepted the jurisdiction of the Court in accordance with article 9 and". It could agree to the Prosecutor initiating investigations ex officio on the basis of information obtained from any source, including non-governmental organizations, as provided for in article 12. It supported article 13 as it stood and endorsed the role of the Pre-Trial Chamber in considering the basis on which the Prosecutor should be allowed to proceed further with an investigation.

89. **Prince Zeid Ra'ad Zeid Al Hussein** (Jordan) said that, in the interests of an effective and credible Court, the Prosecutor would have to be in a position to refer matters to it, in compliance with the principle of complementarity, and to initiate investigations on the basis of information analysed responsibly and in a manner unaffected by international media coverage.

90. With regard to article 12, the Prosecutor should not be restricted as to the sources from which relevant information might be drawn, given the article 13 mechanism which, together with articles 47 and 48, would militate against an abuse of powers by the Prosecutor.

91. His delegation remained flexible as to the square brackets within article 12. The wider brackets around articles 12 and 13 should be removed.

92. **Mr. Kandie** (Kenya) said that his delegation saw no reason why the Prosecutor would require ex officio powers to trigger Court action. The twin triggers of States and the Security



Council, subject to appropriate controls, were sufficient to cover all cases which would need to go before the Court. Article 6, paragraph 1 (c), and other provisions dealing with ex officio powers of the Prosecutor should therefore be deleted.

93. **Mr. González Gálvez** (Mexico) said that the Prosecutor should be able to refer a matter to the Court, and to gather information from the sources mentioned in article 13.

94. To ensure independence, the judges in the Pre-Trial Chamber should not be the same as those in the Court itself or in the Appeals Chamber.

95. **Mr. Díaz Paniagua** (Costa Rica) said that his delegation thought that the Prosecutor should be able to begin investigations on his own initiative, and that that power should be included in article 13. The independence of the Prosecutor and the Court and their freedom from political influence were adequately safeguarded. The Court should have inherent jurisdiction, as proposed by the German delegation.

96. **Mr. Rodríguez Cedeño** (Venezuela) said that the Prosecutor should have autonomous competence and the right to refer matters to the Court. In article 6 ("Further option for articles 6, 7, 10 and 11"), he thought that States parties or the Security Council should refer matters not to the Prosecutor but directly to the Court. In view of his independent status, the Prosecutor should be able to receive complaints both from States and from governmental or non-governmental organizations or individuals.

97. The Prosecutor should be able to receive information from any source and carry out the necessary inquiries before referring the matter to the Court. It was not necessary for the Court to have a pre-trial chamber to study matters that would be submitted to it. Well-grounded and well-documented complaints submitted by States parties, the Security Council or the Prosecutor could be considered directly by the main chamber, and then there could perhaps be a higher body, such as an appeals court.

98. **Mr. Al-Shaibani** (Yemen) said that, like many other delegations, his delegation had difficulty in accepting that the Prosecutor should be able to take the initiative to open investigations or present cases. That was a matter for States alone.

99. **Mr. Mahmoud** (Iraq) said that the Prosecutor should not be able to take the initiative to open investigations or act on his own initiative, particularly as an individual might be susceptible to political influence.

100. **Mr. Taïb** (Morocco) said that the Prosecutor should have an independent role and be able to initiate investigations ex officio. However, such action should be subject to the agreement of the Pre-Trial Chamber. Information should only be obtained from States and organizations in the United Nations system.

101. **Mr. Janda** (Czech Republic) said that his delegation recognized the primary role of the State. It believed that the

Prosecutor should be empowered to initiate proceedings before the Court on his or her own initiative. An ex officio Prosecutor would mean a more effective Court because the Court would thus be open to various sources, including non-governmental organizations and individuals. The competence of the Prosecutor should relate only to the core crimes, as set out in article 5.

102. His delegation was in favour of article 12.

103. **Mr. Effendi** (Indonesia) said that article 6, paragraph 1 (c) should be deleted. The Prosecutor should not be able to initiate investigations *proprio motu*.

104. **Mr. S. R. Rao** (India) said that his delegation attached great importance to the impartiality and objectivity of the Prosecutor in conducting his functions of investigation and prosecution. The success of the Court would depend in great measure on cooperation among States aimed at punishing heinous crimes of international concern. While the Court's jurisdiction would be individual, the nature of the crimes was such that the reputation of Governments would inevitably come under scrutiny.

105. The necessary cooperation would not be promoted by allowing the Prosecutor to act on his own, on the basis of sources of information, regardless of their reliability. Such an ex officio role for the Prosecutor would jeopardize the principle of complementarity which was generally accepted as the basic foundation for the establishment of the Court.

106. **Ms. Connelly** (Ireland) said that, to be truly effective, an enforcement mechanism for international humanitarian law must allow victims an audible and direct voice which did not depend upon a State party or the Security Council for its expression. It was no accident that the first time the word "victim" appeared was in article 13 in relation to the information submitted to the Prosecutor. The Prosecutor should have the competence to receive information about a crime covered by the Statute directly and from any source, including victims, persons acting on their behalf and non-governmental organizations. The Prosecutor would have to sift the information received on the basis of objective criteria and assess whether there was a reasonable basis for an investigation. In that connection, it should be borne in mind that generally acceptable criteria had been used as early as the 1920s by the League of Nations in evaluating information submitted to it in the context of a regime for the protection of minorities. At the present time, under the international human rights treaties, complaints had to satisfy a number of criteria if they were to be processed further.

107. Without the application by the Prosecutor of objective and generally accepted criteria in evaluating information, the credibility of the entire system would be undermined. The office of Prosecutor was a key institution in the structure and operation of the Court, and the person holding the office must have an excellent knowledge of criminal law and procedure and of the relevant international law, and be a person of the highest integrity and sound judgement. However, if the Prosecutor was



to have the competence to receive information from a wide range of sources, it would be too great a responsibility for the evaluation of that information to rest with that person alone. The proposal in article 13 for a further safeguard in connection with the handling of such information, namely that it be subject to confirmation or rejection by a pre-trial chamber, was therefore a good one, and would make the Court more accessible and relevant to those affected by or concerned with violation of international humanitarian law. It would strengthen the Court's ability to act, and she hoped that it would be generally acceptable to States.

108. **Mr. Ivan (Romania)** said that an independent and effective international criminal court would require an independent prosecutor able to trigger *ex officio* the necessary jurisdictional mechanisms and refer matters to the Court. His delegation could nevertheless accept that, to prevent any abuse of power, the role of the Prosecutor should be subject to an independent pre-trial chamber.

109. The Prosecutor should be allowed to trigger the jurisdiction of the Court on his own initiative and not only following a decision by the Security Council or a State party. Concerns that there should be some safeguards in respect of the Prosecutor's authority were already partially addressed in the Statute by the creation of a pre-trial chamber, which would review all indictments submitted by the Prosecutor to determine whether or not a *prima facie* case existed and whether the admissibility requirement under article 15 had been met.

110. The proposals of the delegations of Germany and Argentina were complementary to the solution proposed by the United Kingdom delegation. The Romanian delegation was in favour of the United Kingdom proposal as a viable way of allowing *ex officio* prosecution and, at the same time, ensuring judicial reviews of the Prosecutor's actions.

111. **Mr. Nathan (Israel)** said that his delegation was unable to support the proposal for *ex officio*, *proprio motu* investigations by the Prosecutor. Under the preamble, the Court was intended to exercise jurisdiction only over the most serious crimes of concern to the international community as a whole. If the Prosecutor took over the proposed functions, a situation might result in which no complaints by States were put forward. Furthermore, there would be a risk of the Prosecutor being overburdened by a multitude of complaints from bodies of all kinds, including frivolous or political complaints which would adversely affect the Prosecutor's independence and standing. No parallel could possibly be drawn with the Statutes of the *ad hoc* tribunals for the former Yugoslavia and Rwanda, because there was no State involvement in those tribunals and investigations had to be conducted by the Prosecutor acting *proprio motu*.

112. Regrettably, investigations initiated by the Prosecutor without the backing of a complainant State were likely to be ineffective as he would be dependent on the cooperation and assistance of private or other bodies, and thus be deprived of the

basic requirements for an efficient and effective investigation of the crime in question. Article 12 should therefore be deleted.

113. With regard to the Security Council, under Article 24 of the Charter of the United Nations the Council had primary responsibility for the maintenance of international peace and security, a provision which might give the Council a role *vis-à-vis* the Court and might require the Council to refer matters to it in situations involving Chapter VII of the Charter. The role of the Council in that context was limited to situations arising under Chapter VII of the Charter and not under Chapter VI, which dealt with the settlement of disputes, with no necessary connection with the commission and prosecution of crimes subject to the jurisdiction of the Court.

114. With regard to the powers of the Security Council in relation to the determination of the existence of an act of aggression, it would be inappropriate at the present stage at least to include the crime of aggression in the jurisdiction of the Court. If, however, aggression was included in the Court's jurisdiction, determination by the Security Council under Article 39 of the Charter of the United Nations of the existence of an act of aggression should be a precondition to the exercise of the jurisdiction of the Court in so far as acts of aggression were concerned. That function, a basic function of the Council under Article 24 of the Charter, could not be ignored by the Statute, transferred to the Court or shared with the Court.

115. Another point arose regarding paragraph 2 of article 10 in the "Further option for articles 6, 7, 10 and 11". His delegation considered that, when the Security Council was seized of a situation, matters should be in abeyance in the Court, but not indefinitely. Israel supported the proposal made that, for a limited period – perhaps a period of 12 months, which could be extended for a further 12 months – matters should be in abeyance.

116. **Mr. Rowe (Australia)** said that his delegation agreed that the Prosecutor should have the authority to initiate investigations *proprio motu* in accordance with the provisions of article 12, provided that his actions were subject to appropriate procedural safeguards such as those provided for in article 13, which proposed, *inter alia*, that the authorization of a pre-trial chamber should be obtained before an investigation could proceed.

117. **Ms. Shahan (Libyan Arab Jamahiriya)** said that there was a role for the Prosecutor provided that it was subject to safeguards. The Prosecutor should not have the right to initiate Court action on his own initiative on the basis of information given or sought from other sources, but might conceivably open inquiries *ex officio* on receipt of a complaint from a State, and subject to the consent of the State on whose territory the information would be sought. It was not desirable for the Prosecutor to have to inform the Security Council of any complaints he might receive under article 11.

118. **Ms. Cueto Milián (Cuba)** said that her delegation was not in favour of extending *ex officio* authority to the Prosecutor to

trigger Court action. Conflicts of interest and jurisdiction would undoubtedly arise and politically motivated investigations could affect the credibility of the Court. A frank commitment to international cooperation was preferable to the so-called impartiality of one individual.

119. **Mr. El Masry** (Egypt) said that many States would be deterred from acceding to the Statute if the Court were to allow other persons to trigger Court action. Regarding the Prosecutor's right to receive information from any source, certain safeguards should be imposed, allowing the Pre-Trial Chamber to check the accuracy of information.

120. **Ms. Wong** (New Zealand) said that her delegation supported the position of Lesotho, Ireland and other States which had argued in favour of *proprio motu* powers for the Prosecutor to initiate investigations. It would prefer there to be no judicial review of the Prosecutor's independent powers, but accepted that there might be a need for a mechanism such as that proposed in article 13, to overcome the concern of those delegations which had difficulties with giving the Prosecutor broad powers.

121. New Zealand supported article 12, with the word "may" rather than "shall". It supported article 13 as it stood and would wish to remove the square brackets around the first subparagraph (b) of article 6 in the "Further option for articles 6, 7, 10 and 11".

122. The proposal that the United Nations human rights machinery should be linked to the Court should be given further consideration.

123. **Mr. Madani** (Saudi Arabia), referring to article 12, said that the Prosecutor should not be able to trigger action on his own initiative, but only in connection with a complaint by a State or the Security Council in cases within its competence. The phrase "from any source" and the references to inter-governmental organizations and victims should be deleted. A pre-trial chamber would have an important role to play.

124. **Mr. Wouters** (Belgium) said that his delegation was fully in favour of giving the Prosecutor the authority to initiate prosecution *ex officio*. The compromise solution in articles 12 and 13 provided an excellent working basis.

125. **Mr. Scheffer** (United States of America) said that his delegation was in favour of deleting references to *proprio motu* action by the Prosecutor, and recommended the deletion of articles 12 and 13 from the Statute.

126. His delegation remained unconvinced by the arguments put forward in favour of a *proprio motu* Prosecutor, and rejected the idea that the community of States was so lacking in moral and political courage that, when faced with an atrocity meriting the attention of the Court, not one State party would respond. It was wrong to argue that States' unwillingness to invoke the Court's jurisdiction was presumptively foreshadowed by the past reluctance of States to take on national prosecution of

atrocities. On the contrary, the Court would provide an alternative to overcome the variety of legal, political, practical and resource difficulties which had made States reluctant, if not unable, to take on such prosecutions.

127. The argument that the State and Security Council referral approach would mean a politicized Prosecutor, while the *proprio motu* approach would ensure an impartial one, seemed simplistic. It would be naive to ignore the considerable political pressure that organizations and States would bring to bear on the Prosecutor in advocating that he or she should take on the causes which they championed. Both organizations and States might seek to act politically, but there was a significant difference in the accountability of States, as opposed to individuals and organizations.

128. The discussion had also ignored the extent to which State and Security Council referral had a political component that was beneficial, if not essential, to the work of the Prosecutor. In making referrals, States were expressing political will and political support for the Prosecutor and his work, and signalling to other States the level of their concern about the situation at issue and their commitment to support and assist the Prosecutor both directly and in his or her dealings with other States, including those likely to be hostile to the Prosecutor's investigation. That involvement of States was critical. Under the *proprio motu* model, it would become too easy for States parties to abdicate their responsibilities and leave it to individuals, organizations and the Prosecutor to initiate cases without the foundation of political will and commitment that only States could provide. The Prosecutor might then become isolated in a difficult international arena without the clear, continuing support of States parties. In addition, the argument that a *proprio motu* Prosecutor would be able to base a decision on whether to pursue investigations solely on legal criteria was not persuasive. If the Prosecutor had the authority, and responsibility, to pursue all credible allegations from individuals or organizations, there would surely be many more complaints than the Prosecutor could possibly handle. Many of those complaints might, on the face of it, meet the legal criteria for the initiation of an investigation, and the Prosecutor would not be able to use a simple legal checklist to choose which of several legally sufficient complaints to pursue, but would be required to make decisions of policy in addition to those of law.

129. Some prosecutorial discretion would be necessary and appropriate even in the context of a State referral regime. However, in the *proprio motu* setting, the exercise of prosecutorial discretion, which was not universally accepted, would become a frequent and essential step in preserving the proper functioning and focus of the Court. Considerably expanding the number of instances in which the Prosecutor might intervene was unlikely to result in good prosecutions, would undermine the perception of the Prosecutor's impartiality and would subject the Prosecutor to incessant criticism by groups and individuals who disagreed with his or her choices.

130. The *proprio motu* proposal thus risked routinely drawing the Prosecutor into making difficult public policy decisions which he or she was neither well equipped nor inclined to make. Such initial public policy decisions would be best made elsewhere, freeing the Prosecutor to deal for the most part with the law and the facts.

131. **Ms. Chatoor** (Trinidad and Tobago) said that her delegation could in principle support the role of the Prosecutor in triggering the jurisdiction of the Court, and was flexible on the language in article 12. It was prepared to work with others on articles 12 and 13 in order to reach consensus. The checks and balances proposed in article 13 would provide a good basis for discussion.

132. The trigger mechanism should not be restricted to States parties only. That might not be in the interests of justice in the long run.

133. **Mr. Gevorgian** (Russian Federation) said that, if the Prosecutor was given direct power to initiate investigations, *proprio motu*, both the Prosecutor and the Court would become politicized.

134. **Mr. van Boven** (Netherlands) said that an ex officio role for the Prosecutor was essential if the Court was to be a viable institution. The Prosecutor should have the full use of all sources of information, from governmental and non-governmental sources as well as from victims' associations. As the representative of Ireland had said, victims must be given a voice. It was up to

the Prosecutor to assess the pertinence and credibility of the information and his delegation was confident that the Prosecutor would act responsibly. On that basis, he or she would decide whether there were reasonable grounds for proceeding with an investigation.

135. His delegation also supported the idea of giving the Pre-Trial Chamber a role in exercising judicial review and authorizing the initiation of the investigation.

136. **Mr. Stigen** (Norway) said that his delegation supported ex officio and *proprio motu* powers for the Prosecutor to trigger the Court's intervention. The exercise of those powers should be based on reliable information from any source. A qualified and independent Prosecutor would be the best insurance against politicized action by the Court, and should be able to deal with criticism in relation to the setting of priorities when there were many possible cases.

137. The Norwegian delegation nevertheless appreciated the doubts expressed by some delegations and believed that the proposed checks and balances, including the provisions regarding the Pre-Trial Chamber and the election of the Prosecutor and other rules, addressed those concerns. Norway supported the proposals of Germany and Argentina; it supported the principle of article 12, with the use of the word "may", and was happy with the wording of article 13.

*The meeting rose at 1 p.m.*

## 10th meeting

Monday, 22 June 1998, at 3.15 p.m.

*Chairman:* Mr. Kirsch (Canada)

A/CONF.183/C.1/SR.10

### Agenda item 11 (*continued*)

**Consideration of the question concerning the finalization and adoption of a convention on the establishment of an international criminal court in accordance with General Assembly resolutions 51/207 of 17 December 1996 and 52/160 of 15 December 1997 (A/CONF.183/2/Add.1 and Corr.1 and A/CONF.183/C.1/L.7)**

#### DRAFT STATUTE

PART 2. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW (*continued*)

JURISDICTION: THE ROLE OF THE PROSECUTOR (*continued*)

Article 6. [Exercise of jurisdiction] [Preconditions to the exercise of jurisdiction] (*continued*)

[Article 12]. Prosecutor (*continued*)

[Article 13]. Information submitted to the Prosecutor (*continued*)

1. **Mr. Politi** (Italy) said that Italy had always been in favour of giving the Prosecutor the authority to initiate investigations ex officio on the basis of information obtained from any source. His delegation supported the bracketed subparagraph (b) in the text for article 6 proposed in the "Further option for articles 6, 7, 10 and 11", as well as the text of article 12. In regard to the latter, it favoured the following formulation for the first sentence: "The Prosecutor may initiate investigations *proprio motu* or on the basis of information obtained from any source, in particular from Governments, United Nations organs and intergovernmental and non-governmental organizations." The second sentence would remain as drafted.

2. With regard to article 13, his preference was for an independent prosecutor who would not require specific authorization in order to initiate investigations. At the same

time, he realized that a number of delegations were concerned that all possible guarantees should be provided against any improper use by the Prosecutor of the powers conferred on him or her, and could therefore accept the establishment of a mechanism of scrutiny on the basis of the proposals reflected in draft article 13.

3. **Mr. Rwelamira** (South Africa), speaking on behalf of the Southern African Development Community (SADC) and of his own delegation, said that he wished to associate himself with those who had spoken in favour of the inherent jurisdiction of the International Criminal Court with regard to core crimes. The independence of the Prosecutor was critical to the effectiveness of the Court, and neither his delegation nor the SADC countries would like to see a situation in which the Prosecutor was dictated to either by individual States or by the Security Council.

4. Since the Prosecutor was a critical part of the trigger mechanism under the draft Statute, his or her role should be strengthened as much as possible, and he therefore supported the proposed article 6 in the "Further option for articles 6, 7, 10 and 11". Concerning article 12, he supported the view that the Prosecutor should be able to initiate investigations on the basis of information obtained from any source. In order to preserve the Prosecutor's independence, he would prefer the word "may" to be used in the article rather than the word "shall". In general, he would support removal of the brackets contained in the text.

5. Although his preference was for an independent prosecutor, he could accept the general content of the proposed article 13 in the light of the concerns expressed by others. Use of the Pre-Trial Chamber as a screening or filtering mechanism could allay some of the fears expressed, as well as provide a guarantee against unsubstantiated or frivolous complaints. However, he would like to have further discussion on the article before he took a firm position.

6. **Mr. Bello** (Nigeria) said that the system of checks and balances which article 13 was intended to provide was inadequate. Under article 12, the Prosecutor was granted powers so enormous as to make that office a law unto itself. Moreover, those vast powers would invite complaints and ultimately make the Prosecutor ineffective. Nigeria therefore believed that articles 12 and 13, as well as the bracketed subparagraph (b) in article 6 in the "Further option for articles 6, 7, 10 and 11", should be deleted.

7. **Mr. Manongi** (United Republic of Tanzania) said it was very important that the Prosecutor be given an *ex officio* role if the universal regime of human rights protection was to be strengthened rather than weakened. His delegation could therefore accept that the Prosecutor be empowered to initiate investigations *proprio motu*.

8. However, he agreed with earlier speakers that the powers granted to the Prosecutor under article 12 needed to be qualified

by the provisions proposed in draft article 13, whereby prior authorization by a pre-trial chamber would be required before an investigation could proceed.

9. **Ms. Li Yanduan** (China) said that her delegation did not agree that the Prosecutor should be given powers of investigation *ex officio*. It therefore proposed that article 6, paragraph 1 (c), as well as articles 12 and 13, should be deleted.

10. **Mr. Vergne Saboia** (Brazil) said that his delegation believed that the Prosecutor should be given powers to bring matters before the Court, and was therefore in favour of retaining article 6, paragraph 1 (c), or a similar wording. On the other hand, the Prosecutor should also be able to initiate investigations on the basis of information from a variety of sources, as indicated in article 12. Those powers should be subject to certain safeguards, and in that context he supported the system proposed in article 13, in particular regarding the role of the Pre-Trial Chamber. In his view, that issue was also related to the question of admissibility.

11. **Mr. Skibsted** (Denmark) said his delegation, too, believed that the Prosecutor should have powers of investigation *ex officio*. The text as drafted provided sufficient safeguards. The Prosecutor would have to decide that there was sufficient basis on which to proceed, and that evaluation would have to be approved by the Pre-Trial Chamber. The qualifications of the Prosecutor would have to be the same as those of the judges, and it was essential to ensure that the procedures for selecting members of the Court and for appointing the Prosecutor had the confidence of the world community.

12. The fact that the crimes to be tried by the Court were to be limited to the most serious offences should make it easier to agree on the prosecution of the offenders and allow the Court to become an effective instrument.

13. **Mr. Imbiki** (Madagascar) said that if the Court was to be effective and credible it was important that the Prosecutor be made independent, and not subject to the authority of the Security Council. He or she would nevertheless not be immune from political pressures, which was why Madagascar agreed that any investigation launched should have the prior authorization of the Pre-Trial Chamber.

14. The Prosecutor would be required to initiate an investigation of a complaint brought by the Security Council or a State party; provision would have to be made to ensure that, should he or she refuse to act, the complainant could bring the matter to appeal.

15. **Mr. Kaul** (Germany) said Germany believed that in order to ensure the independence of the Prosecutor it was vital to give him or her the power to initiate investigations *ex officio*, since otherwise prosecutions could only be brought if a State party or the Security Council referred a situation to the Court. Giving the Prosecutor the power to act *proprio motu* would have the advantage of depoliticizing the process of initiating investigations.

16. Article 13 of the draft Statute reflected a proposal submitted jointly by Germany and Argentina. In response to the concerns expressed by a number of delegations, it would subject the Prosecutor to a form of judicial control when initiating investigations *ex officio*.

17. **Mr. Saland** (Sweden) said his delegation did not wish the Court to be a mere tool of the Security Council; it should be truly effective, and the Prosecutor should be given an *ex officio* role. He fully supported the formula for judicial review contained in article 13, which would not only be a safeguard against frivolous complaints, but would also protect the Prosecutor from undue political pressure.

18. It was the duty of the Court at all stages of the proceedings to satisfy itself not only that it had jurisdiction in a particular case, but also that the case was admissible, and in that connection he agreed that lack of sufficient gravity should be a ground for inadmissibility.

19. **Ms. Blokar** (Slovenia) said that she supported the Prosecutor's right to trigger the Court mechanism and to initiate investigations *ex officio*. She therefore supported the bracketed subparagraph (b) of article 6 in the "Further option for articles 6, 7, 10 and 11".

20. She also supported article 12, with the deletion of the brackets around the words "and intergovernmental and non-governmental organizations", and the deletion of the last sentence. In response to those who had expressed the view that the Prosecutor should not have an *ex officio* or *proprio motu* role, she drew attention to article 43, paragraph 3, which stipulated that the Prosecutor was to be a person of high moral character, highly competent and have extensive practical experience.

21. **Mr. Kessel** (Canada) endorsed the views of those who favoured a prosecutor empowered to initiate proceedings *ex officio* based on information from all sources. Articles 12 and 13 provided sufficient safeguards in that respect, and he could not see how giving the Prosecutor the independence he or she needed could undermine the concept of complementarity.

22. **Ms. Hertz** (Chile) said Chile had always believed that, if the Court was to be effective, the Prosecutor should be given powers to initiate investigations *ex officio* on the basis of reliable information. She could accept the wording proposed for article 6, and was in general agreement with the text of article 13, which should provide sufficient guarantees to satisfy both States parties and world opinion.

23. **Mr. Khalid Bin Ali Abdullah Al-Khalifa** (Bahrain) said his delegation believed that the Prosecutor should not take action on his or her own initiative, and that the role he or she should play should be subject to clear limits. The sources of information used had to be limited too, so that information would be accurate and credible. The expression "any source" in article 12 should be eliminated, as well as the mention of

different sources. The Prosecutor's role should be subject to judicial control at all stages.

24. **Mr. Minoves Triquell** (Andorra) said that the Prosecutor's independent role was very important where heinous crimes were concerned. Articles 12 and 13 should be retained, as well as paragraph 1 (c) in article 6 (first version).

25. **Ms. Daskalopoulou-Livada** (Greece) said her delegation believed that the Prosecutor should be given powers to prosecute *ex officio*, since otherwise the bulk of the crimes which warranted international action would go uninvestigated and unpunished.

26. The precedent established by the ad hoc Tribunals for the Former Yugoslavia and Rwanda militated in favour of such *ex officio* powers, and she accordingly favoured retention of article 6 (first version), paragraph 1 (c), or the bracketed subparagraph (b) of article 6 in the "Further option for articles 6, 7, 10 and 11". She also supported article 12, and could accept the idea embodied in article 13, provided that the Prosecutor was given the option of reintroducing a request if new evidence became available.

27. **Ms. Diop** (Senegal) supported the view expressed by earlier speakers that a strong, independent Prosecutor empowered to obtain information *ex officio* was crucial if the Court was to be effective. She therefore favoured the variant contained in article 6 (first version), paragraph 1 (c).

28. She could accept the text proposed for article 12, provided that an alternative was found for the expression "from any source" in the first sentence. Not all sources of information were equally credible. She fully supported article 13; prior authorization by a pre-trial chamber would act as a safeguard against any abuses on the part of the Prosecutor.

29. **Mr. Dhanbri** (Tunisia) said that his country had some misgivings as to the powers being granted to the Prosecutor in the draft proposed. His delegation believed that action should only be initiated on the basis of a complaint submitted by a State.

30. **Mr. Kerma** (Algeria) said that the role assigned to the Prosecutor in the draft text posed certain problems in regard to the principle of complementarity. His delegation was opposed to granting the Prosecutor powers to initiate investigations *ex officio*. Such investigations could in any case only proceed subject to the approval of the Pre-Trial Chamber, and he considered that article 12 should either be deleted or completely redrafted.

31. **Mr. Gouliyev** (Azerbaijan) supported the functions for the Prosecutor defined in article 12, and favoured deletion of the brackets around "and intergovernmental and non-governmental organizations". The brackets in article 13 should also be deleted. The crime of aggression should be included in the list of crimes within the jurisdiction of the Court contained in article 5.

32. **Mr. Choi Tae-hyun** (Republic of Korea) said his delegation agreed with previous speakers that the Prosecutor should have ex officio powers of investigation, with no restriction on sources of information. He endorsed the content of article 13, but considered that it should provide specifically for the possibility of a prosecutor abusing his or her powers.

33. **Mr. Cafilisch** (Switzerland) said that his delegation attached great importance to the Prosecutor being empowered to obtain information ex officio as provided for in the bracketed subparagraph (b) of article 6 in the "Further option for articles 6, 7, 10 and 11", and in article 12. Switzerland also supported the concept of control by the Pre-Trial Chamber contained in article 13.

34. **Mr. Agbetomey** (Togo) said that if the Court was to be effective the Prosecutor should be enabled to play his or her role to the full, and to bring before the Court situations that had come to his or her attention by whatever means, provided that there was sufficient information on which to base the prosecution.

35. In order to dispel the concerns expressed, there should be a system of safeguards to prevent the Prosecutor from being subject to undesirable influences. The provisions of article 6 (first version), paragraph 1 (c), and of articles 12 and 13 should therefore be retained.

36. **Mr. Dabor** (Sierra Leone) said the Prosecutor should be empowered to initiate investigations *proprio motu* on the basis of information received from victims, intergovernmental organizations or non-governmental organizations. However, those powers should be subject to the safeguards provided for in article 13. In the first line of article 12, the word "may" should be used in preference to the word "shall" in order to give the Prosecutor discretion not to investigate frivolous complaints.

37. **Mr. Güney** (Turkey) agreed with earlier speakers that to give an ex officio role to the Prosecutor would have adverse effects on the principle of complementarity. To extend the Prosecutor's powers unduly might lead to a deluge of complaints of a political nature which could reduce his or her effectiveness.

38. **Mr. Matsuda** (Japan) said that allowing the Prosecutor to launch investigations ex officio would upset the balance between States parties and the Court by making the latter a kind of "supra-structure" with authority over States. In his view, complaints by States parties and referrals by the Security Council should adequately cover all serious crimes of international concern. If the Prosecutor was pressured into taking up a case by outside influences, the credibility of the Prosecutor and of the Court could be jeopardized.

39. **Mr. Al Awadi** (United Arab Emirates) agreed that to give the Prosecutor an ex officio role could be dangerous: the role of initiating action belonged solely to States. His delegation did not support article 12 and could not accept article 6 (first version), paragraph 1 (c).

40. **Mr. Mahmood** (Pakistan) supported that position. However, once a State had initiated proceedings, the Prosecutor should be given full independence in conducting the investigation.

41. **Mr. da Costa Lobo** (Portugal) considered that the effectiveness and credibility of the Court would depend on the Prosecutor having ex officio powers to initiate investigations.

42. **Mr. Kam** (Burkina Faso) said that he, too, favoured empowering the Prosecutor to initiate proceedings as provided for in article 6 (first version), paragraph 1 (c), and in article 12. That would enable an independent prosecutor with a purely judicial role to act in cases where States or the Security Council might block investigations because of the political interests at stake. The Prosecutor's powers should nevertheless be subject to control by the Pre-Trial Chamber.

43. **Ms. Vega Pérez** (Peru) endorsed that view, and supported the joint proposal of Germany and Argentina contained in article 13.

44. **Mr. Pérez Otermin** (Uruguay) considered that the risks of granting the Prosecutor ex officio competence were greater than the benefits, for the reasons already advanced by other speakers.

45. **Mr. Huaraka** (Namibia) said that his country favoured an effective court and an independent prosecutor. It had been argued that a "rogue" prosecutor could emerge, but that was unlikely in view of the qualifications required for the office. It was important to have an effective, independent court, bearing in mind experience during the cold war. His delegation favoured retention of the relevant provisions of the draft.

46. **Ms. Frankowska** (Poland) supported articles 12 and 13.

47. **Ms. Tasneem** (Bangladesh) said that, although the system of checks and balances provided by the provisions regarding the Pre-Trial Chamber offered some assurances against abuses by the Prosecutor, she was opposed to having so much power vested in a single individual. The composition of the Pre-Trial Chamber should be representative both in terms of equitable geographical distribution and in terms of the major international legal systems.

#### JURISDICTION: THE ROLE OF THE SECURITY COUNCIL

Article 6. [Exercise of jurisdiction] [Preconditions to the exercise of jurisdiction] (*continued*)

[Article 10]. [[Action by] [Role of] the Security Council]  
[Relationship between the Security Council and the International Criminal Court] (*continued*)

48. **The Chairman** invited comments on the role of the Security Council.

49. **Mr. Kourula** (Finland), acting as Coordinator, drew attention in particular to the two options given for article 10, paragraph 7. Under option 1, no prosecution could be

commenced arising from a situation being dealt with by the Security Council, unless the latter decided otherwise. Under option 2, which reflected a Singaporean/Canadian proposal, the Court could proceed with a prosecution after a period of time unless requested not to do so by a vote of the Security Council. There had also been proposals from the United Kingdom and Belgium.

50. **Mr. Molnár** (Hungary), referring to article 13, proposed that a mention of "intergovernmental organizations" should be added in the second sentence of paragraph 1.

51. In regard to the Security Council, his delegation supported the Singaporean/Canadian proposal, possibly with the amendments proposed by the United Kingdom and Belgium.

52. **Mr. González Gálvez** (Mexico) noted that the Conference was taking place at a time when the United Nations was discussing a number of proposals for reform of the Security Council; those discussions were relevant to the present debate. The Conference should not repeat the mistake made at San Francisco by tying the new Court to the organs of the United Nations, like the International Court of Justice. The Security Council would be one source of information for the new Court regarding the existence of situations involving aggression, but not the only one. However, the Council, or rather the United Nations as a whole, would have a role in ensuring that the new Court's decisions were implemented.

53. **Mr. Lahiri** (India) said that the Court was an independent judicial body, not a political forum. The Security Council's powers and responsibilities were already provided for in the Charter of the United Nations, and could not be subtracted from or added to by the Statute of the Court. If the intention was to add to the Security Council's powers through the Court, it must be borne in mind that the Court, unlike the Council, had no role whatsoever in the maintenance of international peace and security. Moreover, a large majority of States Members of the United Nations considered that the structure of the Security Council was unrepresentative.

54. It had been suggested that a Security Council referral should create a "green channel" in which the safeguards provided under articles 6, 7 and 9 could be dispensed with, but it should be pointed out that a single veto by one of the five veto-holding members of the Council would be sufficient to block such a referral. India was completely opposed to such a discriminatory arrangement.

55. **Ms. Blokar** (Slovenia) said that as she saw it the Security Council, as the main international organ responsible for international peace and security, should have the power to refer situations to the Prosecutor. That should eliminate the need for ad hoc tribunals. She therefore supported the second subparagraph (b) of article 6 in the "Further option for articles 6, 7, 10 and 11".

56. Consideration of a matter by the Security Council should not prevent the Court from acting since, whereas the functions

of the Council were political, those of the International Criminal Court, like those of the International Court of Justice, were purely judicial. As a compromise, her delegation could accept the provision contained in paragraph 1 of article 10 in the "Further option"; the second sentence of that paragraph was particularly important. She could go along with paragraph 2, despite doubts regarding the time-frame involved and the clause concerning renewal.

57. She supported the Belgian proposal regarding the preservation of evidence.

58. **Mr. Saland** (Sweden) said that he had no problem with the second subparagraph (b) of article 6 in the "Further option", provided that the Security Council was acting under Chapter VII of the Charter of the United Nations. He could accept article 10 of the "Further option" if the wording in square brackets in paragraph 2 was retained.

59. **Mr. Shariat Bagheri** (Islamic Republic of Iran) recalled the recent statement adopted by the States members of the Movement of Non-Aligned Countries at Cartagena de Indias. The Security Council's responsibilities under the Charter of the United Nations should not limit the role of the Court as a judicial body. The Court should be empowered to pronounce on acts of aggression independently if the Council failed to perform its role within a certain period of time, and it should be able to decide on the responsibility of an individual for an act of aggression freely, without political influence.

60. **Mr. Stigen** (Norway) supported Security Council referrals of situations, as opposed to cases, to the Court, and welcomed the relevant provisions of articles 6 and 10 in the "Further option for articles 6, 7, 10 and 11". The formula in article 10, paragraph 2, was satisfactory, and the Belgian suggestion to include language providing for preservation of evidence in that connection in document A/CONF.183/C.1/L.7 was attractive.

61. The Statute should include a reference to the power of the Security Council to create ad hoc tribunals. In general, he had no fear that a Security Council role would lead to political interference with the independence of the Court.

62. **Mr. Nyasulu** (Malawi) said it was clear that the Security Council should be among those entities empowered to refer situations to the Court, thus obviating the need for the creation of ad hoc tribunals. That would not mean that the Council would have any control over the action taken by the Court. The second subparagraph (b) of article 6 in the "Further option" covered that notion and was to be preferred.

63. He supported the subsequent articles of the "Further option". Should those texts not be acceptable, however, the first versions of articles 6 and 10 would have to be considered. Paragraph 1 of article 10 might not be necessary if agreement was reached on the relevant provisions of article 6. Paragraphs 2 and 3 were procedural and seemed unnecessary. On the remainder of the article, a compromise was needed, but it should be recognized that there was no incompatibility between

the role of the Security Council under Chapter VII of the Charter of the United Nations and the functions of the Court. For paragraph 7, he suggested wording to the effect that no prosecution could be commenced when the Security Council had so requested, that such a request was not to be interpreted as affecting the Court's independence, and that the Court could proceed if the Council took no action within a reasonable time.

64. **Mr. Wouters** (Belgium), introducing his delegation's proposal (A/CONF.183/C.1/L.7), said that Belgium favoured the texts for articles 6 and 10 contained in the "Further option for articles 6, 7, 10 and 11". The Belgian proposal was for an addition to paragraph 2 to take into account the risk that relevant evidence might disappear during the period in which investigation and prosecution were suspended. The Prosecutor would be authorized in such situations to take measures to preserve evidence.

65. **Mr. Sadi** (Jordan) said that it was not clear to him why the Security Council should be singled out, in preference to other United Nations organs, as authorized to make referrals to the Court. Nor did he understand why the Council would need to request the suspension of an investigation for as long as 12 months. The Court should not become a mere appendage to the Council.

66. **Mr. Kessel** (Canada) said he saw the role of the Security Council vis-à-vis the Court as a positive one, which would increase the Court's effectiveness and avoid the need for the continual creation of ad hoc tribunals to deal with specific situations. He agreed that there could be a time limit for the suspension of the Court's work, but the role of the Security Council in stopping wars and thus saving lives must be taken into account. The draft contained sufficient safeguards to protect the Court's independence.

67. **Mr. Taïb** (Morocco) feared that political decisions taken by the Security Council might unduly influence the Court's decisions or hinder its action. The Council's role should be limited to referrals of situations involving acts of aggression.

68. **Mr. Díaz Paniagua** (Costa Rica) said it must be acknowledged that the Security Council had a responsibility under the Charter of the United Nations for the maintenance of international peace and security. To avoid conflict, the role of the Council must be coordinated with the role of the Court in such a way that the latter's independence was guaranteed. Referrals by the Council to the Prosecutor should only be made under Chapter VII of the Charter, and the square brackets in the second subparagraph (b) of article 6 in the "Further option for articles 6, 7, 10 and 11" should be deleted. He agreed with the representative of Jordan that a twelve-month period of suspension of an investigation was too long. In any event, a request for such a suspension should only be made following a formal resolution on the part of the Security Council. He fully supported the Belgian proposal.

69. He agreed with earlier speakers that the Charter did not give the Security Council a monopoly in determining that an act of aggression had been committed. That could be determined by the victim State, the General Assembly or the Court. He therefore could not support paragraph 1 of article 10 in the "Further option".

70. **Mr. Kaul** (Germany) supported the inclusion of the second subparagraph (b) of article 6 in the "Further option". He also supported article 10, including the material in square brackets in paragraph 2, and the addition proposed by Belgium (A/CONF.183/C.1/L.7).

71. **Mr. A. Domingos** (Angola) said that, in the case of any conflict of competence, there was a need to ensure objectivity and credibility, and that could be done through the mechanism of prior authorization by the Pre-Trial Chamber. Articles 12 and 13 offered a good basis for agreement in that respect.

72. **Mr. Al-Jabry** (Oman) said that, if article 12 was retained, he would like to see changes made in the text to curb the powers of the Prosecutor to initiate action ex officio. To ensure the Court's independence, the role of the Security Council should be limited to referrals in cases of aggression.

73. **Mr. Onwonga** (Kenya) said he was prepared to consider proposals that would strike a balance between the independence of the Court on the one hand and the proper role of the Security Council on the other. The proposed article 10 in the "Further option for articles 6, 7, 10 and 11" would serve as a useful starting point in that regard.

74. **Mr. da Costa Lobo** (Portugal) felt that the Security Council had a role to play within the area of its security responsibilities. Article 10 in the "Further option", with the Belgian amendment, would satisfy his concerns.

75. **Mr. van Boven** (Netherlands), referring to the proposals in the "Further option", said that he approved the provision allowing referral of a situation by the Security Council, which would institutionalize an already existing practice with regard to the situation in the former Yugoslavia and Rwanda. Paragraph 2 of article 10 should be worded positively, to the effect that an investigation or prosecution could be commenced or proceeded with unless the Security Council had requested suspension. It was also unclear up to what point the Security Council could intervene. It was essential to retain the reference to Chapter VII of the Charter of the United Nations. He fully supported the Belgian amendment.

76. Lastly, if the Conference decided to include the crime of aggression in the Statute of the Court, the role of the Security Council as defined in paragraph 1 of article 10 seemed to him essential.

77. **Ms. Shahan** (Libyan Arab Jamahiriya) supported the views expressed by Mexico and India. To give the Security Council, which was a political body, the right to trigger action



would destroy confidence in the impartiality and independence of the Court, and thus detract from its credibility. Such an arrangement would enable the permanent members of the Security Council to make the Court a tool for putting pressure considered that all references to the Security Council should be deleted from the draft Statute.

78. **Mr. Salinas** (Chile) said he supported the provision allowing the Security Council, under Chapter VII of the Charter of the United Nations, to refer to the Prosecutor situations which constituted a threat to peace and security, provided it had adopted a resolution to that effect. However, the Security Council should not be authorized to refer to the Prosecutor situations under Chapter VI of the Charter, as provided for in draft article 10, paragraph 3.

79. The problem of how to reconcile the independence of the Court with the freedom of the Security Council to take action if faced with a political crisis or a threat to peace was a difficult and sensitive one. It would be necessary to try to ensure that the Security Council acted strictly in accordance with its mandate under the Charter.

80. **Mr. Rodríguez Cedeño** (Venezuela) said that it was quite legitimate for the Security Council to submit to the Court situations related to matters that fell within its competence. However, his delegation could not support the proposed provisions that would allow the Council to impose conditions on the Court.

81. **Mr. Janda** (Czech Republic) said that the Security Council should be able to bring situations to the attention of the Court, and that the Court should not be able to consider an act of aggression unless the Security Council had first determined that such an act had been committed. Regarding the suspension of proceedings, he could accept the wording of article 10, paragraph 2, in the "Further option for articles 6, 7, 10 and 11", with the addition proposed by Belgium, provided that all brackets in the text were removed.

82. **Mr. Bello** (Nigeria) said that the Court should be free of all outside influence; however, there was no escaping the fact that the Security Council had a role under Chapter VII of the Charter of the United Nations. He could accept the text of the second subparagraph (b) of article 6 in the "Further option for articles 6, 7, 10 and 11", without the square brackets.

83. However, the provisions proposed in article 10 in the "Further option" would be a travesty of justice. If the Security Council had jurisdiction to determine whether or not an act of aggression had been committed, the Court's hands would be tied, whatever was said about its independence not being affected. Moreover, how could aggression on the part of one of the permanent members of the Security Council be referred to the Court if that member could veto such a referral? If it was the Conference's aspiration to create a free, fair and independent Court, the proposed article 10 should be rejected.

84. **Ms. Li Ting** (China) said that her delegation could not accept the provisions allowing the Prosecutor to initiate action *ex officio*; article 6 (first version), paragraph 1 (c), should be deleted.

85. It was essential that the Security Council be empowered to refer cases to the Court, since otherwise it might have to establish a succession of ad hoc tribunals in order to discharge its mandate under the Charter. The Security Council should also have the power to determine whether acts of aggression had been committed. The operations of the Court should not impede the Council in carrying out its important responsibilities for maintaining peace and security.

86. **Mr. Skibsted** (Denmark) said that the Security Council should be competent to refer situations to the Court, but should not interfere with its proceedings in any other way. The Council had exclusive responsibility for determining the existence of an act of aggression, but only the Court could decide whether the crime of aggression had been committed by an individual. The role given to the Council in the Statute meant that the crime of aggression must inevitably become one of the core crimes to be dealt with by the Court.

87. **Mr. Vergne Saboia** (Brazil) said that while he favoured an independent Court he believed there should be a functional relationship between it and other organs of the United Nations. He therefore supported the view that the Security Council should be empowered to refer situations to the Court, acting under Chapter VII, and possibly also under Chapter VI, of the Charter of the United Nations.

88. A decision by the Security Council to halt a prosecution by the Court should only be taken following a formal decision under Chapter VII and for a limited period of time. He therefore favoured either paragraph 7, option 2, in the first version of article 10, or the draft for article 10 in the "Further option for articles 6, 7, 10 and 11", provided that those two points were preserved. He supported the Belgian proposal (A/CONF.183/C.1/L.7).

89. **Ms. Mekhemar** (Egypt) urged that the Security Council's role should be kept within narrow limits to avoid politicizing the Court. The Council should be empowered to trigger the Court's action only when acting under Chapter VII of the Charter of the United Nations; the final decision would be taken by the Court. As she understood Article 39 of the Charter, the role of maintaining peace and security did not belong only to the Security Council, but also to other United Nations bodies, notably the General Assembly.

90. Concerning article 10, she rejected the idea that the Security Council should be permitted to impose restrictions on the Court. While the Council should have the right to deal initially with some matters, it should be empowered to prevent the Court from dealing with them only for a limited, non-renewable period.

91. **Ms. Wong** (New Zealand) supported the view that it needed to be made clear in the text that the Security Council could only prevent Court action by adopting a formal and specific resolution. With that clarification and the inclusion of a specific time limit, she could accept article 10 in the "Further option for articles 6, 7, 10 and 11".

92. **Mr. Politi** (Italy) said that he, too, favoured enabling the Security Council to refer situations to the Court, to obviate the need for establishing new ad hoc tribunals whenever one or more of the core crimes appeared to have been committed. He preferred the formulation used in the second subparagraph (b) of article 6 in the "Further option". The text of article 10, paragraph 1, in that option was acceptable to his delegation.

93. The issue of the Security Council's power to block intervention by the Court was a delicate one, and it was important to provide guarantees that the Court's action would not be indefinitely impeded or gravely prejudiced. Any request for deferral of an investigation should be made only following a formal decision by the Council, and be confined to a specific period of time, with limited possibility of renewal. He, too, supported the Belgian proposal regarding the Prosecutor's right to take steps to preserve evidence.

94. **Ms. Pibalehon** (Thailand) said that Thailand had no objections to article 6 (first version), paragraph 1 (a), or to article 10, paragraph 1, in the "Further option". She supported the view expressed by New Zealand that suspension by the Security Council of the Court's proceedings should depend on a Council resolution.

95. **Ms. Wilmshurst** (United Kingdom of Great Britain and Northern Ireland) said that her delegation strongly supported enabling the Security Council to make referrals, but agreed that that should be under Chapter VII of the Charter of the United Nations, and that the square brackets in the second subparagraph (b) of article 6 in the "Further option" should be deleted. She was somewhat puzzled by the fears expressed by some delegations that such referrals would interfere with the independence of the Court simply because the Security Council was a political body: no one had accused the Security Council of interfering with the independence of the Tribunals for the former Yugoslavia and Rwanda, which had already been in operation for some time.

96. Concerning article 10 in the "Further option", she would favour removal of the brackets around "for a period of twelve months" in paragraph 2, but was not sure whether the reference to Chapter VII was appropriate, since the Council could be

acting in accordance with its various responsibilities under the Charter.

97. **Mr. Matsuda** (Japan) said that the relationship between the Security Council and the Court was a key issue. Since crimes within the Court's jurisdiction would be the most serious crimes of international concern, and since the Council was the principal organ responsible for maintaining international peace and security, it was right that the latter should have a role under the Statute. The Council should have the power to refer a situation to the Court, and in his view the consent of the parties concerned should not be required.

98. It would not be appropriate to prohibit totally the Court from exercising its functions with respect to a case simply because that case had already been taken up by the Security Council. In that regard, Japan basically supported the text in article 10 in the "Further option".

99. **Ms. Daskalopoulou-Livada** (Greece) said that she had no objection to the Council referring cases to the Court provided that it was acting under Chapter VII of the Charter of the United Nations. In regard to acts of aggression, she would favour the first two paragraphs of option 2 for paragraph 7 in the first version of article 10, including the reference to a time period and to the need for a formal and specific decision by the Council. She could not support the proposed article 10 in the "Further option".

100. **Mr. Dabor** (Sierra Leone) said that he would have no objection to paragraph 1 of article 10 in the "Further option", but considered that the period of 12 months provided for in paragraph 2 was far too long: he proposed that the period be reduced to six months. He endorsed the Belgian proposal for preservation of evidence during such a period, and thought that witnesses, too, should be protected.

101. Further clarification was required concerning paragraph 2. The text as it stood would cover all crimes and not only the crime of aggression; it would be very dangerous, particularly if proceedings had already begun. There should also be a provision allowing a request for suspension of proceedings to be renewed once only.

102. **Mr. Choi Tae-hyun** (Republic of Korea) said that his delegation could accept paragraphs 1, 2, 3, 5 and 6 of the first version of article 10. It favoured option 2 for paragraph 4, and option 2 for paragraph 7, without paragraph 2 of that option. In paragraph 3 of that option, the period of time in question should be specified.

*The meeting rose at 6 p.m.*

## 11th meeting

Monday, 22 June 1998, at 7.10 p.m.

Chairman: Mr. Ivan (Romania) (Vice-Chairman)

A/CONF.183/C.1/SR.11

### Agenda item 11 (*continued*)

**Consideration of the question concerning the finalization and adoption of a convention on the establishment of an international criminal court in accordance with General Assembly resolutions 51/207 of 17 December 1996 and 52/160 of 15 December 1997 (A/CONF.183/2/Add.1 and Corr.1 and A/CONF.183/C.1/L.7)**

#### DRAFT STATUTE

PART 2. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW (*continued*)

JURISDICTION: THE ROLE OF THE SECURITY COUNCIL (*continued*)

Article 6. [Exercise of jurisdiction] [Preconditions to the exercise of jurisdiction] (*continued*)

[Article 10]. [[Action by] [Role of] the Security Council] [Relationship between the Security Council and the International Criminal Court] (*continued*)

1. **Ms. Diop** (Senegal), referring to the role of the Security Council in respect of the International Criminal Court, said that, in her delegation's view, no political structure should hamper the Court's action. The Court should be independent of the Council and any other political body. Regarding the Council's referral of matters to the Court, her delegation could accept the second subparagraph (b) of article 6 in the United Kingdom proposal ("Further option for articles 6, 7, 10 and 11" in document A/CONF.183/2/Add.1 and Corr.1), with the deletion of the square brackets around the words "acting under Chapter VII of the Charter of the United Nations". With regard to article 10, the work of the Court should not be obstructed by the action of the Council. The former was a legal authority and the latter a political body, and they should perform their roles within their respective spheres. The inclusion of language pointing to the need for coordination between their activities might be considered, but otherwise Senegal favoured the deletion of article 10, whether in the original version or the United Kingdom version, and also of paragraph 3 of article 11 in the United Kingdom proposal.

2. **Ms. Chatoor** (Trinidad and Tobago) said that, in her delegation's view, there had to be a relationship between the Security Council and the Court, particularly when the Council acted under Chapter VII of the Charter of the United Nations. However, only situations, and not individual cases, should be referred to the Court by the Council, and the latter's

determination under Chapter VII of the Charter should be supported by a specific resolution. With regard to article 10 of the United Kingdom proposal, her delegation could go along with paragraph 1 if acts of aggression were included in the crimes within the Court's jurisdiction, but felt that the twelve-month period proposed in paragraph 2 was perhaps too long. Finally, Trinidad and Tobago could support the proposed amendment to provide for the preservation of evidence.

3. **Mr. Güney** (Turkey) said that it was reasonable for the Security Council, as a body which had set up ad hoc tribunals, to be able to refer cases to the Court. However, where the Council acted pursuant to Chapter VII of the Charter of the United Nations, an appropriate balance needed to be established between it and the Court. The Turkish delegation considered the granting of full discretionary authority to the Prosecutor, whether ex officio or *proprio motu*, to be unacceptable, and favoured the deletion of article 6 (first version), paragraphs 1 (c) and 2, article 12 and article 13. Regarding the role of the Council, paragraph 2 of article 10 (United Kingdom proposal) could provide a basis for reaching a possible solution to the problem.

4. **Mr. Krokmal** (Ukraine) said that his delegation wished to emphasize that the Security Council was not the sole body responsible for the maintenance of international peace and security. Option 2 for paragraph 7 of article 10 (first version) and the United Kingdom proposal for article 10 were based on the idea that the determination of the facts regarding acts of aggression and of the prerequisites for the Court's exercising of its jurisdiction was the prerogative of the Council. Ukraine preferred option 1 for paragraphs 4 and 7 of article 10 (first version).

5. **Mr. Al Gennan** (United Arab Emirates) said that interference of the Security Council, whose role was political, in the Court's activities could undermine the latter's independence and impede its work. There was a need to ensure that no contradiction arose between their respective roles. While it was admissible for a complaint to be lodged with the Prosecutor under Chapter VI of the Charter of the United Nations, careful thought should be given to the possibility of the Council's referral of such matters under Chapter VII. The Belgian and Singaporean proposals might serve to strike the necessary balance.

6. **Ms. Vargas** (Colombia) said that her delegation felt that the Court's independence and impartiality should be clearly reflected in the Statute. While the Court should have an

institutional relationship with the United Nations, none of the latter's bodies ought to have any influence over the Court or be able to obstruct its activities. Colombia viewed with concern those provisions of the draft which might enable the Council to thwart the jurisdiction of the Court. Despite the commendable efforts made to reach a compromise, it was necessary to seek further alternatives.

7. **Mr. Yañez-Barnuevo** (Spain) said that his delegation considered that the Statute should make provision for the Security Council to be able to refer situations to the Court whenever crimes specified in the Statute appeared to have been committed. That would enable the Council to avoid establishing ad hoc tribunals and would allow it to discharge its functions pursuant to Chapter VII of the Charter of the United Nations. Some delegations had mentioned the possibility of the referral of submissions to the Court by other United Nations bodies. That was acceptable to Spain, provided that they were principal, and not subsidiary, organs; any such referral would not have the same effect as a referral by the Council acting under Chapter VII of the Charter. His delegation agreed with the observations by the representative of Italy concerning the role of the Council with regard to the crime of aggression.

8. Concerning the issue of the suspension of proceedings at the request of the Council, the provision contained in article 23, paragraph 3, of the original draft Statute prepared by the International Law Commission had the effect of requiring the Court to seek the Council's permission to engage in proceedings relating to matters already under consideration by the Council, with the possibility of a veto by one of its members. That was totally unacceptable. The compromise submitted by Singapore and amended by Canada, involving a request for a temporary suspension of proceedings, could, together with a number of safeguards, be envisaged. Neither the wording of paragraph 6 of article 10 (first version) nor that of paragraph 2 of the United Kingdom proposal for article 10 (in the "Further option for articles 6, 7, 10 and 11") was entirely satisfactory. The text should be couched in positive terms, as proposed by the Netherlands. The request should be made formally, in a way that enabled the Council to exercise its authority pursuant to the Charter, and a formal decision on the request should be taken by the Court after it had heard the views of the Prosecutor and interested States. An extension of the suspension should be allowable but subject to a time limit. The Court should take all appropriate measures for the preservation of evidence and any other precautionary measures in the interests of justice. For the sake of clarity, the various issues might be set out in separate provisions.

9. **Mr. Gevorgian** (Russian Federation) said that, in his delegation's view, the triggering role should be an unconditional right of the Security Council. With regard to paragraph 2 of the United Kingdom proposal for article 10, the Russian Federation did not believe that it was possible in principle for the provisions of the Charter to be amended by any other inter-

national instrument; those provisions would override any others. Extreme caution was therefore called for in the drafting of the Statute. His delegation did not see any conflict between the "political" role of the Council and the activities of the Court. The Council was intended to have a political impact on States and the Court would be playing an essential role in the maintenance of peace and security.

10. **Mr. Shukri** (Syrian Arab Republic) said that, under article 10, paragraph 1, of the United Kingdom proposal, the Court would be unable to exercise jurisdiction with respect to a crime of aggression unless the Security Council had first determined that a State had committed such an act. In over 200 cases dealt with by it, the Council had avoided making such a determination. It had become a club of superpowers, whose right of veto could protect thousands of international criminals by blocking the Court's procedures. Therefore, in order to have a court that would deal with all who committed international crimes, his delegation was against assigning any role to the Security Council.

11. **Mr. Morshed** (Bangladesh) said that he did not believe the dichotomy between the political and legal roles to be valid. When the Security Council acted under Article 39 of the Charter of the United Nations in cases involving the crime of aggression, its determination was the legal characterization of a situation. No court could escape the binding effect of such a determination. His delegation wished to reserve its position concerning the Council's role with regard to other crimes, particularly war crimes and those involving weapons of mass destruction, where the prevailing regime was so discriminatory that situations of considerable instability could arise.

12. **Mr. Serekoisse-Samba** (Central African Republic) said that the Security Council should not be denied the right to refer matters to the Court. The provision in article 10, paragraph 2, of the United Kingdom proposal ("Further option for articles 6, 7, 10 and 11") granting the Council power to suspend proceedings reflected a commendable desire to harmonize the actions of those two bodies; however, harmonization did not mean obstruction. Bearing in mind the operation of the statute of limitations under article 27, his delegation felt that paragraph 2 should be reworded so that the Council's right of suspension could not be renewed indefinitely.

13. **Mr. Rogov** (Kazakhstan) said that the role of the Security Council should be limited to the initiation of cases or proceedings, whereupon the Court should be able to act independently. Perhaps the Council could be empowered to request the Court to suspend its consideration of a case, without the Court's decision on that request being prejudged. However, the Council's role in such an important issue as the determination of acts of aggression should not be disregarded. It might be true that the Council was not adapted to present-day circumstances and that the Charter should be amended accordingly, but for the time being the Council's role must be recognized.

14. **Mr. Mansour** (Tunisia) said that it was important to emphasize both the role played by the Security Council in the maintenance of international peace and security and the distinction between the political role of the Council and the legal role of the Court. The Council should be allowed to perform its role in accordance with Chapter VII of the Charter of the United Nations.

15. **Mr. Rowe** (Australia) said that Australia favoured the granting of power to the Security Council to refer situations to the Court when acting under Chapter VII of the Charter of the United Nations. It thus supported article 6, paragraph 1 (a), and article 10, paragraph 1 (first version). It also supported the second subparagraph (b) of article 6 of the United Kingdom proposal. If acts of aggression were included in the crimes within the Court's jurisdiction, Australia would support the proposal that no action by the Court be allowed to proceed without an appropriate determination by the Council under Article 39 of the Charter. In that regard, his delegation favoured option 1 for paragraph 4, article 10 (first version). Concerning the balance to be struck between the independence of the Court and the powers of the Council in matters being dealt with by the Council, his delegation believed that option 2 for article 10, the proposal by Singapore and Canada, in conjunction with article 10, paragraph 2, of the further option, represented the best approach for finding an acceptable solution.

16. **Mr. Scheffer** (United States of America) said that, in his delegation's view, it was important for the Security Council to refer situations to the Court under both Chapters VI and VII of the Charter of the United Nations. Consideration needed to be given to the different consequences arising from a referral under those two authorities. It might be necessary to examine exactly how to word article 10, paragraph 2, of the United Kingdom proposal. The United States delegation believed that a formal resolution by the Council was required with respect both to referrals and to the Council's actions as described in that paragraph 2, and that any action under that paragraph did not have to be exclusively action by the Security Council pursuant to Chapter VII. The Belgian proposal (A/CONF.183/C.1/L.7), although interesting, was vague and would require further discussion.

17. **Mr. Mahmood** (Pakistan) said that all decisions of the Security Council, which was a political organ of the United Nations, were based on political considerations rather than legal principles. Pakistan found it difficult to accept that such political considerations should be infused into the functioning of the Court, and therefore shared the view that the Council should not have a role in the Court.

PART 2. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW (*continued*)

ADMISSIBILITY

Article 14. Duty of the Court as to jurisdiction

Article 15. Issues of admissibility

[Article 16]. Preliminary rulings regarding admissibility

Article 17. Challenges to the jurisdiction of the Court or the admissibility of a case

Article 18. *Ne bis in idem*

[Article 19]

18. **Mr. Holmes** (Canada), Coordinator, introducing articles 14 to 19, said that article 14 might be unnecessary in view of the similar text in article 17, paragraph 1. He understood that most delegations felt that article 14 could be deleted, subject perhaps to clarification in article 17.

19. Article 15, entitled "Issues of admissibility", was the result of extensive discussions in the Preparatory Committee on the Establishment of an International Criminal Court concerning the principle of complementarity. In those discussions, virtually all States had indicated the importance which they attached to the inclusion of the principle of complementarity in the Statute – the principle that the primary obligation for the prosecution of crimes falling within the jurisdiction of the Court lay with States themselves. Also, most delegations had been of the view that, when States were unable or unwilling to fulfil that obligation, the Court should have jurisdiction to intervene. The idea was not that the Court should serve as an appellate body or a court of last resort for national legal systems. Where States assumed their obligations, the Court had no role; only where there was a failure due to inability or unwillingness was the Court engaged. Paragraph 1 of the article set out the basic approach, namely that the Court would determine that a case was inadmissible if it was being investigated or prosecuted by a State, or had been investigated and a decision not to proceed had been taken by the State, or the person concerned had already been tried, or the case was not of sufficient gravity. Subparagraphs (a) and (b) contained the exceptions where the Court could declare a case admissible, that is, if the State was unwilling or unable to carry out the investigation or its decision not to prosecute was based on its unwillingness or inability to prosecute. The terms "unwillingness" and "inability" were defined in paragraphs 2 and 3 respectively. The draft in document A/CONF.183/2/Add.1 and Corr.1 contained a number of footnotes indicating areas that might require adjustment depending on the outcome of discussions on other articles or parts of the draft Statute.

20. Article 16, relating to preliminary rulings regarding admissibility, had been proposed by the United States delegation, which had indicated that its proposal was not intended to reopen issues already agreed upon with regard to article 15, but related to different procedures affecting admissibility.

21. Article 17 dealt essentially with the procedural aspects of challenges to the jurisdiction of the Court or to the admissibility of a case. While agreement had been reached on most of its provisions in earlier discussions, some delegations had indicated that their final position would depend on the ultimate wording

of article 15. Paragraph 1 set out the obligation of the Court to satisfy itself at all stages of the proceedings as to its jurisdiction over a case and the possibility for the Court to determine the admissibility of the case pursuant to article 15. The question of who had the right to challenge the admissibility of a case or the jurisdiction of the Court was dealt with in paragraph 2. All delegations had agreed that individuals, States and the Prosecutor should have that right. With regard to individuals, there was a link between paragraph 2 (a) and the question being dealt with by the Working Group on Procedural Matters regarding an agreed definition of suspects. Concerning States, some delegations had argued that only States referred to in article 15 should be granted the possibility of making challenges, while other delegations had favoured wider definitions, as reflected in the bracketed subparagraphs following paragraph 2 (b). There had been consensus on the right of the Prosecutor to seek a ruling from the Court regarding issues of jurisdiction or admissibility. Paragraph 2 also provided for the possibility for other interested States to submit observations to the Court during its proceedings on admissibility or jurisdiction, and there had been agreement that victims, while not able to make a challenge, should also be entitled to make observations. The following two paragraphs described the modalities of such challenges and had been adopted by the Preparatory Committee without any square brackets, paragraph 3 stating that challenges could be made only once by any person or State prior to or at the commencement of the trial, and paragraph 4 stipulating that challenges must be made at the earliest opportunity, thereby ensuring that those procedures would not be used for purposes of delay or obstruction. However, in order to introduce flexibility for exceptional circumstances, it had been accepted that the Court itself could grant leave for a challenge to be brought more than once. Paragraph 5 dealt with the organ of the Court that would be competent to decide on issues of admissibility or jurisdiction. There had been general agreement that such matters should be referred to the Pre-Trial Chamber during the pre-trial stage and to the Trial Chamber after the charges had been confirmed. Paragraph 6, which had been deemed essential by a number of delegations, allowed the Prosecutor to request the Court to review a decision of inadmissibility if conditions required under article 15 were no longer met. However, the view had also been expressed that such a review procedure gave the Prosecutor too wide a power of appreciation over national proceedings.

22. Article 18, relating to the principle of *ne bis in idem*, was closely linked to article 15. The exceptions to paragraph 1 set out in paragraph 3 were closely linked to the criteria laid down in of paragraphs 1 (a) and (c) of article 15. The footnotes to article 18 in document A/CONF.183/2/Add.1 and Corr.1 related primarily to drafting, but footnote 59 dealt with the possible need for additional exceptions and reflected the view of a few delegations.

23. Article 19 was untitled. In the discussions of the Preparatory Committee on article 18, it had been proposed that, even if a

person had already been convicted, the Court should be able to try the case if a manifestly unfounded subsequent decision by the national authorities resulted in the suspension or termination of a sentence. There had been insufficient time for delegations to agree that such a provision be included and, if so, on where it should be placed.

24. **Ms. Mekhemar** (Egypt) said that her delegation had reservations regarding the deletion of article 14. It was still examining articles 15 and 18.

25. **Mr. Scheffer** (United States of America) said that he would like to introduce article 16. While his delegation supported the text of article 15 on issues of admissibility, it had proposed article 16 after it had become clear in the discussions of the Preparatory Committee that there was growing support for the concept of referrals of overall situations to the Court by the Security Council, a State party, or the Prosecutor acting *proprio motu*. In line with the principle of complementarity, it would then seem necessary to provide for a procedure, at the outset of a referral, which would recognize the ability of national judicial systems to investigate and prosecute the crimes concerned. Under the proposed article, the Prosecutor would be able to proceed immediately to conduct an independent investigation if, in the face of a challenge by a national judicial system, the Prosecutor could persuade the judge to allow him to do so. That did not contravene the principle set out in article 17, paragraph 3, whereby a person or State could challenge admissibility only once concerning an individual case relating to an individual suspect. The United States proposal concerned an overall matter referred to the Court at an earlier stage, when no particular suspects had been identified, and a State's right to launch full-scale investigations. Further consultations on the precise text would be useful. On the question of the preservation of evidence, consideration needed to be given to that not only in the context of the early stage of investigations dealt with in article 16 but also in the Committee's discussion of article 54 and other discussions concerned with the Prosecutor's right of investigation. In addition, it would be desirable to ensure that, at the initiative of the Prosecutor, the Court took account of any radical change in the circumstances in a country while its judicial system was conducting an investigation.

26. Copies of the statement of explanation on article 16 which had originally been submitted by his delegation to the Preparatory Committee would be made available to delegations present.

27. **Mr. González Gálvez** (Mexico) said that the way in which the principle of complementarity was formulated was important. If it could not be based on the consent of States, there needed to be exceptions to national jurisdiction and safeguards to prevent interference with the sovereignty of States. His delegation would comment on article 15 when the proposed amendments which it had submitted in writing to the secretariat had been distributed. Mexico felt that article 14 was unnecessary and could be deleted. Article 16 provided a sound basis for further examination. It was an important text, which

supplemented the guarantees which the Statute aimed to provide.

28. **Mr. Corthout** (Belgium) said that his delegation supported the deletion of article 14, which was redundant. It agreed in principle with article 15. Article 16 would add new obstacles to the exercise of the Court's jurisdiction; Belgium was therefore in favour of its deletion. Regarding article 17, challenges to the admissibility of a case should be possible only for an accused or for a State party which had jurisdiction over the crime on the ground that it was investigating or prosecuting the case or had investigated or prosecuted the case; also, his delegation favoured the inclusion of the proposed paragraph 6. The rule *ne bis in idem* was a fundamental principle of criminal procedural law and should apply in the two ways covered in paragraphs 1 and 2 of article 18, but should not be used to conceal situations or prevent the Court from exercising its jurisdiction in cases where an accused was the subject of a fake trial at the national level. Belgium therefore strongly supported the exceptions provided for in paragraph 3. Article 19, originally co-sponsored by Belgium, was intended to deal with situations where a person had been convicted at the national level but where the sentence was subsequently rendered ineffective through a manifestly unfounded decision on the suspension of its enforcement, or through a pardon, parole or commutation. If that measure prevented the application of an appropriate penalty, the Court should be empowered to exercise jurisdiction over the person concerned.

29. **Mr. Salinas** (Chile) said that his delegation considered that article 14 was unnecessary and should be deleted. Regarding article 15, there was a need to explain more clearly the vague reference in paragraph 1 (d) to sufficient gravity in regard to the justification of the Court's further action. Chile considered a revision of the formulation of article 16 to be necessary, but would reserve its comments until it had examined the explanatory paper referred to by the representative of the United States of America. Finally, it fully supported the text of article 16, in particular the provisions of its paragraph 3.

30. **Ms. Assunção** (Portugal) said that her delegation accepted the negotiated text of article 15 and did not wish to reopen the discussion on it. Concerning article 17, it preferred the wording "an accused or a suspect" in paragraph 2 (a), favoured the term "State Party" in paragraph 2 (b) and supported paragraph 6. It agreed in principle to the text of article 18. Portugal, which had been a co-sponsor of article 19, believed that the limitations on the principle *ne bis in idem* should be confined to exceptional cases but that the cases specified in article 19 were necessary.

31. **Mr. Scheffer** (United States of America) said that, in his delegation's view, article 14 could be deleted provided that the principle which was contained in it remained in article 17. The text of article 15, as currently drafted, was acceptable. Regarding article 17, paragraph 1 would need to be retained; in paragraph 2 (a), the only individual allowed to make challenges should be an accused, since allowing a suspect to do

so would complicate the Court's procedures; in paragraph 2 (b), the challenge should be permissible by any State which met the criteria set forth in that subparagraph, as it would be inconsistent with the principle of complementarity not to recognize the interests of States that were not parties; and paragraph 6 required further discussion to ensure that its provisions were not abused. The text of article 18 had been carefully formulated in previous discussions and should as far as possible remain intact. His delegation was still studying the proposed article 19.

32. **Mr. Kellman** (El Salvador) said that his delegation wished to stress that the application of the exceptions set out in article 18, paragraph 3 (a) and (b), and in article 19 was linked to the principle of complementarity. Certain positions adopted appeared to suggest a different interpretation of those provisions.

33. **Mr. Bazel** (Afghanistan) said that his delegation believed that article 15 should additionally address the issue of admissibility in cases involving amnesties and should include a new paragraph providing for the inadmissibility of cases where there was a temporary interruption of a State's judicial system owing to civil strife. With regard to article 16, it preferred a one-year period in the last sentence of paragraph 2, and wished to suggest that the word "report" be replaced by "inform" in paragraph 4. The Afghan delegation believed that it was the sovereign right of States to decide on the commutation of a sentence or on a pardon, according to its national interests and crime policy, and therefore proposed the deletion of article 19.

34. **Ms. Wilmschurst** (United Kingdom of Great Britain and Northern Ireland) said that her delegation agreed to the deletion of article 14. It found article 15 acceptable. While sympathetic to the idea behind article 16, it had serious problems with the text as currently drafted, but was willing to consider any proposed changes. Regarding article 17, the United Kingdom delegation favoured "accused" in paragraph 2 (a); in paragraph 2 (b), it strongly supported the reference to "a State" since, if a State that was not a party was carrying out an effective prosecution in its own territory, there was no reason for the Court to intervene and also conduct a prosecution. Concerning article 19, while her delegation understood the reasons behind the proposed text, it was unsure whether it would be possible to reach agreement on it in view of the highly sensitive and difficult issues which it raised.

35. **Ms. Diop** (Senegal) said that her delegation agreed that article 14 could be deleted. Article 15, which appeared to have broad support, was acceptable. Senegal had initially intended to request the deletion of article 16, but would re-examine the text in the light of the suggested changes. Concerning article 17, the phrase in square brackets should be deleted in paragraph 2 (a), and the reference to "a State Party" was preferable in paragraph 2 (b), since States parties would have obligations following ratification and the conduct of investigations and prosecutions would thus be facilitated. The text of article 17, paragraph 6, was acceptable, as was that of article 18, possibly with a few modifications.



36. **Mr. Skillen** (Australia) said that his delegation agreed to the wording of article 15 but not with the alternative approach described at the end of that article. It favoured the deletion of article 16, but would reserve its position pending additional clarifications. Australia agreed with the remarks made by the representative of the United Kingdom concerning article 17, paragraph 2 (b), to the effect that non-parties should also have the right to make challenges, and it supported the inclusion of paragraph 6 in that article. It generally agreed with the provisions of article 18 but disagreed with the "alternative approach" set out at the end of that article. Regarding article 19, his delegation sympathized with the proposal but would suggest that it should be dropped if most delegations felt that its negotiation would unduly delay the work.

37. **Mr. Güney** (Turkey) said that, in his delegation's view, article 14 could be deleted provided that the principle laid down in it was reflected elsewhere in the Statute. Articles 15 and 16 could be left aside pending further proposals. Article 17 was acceptable. Article 18, which dealt with one of the basic principles of criminal law, was closely linked to article 15 and needed to be brought into line with article 5 once a decision had been reached on it. With regard to article 19, Turkey agreed with the view expressed by the United Kingdom delegation.

38. **Mr. Syquia** (Philippines) said that his delegation had no objection to the deletion of article 14, which appeared to be redundant. Article 15 was acceptable. The support of the Philippines for article 16 would be subject to the information to be provided by the United States delegation. With regard to article 17, the phrase "an accused" in paragraph 2 (a) was preferred, since there was no point in a suspect's being able to question admissibility; in paragraph 2 (b), the use of the term "State Party" was favoured; it would open up a two-way relationship between the Court and States parties whereas to allow States not parties to challenge admissibility would involve a one-way relationship, because the Court could not determine whether such States observed the principles laid down in the Statute. There were no objections to the text of article 18, or to that of article 19 provided that it did not include amnesty.

39. **Mr. Zimmermann** (Germany) said that his delegation agreed to the deletion of article 14. Article 15 represented a carefully drafted compromise which should stand as presently worded. Concerning article 16, Germany wished to reserve its position until it had seen the written details to be provided by the United States delegation. With regard to article 17, only the accused and any State which had jurisdiction over the crime on the ground that it was investigating or prosecuting the case, or had investigated or prosecuted the case, should be able to challenge the jurisdiction of the Court; also, paragraph 6 of that article should be retained. Finally, the text of article 18 should remain as it stood.

40. **Ms. Lehto** (Finland) said that, in her delegation's view, article 14 should be deleted. Article 15 was the result of extensive discussions and represented a good compromise; it should be

retained as currently drafted. Footnote 42 to that article could be disregarded, since articles 18 and 19 dealt with the matters referred to in it. While appreciative of the presentation made by the representative of the United States on article 16, her delegation was still unconvinced of the need for such a procedure, but might wish to comment on the details subsequently. Concerning article 17, Finland's preference was for the deletion of the text in square brackets in paragraph 2 (a), the use of the words "A State Party" in the first line of paragraph 2 (b) and the deletion of the two bracketed subparagraphs following paragraph 2 (b). Paragraph 6 should be retained. Her delegation supported article 18, in its present form, and article 19, but was flexible with regard to its drafting.

41. **Ms. Vargas** (Colombia) said that her delegation agreed to the deletion of article 14 provided that the principle involved was reflected in article 17. It wished to see the Mexican proposals before taking a decision on article 15 and would examine the information to be submitted by the United States delegation before adopting a position on article 16. Regarding article 19, Colombia agreed with the United Kingdom that major difficulties would be entailed in its negotiation and that it would thus be preferable to delete the article.

42. **Mr. Nathan** (Israel) said that his delegation favoured the deletion of article 14. Article 15 should be retained as currently worded. Article 16 would be given further consideration once the additional details had been made available by the United States delegation. With regard to article 17, in paragraph 2 (a) the words "or a suspect" should be retained; in paragraph 2 (b), the right of challenge should be conferred on all States and not solely on States parties; and paragraph 6 should be retained as presently drafted. While fully in agreement with the principle set out in article 18, his delegation felt that the wording of paragraph 3 (b) should perhaps be looked at since the concept seemed to overlap partly with that in paragraph 3 (a). Israel had a problem with article 19, since it might imply unwarranted interference with decisions of administrative organs of a State which had already tried a person for crimes covered by the Statute.

43. **Mr. Yépez Martínez** (Venezuela) said that his delegation considered article 14 to be unnecessary since its substance appeared elsewhere in the Statute. While it would study the amendments to be submitted by the delegation of Mexico, it would prefer article 15 to remain unchanged, as its text represented a harmonious balance arrived at during earlier consultations. Concerning article 16, Venezuela would await the paper to be provided by the United States delegation, but did not feel that such an article was necessary. With regard to article 17, the text of paragraph 1, dealing with the responsibility of the Court to satisfy itself as to its jurisdiction, should form a separate article; in paragraph 2 (a), reference to "an accused" only was preferable; and, in paragraph 2 (b), only States parties should be able to make challenges. Article 19 did not add clarity and should be deleted.



44. **Mr. Sacirbegovic** (Bosnia and Herzegovina) said that his delegation felt that the "alternative approach" referred to in document A/CONF.183/2/Add.1 and Corr.1 following article 15 and also following article 18 might be used to provide immunity from prosecution. In the situation prevailing in his region, a defence frequently employed in cases where persons were indicted was that they were being brought to trial by a national court, when that was not in fact true.

45. It had been asked why the Court should have jurisdiction over a matter being effectively handled by a national court, but he wished to point out that the main reason why the International Tribunal for the Former Yugoslavia, for example, had been set up was not because prosecution by local courts would have been ineffective but because the crimes involved were of such a nature that they demanded international attention.

46. **Ms. Wyrozumska** (Poland) said that, in her delegation's view, article 14 was redundant. The compromise text of article 15 had been achieved through long negotiations and should remain as it stood. Article 16 would create further obstacles to the Court's jurisdiction and should be deleted. With regard to article 17, Poland believed that, under paragraph 2, it should be possible for challenges to be made by an accused or by the State which had jurisdiction over the crime, and that the Prosecutor should be empowered to seek a ruling from the Court regarding a question of jurisdiction or admissibility; also, paragraph 6 should be retained. The wording of article 18 was acceptable. Poland shared the view that article 19 required

further discussion and could pose problems, given the sensitivity of the issue; it would be preferable to delete it.

47. **Ms. Le Fraper du Hellen** (France) said that her delegation would prefer to retain article 14 but could agree to its deletion if the principle it contained was reflected in article 17. The text of article 17, paragraph 1, might need redrafting; the Court should satisfy itself as to its jurisdiction as soon as a case was referred to it. The text of article 15 was well balanced and could be accepted. With regard to article 16, paragraph 1 was acceptable, but the point seemed already to be covered elsewhere in the Statute. Her delegation would revert to article 16 when more information was made available. Regarding article 17, it would be preferable to retain the reference to both an accused and a suspect; in paragraph 2 (b), the possibility of making challenges should not be available to States not parties; and paragraph 6, as currently worded, was acceptable. The text of article 18 could be accepted as it stood. Article 19 constituted an interesting proposal, but it would be very difficult to introduce such a sensitive provision into the Statute.

48. **Mr. Mansour** (Tunisia) said that his delegation had no objection to the articles on admissibility, but had questions regarding what would happen when certain individuals were prevented from being brought before the Court, and what standards would be applied by the Court in determining issues of admissibility under article 15. Also, the question of appeals was not mentioned in that article.

*The meeting rose at 9.40 p.m.*

## 12th meeting

Tuesday, 23 June 1998, at 10.20 a.m.

*Chairman:* Mr. Kirsch (Canada)

A/CONF.183/C.1/SR.12

### Agenda item 11 (*continued*)

**Consideration of the question concerning the finalization and adoption of a convention on the establishment of an international criminal court, in accordance with General Assembly resolutions 51/207 of 17 December 1996 and 52/160 of 15 December 1997 (A/CONF.183/2/Add.1 and Corr.1, A/CONF.183/C.1/L.9 and A/CONF.183/C.1/L.14)**

#### DRAFT STATUTE

PART 2. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW (*continued*)

ADMISSIBILITY (*continued*)

Article 14. Duty of the Court as to jurisdiction (*continued*)

Article 15. Issues of admissibility (*continued*)

[Article 16]. Preliminary rulings regarding admissibility (*continued*)

Article 17. Challenges to the jurisdiction of the Court or the admissibility of a case (*continued*)

Article 18. *Ne bis in idem* (*continued*)

[Article 19] (*continued*)

1. **Mr. Mahmoud** (Iraq) said that he was in favour of the "alternative approach" set out at the end of article 15, the view of his delegation being that complementarity between the International Criminal Court and national jurisdictions implied mutual respect and trust. He had no problem with paragraph 1 of article 16 and the first part of paragraph 2, but considered that paragraphs 3, 4 and 5 should be deleted. Iraq could accept paragraph 1 of article 17 subject to its comments regarding article 15, and could accept paragraph 2 apart from the second bracketed text following subparagraph (b). The expression "State Party" should be used rather than the expression "State". His delegation favoured the "alternative approach" for article 18.

It would propose that article 19 be deleted since it gave rise to a number of complicated problems, notably in relation to the sovereignty of States. Lastly, in respect to article 20, concerning applicable law, he considered that paragraph 1 (b) was unnecessary and could be deleted, and he favoured option 2 for paragraph 1 (c).

2. **Mr. Nagamine** (Japan) supported the formulation proposed for article 15, and considered that article 16 should be retained, since the principle of complementarity should be applied even in the early stages of an investigation. Article 17 was a very important one, and he fully supported the view that the right of challenge provided for in paragraph 2 should not be limited to States parties. He did not favour inclusion of paragraph 6. While his delegation could basically support the wording of article 18, it would propose that the words "for the same conduct" be added in paragraph 3 after "shall be tried by the Court", for the sake of clarity. He fully understood the idea behind the proposal for article 19, but felt that it should be addressed with the utmost care since sensitive issues of national policy were involved.

3. **Ms. Cueto Milián** (Cuba) said that although the draft text of article 15 could be a good basis for compromise, it tended to place too much emphasis on evaluating the conduct of national courts, and she supported the proposals of Mexico in document A/CONF.183/C.1/L.14 in that regard. Concerning article 16, Cuba was concerned to preserve the principle that States should have the right to appeal against the initial decisions of the Court. In article 17, the term "accused" should be used and the word "suspect" deleted. She favoured the expression "a State" rather than "a State Party". Her delegation could accept the deletion of article 14 on the understanding that its contents were reflected in article 17. Article 18 appeared to contain an excessive number of exceptions to the *ne bis in idem* principle, and she considered that the "alternative approach" described at the end of the article was preferable.

4. **Mr. González Gálvez** (Mexico), introducing his delegation's proposals (A/CONF.183/C.1/L.14), noted that they contained a proposal for a new article 12 bis and proposed amendments to articles 102 and 108 as well as to article 15. Concerning the suggestions made in regard to article 15, he noted that, as pointed out in document A/CONF.183/2/Add.1 and Corr.1, the draft given there was not an agreed text. His delegation's proposals were aimed at facilitating agreement. If they were adopted, a related change would be appropriate in article 18, paragraph 3 (b).

5. **Mr. Effendi** (Indonesia) said he was flexible on articles 14, 16, 17 and 20. He preferred the "alternative approaches" suggested for articles 15 and 18, because they were in line with the principle of complementarity, and proposed that article 19 be deleted.

6. **Mr. Kaddah** (Syrian Arab Republic) said his delegation, too, preferred the "alternative approaches", which embodied the idea of complementarity. The Court should not have jurisdiction

in cases that were being investigated or had been dealt with by a State. The amendments submitted by Mexico were helpful in clarifying the proposed exceptions to that rule.

7. **Mr. Mahmood** (Pakistan) said his delegation was flexible regarding article 14. On article 15, concerning admissibility, it supported the principle of the primacy of national jurisdiction, which was necessary in order to preserve national sovereignty and to avoid situations of conflict between the jurisdiction of the State and the jurisdiction of the Court. It should be the responsibility of the State to prosecute criminals: the Court's role should be to complement the State's judicial system if the latter proved inadequate.

8. He found article 17 generally acceptable, although in his view States which were not States parties, even if interested, should not be permitted to challenge the Court's jurisdiction. He could accept paragraphs 1 and 2 of article 18, but paragraph 3 created problems in challenging the jurisdiction and procedures of national courts. He could support deletion of article 19. He found the text of article 20 acceptable, with a preference for option 1 for paragraph 1 (c).

9. **Ms. Li Yanduan** (China) said her delegation could agree to deletion of article 14. In article 15, the criteria for determining the unwillingness of a State to carry out an investigation listed in paragraph 2 were highly subjective, and gave the Court unduly wide powers. In fact, the judicial systems of most countries were capable of functioning properly: the cases of Rwanda and the former Yugoslavia were exceptions to the rule. In order to make the wording more objective, she proposed that in paragraph 2 (a) the words "in violation of the country's law" be added after the words "the national decision was made". In paragraph 2 (b), a reference to "national rules of procedure" should be included, and in paragraph 2 (c) a reference to "the general applicable standards of national rules of procedure". She supported the amendments proposed by Mexico. In article 17, the words "or a suspect" should be retained in paragraph 2 (a) and the words "a State" used in paragraph 2 (b). She could accept article 18, but considered that article 19 should be deleted.

10. **Mr. S. R. Rao** (India) said that, as his delegation saw it, the principle of complementarity, implying the primacy of national criminal jurisdictions, should be the bedrock of the entire Statute. He was flexible on article 14, but on article 15 he shared the views expressed by the representative of China concerning the criteria for determining unwillingness on the part of a State to prosecute, and would prefer the alternative approach suggested. He could accept the text proposed by the United States of America for article 16, subject to the same reservation regarding criteria for determining unwillingness, and could also accept article 18. Article 19 should be deleted.

11. **Mr. R. P. Domingos** (Angola) considered that article 14 should incorporate article 17, paragraph 1, and should be retained. He supported the amendments proposed by Mexico for article 15, and considered that the term "suspect" should be used in

paragraph 2 (a) of article 17. Article 19 was important and should be retained, and he supported option 2 for paragraph 1 (c) of article 20.

12. **Mr. Chun Young-wook** (Republic of Korea) said his delegation could agree to delete article 14, but supported retention of article 15. In article 17, paragraph 2 (a), he would prefer to delete "or a suspect", and would opt for "State Party" in paragraph 2 (b). He favoured retention of articles 18 and 19.

13. **Mr. Nyasulu** (Malawi) endorsed the view that article 14 should be deleted. In article 15, he proposed that the word "genuinely" should be deleted in paragraphs 1 (a) and (b). Paragraph 1 (c) could perhaps refer to "indictment proceedings" rather than a "complaint". Paragraphs 2 and 3 were very important and should be retained as they stood. He was not sure whether article 16 was necessary; he suggested that it might be taken up at a later stage together with articles 55 and 56. In article 17, paragraph 3, he proposed that "The challenge must take place" be replaced by "The challenge shall be made", and that "at a time later than the commencement of the trial" be replaced by "at a later stage". The last two lines of paragraph 3 appeared to him unnecessary, and paragraph 4 appeared to contradict paragraph 3. He proposed that paragraph 6 be deleted; once the Court had decided that a case was inadmissible, the Prosecutor would have to accept that decision. He endorsed the general view that article 19 should be deleted.

14. **Mr. Kerma** (Algeria) said that it was important clearly to define the principle of complementarity in the Statute in order to ensure that the Court would be accepted by the entire international community. He could go along with the majority view that article 14 should be deleted, provided that its contents were reflected in article 17.

15. He could support the Mexican proposal in regard to article 15, and in article 17 favoured the expression "a State" in paragraph 2 (b), as well as deletion of paragraph 6. In regard to article 18, he preferred the alternative approach suggested. Article 19 raised a number of complex and difficult issues and would be better deleted.

16. **Mr. Zellweger** (Switzerland) said that the text of article 15 was the fruit of long discussions and would be best left unchanged. On the other hand, article 16 introduced a number of obstacles which would not contribute to the smooth functioning of the Court: the safeguards and guarantees provided in articles 13 and 17 were quite sufficient in that regard. Article 17, paragraph 2 (a), should read simply "an accused", and paragraph 2 (b) should begin "A State which has jurisdiction ...". Paragraph 6 was important and should be retained, and article 18 represented a compromise solution which should not be altered. While he sympathized with the intent of article 19, he considered that it would raise major drafting problems and would be best omitted.

17. **Prince Zeid Ra'ad Zeid Al Hussein** (Jordan) said he could accept the compromise language of article 15, rather than

the alternative approach suggested. In article 17, paragraph 2 (b), he too, would prefer the expression "a State"; paragraph 6 of the article should be retained. The Japanese proposal for an amendment to article 18 could be considered, and on article 19 he supported the views expressed by Switzerland.

18. **Mr. Yee** (Singapore) said that the formulation of articles 15 and 18 represented a hard-won compromise, and he urged delegations to accept the articles as they stood. In article 17, paragraph 2 (b), his preference would be for "a State" rather than "a State Party", since the former was more in line with the concept of complementarity whereby exercise of jurisdiction was not limited to States parties alone. He could not accept article 19 as it stood, since it would constitute a clear violation of the principle *ne bis in idem* and was hard to reconcile with current rules governing procedure, cooperation and enforcement. Lastly, in relation to article 20, paragraph 1 (c), he was strongly opposed to option 2, which would violate the basic principle of equality of persons of different nationalities before the Court. Option 1 correctly defined how national laws should impact upon the applicable law of the Court.

19. **Mr. Vergne Saboia** (Brazil) said that, although he could accept the text of article 15 as it stood, he considered that the language proposed by Mexico would improve paragraphs 2 (b) and (c) and paragraph 3. He supported the views expressed by Switzerland in regard to article 17, paragraphs 2 (a) and (b), and agreed that the many complex issues involved made it very difficult to find an acceptable formulation for article 19.

20. **Mr. Díaz La Torre** (Peru) said his delegation, too, supported the Mexican proposal for the amendment of article 15, and preferred the term "accused" for article 17, paragraph 2 (a). Article 19 was unnecessary and could be deleted.

21. **Ms. Kolshus** (Norway) agreed that the text of article 15 represented an extremely important compromise, which Norway supported without reservation. On the other hand, she was still unconvinced that article 16 was necessary. In article 17, she would prefer "accused" in paragraph 2 (a) and "a State Party" in paragraph 2 (b), and supported retention of paragraph 6. She could accept article 18 but, while appreciating the intent behind article 19, was inclined to agree that it was best deleted.

22. **Mr. Bello** (Nigeria) endorsed the view that article 14 should be deleted. On article 15, the criteria listed in paragraph 2 were too vague and subjective, and he preferred the alternative approach suggested, which was in line with the principle of complementarity and the third paragraph of the preamble to the Statute. He could accept article 16, subject to improved drafting, article 17 with the deletion of paragraph 6, and article 18, but considered that article 19 should be deleted.

23. **Mr. El Masry** (Egypt) said that although his preference would be for retaining article 14, he could go along with the majority view that it should be deleted. Article 15 as now drafted seemed to imply that the complementarity principle should be the exception rather than the rule, and that the Court

was a supreme body which could pass judgement on national jurisdictions. The amendments proposed by Mexico improved the text because they introduced a more objective element, and he agreed that the word “genuinely” should be deleted in paragraphs 1 (a) and (b).

24. In article 17, he would prefer paragraph 2 (a) to read “an accused or a suspect”, and paragraph 2 (b) to begin “a State which has jurisdiction ...”; in paragraph 3, he would prefer that provision be made for making a challenge to the Court’s jurisdiction at any time, not only prior to the trial or in exceptional circumstances. In article 18, he preferred the alternative approach. He considered that article 19 could be deleted.

25. **Mr. Fadl** (Sudan) said that since so many speakers had emphasized the importance of the principle of complementarity, the Committee’s task was now to ensure that that principle was adequately reflected in the text of the Statute. In his view, the existing text of article 15 was not clear and he supported the Mexican proposal. He agreed that articles 16 and 19 could be deleted.

26. **Mr. Politi** (Italy) considered that the text of article 15 should remain unchanged. Article 16 as now drafted appeared to create a number of complicated procedural obstacles to the exercise of the Court’s jurisdiction, which would have the effect of unnecessarily delaying the start of an investigation, but he would be ready to consider any revised formulation which might be put forward.

27. On article 17, he would like paragraph 2 (a) to read simply “an accused”. While he was flexible regarding paragraph 2 (b), his preference was for the wording “a State Party”; he would be reluctant to allow States not parties, which did not share the burden of obligations under the Statute, to share the privilege of challenging the jurisdiction of the Court. On paragraph 6, he agreed that the Prosecutor should have the right to request a review of a decision of inadmissibility. He supported the text proposed for article 18 but, while sympathizing with the principle behind the proposal for article 19, agreed that it would be difficult to reach agreement on the text.

28. **Mr. Güney** (Turkey), referring to the Mexican proposals contained in document A/CONF.183/C.1/L.14, said that he had earlier expressed the view that article 12 should be deleted; it followed that he could not support the article 12 bis proposed by Mexico. On the other hand, the proposals for article 15 represented a substantial improvement which his delegation could support.

29. He could accept the deletion of article 14 provided that its contents were faithfully reflected in article 17.

30. **Mr. Gevorgian** (Russian Federation) said that while his delegation did not consider retention or deletion of article 14 to be a major issue, articles 15 to 18 were of exceptional importance, because they would determine the extent to which

States participated in the Statute, and hence the effectiveness of the Court. The first task of the Conference was to reach a generally acceptable agreement on the wording of those articles, and he urged that in carrying out that task all the views put forward by previous speakers, in particular by the representatives of China, India, Indonesia, Pakistan, Mexico, Egypt and Turkey, should be taken into account.

31. **Ms. Tomič** (Slovenia) said she supported article 15 as it stood. Her preliminary view on the Mexican proposals was that they would establish an additional threshold at a very early stage of the proceedings: her delegation would prefer not to go beyond the standards set in article 15 as now drafted. In article 17, paragraph 2 (a), she would prefer the term “an accused”, and in paragraph 2 (b) would prefer “an interested State”, which would cover both States parties and States not parties. She supported inclusion of paragraph 6 of that article, and favoured retention of articles 18 and 19.

32. **Mr. Cherquaoui** (Morocco) considered that article 14 should be retained, or its contents inserted in article 17. Concerning article 15, he preferred the alternative approach suggested, which would better ensure compliance with the principle of complementarity with national jurisdictions. He was flexible regarding article 17 and supported article 18 as it stood. He favoured deletion of article 19 and in article 20 preferred option 2 for paragraph 1 (c).

33. **Mr. Tafa** (Botswana) said he would prefer article 14 to be deleted, since its intent was already well articulated in article 17. Article 15 embodied the principle of complementarity excellently and he appealed to the Committee to leave it unchanged. He found article 17 generally acceptable, although in paragraph 2 (a) he would prefer “an accused” and in paragraph 2 (b), “a State”. He fully supported article 18, which embodied a fundamental principle of criminal law, but considered that article 19 was fraught with controversy and would be better omitted.

34. **Mr. Stillfried** (Austria) said that article 15 was a carefully drafted compromise which ought to be left unchanged. Like many other delegations, he was unconvinced of the need to keep article 16, at least in its current form. Concerning article 17, paragraph 2 (a), he would prefer “an accused”, but remained flexible regarding paragraph 2 (b), and supported retention of paragraph 6. Article 18 also represented a carefully drafted compromise, and he would prefer it to be retained as it stood. While sympathizing with the underlying concept of article 19, Austria recognized that it involved very delicate problems which would be difficult to resolve.

35. **Mr. Minoves Triquell** (Andorra) said the question of admissibility was central to the debate on the establishment of the Court. His Government attached great importance to the principle of complementarity, and considered that the system of checks and balances provided for under articles 13, 15 and 17 was sufficient to ensure that the jurisdiction of the Court was compatible with the judicial sovereignty of States. He had strong doubts as to the need for article 16. On article 17, it might

be useful to consider including in paragraph 4 a specific time limit for challenges by a State, and he favoured retention of paragraph 6. He supported inclusion of article 19.

36. **Ms. Wong** (New Zealand) said that in her view it would be dangerous to reopen debate on article 15, the text of which represented the outcome of long and difficult negotiations. She had some concerns about article 16, which appeared to provide at least three opportunities for States to contest the Court's jurisdiction on the same matter. Article 19 was interesting and would increase the Court's effectiveness, but she recognized that there were problems associated with it.

37. **Mr. van Boven** (Netherlands) agreed that article 15 should be retained. On the question of admissibility, he believed that, as a general principle, domestic legislation granting impunity for heinous crimes covered by the Statute should not be a basis for determining that a case before the Court was inadmissible.

38. Concerning article 17, paragraph 2 (a), he favoured the term "an accused", and in paragraph 2 (b), the term "a State Party". He strongly supported the provision in the same paragraph to the effect that, in proceedings with respect to jurisdiction or admissibility, not only those submitting the case but also victims should be entitled to submit observations to the Court. He favoured retention of paragraph 6. Article 18, likewise the result of lengthy negotiations, was acceptable to his delegation, and he wished to express support for article 19, which embodied an important principle.

39. **Ms. Vargas** (Colombia) supported the amendments proposed by Mexico to article 15, and those proposed orally by the United States to article 16. For article 17, paragraph 2 (b), she favoured using the expression "a State", but the wording should perhaps be made clearer.

40. **Mr. Niyomrerk**s (Thailand) favoured deletion of article 14 but could support articles 15 and 16. For article 17, paragraph 2 (a), he would prefer "an accused" and in paragraph 2 (b) "a State". He supported retention of articles 18 and 19, and favoured option 2 for paragraph 1 (c) of article 20.

41. **Mr. Pham Truong Giang** (Viet Nam) said that complementarity was a fundamental principle of the Statute. According to that principle, whenever national jurisdiction was available to try a particular case, that case would not be admissible before the Court, and conversely a person who had been tried by the Court could not be tried again by another court.

42. He, too, favoured deletion of article 14, which was already reflected in article 17, but could accept the compromise text contained in article 15, which embodied the principle of complementarity. He would propose the deletion of paragraph 6 of article 17. He had no difficulty with article 18 but would favour deletion of article 19.

43. **Mr. Pérez Otermin** (Uruguay) said that the task of the Conference was to strike a proper balance between the authority

of the Court and the authority of legitimately constituted national judicial systems. For decisions by the Court to be given precedence over the decisions of national courts would not be in line with the notion of complementarity.

44. He supported article 15 in principle but considered that the Mexican proposals would improve the text. His delegation would suggest that the words "without grounds" be added after the word "unwilling" in paragraph 1 (a), and that the word "unfounded" be added before "purpose" in paragraph 2 (a). That change would help to safeguard the legitimate right of States to take decisions in the interests of national security.

45. His delegation had no objections to the deletion of article 14 provided that the principle it contained was clearly embodied in article 17. Concerning article 17, he, too, preferred the wording "An interested State" in paragraph 2 (b). He favoured article 18 but agreed that article 19 would be best deleted.

46. **Mr. Díaz Paniagua** (Costa Rica) supported the view that discussion of article 15 should not be reopened, and did not think the Mexican proposals would improve the text. He saw no need for article 16, and on article 19 he considered that the problem would be better dealt with through cooperation between the Court and the court which had carried out the initial trial.

47. **Mr. Al Ansari** (Kuwait), referring to article 17, said that in his view the right to make challenges should be limited to States parties. The text of article 18 would be improved if paragraphs 1 and 2 were combined in a single paragraph. Although the wording of article 19 was perhaps not sufficiently precise, he had no problem with it in legal terms.

48. **Mr. Al-Azizi** (Oman) said that in respect to article 15 his delegation supported the alternative approach suggested. He supported article 17, and for article 18 favoured the alternative approach. Article 19 should be deleted.

49. **Mr. Mirzaee Yengejeh** (Islamic Republic of Iran) joined earlier speakers in emphasizing the central importance of the principle of complementarity. He supported deletion of article 14, and for article 15 preferred the alternative approach. In article 17, paragraph 2 (b), he would prefer the term "a State", and would support deletion of paragraph 6 in the same article. While endorsing paragraphs 1 and 2 of article 18, he would prefer the deletion of paragraph 3. Lastly, he supported the deletion of article 19.

#### APPLICABLE LAW

##### Article 20. Applicable law

50. **The Chairman** invited Mr. Saland (Sweden) to introduce article 20.

51. **Mr. Saland** (Sweden), acting as Coordinator, said that article 20 was a key article of the Statute in that it indicated how

“law” was to be interpreted. Discussion in the Preparatory Committee had shown considerable support for the order of precedence set out in paragraph 1, whereby the Court would apply first the Statute, secondly, if necessary, applicable treaties and rules of international law and, lastly, national law in one way or another.

52. He drew attention to the two options suggested for paragraph 1 (c). Under option 1, which had had the support of the broad majority, the Court would not apply any national law directly, but would rather apply general principles derived from laws to be found in different national legal systems. Under option 2, the Court would apply national law directly. Paragraph 2 of the article made reference to case law, and paragraph 3, which was a consensus text, required that the law applied should be consistent with certain internationally recognized values.

53. The United States proposal for paragraph 1 (a) (A/CONF.183/C.1/L.9) touched on a question of principle which had a bearing on many parts of the Statute, and he did not think that question could be resolved solely within the context of article 20. Concerning paragraph 3, he pointed out that footnote 63 in document A/CONF.183/2/Add.1 and Corr.1 was now obsolete since the matter had already been dealt with in the context of article 21. The only issue of substance that remained to be discussed was therefore the choice of options for paragraph 1 (c), and he urged that discussion of it should be kept as brief as possible. Any outstanding issues could be dealt with in informal consultations.

54. **Mr. Shukri** (Syrian Arab Republic) said he had no basic problem with the text of article 20. He would prefer paragraph 1 (b) to read “if necessary, applicable treaties and the principles and rules of public international law, including the established principles of either the Geneva Conventions or international humanitarian law”. For paragraph 1 (c), he favoured option 2.

55. **Mr. Kouakou Brou** (Côte d’Ivoire), supported by **Ms. Sinjela** (Zambia), said he favoured deletion of the brackets in paragraph 1 (b). Concerning paragraph 1 (c), he preferred option 1, since general principles of law derived from national laws came closer to international law, and thus would be more practical for the judge to apply as well as being an additional guarantee for the person being prosecuted. He supported retention of paragraphs 2 and 3.

56. **Mr. Al Noaïmi** (United Arab Emirates) said that the Arabic version of paragraph 1 (b) should be aligned with the English version. For paragraph 1 (c), he would prefer option 2, with the deletion of the words “and only insofar as it is consistent with the objectives and purpose of this Statute” after the words “failing that”.

57. **Mr. Nyasulu** (Malawi) said that for paragraph 1 (c) he would prefer option 1. The words within brackets were taken care of by paragraph 3, and could therefore be deleted.

58. **Mr. Agbetomey** (Togo) also preferred option 1.

59. **Mr. Jarasch** (Germany) said he would prefer the phrase within brackets in paragraph 1 (b) to be retained. For paragraph 1 (c) he favoured option 1, and he could accept paragraphs 2 and 3. The United States proposal regarding paragraph 1 (a) should be dealt with in another context.

60. **Mr. Bello** (Nigeria), referring to paragraph 1 (c), said that in his view option 1 lacked clarity and gave wide discretionary powers to the Court which were not based on any set criteria. He therefore preferred option 2.

61. **Mr. Al Ansari** (Kuwait) said that for paragraph 1 (c) he would prefer option 1, with the words “of legal systems” replaced by “and from rules and regulations which constitute the legal systems”. The words in brackets should be included.

62. **Ms. Li Yanduan** (China) said that for paragraph 1 (c) her delegation would prefer option 2.

63. **Mr. Salinas** (Chile) said he would prefer paragraph 1 (b) to include a mention of international humanitarian law. For paragraph 1 (c) he favoured option 1.

64. **Mr. Bazel** (Afghanistan) said he, too, would support removal of the brackets in paragraph 1 (b), but would suggest that the phrase “including the established principles of the law of armed conflict” be replaced by “including the established principles of international humanitarian law”. For paragraph 1 (c), he favoured option 2.

65. **Mr. Nathan** (Israel), referring to paragraph 1 (b), considered that the bracketed phrase “including the established principles of the law of armed conflict” was unnecessary and could be deleted, since such principles obviously formed part of the principles of general international law. For paragraph 1 (c) he preferred option 1, since option 2 might have the effect of causing confusion and conflict in the Court’s jurisprudence.

66. **Mr. Tafa** (Botswana) also considered that the bracketed words in paragraph 1 (b) should be deleted. For paragraph 1 (c), he preferred option 1; option 2 was too prescriptive.

67. **Ms. Tomič** (Slovenia) said she, too, would prefer deletion of the words in brackets in paragraph 1 (b). For paragraph 1 (c) she would favour option 1, which would guarantee for everyone the fundamental principle of equality before the law and before the Court.

68. **Mr. Krokmal** (Ukraine) said his delegation unconditionally supported article 20 as a whole, with a preference for option 1 for paragraph 1 (c), with the wording in brackets included, though it could perhaps be redrafted in positive terms.

69. **Mr. Palacios Treviño** (Mexico) said he had no problem with paragraph 1 but had some small changes to propose. In paragraph 1 (a), the words “and its Rules of Procedure and Evidence”, and in paragraph 1 (b) the words “if necessary”,

should be deleted. The bracketed words in paragraph 1 (b) should be included, and for paragraph 1 (c) he would prefer option 1.

70. **Mr. El Masry** (Egypt) said he would have no problem in accepting article 20 with the amendment proposed by the representative of the Syrian Arab Republic, and with option 2 for paragraph 1 (c).

71. **Mr. Chun Young-wook** (Republic of Korea) supported the inclusion of the bracketed words in paragraph 1 (b), and for paragraph 1 (c) favoured option 1, but with the words in brackets deleted.

72. **Ms. Daskalopoulou-Livada** (Greece) considered that in paragraph 1 (b) the words in brackets were superfluous, since international law in any case included the law of armed conflict. She could agree to inclusion of a reference to international humanitarian law, and could support the Mexican representative's proposal for the deletion of the words "if necessary". For paragraph 1 (c), she supported option 1, with the inclusion of the words in brackets, which provided a useful safeguard.

73. **Mr. Adamou** (Niger) said that his delegation, too, favoured option 1 for paragraph 1 (c).

74. **Ms. Venturini** (Italy) considered that the bracketed text in paragraph 1 (b) should be included in order to highlight the importance of the principles of the law of armed conflict in matters to be decided by the Court. For paragraph 1 (c), she favoured option 1, with inclusion of the bracketed text, which was fully in conformity with the tradition of international instruments.

75. **Mr. Addo** (Ghana), **Mr. Kam** (Burkina Faso) and **Mr. Cottier** (Switzerland) supported the previous speaker's position.

76. **Mr. Luhonge Kabinda Ngoy** (Democratic Republic of the Congo) considered that the drafting of paragraph 1 (a) could be clarified, and favoured deletion of the bracketed text in paragraph 1 (b). He preferred option 1 for paragraph 1 (c), with deletion of the bracketed text.

77. **Mr. Al-Hajery** (Qatar) favoured option 2 for paragraph 1 (c).

78. **Mr. Scheffer** (United States of America) said that, in document A/CONF.183/C.1/L.9, his delegation was proposing that the words "and its Rules of Procedure and Evidence" in paragraph 1 (a) should be replaced by "including its annexes". The annexes, however they were ultimately negotiated, should be an integral part of the Statute and therefore should have priority in any applicable law applied by the Court. He strongly supported inclusion of the bracketed text in paragraph 1 (b), since there was a need to ensure that war crimes were interpreted with reference to such principles as proportionality and military necessity, which were included in the law of armed conflict. For paragraph 1 (c), he favoured option 1 with the deletion of the bracketed text.

79. **Ms. Vargas** (Colombia) said that it was unclear what was meant by "applicable treaties" in paragraph 1 (b). For paragraph 1 (c), she favoured option 1, with inclusion of the bracketed text.

*The meeting rose at 1.05 p.m.*

### 13th meeting

Tuesday, 23 June 1998, at 3.10 p.m.

*Chairman:* Mr. Kirsch (Canada)

A/CONF.183/C.1/SR.13

#### **Agenda item 11 (continued)**

**Consideration of the question concerning the finalization and adoption of a convention on the establishment of an international criminal court, in accordance with General Assembly resolutions 51/207 of 17 December 1996 and 52/160 of 15 December 1997 (A/CONF.183/2/Add.1 and Corr.1 and A/CONF.183/C.1/L.9)**

#### **DRAFT STATUTE**

PART 2. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW (*continued*)

APPLICABLE LAW (*continued*)

Article 20. Applicable law (*continued*)

1. **Ms. Shahen** (Libyan Arab Jamahiriya) said that her delegation accepted all three paragraphs of article 20 and preferred option 2 for paragraph 1 (c).

2. **Ms. Wilmshurst** (United Kingdom of Great Britain and Northern Ireland) said that her delegation preferred option 1 for paragraph 1 (c). Paragraph 3 could perhaps be shortened: it could end with the words "human rights" in the second line.

3. **Mr. Shariat Bagheri** (Islamic Republic of Iran) said that his delegation supported the proposal made at the last meeting by the representative of the Syrian Arab Republic to replace the words "general international law" in paragraph 1 (b) by "public international law". The phrase in square brackets should be deleted. Option 2 for paragraph 1 (c) was to be preferred. Paragraph 2 was acceptable. With regard to paragraph 3, in view of the differences between the various legal systems as far as the concept of human rights was concerned, it might be better to speak of human rights norms recognized by the international community or recognized by the main legal systems.

4. **Mr. Mansour** (Tunisia) thought that article 20 should be retained in its entirety and the square brackets deleted. Option 2 for paragraph 1 (c) was preferable to option 1.

5. **Mr. Onkelinx** (Belgium) said that his delegation could accept article 20 with option 1 for paragraph 1 (c). Option 2 established a hierarchy among national laws which was out of place in view of developments in international law. With option 1, some textual alignment might be necessary between subparagraphs (b) and (c).

6. **Mr. Skibsted** (Denmark) said that his delegation could accept subparagraphs (a) and (b) of paragraph 1, including the bracketed portion, and preferred option 1 for subparagraph (c), including the bracketed portion. In view of the point made in footnote 63 in document A/CONF.183/2/Add.1 and Corr.1 regarding the principle of *nullum crimen sine lege*, Denmark considered that general principles derived from the various legal systems should be drawn upon only to fill any potential lacunae in the Statute, in treaties and in customary international law.

7. **Mr. Janda** (Czech Republic) said that his delegation could accept article 20 with the deletion of the phrase in square brackets in paragraph 1 (b) and with option 1 for paragraph 1 (c), including the bracketed text.

8. **Mr. Maiga** (Mali) said that his delegation could support article 20 with the deletion of the bracketed phrase in paragraph 1 (b) and with option 1 for paragraph 1 (c), with the deletion of the bracketed text.

9. **Mr. Gevorgian** (Russian Federation) said that his delegation was in favour of subparagraph (a) of paragraph 1 and agreed with the Mexican delegation that the words "if necessary" in subparagraph (b) should be deleted. The words in square brackets in that subparagraph were superfluous, but his delegation would not insist on their deletion. It had a clear preference for option 1 for subparagraph (c), and supported the proposal by the United Kingdom that paragraph 3 should end with the words "human rights".

10. **Mr. Yépez Martínez** (Venezuela) said that the words "in the first place" should be deleted from subparagraph (a) of paragraph 1 and the words "if necessary" should be deleted from subparagraph (b). The phrase in square brackets in subparagraph (b) should be retained, but explicit reference should be made to international humanitarian law. Option 1 for subparagraph (c), without the phrase in square brackets, was preferable to option 2. Paragraph 2 was necessary because it would enable the Court to take into account previous decisions, but more precise wording would be preferable.

11. **Mr. Bartoň** (Slovakia) said that his delegation supported article 20 with option 1 for paragraph 1 (c).

12. **Mr. Aboly** (Guinea) said that, if subparagraph (b) of paragraph 1 were to be amended by the deletion of the words "if necessary", the words "in the first place" in subparagraph (a) should also be deleted. Subparagraph (b) might be amended to read: "applicable treaties and the principles and rules of international humanitarian law", the phrase in square brackets being deleted. His delegation was in favour of option 1 for subparagraph (c) with the deletion of the words in square brackets.

13. **Mr. Khalid Bin Ali Abdullah Al-Khalifa** (Bahrain) said that his delegation supported article 20 in general and agreed with other delegations that the phrase in square brackets in subparagraph (b) of paragraph 1 should be deleted. It preferred option 2 for subparagraph (c).

14. **Ms. Kamaluddin** (Brunei Darussalam) said that her delegation supported article 20 generally. The words "if necessary" in subparagraph (b) of paragraph 1 should be retained and the phrase in square brackets deleted. She preferred option 1 for subparagraph (c) with the deletion of the words in square brackets.

15. **Mr. Simpson** (Australia) said that his delegation supported paragraph 1 (a), and was open-minded about the inclusion of the phrase in square brackets in subparagraph (b). It supported option 1 for subparagraph (c) and was flexible about the words in square brackets. Paragraphs 2 and 3 were acceptable as they stood.

16. **Mr. Holmes** (Canada) said that his delegation supported subparagraphs (a) and (b) of paragraph 1 and had no strong position on the inclusion or otherwise of the text in square brackets. It favoured option 1 for subparagraph (c) with the retention of the words in square brackets. Paragraphs 2 and 3 should remain as drafted.

17. **Mr. Saenz de Tejada** (Guatemala) said that his delegation supported article 20. The phrase in square brackets in paragraph 1 (b), was unnecessary but could be accepted. Option 1 for subparagraph (c) was preferable to option 2.

18. **Mr. Al Hafiz** (Saudi Arabia) said that his delegation would prefer the deletion of the phrase in square brackets in paragraph 1 (b), and the replacement of the words "general international law" by "international humanitarian law". It preferred option 2 for subparagraph (c).

19. **Mr. Sadi** (Jordan) said that his delegation had no objection in principle to option 1 for paragraph 1 (c) but would prefer simpler wording, such as: "failing that, national laws only insofar as they are consistent with the objectives and the purpose of this Statute".

*The meeting rose at 3.30 p.m.*



## 14th meeting

Wednesday, 24 June 1998, at 10.10 a.m.

Chairman: Mr. Kirsch (Canada)

A/CONF.183/C.1/SR.14

### Agenda item 11 (*continued*)

**Consideration of the question concerning the finalization and adoption of a convention on the establishment of an international criminal court in accordance with General Assembly resolutions 51/207 of 17 December 1996 and 52/160 of 15 December 1997 (A/CONF.183/2/Add.1 and Corr.1 and A/CONF.183/C.1/L.16)**

#### DRAFT STATUTE

##### PART 4. COMPOSITION AND ADMINISTRATION OF THE COURT

1. **Mr. Rwelamira** (South Africa), Coordinator for part 4, said he thought that some of the articles in part 4 of the draft text in document A/CONF.183/2/Add.1 and Corr.1 were already at a stage where they could be referred to the Drafting Committee without debate or with very little debate in the Committee of the Whole. He suggested that the Committee might consider transmitting subparagraphs (a), (c) and (d) of article 35 to the Drafting Committee without any debate. Paragraphs 1 and 2 of article 39 contained no particular problems and might also be transmitted to the Drafting Committee. Paragraph 3 could also be sent to the Drafting Committee if the Committee of the Whole took the view that the contents of the square brackets in subparagraph (a) were already covered by the notion of "the due administration of the Court".

2. Article 41 as it stood was a well-balanced and well-considered compromise text arrived at after extensive debate in the Preparatory Committee on the Establishment of an International Criminal Court, and might likewise go to the Drafting Committee. Paragraphs 1, 2 and 3 of article 45 could also be sent on without further debate, but some discussion on paragraph 4 might be required.

3. Other articles recommended for transmission to the Drafting Committee were articles 46 and 48. A small correction was needed in article 48: "article 47" should be inserted after "set out in". He would also suggest that, as article 48 dealt with misconduct of a less serious nature than article 47, the second of the two bracketed alternatives in article 48, referring to the Regulations of the Court, might be chosen. The Committee might also wish to delete the bracketed reference to the Rules of Procedure and Evidence in article 50. Articles 46, 48, 50 and 51 could then go to the Drafting Committee.

4. The rest of the articles in part 4 could be handled in two stages. Articles 35, 36, 37 and 40 raised difficult problems and could be debated first. After some discussion in the Committee

of the Whole, they could be referred to an informal group, which the United Kingdom delegation had already agreed to coordinate.

5. After that, the Committee could take up the remaining provisions, namely articles 38, 39, 42 to 45, 47, 49, 52 and 53, as a second cluster of provisions.

6. Turning to the cluster of provisions that he had suggested should be considered first, he said, with regard to article 35 (b), that there had been a divergence of views in the Preparatory Committee on the question of whether there should be one or more pre-trial chambers. That question would need discussion.

7. Under article 36, the question of whether some Court judges should serve on a part-time basis, and whether the decision as to which judges should serve part-time should be taken by the Presidency or by States parties on the recommendation of the Presidency, would undoubtedly require debate in the Committee. His own feeling was that the matter should be left to the Presidency to decide in the light of the volume of work in the Court.

8. Article 37, which should perhaps be discussed jointly with article 40, raised the issue of the number of Court judges and whether, and if so how, the number of judges could be increased or decreased after the Court had been established. Paragraph 3 (b) dealt with the balance that should exist in the Court between judges with expertise in criminal law and those with expertise in international law. It would affect other provisions in the Statute, notably paragraphs 1, 5 and 6 of article 40. The options in paragraph 4 of article 37 concerning the nomination of judges, and paragraph 5 on the election of judges, would require debate. Paragraph 8 had been extensively debated in the Preparatory Committee. His recommendation would be that the square brackets around subparagraphs (b), (d) and (e) should be removed and that the alternative "bear in mind" should be used rather than "take into account the need for" in the chapeau.

9. The question of whether judges should hold office for five or for nine years under paragraph 10 of article 37 might best be discussed in the proposed informal group.

10. Article 40 might usefully be debated briefly in the Committee of the Whole prior to a more detailed discussion in the informal group. The proposal in paragraph 7 for alternate judges had been debated extensively in the Preparatory Committee and might need discussion in the Committee of the Whole.

Article 35. Organs of the Court

Article 36. Judges serving on a full-time basis

Article 37. Qualification and election of judges

Article 40. Chambers

11. **The Chairman** invited the Committee to give its views on the cluster of provisions that the Coordinator had suggested should be considered first, namely articles 35 (particularly subparagraph (b)), 36, 37 and 40. Comments could also be made at any time on the articles that the Coordinator had suggested should be referred to the Drafting Committee.

12. **Sir Franklin Berman** (United Kingdom of Great Britain and Northern Ireland) said that the issues raised in those articles were among the most fundamental for the entire establishment and structure of an international criminal court. It would be crucial to have provisions which would ensure a court of the right quality.

13. With regard to article 35 (b), it was self-evident that there needed to be a pre-trial function in the Court. Turning to article 36, he said that the question of full-time versus part-time judges had a financial aspect but also raised the issue of the impartiality of judges and the avoidance of conflicts of interest. It was not easy to envisage a court consisting of part-time judges who exercised another function but could serve as judges of that court with complete professional detachment. The United Kingdom was in favour of a full-time court from the outset.

14. Regarding article 37, it could be assumed to be generally accepted that there should be a system that would ensure judges of the highest quality as members of the Court. More difficult was the question of qualifications. He did not think that it was a matter of competition between criminal law and international law. There would be many people, including some candidates for the Court, who would have experience both in criminal law and practice and in international law. Nor could every candidate for the Court represent an ideal model of the qualifications required. The Statute would set out a pattern and it was to be hoped that as many candidates as possible would come as close as possible to the ideal.

15. There was also a very important distinction between knowledge in particular fields of law and the professional competence and experience which indicated that a candidate was the sort of person likely to be able to perform effectively the function of judge. Reference should be made to both knowledge and professional qualifications.

16. The Court should not be over-large. The functions covered in articles 37 and 40 would suggest a court of about 17 members. It should be structured around pre-trial, trial and appeal functions. The professional activity involved at those three different levels was not identical and some discussion would be required on the numbers and on the qualities and qualifications needed at each level. That area had not been addressed in detail in the Preparatory Committee.

17. There should be a certain degree of flexibility in the composition of the Court, and there should be provision for the movement of judges between one function and another, with the exception of the appeal function. It would be neither proper nor possible for judges assigned to the appeal function to be transferred ad hoc to perform any function below that level, as that might impair the appeal function.

18. With regard to the question of nomination and election, it was important that the nominating process should not be a political process but should be one designed to identify candidates who fulfilled the qualifications required by the Statute. One possibility would be to follow the procedure used for elections to the International Court of Justice and have the national groups in the Permanent Court of Arbitration nominate candidates. Another would be to rely on procedures used within each State for the selection of its own judges. Election must be by secret ballot in the Assembly of States Parties, and it was fundamental that nothing in the Statute could in any way affect the right of each State party to make its own choice as to which candidate it would vote for. However, there could be some screening process between the completion of the nomination phase and the election phase, to enable Governments to make a good choice. In the United Kingdom's experience of such elections, Governments were often confronted with a list of candidates without the necessary information to help them to choose. One great advantage of an objective screening process was that it could help States parties take into account the criteria referred to in paragraph 8 of article 37, as well as the qualities of the individual candidates.

19. **Mr. Imbiki** (Madagascar) said that article 35 (b) should provide for two Pre-Trial Chambers. There should also be a provision allowing the President to move judges between the different Chambers as required. Under article 36, judges should serve on a full-time basis once the Court was seized of a matter. It was undesirable that judges should engage in other activities while serving as judges of the Court.

20. In article 37, paragraph 2 (a), it should be for the President acting on behalf of the Court to propose increases or decreases in the number of judges. In paragraph 2 (b), a simple majority would be preferable and, under paragraph 5, one half of the States parties should constitute a quorum.

21. In paragraph 8, subparagraphs (d) and (e) might hinder the representation of certain States or groups of States.

22. Paragraph 10 should provide for a nine-year mandate, to be closer to the situation in the International Court of Justice.

23. Paragraph 11 was acceptable as it stood but might be amended to provide for the fact that a judge might be unable to continue to carry out his or her functions. Article 40 should provide for "Pre-Trial Chambers" in the plural and for Chambers composed of five judges.

24. **Mr. Yáñez-Barnuevo** (Spain) asked whether article 51 would be submitted to the Drafting Committee together with

document A/CONF.183/C.1/L.16, which contained a proposal by 14 delegations, including his own.

25. **The Chairman** said it was his understanding that article 51 would be referred to the Drafting Committee together with that proposal.

26. **Mr. Rebagliati** (Argentina) expressed general agreement with the views expressed by the representative of the United Kingdom. Candidates could be nominated by bodies such as the national groups in the Permanent Court of Arbitration, or through national mechanisms used for the appointment of senior judges. States might prefer either of those options or a combination.

27. With regard to the qualities and qualifications of candidates, the aim would be for candidates to have all the intellectual and moral qualities and qualifications listed, including practical experience in criminal and international law.

28. His delegation was flexible as to whether judges should serve on a full-time or part-time basis. There were precedents in other similar bodies for judges working part-time, with clear limitations on the exercise of other functions. The maximum number of judges should be 17.

29. In discussing the number of judges and their terms of service, the financial implications should not be overlooked. It might not be possible at the outset to finance what might be described as an ideal court.

30. His delegation endorsed the view of the United Kingdom that there should be a screening process for candidates. The mechanism must be objective and equitable geographical distribution must be ensured.

31. **Ms. Joyce** (United States of America), referring to the suggestions made for provisions to be passed on to the Drafting Committee, said her delegation agreed that articles 35, 41, 46 and 50 should go to the Drafting Committee. As far as article 39 was concerned, the United States would prefer the contents of the square brackets in paragraph 3 (a) to be retained. Further discussion on that matter would be required; informal consultations might be useful.

32. With regard to article 45, the United States had some concerns about paragraph 3 and hoped that it could be considered further informally. Further discussion might also be required on article 48: the United States considered that, since the Prosecutor and judges were concerned, disciplinary measures should be dealt with in the Rules of Procedure and Evidence.

33. It would also be useful to have informal discussions on the proposal in document A/CONF.183/C.1/L.16 concerning article 51.

34. **Mr. Scheffer** (United States of America), referring to articles 35, 36, 37 and 40, said that the Court's moral authority would derive from its impartiality and credibility and it would only be as impartial and credible as its judges, the Prosecutor and others who assisted them. They must be individuals of the

highest calibre. Despite the common goal of attracting and selecting the best people for the job, the draft Statute still reflected a certain degree of confusion as how to achieve that goal, especially with regard to judges. Some delegations had already been consulting informally in an attempt to find appropriate wording, and the United States was prepared to explore modalities and language, but was committed to certain core concepts. It was especially concerned about the need for criminal trial experience or its equivalent for judges who would be handling cases at the pre-trial or trial levels, whether as judges or advocates. It was critical that, for cases of the gravity of those that would be assigned to the Court, judges should have experience in regard to procedures. Some delegations had emphasized the need for judges to have knowledge of international law as well. The accommodation of that concern, however, should not be allowed to compromise the high standard that had been set for the way trials were conducted. The United States continued to believe that there should be a mechanism at the international level whereby countries could gain more information about candidates before election, and perhaps even filter out clearly unqualified candidates, and looked forward to reviewing any proposals from other delegations in that regard.

35. The United States supported the need for overall balance in the composition of the Court and in particular the need to ensure the appointment of qualified women as well as men. Paragraph 8 (e) of article 37, which addressed the need for expertise on sexual and gender violence, was also important. On the basis of its experience in the International Tribunals for the Former Yugoslavia and for Rwanda, the United States believed that that issue needed to be covered explicitly in the Statute if the Court was to be responsive to the concerns of women caught up in international and internal conflicts.

36. Regarding the way in which the Chambers were to be set up, the provisions should be limited to broad parameters that would provide the necessary flexibility. The aim should be to set up a court with the capacity to adapt as needed. The need for a pre-trial function was clear. Provision should also be made for some limited rotation of judges between Chambers, but not between the Appeals Chamber and the Trial Chambers, since they were likely to be composed differently in terms of qualifications, and a truly independent Appeals Chamber was of particular importance. The Court should also be explicitly authorized to accept temporary assignments of personnel from States and other organizations, since that would provide a good way for the Court to obtain experienced staff at short notice and for limited periods to help with surges in its caseload.

37. As the United States had already indicated, it would prefer to see the Rules of Procedure and Evidence for the Court finalized before the conclusion of the Conference. Such a critical document would have to be completed before the Court could become operational and it was to be hoped that a way would be found to address that issue as soon as possible.

38. **Mr. Verweij** (Netherlands) agreed that there should be continued informal consultations on the election and qualifications of judges.

39. With regard to article 35, he strongly favoured the establishment of a Pre-Trial Chamber, but was flexible as to whether there should be one or more. With regard to article 36, he had doubts about the proposal for part-time judges and would appreciate further explanation of how a part-time system would work.

40. Article 37 warranted further study. One of the lessons learned from the ad hoc tribunals in that respect had been that, besides excellent personal qualifications, actual trial experience was vital. It would be particularly important, however, for judges with a knowledge of international law, including international humanitarian law, to be represented in the Chambers.

41. In relation to the selection and election process, further thought was needed on how an objective assessment of candidates could be ensured. He strongly supported the retention of paragraph 8 (e) of article 37.

42. **Mr. Bello** (Nigeria), referring to article 35, agreed that the Court should have a Pre-Trial Chamber, a trial Chamber and an Appeals Chamber, and thought that the three Chambers should be kept separate.

43. He supported the proposals for balanced geographical and gender representation. There should be judges from each geographical group as established by the General Assembly, and the principal legal systems of the world should be represented. If judges served for a period of five years, they should be eligible for re-election, but not if they served for nine years. Generally speaking, the provisions concerning the judges and the administration of the Court were acceptable, but paragraphs 1 and 2 of article 49 should be merged.

44. **Mr. Shukri** (Syrian Arab Republic) said that while he was flexible as to the number of Pre-Trial and Trial Chambers to be provided for in article 35 (b), he was in favour of only one Appeals Chamber. Regarding full-time versus part-time judges (article 36), his understanding was that all judges would be elected at the same time but would only be called upon to perform their functions when the need arose. While the number of judges could not be determined until a decision had been taken on the number of Chambers, the number should be between 15 and 21. He fully supported paragraph 3 (a) of article 37; regarding paragraph 3 (b), recognized competence in international criminal law and international humanitarian law was particularly important, without prejudice to specialists in criminal law. International law and criminal law qualifications should be combined for the Appeals Chamber under article 40, paragraph 1.

45. With regard to article 37, paragraph 5, two thirds of the States parties should constitute a quorum for elections. In the chapeau of paragraph 8, the expression "take into account the need for" was preferable to "bear in mind".

46. Paragraph 8 (a) was acceptable. Paragraph 8 (b) was unnecessary, as the main concern was to have as many legal systems as possible represented. Equitable geographical distribution was important, but gender balance might at times cause problems. Paragraph 8 (e) was unacceptable; he knew of no speciality called "gender violence". He hoped that the age restriction in paragraph 9 would be removed.

47. With regard to paragraph 10, five years was too short a period for judges to familiarize themselves with their task and to build up experience. They should hold office for nine years and be eligible for re-election.

48. A three-year period of service would be appropriate in paragraph 2 of article 40. The question of rotation between Chambers was a sensitive one and the established rule was that no judge could consider a case in two different capacities. Provision should be made to avoid that.

49. **Mr. Matsuda** (Japan), referring to article 35 (b), said that he would prefer Pre-Trial Chambers set up on a case-by-case basis rather than a permanent chamber. In article 36, the second sentence should be deleted. Regarding the last sentence, he agreed with the Coordinator that the Presidency should decide whether there was a need for judges serving on a full-time basis.

50. With regard to paragraph 3 of article 37, his delegation shared the view that Pre-Trial Chamber and Trial Chamber judges should have criminal trial experience. However, to allow people who were highly competent in international law to become judges of the Court, it would be appropriate to require either criminal trial experience or knowledge of international law. To ensure that there were enough judges with criminal trial experience, paragraph 7 should be retained and should require two thirds of the judges to have such experience.

51. In paragraph 4 of article 37, he preferred option 1. Under paragraph 5, judges should be elected by a two-thirds majority of the Assembly of States Parties. There should be no age limit, as in other similar bodies, and paragraph 9 should be deleted.

52. With regard to article 40, a term of office was inappropriate for chambers set up on a case-by-case basis. Paragraph 4 should therefore be deleted.

53. **Mr. Perrin de Brichambaut** (France) said that at least one Pre-Trial Chamber should be established as soon as judges were elected. Experience in criminal law matters and experience in international law should be alternatives. Rather than having to have a specific number of years of professional experience, it should be sufficient for judges to have extensive criminal law experience and the qualifications needed in their respective States for appointment to the highest judicial offices.

54. There should be at least 18 judges, elected by an absolute majority by the Assembly of States Parties on the basis of nominations submitted by each State party according to its national procedures.

55. The French delegation endorsed the views expressed by the United Kingdom delegation in respect of the examination and confirmation of the qualifications of judges. To guarantee their independence, judges should be elected for a non-renewable period of nine years.

56. **Mr. Yépez Martínez** (Venezuela) said that he was prepared to agree to Pre-Trial Chambers although in principle he felt that they were unnecessary, particularly at the outset. Members of the Court should devote themselves exclusively to their judicial functions, and should therefore serve on a full-time basis. Regarding article 37, he had no definite position on the number of judges; that would have to be determined on the basis of such criteria as geographical distribution and the need to include the world's main legal systems. The square brackets should be removed in paragraph 3 (a). Option 1 for paragraph 4 should be chosen; only States parties should be able to nominate judges to the Court. Paragraph 5 was acceptable, but the Assembly of States Parties should elect the judges by a two-thirds majority. Two thirds of the States parties should constitute a quorum. Paragraph 8 should refer to States parties and require representation of the principal legal systems of the world and equitable geographical distribution to be taken into account. Paragraph 9 could be deleted.

57. Paragraph 4 of article 39 was unnecessary. Regarding article 49, the privileges and immunities of members of the Court could be covered by a headquarters agreement with the host State. The question of working languages should be determined by consensus.

58. **Mr. Tankoano** (Niger), referring to article 36, said that judges should serve on a full-time basis as in the International Court of Justice, irrespective of the number of cases before the International Criminal Court.

59. **Mr. Bartoň** (Slovakia), referring to article 35, said that he was flexible as to whether there should be one or several Pre-Trial Chambers. With regard to article 36, judges should serve on a full-time basis. In article 37, paragraph 1, the number of judges should be between 15 and 18, and the text in square brackets should be kept. With regard to qualifications, the Court should consist of judges with experience in criminal and international law, but at the pre-trial and trial levels there should be a predominance of judges with criminal law experience. In the Appeals Chamber, there should be a balance of experience between criminal law and international law.

60. Judges should be elected by the Assembly of States Parties. Subparagraphs (d) and (e) of paragraph 8 were acceptable. A nine-year period would be appropriate in paragraph 10.

61. **Mr. Larrea Dávila** (Ecuador) said that his delegation endorsed the comments made by the representative of Spain in connection with article 51 and associated itself with the sponsors of document A/CONF.183/C.1/L.16.

62. **Mr. Mansour** (Tunisia) said that the Court should consist of an Appeals Chamber, a Trial Chamber and a Pre-Trial

Chamber, the number of Trial and Pre-Trial Chambers depending on the number of cases before the Court. Judges should serve on a full-time basis. With regard to article 37, it was important that the principal legal systems and equitable geographical distribution should be taken into account in the election of judges, but paragraph 8 (e) was not necessary. The number of judges could vary according to the number of cases before the Court. He preferred option 2 for paragraph 4. The qualifications of judges in the Appeals Chamber and the Pre-Trial Chamber should not necessarily be the same. The Appeals Chamber should require higher qualifications and consist of five judges whereas the Pre-Trial Chamber should consist of three.

63. **Mr. Sözen** (Turkey) said that part 4 of the draft Statute did not pose any real problems. In article 35, he would prefer an Appeals Chamber and a limited number of Pre-Trial Chambers. The principle of equitable geographical distribution should ensure that there was not more than one judge from the same State. An age limit for judges was not provided for in the Statute of any other tribunal, and experience was the most important criterion.

64. **Mr. El Masry** (Egypt), referring to the articles that it was suggested should be submitted directly to the Drafting Committee, said that it was essential that article 45 should provide for the approval of the staff regulations by States parties. It might also be useful to include a reference to the need to deal with staff complaints, as well as a mechanism for resolving staff disputes. It was not clear in article 46 before whom the solemn undertaking would be made. It would be premature to submit article 51 to the Drafting Committee before taking a decision on document A/CONF.183/C.1/L.16, which his delegation fully supported.

65. With regard to the cluster of articles now under consideration, he was in favour of Pre-Trial Chambers, in the plural, in article 35 (b). In article 37, paragraph 3 should emphasize impartiality, high moral stature and experience. The requirements in paragraphs 3 (b) (i) and (ii) should be alternatives; they should not both be requirements for each judge. Judges should be nominated by national groups in consultation with Governments. His delegation had strong reservations about the proposals for the Nominating Committee. In view of the many practical difficulties involved, the matter might best be left to the Assembly of States Parties. A possible procedure would be to have a series of ballots, allowing candidates to withdraw if they had little possibility of being elected. His delegation supported subparagraphs (a), (b), (c) and (d) of paragraph 8 but felt that subparagraph (e) was unnecessary; moreover, it did not mention other serious human rights violations such as torture and expulsions.

66. **Mr. Palacios Treviño** (Mexico) supported the proposal contained in document A/CONF.183/C.1/L.16, which was consistent with Mexico's general views on the use of the Spanish language. He also supported the comments of the United Kingdom on the professional qualifications for judges of

the Court, as well as the methods of nomination and election. The election procedure should be as objective as possible, so that the best individuals, men or women, could be elected without any political influence. Nomination might best be left to national groups such as those in the Permanent Court of Arbitration. He was flexible as to the number of chambers in the Court, provided that it was sufficient to ensure that appeals, trials and pre-trial matters were dealt with by different people. He was also flexible as to the number of judges to be appointed, provided that different judges served in different chambers.

67. **Mr. Zellweger** (Switzerland), referring to paragraph 1 of article 37, said that the Court should be composed of no more than 15 judges, at least in its initial stages. Any increase in that number later on should be dealt with in accordance with the provisions on amendments to the Statute referred to in footnote 4 to paragraph 2 (a) of article 37. Switzerland intended to propose a new text for articles 110 and 111 which would cover the matter raised in that subparagraph.

68. With regard to paragraph 3 of article 37, care should be taken not to restrict the choice of candidates through criteria that were too narrow. Criminal trial experience and competence in international law should be alternatives; that was important for countries which did not have as large a pool of candidates representing both areas of competence as did the larger countries. For the same reason his delegation was against the strict criteria proposed regarding the distribution of judges with experience in criminal law and judges with competence in international law in the different Chambers.

69. It was important that judges should rotate between the Trial and Pre-Trial Chambers. To ensure that a judge did not hear the same case twice, teams of judges should be established as suggested in the footnote to article 40, paragraph 3.

70. **Mr. Al-Thani** (Qatar), referring to article 36, said that judges should serve on a full-time basis, to ensure complete impartiality. As the Court would be breaking new ground, it would be difficult to specify in paragraph 1 of article 37 the number of judges that would be required. There was also a need to ensure that the number could be increased if necessary. Paragraph 2 of article 37 was acceptable. In paragraph 5, election should be by the Assembly of States Parties on the basis of a two-thirds majority. Paragraph 8 (e) should be deleted because it was unduly selective. Age should not be a barrier to election, provided that a judge was in good health at the time. A five-year period of office would be reasonable, with three-year periods for the Chambers under article 40.

71. **Ms. Li Ting** (China) said that the number of Pre-Trial Chambers in article 35 would be determined by need and the provisions should therefore be kept flexible. The question of full-time or part-time service by judges in article 36 should not be determined solely on the basis of financial considerations. However, as the question had financial aspects, it should be decided by States parties.

72. China endorsed the views of Japan and France regarding criminal trial experience and competence in international law under article 37. The two areas of competence should be alternatives. Judges with experience in criminal trials would be required for the Trial Chambers. Paragraph 8 of article 37 was also important: the impartiality of the Court would depend on judges representing the principal legal systems of the world and there being equitable geographical distribution. The main forms of civilization should be represented; it was important that the Court should consider the stages of development and the situations of the different regions of the world. China was flexible, however, in respect of subparagraphs (d) and (e) of paragraph 8.

73. **Ms. Vargas** (Colombia) said that she was in favour of the Permanent Court of Arbitration or the national groups referred to in the Statute of the International Court of Justice being responsible for the nomination of candidates. Judges in all Chambers should work on a full-time basis except for those who had left the International Criminal Court but were continuing to deal with cases that had not concluded. Judges should have competence in international law and particularly in international humanitarian law and human rights law, but criminal and trial experience was also important.

74. Judges should be elected by two thirds of the Assembly of States Parties. Among the criteria for election, it was important that the main legal systems of the world were represented, and that there should be equitable geographical distribution and gender balance. Judges should hold office for a term of nine years, non-renewable. The number of members of each Chamber would depend on the decision taken on the total number of judges. It should be an odd number and not a high one, and would depend on work requirements.

75. **Mr. Janda** (Czech Republic), referring to article 36, said that he would prefer judges to serve on a full-time basis from the outset. They should be elected by the Assembly of States Parties, and there should be a mixture of skills relating to criminal and international law among judges working in the Trial Chambers and Appeals Chambers. People with experience in criminal proceedings would be required for the Pre-Trial Chambers. Subparagraphs (d) and (e) of paragraph 8 should be retained with some editorial improvements in subparagraph (e), which could be left to the Drafting Committee.

76. **Mr. Nyasulu** (Malawi) said that there should be between 15 and 18 judges to allow for 3 in the Presidency, 7 in the Appeals Chamber, 6 in the Trial Chamber and 2 in the Pre-Trial Chambers. He would prefer to retain the full text of paragraph 3 (a) of article 37 and delete the square brackets. Qualifications should include criminal law or trial experience, together with professional competence in international law. Both paragraphs 3 (b) (i) and (ii) were necessary therefore, but some drafting changes might be useful to harmonize them. He preferred option 2 for paragraph 4; the Nominating Committee would also assess the requirements under paragraph 8, which should be retained in its entirety. Appeals judges should not serve

in the Trial or Pre-Trial Chambers, but judges in the Trial and Pre-Trial Chambers could rotate. With regard to paragraph 10, either a term of 5 years with the possibility of re-election or single, staggered terms of 9 years would be acceptable. In article 35 (b), he would prefer "Pre-Trial Chambers".

77. **Ms. Wong** (New Zealand) said that, to ensure the independence and effectiveness of the Court, the judges should be persons of high character, independence, impartiality and integrity, with recognized competence in international or criminal law and fluency in one of the working languages. She was also in favour of the principal legal systems of the world being represented, but not the main forms of civilization. She supported equitable geographical distribution and gender balance. Women were currently under-represented on international judicial bodies. The words "take into account the need for" should be retained in the chapeau of paragraph 8 of article 37. Paragraph 8 (e) was important and should be retained, but the words "violence against children" should be replaced by "protection of children". The requirement in paragraph 3 (b) (i) for ten years' criminal law or trial experience would be too much if women were to be given due consideration as judges.

78. The reference to an "interested State" in paragraph 3 of article 42 was unacceptable.

79. **Mr. Al-Shaibani** (Yemen) said that he was in favour of one Trial Chamber in article 35 (b), and in relation to article 36 endorsed the comments by the United Kingdom that judges should work on a full-time basis to guarantee their independence. With regard to judges' qualifications, practical experience was more important than academic qualifications. With regard to paragraph 8 of article 37, he emphasized the need for the representation of the principal legal systems and equitable geographical distribution.

80. Regarding paragraph 10, his delegation supported the proposal for a non-renewable nine-year term of office, on the understanding that a judge would be able to continue in office to complete a case. With regard to article 51, his delegation supported the proposal contained in document A/CONF.183/C.1/L.16, which should be discussed before referral to the Drafting Committee.

81. **Ms. Mäkelä** (Finland) said that as far as paragraph 3 of article 37 was concerned, judges should be persons of high moral character and impartiality and have extensive criminal trial experience or recognized competence in international law, in particular international humanitarian law and human rights law. While criminal trial experience would be important for the Trial Chamber and Pre-Trial Chamber, those Chambers would also need judges with competence in international law. That requirement was even more important for judges of the Appeals Chamber.

82. In paragraph 8, she was strongly in favour of subparagraphs (d) and (e) being taken into account in the election of judges. The square brackets should be deleted. She was also

in favour of having an age limit for judges, but was flexible as to what that limit should be. There should be small chambers, with five judges in the Appeals Chamber, three in the Trial Chamber and perhaps only one at the pre-trial level. That arrangement could be supplemented by a system of alternate judges. If the Chambers were any larger, the number of situations in which judges would need to be disqualified might increase, which would hamper the functioning of the Court.

83. **Ms. Daskalopoulou-Livada** (Greece) said that, in article 35 (b), she was in favour of providing for one or more Pre-Trial Chambers, and in article 36 she would prefer judges working on a full-time basis. In paragraph 2 (a) of article 37, the President acting on behalf of the Court should be able to propose an increase, but not a decrease, in the number of judges. In paragraph 2 (b), she favoured a simple majority. Paragraph 3 (a) was of paramount importance. Paragraph 3 (b) should provide for "extensive" experience rather than "at least ten years", which was too rigid. Criminal trial experience should be sufficient. Recognized competence in international law should also be sufficient without further specification. Greece had as yet no clear position as to whether paragraphs 3 (b) (i) and (ii) should apply cumulatively, because that would be desirable but would not be feasible in most cases. She favoured option 1 for paragraph 4, with reference to "each State Party". In paragraph 5, she would prefer a two-thirds majority of States parties. The original number of judges should be 17 or 18. With regard to paragraph 8, she agreed with the Coordinator's suggestion that the phrase "bear in mind" should be used in the chapeau, and was flexible as to the retention of subparagraphs (d) and (e). In paragraph 10, she supported a non-renewable nine-year term of office. The last sentence of paragraph 1 of article 40 was inappropriate.

84. **Ms. Bergman** (Sweden) said that the organization of the Court was a task for the Court itself and could not be covered in detail in the Statute. She was in favour of a flexible solution in respect of the qualifications of judges, so that the Court as a whole, rather than each and every judge, would have a variety of skills and experience. Gender balance was particularly important. It should be left to the Presidency of the Court to ensure that chambers had judges with the requisite qualifications. The Pre-Trial Chamber and Trial Chamber should consist of three judges each, and the Appeals Chamber should have five judges. It should be possible to expand the Chambers by one or more judges if, for example, a long trial was anticipated. The proposal for a screening process to ensure the election of the best available judges worldwide was an interesting one. However, such a system would need to be transparent. Judges should hold office for a non-renewable period of nine years.

85. **Mr. Mahmood** (Pakistan) said that the reference in article 35 (b) should be to one Pre-Trial Chamber. In article 36, to minimize the financial implications, the Pre-Trial Chamber should only be established on a permanent basis once the Court was seized of a matter. States parties should decide by a two-thirds majority whether judges should serve on a full-time basis.



86. In article 37, paragraph 2 (b), he favoured "a two-thirds majority of States Parties" without the words "present and voting at that meeting". He endorsed the views expressed by the representative of China on paragraph 8.

87. With regard to article 40, the Appeals Chamber should consist of five judges, the Trial Chamber of three judges and the Pre-Trial Chamber of one judge. The numbers should be kept to the minimum to ensure the efficiency of the Chambers and minimize expenditure.

88. **Mr. Bazel** (Afghanistan) said that, in article 35 (b), he preferred "Trial Chambers" and "Pre-Trial Chambers". Judges should serve on a full-time basis under article 36. In paragraph 2 of article 37, he favoured the expression "acting on behalf of the Court". He shared the views of the representative of France on paragraph 3 (b). In paragraph 5, he favoured the election of judges by a two-thirds majority. In paragraph 8, only subparagraphs (a), (c) and (e) should be retained, the latter being amended by an additional sentence reading: "The expert on issues related to sexual and gender violence and violence against children should be a woman." In paragraph 10, he supported a nine-year term of office.

89. **Ms. Diop** (Senegal) said that, among the articles that the Coordinator had suggested should be referred to the Drafting Committee, article 51 should only be referred to the Drafting Committee if accompanied by the proposal contained in document A/CONF.183/C.1/L.16.

90. She was in favour of a Pre-Trial Chamber under article 35. The independence and impartiality of judges would best be assured if they served on a full-time basis, which would also ensure that conflicts of interest did not arise.

91. In paragraph 2 (a) of article 37, she was in favour of "the President acting on behalf of the Court" but was prepared to be flexible regarding the bracketed words "as well as any State Party". Paragraph 3 was satisfactory, but the drafting could be made clearer.

92. With regard to paragraph 8, and particularly subparagraphs (d) and (e), it was high time for discrimination against women in the legal field to cease and for a proper gender balance to be established. There were women with the high qualifications required. The International Tribunals for Rwanda and the Former Yugoslavia had been hampered by the lack of judges with experience in regard to violence against women, rape or discrimination against women. A woman who had been raped would naturally find it easier to talk about her experience to another woman. She appealed to all delegations to be as objective as possible in that regard.

93. Paragraph 9 should be deleted. She would prefer a nine-year, non-renewable term of office in paragraph 10.

94. **Mr. Nathan** (Israel) said that article 35 (b) should provide for a Trial Chamber and Pre-Trial Chambers to cover any need

which might arise. Under article 36, judges should serve on a full-time basis to ensure their availability when needed and to be consistent with the nature of their office as judges of the Court.

95. Under paragraph 2 (a) of article 37, the President, acting on behalf of the Court, should be able to propose an increase or decrease in the number of judges according to the workload of the Court. Paragraph 3 (b) (i) should stipulate a specific minimum period of criminal trial experience as a judge, prosecutor or defending counsel or, as an alternative, recognized competence in international law. The number of judges needed with criminal law experience and the number with competence in international law should be specified. In addition to the formal qualifications of judges, it would be important to look into the actual experience and records of those offering their candidacy for the Court, a task which might be performed by a screening committee.

96. He preferred option 2 for paragraph 4. Under paragraph 5, the judges of the Court should be elected by secret ballot by a two-thirds majority of the States parties present and voting. The aim should be to eliminate political influence on the election of judges. In paragraph 8, subparagraphs (a), (c), (d) and (e) should be kept and subparagraph (b), which referred to a rather antiquated concept, should be deleted.

97. Article 40 should ensure that there was no rotation of judges between Appeals and Trial Chambers. Judges sitting in the Trial Chamber or Appeals Chamber would not be interchangeable. However, judges in the Trial Chamber might be eligible to serve in the Pre-Trial Chamber.

98. **Mr. Al Awadi** (United Arab Emirates) said that article 35 (b) should provide for Pre-Trial Chambers which would be used when necessary and thus avoid the need to amend the Statute at a later stage. In article 36, he was in favour of judges serving on a full-time basis. In paragraph 2 (a) of article 37, the President should act only on behalf of the Court. Paragraph 3 (a) should be retained as it stood with the deletion of the square brackets and paragraph 3 (b) should stipulate both criminal law and trial experience. That did not mean that judges need not have additional qualifications. Under paragraph 4, each State party should have the right to submit nominations. In paragraph 5, judges should be elected by secret ballot by a two-thirds majority of States parties present and voting, and two thirds of the States parties should constitute a quorum.

99. In paragraph 8, only subparagraphs (a) and (c) should be retained; that did not mean that the Court would not have access to the necessary expertise on questions of sexual or gender violence. In paragraph 10, judges should remain in office for 9 years but not be eligible for re-election.

100. With regard to article 40, the Appeals Chamber should consist of seven judges, with five in the Trial Chamber and three in the Pre-Trial Chamber.

101. Regarding the articles to be referred to the Drafting Committee, article 51 should be referred to the Drafting



Committee only if the Committee of the Whole accepted the proposal in document A/CONF.183/C.1/L.16.

102. **Mr. Corell** (Representative of the Secretary-General), referring first to the Appeals Chamber, said that, as the rules stood, judges would be able to circulate between the Appeals Chamber and the Trial Chambers. That system functioned well at the national level, but would not be appropriate in the context of the Court. It was important to bear in mind that judges rotating from the Trial Chambers to the Appeals Chamber would be disqualified except in very special circumstances.

103. With regard to the Trial Chambers, care should be taken to ensure that the Presidency had the necessary flexibility to

ensure the smooth running of the Court. Rotation was important in any court and would be particularly important in the Court provided that it was not tied strictly to dates.

104. The Statute currently provided that the only task of the Pre-Trial Chambers would be to examine the pre-trial situation. That would disqualify all pre-trial judges from rotating to the Trial Chambers.

105. It was important to bear those situations in mind in considering the total number of judges for the Court and the appropriate wording for the rules.

*The meeting rose at 1.15 p.m.*

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### 15th meeting

Wednesday, 24 June 1998, at 3.10 p.m.

*Chairman:* Mr. Kirsch (Canada)

A/CONF.183/C.1/SR.15

#### **Agenda item 11 (continued)**

**Consideration of the question concerning the finalization and adoption of a convention on the establishment of an international criminal court in accordance with General Assembly resolutions 51/207 of 17 December 1996 and 52/160 of 15 December 1997 (A/CONF.183/2/Add.1 and Corr.1)**

1. **The Chairman** said that, in the light of the discussions at the previous meeting, it might be useful to hold informal consultations on four of the provisions that the Coordinator had suggested could be referred to the Drafting Committee, namely article 39, paragraph 3 (a), article 45, paragraph 3, article 48 and article 51.

2. He invited the Committee to continue its consideration of the cluster of articles that it had taken up at the previous meeting ("cluster 1"): articles 35, 36, 37 and 40.

#### **DRAFT STATUTE**

##### **PART 4. COMPOSITION AND ADMINISTRATION OF THE COURT (continued)**

Article 35. Organs of the Court (continued)

Article 36. Judges serving on a full-time basis (continued)

Article 37. Qualification and election of judges (continued)

Article 40. Chambers (continued)

3. **Ms. Pavlikovska** (Ukraine) said that she was fairly flexible about paragraph 2 of article 37, provided that the principle of equitable geographical distribution set out in paragraph 8(c) was taken into account. Regarding paragraph 1 of article 37,

equitable geographical distribution would have a direct impact on States' trust in the judges. The number of judges should not be less than 18. That would allow at least two judges from each geographical group.

4. **Mr. Chun Young-wook** (Republic of Korea) said that he favoured a single Pre-Trial Chamber in article 35. Regarding article 36, the problem of full-time versus part-time judges was a financial matter, and should be decided on by States parties depending on the workload. On the qualifications of judges under article 37, all judges should be experienced in criminal law, have an understanding of different cultures and legal systems and be in a position to take into account the circumstances of each criminal. Equitable geographical distribution, therefore, deserved serious consideration. If election through a nominating committee or screening process was adopted, there would be a problem as to who would assess the qualification of a nominee and the standard applied. He therefore supported option 1 in paragraph 4 of article 37. Although he was flexible on the issue, he would prefer one or three judges in a pre-trial chamber, three judges in a trial chamber and five judges in an appeals chamber.

5. **Mr. Agbetomey** (Togo), referring to article 35, said that he favoured a plurality of pre-trial chambers. As for article 36, a permanent court would require full-time judges to make it effective. The number of judges to be provided for in article 37 would depend on the number of chambers and the number of judges in each. The judges must be highly qualified and of high moral character. He questioned the provision in paragraph 6 that "no two judges may be nationals of the same State", since competence should take precedence over nationality. In paragraph 10 of article 37, he would opt for a mandate of 5 years, renewable once. Age would then not be a problem.

6. **Mr. Salinas** (Chile) said that there should be pre-trial chambers, trial chambers and appeals chambers. He was flexible on article 36, but thought it desirable that the International Criminal Court be composed of full-time judges. He agreed on the need in article 37 to heed geographical factors and budgetary limitations. An appropriate number of judges would be about seventeen, sufficient to allow a balance between experience in criminal law, public international law and international humanitarian law. In paragraph 4, he favoured option 1. In paragraph 5, he supported the election of judges by a two-thirds majority of States parties. As to paragraph 8, he agreed with subparagraphs (a), (c), (d) and (e). With regard to (e), the link with article 5, concerning crimes against humanity, especially gender crimes, should be taken into account. Paragraph 9 could be deleted because no age limit was needed.

7. **Mr. Monetti** (Italy) said that a pre-trial chamber or chambers was essential and could be composed of a single judge. Rotation was possible, although a judge could not sit in the Pre-Trial Chamber and a second chamber in the same case. In article 36, the second sentence, in square brackets, should be deleted. He would like to see an article containing criteria for assigning judges to chambers, to control the authority given to the Presidency. Judges should be elected by an absolute majority vote of the Assembly of States Parties on the basis of their expertise and experience. A checklist of requirements should be drawn up and sent to States to assist them in assessing candidates' qualifications. The judge's term of office should not be renewable, because the wish of a judge to be confirmed in his office might influence his decisions.

8. **Mr. Sayyid Said Hilal Al-Busaidy** (Oman) said that the references to Appeals, Trial and Pre-Trial Chambers in article 35 (b) should be deleted. The President or the Court should determine the number of chambers required. Article 36 should provide for full-time judges, to guarantee impartiality. As to article 37, he agreed that competence and high moral character were essential qualifications for judges, and he had no difficulty in accepting paragraph 3 (b) (ii), concerning recognized competence in international law, criminal law, international humanitarian law and human rights law. Election of judges, under paragraph 5, should require a two-thirds majority vote of the Assembly of States Parties. In paragraph 8, he favoured the inclusion of subparagraphs (a), (b), (c) and (d), on representation of the main legal systems and forms of civilization in the world, equitable geographical distribution and gender balance. Subparagraph (e) was unnecessary. He had no objection to paragraph 9. In paragraph 10, he would prefer a nine-year non-renewable term of office. As proposed in the second sentence, one third of those elected at the first election could serve for three years, one third for six years and the rest for nine years. The Pre-Trial Chamber should have five members.

9. **Mr. Kessel** (Canada) supported article 37, paragraph 8 (d), and said that gender balance was one important factor to be taken into account in the nomination process. The Platform for Action adopted at Beijing by the Fourth World Conference on

Women, in its paragraph 142, called on Governments to aim for gender balance when nominating or promoting candidates for judicial and other positions in international bodies such as the International Tribunals for the Former Yugoslavia and Rwanda. The experience of those Tribunals had demonstrated the benefit of expertise in issues related to sexual and gender violence.

10. **Mr. Shariat Bagheri** (Islamic Republic of Iran) agreed with article 37, paragraph 3, on qualification of judges. A combination of extensive experience of criminal law and competence in international law was necessary. He agreed with paragraphs 1 and 2 of article 37, without the bracketed reference to geographical distribution in paragraph 1, because that was covered in paragraph 8. As to paragraph 4, he supported option 1, with the term "State Party" and without the reference to national groups. The last sentence should be deleted.

11. In paragraph 8, he supported subparagraphs (a) and (c). The other subparagraphs had drawbacks. The very notion of gender balance was based on discrimination between the sexes and the term gave rise to difficulties of understanding and interpretation. He also wondered why, in subparagraph (e), there was a need to mention specialists in sexual and similar forms of violence; why not also specialists in crimes such as torture, etc.?

12. On articles 35 and 40, he favoured a Pre-Trial Chamber with three judges, two trial chambers with five judges each and an appeals chamber with seven judges. The judges should be elected for a five-year term, non-renewable, so that they would not be influenced by political considerations.

13. **Mr. Al Ansari** (Kuwait) said that article 35 should provide for a single, permanent Pre-Trial Chamber. Judges should be full-time under article 36. The number of judges should take into account the requirements of article 37, paragraph 8. In article 37, paragraph 2 (a), the text in the first set of square brackets should be deleted, since in acting on behalf of the Court the President would be acting on behalf of all States parties. The text in square brackets in paragraph 3 (a) should be kept. As to paragraph 3 (b), the judges should have at least 10 years' criminal trial experience. In paragraph 4, he was in favour of option 1 and the wording "State Party". Election, under paragraph 5, should be by a two-thirds majority. He did not agree on the need for the age limit in paragraph 9. Paragraph 10 should provide for a single term of nine years. Concerning article 40, paragraph 1, the Appeals Chamber should be composed of five judges and the last sentence should be retained.

14. **Ms. Steains** (Australia) saw merit in including the words "extensive criminal law experience" in article 37, paragraph 3 (b). The requirement for 10 years' experience was unnecessary. She also recognized the importance of competence in international law within the membership of the Court. The composition of the different chambers should reflect the nature of the responsibilities of each, judges with criminal law experience predominating in the Pre-Trial and Trial Chambers and a balance of judges with international law and criminal law

experience in the Appeals Chamber. In paragraph 8, she preferred the formulation "take into account the need for" to the weaker "bear in mind". Subparagraph (b) should be deleted because the concept was outmoded. She supported the inclusion of references to representation of the principal legal systems of the world and to equitable geographical distribution.

15. She strongly endorsed the need for gender balance, as well as expertise on issues relating to sexual and gender violence, and violence against children, within the membership of the Court. Women and children were often the victims of the crimes which would fall within its jurisdiction.

16. **Mr. Mourid** (Morocco), referring to article 35, said that the Court could be limited to an Appeals Chamber, a Trial Chamber and a Pre-Trial Chamber. Each chamber could set up additional chambers where the caseload so required. The full-time appointment of judges would allow them to discharge their functions properly, free from outside influence. He was flexible on paragraph 1 of article 37, but there should be a minimum number of judges. In paragraph 4, he preferred option 1. In paragraph 5, he would prefer election by a two-thirds majority of States parties. Paragraph 8 should read "States Parties shall take into account", followed by the list of criteria. He favoured subparagraph (a) concerning representation of the principal legal systems of the world and subparagraph (c) on equitable geographical distribution. On the question of working languages, article 51, paragraph 2, should be retained in the interests of ensuring justice.

17. **Mr. da Costa Lobo** (Portugal) said that in principle, in article 35, he favoured "Pre-Trial Chambers" in the plural. As to article 36, judges should serve on a full-time basis. Article 37 was undoubtedly one of the most important. He saw expertise in criminal law and in international law as alternatives. In that connection, he was very much in sympathy with the suggestion for a screening mechanism between nomination and election. That would give States better information on individual judges and would make it easier to consider the composition of the Court as a whole. The election itself should be by absolute majority in a secret ballot. The Appeals Chamber and the Trial Chamber should have at least five judges each.

18. **Mr. Niyomrerk** (Thailand) thought that provision should be made for more than one Pre-Trial Chamber in article 35. Under article 36, full-time judges could serve alternately on a rotational basis in the Pre-Trial and Trial Chambers, but should serve in only one Chamber at a given time. In article 37, paragraph 2 (a), he would prefer the deletion of all the brackets. Under paragraph 3 (b), judges should have criminal law experience as well as competence in international law, international humanitarian law and human rights law. Under paragraph 4, States parties and not national groups should nominate judges, and they should be elected by a two-thirds majority vote of the Assembly of States Parties. He supported paragraph 8, including the references to gender balance and special expertise.

19. Under article 40, paragraph 3, the Presidency should assign judges to Trial and Pre-Trial Chambers in accordance with the Rules of Procedure and Evidence. He would prefer a small number of judges in each chamber, and was flexible on the term of office.

20. **Ms. Shahan** (Libyan Arab Jamahiriya) said that her position was flexible as to whether, in article 35 (b), there should be a separate Pre-Trial Chamber or not. Under article 36, the judges should carry out their functions on a full-time basis. Under article 37, she would prefer there to be 18 judges. In paragraph 4, she supported option 1, with the use of the expression "State Party". Under paragraph 5, the judges of the Court should be elected by a two-thirds majority vote of the Assembly of States Parties. As for paragraph 8, she agreed with subparagraphs (a) concerning the representation of the principal legal systems of the world, (c) on equitable geographical distribution and (d) on gender balance. Subparagraph (e) was not essential, because expertise would be required in all areas covered by the Court. Under paragraph 10, judges should be appointed for a nine-year term.

21. The general rule for article 40 should be that a judge could not be a member of more than one chamber.

22. **Mr. Morshed** (Bangladesh) said that the functions contemplated in article 13 should be performed by a pre-trial chamber, its composition based on the principle of equitable geographical representation and reflecting the major legal systems of the world.

23. **Mr. Soh** (Cameroon) supported a single Pre-Trial Chamber in article 35. An independent and impartial court required full-time judges, who should have high intellectual and moral qualities and professional competence in both criminal law and international humanitarian law. They should be elected by States parties by a two-thirds majority, taking into account the provisions of subparagraphs (a), (b), (c) and (e) of paragraph 8. He favoured a nine-year, non-renewable term for judges. The number should be the strict minimum necessary for the smooth functioning of the Court.

24. **Mr. Kifli** (Brunei Darussalam) had no objection to article 37, paragraph 8 (e), on the need for expertise on issues related to sexual and gender violence. He agreed that, under paragraph 9, judges should not be over the age of 65 at the time of election. Regarding paragraph 10, he would prefer judges to hold office for a non-renewable term of nine years.

25. **Mr. Kam** (Burkina Faso) said that he was in favour of the professional qualification requirements for judges in article 37, but that they should be alternatives. As for paragraph 8, the election of judges should take account of the principal legal systems of the world and equitable geographical distribution, but not the aspects mentioned in subparagraphs (d) and (e). The term of office should be at least nine years, but non-renewable. The number of judges would vary depending on the Court's caseload.

26. **Mr. Al-Adhami** (Iraq) supported a single Pre-Trial Chamber. Under article 36, judges should serve on a full-time basis to guarantee their impartiality and independence. In article 37, paragraph 4, he supported option 1 and nomination by States parties. Under paragraph 5, judges should be elected by secret ballot by a two-thirds majority of States parties present and voting, and the quorum should be one half of the States parties. In paragraph 8, the representation of the principal legal systems of the world, equitable geographical distribution and gender balance were valid criteria. He supported paragraph 9. Under paragraph 10, judges should be elected for a term of five years, renewable for one term.

27. Under article 40, the Appeals Chamber should be made up of five judges.

28. **Mr. Fortuna** (Mozambique) supported several Trial Chambers in article 35 (b). In article 36, he supported full-time judges. The main qualification for judges, in article 37, should be long experience of criminal trials, followed by a background in international criminal law or human rights. Regarding paragraph 4 of article 37, he preferred option 2. He supported paragraphs 5, 6 and 7. In paragraph 8, he would prefer to delete subparagraph (b). In paragraph 9, he supported an age limit of 65 to encourage participation by younger people. Under paragraph 10, a three-year term would allow greater rotation. Finally, in article 40, the minimum composition of the Appeals Chamber should be 3 judges.

29. **Ms. La Haye** (Bosnia and Herzegovina) said that the reference to geographical distribution in the bracketed text to article 37, paragraph 1, might not be sufficient. Consideration should be given to the different cultural and legal traditions within each geographical area. She therefore proposed that, in article 37, paragraph 1, the phrase "and appropriate consideration shall be given to cultural and legal traditions" should be added at the end of the sentence in square brackets, and that a new subparagraph (c bis), "appropriate representation of different cultural and legal traditions" should be added to paragraph 8.

30. **Ms. Rwamo** (Burundi) said that the principle of equitable geographical distribution was essential in recruiting judges with a balance of viewpoints. She was in favour of a non-renewable nine-year term. Article 37, paragraph 8 (e), calling for the inclusion among the judges of experts in sexual and gender violence, should be maintained. She firmly supported subparagraph (d) on gender balance; experience in many countries had already shown the effectiveness of women judges.

31. **Mr. Kerma** (Algeria) said that the Court should have at least one Pre-Trial Chamber. Under article 36, full-time judges would facilitate the smooth operation of the Court, but the availability of financial resources must be taken into account. Under article 37, the total number of judges would depend on the composition of each chamber, but should not be less than 17. It should be for the Assembly of States Parties to elect the judges. There was no need to specify the number of years of experience, but judges must have expertise in criminal law and

international law. Regarding paragraph 4, he favoured option 1, with the expression "State Party". He had no special problems with the contents of paragraph 8, but emphasized representation of the main legal systems of the world and the principle of equitable geographical distribution. Paragraph 9 was acceptable. For paragraph 10, a non-renewable nine-year term seemed the most reasonable. He was in favour of the idea in paragraph 11.

32. **Mr. Pérez Otermin** (Uruguay) said that article 35 (b) and article 36 required a flexible approach, since the eventual workload was unknown. Initially, at least, judges should serve on a full-time basis, after which the position should be reviewed. The qualification requirements in article 37, paragraph 3 (b), should not be cumulative, but the qualifications of the judges collectively must encompass criminal trial experience and international law. The requirement in subparagraph (c) relating to working languages was perhaps excessive; that should be regarded as a secondary matter.

33. The election of judges also required a flexible approach. Initially judges should be elected by the General Assembly. Only later should the Assembly of States Parties elect them.

34. **Mr. Addo** (Ghana) favoured a single Pre-Trial Chamber. An Appeals Chamber was essential. Article 36 should provide for full-time judges, and they should be 21 in number. The judges must have both criminal trial experience and competence in international law. The existing mechanisms for election in the United Nations system could be used to elect the judges of the Court.

35. He agreed with the provisions in article 37, paragraph 8, on the representation of the principal legal systems, equitable geographical distribution and gender balance but favoured the deletion of subparagraph (b), "The representation of the main forms of civilization".

36. **Ms. Ramoutar** (Trinidad and Tobago), supported by **Mr. McCook** (Jamaica), said that the Pre-Trial Chamber in article 35 was necessary to ensure the performance of important functions described elsewhere in the Statute. A single Pre-Trial Chamber should be established in the first instance and, as and when necessary, additional chambers could be established by the Court itself.

37. Article 37 should provide for highly qualified judges with criminal trial experience and knowledge of international law. She was not in favour of the screening process proposed for nomination of candidates, which might open the door to political and other influences. She preferred nomination by States parties.

38. **Mr. Panin** (Russian Federation) said that a single Pre-Trial Chamber would be preferable, but the volume of work might require additional Pre-Trial Chambers. Only the judges making up the Presidency should be full-time. The remainder could be convened by the Presidency as required. They must be highly experienced and well qualified in criminal law and have recognized competence in international law. A proper balance

must be struck. In a trial chamber, priority might perhaps be given to judges with experience in criminal justice.

39. With reference to paragraph 4 of article 37, candidates should be nominated by States parties, and the judges should be elected by the Assembly of States Parties by a two-thirds majority for a term of nine years. That would help to ensure the greatest possible independence on the part of the judges.

40. Rotation might be possible between Trial and Pre-Trial Chambers, but not with the Appeals Chamber.

41. In electing judges, the Assembly of States Parties should take into account the need for representation of the principal legal systems of the world and equitable geographical distribution. The other elements of paragraph 8 of article 37 had no bearing on ensuring an impartial criminal justice system.

42. **Ms. Tomič** (Slovenia) strongly supported article 37, paragraphs 8 (d) and (e).

43. **Mr. Ruberwa** (Democratic Republic of the Congo) said that judges required above all a high moral character and technical competence. The principal legal systems should be represented. Equitable geographical distribution was needed. The reference to the main forms of civilization could be deleted, and a mathematical gender balance would be unnecessary.

44. **The Chairman** recalled what he had said at the beginning of the meeting. It was his understanding that the following provisions could be referred to the Drafting Committee: article 35, subparagraphs (a), (c) and (d); article 39, paragraphs 1 and 2; article 41; article 45, paragraphs 1 and 2; article 46; and article 50. Article 39, paragraph 3 (a), article 45, paragraph 3, and articles 48 and 51 would be the subject of informal consultations.

45. *It was so decided.*

Article 38. Judicial vacancies

Article 39. The Presidency

Article 42. Excusing and disqualification of judges

Article 43. The Office of the Prosecutor

Article 44. The Registry

Article 45. Staff

Article 47. Removal from office

Article 49. Privileges and immunities

Article 52. Rules of Procedure and Evidence

Article 53. Regulations of the Court

46. **The Chairman** invited the Coordinator for part 4 to introduce cluster 2: article 38; article 39, paragraphs 3 (b) and 4; articles 42 to 44; article 45, paragraph 4; and articles 47, 49, 52 and 53.

47. **Mr. Rwelamira** (South Africa), Coordinator for part 4, said that there did not seem to be any major problems with article 38, paragraph 1. There might be a need to consider paragraph 2, the issue being whether a judge elected to fill a judicial vacancy should be eligible for re-election after completing his or her predecessor's term, or whether that should be dependent on the period of the term remaining.

48. Article 39, paragraph 4, raised a matter of principle regarding the exact relationship between the Presidency and the Prosecutor.

49. Article 42 dealt with the excusing and disqualification of judges. It might be best to leave the situation envisaged in paragraph 1 to be governed by the internal rules of the Court. He would therefore suggest that the second of the bracketed alternatives in paragraph 1 should be used. The issue raised in paragraph 2 was whether nationality should be a ground for disqualification and, if so, the scope of application of that principle. In paragraph 3, the question was who had the right to request the disqualification of a judge, and whether that right should be extended to an interested State. In view of the indeterminate nature of the term "interested State", it might be useful to confine that right to the Prosecutor and the accused, but that should be discussed.

50. He suggested that the issue of the ex officio powers of the Prosecutor in article 43, paragraph 1, be deferred until the formulation in article 12 and other articles related to the trigger mechanism was settled. The issue in paragraph 2 seemed largely to depend on the discussion of article 47, concerning removal from office. Another important issue was whether the Prosecutor and the Deputy Prosecutor or Prosecutors should serve on a full-time or a part-time basis.

51. Article 43, paragraph 3, raised an issue regarding skills and qualifications, namely whether the Prosecutor and the Deputy Prosecutor should have trial or prosecution experience. In order to allow flexibility, it might be desirable to opt for the expression "extensive experience" rather than specify a number of years.

52. In article 43, paragraph 4, one proposal was that the Deputy Prosecutor should be appointed by the Prosecutor. That was related to the proposal in article 47, paragraph 2 (c), that the Prosecutor should be able to remove the Deputy Prosecutor from office. Those issues might need discussion.

53. Article 43, paragraph 7, dealt with disqualification. The question of the relevance of nationality should probably be considered in conjunction with the issue raised in article 42, paragraph 2. A related issue was whether disqualification should be decided on by the Presidency, the Appeals Chamber or the judges of the Court.

54. Paragraph 9, in square brackets, provided that the Prosecutor should appoint advisers with expertise on specific issues such as gender violence. One solution might be to include that particular provision in the Rules of Procedure and Evidence rather than in the Statute.

55. Paragraph 10 would provide for the protection of witnesses called by the prosecution, and for the inclusion in the Prosecutor's staff of people with expertise in trauma and matters related to sexual violence. The issue might better be considered under article 44, paragraph 4, which would establish a "Victims and Witnesses Unit".

56. Under article 44 itself, issues that arose were whether the States parties or the judges should elect the Registrar, what majority would be required and whether the Deputy Registrar should be elected or appointed. Paragraph 4 raised issues also covered by article 68, paragraph 5, in part 6 of the draft Statute. The question of the proper location of the paragraph, if it was included, might have to be considered.

57. Article 45, paragraph 4, allowing personnel seconded from States and organizations to assist in the work of organs of the Court, was controversial.

58. With regard to article 47, an issue that arose was whether it should be possible for the Deputy Prosecutor to be removed from office by the Prosecutor or only by the States parties. Paragraph 3 raised the issue whether the rights of those whose conduct was challenged should be governed by the Rules of Procedure and Evidence or the Regulations of the Court. As such matters were central to the functioning of the Court, he suggested that the Committee might consider whether they should not be governed by the Rules of Procedure and Evidence.

59. Article 52 dealt with the Rules of Procedure and Evidence and raised the question whether they should be an integral part of the Statute and annexed to it, as provided for in option 1 for paragraph 1. That would have implications for ratification and possibly also for signature. Option 2 was much more flexible. It provided merely that the Rules of Procedure and Evidence, which might possibly be adopted together with the Statute, should not be inconsistent with the Statute. In paragraph 2, the majority needed for the adoption of amendments to the Rules of Procedure and Evidence would need to be considered.

60. Finally, article 53, on the Regulations of the Court, raised three problems. The first issue was whether they should be adopted by a two-thirds or an absolute majority of the judges. The second issue concerned precedence in the case of a conflict between the Rules of Procedure and Evidence and the Regulations of the Court. The third issue related to the role of States parties in the elaboration of the Regulations.

61. **Mr. Addo** (Ghana) said that he was satisfied with the thrust of article 42, and urged the removal of the brackets in paragraphs 2 and 3. The provisions of article 43 were adequate, but the functions in paragraph 10 would be better performed by the Office of the Registrar. He was not in favour of article 45, paragraph 4.

62. **Mr. McCook** (Jamaica) wished to see article 45, paragraph 4, deleted. The staff of the Court should be employed in accordance with its needs under the relevant provisions of the Statute. Staff should not be seconded from other bodies;

concerns about so-called gratis personnel had been the subject of extensive discussions in other United Nations forums.

63. **Mr. Dive** (Belgium) agreed to article 38, paragraph 2, and article 39, paragraph 4, in toto and proposed the deletion of the square brackets. In article 42, he was in favour of the first two paragraphs; he favoured the first bracketed alternative in paragraph 1 and the removal of the square brackets in paragraph 2.

64. In article 43, paragraph 1, the text in square brackets should be kept. He favoured keeping paragraph 9 and deleting paragraph 10. The rules on protection for witnesses should be a matter for the Registrar. He was therefore in favour of keeping paragraph 4 of article 44. The Registrar should be appointed by the judges, with a term of office of nine years, in line with that of the judges and the Prosecutor.

65. In article 45, he favoured keeping paragraph 4. The rules in article 47, paragraph 2, should be the same for the Deputy Prosecutor as the Prosecutor, and the first subparagraph (c) should be deleted.

66. Under article 49, paragraph 1, there should be the same privileges and immunities for the judges, the Prosecutor, the Deputy Prosecutor, the Registrar and the Deputy Registrar. In paragraph 4, the first bracketed alternative in subparagraph (a) should be chosen, and subparagraph (b) should be deleted.

67. In article 52, he was in favour of option 2. The Rules of Procedure and Evidence should be adopted by a two-thirds majority of States present and voting in the Assembly of States Parties. There should be no link with the adoption of the Statute. The emergency procedure in paragraph 3 should also require a two-thirds majority.

68. As for article 53, paragraph 1, he was in favour of adoption of the Regulations by an absolute majority of judges, because if a two-thirds majority was not obtained the Court might have no regulations. The last sentence in brackets should be deleted.

69. **Mr. Bello** (Nigeria) said he wished to point out that, if it was decided that judges should serve full-time, there would be no need for article 41, paragraph 3.

70. Under article 43, both the Prosecutor and the Deputy Prosecutor should serve full-time and be elected by an absolute majority of the States parties. In paragraph 8, disqualification of the Prosecutor or the Deputy Prosecutor should be decided on by the Presidency.

71. In article 44, paragraph 2, the judges should, by an absolute majority, elect a Registrar and a Deputy Registrar. Paragraph 4 of that article should be moved to article 43. It was the Prosecutor who had direct contact with the victims and the witnesses and who should arrange for assistance to them.

72. Article 45, paragraph 4, could be deleted. The issues concerned should be dealt with in parts 9 and 10 of the Statute.

Alternatively, that provision could be worded: "The Presidency or the Office of the Prosecutor may request the assistance of personnel from any State Party, intergovernmental or non-governmental organization, in the exercise of its functions under this Statute."

73. In article 47, paragraph 2, removal from office of both the Prosecutor and the Deputy Prosecutor should be decided on by a majority of the States parties. He agreed with the proposal for an additional article appearing in footnote 28 of document A/CONF.183/2/Add.1 and Corr.1. In article 49, paragraphs 1 and 2 should be aligned so that the officers in question enjoyed the same diplomatic privileges and immunities in the exercise of their duties under the Statute.

74. **Mr. Matsuda** (Japan) thought that the reference in article 42, paragraph 1, should be to the Regulations of the Court rather than the Rules of Procedure and Evidence, for the reasons given earlier by the Coordinator. Paragraph 2, on the grounds for the disqualification of judges, was very important in terms of the independence and the impartiality of the Court. The grounds for disqualification must be in the Statute itself rather than in the Rules of Procedure and Evidence. The bracketed language in that paragraph should be retained. In paragraph 3, only the Prosecutor or the accused should have the right to request the disqualification of a judge.

75. In article 49, paragraph 1, he supported diplomatic privileges and immunities for judges, the Prosecutor and Deputy Prosecutors, but the Registrar and the Deputy Registrar should come under paragraph 2. In paragraph 2, the privileges and immunities enjoyed should be in line with those of the staff of the United Nations. Paragraph 2 might therefore be amended so that the officials concerned would enjoy "such privileges and immunities as are accorded to officials of the United Nations under article V of the Convention on the Privileges and Immunities of the United Nations of 13 February 1946". The first sentence of paragraph 3 was acceptable in principle but the reference to counsel and experts should be clarified. The second sentence was superfluous; it was not necessary to accord such immunities to counsel and witnesses. Their correct treatment was sufficiently ensured by the first sentence.

76. **Mr. Panin** (Russian Federation) would prefer the deletion of article 39, paragraph 4, and the reference to an interested State in article 42, paragraph 3. In article 43, paragraph 4, both the Prosecutor and the Deputy Prosecutor should be elected by the States parties. He had no objection to paragraphs 9 and 10 of that article being transferred to the Rules of Procedure and Evidence. In article 45, paragraph 4, he had doubts regarding personnel being detailed by non-governmental organizations. In article 47, he agreed with the formulation of paragraph 2 (a). The Deputy Prosecutor and the Registrar should be removed from office by a decision of the States parties. The Deputy Registrar could be removed by the judges.

77. Finally, the Rules of Procedure and Evidence should be an integral part of the Statute.

78. **Mr. Nyasulu** (Malawi) said that article 38 would depend on whether article 37 provided for re-election of judges. A person replacing a judge whose term had not yet expired should enjoy the same eligibility for re-election as his predecessor. In article 39, paragraph 3, the President should have responsibility for administration of the Court, which would include supervision of the Registrar and staff, but the words in brackets should not be retained because they implied an undue restriction on the Registrar. The Court should be left to develop its own internal arrangements for effective implementation of the Statute.

79. In article 42, paragraph 1, the reference should be to the Regulations of the Court. In paragraph 2, whether nationality should be a ground for disqualification might depend on the circumstances of the particular case. In paragraph 3, a State should not be allowed to ask for the disqualification of a judge. The Court would be dealing with individuals, and the matter should be left to the individuals concerned or the Prosecutor.

80. In article 43, paragraph 2, prosecutors should serve on a full-time basis. He would prefer "extensive ... experience" to "ten years ... experience" in paragraph 3. Both the Prosecutor and the Deputy Prosecutor should be elected by secret ballot by the Assembly of States Parties, to serve for nine years, non-renewable. There was no reason to restrict the age of the Prosecutor or Deputy Prosecutor. In paragraph 8, disqualification should be decided on by the judges of the Court. Paragraph 9 should be deleted. Article 43, paragraph 10, should be dealt with under article 44, paragraph 4, taking into account article 68. In article 44, paragraph 2, the judges should appoint the Registrar for a term of nine years.

81. **Mr. Krokhmal** (Ukraine) said that article 42, paragraph 3, should include reference to an interested State because the case considered might have some impact on States. He agreed that article 45, paragraph 4, was superfluous. Article 49, paragraph 3, giving immunity to witnesses and experts, was important and must be retained. In article 52, he was in favour of option 1, on the assumption that the Rules of Procedure and Evidence would have equal legal value with the Statute.

82. **Mr. Pérez Otermin** (Uruguay) said that article 45, paragraph 4, should be deleted. The United Nations had experienced problems with staff on loan or on secondment, especially in peacekeeping operations, because they were not part of the regular staff. That mistake should not be repeated with the Court.

83. **Mr. Al Awadi** (United Arab Emirates), supported by **Mr. Shukri** (Syrian Arab Republic), said that, in article 38, paragraph 2, the term of office of a judge elected to fill a vacancy should not exceed the term of office of his predecessor. As for article 39, the square brackets in paragraph 3 (a) should be deleted. Paragraph 4 of that article should be retained.

84. In article 42, paragraph 1, the words in brackets should be replaced by "Regulations of the Court and their annexes". All the brackets in paragraph 2 should be deleted. In paragraph 3,



the reference to an interested State should be deleted because States would not be party to the proceedings.

85. In article 43, paragraph 1, the term "complaints" should be deleted and the term "referrals" retained. In paragraph 2, the reference to different legal systems should be kept. In paragraph 4, the reference to the appointment of the Deputy Prosecutor should be deleted. The entire text of paragraph 7 should be retained.

86. Article 45, paragraph 4, should be dropped because it could have an adverse impact on the independence of the Court.

87. In article 47, paragraph 1, the words in square brackets should be replaced by the words "and its annexes". The subparagraphs of paragraph 2 could be replaced by words such as "by the body in which the person concerned discharged his or her functions". As for article 52, paragraph 1, he favoured option 2, with provision for a two-thirds majority, and the deletion of paragraph 3. In article 53, paragraph 1, an absolute majority should suffice for the adoption of the Regulations of the Court.

88. **Mr. El Masry** (Egypt), referring to article 43, thought that, to maintain a balance, the President of the Court and the Prosecutor should not have the same nationality or come from the same geographical group.

89. There could be objections to article 45, paragraph 4, since it could expose the Court to undesirable influence.

90. **Mr. Quintana** (Colombia) associated himself with everything said by the representatives of Jamaica and Uruguay on article 45, paragraph 4, which should be deleted.

91. **Mr. Nathan** (Israel) said that in article 42, paragraph 2, the material in square brackets should be kept because, in the situations described, there might be a conflict of interests. He opposed the inclusion in paragraph 3 of "an interested State"; the right in question should be limited to the Prosecutor and the accused.

92. The wording of article 43 on the Office of the Prosecutor might not be consistent with article 12. In paragraph 3, the qualifications of the Prosecutor and the Deputy Prosecutor should include 10 years' practical experience in the prosecution of criminal cases. Their term of office should be nine years, non-renewable.

93. Concerning paragraph 5, the Prosecutor and the Deputy Prosecutor should serve full-time and not engage in any other occupation of a professional nature; that would lead to a conflict of interests. The bracketed material in paragraph 7 should be retained.

94. The reference in article 47, paragraph 1, should be to the Regulations of the Court. In subparagraph (a), paragraph 2, a two-thirds majority should be required, while in subparagraphs (b) and (c) an absolute majority would be sufficient.

95. In article 49, privileges and immunities should apply similarly to judges, the Prosecutor, the Deputy Prosecutor and the Registrar. In paragraph 3, the immunity referred to in the second and third sentences was absolutely necessary for the proper functioning of the Court.

96. In article 53, it should be stated that the Regulations of the Court formed an integral part of the Statute, so that States parties signing the Statute would already be aware of the contents of the Regulations.

97. **Ms. Tomič** (Slovenia) supported the creation in article 44, paragraph 4, of a "Victims and Witnesses Unit" within the Registry. Only the Registry would be sufficiently neutral to provide that protection. The provisions would have to be harmonized with those of article 68, paragraph 5.

98. In article 52, she supported the proposal in option 2 that the Rules of Procedure and Evidence should enter into force upon adoption by the Assembly of States Parties, preferably by an absolute majority of those present and voting.

99. **Ms. Bajrai** (Singapore) said that if nationality was to be specified as a ground for exclusion in article 42, paragraph 2, and article 43, paragraph 7, nationals of both the complainant State and the State on whose territory the offence was alleged to have been committed should be disqualified as judges, Prosecutors and Deputy Prosecutors.

100. **Mr. Gramajo** (Argentina) said that the text of article 42, paragraph 2, should remain as it stood and the square brackets should be removed. Concerning article 44, paragraph 4, the Victims and Witnesses Unit should come under the secretariat of the Court or the Registry of the Court, not the Prosecutor's Office. Article 43, paragraph 10, should be deleted.

101. **Ms. Nagel Berger** (Costa Rica), referring to article 43, paragraph 9, said that there must be at least one adviser on gender violence in the Office of the Prosecutor. The General Assembly had acknowledged the importance of the problem of violence against women, yet there were still eminent jurists who did not understand that gender violence required special treatment.

102. **Mr. Lagèze** (France) was in favour of deleting the words in brackets in article 39, paragraph 3 (a). Paragraph 4 could be replaced by a provision saying that, in performing its tasks under paragraph 3 (a), the Presidency would act in coordination with the Prosecutor.

103. In article 42, paragraph 1, he preferred the words "Regulations of the Court", and in paragraph 3 the reference to "an interested State" should be deleted. Only the Prosecutor or the accused should be able to request the disqualification of a judge.

104. In article 43, the Prosecutor and the Deputy Prosecutors should be elected in the same way as judges and, to ensure their independence, for the same non-renewable term of nine years. They should exercise their functions on a full-time basis.



105. Regarding article 44, his preference, in the interests of proper management, would be for an arrangement which, while according a specific sphere of competence to the Registry, would place it under the Presidency.

106. The Rules of Procedure and Evidence, in article 52, should be adopted by the Assembly of States Parties by an absolute majority. They should be negotiated only after the adoption and signature of the Statute by the States concerned.

107. **Mr. Mahmood** (Pakistan), speaking on article 43, said that the Prosecutor should act only in cases referred to him by a State. Consequently, the bracketed words in paragraph 1 concerning information related to the alleged commission of a crime should be deleted. The Prosecutor should be elected by the States parties by a two-thirds majority. The Deputy Prosecutor could be appointed by the Prosecutor, thus obviating any need for States parties to meet every time a Deputy Prosecutor was to be appointed. The Prosecutor and Deputy Prosecutor should hold office for a non-renewable term of seven years.

108. Under article 47, paragraph 2 (a), the removal of a judge should be by a two-thirds majority of States parties. Under paragraph 2 (b), the removal of the Prosecutor should be by an absolute majority of States parties. Under paragraph 2 (c), if the Deputy Prosecutor was appointed by the Prosecutor he should be removed by the Prosecutor; otherwise, by a majority of States parties. The Registrar, if appointed by the Court, should be removed by a majority of judges or, if elected, by a majority of States parties. The Deputy Registrar, if appointed by the Registrar, should be removed by the Registrar or, if elected, by the States parties.

109. In article 52, he supported the adoption of the Rules of Procedure and Evidence by a two-thirds majority of States parties present and voting.

110. **Mr. Yépez Martínez** (Venezuela) said that the bracketed text in article 38 should be retained. In article 39, paragraph 3, the bracketed text was acceptable except that it should be up to the Registrar, not the Presidency, to supervise secretariat staff.

111. All the brackets should be deleted from article 42, paragraph 2, article 43, paragraphs 1, 5 and 7, and article 44, paragraph 4. Article 45, paragraph 4, should be deleted. In article 52, he preferred option 2.

112. **Ms. Vega Pérez** (Peru) said that in article 42, paragraph 3, only the Prosecutor or the accused should have the right to request the disqualification of a judge. That right should not be given to an interested State, which would not be a party to the process.

113. **Mr. Shariat Bagheri** (Islamic Republic of Iran) accepted the text of article 38, paragraph 2, except the part in square brackets. He supported the entire text of article 39, paragraph 3, including the phrase in brackets. Paragraph 4 should be deleted.

114. In article 42, he agreed with paragraph 1 and with the entire text of paragraph 2. He could accept article 43 provided that it did not give the Prosecutor *ex officio* powers. In paragraph 4, the Prosecutor and Deputy Prosecutors should be elected by States parties.

115. In article 44, the Registrar should be elected by the Assembly of States Parties and elected for the same non-renewable term as judges. He was in favour of paragraph 4. In article 45, the phrase "or non-governmental organization" should be deleted. In article 47, serious misconduct needed to be defined. Decisions to remove judges were very serious, and should be taken by a two-thirds majority of States parties on the recommendation of two thirds of the judges of the Court. In paragraph 2 (b), the text in brackets should be retained, and the first subparagraph (c) should be deleted. Removal of the Registrar or the Deputy Registrar should require a majority vote of the judges. He agreed with article 47, paragraph 3, and with article 49. In article 52, he was in favour of option 1.

116. In article 53, he would keep the bracketed last sentence of paragraph 1. The Regulations of the Court should be adopted by a two-thirds majority of the judges. Paragraphs 2 and 3 were acceptable.

117. **Ms. Shahan** (Libyan Arab Jamahiriya) said that in article 43, paragraph 2, the brackets around the provision on the representation of different legal systems should be removed. In paragraph 4, the Prosecutor and Deputy Prosecutor should be elected by an absolute majority of the States parties. Article 45, paragraph 4, should be deleted.

118. **Ms. Pibalchon** (Thailand) said that, in article 43, paragraph 4, the Prosecutor and Deputy Prosecutor should be elected by secret ballot by an absolute majority of States parties. The excusing and disqualification of the Prosecutor, dealt with in paragraphs 6 to 8, should be the subject of a separate article, in line with the excusing and disqualification of judges in article 42. Thirdly, she supported article 43, paragraph 9, in principle, whether included in that article or in the Rules of Procedure and Evidence. She supported the establishment of the Victims and Witnesses Unit.

119. On article 49, the persons referred to in paragraph 3 should not remain immune once they had been discharged from their functions.

120. **Ms. Ramoutar** (Trinidad and Tobago) supported the general thrust of article 43, especially paragraph 3 on the qualifications of the Prosecutor, which should be consistent with those for judges in respect of criminal trial experience. The Deputy Prosecutor should be elected in the same manner as the Prosecutor. The Registrar should be elected by the judges for a term of five years, renewable only once. The Registrar should be under the authority of the President. The judges, the Prosecutor, the Deputy Prosecutor, the Registrar and the Deputy Registrar should enjoy diplomatic privileges and immunities. The words in square brackets in article 49, "when engaged in

the business of the Court”, should be deleted, as those officers should enjoy such privileges and immunities at all times so that they could perform their functions independently.

121. In article 39, paragraph 3 (a), the text in square brackets could be deleted, as that idea was contained in the term “due administration of the Court”. The Victims and Witnesses Unit should be established in the Registry of the Court, since victims or witnesses might be required to testify for either the prosecution or the defence.

122. **Mr. Fortuna** (Mozambique) agreed with paragraphs 1 and 2 of article 42. With regard to paragraph 3, neither the Prosecutor nor an interested State should have the right to take action on the removal of judges. Regarding article 43, paragraph 4, the age limit for appointment as Prosecutor should be lowered. He agreed with the election of the Registrar by secret ballot by the judges under article 44, paragraph 2. In article 45, paragraph 1, the President of the Court should appoint the staff of the Registry. In article 49, the President of the Court should be the one to waive the privileges or immunities of the Registrar, Deputy Registrar and staff of the Registry.

123. **Ms. Li Ting** (China) said that, in article 43, paragraph 4, the Deputy Prosecutor, like the Prosecutor, should be elected by the States parties. Article 45, paragraph 4, should be deleted. In article 49, paragraph 3, she suggested the deletion of the text in brackets. In article 52, paragraph 1, she could accept option 2, but the legal status of the Rules should remain as under option 1. She was flexible on article 52, paragraph 3, but any decision taken should be by a two-thirds majority.

124. **Ms. Joyce** (United States of America) stressed the need for cohesion in the Prosecutor’s Office and also with respect to the Court as a whole. Election by States parties of the Deputy Prosecutor and the Registrar would be tantamount to giving them a separate power base. That would undermine the control of the Prosecutor over his or her Office and possibly the ability of the judges to keep the Registrar in check. The Deputy Prosecutor should be appointed by the Prosecutor and the Registrar by the judges.

125. **Mr. Ruberwa** (Democratic Republic of the Congo) said that the reference to a three-year period in article 38, paragraph 2, was arbitrary. A judge elected to fill a vacancy should be eligible for re-election if less than half of the predecessor’s term remained to be completed. Articles 39, 43 and 44 should be merged. Ensuring the safety of witnesses should be a task of the Registrar under the supervision of the President of the Court, with the assistance of the Prosecutor.

126. In article 42, paragraph 1, the reference should be to the “Regulations of the Court” rather than “Rules of Procedure and Evidence”. Regarding paragraph 2, the criterion of nationality should be maintained, because a judge might simply be partial because he had the same nationality as a party to the case in

question. A judge should also be able to disqualify himself in the circumstances covered by that article. Under paragraph 3, any interested party, including the Prosecutor, the accused, or an interested State, should have the right to request disqualification.

127. In article 43, paragraph 4, the Prosecutor and his deputies should be elected by secret ballot by a two-thirds majority of the States present and voting. Under article 44, the Registrar should be elected by the States parties and not the judges. The judges, the Prosecutor and the Registrar should all serve the same renewable term of five years.

128. He agreed with the deletion of article 45, paragraph 4, as acceptance of seconded staff might result in abuses. In article 47, paragraph 2, the second subparagraph (c) should be deleted.

129. In article 49, he agreed with paragraph 1, with the removal of the square brackets, and also supported paragraph 3. In article 52, he agreed with option 2, but a two-thirds majority should be needed.

130. **Ms. Mäkelä** (Finland) said that both the Registrar and the Prosecutor should be independent of the Presidency, and both they and their deputies should be elected by the States parties. States parties should also decide as to their possible removal from office. She was in favour of the provision in article 43, paragraph 9, that the Prosecutor should appoint advisers with legal expertise on specific issues including sexual and gender violence and violence against children. The Victims and Witnesses Unit should be in a neutral location in the Registry.

131. **Ms. Brady** (Australia) said that she would like the deletion of the reference to “an interested State” in article 42, paragraph 3. She would like to retain article 43, paragraph 9, regarding the appointment of advisers with expertise on issues including sexual violence and violence against children. Regarding article 43, paragraph 10, the provision of protective measures for prosecution witnesses should be dealt with by the Victims and Witnesses Unit covered by article 44, paragraph 4. That paragraph should be retained. However, the provision in article 43, paragraph 10, requiring the Office of the Prosecutor to include staff with expertise in trauma, including trauma related to crimes of sexual violence, should also be retained.

132. **Mr. Chun Young-wook** (Republic of Korea) said that he would prefer, in article 42, paragraph 2, not to include the text in brackets regarding the nationality of the judge. He supported restricting the right, in article 42, paragraph 3, to request the disqualification of a judge to the Prosecutor and the accused. In article 43, paragraph 1, all the brackets should be removed. He had no problem with the bracketed text in article 43, paragraph 9. In article 44, paragraph 2, the Deputy Registrar should be appointed by the Registrar. He supported the provision in article 44, paragraph 4. Finally, in article 52, paragraph 1, he preferred option 2.

*The meeting rose at 6.45 p.m.*

## 16th meeting

Thursday, 25 June 1998, at 10.20 a.m.

*Chairman:* Mr. Kirsch (Canada)

A/CONF.183/C.1/SR.16

### Organization of work (*continued*)

1. The Chairman said that at the previous meeting the Committee had completed consideration of the articles in part 4 of the draft Statute. The current meeting would be a very short one, and would be followed by a meeting of the Working Group on International Cooperation and Judicial Assistance. The Committee would reconvene late in the afternoon to consider the report of the Working Group on Procedural Matters concerning part 5 of the draft Statute.

2. He understood that some delegations had had problems in finding out when meetings were going to take place, particularly informal consultations. He would make every effort to ensure that all participants were kept fully informed by posting a schedule of each day's meetings, whether formal meetings or informal consultations. The schedule would be changed on a daily basis.

*The meeting rose at 10.30 a.m.*

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## 17th meeting

Thursday, 25 June 1998, at 6 p.m.

*Chairman:* Mr. Kirsch (Canada)

A/CONF.183/C.1/SR.17

### Agenda item 11 (*continued*)

**Consideration of the question concerning the finalization and adoption of a convention on the establishment of an international criminal court in accordance with General Assembly resolutions 51/207 of 17 December 1996 and 52/160 of 15 December 1997 (A/CONF.183/2/Add.1 and Corr.1 and A/CONF.183/C.1/WGPM/L.2 and Corr.1 and 2)**

#### DRAFT STATUTE

##### PART 5. INVESTIGATION AND PROSECUTION

*Report of the Working Group on Procedural Matters*  
(A/CONF.183/C.1/WGPM/L.2 and Corr.1 and 2)

1. The Chairman invited the Chairman of the Working Group on Procedural Matters to introduce the Working Group's report concerning the articles in part 5 of the draft Statute.

2. Ms. Fernández de Gurmendi (Argentina), Chairman of the Working Group on Procedural Matters, introducing the report (A/CONF.183/C.1/WGPM/L.2 and Corr.1 and 2), said that although the Group had not been able to reach agreement on all the paragraphs of the articles contained in part 5, it had agreed on most of them. In certain cases it had been decided to divide up the existing text into shorter articles, with the result that part 5 now had more articles than before.

3. She drew attention to certain corrections to be made in the report reflecting agreement reached since the finalization of the document.

4. In order to facilitate the work of the Drafting Committee, she would like to draw attention to the fact that the Working Group had decided to substitute the word "charges" for the word "indictment" and to replace the term "suspect" with a formulation which would be clearer for the various legal systems which would have to interpret the Statute, such as "person in respect of whom there are grounds to believe that he or she has committed a crime". She also wished to point out that the use of the expression "reasonable basis" in paragraph 1 of article 54 and the use of the expression "sufficient basis" in paragraph 3 was not an accidental inconsistency, but rather the result of a deliberate decision on the part of the Working Group following discussion of the issues involved. Similarly, the decision to divide up certain articles and to combine certain paragraphs had been taken after long discussion, with a view to achieving a delicate balance on a number of substantive issues.

5. She thanked all delegations for their cooperation, and hoped that the texts being submitted would meet with the approval of the Committee.

6. The Chairman said he took it that it was the wish of the Committee to refer the report of the Working Group to the Drafting Committee.

7. *It was so decided.*

*The meeting rose at 6.20 p.m.*

## 18th meeting

Monday, 29 June 1998, at 10.25 a.m.

*Chairman:* Mr. Kirsch (Canada)

A/CONF.183/C.1/SR.18

### Agenda item 11 (*continued*)

**Consideration of the question concerning the finalization and adoption of a convention on the establishment of an international criminal court in accordance with General Assembly resolutions 51/207 of 17 December 1996 and 52/160 of 15 December 1997 (A/CONF.183/2/Add.1 and Corr.1 and A/CONF.183/C.1/L.16)**

#### DRAFT STATUTE

##### PART 11. ASSEMBLY OF STATES PARTIES

##### PART 12. FINANCING OF THE COURT

1. **Mr. S.R. Rao** (India), Coordinator for parts 11 and 12, said that part 11 consisted of article 102. With respect to paragraph 1, he suggested that the Committee of the Whole should focus on the question of which States should be members or observers in the Assembly of States Parties. By way of an analogy, he noted that several States not yet parties to the United Nations Convention on the Law of the Sea took part in meetings of the States parties to the Convention as observers.

2. In paragraph 2, which dealt with the functions of the Assembly, some subparagraphs or parts of subparagraphs were in square brackets.

3. Paragraph 2 (a) referred to the Preparatory Commission for the International Criminal Court whose establishment was proposed (see A/CONF.183/2/Add.1 and Corr.1, annex).

4. On paragraph 2 (d), he said that it was considered that the Assembly should approve the budget of the Court, while the budget estimates could be prepared by the Court itself. Paragraph 2 (e) dealt with the possibility that additional judges might be required. Paragraph 2 (f), on matters relating to non-cooperation, would have to be coordinated with article 86, in part 9 of the draft Statute. Paragraph 2 (g) covered possible future functions of the Assembly which could not be foreseen at present.

5. Paragraph 3 dealt with the Bureau of the Assembly. On 3 (a), a decision was needed as to what the number of members should be. It had also been suggested that there should be more than one Vice-President. The criteria for election of the Bureau (3 (b)) might be considered in the light of decisions taken concerning other bodies mentioned in the Statute.

6. Paragraph 3 (c) referred to other subsidiary bodies that might be established by the Assembly. A decision was needed as to whether any oversight mechanism should deal with all the operations of the Court or only with non-judicial administration.

7. Paragraph 4 mentioned the possibility of holding special sessions of the Assembly, and the question was whether they could be convened by the Bureau or should be convened only at the request of one third of the States parties.

8. Paragraph 6 was in square brackets. It dealt with loss of voting rights by States failing to pay contributions and would be subject to finalization of the provisions on the financing of the Court.

9. Turning to part 12 ("Financing of the Court"), he said that article 104 dealt with the funds of the Court, and there were three options. According to option 1, the funds would comprise assessed contributions made by States parties. Under option 2, the expenses of the Court would be borne by the United Nations, subject to the approval of the General Assembly. That would imply that not only the States parties to the Statute but all States Members of the United Nations would be contributing to the expenses of the Court. Option 3 provided that the Court's funds should include both assessed contributions by States parties and funds provided by the United Nations, but that during an initial phase, still to be determined, the expenses should be borne by the United Nations, subject to the approval of the General Assembly.

10. Article 105 dealt with voluntary contributions, which were to be utilized in accordance with criteria adopted by the States parties. With respect to article 106 ("Assessment of contributions"), a decision still had to be taken as to whether assessments should be based on the scale used for the regular budget of the United Nations or on a multi-unit class system like that used in the International Telecommunication Union or the Universal Postal Union.

11. He suggested that informal discussions should be held on the question of financing.

12. **Mr. Yáñez-Barnuevo** (Spain), introducing the amendment in document A/CONF.183/C.1/L.16, said that the proposal relating to article 102 was for the addition of a paragraph specifying that the official and working languages of the Assembly of States Parties should be those of the General Assembly, namely Arabic, Chinese, English, French, Russian and Spanish.

13. With regard to article 102, paragraph 1, he considered that the Assembly should be composed of States parties but that other States signatories either to the Statute or to the Final Act should participate as observers.

14. With regard to paragraph 2, he was in favour of the Assembly's considering recommendations of the preparatory

commission and considering any question relating to non-cooperation by States parties.

15. As to paragraph 3 (a), the President of the Court, the Prosecutor and the Registrar should be able to participate as observers but not as members in the meetings of the Bureau; the judicial functions of the Court must be kept separate from political and administrative considerations and the functions of the Assembly of States Parties.

16. With regard to paragraph 5, for decisions of the Assembly the majority should be half of the States parties plus one, except for amendment of the Statute and similar matters.

17. It would be important to include paragraph 6 as an incentive for payment of contributions on time and in full.

18. The key article in part 12 was article 104, and his delegation considered that the only option on which consensus could be reached was option 3.

19. With regard to article 106, the assessment of contributions should be based on the scale used for the regular budget of the United Nations. References should be made to the Assembly of States Parties in that article and in articles 103 and 105.

20. **Mr. Skibsted** (Denmark), speaking on part 12 and in particular article 104 and its three options, said that his delegation considered that stable financing was essential for the International Criminal Court to run effectively and smoothly. Financing of the Court should be a collective responsibility of all States, given the Court's universal nature and mandate. The establishment of the Court would be relatively expensive, and the financial burden of sharing in the costs should not be a disincentive to ratifying the Statute. The funding system should also reflect the Security Council's special responsibility for maintaining international peace and security. Expenses connected with the referral of situations to the Court by the Council should not be borne by States parties alone. Moreover, funding by States parties might subject the Court to the control of a small number of States. Attempts to finance international bodies entirely from contributions by States parties had proved unworkable in the past. For instance, the work of the Committee against Torture and the Committee on the Elimination of Racial Discrimination had been paralysed because dues had not been paid, and human rights monitoring bodies were now financed from the regular budget of the United Nations. The International Court of Justice was funded collectively by all States through the regular budget of the United Nations, even though only some 50 Member States accepted the compulsory jurisdiction of the Court; those States did not assume greater financial responsibility or greater budgetary control. Voluntary contributions should be encouraged, but only as additional funding.

21. Lastly, penalties for non-payment of contributions should be incorporated in the Statute.

22. **Mr. Mahmoud** (Iraq), speaking on article 102, said that his delegation would like the last sentence of paragraph 1 to read as follows: "The signatories of the Statute or the Final Act may be observers in the Assembly."

23. With respect to paragraph 2 (e), his delegation was in favour of full-time judges; the reference to judges appointed on a part-time basis should be deleted.

24. With regard to paragraph 2 (f), his delegation considered that the Assembly of States Parties should be the sole body to consider non-cooperation by States parties or States not parties.

25. Regarding paragraph 3 (b), he considered that the Bureau should be elected on the basis of equitable geographical distribution; it was insufficient to say that equitable geographical distribution should be "taken into account".

26. Turning to part 12, he said that his delegation preferred option 1 for article 104, with the funds of the Court comprising assessed contributions made by States parties.

27. **Mr. Al Hoiesh** (Saudi Arabia) said that his delegation would prefer option 3 for article 104 and would like to keep the provision for voluntary contributions in article 105.

28. With respect to article 106, his delegation would prefer the Court's scale of assessments to be that of the regular budget of the United Nations.

29. **Mr. Al-Shaibani** (Yemen) said that his delegation also preferred option 3 in article 104. With regard to article 106, his delegation would prefer the scale of assessment used for the regular budget of the United Nations.

30. **Ms. Chatoor** (Trinidad and Tobago), speaking on behalf of the States members of the Caribbean Community, endorsed the remarks of the representative of Denmark with respect to article 104. She had no particular difficulty with article 105. With respect to article 106, her preference was for the scale used for the regular budget of the United Nations, but consideration might also be given to the creation of a separate account, as with the United Nations peacekeeping budgets or the International Tribunals for the Former Yugoslavia and Rwanda.

31. With regard to article 107, the establishment of an independent auditor would need to be considered closely, since the United Nations system already had a well-developed oversight mechanism.

32. **Ms. Sundberg** (Sweden) endorsed the remarks of the representatives of Denmark and Trinidad and Tobago regarding the financing of the Court. Stable funding could be achieved only through assessed contributions borne collectively by all States Members of the United Nations. In cases of referral by the Security Council, in particular, Sweden would be unwilling to accept anything but collective financing by all Member States.

33. Only signatories to the Statute could be considered as members of the Assembly of States Parties. Sweden supported the establishment of a preparatory commission to work on the Rules of Procedure and Evidence and other questions outstanding from the present Conference. It also believed that the Assembly of States Parties should consider the budget; however, if it was agreed that the United Nations should finance the Court, the General Assembly would actually take the final decision on the budget. Sweden would like the Assembly of States Parties to consider non-cooperation by States parties and refer such matters to the Security Council, but its attitude was flexible and would depend on the outcome of the consultations on article 86. Sweden supported the inclusion of a provision on the loss of voting rights for countries in arrears.

34. **Mr. Al-Amery** (Qatar) supported option 3 for article 104. His delegation would prefer to see article 105 deleted, in order to guarantee the independence and impartiality of the Court.

35. **Ms. Mokitimi** (Lesotho) said that her delegation could accept article 102, paragraph 2, in general. It supported the removal of the square brackets around paragraph 2 (a), and considered that 2 (b) should be harmonized with the provisions in paragraph 1 of article 41 and paragraphs 1 and 2 of article 43 to ensure that management oversight by the Assembly of States Parties did not impede the independence of the judges and the Prosecutor. Paragraph 2 (f) needed to be strengthened to ensure that the Assembly was able to deal effectively with non-cooperative States. Paragraph 6 should ensure that all members paid their assessed contributions in full and on time by providing for the automatic suspension of a member in arrears.

36. On part 12, she agreed that the United Nations regular budget would offer sounder financial backing, but feared that political manoeuvring might undermine the Court's independence. If that independence could be guaranteed, financing from the United Nations budget would be preferable. She was flexible about the idea of initial financing by the United Nations. She agreed that the Court should be able to receive contributions, financial or otherwise, from other sources. She considered that the United Nations scale should be used for assessments.

37. **Ms. Feder** (Uruguay), referring to article 105, said that her delegation did not agree with the proposal to allow voluntary contributions to be used to finance the Court's activities. A problem had arisen in the United Nations as a result of the secondment or loaning of staff, which was a form of voluntary contribution. Voluntary contributions would be inappropriate for the Court, and article 105 should be deleted.

38. Her delegation favoured option 1 for article 104.

39. **Ms. Betancourt** (Venezuela) said that her country was a co-sponsor of document A/CONF.183/C.1/L.16 in which it was proposed that the official and working languages of the Assembly of States Parties should be those of the General Assembly.

40. Regarding article 102, her delegation considered that only signatory States could be members of the Assembly of States Parties. Others could participate as observers. Her delegation also considered that it should be possible for the President of the Court, the Prosecutor and the Registrar to participate as observers in meetings of the Bureau of the Assembly.

41. With regard to article 104, her delegation considered that only States parties to the Statute should finance the expenditures of the Court. Her delegation was in favour of option 1. It also supported deletion of article 105, so as to guarantee the Court's impartiality. As to the scale of assessment of contributions, her delegation considered that the United Nations scale should be used.

42. **Mr. Scheffer** (United States of America), referring to the question of who should be observers in the Assembly of States Parties under article 102, paragraph 1, said that his delegation believed that all signatories to the Final Act should be invited as observers since all participants in the Conference were potential parties to the Statute.

43. With respect to paragraph 2 (a) he considered that, if the proposed preparatory commission was entrusted with drafting the Rules of Procedure and Evidence or "elements of offences", those texts should be completed and enter into force along with the Statute itself, in which case the Assembly would not need to adopt them.

44. The issue of the Assembly's role in handling cases of non-cooperation with the Court was being addressed in connection with part 9 and did not need to be debated by the Committee at that stage.

45. His delegation agreed that flexibility was needed in respect of other functions to be performed by the Assembly since it was difficult at present to envisage precisely what they would be.

46. With regard to paragraph 5, he said that decisions should certainly be made by consensus as far as possible, failing which the requirement should be a two-thirds majority of those present and voting, representing an absolute majority of the States parties.

47. Under article 104, the Court should be funded by States parties to the Statute, as in the case of the Organization for the Prohibition of Chemical Weapons and the Comprehensive Nuclear-Test-Ban Treaty Organization. The future Court resembled those organizations both in budgetary size and operational scope. It would be appropriate, however, for United Nations contributions to be made to cover part of the cost of referrals to the Court by the Security Council.

48. He welcomed the provision in article 105 for voluntary contributions, which would be essential if the Court was to respond effectively to all the demands that would be placed on it. He could not see on what legal basis the Court could be fully funded by the United Nations regular budget, even at the outset. The Court would be more independent and financially stable if

it did not have to compete with other United Nations programmes as the International Tribunals for the Former Yugoslavia and Rwanda had had to.

49 On the question of scales of assessment in article 106, his delegation strongly preferred a multi-unit class system along the lines of that used by the Universal Postal Union (UPU) or the International Telecommunication Union (ITU).

50 **Mr. Kawamura** (Japan) said, with respect to article 102, paragraph 1, that his delegation believed that States parties should be represented in the Assembly of States Parties and that the signatories of the Statute and the Final Act should be observers since they were potential States parties. The precedent of the International Seabed Authority could be followed.

51. With regard to paragraph 2 (d), the Assembly should consider and approve the budget of the Court, but in consultation with the President of the Court.

52. Paragraph 2 (f) should be retained, and he agreed that there was a need to ensure consistency between that provision and article 86.

53. With respect to paragraph 6, in order to ensure consistency with the Charter of the United Nations, the wording should be "two full years".

54. Turning to article 104, he agreed with the representative of the United States concerning the funds of the Court and was in favour of option 1. As an independent international organization, the Court's administrative and financial independence had to be ensured. There was an appropriate precedent in the International Tribunal for the Law of the Sea.

55. With respect to article 106, a multi-unit class system on the lines of that used in ITU or UPU would be appropriate. However, the wording "in accordance with an agreed scale of assessment" would be sufficient.

56. He suggested that a ceiling on States parties' contributions might be considered at some stage.

57. **Mr. Skillen** (Australia) said that his delegation supported option 2 for article 104 for the reasons given by the delegation of Denmark.

58. **Mr. Krokmal** (Ukraine), referring to article 102, paragraph 1, said that it would be advisable for States not parties to the Statute to be given observer status. With respect to paragraph 2 (d), he believed that the Assembly of States Parties should have the right to rule on financial issues. With regard to paragraph 3 (b), he believed that elections to the Bureau should take account of the principle of equitable geographical distribution and that there should be a provision requiring representation of each geographical group.

59. With regard to paragraph 5, he believed that a two-thirds majority was desirable for decision-making. With regard to

paragraph 6, he considered that a five-year period should be allowed for arrears.

60. Turning to article 104 on the funds of the Court, he believed that the Court should be financed by the contributions of States parties to ensure its independence.

61. Regarding article 106, he considered that the scale used for the regular budget of the United Nations was the most appropriate one.

62. **Mr. Qu Wencheng** (China) said in connection with article 102, paragraph 1, that his delegation considered that the signatories to the Final Act should be observers in the Assembly of States Parties. It was important that the signatories to the Final Act should be able to participate in such activities as considering draft rules of procedure and evidence.

63. With respect to the financing of the International Criminal Court, his delegation was in favour of option 1 for article 104. The future Court would be an independent body, unlike the International Court of Justice. If it was to remain independent, it should be funded by States parties.

64. With regard to article 105, his delegation considered that very strict criteria governing voluntary contributions would have to be drawn up to avoid their affecting the Court's impartiality. Any voluntary contributions would have to be complementary and additional to the main funding sources.

65. **Mr. Bartoň** (Slovakia), referring to article 102, paragraph 1, said that his delegation considered that States parties should have the status of members of the Assembly of States Parties. Signatories should have the status of observers.

66. In article 104, for the reasons given by the representatives of Denmark, Sweden and others, his delegation supported option 2. With respect to article 106, his delegation considered that the scale of assessments should be that of the United Nations.

67. **Mr. Agbetomey** (Togo) said that his delegation would prefer option 3 for article 104, as a middle course.

68. In respect of article 102, paragraph 2 (f), his delegation would prefer the wording "appropriate measures". With regard to paragraph 3 (a), there should be at least two Vice-Presidents.

69. **Mr. Rogov** (Kazakhstan), referring to article 102, said that his delegation considered that the signatory States of the Final Act should be observers in the Assembly of States Parties.

70. With regard to working languages, the working languages of the Court and the Assembly need not be the same; he thought that the working languages of the Assembly should be all the working languages of the United Nations.

71. With regard to article 104, his delegation considered that option 3 would be an acceptable compromise.

72. Concerning article 105, in his delegation's view the concern that voluntary contributions might influence the impartiality of the Court was unwarranted. Voluntary contributions might be useful.
73. **Mr. da Costa Lobo** (Portugal) said, in connection with article 102, that the representatives of States that had signed the Statute should be able to participate in the Assembly of States Parties as observers.
74. As to article 104, although it might be logical to provide for financing by States parties, in view of previous experience his delegation was inclined to support option 2. Even if another solution were adopted, at least during the early years the Court should be financed from the United Nations budget.
75. **Mr. Bhattarai** (Nepal), referring to article 102, paragraph 1, said that his delegation considered that signatories of the Final Act should be observers in the Assembly of States Parties, but would prefer the wording to be "may participate as observers in the Assembly". Paragraph 2 (a) should stand. He endorsed the views of the Japanese representative that consideration and approval of the Court's budget should take place in consultation with the President of the Court.
76. Paragraph 2 (f) should be retained and the opening wording should be "consider, upon recommendation of the Court ...". In paragraph 3 (b), he was in favour of the words "have a representative character". In paragraph 3 (c), he favoured the wording "non-judicial administration". In paragraph 6, he favoured the wording "two full years".
77. **Mr. Kessel** (Canada) said that his delegation supported the views expressed by the representatives of Denmark, Trinidad and Tobago and Sweden with respect to the funding of the Court.
78. **Mr. Luhonge Kabinda Ngoy** (Democratic Republic of the Congo), referring to article 102, paragraph 1, said that States not parties to the Statute should be observers in the Assembly of States Parties.
79. With respect to paragraph 5, he said that, in the absence of consensus, an absolute majority of States parties should be able to take decisions.
80. In paragraph 6, he considered that a three-year period would be appropriate.
81. In article 104, he was in favour of option 3.
82. Voluntary contributions might jeopardize the Court's independence and he was therefore in favour of deleting article 105.
83. In connection with article 106, he believed that the scale of assessments used for the regular budget of the United Nations should be adopted.
84. **Mr. Mansour** (Tunisia) said that his delegation was in favour of option 3 for article 104. It wished article 105 to be deleted in order to guarantee the Court's independence and impartiality. It supported articles 106, 107 and 102.
85. **Mr. Shukri** (Syrian Arab Republic), referring to article 102, paragraph 1, said that his delegation considered that the signatories of the Statute, not the Final Act, should be either observers or members in the Assembly of States Parties.
86. In paragraph 3 (b), he proposed that the words "as far as possible" should be deleted; representation of the principal legal systems of the world should be guaranteed. With respect to paragraph 6, he considered that a period of two full years was sufficient.
87. Turning to article 103, he thought that the words "by the States Parties" at the end should read "by the Assembly of States Parties".
88. In article 104, he preferred option 3. With regard to article 105, he was in principle against the idea of voluntary contributions, but would not oppose it if the wording of the article safeguarded their unconditionality. It would be for the Court to decide on the criteria for accepting or refusing such contributions.
89. With regard to article 106, he considered that the contributions of States parties should be based on the scale of assessments used for the regular budget of the United Nations.
90. **Mr. Fall** (Guinea), referring to article 102, paragraph 1, said that the signatories of the Statute would presumably be members of the Assembly of States Parties, and there would be advantages in the signatories of the Final Act being able to sit as observers.
91. In paragraph 2 (f), he would prefer the alternatives "of the Bureau" and "appropriate". With regard to paragraph 3 (a), he would like there to be more than one Vice-President. It would be for the Conference to determine the number of members of the Bureau to be elected on the basis of equitable geographical distribution. The President, the Prosecutor and the Registrar should be able to participate as observers in meetings of the Bureau.
92. In article 104, his preference was for option 2, subject to the approval of the General Assembly. Article 105 should be deleted. Lastly, he supported the proposal regarding official and working languages (A/CONF.183/C.1/L.16).
93. **Mr. Maiga** (Mali) said that his delegation agreed that, under article 102, paragraph 1, the signatories of the Statute should be able to participate as observers in the Assembly of States Parties, but was not in favour of the signatories of the Final Act participating in the Assembly.
94. Paragraph 2 (a) should be kept. He endorsed the comments made by the representative of Guinea concerning paragraph 2 (f). With respect to paragraph 3 (a), he agreed that the President of the Court, the Prosecutor and the Registrar or their representatives should be able, as appropriate, to participate as observers in the meetings of the Bureau. With regard to paragraph 3 (b), the Bureau should have a representative character taking into account equitable geographical distribution. With regard to paragraph 6, sanctions should be imposed after two full years.



95. In article 104, he was in favour of option 2. With regard to article 105, his delegation considered that voluntary contributions would in no way affect the Court's impartiality.

96. With regard to article 106, his delegation was in favour of the scale of contributions to the regular budget of the United Nations being used for the Court.

97. **Mr. Ly** (Senegal) said that, with regard to article 102, paragraph 1, the signatories of the Final Act should be observers. Paragraph 2 (a) should be kept. However, subparagraphs (b) and (e) of paragraph 2 gave rise to concern regarding the independence of the Court. In subparagraph (f), the words "upon recommendation of the Court" should be used. Any formulation used for paragraph 3 (a) should safeguard the Court's independence. In paragraph 5, a two-thirds majority of those present and voting should suffice. With respect to paragraph 6, he considered that the provision should be drafted to ensure that countries which for obvious economic reasons could not fulfil their obligations should be dealt with sympathetically, whereas those which did have the economic means to do so should be punished more severely.

98. With regard to article 103, he endorsed the point made by the representative of the Syrian Arab Republic concerning the final phrase. In article 104, option 2 should be chosen. Regarding article 105, voluntary contributions should be allowed. With respect to article 106, he would prefer the scale used for the regular budget of the United Nations.

99. **Mr. Hakwenye** (Namibia), referring to article 102, paragraph 1, said that observers should be allowed to participate in the Assembly of States Parties.

100. With regard to paragraph 2 (d), he considered that the Assembly should consider and approve the budget for the Court in consultation with the Registrar, not with the President of the Court.

101. In article 104, he supported option 3. He was in favour of article 105 regarding voluntary contributions. With respect to article 106, he supported the view that the scale of assessments should be based on the United Nations regular budget.

102. **Ms. Blair** (United Kingdom of Great Britain and Northern Ireland) said, with regard to article 102, paragraph 1, she thought that the signatories of the Statute rather than those of the Final Act should be observers in the Assembly of States Parties. She supported inclusion of paragraph 2 (a). With respect to paragraph 3 (b), she favoured the wording "have a representative character" and the inclusion of the words "as far as possible". With regard to paragraph 5, she supported the requirement for a two-thirds majority of those present and voting for decision-making. With respect to paragraph 6, her delegation was in favour of the period in question being two full years.

103. Turning to article 104, she endorsed the comments made by the representative of Denmark.

104. With respect to article 106, she believed that assessments should be based on the scale used for the regular budget of the United Nations.

105. **Mr. Sayyid Said Hilal Al-Busaidy** (Oman), referring to article 102, paragraph 1, said that the signatories of the Final Act should be observers in the Assembly of States Parties. With respect to paragraph 3 (b), he supported the inclusion of a reference to equitable geographical distribution.

106. In article 104, he was in favour of option 3.

107. Article 105 should be retained, and he hoped that ways would be found to safeguard the independence of the Court.

108. With respect to article 106, he was in favour of contributions being assessed in accordance with the scale used for the regular budget of the United Nations. He also supported articles 103 and 107.

109. **Mr. Aukrust** (Norway) favoured option 2 for article 104. Financing by the United Nations would ease the ratification process for a number of States, including less developed countries. Funding by States parties had already failed in the case of other treaty bodies.

110. **Mr. Fortuna** (Mozambique), referring to article 102, paragraph 1, said that he supported the view that the signatory States of the Statute and Final Act should be observers in the Assembly of States Parties. With regard to paragraph 5, he was in favour of a two-thirds majority of those present and voting.

111. He supported option 3 for article 104 and was in favour of articles 105 and 106.

112. **Mr. Chun Young-wook** (Republic of Korea) said, in connection with article 102, paragraph 1, that his delegation believed that signatories of the Final Act should be observers in the Assembly of States Parties. With regard to paragraph 3 (a), the President of the Court, the Prosecutor and the Registrar should be able to participate in meetings of the Bureau as observers. With respect to paragraph 5, he was in favour of a two-thirds majority of those present and voting.

113. In article 104, he supported option 3 as a compromise formula.

114. **Mr. Nyasulu** (Malawi) supported the views expressed by the representatives of Denmark, Trinidad and Tobago and Sweden on article 104. Paragraph 6 of article 102 would lead to the exclusion of the least developed countries if option 1 was adopted for article 104. His delegation was in favour of option 3.

115. His delegation had supported the deletion of article 45, paragraph 4, and would recommend the deletion of article 105 unless it was reworded to preclude its covering the situations envisaged in article 45, paragraph 4, and article 43, paragraph 9.

116. Concerning article 106, his delegation would prefer the United Nations scale of assessments if option 3 was adopted for article 104.

117. With respect to article 102, paragraph 6, his delegation was in favour of the period of two full years. It also supported the proposal in document A/CONF.183/C.1/L.16 regarding official and working languages.

118. **Ms. Shahen** (Libyan Arab Jamahiriya) said, with respect to article 102, paragraph 1, that she considered that the signatories of the Statute and the Final Act should be observers in the Assembly of States Parties.

119. With respect to paragraph 2 (f), she considered that the Assembly of States Parties should look into any question relating to non-cooperation by States parties and non-parties with the Court. The reference to the Security Council should be deleted.

120. With regard to paragraph 3 (a), she considered that the Registrar and the Prosecutor should be able to participate as observers in meetings of the Bureau. With regard to paragraph 3 (b), she stressed the importance of ensuring equitable geographical distribution and proposed the deletion of the words "as far as possible".

121. With regard to paragraph 6, she was in favour of a two-year period.

122. In article 104, her delegation was in favour of option 1. With regard to article 105, voluntary contributions should be looked upon as complementary contributions, but criteria to ensure the independence of the Court should be adopted. She endorsed the proposal in document A/CONF.183/C.1/L.16 concerning the Assembly's official and working languages.

123. **Mr. Bazel** (Afghanistan) said that his delegation shared the views of the Danish representative concerning the options for article 104. It supported the idea of voluntary contributions in article 105.

124. **Mr. Amehou** (Benin) endorsed the views of the representative of Denmark regarding the financing of the Court.

125. **Mr. Addo** (Ghana) said that article 102, paragraph 2 (f), should be dealt with only after article 86, paragraph 6, had been finalized. Article 102, paragraph 2 (e), would have financial implications, and the wording would be linked to the financial regulations of the Court. The remaining paragraphs of article 102 were satisfactory.

126. In article 104, Ghana's preference was for option 1, but paragraph 2 in option 3 could be kept. In article 106, his delegation favoured the wording: "The contributions of States Parties shall be assessed in accordance with an agreed scale of assessments based upon the scale used for the regular budget of the United Nations."

127. His delegation supported article 107.

128. **Mr. Welberts** (Germany) said that his delegation favoured option 3 for article 104 as a compromise between options 1 and 2. The Court needed stable funding but its authority might be compromised if it was dependent on the budget of the United

Nations, which was facing difficulties because of unpaid contributions. Moreover, the mid-term priority planning of the United Nations did not allow for appropriate and continuous funding of the Court. It would therefore be better for States parties to be responsible for allocating resources to the Court.

129. The burden of sharing the cost of the Court should not be a disincentive to ratifying the treaty. There should be no obstacle to States with less capacity to pay becoming parties to the Statute or filing complaints with the Court.

130. Germany would be in favour of including in the Statute a penalty provision for defaulting and late contributors going beyond that set out in article 102, paragraph 6.

131. **Mr. Al Hosani** (United Arab Emirates), referring to article 102, expressed the view that the signatories of the Statute and of the Final Act should be observers in the Assembly of States Parties. With regard to paragraph 3 (a), he considered that the President of the Court, the Prosecutor and the Registrar should be able to participate as observers in the meetings of the Bureau. With regard to paragraph 5, decisions on matters of substance should be taken by consensus or, failing that, approved by a two-thirds majority of those present and voting, representing an absolute majority of the States parties. With regard to paragraph 6, a State party should not have the right to vote if the amount of its arrears equalled or exceeded the amount of its contributions due for the preceding two full years. He endorsed the proposal in document A/CONF.183/C.1/L.16 regarding the official and working languages of the Assembly.

132. In article 104, he preferred option 3. Article 105 should be retained, due attention being paid to the independence of the Court on the basis of clear criteria to be adopted by the Assembly of States Parties.

133. Regarding article 106, contributions should be assessed in accordance with an agreed scale of assessment based on the scale used for the regular budget of the United Nations. At the end of the sentence, the words "after this is accepted by the Assembly of States Parties" should be added.

134. **Mr. Manyang D'Awol** (Sudan) said that his delegation would prefer option 3 for article 104 and would like the scale of contributions mentioned in article 106 to be that of the United Nations.

135. **Mr. Masuku** (Swaziland) endorsed the views expressed by the delegations of Lesotho and Germany.

136. **Ms. Vega Pérez** (Peru) said that, in article 102, paragraph 1, she supported the proposal that signatories of the Statute should be members of the Assembly of States Parties. In article 104, she supported option 1. With regard to article 106, the scale used in the United Nations was to be recommended.

137. **Mr. Kam** (Burkina Faso) said that his delegation was in favour of option 3 for article 104.

138. **Mr. Ruphin** (Madagascar) said that he was in favour of option 3 for article 104. The independence of the Court would

depend more on its procedures and its competence than on the sources of its funding. Funding for national courts came from the State and their independence was not jeopardized because of it. In article 105, concerning voluntary contributions, wording might be found to specify that any such funds would be complementary. With regard to article 106, he was in favour of the adoption of the scale used for the regular budget of the United Nations.

139. **Mr. Mikulka** (Czech Republic) said that he preferred option 2 for article 104. The Court was intended to have a universal character and relations between the Court and the United Nations should be as close as possible. The Security Council would have certain functions under the Statute and the Court would be contributing towards maintaining international peace and security, which was one of the main objectives of the United Nations.

140. **Mr. González Gálvez** (Mexico) thought that references to the Security Council, especially in article 102, paragraph 2 (f), should not be considered at present, since they were being looked at in connection with part 9.

141. His delegation agreed that the Assembly should be able to allow a State to vote even though it had problems with its contributions, but thought that the last sentence in article 102, paragraph 6, might need amending. His delegation had proposed, in document A/CONF.183/C.1/L.14, the inclusion of a new paragraph in article 102, but had now withdrawn that proposal because many delegations believed that to ask for an advisory opinion from the International Court of Justice on controversies

between States parties and the International Criminal Court would be inappropriate. His delegation maintained its proposal concerning article 108 in part 13 of the draft Statute.

142. With regard to article 104, it was important to avoid placing yet another burden on the United Nations, and he therefore supported option 1. The only possibility for starting up the Court might be to provide for contributions by States parties and also a fund fed by voluntary contributions. However, article 105 might need to be amended.

143. He supported the view that it would be enough in article 106 to refer to "an agreed scale of assessment", without further specification.

144. **Mr. Wouters** (Belgium) said, with regard to part 12, that his delegation saw much merit in a system of financing through the United Nations supplemented by a system of voluntary contributions. He endorsed the arguments put forward in favour of option 2 for article 104. The Conference should decide what should be the main source of financing for the Court, and not postpone that difficult choice.

145. At least in the initial phase, outside assistance for the Court might be helpful.

146. He was not convinced that it would be desirable to create further external auditing mechanisms in addition to those already existing in the United Nations. However, that issue might be clarified in informal consultations.

*The meeting rose at 1.15 p.m.*

## 19th meeting

Monday, 29 June 1998, at 3.15 p.m.

*Chairman:* Mr. Kirsch (Canada)

*later:* Mr. Ivan (Romania) (Vice-Chairman)

*later:* Mr. Kirsch (Canada) (Chairman)

A/CONF.183/C.1/SR.19

### Agenda item 11 (*continued*)

**Consideration of the question concerning the finalization and adoption of a convention on the establishment of an international criminal court in accordance with General Assembly resolutions 51/207 of 17 December 1996 and 52/160 of 15 December 1997 (A/CONF.183/2/Add.1 and Corr.1, A/CONF.183/C.1/L.14/Rev.1 and A/CONF.183/C.1/L.24)**

#### DRAFT STATUTE

##### PART 13. FINAL CLAUSES

1. **The Chairman** invited the Coordinator for part 13 to introduce that part of the draft Statute (A/CONF.183/2/Add.1 and Corr.1).

2. **Mr. Slade** (Samoa), Coordinator for part 13, said that that part contained the final clauses. With regard to article 108, there was no consensus in favour of any of the four options suggested in the draft. The effect of option 3 would be to make the International Criminal Court judge of its own jurisdiction. Option 2, on the other hand, would not exclude the possibility of reference by the Assembly of States Parties of a dispute over the interpretation or application of the Statute to the International Court of Justice. Under option 4, there would be no provision on dispute settlement. There was a further proposal by Mexico, contained in document A/CONF.183/C.1/L.14/Rev.1, to the effect that any dispute between States parties relating to the interpretation or application of the Statute not resolved through

negotiation should be referred to the International Court of Justice. There were thus many policy issues to be resolved.

3. For article 109, there were also four options, all of which had their supporters. Further consultations were needed, and he suggested that discussion of the article be deferred.

4. Concerning article 110, which was closely linked to article 111, there was a general feeling that there should be a provision on amendments, but also that a period should be stipulated after which it would be possible to propose amendments. Some delegations considered that the review conference referred to in article 111 would be the appropriate body to consider such proposals. For paragraph 3, there were two options; in the case of option 2, it would need to be decided what kind of majority was required. In informal discussions, a proposal had also been made for a simplified procedure for dealing with amendments on matters described as being of an institutional nature.

5. Concerning article 111, there was the possibility of a merger with the preceding article. There were also two options: option 1 provided generally for the possibility of a special meeting of the Assembly of States Parties to review the Statute, while option 2 called more specifically for a meeting to review the list of crimes within the jurisdiction of the International Criminal Court. A final decision would depend on agreement on article 5.

6. Consultations were still needed to resolve the issues arising under article 112.

7. There had been a wide measure of support for inclusion of article 113, although some had favoured a more cautious approach. Questions had been raised as to whether the article was correctly placed within the Statute in view of its essentially political objective, and concern had been expressed that the article should fully and correctly reflect the 1969 Vienna Convention on the Law of Treaties.

8. Concerning article 114, there were two aspects which warranted further consideration. The first was the proposed link between entry into force of the Statute and completion of the Rules of Procedure and Evidence, an issue of substance which also had implications for negotiations under articles 52 and 53. The second was the idea that the deposit of instruments of ratification or acceptance by members of different geographical groups should be required. In his view, discussion of the article by the Committee of the Whole at the current stage was unlikely to produce useful results, and he suggested that further consultations be held.

9. There had been no difficulty over paragraphs 1 and 2 of article 115, and general support had been expressed for inclusion of the bracketed text, perhaps with some redrafting. Lastly, no problems had been raised in regard to article 116, which he suggested could be referred to the Drafting Committee.

10. **Mr. Shukri** (Syrian Arab Republic) said that he would prefer option 4 for article 108 because he believed that it was one of the fundamental responsibilities of the International Court of Justice to judge on disputes arising out of treaties. For article 109, he preferred option 4, under which there would be no article on reservations; article 19 of the Vienna Convention on the Law of Treaties already established the principle that reservations to a treaty were not permissible if they were incompatible with the purpose of the treaty.

11. Concerning article 110, he was flexible as to the period that should elapse before amendments were proposed, but considered a period of 10 years reasonable. For paragraph 3, he preferred option 2 with a requirement for a majority of either two thirds or three fourths of the States parties. Concerning article 111, he believed that review should be possible 5 to 10 years after entry into force, and agreed that articles 110 and 111 could be combined. It was important that in article 112 the words "ratification", "acceptance", "approval" and "accession" be retained, since they were words used in the Vienna Convention. For article 114, the number of instruments required to be deposited could be 60 or 65. In article 115, he would prefer deletion of the bracketed text.

12. **Mr. Pfirter** (Switzerland) said that for article 108 his delegation preferred option 3. He drew attention to a proposal by his delegation (A/CONF.183/C.1/L.24) for articles 110 and 111, which would soon be available in all languages and which was intended to provide a realistic solution to the problem of review of the Statute. His delegation was aware that a review against the wishes of some States parties was a delicate issue, but believed that it was not appropriate to give the right of veto to a single State party by requiring total consensus. A fact that also had to be taken into account was that some States which were Members of the United Nations did not have Governments which were in a position to act on their behalf by ratifying amendments to the Statute. Switzerland's proposal was that amendments should require a large majority, perhaps a five-sixths majority. The other essential element in the proposal was a simplified procedure for dealing with problems which were institutional in nature.

13. Concerning article 112, he saw no need for the bracketed words "without any kind of discrimination". He supported inclusion of article 113, as well as inclusion of the bracketed text in article 115.

14. **Mr. Rebagliati** (Argentina), referring to article 108, said that it was important that some provision be made in the Statute for the settlement of disputes. In his view, the International Criminal Court should be judge of its own jurisdiction, but disputes between States parties relating to other aspects of interpretation or application of the Statute should be settled by the classic mechanism of peaceful settlement through negotiation, conciliation, arbitration or, as a last resort, reference to the International Court of Justice. The Committee should be

prudent in its approach and should seek a solution which was in line with existing international practice.

15. He agreed that articles 110 and 111 might be combined. For the latter, he preferred option 2.

16. While he respected the intention behind article 113, he feared that it might give rise to confusion. He did not think that the first sentence was really necessary, but if it was to be retained he would like the wording to be brought into line with article 25 of the Vienna Convention on the Law of Treaties. The second sentence had a political objective, and he doubted whether it would be in conformity with the Vienna Convention to require States to comply with the provisions of the Statute before it had entered into force. If there was a majority in favour of inclusion of such a text, he believed that the proper place for it would be in the preamble.

17. **Mr. Quintana** (Colombia) said that his delegation preferred option 2 for article 108, subject to drafting improvements. The Statute was bound to give rise to disputes among States parties, and it was essential that a mechanism for settling such disputes be provided, whether it was through a political body, as proposed in option 2, or a judicial body. The Committee should not lose sight of the fact that the International Criminal Court that it was creating would be judging individuals and not States, and in his view option 1 was quite unacceptable.

18. **Mr. González Gálvez** (Mexico) agreed that articles 110 and 111 could be combined, but would prefer that article 113 be deleted.

19. **Mr. Dimovski** (The former Yugoslav Republic of Macedonia) said that his delegation would be unable to sign the Convention if the bracketed text in lines 1 and 2 of article 112, paragraph 1, was not adopted. He would therefore appreciate the understanding of other delegations in that regard.

20. **Mr. Aukrust** (Norway), referring to article 113, said that the French version of the title might suggest that what was proposed was the provisional application of the Statute. That notion should be dispelled. Rather, the article had been drafted in order to meet the concern that, during the interim period before the Statute entered into force, there might be a need for international prosecution of perpetrators of crimes within the Court's jurisdiction and that, accordingly, provision would have to be made for ensuring that the fact that the Statute had not yet entered into force should not be made a pretext for failure to initiate such prosecution. In his view, the Statute should give guidance on the principles to be followed in such cases.

21. Article 113 sought to clarify how the principle contained in article 18 of the Vienna Convention on the Law of Treaties would apply in practice pending entry into force of the Statute. He was open to suggestions as to where the article should be placed in the text of the Statute.

22. **Mr. Gevorgian** (Russian Federation) favoured option 2 for article 108, which he thought covered all the situations provided for in options 1 and 3, as well as all the concerns

expressed by delegations. The first part of the sentence established that the Court was competent to decide questions relating to its judicial activities, and the second provided for a flexible approach under which the Assembly of States Parties could make recommendations for further means of settling a dispute, which could include referral to the International Court of Justice. He supported those speakers who had favoured a merger of articles 110 and 111.

23. Although he supported the idea behind article 113, he considered that it was more political than legal in nature and might thus have a more appropriate place in the Final Act of the Conference than in the Statute itself.

24. **Mr. Al-Amery** (Qatar) said that, concerning article 108, he supported option 4 for the reasons already advanced by the representative of the Syrian Arab Republic. Concerning article 110, he supported paragraph 1 with the inclusion of the bracketed words "the Secretary-General of the United Nations", and paragraph 2 with the words "meeting of the Assembly of States Parties". For paragraph 3, he supported option 2 with the wording "shall require a three-fourths majority of all the States Parties". Lastly, he could accept paragraphs 4, 5 and 6, provided that paragraph 5 referred to "three fourths of all the States Parties".

25. **Mr. Scheffer** (United States of America) said that for article 108 his delegation favoured option 2. Article 110 was a critical article which needed to be carefully worded in order to ensure the continued viability of the treaty. The States parties should not be in a hurry to revise the Statute; time should be allowed for the International Criminal Court to begin operations, so that any revisions required could be made in the light of experience gained in implementing the Statute. Amendments should only be made at a review conference, and then only if they had the overwhelming support of States parties.

26. Regarding the signature of the Statute, the United States had requested that the dates should be placed in brackets in order to emphasize its view that the Rules of Procedure and Evidence and the elements of crimes should be an integral part of the Statute. Lastly, regarding article 113, he endorsed the views expressed by the representative of Norway. Justice ought not to stand still until the Court was established.

27. **Mr. Saland** (Sweden) said that for article 108 he favoured option 3, since any disputes that arose were likely to concern judicial functions and should therefore be settled by the Court itself. However, he was also ready to consider option 2. He supported the Swiss proposal for articles 110 and 111. Concerning the latter article, he saw merit in including a provision whereby a review conference would take place automatically 5 to 10 years after entry into force of the Statute to deal with any unresolved issues and also with any deficiencies in the Statute that might have emerged.

28. Concerning article 112, his delegation's position was that the Statute should stand alone and that any other instruments, for instance those governing rules of procedure and evidence,

should be secondary and should not affect the opening of the Statute for signature or indeed its entry into force. He wished to make clear, however, that Sweden would not wish the Court to start operating before rules of procedure and evidence had been adopted. He strongly supported article 113 as well as retention of the bracketed third paragraph of article 115.

29. **Mr. Al-Sa'aidi** (Kuwait) said that for article 108 he preferred option 2, but also supported the Mexican proposal to refer to the International Court of Justice. For article 109 he favoured option 4. Regarding article 110, he suggested that the period of time specified in paragraph 1 should be 10 years. For paragraph 3 he preferred option 2 with a requirement for a two-thirds majority of those present and voting. Paragraph 5 should require the deposit of instruments by two thirds of the States parties. Provision should be made in article 111 for review of the Statute after the expiry of a period of 5 to 10 years. He favoured retention of article 113 and supported the Syrian proposal regarding article 114.

30. **Mr. Lehmann** (Denmark) said that part 13 contained provisions which were standard in most treaties and which he supported. For article 108 he would prefer option 3 in combination with a provision on settlement of disputes between States. Some article on reservations must be included. An article on amendments was also needed, along the lines suggested in article 110. He supported articles 112 and 113.

31. Article 111 on review of the Statute was not a clause normally included in treaties, but he believed that some provision should be made for adjusting the Statute on the basis of experience gained in order to ensure that it served the interests of justice, fairness and efficiency. The text as it stood was somewhat cumbersome, and his delegation had prepared a new draft combining the two options, which would be circulated.

32. **Mr. Mansour** (Tunisia) said that his delegation favoured option 4 for article 108, and would propose 10 years for the period to be specified in article 110, paragraph 1. He had no particular problem with articles 112, 113 and 115.

33. **Ms. Pavlikovska** (Ukraine) said that she preferred option 1 for article 108, but would also be prepared to accept option 2. For article 109 she preferred option 2, with option B for paragraphs 1 and 2. She considered that article 113 could be deleted since its content was already covered by the corresponding provision in the Vienna Convention on the Law of Treaties. She would prefer article 114, paragraph 1, to read: "This Statute shall enter into force following the completion of the Rules of Procedure and Evidence on the 60th day following ... provided that such instruments have been deposited by no fewer than four members from each geographical group ...". For article 115, she favoured retention of the bracketed third paragraph.

34. **Mr. Molnár** (Hungary) said that for article 108 his delegation preferred option 3, although it would be prepared to accept inclusion of elements of option 2. For article 110,

paragraph 3, he supported option 2; he was opposed to requiring that adoption of amendments should be by consensus. For article 111 he would prefer option 2 providing for automatic review of the list of crimes within the jurisdiction of the International Criminal Court after a certain period of time, and would be prepared to discuss combining that article with article 110. On article 112, his delegation considered that the Statute should be opened for signature following the successful conclusion of the Conference, and favoured inclusion of article 113 for the reasons advanced by the Norwegian delegation. Lastly, he supported article 115 with inclusion of the bracketed text.

35. **Ms. Daskalopoulou-Livada** (Greece) said that she preferred option 3 for article 108, as she saw no need to set up an elaborate settlement procedure in regard to functions of the Court which were not judicial. The proposal by Switzerland regarding articles 110 and 111 was of considerable merit: she was inclined to favour an amendment procedure dispensing with the need for an automatic review after a certain number of years had elapsed. For article 110, paragraph 3, she favoured option 2 with a requirement for a three-fourths majority of those present and voting, but had reservations as to the bracketed language in the first line of article 112, paragraph 1, which was unclear and was not in line with the standard language. She favoured article 113 in substance. She supported inclusion of the bracketed text in article 115, but perhaps it should be combined with paragraph 2.

36. **Ms. Wilmshurst** (United Kingdom of Great Britain and Northern Ireland) said that, concerning article 108, she shared the view expressed by the Syrian Arab Republic that there should be no article on settlement of disputes. She was particularly puzzled by option 3, which she found odd in language and unnecessary in substance. On article 110, paragraph 2, she suggested that consideration might be given to a compromise wording whereby amendments to some parts of the Statute, for instance part 4, could be considered at the Assembly of States Parties, and others could be considered at the proposed review conference. It would be in line with recent precedent for the adoption of amendments to require consensus and for their entry into force to require ratification by three fourths of the States parties. Concerning article 111, her delegation preferred option 1.

37. She noted that a number of delegations had expressed support for retention of the bracketed text in article 115, but pointed out that, in fact, that text was an alternative to paragraph 2 and could not just be added. Careful consideration would need to be given to the way in which the article was to be drafted.

38. **Mr. Yáñez-Barnuevo** (Spain), referring to article 108, said that he did not think it appropriate to include a provision on settlement of disputes in the final clauses; perhaps it should be included in part 2. At any rate, he agreed with previous speakers that there was room for a provision on settlement of disputes based on option 2.

39. He agreed that articles 110 and 111 should be considered jointly, although he was not sure that they would have to be combined. Concerning the proposal by Switzerland, he thought that one would have to spell out clearly which provisions were deemed to be of an institutional nature and thus subject to amendment through a simplified procedure. For article 110, paragraph 3, he would favour a combination of options 1 and 2 whereby, if consensus could not be reached on adoption of an amendment, such adoption should be by a three-fourths majority of States present and voting. While he recognized that the idea behind article 113 was a valid one, he did not think that the text was appropriate for inclusion in the body of the Statute. Concerning article 115, he shared the views expressed by the representative of the United Kingdom.

40. *Mr. Ivan (Romania), Vice-Chairman, took the chair.*

41. **Mr. Arévalo** (Chile) said that his delegation considered that some provision for the settlement of disputes should be included in the Statute, and would prefer option 2 for article 108, which covered not only disputes concerning the judicial functions of the Court but also disputes between States parties regarding interpretation or application of the Statute. Concerning articles 110 and 111, any amendment or review of the Statute should only be proposed after it had been in force for at least five years, and a fairly large majority should be required for the adoption of amendments. Article 113 as currently drafted caused some difficulty for his delegation because it appeared to confuse two separate issues, the first the legal effects of signature of treaties subject to ratification, and the second the possible provisional application of the Statute. Those two issues were governed by separate articles of the Vienna Convention on the Law of Treaties, articles 18 and 25. In article 115, the provisions in the bracketed paragraph seemed to be covered by paragraph 2.

42. **Mr. Rogov** (Kazakhstan) said that for article 108 he preferred option 2, and for article 110, paragraph 3, he preferred option 1. He supported the proposal that articles 110 and 111 be combined. He favoured retention of all the bracketed texts in article 112, and considered that the formulation contained in article 113 should be retained either in its current place or elsewhere in the Statute.

43. **Ms. Tomič** (Slovenia) favoured option 3 for article 108 and option 2 for article 110, paragraph 3. Provided that article 110, paragraph 6, was retained, there would be no need to provide for adoption by consensus, which would in effect mean that the veto of a single State party could block any amendment. She supported the simplified procedure for provisions of an institutional nature proposed by the delegation of Switzerland. Regarding article 111, she would favour a simplified provision for the convening of a review conference five years after entry into force of the Statute. Any amendments arising from such a review conference would be covered by the provisions of article 110. She favoured retention of article 113, which incorporated an important principle already enshrined in the Vienna Convention on the Law of Treaties, and fully supported

the views expressed by the representative of Norway in that regard. Lastly, she was in favour of the bracketed paragraph in article 115, but agreed that it must be brought into line with paragraph 2.

44. **Mr. Bartoň** (Slovakia) said that for article 108 he would prefer option 2, but thought that the words "the International Court of Justice" could be substituted for the words "the Assembly of States Parties". For article 110, paragraph 3, he was inclined to support option 1, but was prepared to accept the suggestion made by the delegation of Switzerland. He also favoured retention of article 113, and in article 115 supported inclusion of the bracketed text.

45. **Ms. Betancourt** (Venezuela) said that, from the very beginning of the preparatory work, her delegation had emphasized the need for an article on settlement of disputes. For article 108 she was in favour of option 2. She also preferred option 2 for article 110, paragraph 3, and article 111. For article 113, it would be preferable to follow the wording used in the Vienna Convention on the Law of Treaties.

46. **Mr. Momtaz** (Islamic Republic of Iran) said that his delegation also favoured option 2 for article 108, with the possible inclusion of a reference to conflicts which might arise between the International Criminal Court and States parties. Article 109 was of great importance, and he favoured the general regime for reservations as envisaged in the relevant provisions of the Vienna Convention on the Law of Treaties. The wording of article 113 should also be in line with the wording of the Vienna Convention. Article 114 could refer to the deposit of the sixtieth or sixty-fifth instrument. He favoured retention of the bracketed text in article 115, and would like to reserve his delegation's position with regard to articles 110 and 111.

47. **Mr. Al-Saadi** (Oman) said that his delegation supported option 4 for both article 108 and article 109. For article 110, paragraph 3, he favoured option 2, and in paragraph 5 he would prefer "two thirds". For article 111, he favoured option 1 and was flexible regarding the period to be specified. Article 114, paragraph 1, should refer to the sixtieth day following the date of deposit of the instrument concerned and to four members from each geographical group. The bracketed text in article 115 should be retained.

48. **Mr. Simpson** (Australia) thought that disputes arising out of the Court's judicial function should come within the jurisdictional ambit of the Court itself. He also believed, however, that disputes of a more administrative nature could well be resolved by the Assembly of States Parties. Option 2 and option 3 for article 108 were therefore complementary. If option 2 was to be adopted, it might be useful to specify which disputes were to be characterized as "administrative" for the purposes of the article.

49. He was sympathetic to the idea of combining articles 110 and 111. In the former, he would prefer a threshold of two thirds of States parties for any amendment to the Statute, and would



support deletion of paragraph 6, since the issue of withdrawal was well covered by article 115. Australia's position on article 111 was in line with that of the Danish delegation. It was vital that a review conference be held five years after entry into force. Generally speaking, a balance should be struck between binding States to amendments that they might not support and preventing a small number of States from vetoing much-needed amendments.

50. He supported retention of article 112 and of article 115 with the bracketed text included. Lastly, he supported the views expressed by Norway in favour of retention of article 113, but would suggest that it include a reference to article 18 of the Vienna Convention on the Law of Treaties, and that in the title the words "objects and purposes" should be substituted for "principles and rules".

51. **Mr. da Costa Lobo** (Portugal) favoured inclusion of article 113. The bracketed text in article 115 contained important elements, but note should be taken of the comments made by the representative of the United Kingdom.

52. **Mr. Kawamura** (Japan) thought that, while it should be for the Court to decide on disputes concerning its own judicial functions, in the case of other disputes, for instance relating to administrative or budgetary questions, the Assembly of States Parties would be better able to resolve the issues. For article 108, therefore, he favoured option 2. Concerning article 110, paragraph 3, he would prefer option 2, since consensus on an amendment might be difficult to achieve, although a merger of the two options might be a good compromise solution. He noted that option 2 for article 111 provided for a simplified procedure for entry into force of amendments to the list of crimes within the jurisdiction of the Court contained in article 5. In his delegation's view, the list of crimes was a core part of the Statute, and the entry into force of amendments to it should be subject to the procedure provided for in article 110. He proposed that, in the first sentence of paragraph 1 of option 2 for article 111, the words "in order to consider additions to the list" should be deleted. Lastly, he could support the first sentence of article 113, but considered that the second sentence would be better placed in the preamble to the Statute.

53. **Mr. Politi** (Italy) said that his delegation was also prepared to accept option 2 for article 108. He considered that, at the current stage, articles 110 and 111 would be best kept separate. Concerning article 110, it was important that the adoption and entry into force of amendments should have the support of an adequate majority, and he therefore favoured a reference to two thirds or three fourths of "all the States Parties", rather than of those present and voting. For article 111, he would prefer option 2.

54. Regarding article 112, the Italian Government was in fact proposing that the Statute should be opened for signature on 18 July 1998. He endorsed the comments made by Sweden regarding the signature and entry into force of the Statute. In regard to article 113, he supported the views expressed by the representative of Australia, and in article 115 he supported

inclusion of the bracketed text, though consistency with paragraph 2 must be ensured.

55. **Mr. P. S. Rao** (India) said that for article 108 he would prefer option 4. Since articles 110 and 111 served different purposes, they would be best kept separate. Procedures for amendment should be such that they attracted the widest possible consensus, and voting should be a last resort. For article 111, he preferred option 1. Any review carried out should consider not only additions to the list of crimes within the jurisdiction of the Court but also deletions from that list, as circumstances required. He had doubts as to the legal validity of the second sentence of article 113, and would prefer that the whole article be deleted.

56. **Mr. Mahmood** (Pakistan) said that for article 110, paragraph 3, he supported the idea that a three-fourths majority of all States parties should be required for adoption of amendments. For article 111, he favoured option 1 and the alternative "States Parties", rather than "those present and voting", in paragraph 1.

57. **Mr. Ahmed** (Iraq) said that he preferred option 4 for article 108 and also for article 109. There would be good grounds for combining articles 110 and 111. For paragraph 3 of article 110, he favoured option 2, and in paragraph 5 would prefer "three fourths". For article 111, review of the Statute after the expiry of a five-year period from entry into force would be acceptable to his delegation. Lastly, he considered that article 113 could be deleted since the general principles it contained were already reflected in article 18 of the Vienna Convention on the Law of Treaties.

58. **Mr. Büchli** (Netherlands), referring to article 108, said that he was flexible as to whether there was need to make separate provision for two types of dispute which might come before the Court. He was generally favourable to combining articles 110 and 111, but appreciated the argument that any review of the Statute was a major step calling for a special procedure. Regarding what had been said by the representative of the former Yugoslav Republic of Macedonia on article 112, he thought that the final clauses of the Statute were not the place to debate political issues. It would probably be better to keep to the traditional wording.

59. He favoured retention of article 113 for the reasons outlined by the delegation of Norway: a mere reference to the Vienna Convention on the Law of Treaties would not be sufficient. He strongly urged delegations to consider the inclusion of such wording either there or elsewhere in the Statute. Regarding article 115, he would like to see elements of all three paragraphs incorporated in the text.

60. **Mr. Güney** (Turkey), referring to article 108, said that, while option 2 could accommodate his concerns, he would prefer the Mexican proposal, which made provision for referral of disputes to the International Court of Justice. He urged that agreement on article 109 be reached as soon as possible, since the subject of reservations was closely related to a number of substantive issues on which there were still differences of



opinion. In regard to article 111, provision for automatic review was essential if the future treaty was to remain viable. His delegation had difficulty in supporting article 113 as currently worded, and would prefer that the issue be covered by the relevant provisions of the Vienna Convention on the Law of Treaties. Lastly, he considered that the bracketed paragraph in article 115 was unnecessary and should be deleted.

61. *Mr. Kirsch (Canada) resumed the Chair.*

62. **Mr. Ndjalandjoko** (Democratic Republic of the Congo) said that for article 108 he favoured option 2, which would cover both disputes relating to the internal activities of the International Criminal Court and disputes between States parties. The text would not necessarily have to make reference to referral to the International Court of Justice. He could support the proposal that articles 110 and 111 be combined in a text which might perhaps be entitled "Modifications to the Statute".

63. His delegation found the overall content of article 112 acceptable, provided that the bracketed words "without any kind of discrimination" in lines 1 and 2 were deleted. He favoured deletion of article 113 for the reasons already advanced by previous speakers, and in article 115 would propose that paragraph 2 be replaced by the bracketed paragraph.

64. **Mr. Al Hafiz** (Saudi Arabia) supported the view expressed by the representative of the Syrian Arab Republic that there should be no article on settlement of disputes; that issue was already covered by general principles of international law and more specifically by the Vienna Convention on the Law of Treaties. Nor should the Statute include any article on reservations. For article 110, paragraph 3, he would prefer option 2 with reference to a three-fourths majority, and he would favour a corresponding wording for paragraph 5.

65. **Ms. Wyrozumska** (Poland) said that for article 108 her delegation would prefer option 3, although, in the light of concerns expressed by other delegations, it would be ready to discuss option 2. Concerning article 110, paragraph 3, her delegation did not consider that consensus was the proper procedure for adoption of amendments, and she would therefore prefer option 2 with provision for a two-thirds majority. However, she saw some merit in the Swiss proposal. Concerning article 111, she believed that provision for review of the Statute was necessary for the reasons outlined by Sweden, and would prefer option 2. Lastly, she shared Sweden's view that the Statute should stand on its own; the Rules of Procedure and Evidence should not necessarily have to be ratified, accepted or approved at the same time as the Statute itself. While she fully supported the intentions behind article 113, she agreed with Australia that its title should be reformulated.

66. **Mr. Ly** (Senegal) said that, with regard to article 108, he supported the position of the representative of Australia. For article 110, paragraph 3, he favoured option 2, but was waiting to see the French text of the Swiss proposal for articles 110 and 111, which he hoped would provide a solution. Concerning

article 113, he could support the idea behind the second sentence, but considered that it might give rise to confusion and would be better redrafted and placed elsewhere in the Statute. Lastly, he could agree to the inclusion of the bracketed text in article 115, with some rewording of paragraph 2.

67. **Ms. Rwamo** (Burundi) favoured option 2 for article 108. She supported those delegations that had argued for the retention of article 113 on the grounds that it was vitally important not to allow crimes committed before the entry into force of the Statute to go unpunished. However, the wording of the last part of the second sentence might perhaps be improved.

68. **Mr. Mikulka** (Czech Republic) said that for article 108 he preferred option 3, which contained all that needed to be said on the subject. Its purpose was to prevent a situation in which the International Criminal Court might be paralysed by an artificial dispute which it was not competent to settle. He had no major problems with option 2, but thought that it should be stipulated that any recommendations made by the Assembly of States Parties should take due account of the obligations of the States involved under Article 36 of the Statute of the International Court of Justice.

69. For article 110, paragraph 3, he had a preference for option 2. In that regard, whatever majority was required for the adoption of amendments should be a majority of all States parties, not merely of States parties present and voting. He saw no reason why the article on amendments should not be combined with the article on review of the Statute. He was still not convinced of the usefulness of article 113: the first sentence was already covered by the law of treaties, and the second sentence might give rise to confusion because it did not constitute a legal obligation and did not make clear what was the goal of the action being requested of States. He saw no need for including such a provision in the final clauses, and believed that, if a political message was intended, it should more properly be placed in the preamble to the Statute.

70. **Mr. Onkelinx** (Belgium) said that, for article 108, option 1 was attractive, but it might be necessary to provide for other means of settlement for some disputes. He would support a merger of articles 110 and 111, and for article 110, paragraph 3, would suggest that options 1 and 2 be combined. He endorsed the views expressed by Norway on article 113: its contents might duplicate articles 18 and 25 of the Vienna Convention on the Law of Treaties, but its inclusion could still be useful. In his view the provision was correctly placed where it was, but he would be glad to accept its being placed elsewhere if that would give it greater prominence.

71. **Ms. Shahan** (Libyan Arab Jamahiriya) said that for article 108 she preferred option 4; for article 110, paragraph 3, she preferred option 2. For article 111 she would favour option 1 with a requirement for a five-year period from entry into force; that would give ample time for the issues to be considered.

*The meeting rose at 6.05 p.m.*

## 20th meeting

Tuesday, 30 June 1998, at 10.20 a.m.

Chairman: Mr. Kirsch (Canada)

A/CONF.183/C.1/SR.20

### Agenda item 11 (*continued*)

**Consideration of the question concerning the finalization and adoption of a convention on the establishment of an international criminal court in accordance with General Assembly resolutions 51/207 of 17 December 1996 and 52/160 of 15 December 1997** (A/CONF.183/2/Add.1 and Corr.1, A/CONF.183/C.1/L.14/Rev.1, A/CONF.183/C.1/L.22, A/CONF.183/C.1/L.24 and A/CONF.183/C.1/L.29)

#### DRAFT STATUTE

##### PART 13. FINAL CLAUSES (*continued*)

1. **Mr. Qu Wencheng** (China) said that he preferred option 4 for article 108 ("Settlement of disputes") but could agree to option 2. Amendments should preferably be made only 5 or 10 years after the Statute entered into force. They should, as far as possible, be adopted by consensus but, failing that, by a vote. He preferred option 1 for the review conference, and agreed with what had been said by the representative of Japan at the previous meeting. Article 113 should be deleted since it might cause confusion, especially the second sentence.
2. **Mr. Kourula** (Finland) preferred option 3 for article 108, but was prepared to discuss possible additions related, for example, to what the representative of Australia had referred to as "administrative" issues. He was in favour of article 111 ("Review of the Statute") and welcomed the Danish proposal (A/CONF.183/C.1/L.29). Article 113 could be accepted for the reasons given by the representative of Norway.
3. **Ms. Mekhemar** (Egypt) thought that there was no need for an article on the settlement of disputes, since there were general rules applicable. If such an article was included, the arbiter should be a third party and not the International Criminal Court itself.
4. A period of 5 or 10 years would be appropriate before the introduction of any amendments to the Statute. Proposed amendments should be considered by a review conference. Given the significance of the Statute, the preference should be for the adoption of amendments by consensus but, failing that, the required majority should be two thirds of the States parties. Articles 110 and 111 could be merged because they covered the same topic. The Swiss proposal for those articles (A/CONF.183/C.1/L.24), which differentiated between different kinds of amendments, would need careful study. She agreed with the text of article 112, subject to the deletion of the bracketed words "without any kind of discrimination", which were out of place in such a provision. Article 113 was not needed. She supported the first two paragraphs of article 115 ("Withdrawal"), but the bracketed text was repetitive and should be deleted.
5. **Mr. Kerma** (Algeria) preferred option 4 for article 108, namely the option of having no article on dispute settlement in the Statute. In article 110, paragraph 1, he would favour a five-year period from the date of entry into force of the Statute before amendments could be proposed. For paragraph 3 he preferred option 2 with provision for the adoption of amendments by a two-thirds majority of the States present and voting. For article 111 he preferred option 2 with the deletion of the brackets around the word "Five". That article was very important, since it would provide for a review of the list of crimes falling within the jurisdiction of the Court. He had reservations about article 113 as currently worded. He accepted articles 112, 115 and 116, including the paragraph in brackets in article 115.
6. **Mr. Kida** (Nigeria) preferred option 2 for article 108. He was flexible about the number of years to be specified in article 110, paragraph 1. For paragraph 3, he favoured option 2 with a requirement for a two-thirds majority of all States, and he favoured the deletion of paragraph 6.
7. **Mr. Al Gennan** (United Arab Emirates) preferred option 2 for article 108 because it seemed more comprehensive, while remaining sufficiently flexible. The period specified in article 110, paragraph 1, should be long enough to enable the proposed Preparatory Commission for the International Criminal Court to establish the necessary rules and procedures. He preferred option 2 for paragraph 3, with the adoption of an amendment at a review conference by a two-thirds majority of all the States parties. In paragraph 5 the proportion of the States parties depositing ratifications or acceptances should be two thirds. He found articles 111 and 112 acceptable. Article 113 should be in line with the 1969 Vienna Convention on the Law of Treaties.
8. **Mr. Welberts** (Germany), referring to article 108, said that he was sensitive to the argument that no reference to settlement of disputes was needed. However, if there was such a reference, he would strongly favour option 3. Switzerland's proposal for article 110 should be given full consideration. For article 111, he favoured option 2. Concerning article 112, the Statute, in his view, stood by itself for the purpose of signature and ratification. Article 113 was very useful and should be kept. In article 115, the bracketed third paragraph should be kept.
9. **Ms. Aguiar** (Dominican Republic) said that, if a provision on settlement of disputes were to be included, the Court itself should have the power to settle them. That principle was already enshrined in international law. She could envisage a merger of articles 110 and 111. A review of the Statute should take place after five years to examine any difficulties encountered in its application and the possibility of amending the list of crimes

in article 5. For article 110, paragraph 3, she preferred option 2 with a two-thirds majority of States present and voting. She supported option 2 for article 111. Article 113 should be retained as it stood. The purpose was to fill the void between the moment of signing the Statute and its entry into force.

10. **Mr. Effendi** (Indonesia) said that he supported the spirit and content of article 113, but thought that it might be possible to find an alternative way of achieving the desired purpose.

11. **Mr. Hafner** (Austria) preferred option 3 for article 108, since option 2 might give rise to legal problems. If there was a general preference for option 2, he could accept it provided that the independence of the Court was satisfactorily safeguarded. In article 110, he favoured option 2 for paragraph 3, perhaps prefaced by reference to a duty to try to achieve a consensus. In option 2, the majority should be a two-thirds or three-fourths majority of all the States parties, not only of those present and voting. For article 111, he particularly favoured option 2 because it drew a distinction between amendment and review mechanisms. The distinction related in particular to the effects of entry into force. Article 112 raised no problems, except that he saw no need for the words "without any kind of discrimination". He was very much in favour of the main thrust of article 113, which went beyond article 18 of the Vienna Convention on the Law of Treaties. He could accept article 115, though paragraph 2 and the bracketed paragraph could be merged.

12. **Mr. Maiga** (Mali) preferred option 2 for article 108, because it covered disputes between States parties as well as disputes relating to the Court's judicial activities. In article 110, he supported the first paragraph. In paragraph 3, he preferred option 2 with a two-thirds majority of States parties. He agreed with Australia that paragraph 6 could be deleted. For article 111, he preferred option 2 with provision for a five-year period. In article 112, the words "without any kind of discrimination" could perhaps be deleted. Article 113 could be deleted because it was covered by the Vienna Convention on the Law of Treaties. The bracketed paragraph at the end of article 115 should become paragraph 2.

13. **Mr. Dimovski** (The former Yugoslav Republic of Macedonia) said that he wished to reiterate that, without the bracketed wording in lines 1 and 2 of article 112, paragraph 1, his delegation would not be able to sign the Convention. The effect of what had been proposed by some delegations would be to prevent his delegation from signing.

14. **Mr. Nathan** (Israel) said that article 108 should provide for disputes between States to be dealt with initially by negotiation and, if negotiations failed, for the matter to be referred to the Assembly of States Parties. He therefore preferred option 2. He had no particular problem with the current draft of article 110, but preferred option 2, with a majority of three fourths of all the States parties. He preferred option 2 for article 111, but the convening of a review conference should perhaps be made subject to there being a minimum number of States interested in the convening of such a conference.

15. **Mr. Robinson** (Jamaica) thought that article 112 was not entirely consistent with United Nations practice in that, under paragraph 2, the Statute was said to be subject to ratification, acceptance or approval by signatory States. It was enough to say that the Statute was subject to ratification, acceptance, approval or accession.

16. **Mr. Gadyrov** (Azerbaijan) supported option 3 for article 108; all disputes should be settled by the Court itself.

17. For article 110, in principle, he favoured option 2, but he thought that the kind of majority should depend on the nature of the proposed amendments. For an amendment of a technical nature, a simple majority should be enough. If, however, the proposed amendment concerned issues fundamental to the concept of international criminal justice, or significant changes to the Statute and jurisdiction, a majority of two thirds or three fourths should be required.

#### PREAMBLE

18. **Mr. Yáñez-Barnuevo** (Spain), introducing his delegation's proposal in document A/CONF.183/C.1/L.22, said that the draft preamble in document A/CONF.183/2/Add.1 and Corr.1 was, in his view, insufficient. The first paragraph in his delegation's draft was new; it was intended to underscore the basic motive for the creation of the Court – the fact that, throughout the current century, millions of people had been victims of grave crimes that affected humanity. It also reflected an idea that appeared in the Preamble to the Charter of the United Nations. The next two paragraphs were based on the first two paragraphs of the original draft. They stressed the collective wish of the States represented at the Conference to foster and improve international cooperation in bringing to justice those who perpetrated grave international crimes, and the determination to create an international criminal court as a permanent body within the United Nations system, with jurisdiction over the most serious crimes that affected the international community as a whole.

19. The next paragraph was based on the text suggested in footnote 2 in document A/CONF.183/2/Add.1 and Corr.1. The fifth paragraph was new, but reflected language found in other similar conventions. It stressed two particular concerns found in the Charter, the maintenance of international peace and security and respect for universal human rights.

20. The final paragraphs were safeguard clauses. One was based on the fourth preambular paragraph of the definition of aggression annexed to General Assembly resolution 3314 (XXIX) of 14 December 1974, and made it clear that the Statute should not be interpreted as affecting in any way the scope of the provisions of the Charter relating to the functions and powers of the organs of the United Nations. The last paragraph was based on the preambular paragraphs of certain conventions dealing with the codification and progressive development of international law, and stressed that the Statute would not prevent general international law from continuing to govern those questions not expressly regulated in the Statute.

21. **Mr. Nathan** (Israel) said that, although he would be quite happy with the existing text of the draft preamble, he had no major problem with the draft presented by the delegation of Spain. However, he had doubts about the proposed reference to a court "within the United Nations system", since what was proposed was that the Court should be an independent organ and not part of the United Nations system. He also thought that the sixth paragraph of the Spanish proposal was superfluous, because it was obvious that the Statute of the Court could have no impact on the provisions of the Charter of the United Nations.

22. In the third paragraph of the original draft and the fourth paragraph of the Spanish proposal, he would prefer the expression "criminal jurisdictions" to "criminal justice systems". The words "such a court is intended to be complementary" in the original draft should be replaced by the mandatory form "the Court shall be complementary".

23. **Ms. Mekhemar** (Egypt) said that the reference should be to "criminal jurisdictions", in line with the text of article 1 of the draft Statute.

24. **Mr. Nyasulu** (Malawi) had no problems with the first and second paragraphs of the text in document A/CONF.183/2/Add.1 and Corr.1. He agreed that in the third paragraph the term should be "criminal jurisdictions". That paragraph, however, could be deleted, since it added little that was not contained in article 1. To replace the words "is intended to be complementary" by the words "shall be complementary" would be to move words from article 1 to the preamble. He would rather retain those words in article 1. He had no serious problems with the Spanish proposal in document A/CONF.183/C.1/L.22 except that it seemed to say the same as the current draft but at greater length. The fourth paragraph was unnecessary, but the second paragraph could perhaps address the point raised in the second sentence of article 113.

25. **Mr. Minoves Triquell** (Andorra) said that the preamble should briefly refer to the principles underlying the Statute, and it should also contain inspirational language and give the Statute a certain tone. The Spanish proposal, unlike the original draft, went a long way to meeting those objectives. He particularly supported the reference to the principles of the Charter of the United Nations.

26. **Ms. Shahan** (Libyan Arab Jamahiriya) said that she preferred the original draft of the preamble, but that the reference should be to complementarity to "criminal jurisdictions".

27. **Mr. Al-Amery** (Qatar) supported the proposal to speak of "jurisdictions". He had no problems with regard to the first and second paragraphs.

28. **Mr. Ringera** (Kenya) said that he preferred the original draft; the Spanish proposal was a little too wordy. He had no problem with the first two paragraphs of the original draft. For the third paragraph, however, he preferred the wording given in footnote 2 in the original draft.

29. **Mr. Shukri** (Syrian Arab Republic), supported by **Mr. Mahmood** (Pakistan), said that the wording of the third paragraph should be aligned with article 1.

30. **Mr. Agbetomey** (Togo) welcomed the Spanish proposal, which was more explicit than the original draft. However, certain expressions in the original draft, such as "crimes of concern to the international community", were preferable to the Spanish wording. In the fourth paragraph of the Spanish draft, he would prefer the formula "shall be complementary to national criminal jurisdictions".

31. **Mr. Chun Young-wook** (Republic of Korea) said that the current wording of the second and third paragraphs of the original draft was rather restrictive and did not reflect the noble purpose of the Statute. The Spanish proposal provided a good basis for a new draft, and he supported it.

32. **Mr. Gevorgian** (Russian Federation) said that he had no particular problems with the original text of the preamble, although he would prefer the formula proposed in the footnote to the third paragraph. He was also ready to support the Spanish proposal. He welcomed the third paragraph and did not think that the independence of the Court would be threatened by its being established within the United Nations system. The Court should function within the existing system of international relations. He supported the fifth paragraph because the purposes and principles of the Charter of the United Nations concerning the maintenance of international peace and security and respect for human rights were directly connected with the activities of the future Court.

33. **Mr. Güney** (Turkey) thought that it was somewhat premature to discuss the preamble before the operative part of the Statute had been completed. In principle, he had no problem with the original draft, although he would prefer the wording in the footnote to the third paragraph.

34. **Ms. Willson** (United States of America) said that, in general, she found the original draft of the preamble acceptable, but could support many elements of the Spanish proposal.

## Agenda item 12

### Adoption of a convention and other instruments deemed appropriate and of the final act of the Conference

(A/CONF.183/2/Add.1 and Corr.1 and A/CONF.183/C.1/L.16)

35. **Mr. S. R. Rao** (India), speaking as Coordinator, introduced the draft final act contained in part two of document A/CONF.183/2/Add.1 and Corr.1. It was based on the usual form for final acts of conferences. The finalized Statute or Convention would be inserted in the final act or annexed to it. In paragraph 14, the names of participating States would be inserted by the Secretariat from the list provided by the Credentials Committee. The Secretariat would also complete the blank spaces in paragraphs 15 to 19. The appropriate symbols for the documents in question would be entered in paragraph 23. The brackets in paragraph 24 related to the period

during which the Statute would be open for signature, something that was still to be decided by the Conference.

36. In paragraph 26, there was a bracketed reference to a resolution on the establishment of the Preparatory Commission. The brackets could perhaps now be removed.

37. He suggested that, subject to the necessary additions to which he had referred, the draft final act could be passed on to the Drafting Committee.

38. In the draft resolution in the annex, there were various issues to be decided regarding the establishment of the Preparatory Commission. There were several sets of brackets in the draft, and three footnotes. One question concerned when the Commission should start its work. The main function of the Commission would be to make concrete proposals concerning arrangements for establishing the Court and bringing it into operation. Regarding paragraph 4 (d), it might be asked, since the Registrar would be responsible for proposing staff regulations under article 45, paragraph 3, of the draft Statute, what the function of the Commission would be in that connection. The suggestion was that the Commission should prepare a draft so that something would be available in advance.

39. A decision was also needed on whether the Preparatory Commission would convene the Assembly of States Parties. Based on his consultations, he thought it might be appropriate for the Secretary-General, rather than the Commission, to convene the Assembly of States Parties. He therefore proposed the deletion of the text in brackets in paragraph 5.

40. **Mr. Yáñez-Barnuevo** (Spain), referring to paragraphs 23 and 24 of the draft final act, expressed the view that the established term "Statute" rather than the term "Convention" should be used in the title of the instrument establishing the Court. That would also help to avoid confusion with other Rome conventions.

41. In paragraph 26, the brackets around "Resolution on the Establishment of the Preparatory Commission for the International Criminal Court" should be removed. Turning to the annexed resolution, he said that, under paragraph 1, he would like to see the Commission convened as soon as possible following the signature of the Statute and once the General Assembly had been able to take action as indicated in paragraphs 7 and 8. The Commission should be convened, at the initiative either of the General Assembly or of the Secretary-General, once a stated number of signatures was received, and the number did not need to be very high.

42. He wished also to draw attention to document A/CONF.183/C.1/L.16 containing a proposal, submitted by his delegation along with others, to amend the draft resolution by adding a paragraph 3 bis, according to which the official and working languages of the Preparatory Commission would be those of the General Assembly That would reflect the established practice for such preparatory commissions.

43. Finally, with regard to the tasks of the Preparatory Commission, he was not convinced that it should discuss elements of offences at that stage. He agreed with all the other tasks listed.

44. **Ms. Willson** (United States of America) said that paragraphs 1 to 23 of the draft final act presented no particular problems for her delegation. For the reasons already explained, the United States had requested the brackets contained in paragraph 24. Bearing in mind the need to pass articles on to the Drafting Committee, her delegation would accept the words in brackets in paragraph 24 of the draft final act and the corresponding words in brackets in article 112 of the draft Statute; however, it maintained its position that the Rules of Procedure and Evidence and the elements of offences were an integral part of the Statute and must be completed prior to its entry into force.

45. The brackets in paragraph 26 simply reflected the fact that there were still outstanding issues to be considered in the draft resolution concerned. They included the financing of the Preparatory Commission and the final preparation of the Rules of Procedure and Evidence.

46. The bracketed language in paragraph 4 (f) of the draft resolution should be deleted. Article 49 of the Statute would provide adequate privileges and immunities. Additionally, it was anticipated, as reflected in paragraph 4 (c) of the draft resolution, that the host country would conclude a headquarters agreement with the Court; that agreement should provide for the necessary privileges and immunities.

47. **Mr. Blichli** (Netherlands) agreed that paragraph 4 (f) was redundant, as the general privileges and immunities of the Court would be covered by the Statute.

48. **Mr. Krokmal** (Ukraine) said that the ellipsis at the end of paragraph 26 after the list of resolutions presumably meant that the list was not exhaustive. Some questions which were difficult to address within the framework of the Statute itself could perhaps be solved in the resolutions adopted by the Conference. The question of privileges and immunities was adequately dealt with in the draft Statute.

49. **Mr. Al Ansari** (Kuwait) agreed that the term "Statute" should be used rather than "Convention". In paragraph 1 of the draft resolution, the wording should be "as early as possible at a date to be decided by the General Assembly of the United Nations". Regarding the number of required signatures, 50 would be an acceptable figure, representing almost one third of the total number.

50. **Mr. Güney** (Turkey) thought that paragraph 21 of the draft final act should refer to the draft originally prepared by the International Law Commission and should read: "The Conference had before it a draft Convention on the Establishment of an International Criminal Court originally prepared by the International Law Commission and transmitted by the Preparatory Committee in accordance with its mandate."

51. **Mr. Politi** (Italy) supported the removal of the brackets in paragraph 26. Referring to paragraph 24 and footnote 1 to the draft resolution, he reiterated his view that the Statute stood by itself and any secondary instrument, such as the Rules of Procedure and Evidence, should not affect the opening for signature or entry into force of the Statute.

52. On paragraph 1 of the draft resolution, he considered that the Preparatory Commission should be convened as soon as possible and that the number of signatures necessary to make paragraph 1 operative should not be very high. He supported the deletion of paragraph 4 (f). Finally, he agreed with the Coordinator regarding the deletion of the text in brackets in paragraph 5.

53. **Mr. Kawamura** (Japan), referring to paragraph 1 of the draft resolution, said that, as the Preparatory Commission's task was to propose practical arrangements for the establishment of the Court, it should be set up as soon as possible.

54. It might be appropriate to mention who was to draft the Rules of Procedure and Evidence, perhaps the United Nations Secretariat. He would support the deletion of paragraph 4 (d)

because the staff regulations would be prepared by the Registrar as prescribed in article 45, paragraph 3. Lastly, paragraph 4 (f) should be deleted for the reason given by other speakers.

55. **Mr. González Gálvez** (Mexico) had serious misgivings about the contents of the brackets in paragraph 4 (a) of the draft resolution. It should be made clear that preparation of a text on elements of offences would take place at a later stage.

56. **Mr. Momtaz** (Islamic Republic of Iran) shared the views expressed by the representative of Turkey on the wording of paragraph 21 of the draft final act. In paragraph 23, he agreed that "Convention" should be replaced by "Statute". He was against deleting paragraph 4 (f) of the draft resolution, since article 49 of the draft Statute was not sufficiently explicit on privileges and immunities. He did not think it a good idea for the first meeting of the Preparatory Commission to be convened by the Assembly of States Parties. A reference should also be made to the working languages of the Commission.

*The meeting rose at 12.40 p.m.*

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## 21st meeting

Tuesday, 30 June 1998, at 3.15 p.m.

*Chairman:* Mr. Kirsch (Canada)

A/CONF.183/C.1/SR.21

### Agenda item 11 (*continued*)

**Consideration of the question concerning the finalization and adoption of a convention on the establishment of an international criminal court in accordance with General Assembly resolutions 51/207 of 17 December 1996 and 52/160 of 15 December 1997 (A/CONF.183/2/Add.1 and Corr.1 and A/CONF.183/C.1/WGPM/L.2/Add.1 and Corr.1)**

#### DRAFT STATUTE

PART 5. INVESTIGATION AND PROSECUTION (*continued*)

PART 6. THE TRIAL

*Report of the Working Group on Procedural Matters (continued) (A/CONF.183/C.1/WGPM/L.2/Add.1 and Corr.1)*

1. **The Chairman** invited the Chairman of the Working Group on Procedural Matters to introduce the addendum to the report of the Working Group contained in document A/CONF.183/C.1/WGPM/L.2/Add.1 and Corr.1, dealing with some articles of parts 5 and 6.

2. **Ms. Fernández de Gurmendi** (Argentina), Chairman of the Working Group on Procedural Matters, said that, since the submission of its last report (A/CONF.183/C.1/WGPM/L.2 and Corr.1 and 2), the Working Group had held seven additional meetings on outstanding issues. The Working Group was now transmitting to the Committee of the Whole the following provisions of part 5 for consideration: article 54, paragraph 4; article 54 ter, paragraph 3 (d); article 58, paragraph 6; and article 61, paragraph 6 bis. It was also transmitting the following provisions of part 6: article 62, paragraph 1; article 65; and article 69, paragraphs 2 to 4, 4 bis, 5, 6 and 8. The other articles would be transmitted later. The Working Group would continue to discuss the issues pending in part 6 and would soon begin its examination of part 8.

3. **The Chairman** asked whether he could take it that the Committee of the Whole agreed to refer the articles contained in the report of the Working Group to the Drafting Committee.

4. *It was so decided.*

*The meeting rose at 3.20 p.m.*

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## 22nd meeting

Thursday, 2 July 1998, at 3.20 p.m.

*Chairman:* Mr. Kirsch (Canada)

A/CONF.183/C.1/SR.22

### Agenda item 11 (*continued*)

**Consideration of the question concerning the finalization and adoption of a convention on the establishment of an international criminal court in accordance with General Assembly resolutions 51/207 of 17 December 1996 and 52/160 of 15 December 1997 (A/CONF.183/2/Add.1 and Corr.1, A/CONF.183/C.1/WGIC/L.8/Rev.1 and Corr.1 and 2, A/CONF.183/C.1/WGIC/L.10 and Corr.1 and A/CONF.183/C.1/WGIC/L.11 and Corr.1 and 2)**

#### DRAFT STATUTE

##### PART 9. INTERNATIONAL COOPERATION AND JUDICIAL ASSISTANCE

##### *Report of the Working Group on International Cooperation and Judicial Assistance*

(A/CONF.183/C.1/WGIC/L.8/Rev.1 and Corr.1 and 2, A/CONF.183/C.1/WGIC/L.10 and Corr.1 and A/CONF.183/C.1/WGIC/L.11 and Corr.1 and 2)

1. The **Chairman** invited the Coordinator for part 9 to introduce the report of the Working Group on International Cooperation and Judicial Assistance.

2. **Mr. Mochochoko** (Lesotho), Coordinator for part 9, introducing the report of the Working Group, said that it was transmitting to the Committee of the Whole for consideration article 85; article 86, paragraphs 1 to 4, 6 and 7; articles 88, 89 and 90 bis; all paragraphs of article 91 with the exception of paragraph 4; and article 91 bis. The remaining articles would be transmitted at a later stage.

3. He wished to highlight a few points regarding some of those articles. In article 88, paragraph 1 (a) (iii), a footnote should be added reading: "Some delegations have emphasized that they accept paragraph 1 (a) (iii) with the proviso that, in article 87, paragraph 3, subparagraph (d) of option 2 will be deleted." In article 91 bis, the reference in the first sentence of paragraph 2 should be to paragraph 1. The understanding of the Working Group was that the text within brackets in article 86, paragraph 7, would have to be reconsidered in the light of the decision on the question of referral of the matter to the International Criminal Court by the Security Council. The terms that appeared in brackets in articles 88 and 89 should be considered in the light of the use of those terms in article 87. Lastly, the terms enclosed in brackets in article 91, paragraph 1, would have to be reconsidered in the light of the decision taken on the question of application of national law in part 9.

4. **Ms. Borek** (United States of America), referring to the footnote to article 88, paragraph 1 (a) (iii), pointed out that there had in fact been no agreement on the deletion of subparagraph (d) of option 2 for article 87, paragraph 3. She therefore proposed that, for the sake of clarity, a further sentence should be added to the footnote, to read: "This issue, however, is still under discussion in the Working Group."

5. The **Chairman** said that he noted that the Coordinator for part 9 was prepared to accept that amendment. If he heard no objection he would take it that the Committee of the Whole wished to refer the articles concerned to the Drafting Committee.

6. *It was so decided.*

*The meeting rose at 3.30 p.m.*

## 23rd meeting

Friday, 3 July 1998, at 3.15 p.m.

Chairman: Mr. Kirsch (Canada)

A/CONF.183/C.1/SR.23

### Agenda item 11 (*continued*)

**Consideration of the question concerning the finalization and adoption of a convention on the establishment of an international criminal court in accordance with General Assembly resolutions 51/207 of 17 December 1996 and 52/160 of 15 December 1997 (A/CONF.183/2/Add.1 and Corr.1 and A/CONF.183/C.1/WGGP/L.4/Add.1/Rev.1 and Corr.1)**

#### DRAFT STATUTE

##### PART 3. GENERAL PRINCIPLES OF CRIMINAL LAW (*continued*)

##### *Report of the Working Group on General Principles of Criminal Law (continued)* (A/CONF.183/C.1/WGGP/L.4/Add.1/Rev.1 and Corr.1)

1. **The Chairman** invited the Coordinator for part 3 to introduce the report of the Working Group on General Principles of Criminal Law (A/CONF.183/C.1/WGGP/L.4/Add.1/Rev.1 and Corr.1).
2. **Mr. Saland** (Sweden), Coordinator for part 3, introducing the report, said that the entire text of article 31, paragraph 1 (c), should be deleted and replaced with the word "pending" and that, consequently, footnotes 9 to 11 should also be deleted. In article 23, the Working Group had decided to delete paragraph 7 (c), since a cross-reference to the issue of command responsibility was no longer needed. The agreement reached on article 25, which was a very difficult article, was a major breakthrough, and he was grateful for the flexibility shown by many delegations. The attention of the Drafting Committee was drawn to the need to review the title, and to the fact that the text represented a delicate compromise.
3. Following long and arduous discussions on article 28, it had become apparent that defining an omission and the circumstances in which it created individual criminal responsibility was an almost impossible task. The Working Group had therefore reluctantly agreed to delete the article and to leave the question to be resolved in other parts of the Statute. Footnote 3 indicated that some delegations had not been altogether happy with that decision.
4. There had also been a long and difficult discussion on article 30, but in the end a reasonably satisfactory result had been achieved. However, as was pointed out in footnote 5, some delegations had not considered that a mistake of fact or a mistake of law could be grounds for excluding criminal responsibility. While he respected that view, he believed that the text, which had been the subject of extensive negotiations, could now be referred to the Drafting Committee.
5. A considerable amount of time had been spent on article 31, which was central to the Statute, and he was pleased to say that agreement had been reached on the entire text with the exception of paragraph 1 (c), which was still pending. There had been a general understanding in the Working Group that the text was the best result that could be achieved in the circumstances, and he again commended the flexibility shown by delegations. He drew attention to the various footnotes to the article. Footnote 7 indicated that the word "law" at the end of paragraph 1 (a) was intended to refer to applicable law as defined in article 20. Footnote 8 dealt with a very important issue to which the Working Group had devoted many hours of discussion. It read: "It was the understanding that voluntary intoxication as a ground for excluding criminal responsibility would generally not apply in cases of genocide or crimes against humanity, but might apply to isolated acts constituting war crimes." Another important interpretative statement was contained in footnote 12, which indicated that cases of voluntary exposure were understood to be dealt with under article 31, paragraph 2, which enabled the International Criminal Court to disregard grounds for excluding criminal responsibility which would otherwise be applicable.
6. The Working Group had concluded that articles 33 and 34 could be deleted, since the issues they covered had been subsumed under article 31, paragraph 3.
7. He proposed that the Committee of the Whole agree to refer to the Drafting Committee the articles contained in the report and to delete article 23, paragraph 7 (c), and articles 28, 33 and 34.
8. **Mr. Avendaño** (Mexico) said that his delegation was not clear whether the footnotes referred to by the Coordinator were to be included in the final text of the Statute. If that was not to be the case, Mexico wished to insist that footnote 9 should be included in the text of article 31, paragraph 1 (c).
9. **Mr. Saland** (Sweden), Coordinator for part 3, said that, as he had already explained, article 31, paragraph 1 (c), was still pending, which meant that, for the time being, the footnotes relating to it were deleted. The delegation of Mexico would have the opportunity to return to the issue at a later stage.
10. **The Chairman** said that, if he heard no objection, he would take it that the Committee of the Whole wished to refer the articles contained in the report of the Working Group to the Drafting Committee.
11. *It was so decided.*

*The meeting rose at 3.30 p.m.*



## 24th meeting

Monday, 6 July 1998, at 3.15 p.m.

Chairman: Mr. Kirsch (Canada)

A/CONF.183/C.1/SR.24

### Agenda item 11 (*continued*)

**Consideration of the question concerning the finalization and adoption of a convention on the establishment of an international criminal court in accordance with General Assembly resolutions 51/207 of 17 December 1996 and 52/160 of 15 December 1997 (A/CONF.183/2/Add.1 and Corr.1, A/CONF.183/C.1/L.45 and Corr.1–3, A/CONF.183/C.1/L.47 and Corr.1, A/CONF.183/C.1/WGGP/L.4/Add.2 and Corr.1, A/CONF.183/C.1/WGP/L.14 and Corr.1 and 2 and A/CONF.183/C.1/WGPM/L.2/Add.2 and Corr.1 and 2)**

#### DRAFT STATUTE

##### PART 5. INVESTIGATION AND PROSECUTION (*continued*)

##### PART 6. THE TRIAL (*continued*)

##### PART 8. APPEAL AND REVIEW

*Report of the Working Group on Procedural Matters (continued)* (A/CONF.183/C.1/WGPM/L.2/Add.2 and Corr.1 and 2)

1. **Ms. Fernández de Gurmendi** (Argentina), Chairman of the Working Group on Procedural Matters, introducing the report of the Working Group (A/CONF.183/C.1/WGPM/L.2/Add.2 and Corr.1 and 2), said that good progress had been made on the articles left pending. She listed the provisions of articles 54 bis, 61, 64, 66, 67, 74, 80 and 81 which were being submitted to the Committee of the Whole for consideration, pointing out that article 80, paragraph 1 (c), had been deleted. She drew the Committee's attention to the fact that, in the title of article 80, the word "judgement" should be replaced by "decision", and a footnote added, reading: "The Working Group notes that the term 'decision' or 'sentence', as appropriate, should be used consistently throughout part 8, rather than the term 'judgement'." The title of article 81 should read: "Appeal against other decisions".

2. **The Chairman** said that, if he heard no objection, he would take it that the Committee of the Whole wished to refer the provisions contained in the report of the Working Group, as orally amended, to the Drafting Committee.

3. *It was so decided.*

##### PART 3. GENERAL PRINCIPLES OF CRIMINAL LAW (*continued*)

*Report of the Working Group on General Principles of Criminal Law (continued)* (A/CONF.183/C.1/WGGP/L.4/Add.2 and Corr.1)

4. **Mr. Saland** (Sweden), Chairman of the Working Group on General Principles of Criminal Law, introducing the report

of the Working Group (A/CONF.183/C.1/WGGP/L.4/Add.2 and Corr.1), said it would be seen from the corrigendum to the report that no text of paragraphs 5 and 6 of article 23 had yet been agreed. Article 31, paragraph 1 (c), concerning self-defence as a ground for excluding criminal responsibility, was also still pending. However, he was pleased to say that article 32 had been adopted. He drew attention to footnote 8, which explained the understanding which had enabled some delegations to go along with that decision.

5. **The Chairman** said that, if he heard no objection, he would take it that the Committee of the Whole agreed to refer article 32 to the Drafting Committee.

6. *It was so decided.*

##### PART 4. COMPOSITION AND ADMINISTRATION OF THE COURT (*continued*)

*Recommendations of the Coordinator* (A/CONF.183/C.1/L.45 and Corr.1–3)

7. **Mr. Rwelamira** (South Africa), Coordinator for part 4, introducing his report (A/CONF.183/C.1/L.45 and Corr.1–3), pointed out that the text of article 40, paragraph 2, presented therein was in fact still pending. He drew attention to footnote 3 to article 43, paragraph 1, which indicated that the language ultimately adopted would reflect the outcome of discussions on article 12. Concerning article 44, paragraph 4, he drew attention to footnote 8, which indicated that the language of the paragraph would have to be aligned with that of article 68, paragraph 5.

8. As could be seen from corrigendum 1 to the report, article 45, paragraph 4, was in fact still pending. Other provisions that required further consultations before they could be submitted to the Committee for adoption were article 37, paragraphs 1, 3 (b), 4, 4 bis and 7; article 40, paragraph 1; article 49, paragraph 1; and article 52, paragraphs 1 and 3.

9. **Ms. Baykal** (Turkey), referring to article 45, paragraph 4, on gratis personnel, pointed out that footnote 9 did not reflect the view of her delegation, shared by a number of other delegations, that the bracketed paragraph should be deleted.

10. **Mr. Rwelamira** (South Africa), Coordinator, said that it was because considerable support had also been expressed for the retention of that paragraph that it had been decided to leave it pending until further consultations had been held.

11. **Ms. Shahan** (Libyan Arab Jamahiriya), referring to the penultimate sentence of article 43, paragraph 2, said that her delegation would have preferred the words "[and represent different legal systems]" to have been retained.

12. **Mr. Robinson** (Jamaica) drew attention to article 52, paragraph 4, which required that the Rules of Procedure and Evidence should be consistent with the Statute. During the informal consultations, his delegation had raised the question of whether such a provision would not invite challenges to the International Criminal Court alleging ultra vires. As he understood it, the intention had been to indicate that, in the event of a conflict between the Rules and the Statute, the Statute would prevail.

13. **Mr. Rwelamira** (South Africa), Coordinator, said that it was his recollection that the same point had been raised in connection with article 52, paragraph 1. That provision had also been left pending, with a view to finding an acceptable formulation which would take care of Jamaica's concern.

14. **Mr. Pérez Otermin** (Uruguay), referring to article 37 on the qualification of judges, noted that paragraph 3 (c) required every candidate to "possess an excellent knowledge of and be fluent in" at least one of the working languages. That seemed an unduly stringent requirement: he considered it sufficient to require "some knowledge" of one of the working languages.

15. **Mr. Rwelamira** (South Africa), Coordinator, said there had been general consensus that that requirement should be included. However, if the representative of Uruguay wished to pursue that point, it could be discussed by the Committee. In response to the question raised by the representative of the Libyan Arab Jamahiriya, he explained that it had been felt that the most realistic solution would be to require that the Prosecutor and the Deputy Prosecutors should be of different nationalities.

16. **Mr. Shukri** (Syrian Arab Republic) pointed out that nationalities and legal systems were not synonymous. He would prefer the wording "[and represent different legal systems]" to be retained.

17. **The Chairman** proposed that, in order to save time, the report of the Coordinator, as orally amended, should be referred to the Drafting Committee with article 43, paragraph 2, left pending.

18. *It was so decided.*

#### PART 11. ASSEMBLY OF STATES PARTIES (*continued*)

##### *Recommendations of the Coordinator* (A/CONF.183/C.1/L.47 and Corr.1)

19. **Mr. S. R. Rao** (India), Coordinator for part 11, introducing his report (A/CONF.183/C.1/L.47 and Corr.1), said that it concerned only one article, article 102. Outlining the various decisions taken, he said that paragraph 3 (a) now provided for two Vice-Presidents of the Assembly instead of one. In paragraph 3 (b) the words "as far as possible" should be deleted. In paragraph 4, the first of the two bracketed phrases had been deleted and the second retained without the brackets. For the third sentence of paragraph 5, a compromise solution had been reached whereby decisions on matters of substance had to be approved by a two-thirds majority of those present and voting, with a quorum of an absolute majority of States parties. It had

been decided to delete the brackets enclosing paragraph 6 as a whole, and to specify a period of two full years.

20. Paragraph 8, which had not existed in the earlier version, reflected a proposal by Spain concerning official languages which had received general support in the informal consultations.

21. **Mr. Yáñez-Barnuevo** (Spain) said that his delegation did not object to the referral of article 102 to the Drafting Committee, but would appreciate clarification concerning paragraph 5. Did the formula chosen imply that the two-thirds majority of those present and voting had also to constitute an absolute majority of States parties? He also wished to know whether the words "except as otherwise provided in the Statute" referred back to the particular issue of the quorum for voting, or, as was his understanding, to the broader issue of adoption of decisions on matters of substance.

22. **Mr. S. R. Rao** (India), Coordinator, said that the understanding of the representative of Spain was correct regarding the second point.

23. **Mr. van Boven** (Netherlands), noting that a footnote had been added to paragraph 2 (d) to the effect that the paragraph was without prejudice to the final decision on article 104, said that a footnote to the same effect should perhaps be added to paragraph 6.

24. **Mr. Shukri** (Syrian Arab Republic) noted that no mention was made in paragraph 5 of the majority required for approval of decisions on non-substantive or procedural matters. That issue should also be addressed.

25. **Mr. Pfirter** (Switzerland) endorsed the views expressed by Spain regarding the need for clarification of paragraph 5. It should be made clear whether the quorum specified was a quorum for adoption of decisions on matters of substance or simply one required for proceeding to a vote.

26. **Mr. Bouguetaia** (Algeria) said that, since paragraph 5 dealt with the fundamental issue of the procedure for making decisions on substantive matters, it was important to be precise, and he therefore fully endorsed the requests for clarification just made. Did the provision require a two-thirds majority of the absolute majority specified in the proviso?

27. **Mr. Krokmal** (Ukraine) supported the views expressed by the representative of Spain concerning paragraph 5, and by the representative of the Netherlands concerning paragraph 6.

28. **Mr. S. R. Rao** (India), Coordinator, in reply to the point raised by the representative of the Netherlands, said that it had been decided to add the footnote to paragraph 2 (d) in order not to prejudge the question of the kind of funding mechanism for the Court that might eventually evolve under article 104. However, the issue dealt with in paragraph 6, namely the voting rights of States parties in arrears in the payment of financial contributions, was unrelated to the one dealt with in paragraph 2 (d), and there was therefore no need to add any reference to article 104.

29. In reply to the question raised by the representative of the Syrian Arab Republic concerning paragraph 5, he said that the issue of the procedure to be followed in taking decisions on non-substantive matters had not been addressed. In response to the concerns expressed regarding the formulation of the third sentence of paragraph 5, he said that the two kinds of majority referred to should be seen as an integral whole, reflecting a compromise solution to the question of the required majority for voting. He suggested that the meaning of the text would perhaps be clarified if the words "except as otherwise provided in the Statute" were placed after the words "if consensus cannot be reached". It could be left to the Drafting Committee to clarify any remaining ambiguities.

30. **Ms. Aguiar** (Dominican Republic), speaking as a member of the Drafting Committee, pointed out that it was not the task of that Committee to divine the intentions underlying the articles of the Statute, but rather to clarify the language in which they were expressed. That task was extremely difficult in the case of paragraph 5, which dealt with at least four separate concepts: voting rules, rules on decision-making, majorities and quorums. A quorum was normally required for the holding of a meeting, not for proceeding to a vote. If that confusion could be clarified, the task of the Drafting Committee would be a great deal easier.

31. **The Chairman** proposed that paragraph 5 of article 102 should be left pending and that the remainder of the article, as orally amended, should be referred to the Drafting Committee.

32. *It was so decided.*

#### PART 7. PENALTIES

##### *Report of the Working Group on Penalties* (A/CONF.183/C.1/WGP/L.14 and Corr.1 and 2)

33. **Mr. Fife** (Norway), Chairman of the Working Group on Penalties, introducing the report of the Working Group (A/CONF.183/C.1/WGP/L.14 and Corr.1 and 2), said that the Working Group was now in a position to transmit to the Committee for consideration article 75, paragraph 2; article 77, paragraphs 1 and 2; and article 79. A reference to an article 21 bis had been included in the text because, although some had felt that the principle of *nullum crimen sine lege* might usefully be considered in the Working Group, others had been of the view that that issue really belonged in part 3 of the Statute. Two minor amendments should be made to the text of the report: it had been agreed in the informal consultations that the term "forfeiture" should be used in a consistent manner throughout the Statute, and not simply in part 7 as erroneously stated in footnote 1; and in footnote 3 the word "possible" should read "impossible".

34. **The Chairman** said that, if he heard no objection, he would take it that the Committee of the Whole agreed to refer the articles contained in the report of the Working Group, as orally amended, to the Drafting Committee.

35. *It was so decided.*

*The meeting rose at 4.35 p.m.*

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### 25th meeting

Wednesday, 8 July 1998, at 10.25 a.m.

*Chairman:* Mr. Kirsch (Canada)

A/CONF.183/C.1/SR.25

#### **Agenda item 11 (continued)**

**Consideration of the question concerning the finalization and adoption of a convention on the establishment of an international criminal court in accordance with General Assembly resolutions 51/207 of 17 December 1996 and 52/160 of 15 December 1997 (A/CONF.183/2/Add.1 and Corr.1 and A/CONF.183/C.1/L.53)**

#### **DRAFT STATUTE**

##### **PART 2. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW (continued)**

*Discussion paper prepared by the Bureau*  
(A/CONF.183/C.1/L.53)

1. **The Chairman** drew delegations' attention to a discussion paper (A/CONF.183/C.1/L.53) prepared by the Bureau to facilitate consideration of part 2 by the Committee of the Whole.

2. He proposed that the debate should be divided into two parts, the first bearing on crimes (article 5), and the second on other jurisdictional issues, admissibility and applicable law. It would be particularly useful if delegations would comment on the following issues: (i) an approach to the crime of aggression that might form the basis of general agreement; (ii) an approach to the treaty crimes, namely terrorism, drug trafficking and crimes against United Nations and associated personnel; (iii) the need for a threshold for war crimes; (iv) a generally acceptable approach to weapons of a nature to cause superfluous injury or unnecessary suffering; (v) sections C and D on armed conflict not of an international character, including the need for those sections and, if they were included, the threshold for those provisions; (vi) the need for an appropriate provision on elements of crimes to be elaborated after the Conference.

3. On other jurisdictional issues, admissibility and applicable law (articles 6 to 20), the Bureau would appreciate comments on the following: (i) acceptance of jurisdiction – automatic jurisdiction, opt-in or State consent for one or more core crimes; (ii) which States should be parties to the Statute or should have accepted jurisdiction before the International Criminal Court exercised such jurisdiction; (iii) the *proprio motu* power of the Prosecutor to initiate proceedings and the safeguards that would be required; (iv) the role of the Security Council on issues other than aggression. Delegations were, of course, free to comment on any other issues relating to part 2.

Article 5. Crimes within the jurisdiction of the Court  
(continued)

4. **Mr. von Hebel** (Netherlands), Coordinator, said that the first major issue in connection with article 5 was whether the crime of aggression should be included within the jurisdiction of the Court. If no general agreement could be secured on the definition of that crime, there was an option to exclude it. The second issue was the inclusion of treaty crimes. With regard to genocide and crimes against humanity, the definition of the former had caused no problems and was indeed exactly the same as the one in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. With regard to crimes against humanity, a compromise text had now received wide support. On war crimes, there were three options relating to the thresholds. Option 1 provided that the Court should have jurisdiction over war crimes only when committed as part of a plan or policy or as part of a large-scale commission of such crimes. Option 2 was almost the same but with the word “only” replaced by “in particular”. Option 3 was for no such provision to be included. In earlier discussions, option 2 had been favoured by most delegations as a compromise solution.

5. The definition of war crimes consisted of four sections, A to D. Section A, on grave breaches of the Geneva Conventions of 1949, had not caused serious problems. There were a few outstanding issues requiring clarification in section B, dealing with other serious violations of the laws and customs applicable in international armed conflict. In subparagraph (o), dealing with weapons, there were three options, the first providing for a short list of weapons of a nature to cause superfluous injury or unnecessary suffering, with a provision (subparagraph (vi)) to allow further expansion of the list in the future in accordance with a procedure to be laid down. Further consultation might be held on the wording of that provision. Option 2 contained the same list plus three other elements: nuclear weapons, anti-personnel mines and blinding laser weapons. Subparagraph (ix) of that option provided for the possibility of further expansion of the list.

6. Option 3 took a different approach, since it did not give a list of weapons but simply stated that certain weapons should be considered prohibited. Subparagraph (p bis) (crimes of a sexual nature), subparagraph (r bis) (United Nations personnel) and subparagraph (t) (participation of children) were still under

discussion. Sections C and D were open for further discussion and for each there was an option 2 which provided that there would be no such section.

7. Lastly, following article Y there was a comment that read in part: “Elements of crimes may be elaborated after the Rome Conference by the Preparatory Commission”, which had received considerable support. The drafting was subject to further discussion.

8. **Mr. Rwelamira** (South Africa), speaking on behalf of the member States of the Southern African Development Community (SADC) on article 5, said that the member States of SADC supported the inclusion of the crimes enumerated in (a), (b) and (c) under “Crimes within the jurisdiction of the Court”. They also supported inclusion of the crime of aggression, subject to agreement on a definition and a clear spelling-out of the Security Council’s role. They had no problem with inclusion of the crime of genocide or the definition thereof, and supported the current formulation of the provisions on crimes against humanity and the wording of the chapeau of those provisions.

9. With regard to war crimes, option 1 set too high a threshold; the member States of SADC therefore supported option 2. With regard to section B, subparagraph (o), in the interests of compromise they would be prepared to support option 1 on the understanding that it included subparagraph (vi), which allowed for the possibility of including other weapons at a later stage.

10. Most atrocities were now committed in the context of internal armed conflicts. The member States of SADC therefore supported inclusion of sections C and D in the Statute, although a compromise provision containing elements of both sections might also be acceptable.

11. With regard to the crime of aggression, option 1 provided a good starting point for an acceptable definition, but it should also take account of contemporary forms of aggression, particularly the elements set out in General Assembly resolution 3314 (XXIX) of 14 December 1974.

12. The member States of SADC had a flexible attitude with regard to the inclusion of treaty crimes: drug crimes and crimes against United Nations personnel represented major challenges and might usefully be reflected in the Statute. While attracted to the idea of including the elements of crimes, they wished to know whether the elements would form an integral part of the Statute, whether they would be elaborated in the Preparatory Commission for the International Criminal Court, and what the influence of States in that process would be.

13. **Mr. Hafner** (Austria), speaking on behalf of the member States of the European Union, said that the European Union considered that the Court should be an independent institution with jurisdiction over the core crimes of genocide, crimes against humanity and war crimes. Aggression should also come within the Court’s jurisdiction if properly defined.

14. The European Union considered that, as internal conflict was now so widespread, the Court's jurisdiction should extend to crimes committed in internal as well as international armed conflict. Moreover, the Court should be complementary to national processes when national systems were unable or unwilling to investigate or prosecute. The Security Council should be able to refer to the Court situations in which crimes within the Court's jurisdiction might be committed.

15. **Mr. MacKay** (New Zealand) said that his delegation wished the crime of aggression to be included in the Court's jurisdiction, but that in view of the difficulties of definition it might be necessary to maintain the status quo, whereby aggression was ultimately determined by the Security Council.

16. New Zealand was in favour of the inclusion of treaty crimes but, because of its complexity, that question might have to be left to the review conference provided for in the Statute. There was no need for a threshold for war crimes since international law was already clear and any threshold adopted might limit the existing rules. Option 1 was unacceptable to his delegation because its chapeau would rule out application of the Statute to situations in which it was desirable that it should apply. In view of the concerns expressed by other delegations, option 2 was probably the best way forward, although not the one preferred by his own delegation.

17. With regard to the approach to weapons of a nature to cause superfluous injury, New Zealand supported option 3, which had the merit of avoiding a precise listing and had stood the test of time. His delegation also proposed that the reference to "bullets which expand or flatten easily" in subparagraph (iii) of options 1 and 2 should be amended to read "bullets which expand, explode or flatten easily".

18. He again drew the Committee's attention to New Zealand's proposal, contained in document A/CONF.183/C.1/L.40, to delete the word "overall" from subparagraph (b) of section B, an issue which he hoped would be taken up at a later stage.

19. As to whether armed conflicts not of an international character should be covered by the Statute, failure to include such conflicts would leave a huge gap that would be quite unacceptable to the international community. However, further discussion was needed with delegations that were concerned about the application of that provision.

20. His delegation was not entirely convinced of the need for including elements of crimes, but did not rule out that possibility, provided that it did not delay the entry into force of the Statute.

21. **Mr. Onkelinx** (Belgium) said that his delegation hoped that the crime of aggression would be included in the jurisdiction of the Court. Belgium was in favour of option 1, but would like military occupation and annexation of territory not to be the only objectives referred to in the definition of aggression.

22. While his delegation was greatly interested in including treaty crimes, that was a complex issue on which it would be

very difficult to reach a conclusion at the Conference. The matter might be reflected in the Final Act in the hope that it could be included in a subsequent revision of the Statute. His delegation did not consider that terrorism and economic embargoes had a place among crimes against humanity as currently defined in international law.

23. With regard to the threshold for war crimes, Belgium had always favoured option 3, but with a view to achieving a compromise would be prepared to accept option 2. With regard to weapons, his delegation's preference was for option 3 because it was the one most consistent with the texts of humanitarian law conventions. However, if there was a large majority in favour of specifically enumerating prohibited weapons, it could accept option 1, provided that the whole of option 3, and in particular the words "inherently indiscriminate", were included in the chapeau.

24. With regard to sections C and D, Belgium, like all the member States of the European Union, was firmly in favour of the recognition of the Court's jurisdiction over war crimes committed in armed conflicts not of an international character.

25. Article Y should also be reflected in the Statute. However, further discussion was needed with regard to elements of crimes.

26. **Mr. Owada** (Japan) stressed the need for flexibility in order to achieve consensus. The Statute had to be drafted so as to provide satisfactory coordination between existing national judicial systems and the Court's international mechanism. A strictly purist approach would merely produce an unworkable Statute.

27. On crimes against humanity, his delegation had been in favour of the words "widespread and systematic attack" in the chapeau of paragraph 1, but since many delegations preferred "widespread or systematic attack", as in the 1996 draft Code of Crimes against the Peace and Security of Mankind, and since paragraph 2 provided some clarification, his delegation would adopt a flexible attitude on that point. Japan supported the inclusion of subparagraph (g) on rape or other crimes of sexual violence, and hoped that the matter would be satisfactorily resolved. His delegation was not in favour of including terrorism and economic embargoes under crimes against humanity.

28. With regard to war crimes, his delegation considered that a threshold was important, since crimes under the Court's jurisdiction had to be distinguished from more general categories of crime. His delegation was therefore in favour of option 1, but would be prepared to consider option 2 if the majority so desired.

29. With regard to weapons (section B, subparagraph (o)), he said that, in accordance with the principle of *nullum crimen sine lege*, it was important to enumerate the acts to be considered as war crimes and their constituent elements. The approaches in options 1 and 2 were therefore preferable to the more generic approach adopted in option 3.

30. Since international law on the subject was still in the process of development, Japan was in favour of including

provision for a review, as in subparagraph (vi) of option 1, and subparagraph (ix) of option 2. Any such review would, however, have to be carried out in accordance with the procedures laid down for the revision of the Statute.

31. His delegation was in favour of including subparagraphs (*p* bis), (*r* bis) and (*t*), and urged the Conference to find appropriate wording for those provisions. Japan was also in favour of including sections C and D so that the Statute would apply to armed conflicts not of an international character. It favoured including the crime of aggression on two conditions: first, that a clear definition of the crime was established, and secondly, that there would be no infringement of the Security Council's prerogative under Article 39 of the Charter of the United Nations.

32. On the question of treaty crimes, his delegation considered that, while crimes related to drugs and terrorism were extremely serious, it was essential to intensify cooperation within the framework of the treaties dealing with those issues. If treaty crimes were included within the Court's jurisdiction, they should all be treated on an equal footing. Moreover, if the treaty crimes were assigned to the jurisdiction of the Court, there was a danger that it might become overburdened. Lastly, Japan considered it absolutely essential to include a binding provision on elements of crimes as an integral part of the Statute; however, work on that issue could continue after the Conference.

33. **Mr. Sadi** (Jordan) said that his delegation was in favour of including the crime of aggression in the Statute. It maintained an open mind on the issue of treaty crimes. However, it wished to insist that armed conflicts not of an international character should be included. It favoured option 2 with regard to the threshold for war crimes, and preferred option 2 with respect to weaponry, although it was also prepared to entertain option 1. His delegation maintained an open mind on the question of including the elements of crimes.

34. **Mr. Liu Daqun** (China) said that his delegation considered that, if agreement could be reached on the definition and on the role of the Security Council in that context, the crime of aggression should be included in the Court's jurisdiction. It could not agree to a selective approach to treaty crimes, which should either all be included or all omitted. His delegation also had some concerns about the provisions concerning crimes against humanity, but was prepared to accept the compromise proposal of Canada.

35. With regard to war crimes his delegation favoured option 1 for the chapeau. It was also in favour of option 1 for subparagraph (*o*) of section B. However, it still needed more time to study subparagraph (vi) of that option. With regard to subparagraph (*r* bis), on protection of United Nations personnel, his delegation considered that that matter could not be assimilated to a war crime. Moreover, since peacekeeping personnel could be regarded as combatants and other personnel as civilians, the Statute already covered United Nations personnel and the paragraph could therefore be deleted.

36. His delegation favoured deletion of sections C and D, relating to internal armed conflicts, as not being in keeping with international customary law; however, it was open to other suggestions. Specific provision should also be made within the Statute for the elements of crimes, and discussion on that issue could be continued after the Conference.

37. **Mr. Mochochoko** (Lesotho) said that the Group of African States supported the inclusion of the core crimes of genocide, crimes against humanity and war crimes in the Statute. It was in favour of including other crimes, in particular aggression, if appropriate definitions could be found and agreement reached on other issues.

38. **Mr. Jeichande** (Mozambique) said that his delegation supported the inclusion of genocide, crimes against humanity and war crimes as crimes within the Court's jurisdiction. It also favoured inclusion of the crime of aggression in the Statute, although the Security Council also had a role to play in safeguarding peace and security. His delegation supported option 1 in respect of treaty crimes.

39. Mozambique had no problems with the texts on genocide and crimes against humanity. As for war crimes, its preference was for option 2 in the chapeau. With regard to section B, subparagraph (*o*), his delegation preferred option 2 as being more inclusive. For sections C and D, his delegation was also in favour of option 1. With regard to aggression it favoured option 1 with the incorporation of elements from General Assembly resolution 3314 (XXIX).

40. **Mr. Saland** (Sweden) said that his delegation was in favour of including the crime of aggression, provided that a satisfactory definition could be found and the role of the Security Council under the Charter of the United Nations was respected. It was also satisfied with the definition in option 1, but, in view of the continued efforts to refine it, felt that option 2 ("no such provision") might have to be adopted for lack of time – an outcome Sweden did not favour. As for treaty crimes, his delegation had serious doubts that it would prove possible to include them at the current juncture.

41. He supported the chapeau of the provision on crimes against humanity proposed by the Jordanian delegation. As for the threshold for war crimes, his delegation had always supported option 3 ("no such provision") but could reluctantly agree to option 2 if a consensus existed.

42. With regard to section B, subparagraph (*o*), his delegation had originally supported the generic approach in option 3 but, since clarity was important to many delegations, it was willing to work on the basis of option 1. It attached great importance to subparagraph (vi) under that option, in the light of its continued interest in the issue of anti-personnel landmines. Sweden also remained attached to the idea of adding weapons and methods of warfare that were inherently indiscriminate to the requirements set forth in the chapeau of option 1.

43. His delegation had grave doubts about the advisability of including elements of crimes in the Statute but was prepared to consider their inclusion as guidelines rather than as absolute provisions.

44. **Mr. Shukri** (Syrian Arab Republic) said that he considered that the introductory sentence added to article 5 weakened the article and that the wording of the chapeau should remain unchanged. With regard to aggression, he was dismayed by the proposal in option 2 to delete that crime, and wondered why no account appeared to have been taken of the definition proposed in document A/CONF.183/C.1/L.37 and Corr.1 by his delegation and others.

45. As far as treaty crimes were concerned, his delegation, while condemning the crime of terrorism, believed that it had not been well defined and should therefore be omitted from the Statute. Moreover, drug crimes and crimes against United Nations personnel had no place in a statute dealing with international crimes.

46. With regard to crimes against humanity, his delegation would prefer the wording "widespread and systematic attack", but was prepared to accept the wording "widespread or systematic attack". Serious consideration should be given to including economic embargoes under crimes against humanity, for, if protracted, they were tantamount to murder.

47. With regard to the chapeau for war crimes, his delegation was in favour of option 3 ("no such provision") but was prepared to accept option 2. As for weapons, his delegation was in favour of option 2, though it did not insist on the inclusion of anti-personnel mines. Options 1 and 3 were totally unacceptable.

48. Option 1 concerning aggression raised the issue of a determination by the Security Council. In that connection, article 6 should be amended so that the Court could exercise jurisdiction if a situation was referred to the Prosecutor by the Council or by the General Assembly. Alternatively, where, following exercise of the right of veto, the Council failed to make a determination of aggression, the Court should be free to exercise its jurisdiction upon the complaint of a State.

49. He considered that the issue of elements of crimes was too complex to be included. Referring to article 20 (Applicable law), he said that there was no such concept as "general international law". The correct wording should probably be "international customary law". Lastly, although his delegation was opposed to including sections C and D, which extended the Court's jurisdiction to armed conflict not of an international character, it might be willing to consider section C if certain criteria, such as the total collapse of a country's central regime, were included.

50. **Mr. Fife** (Norway) endorsed the position of the Swedish delegation with regard to the crime of aggression. With regard to treaty crimes, he agreed on the need for a unified approach, although his delegation would have preferred crimes against

United Nations personnel to be included. However, those crimes might be reviewed at a later stage.

51. On the need for a threshold for war crimes, in a spirit of compromise his delegation was prepared to consider option 2. On weaponry, it saw no alternative to option 1. It was not entirely satisfied with subparagraph (vi) but was prepared to discuss it further.

52. His delegation considered it essential to include sections C and D in the Statute in order to extend the Court's jurisdiction to internal conflicts. It believed that the threshold was already high enough and that the text was clear, but was prepared to discuss the drafting to clarify it even further.

53. As to the provision on elements of crimes, although Norway was basically opposed to its inclusion, a basis for consensus was emerging which his delegation was prepared to join.

54. **Mr. Dabor** (Sierra Leone) said that his delegation supported the inclusion of the crime of genocide, crimes against humanity and war crimes. With regard to war crimes, it considered that there should be no threshold, but as a compromise was prepared to accept option 2. It would support the inclusion of the crime of aggression if an acceptable definition was agreed upon and the role of the Security Council defined.

55. While appreciating the seriousness of the treaty crimes and their adverse effect on society, his delegation thought that those offences should not be included at the current stage, and it therefore preferred option 2. With regard to section B, subparagraph (o), it could accept either option 1 or option 2. It strongly supported the inclusion of sections C and D since, as was well known, his country was undergoing an internal conflict in which very serious offences had been committed over which the Court should have jurisdiction.

56. His delegation had not been in favour of including elements of crimes in the Statute, but, in the light of the discussion in the Working Group on War Crimes, its attitude was now flexible. However, if the elements were included, his delegation would prefer them not to be of a binding nature but merely to serve as guidelines for the Court. Moreover, any discussions on that provision should be left until after the Statute had been finalized.

57. **Mr. Gadyrov** (Azerbaijan) said that his delegation strongly supported inclusion of the crime of aggression in the Statute. An appropriate definition could be found if the will existed to do so. Moreover, without prejudice to its role in maintaining international peace and security, the Security Council should not be the only trigger mechanism with respect to the crime of aggression: any State affected by an act constituting aggression should be able to lodge a complaint with the Court.

58. His delegation had no strong position on the inclusion of treaty crimes, but wondered whether provision should not be made for other crimes covered by existing or future treaties. It



did not feel that a threshold for war crimes was needed but was prepared to work on option 2 in an attempt to secure a compromise. On weapons, it supported option 3 but was prepared to consider other options.

59. His delegation had no problems with including section C, and agreed with the representative of Norway regarding the threshold. However, his Government was not prepared to accept section D since it was not a party to Additional Protocol II to the 1949 Geneva Conventions.

60. His delegation was not opposed to including a definition of elements of crimes, but wondered whether the elements would have the same legal force as other provisions of the Statute or whether they would simply be guidelines for interpretation by judges.

61. His delegation had some concerns about the terminology used in the Statute. Words such as “wilfully”, “intentionally” and “knowingly” were used interchangeably, whereas each term should have its own meaning. Problems of interpretation might arise for judges; moreover, there might not be an appropriate translation of all those terms in some languages. Thus, for instance, his delegation was concerned about the use of the word “gender” in paragraph 1 (*h*) under “Crimes against humanity”. Did that provision imply that a conviction by a national court for homosexual acts might be regarded as persecution and thus fall within the jurisdiction of the Court as a crime against humanity? He asked for clarification in that regard.

62. **Ms. Chatoor** (Trinidad and Tobago) endorsed the remarks of the representative of South Africa but was concerned that the effectiveness of the Court should not be undermined by a high threshold for war crimes. Her delegation’s preference would have been for no threshold, but it could accept option 2. Internal armed conflict was currently the most prevalent form of conflict, and it was thus absolutely essential to include sections C and D. Her delegation was also in favour of including all the treaty crimes in the Statute. A separate regime through the opt-in mechanism would assist in that regard.

63. **Mr. González Gálvez** (Mexico) said that it was important that the Statute should not include provisions subordinating the authority of the Court to that of the Security Council, in contravention of article 53 of the 1969 Vienna Convention on the Law of Treaties. Mexico had put forward its own proposals in connection with the crime of aggression, but could accept the similar proposals of the representative of the Syrian Arab Republic in that regard. In other words, it could agree to the reference to the Council as long as reference was also made to the General Assembly and a paragraph included to the effect that referral of an act of aggression to the Court by the Council was pursuant to Article 27, paragraph 2, of the Charter of the United Nations, and would thus be considered as a procedural matter to which the right of veto would not apply.

64. With regard to weapons, his delegation was willing to support option 3, the provisions of which would apply to nuclear weapons since they were inherently indiscriminate.

65. With regard to the elements of crimes, Mexico could not agree to sign or ratify the Statute until that provision had been finalized. It was prepared to accept the inclusion of non-international armed conflict in the Statute as long as no reference was made to Additional Protocol II to the 1949 Geneva Conventions, an instrument to which it was not a party. It considered that discussions should continue on the thresholds for crimes against humanity and war crimes, and would be pleased to submit its own proposals if that would advance the Committee’s work. Alternatively, those proposals might be taken into account in preparing the new version of document A/CONF.183/C.1/L.53.

66. **Ms. Wilmshurst** (United Kingdom of Great Britain and Northern Ireland) said that her delegation believed that option 1, which reflected a long process of negotiation in the Preparatory Committee for the Establishment of an International Criminal Court, could form the basis for general agreement on the crime of aggression. If agreement could not be reached on all the elements of option 1, option 2 (“no such provision”) was the only realistic alternative.

67. The difficulty with including treaty crimes was not just the complexity of the issue but the fact that many believed that the Court was not the best forum in which to try issues involving terrorism and drug offences. Her delegation could not see a way of including treaty crimes that would command general acceptance. As to the threshold for war crimes, her delegation believed that option 2 was the best way forward.

68. With regard to weaponry, option 1 was closest to her delegation’s views, but subparagraph (vi) needed reconsideration since it was tied to the amendment procedures, which were not yet agreed. With regard to the inclusion of non-international conflicts within the jurisdiction of the Court, her Government regarded it as essential that sections C and D should be included in the Statute without any opt-in or opt-out provision and without the possibility of reservations. Inclusion of elements of crimes could be useful, but they should not hold up the entry into force of the Statute. The elements should be transmitted to the Preparatory Commission for further elaboration.

69. **Mr. Kaul** (Germany) said that his delegation could agree to the definition of aggression in option 1. With regard to the note in the discussion paper that elements from General Assembly resolution 3314 (XXIX) might be inserted in the definition, he pointed out that important elements from that resolution were already included. At the end of paragraph 1 of option 1, the words “with the object or result of establishing a military occupation of, or annexing, the territory of such other State or part thereof” were based on article 3 (*a*) of the annex to resolution 3314 (XXIX). Moreover, the entire approach underlying option 1 was based on article 5 of the annex to resolution 3314 (XXIX), which included the words: “A war of aggression is a crime against international peace”. His understanding was that the provisions on aggression referred to wars of aggression, not to single, specific aggressive acts.



70. With regard to option 2 ("no such provision"), he reluctantly conceded that that option might in the end have to be adopted. Attempts to make the definition too broad would simply preclude general agreement, while attempts to ignore the responsibility of the Security Council would also rule out the adoption of option 1. However, his delegation was prepared to persevere with the attempt to find a solution.

71. His delegation's position on treaty crimes was similar to that outlined by the representative of the United Kingdom but, again, his delegation was prepared to work on a compromise. It felt that there was a need for a threshold clause for war crimes and that option 2 might be an appropriate compromise. With regard to the weaponry provision for war crimes, option 1 was essential, as was the inclusion of sections C and D.

72. With regard to elements of crimes, his delegation had carefully studied the United States proposal and considered that their inclusion might be useful, although it was not absolutely necessary. Germany would therefore be pleased to participate in the discussion in a follow-up phase to the Conference. However, failure to reach general agreement on the elements and definitions should not prevent early entry into force of the Statute. Consideration might be given to the possibility of adding definitions and elements in the form of an annex to the Statute in due course.

73. **Mr. Tafa** (Botswana) said that his delegation favoured the inclusion of genocide, crimes against humanity and war crimes as core crimes in the Statute. Aggression should also be included as a core crime, subject to an acceptable definition being found.

74. With regard to crimes against humanity, his delegation supported the chapeau as currently worded. As for war crimes, in principle his delegation considered that there should be no threshold whatsoever, but it was prepared to consider option 2. With regard to weapons, its preference was for option 2, and for inclusion of sections C and D. It was in favour of including treaty crimes, but since they were all equally important, they must either all be included or all excluded. If elements of crimes were included, they should take the form of guidelines of a non-binding nature.

75. **Ms. Plejić-Marković** (Croatia) endorsed the views of the presidency of the European Union with regard to article 5. Croatia was strongly in favour of including the crime of aggression, as currently defined, in the Statute. It was therefore in favour of option 1. Omission of aggression would send a very dangerous message to aggressors throughout the world. Her delegation had a flexible attitude with regard to the inclusion of treaty crimes, and found the current definition of genocide acceptable.

76. The solution proposed with regard to crimes against humanity was satisfactory. Croatia was prepared to work with others on the remaining unresolved questions. For war crimes, her delegation was in favour of option 2, with strong emphasis on the words "for the purpose of the present Statute". With regard to weaponry, her delegation was in favour of option 1, although subparagraph (vi) might give rise to problems of

interpretation. Croatia was strongly in favour of including sections C and D since internal conflicts were now the rule rather than the exception. Her delegation's position with regard to the inclusion of elements of crimes was still open.

77. **Mr. Rowe** (Australia) said that his delegation acknowledged the importance of the crime of aggression, but agreed that the definition had to be satisfactory and that the role of the Security Council under the Charter of the United Nations must be respected. However, since time was running out, efforts to include aggression in the Statute at the Conference might have to be abandoned. The same applied to treaty crimes. The primary focus must now be on the three core crimes of genocide, crimes against humanity and war crimes.

78. His delegation endorsed the support expressed for the text on crimes against humanity, in particular the words "widespread or systematic" in the chapeau. With regard to the need for a threshold for war crimes, Australia had favoured option 3, but in view of the emerging consensus could now support option 2. It was unable to support option 1. In relation to the weapons provision, it had originally favoured the generic provision in option 3, but could now accept option 1 in the light of the strong support expressed for it. It was absolutely essential to include sections C and D in the Statute. Efforts to find an acceptable wording should therefore continue. Lastly, elements of crimes would be of assistance to the Court, but their elaboration must not impede the entry into force of the Statute.

79. **Mr. Ndir** (Senegal) said that his delegation agreed with the definitions of genocide and crimes against humanity. It could support the inclusion of the crime of aggression in the Statute, but an acceptable definition had to be found.

80. With regard to treaty crimes, drug-related crimes should be dealt with by the United Nations International Drug Control Programme and should not be included in the crimes covered by the Statute. On weaponry, his delegation was in favour of option 3 for section B, subparagraph (o), but would be ready to accept option 1 as a compromise. Lastly, it was essential that internal conflicts should be included within the jurisdiction of the Court.

#### Message from the Secretary-General

81. **Mr. Corell** (Representative of the Secretary-General) drew attention to a letter from the Secretary-General to the President of the Conference (A/CONF.183/INF.8), expressing his hope that the participating States would find the necessary spirit of cooperation to be able to finalize the Statute on 17 July 1998 with a view to creating a court that would be strong and independent enough to carry out its task. The Secretary-General reiterated that the overriding interest must be that of the victims and of the international community as a whole. The Court must be an instrument of justice, not expedience. It must be able to protect the weak against the strong, and demonstrate that an international conscience was a reality.

*The meeting rose at 1.20 p.m.*

## 26th meeting

Wednesday, 8 July 1998, at 3.15 p.m.

Chairman: Mr. Kirsch (Canada)

A/CONF.183/C.1/SR.26

### Agenda item 11 (*continued*)

**Consideration of the question concerning the finalization and adoption of a convention on the establishment of an international criminal court in accordance with General Assembly resolutions 51/207 of 17 December 1996 and 52/160 of 15 December 1997** (A/CONF.183/2/Add.1 and Corr.1, A/CONF.183/C.1/L.45/Add.1, A/CONF.183/C.1/L.49/Rev.1, A/CONF.183/C.1/L.53, A/CONF.183/C.1/WGE/L.14, A/CONF.183/C.1/WGP/L.14/Add.1 and Corr.1, A/CONF.183/C.1/WGGP/L.4/Add.3, A/CONF.183/C.1/WGIC/L.11/Add.1 and Corr.1, A/CONF.183/C.1/WGIC/L.15 and Corr.1 and A/CONF.183/C.1/WGPM/L.2/Add.3)

#### DRAFT STATUTE

PART 9. INTERNATIONAL COOPERATION AND JUDICIAL ASSISTANCE (*continued*) (A/CONF.183/C.1/WGIC/L.15 and Corr.1)

*Report of the Working Group on International Cooperation and Judicial Assistance (continued)*  
(A/CONF.183/C.1/WGIC/L.11/Add.1 and Corr.1)

1. **Mr. Mochochoko** (Lesotho), Chairman of the Working Group on International Cooperation and Judicial Assistance, introduced the report of the Working Group contained in document A/CONF.183/C.1/WGIC/L.11/Add.1 and Corr.1. The Working Group had recommended the transmission to the Committee of the Whole, for referral to the Drafting Committee, of article 87, paragraphs 1 and 11; article 90, paragraphs 1, 1 bis and 1 ter, as well as paragraphs 6 and 7; and articles 90 ter and 90 quater in their entirety. Some amendments to document A/CONF.183/C.1/WGIC/L.15 had been agreed upon in the Working Group. In the chapeau of article 90, paragraph 1, the words "in relation to investigations or prosecutions" had been inserted after the word "assistance". In article 90, paragraph 1 (e), the words "witnesses and experts" had been replaced by "witnesses or experts". The text of article 90 quater had been changed and now read as follows:

"The Court may not proceed with a request for surrender/cooperation which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity."

2. **The Chairman** asked the Committee of the Whole if it wished to refer to the Drafting Committee the articles contained in the report of the Working Group.

3. *It was so decided.*

#### PART 8. APPEAL AND REVIEW (*continued*)

*Report of the Working Group on Procedural Matters (continued)* (A/CONF.183/C.1/WGPM/L.2/Add.3)

4. **Ms. Fernández de Gurmendi** (Argentina), Chairman of the Working Group on Procedural Matters, introduced the report of the Working Group pertaining to part 8, article 82, paragraphs 1 to 3, paragraph 4, first subparagraph, and paragraph 5; and article 83, paragraphs 1 and 3, as contained in document A/CONF.183/C.1/WGPM/L.2/Add.3.

5. **The Chairman** asked the Committee of the Whole if it wished to refer those articles to the Drafting Committee.

6. *It was so decided.*

#### PART 3. GENERAL PRINCIPLES OF CRIMINAL LAW (*continued*)

*Report of the Working Group on General Principles of Criminal Law (continued)*  
(A/CONF.183/C.1/WGGP/L.4/Add.3)

7. **Mr. Saland** (Sweden), Chairman of the Working Group on General Principles of Criminal Law, introduced the report of the Working Group contained in document A/CONF.183/C.1/WGGP/L.4/Add.3.

8. He said that the Working Group had adopted article 31, paragraph 1 (c), dealing with self-defence. Footnote 1 to paragraph 1 (c), reading: "This provision only applies to actions by individuals during an armed conflict" was not intended to apply to the use of force by States, which was governed by applicable international law. Footnote 2 referred to the word "imminent" in line 4 and read: "This provision is not intended to apply to international rules applicable to the use of force by States", while footnote 3, reading: "Some delegations were of the view that this was applicable only in the context of a lawful operation", referred to the whole paragraph.

9. Footnote 5 contained the important interpretative statement that cases of voluntary exposure were understood to be dealt with under article 31, paragraph 2. There was also a footnote

that the Drafting Committee would find it useful to consider in view of the very long and difficult negotiations on that paragraph.

10. Regarding article 23, paragraphs 5 and 6, on the criminal responsibility of juridical persons, all delegations had recognized the great merits of the relevant proposal, but some had felt that it would perhaps be premature to introduce that notion. Consequently, the deletion of those paragraphs was noted.

11. He suggested that it would be easier to conclude work on article 20 if a working group were set up for that purpose.

12. **The Chairman** asked the Committee of the Whole if it wished to refer to the Drafting Committee the articles contained in the report of the Working Group and to set up a working group to consider article 20.

13. *It was so decided.*

#### PART 4. COMPOSITION AND ADMINISTRATION OF THE COURT (continued)

##### *Recommendations of the Coordinator (continued)* (A/CONF.183/C.1/L.45/Add.1)

14. **Mr. Rwelamira** (South Africa), Coordinator, introduced document A/CONF.183/C.1/L.45/Add.1 dealing with article 43, paragraph 2; article 45 and article 52, paragraph 3.

15. Some delegations had felt that it was also necessary to reflect the discussion on article 105, dealing with the funding of the International Criminal Court. It was also suggested that the proposed paragraph 4 bis of article 52 could be included in paragraph 4.

16. A number of delegations had felt quite strongly that the Court should not become operational before the Rules of Procedure and Evidence had been finalized.

17. **The Chairman** asked the Committee of the Whole if it wished to refer to the Drafting Committee the articles contained in document A/CONF.183/C.1/L.45/Add.1.

18. *It was so decided.*

#### PART 10. ENFORCEMENT

##### *Report of the Working Group on Enforcement* (A/CONF.183/C.1/WGE/L.14)

19. **Ms. Warlow** (United States of America), Chairman of the Working Group on Enforcement, introduced the report of the Working Group on article 94, paragraph 3; article 94 bis; articles 95 to 98; and article 99, paragraphs 1 and 1 bis, as contained in document A/CONF.183/C.1/WGE/L.14.

20. **The Chairman** asked the Committee of the Whole if it wished to refer to the Drafting Committee the articles contained in the report of the Working Group.

21. *It was so decided.*

#### *Agenda item 12 (continued)*

##### **Adoption of a convention and other instruments deemed appropriate and of the final act of the Conference** (A/CONF.183/2/Add.1 and Corr.1 and A/CONF.183/C.1/L.49/Rev.1)

##### *Recommendations of the Coordinator* (A/CONF.183/C.1/L.49/Rev.1)

22. **Mr. S. R. Rao** (India), Coordinator, introducing document A/CONF.183/C.1/L.49/Rev.1 on the Final Act, said that paragraphs 14 to 16 would be completed following the meeting of the Credentials Committee and that any further resolutions would be included on page 7, subject to decisions by the Committee of the Whole.

23. All the resolutions to be annexed to the Final Act were indicated on page 8 of the report. A new paragraph 3 bis had been introduced in the annex in the light of the proposal made by several delegations on the official and working languages of the Preparatory Commission for the International Criminal Court. The text of paragraph 4 (a) would be adjusted in the light of the final decision on the inclusion of elements of crimes under the Rules of Procedure and Evidence, as stated in footnote 1. Paragraph 7 was subject to a decision on article 104, dealing with the funding of the Court.

24. **Mr. Güney** (Turkey) said that, during the previous discussion of the matter, he had proposed that the words "initially prepared by the ILC" be added after the words "International Criminal Court" in line 2 of paragraph 21 so as to reflect the history of preparing the draft Statute. That proposal had been supported by other delegations, and there had been no objection. Therefore, the paragraph should be amended accordingly.

25. **Mr. S. R. Rao** (India) said that a tribute to the immense contribution of the International Law Commission was reflected in paragraphs 3 to 7.

26. **Mr. Güney** (Turkey) said that, although the draft before the Conference was submitted by the Preparatory Committee on the Establishment of an International Criminal Court, the initial basis had been the draft prepared by the International Law Commission. However, he did not wish to create difficulties by pressing the point.

27. **Ms. Willson** (United States of America) said that any conference servicing or other expenses in connection with meetings of the Preparatory Commission arranged pursuant to paragraphs 1 and 7 of the resolution annexed to the Final Act must be accommodated within the current budget.

28. **The Chairman** asked the Committee of the Whole if it wished to refer to the Drafting Committee the text contained in document A/CONF.183/C.1/L.49/Rev.1.

29. *It was so decided.*

**Agenda item 11 (continued)**

**Consideration of the question concerning the finalization and adoption of a convention on the establishment of an international criminal court in accordance with General Assembly resolutions 51/207 of 17 December 1996 and 52/160 of 15 December 1997 (A/CONF.183/2/Add.1 and Corr.1 and A/CONF.183/C.1/L.53)**

**DRAFT STATUTE**

**PART 7. PENALTIES (continued)**

*Report of the Working Group on Penalties (continued)*  
(A/CONF.183/C.1/WGP/L.14/Add.1 and Corr.1)

30. **Mr. Fife** (Norway), Chairman of the Working Group on Penalties, introduced the report of the Working Group contained in document A/CONF.183/C.1/WGP/L.14/Add.1 and Corr.1, and announced a number of amendments. The sentence in paragraph 1 reading: "The Working Group herewith transmits to the Committee of the Whole the following article of part 7 for its consideration" should be deleted. In the next sentence, the word "also" should be deleted. Paragraph 1 should read:

"The Working Group on Penalties held one additional meeting to consider the remaining articles contained in part 7, on penalties, on 7 July 1998. The Working Group transmits the following article for inclusion in part 3: article 21 bis. The Working Group further notes the deletion of [article 76]."

31. In the text of the draft articles, article 21 bis was unchanged, with its footnote 1. In article 75, on applicable penalties, the text of paragraph 1 and footnote 2 should be deleted, and a colon and the word "pending" should be added. The note on page 3 should be deleted. Article 76 should remain as it was. Article 77, paragraph 3, was still pending.

32. **The Chairman** asked the Committee of the Whole if it wished to refer to the Drafting Committee the articles contained in the report of the Working Group.

33. *It was so decided.*

**PART 2. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW (continued)**

*Discussion paper prepared by the Bureau (continued)*  
(A/CONF.183/C.1/L.53)

**Article 5. Crimes within the jurisdiction of the Court (continued)**

34. **Mr. Katureebe** (Uganda), referring to document A/CONF.183/C.1/L.53, said that the crimes over which the Court had jurisdiction should be clearly defined in order to avoid objections on technicalities. He had no objection to the definitions of genocide or crimes against humanity contained in the document. With respect to war crimes, he supported option 2. However, those crimes for which no agreed definition

could be found should be left for further consideration, either by the Preparatory Commission or by the Assembly of States Parties. Situations of internal conflict must be included, the threshold being armed conflict. He felt very strongly that the Court should also concern itself with the systematic abduction, rape and abuse of children.

35. **Mr. Güney** (Turkey), referring to crimes against humanity, said that he favoured the updated version contained in document A/CONF.183/C.1/L.44/Corr.1, which included, in brackets, the crime of terrorism, and explained that its inclusion had received substantial support. The inclusion of war crimes was essential, and he strongly supported option 1. He was fully aware of the problems of finding an acceptable definition of aggression, while keeping in mind the role of the Security Council as established under the Charter of the United Nations.

36. There should be a unified approach to treaty crimes, covering terrorism and drug trafficking, as well as crimes committed against United Nations personnel. The elements of any crime must be determined before it could be placed under the jurisdiction of the Court.

37. **Mr. Wenaweser** (Liechtenstein) said that, since problems of definition persisted with regard to aggression and the related role of the Security Council, that crime should not initially be included in the jurisdiction of the Court. He also advocated a unified regime of jurisdiction for treaty crimes, subject to review after the entry into force of the Statute. On the question of the war crimes threshold, he preferred option 3, but would continue to work on option 2, which seemed to find the broadest support.

38. It would be unacceptable if the Court were not competent to deal with crimes committed in internal armed conflict. He therefore strongly supported the inclusion of both section C and section D.

39. For section B, subparagraph (o), on weapons, he had always preferred option 3, but was ready to work on option 1, which seemed to find the broadest support. It was not necessary to include the elements of crimes.

40. **Mr. Pfirter** (Switzerland) said that major complications might arise in defining jurisdiction over treaty crimes, and that the question should be left to a review conference. The chapeau, which touched on a jurisdictional issue, was inappropriate in a definition of war crimes. He preferred option 3, but could compromise, somewhat reluctantly, on option 2. As for the list of prohibited weapons contained in section B, subparagraph (o), he favoured option 3. For the sake of consensus on that matter, he could accept option 1, if the words "or with indiscriminate effects" were added to the chapeau. Subparagraph (ix) of option 2 should refer not only to article 111 on a review conference, but also to article 110 on amendments. Subparagraph (iii) of options 1 and 2 should also include weapons that exploded within the human body, and should begin with the words "explosive or dilating bullets".

41. Without wishing to limit the rights of States to ensure internal security, he pointed out that the majority of atrocities stemmed from internal conflicts. Section C undoubtedly reflected customary international law. It was precisely because some countries had not ratified Additional Protocol II to the Geneva Conventions of 1949 that the Preparatory Committee had been very selective in the crimes it included under section D. That list had since been further shortened by the omission of the crimes listed under option II of the draft Statute. He drew attention to the abuses that had occurred in many countries and asked those delegations that had problems with section D to consider the merits of including such crimes so as to arrive at a consensus.

42. It would be superfluous to include elements of crimes, since the crimes were well defined in international case law and international practice. There was the potential danger of giving rise to contradictions. However, he could consider adopting such a list if it did not prevent the adoption and entry into force of the Statute and was of a strictly advisory nature.

43. **Mr. Nyasulu** (Malawi) supported the statement made by South Africa on behalf of the Southern African Development Community, adding that there seemed to be an emerging sense that it might be useful to elaborate the elements of crimes.

44. **Mr. Paulauskas** (Lithuania) said that he endorsed the statement made by Austria on behalf of the European Union. He was fully in favour of including the three core crimes and strongly supported the inclusion of aggression, based on the definition in option 1. The role of the Security Council in determining the fact of aggression should be acknowledged. With regard to the threshold for war crimes, he preferred option 3, but could accept option 2. He also supported the proposal to include crimes against United Nations and associated personnel as a separate paragraph under war crimes. He strongly favoured the inclusion of sections C and D. The proposal on elements of crimes had merit and deserved consideration.

45. **Mr. Vergne Saboia** (Brazil) said that he was very much in favour of the early establishment of an efficient, independent and impartial court. In the context of a reasonable compromise, however, nothing should be done to undermine what had already been achieved in terms of international law. Article Y should be retained as a safeguard for existing international law and its progressive development.

46. The Court's jurisdiction should be limited to the three core crimes. He would be more in favour of the early inclusion of aggression if an acceptable definition of that crime could be found, bearing in mind the related role of the Security Council, but that was so far not the case.

47. As regards treaty crimes, he shared the views expressed by the delegation of the United Kingdom and that of Japan, among others. Including such crimes raised substantive and practical difficulties because of their different nature and the different circumstances under which they occurred. He agreed

that such acts were serious and should be the subject of international cooperation to fight them, but the Court was being set up to deal with the core crimes. It would be impractical and costly to include treaty crimes during the early stages of the Court's existence. The question could be reviewed later.

48. He warmly supported the text on crimes against humanity. A balance had been achieved in paragraph 1, taken in combination with paragraph 2 (a). He doubted whether terrorism could be included, but would adopt a flexible attitude if a satisfactory definition could be found. Economic embargoes should not be included, because the Statute dealt with criminal acts on a personal and individual basis.

49. Option 2 on war crimes represented a possible compromise; any higher threshold would threaten the existing rules of international law, particularly in view of the threshold provision at the beginning of article 5.

50. With regard to weapons, he was initially inclined to favour option 2 for section B, subparagraph (o), including nuclear weapons, anti-personnel mines and blinding laser weapons; however, realistically, it would be more constructive to use option 1 at the current stage. He shared the views of Switzerland on inherently indiscriminate weapons and explosive bullets.

51. He supported the inclusion of sections C and D, since their introductory paragraphs already contained safeguards relevant to the concerns of some delegations. With regard to section B, subparagraph (t), of the draft Statute, he said that the minimum age for recruitment of children should be 18 and certainly not less than 15. Any solution taking account of concerns about the inclusion of internal armed conflicts must ensure that existing commitments under customary international law were in no way undermined. His position on the inclusion of the elements of crimes was fairly flexible, though he had noted with interest the comments by Switzerland.

52. **Mr. Shin Kak-soo** (Republic of Korea) said that he strongly supported the inclusion of aggression in the Statute, and would accept the current option 1, including its reference to the role of the Security Council, but recalled his delegation's proposed compromise between options 1 and 2 contained in option 2 for article 10, paragraph 4, of the draft Statute.

53. While he sympathized with those who had suffered from drug trafficking and terrorism, he said that time constraints at the Conference required a sense of realism. A gradual approach to the inclusion of treaty crimes, involving the review process, could be adopted. On the chapeau for war crimes, his original preference had been for option 3 but, in a spirit of compromise, he could accept option 2.

54. He strongly supported option 1 for sections C and D. If a court were set up without jurisdiction over war crimes committed during non-international armed conflicts, its *raison d'être* would be seriously undermined.

55. For section B, subparagraph (o), he favoured option 1, in the light of the principle of *nullum crimen sine lege* and the conviction that the list of prohibited weapons must be based on customary international law.

56. The proposed inclusion of elements of crimes would be useful as a guideline rather than a binding rule.

57. **Mr. Maquieira** (Chile) said that he favoured the inclusion of aggression. However, for the reasons that had emerged during the Conference concerning the definition, and complexities of a jurisdictional nature, he would be open to other solutions. Treaty crimes should not be included, for the reasons given by many other delegations. On war crimes, he supported option 3, but, to achieve a consensus, he was prepared to accept something along the lines of option 2.

58. Although his delegation had always favoured option 1 for section B, subparagraph (o), on weapons, he had, for the sake of making progress, considered the possible merits of option 3. He hoped that agreement could be reached on the inclusion of crimes against United Nations personnel and supported the inclusion of non-international armed conflicts.

59. Regarding aggression and the related role of the Security Council, he said that the formula currently proposed was acceptable. He expressed surprise that the elements of crimes needed to be set out in the Statute, but was prepared to move in that direction, provided that it did not affect the entry into force of the Statute.

60. **Mr. Odoi-Anim** (Ghana) said that he associated himself with the general thrust of the statement by Lesotho on behalf of the Group of African States.

61. The Court should have jurisdiction over genocide, crimes against humanity and war crimes, but not, at the current juncture, over aggression, as that would inevitably cause conflict with the Security Council.

62. The inclusion of the treaty crimes, particularly terrorism and drug trafficking, would only heighten national sensitivities, and would therefore not be conducive to the desired cooperation envisaged for their effective prosecution.

63. He welcomed the general approach to crimes against humanity and preferred option 1 on war crimes.

64. The judges of the Court must display flexibility in applying the Statute, bearing in mind the need to ensure successful prosecutions, without conflicting with national systems. The purpose of the Court was to make sure that national systems worked efficiently so that there would be no need for it to intervene.

65. **Mr. Maiga** (Mali) said that he concurred with the statement made by Lesotho on behalf of the Group of African States. He favoured the inclusion of genocide, crimes against humanity and war crimes. In the chapeau on war crimes, he preferred option 3. Aggression should not be included at that stage because it was

an act for which no generally acceptable definition had yet been found. He favoured a list of weapons such as that in option 1 for section B, subparagraph (o), taking into account the comments made by Switzerland.

66. Most conflicts were internal in nature, so sections C and D should be included in the Statute. It would be premature to include treaty crimes in the Statute, which should be referred to a review conference.

67. **Mr. Politi** (Italy) said that he fully concurred with the remarks made by Austria on behalf of the European Union. He was strongly in favour of the inclusion of aggression in the Statute. However, if no agreement were reached on a definition and on the relationship with the Security Council relatively soon, it would be necessary to revert to option 2, at least temporarily.

68. While he was sympathetic to at least some of the reasons given for considering the inclusion of treaty crimes, he thought that it was unrealistic to expect that agreement would be reached at the current juncture; the issue should therefore be left to a review conference.

69. Crimes against United Nations personnel could be addressed in the context of war crimes. Concerning the war crimes threshold, he favoured option 3, but was prepared to accept option 2. On weaponry, option 1 for section B, subparagraph (o), offered a possible basis for compromise. The inclusion of sections C and D was an essential element of Italy's position.

70. He doubted the need to include the elements of crimes, because it was a notion foreign to his country's legal system, but he was ready to discuss their elaboration, perhaps in the form of guidelines, after the opening of the Statute for signature at the end of the Conference.

71. **Mr. Agbetomey** (Togo) said that he was not, in principle, opposed to the inclusion in the Statute of all the crimes mentioned in the document. However, no appropriate definition of aggression had emerged. He saw no particular reason to include treaty crimes. As for the war crimes threshold, he preferred option 3, although he remained flexible. Concerning weaponry, he preferred option 3 for section B, subparagraph (o), since it was open and could be changed with respect to both cause and effect.

72. Sections C and D on non-international armed conflicts must be included in the Statute, as the credibility of the Court depended on it.

73. **Mr. Bazel** (Afghanistan) said that he favoured including aggression, for the reasons he had set out in the general debate at the beginning of the Conference. As far as the definition of aggression was concerned, he preferred option 1, provided that it incorporated some elements of General Assembly resolution 3314 (XXIX) of 14 December 1974, such as the sending by a State of armed bands, groups, irregulars or mercenaries which carried out acts of armed force against another State.

74. Concerning the war crimes threshold, he was in favour of option 2. For section B, subparagraph (o), he supported

option 1 with the inclusion of blinding laser weapons as subparagraph (o) (vii).

75. On the question of non-international armed conflict, while he again emphasized the principle of complementarity, he expressed his preference for option 1 for section C, for the reasons given by the Syrian Arab Republic. He also supported the inclusion within the jurisdiction of the Court of crimes against United Nations and associated personnel.

76. **Mr. Peraza Chapeau** (Cuba) said that the Court must be competent to deal with a crime such as aggression, since an aggressor generally committed other war crimes as well. Aggression should not be linked to a role of the Security Council. Even if the Council were to play a part, the General Assembly would have to be involved. With regard to aggression falling within the jurisdiction of the Court, exercise of the veto should not be allowed.

77. Genocide, as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, must clearly come under the Court's jurisdiction. The thresholds of war crimes should be based on the definitions in the Geneva Conventions of 1949; he could accept option 2. Subparagraph (vi) of option 1 for section B, subparagraph (o), required revision in order to find agreed wording.

78. As regards sections C and D, a generally acceptable formulation must be found on non-international armed conflicts. The use of weapons of mass destruction with indiscriminate effects on combatants and non-combatants should also constitute a crime within the jurisdiction of the Court.

79. The crimes falling under the jurisdiction of the Court must be precisely defined, in accordance with the general principle of *nullum crimen sine lege*.

80. The imposition of a permanent economic blockade should be included as a crime against humanity under the jurisdiction of the Court. That was the basis of the Cuban proposal contained in document A/CONF.183/C.1/L.17.

81. **Mr. da Costa Lobo** (Portugal) said that his delegation fully associated itself with the statement made by Austria on behalf of the European Union. He favoured including aggression, provided that agreement could be reached on an adequate definition and on the role of the Security Council.

82. Treaty crimes were of great concern to the international community, but, for reasons given by previous speakers, the matter would be better left to a future revision of the Statute. In the war crimes chapeau, he would prefer option 3 but could accept option 2. Regarding the provisions on weapons in section B, subparagraph (o), he preferred option 1. He strongly supported the inclusion of sections C and D on non-international armed conflicts, because the scope of the Court should not exclude situations where the most serious crimes occurred. He had doubts about including the elements of crimes, but was prepared to continue to examine the issue.

83. **Mr. Pal** (India) said that aggression, if properly defined, should in principle be included under the Statute of the Court. Treaty-based crimes must also be included since, like the core crimes, they affected people's daily lives.

84. With regard to the chapeau on crimes against humanity, he very strongly believed that such crimes applied only to situations of armed conflict. He noted that China shared that concern.

85. There was general agreement in the context of the threshold for war crimes that the Court would deal only with situations of an exceptional nature. He could therefore support only option 1. The wording of options 2 and 3 would leave it open to the Court to seek jurisdiction even in situations below the threshold.

86. If the Court was to deal with the most heinous crimes, it must also address the means of committing them, namely, weapons. Nuclear weapons, with the potential to create the most widespread damage, must be brought within the provisions of the Statute.

87. On principle, he did not agree to the inclusion of either section C or D.

88. Regarding the elements of crimes, the Preparatory Commission procedure could be used to elaborate the elements of the so-called core crimes, and also of aggression and treaty-based crimes.

89. **Ms. Sinjela** (Zambia), speaking also on behalf of Swaziland, said that most of her comments had already been expressed by the representative of South Africa, speaking on behalf of the member States of the Southern African Development Community. However, she wished to state that she strongly believed that aggression should come under the jurisdiction of the Statute.

90. **Mr. Slade** (Samoa) said that he continued to advocate the inclusion of aggression. However, he recognized the problem of defining the crime itself and the related role of the Security Council, which should not jeopardize the success of the Conference. Treaty crimes should also be included, bearing in mind that it was concerns about one of those crimes that had originally inspired the convening of the Conference. However, if the related difficulties could not be resolved in time, he would join those who insisted that provision be made for the future inclusion of those crimes, perhaps through the review of the Statute.

91. In the area of war crimes, the inclusion of nuclear weapons was of particular importance. He strongly supported option 3 for section B, subparagraph (o), the language of which was consistent with that of the Hague Conventions. Article Y should be included in the Statute, under war crimes or elsewhere. In respect of both option 1 and option 2, he agreed with the suggestion by New Zealand on explosive bullets.

92. The elaboration of the elements of crimes could be beneficial but could appropriately be left to a future meeting.

93. **Mr. Dalton** (United States of America) said that the effectiveness of the Court would largely be judged by the willingness of a significant number of States to join in the treaty and assist the Court in bringing individuals to justice. Its membership would be limited if it sought to overreach established customary international law or set aside national judicial principles.

94. The Court's jurisdiction should be limited to genocide, crimes against humanity and war crimes. The inclusion of terrorism would serve no useful purpose. It would be neither appropriate nor wise for the Court to address isolated war crimes, action against which must be taken through concerted national action.

95. With respect to war crimes thresholds, he supported option 1. The fundamental premise was that the Court must deal only with certain heinous crimes of concern to the international community, which were committed at a relatively high threshold of criminal activity. How to apply the appropriate threshold should be left to the Prosecutor and the judges, but they had a duty to use the limited resources of the Court only in the case of crimes committed as part of a plan or policy or on a large scale.

96. For section B, subparagraph (o), he strongly favoured option 1, subject to a revision of subparagraph (vi) to provide for amendment of the list to avoid the risk of adding weapons to the list without appropriate deliberation. The United States could not accept option 2. Option 3 failed to determine precisely which weapons it would be criminal to use under any circumstances, which was the standard required to establish individual criminal responsibility.

97. Sections C and D were vital to the integrity and rationale of the Court. He hoped that the concerns of certain delegations could be accommodated by appropriate wording, in the chapeau or elsewhere, that clearly established the high threshold to be covered by those two sections. The rules were not intended to apply to internal disturbances, nor to affect the responsibility of a Government to establish and maintain law and order by all legitimate means. He supported option 1 for section C and option 2 for section D, and looked forward to further discussion on subparagraphs (b bis), (e bis), (f) and (l), as well as on article Y.

98. He emphasized the importance of work by the Preparatory Commission on elements of crimes after the Conference and before the entry into force of the treaty. Work on the Rules of Procedure and Evidence could also proceed after the Conference, and ideally should be completed prior to the entry into force of the treaty.

99. An impasse had been reached on the definition of aggression in the context of individual criminal responsibility and on whether to require prior determination by the Security Council regarding State responsibility for aggression.

100. **Mr. Momtaz** (Islamic Republic of Iran) said that aggression should be included as one of the crimes within the jurisdiction of the Court. He therefore favoured option 1 for the chapeau.

However, he was opposed to the inclusion of treaty crimes, because of the difficulty of deciding which to include. With respect to crimes against humanity, he welcomed the proposal that economic embargoes be the subject of further in-depth consideration.

101. As to the war crimes threshold, he preferred option 1. For section B, subparagraph (o), option 1 was preferable, as it included an exhaustive list of prohibited weapons. Nuclear weapons should be included.

102. In principle, he opposed the inclusion of section C on non-international armed conflicts, but his final position would depend on the results of the negotiations on the respective roles of the Security Council and the Prosecutor. He was firmly opposed to the inclusion of section D, since its provisions were not the expression of well-established international customary law.

103. It would be useful to define elements of crimes. If necessary, the task could be undertaken after the adoption of the Statute, and entrusted to the Preparatory Commission.

104. With regard to the exercise of jurisdiction covered by article 6, he said that the General Assembly should be given the same role in the maintenance of international peace and security as that of the Security Council specified in subparagraph (b). He opposed option 2 in article 6 and the assignment to the Prosecutor of a role in initiating an investigation.

105. **Ms. O'Donoghue** (Ireland) said that she endorsed the remarks made by the representative of Austria on behalf of the European Union. Her delegation's position had consistently been to support the inclusion of aggression, subject to an acceptable definition and respect for the role of the Security Council under the Charter of the United Nations. Option 1 was a good basis for further progress on formulating a definition. In the past, her delegation had favoured including treaty crimes, but, bearing in mind the time constraints, that issue could be left to a review conference.

106. She would have preferred not to specify a threshold for war crimes, as in option 3, but, in a spirit of compromise, could work on the basis of option 2. With regard to section B, subparagraph (o), she was prepared to show some flexibility. Ireland was actively working towards a global and comprehensive ban on nuclear weapons. Without prejudice to her position on that or other weapons such as anti-personnel mines and laser weapons, she was prepared to work on the basis of option 1. However, she emphasized the importance of including some wording along the lines of subparagraph (vi) in option 1 that would allow the Court to have jurisdiction in rapid response to developments in that area of law. She could also support the proposals of Sweden and Switzerland with respect to the chapeau of option 1, namely, to add a reference to inherently indiscriminate weapons and methods of war.

107. She regarded the inclusion of sections C and D as fundamental. The inclusion of elements of crimes was unnecessary, but she would not object if that did not delay the entry into force of the Statute.



108. **Mr. van Boven** (Netherlands) said that he associated himself with the statement made by the representative of Austria on behalf of the European Union.

109. In principle, he favoured the inclusion of aggression, provided that a satisfactory definition could be found and the role of the Security Council could be respected. He doubted, however, whether the Conference could reach a basis for agreement, so that it might be advisable not to include it. He had always regarded the inclusion of treaty crimes to be inadvisable. The Statute should confine itself to the core crimes: genocide, war crimes and crimes against humanity.

110. He preferred to have no threshold for jurisdiction on war crimes. However, in a spirit of compromise, he could agree to option 2 as being closer to the "no threshold" position than option 1.

111. For section B, subparagraph (o), he preferred option 1, if a better formulation of the review clause under subparagraph (vi) could be found. Jurisdiction on war crimes in conflicts of a non-international nature should be an essential part of the Court's jurisdiction. Further work could be done on elements of crimes after the Conference, provided that the entry into force of the Statute was not delayed.

112. **Mr. El Masry** (Egypt) said that he had no objection to the inclusion of genocide, crimes against humanity and war crimes. It was important to include aggression, provided that the issue of its definition could be solved. He pointed out that the discussion paper omitted option 3 of the consolidated text, which he favoured, as being the closest to General Assembly resolution 3314 (XXIX). Even if no definition of aggression were reached, that crime should still be included, but the Court should not be allowed to exercise its jurisdiction until an acceptable definition had been found. As to the role of the Security Council, he supported the proposal by the Syrian Arab Republic that the Court could exercise its jurisdiction if the Council decided that an act of aggression had been committed. However, if the Council failed to do so because of a veto by one of the permanent members, the General Assembly must be able to trigger the action of the Court.

113. Terrorism, which he condemned in all its forms, should be included within the jurisdiction of the Court. However, a distinction should be made between terrorism and national liberation movements for self-determination and independence.

114. He did not favour a threshold for jurisdiction over war crimes, but could, for the sake of compromise, accept option 2. With regard to section B, subparagraph (o), he could not accept any list of weapons that did not include nuclear weapons. Thus he supported option 2, while reserving his position regarding anti-personnel mines.

115. He did not favour the inclusion of sections C and D, but could consider section C if safeguards such as non-interference in the internal affairs of States, a higher threshold and the guarantees contained in Additional Protocol II to the Geneva Conventions of 1949 were stipulated. Elements of crimes must

be included in the Statute, but, in view of time constraints, the Preparatory Commission might be charged with their examination, for possible inclusion at the first review conference.

116. **Mr. Chkheidze** (Georgia) said that it was his Government's view that large-scale violations of international humanitarian law committed in non-international armed conflicts should fall within the jurisdiction of the Court. He therefore strongly endorsed the inclusion of sections C and D in the Statute. As for the threshold for war crimes, option 2 could serve as the basis for a compromise, to elicit the widest possible support from delegations.

117. **Mr. Maema** (Lesotho) said that he supported the views expressed by South Africa on behalf of the Southern African Development Community. The Court should have automatic jurisdiction over genocide, crimes against humanity and war crimes. An acceptable definition of aggression must be found, so that it could also be included in the Statute. In view of the controversy that still surrounded questions of definition and scope, as well as time constraints, treaty crimes should be included at a later stage. The definition of genocide contained in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide should be adopted.

118. Crimes against humanity were acts committed on a widespread or systematic basis. Under the war crimes heading, he preferred option 2. Should option 1 be chosen, he would like to see section B, subparagraph (o) (vi), included, so that the Assembly of States Parties could add further weapons to the list. The Court's jurisdiction should extend to attacks on civilians in non-international armed conflict, as well as in international armed conflict; he supported the inclusion of sections C and D.

119. He was open-minded regarding the elaboration of elements of crimes soon after the conclusion of the Conference, but there should be no linkage between work on those elements and the entry into force of the Statute.

120. **Ms. Daskalopoulou-Livada** (Greece) said that she supported the statement made by Austria on behalf of the European Union. Despite the attendant difficulties, she firmly supported the inclusion of aggression as a crime within the jurisdiction of the Court and therefore preferred option 1 for subparagraph (d). On the definition of aggression, she was ready to work on the basis of option 1, although she would have preferred a text that encompassed all the instances of aggression and covered all concerns. However, even a restricted definition was better than no definition at all, and better than the exclusion of aggression from the Court's jurisdiction.

121. On the other hand, treaty crimes were not of the same fundamental nature as the core crimes, for which reason they should not, at that stage at least, come within the jurisdiction of the Court.

122. She could accept the proposal concerning crimes against humanity, except that terrorism should not be listed under that heading, being adequately covered elsewhere in international law.

123. She would have preferred option 3 in the war crimes chapeau. However, she could accept option 2 if that met with general agreement. On the list of weapons in section B, subparagraph (o), she favoured option 1. The inclusion of sections C and D was crucial to the relevance of the Statute and the Court.

124. Further reflection on the elements of crimes was clearly needed. The issue could certainly be addressed by the Preparatory Commission after the Conference, provided that the entry into force of the Statute was not delayed.

125. **Mr. Kamto** (Cameroon) said that he fully supported the inclusion of aggression in the Statute, and option 1 under the war crimes chapeau. He would welcome any improved draft that would achieve consensus. He was open-minded as to the inclusion of treaty crimes. As to war crimes, he preferred option 3 for reasons of principle and for technical reasons, although, for the sake of consensus, he could accept option 2. For section B, subparagraph (o), he could accept option 1, although he would prefer the inclusion of elements from the other options.

126. Sections C and D should be included. Consideration of the elements of crimes could be kept under review, either by referring to them in the Final Act or by introducing an explicit clause in the Statute that would give the Preparatory Commission a mandate to produce a paper on the subject.

127. **Mr. Tomka** (Slovakia) said that he had strongly supported the inclusion of aggression but that a generally acceptable definition would probably not be found. He therefore believed

that option 2 should be adopted, as that would enable the Conference to complete its work. That did not preclude the inclusion of aggression in the future, when the Statute was reviewed, once an agreement on a definition had been reached.

128. Treaty crimes differed in nature from crimes against humanity, war crimes and genocide, and should not be included in the Statute at the current stage.

129. As he saw it, the war crimes threshold was not an element in the definition of such crimes, but rather a condition for establishing the jurisdiction of the Court. He would prefer option 3, but option 2 seemed to offer a basis for compromise.

130. With regard to section B, subparagraph (o), he said that option 2, which had the most support, did not reflect the current state of international law. Option 1 could serve as a basis for compromise, especially as subparagraph (vi) would make it possible to take into account future developments in the area of armed conflicts and international humanitarian law.

131. Sections C and D should be included, as the majority of the conflicts in the world were non-international in nature.

132. There was no need to include the elements of crimes, as the Statute should be sufficient for the functioning of the Court. He had no objection to discussion of the issue by the Preparatory Commission, but questioned the legal force of any document produced by the Commission and its relevance to decisions of the Court's judges.

*The meeting rose at 6 p.m.*

## 27th meeting

Wednesday, 8 July 1998, at 6 p.m.

*Chairman:* Mr. Ivan (Romania) (Vice-Chairman)

A/CONF.183/C.1/SR.27

### Agenda item 11 (*continued*)

**Consideration of the question concerning the finalization and adoption of a convention on the establishment of an international criminal court in accordance with General Assembly resolutions 51/207 of 17 December 1996 and 52/160 of 15 December 1997 (A/CONF.183/2/Add.1 and Corr.1 and A/CONF.183/C.1/L.53)**

#### DRAFT STATUTE

##### PART 2. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW (*continued*)

*Discussion paper prepared by the Bureau (continued)*  
(A/CONF.183/C.1/L.53)

##### Article 5. Crimes within the jurisdiction of the Court (*continued*)

1. **The Chairman** invited the Committee of the Whole to continue its consideration of document A/CONF.183/C.1/L.53,

and referred to the six questions to which the President of the Conference had requested replies.

2. **Mr. Mahmoud** (Iraq) said that the jurisdiction of the International Criminal Court should cover genocide, crimes against humanity and war crimes. In the chapeau on war crimes, he supported option 3. In section B, subparagraph (o), concerning weapons, option 2 should be taken up, with the addition of a new subparagraph (vii) on weapons which contained enriched uranium. On aggression, he confirmed his support for the option contained in document A/CONF.183/C.1/L.37 and Corr.1. If that option did not find general acceptance, the crime should not be included. Economic embargoes should be regarded as crimes against humanity. Sections C and D, concerning non-international armed conflicts, should not be included in the Statute.

3. **Mr. Bouguetaia** (Algeria) said that aggression had been defined by the General Assembly as a crime against international peace and should therefore be within the purview of the

Court. He favoured the inclusion of treaty crimes, especially terrorism. However, a global and unified approach to such crimes was needed.

4. With regard to thresholds for war crimes, he agreed that the introduction to article 5 was rather restrictive. He would prefer option 2, because option 1, taken in the light of the introduction, might remove certain war crimes from the jurisdiction of the Court. On the question of weapons, he preferred option 2 for section B, subparagraph (o). The objection that the principle of *nullum crimen sine lege* might preclude listing some weapons because they were not prohibited under customary international law was not cogent. Moreover, the purpose of the Conference was, surely, to harmonize ethics, morality and law.

5. He was somewhat concerned about the inclusion of sections C and D, since that might lead to interference in the internal affairs of countries. It would be difficult to draw a line between a genuine armed internal conflict and internal disturbances.

6. The elements of crimes must be included, because the Court could not deal with crimes without knowing what their constituent elements were.

7. **Mr. Hafner** (Austria) said that he was in favour of including aggression, provided that it was possible to agree on a definition. While he shared the concerns of those who had proposed the inclusion of treaty crimes, he found it difficult to support their views at the current juncture. He would like to include a text on attacks against United Nations personnel, but that should be dealt with in the framework of war crimes. With regard to the war crimes threshold, he could, with hesitation, accept option 2 as a compromise. Similarly, on the question concerning weapons, he could accept option 1 for section B, subparagraph (o), provided that subparagraph (iii) included a reference to exploding bullets and particular emphasis was laid in subparagraph (vi) on the possibility of introducing flexibility in the course of review conferences. That had to be harmonized with negotiations on articles 110 and 111.

8. The reference to internal conflicts was a *sine qua non* for his delegation. However, he saw no need to deal with the elements of crimes but would not refrain from cooperating on that issue, provided that the elements of crimes were not incorporated in the Statute but were addressed afterwards by the Preparatory Commission for the International Criminal Court.

9. **Mr. Pérez Otermin** (Uruguay) said that, if the Court was to judge the most serious crimes affecting the international community as a whole, it was relevant to include genocide, crimes against humanity and war crimes. Aggression must also be included. On the other hand, it was difficult to accept the intervention of a political organ such as the Security Council in defining the existence or non-existence of a crime.

10. Owing to time constraints, it might be advisable not to consider the inclusion of terrorism, drug trafficking and crimes against United Nations personnel until a later stage.

11. His position on crimes against humanity was that attack must be defined as both systematic and generalized. As to war crimes thresholds, he preferred option 1. Most of the crimes within the purview of the Court arose in the course of internal conflicts. However, bearing in mind the concerns of some countries, the scope of those crimes in sections C and D should be more precisely defined to make it perfectly clear that there was no intention to interfere in the internal affairs of States with fully established democratic regimes.

12. It was essential to include the elements of crimes in the Statute.

13. **Mr. Gaitán Mahecha** (Colombia) said that he preferred option 3 on the threshold for war crimes but, for the sake of general agreement, could accept option 2. He supported the inclusion of sections C and D on internal conflicts.

14. The elements of crimes should be established in a precise manner by the Preparatory Commission to ensure strict compliance with the principle of *nullum crimen sine lege* contained in article 21 of the draft Statute. Although there were definitions in international law for certain crimes such as genocide and forced disappearance, those definitions had to be formulated very carefully for adoption in the Statute.

15. **Ms. Lehto** (Finland) said that she endorsed the statement made by the representative of Austria on behalf of the European Union. It would be quite appropriate and timely for the Court to have jurisdiction over aggression, the definition of which contained in option 1 under the relevant heading of the discussion paper was acceptable. The inclusion of treaty crimes would not be advisable, and the jurisdiction of the Court should be limited to the core crimes, at least initially. The reasons were that its resources should be focused on the most serious international crimes and that there were still considerable problems of defining treaty crimes in some cases. Crimes against United Nations personnel could be included under war crimes.

16. Her clear preference on war crimes thresholds would be for option 3. However, as a compromise, she could accept option 2, which seemed to enjoy broad support. Concerning weapons, option 1 would be an acceptable compromise, in view of the support it had received. However, the chapeau and subparagraphs (iii) and (vi) might still need some revision.

17. On internal conflicts, she strongly supported the inclusion of both section C and section D, as otherwise the Court would be left toothless with respect to most current armed conflicts. In her view, no further elaboration of elements of crimes under the Court's jurisdiction was necessary, but she was prepared to be flexible if the general view of the Conference was that a paper on the subject should be drafted by the Preparatory Commission, provided that the entry into force of the Statute was not delayed.

18. **Mr. Castellón Duarte** (Nicaragua) said that he agreed with the presentation of the crimes set out in article 5. With regard to war crimes, he supported the reference to both international and internal conflicts, and consequently the inclusion

of sections C and D. Aggression should be included, subject to achieving a consensus on its definition. However, the role of the Security Council should be as limited as possible and should not undermine the independence of the Court.

19. Treaty crimes should be included, and he therefore supported option 1, but, in view of conflicting opinions, it might be advisable to refer the issue to a review conference. The definition of crimes against humanity was acceptable to his delegation. Genocide, as defined in the draft Statute, should be included. He hoped that consideration of the elements of crimes would not delay the entry into force of the Statute and that subsequently those elements would be included in an annex to the Statute.

20. **Mr. Khalid Bin Ali Abdullah Al-Khalifa** (Bahrain) said that aggression should be included, taking account of the definition in General Assembly resolution 3314 (XXIX) of 14 December 1974. He endorsed what had been said by the representatives of the Syrian Arab Republic and Egypt. At that stage, treaty crimes should not be included because they required further consideration. Although he supported option 3 on war crimes thresholds, he could accept option 2. There should be an exhaustive list of weapons which caused superfluous injury and unnecessary suffering or were inherently indiscriminate.

21. He found the thresholds in sections C and D difficult to accept because there was no positive definition of non-international conflicts. An exact definition of internal conflicts would be required, along the lines of Additional Protocol II to the Geneva Conventions of 1949, and great care must be taken not to interfere in the internal affairs of States. The definition must take into account situations of peace and of armed conflict, as well as situations of violence which did not amount to armed conflict.

22. There was no link between crimes against humanity and terrorism. With regard to gender-based crimes, he pointed out that the word "gender" was not defined in the discussion paper, although document A/CONF.183/C.1/L.44 and Corr.1 contained a definition. Crimes against humanity should be considered as consisting of acts committed in a systematic and widespread way during armed conflict or, indeed, before such armed conflict.

23. **Ms. Tomič** (Slovenia) said that she favoured the inclusion of aggression within the Court's jurisdiction, and thus supported option 1. The reasons for the inclusion of treaty crimes, such as crimes related to drug trafficking, were quite understandable, but that question would be more appropriately dealt with later, perhaps through an early review of the Statute. There should be no threshold provision for war crimes, so that she preferred option 3, but could support option 2 as a compromise. Since she considered that jurisdiction over war crimes committed in internal armed conflicts was a necessary prerogative of the Court, she supported the inclusion of sections C and D. Section B, subparagraph (*p* bis), and subparagraph (*r* bis) on United Nations personnel, should be included.

24. For section B, subparagraph (*o*), on weapons, she preferred option 3 but would be willing to work on the basis of option 1 if the words "inherently indiscriminate" were added in the chapeau and if the wording from the draft Statute itself were incorporated in subparagraph (*vi*).

25. She was flexible about the elements of crimes, even though she remained doubtful as to the necessity of including them. However, that should in no way delay the entry into force of the Statute.

26. **Mr. Prandler** (Hungary) said that he associated himself with the position taken by the European Union on document A/CONF.183/C.1/L.53. He was still in favour of including aggression if general agreement could be reached on a definition. The formulation contained in the discussion paper, although minimal, did refer to the most important elements and acts which might constitute aggression. However, in defining aggression, the prerogatives of the Security Council in determining any act of aggression must not be prejudiced.

27. Treaty crimes need not be included. As to thresholds for war crimes, option 2 was the right approach. He supported the retention of sections C and D on non-international armed conflicts and regretted that several delegations were opposed to their inclusion. A great majority of the armed conflicts in the world over the past 50 years had been of a non-international character.

28. **Mr. Robinson** (Jamaica) said that the question of elements of crimes was perhaps the most important question to be considered. He was not entirely convinced of the need to include them at all. Other courts managed without the benefit of any detailed statement of such elements, and there was an abundance of case law. If, however, the issue was to be addressed, the proper forum was the Conference. It was not a matter for a preparatory commission. If the elements were to be an integral part of the Statute, they would be binding on the Court, as distinct from being merely recommendatory, and would have to be formulated before the Statute entered into force.

29. As matters stood, he would not support the inclusion of treaty crimes in the Statute, though he was open to considering any fair and reasonable resolution of the issue.

30. **Mr. Nathan** (Israel) said that the first essential precondition for the inclusion of aggression in the jurisdiction of the Court was a precise and generally accepted definition. The second was to safeguard the position of the Security Council under Article 39 of the Charter of the United Nations. Although option 1 spoke of attack by the armed forces of a State on the territory of another State, it completely disregarded other grave acts of aggression.

31. It would not be appropriate to include treaty crimes in the Statute. The Conventions of The Hague and Montreal provided for universal jurisdiction on treaty crimes.

32. His delegation reserved its position on section B, subparagraph (*f*), relating to the transfer of population. In particular,

the references to "transfer, directly or indirectly" and the "population of the occupied territory within or outside this territory" should be deleted.

33. With regard to the war crimes threshold, he would support option 1. Article 20 of the 1996 draft Code of Crimes against the Peace and Security of Mankind contained a similar threshold clause. Such a clause would certainly be appropriate for inclusion in the Statute. Section B, subparagraph (o), should include a specific enumeration of the prohibited weapons because of the need for clear definitions as a matter of legal principle. Further consideration should be given to the wording of subparagraph (o) (vi) on future prohibitions under conventional and customary law, in order to formulate an adequate and precise definition.

34. As many atrocities during recent decades had been committed in internal conflicts, it was essential that they be subject to international law, and sections C and D should therefore be included.

35. It would certainly be necessary to define the elements of crimes under the jurisdiction of the Court, to assist it in interpreting the Statute. The definitions should be contained in an annex which should form an integral part of the Statute. The drafting of such an annex should not delay the entry into force of the Statute.

36. **Ms. Aguiar** (Dominican Republic) said that article 5 had no need of a chapeau, which could only undermine the strength of the Court. A listing of the crimes within the jurisdiction of the Court would be sufficient. She could agree to including aggression, so long as a clear and mutually acceptable definition could be established. The definition should stipulate the role of the Security Council. General Assembly resolution 3314 (XXIX) could serve as a basis for finding common understanding because it had been adopted by a large majority of Member States.

37. In view of the state of customary law, it was perhaps not the opportune moment to include treaty crimes in the jurisdiction of the Court. However, the issue should be left open for review.

38. Both option 1 and option 2 on war crimes thresholds were unsatisfactory. To kill intentionally was equally serious, whether or not it was part of a plan or general policy. She therefore favoured option 3, perhaps together with the chapeau of option 2.

39. She advocated including a list of weapons, materials and methods of war that caused damage or unnecessary suffering or had indiscriminate effects, the latter being the key factor. She favoured option 1 for section B, subparagraph (o), which included a potentially open list, especially in subparagraph (vi), which would make it possible to take into account technological progress in the arms industry.

40. Supporting the principle of legality expressed by *nullum crimen sine lege, nulla poena sine lege*, she said that the elements

of crimes must not be left to a later stage. States parties must be sure of the commitments that they were undertaking. The core crimes, however, were well defined by reference to existing instruments, thus satisfying the requirement of legality. Lastly, she was concerned that some types of crimes used as methods of war, for instance, sex abuse against women and children, were not contained in the document.

41. **Mr. R. P. Domingos** (Angola) said that he strongly supported the statements made by South Africa on behalf of the Southern African Development Community and Lesotho on behalf of the Group of African States. Genocide, crimes against humanity and war crimes should be included in the Statute. With regard to war crimes, both section A and section B were acceptable. In section B, subparagraph (o), he supported option 2, although he could accept option 1, with the addition of nuclear weapons and of anti-personnel mines from option 2. He supported option 1 for both section C and section D.

42. He was not yet decided whether aggression should be included in the Statute. A clear definition was needed so as to take account of General Assembly resolution 3314 (XXIX) and, particularly, the role of the Security Council. Acts committed by mercenaries should also be of concern to the international community, and as such should be included in the Court's jurisdiction.

43. **Ms. La Haye** (Bosnia and Herzegovina) said that she favoured the inclusion of aggression, provided that a wider definition was adopted, perhaps on the lines of the amended German proposal. However, if the issue continued to divide the Conference, it might be better to defer consideration. As to treaty crimes, she would favour the inclusion of crimes against United Nations personnel. On war crimes, she had a strong preference for option 3, but, in a spirit of compromise, could accept option 2. Regarding weapons, she favoured option 3, which seemed to represent the best reflection of customary international humanitarian law. However, for the sake of consensus, she could accept option 1, which contained a restricted list of prohibited weapons.

44. On internal armed conflicts, she strongly favoured the inclusion of sections C and D. She was in total agreement with Switzerland regarding the definition under customary international law of the crimes listed in section D. There was no need for a threshold, but, if one were adopted, it should apply to war crimes committed both in international and in non-international armed conflicts.

45. Most elements of crimes were already established in treaty and customary international law. In defining the scope of the jurisdiction of the Court, it would be appropriate to refer to existing law.

46. **Mr. Bihamiriza** (Burundi) said that he supported the inclusion of the core crimes and could also support the inclusion of aggression. Economic embargoes, which subjected the vulnerable population to great suffering, should also fall under

the jurisdiction of the Court. Regarding war crimes, he favoured option 3, provided that there was a clear and exhaustive list of such crimes. As to the list of weapons prohibited under section B, subparagraph (o), he favoured option 2 but, in a spirit of compromise, would be prepared to accept option 3, provided that the list remained open. The Court should not have competence with respect to internal conflicts. He would favour defining the elements of crimes after the Conference, provided that the entry into force of the Statute were not delayed.

47. **Mr. Lehmann** (Denmark) said that it would be a most unfortunate signal to the world public if the primary crime of aggression could not be included in the Statute. The Charter of the United Nations was based on the need to save succeeding generations from the scourge of war. To claim that aggression could not be included in the Statute because it had not been defined was unacceptable. Furthermore, the nonsensical situation could arise that, if the Security Council referred a case of aggression to the Court, the Court would not be able to try the individuals responsible.

48. He was more flexible on treaty crimes, especially if a review clause were incorporated in the Statute. As to the question of the threshold for war crimes, the Geneva Conventions of 1949 distinguished between breaches and grave breaches of international humanitarian law, the latter being war crimes. Raising the threshold to "extremely" grave breaches might undermine the whole concept behind the language of the Geneva Conventions. He could accept option 2 at the current stage of developments.

49. With regard to weapons, he could accept option 1, seen in the context of the principle of *nullum crimen sine lege*. It was essential to incorporate sections C and D. Finally, on elements of crimes, the judges and the Court needed to know exactly what was intended by the drafters. Perhaps, however, the final draft of the Statute would to some extent obviate the need for including such elements. Some might perhaps be incorporated into the Rules of Procedure and Evidence. If a third document on elements of crimes did prove necessary, it should constitute a guide to the Court. But the adoption and entry into force of the Statute should not be delayed by work on such a document.

50. **Mr. Mikulka** (Czech Republic) said that he associated himself with the statement made by Austria on behalf of the European Union. He was firmly convinced that aggression should be included in the Statute. However, as there seemed to be no consensus on the inclusion of treaty crimes, it would be better to defer consideration of that issue to a review conference.

51. It was not necessary to establish a threshold for war crimes. He therefore preferred option 3, but could accept option 2 as a compromise. The list of prohibited weapons in option 3 for section B, subparagraph (o), was acceptable, but again, as a compromise, he could accept option 1. Sections C and D on crimes committed in non-international armed conflicts should be included in the Statute. He understood the difficulties of States not parties to Additional Protocol II to the Geneva

Conventions of 1949, but, after hearing the representative of Mexico, believed that the problem could be overcome.

52. Although not convinced that it was really necessary to elaborate elements of crimes, he would not object if that were the wish of the majority. However, their legal status, their relationship with the Statute and their form should first be clarified.

53. **Ms. Dabrowiecka** (Poland) said that she fully endorsed the remarks of previous speakers, especially Denmark and the Czech Republic, on aggression, which should be included in the Statute on the basis of the definition contained in option 1.

54. Although generally in favour of including treaty crimes, she said that they should be considered at a review conference, given the complexity of the issues involved and time constraints. She would support option 2 on the threshold for war crimes, and option 1 for section B, subparagraph (o), on weaponry. She reiterated her firm support for the inclusion of sections C and D in the Statute. The formulation of a text on elements of crimes should not impede the entry into force of the Statute.

55. **Mr. Ngatse** (Congo) said that the Court should have jurisdiction over genocide, as defined in the Convention on the Prevention and Punishment of the Crime of Genocide of 1948, war crimes and crimes against humanity, and also over aggression. The proposed definition of aggression in the discussion paper was not satisfactory, but work on defining aggression could be continued after the Conference, provided that the crime was mentioned in the Statute.

56. He was not opposed to the inclusion of treaty crimes, since the role of the Court was to ensure legal protection for the international community.

57. Concerning crimes against humanity, he restated his view that, in the chapeau of paragraph 1, the term "generalized" or "systematic" might be used with reference to attacks. On war crimes, he preferred option 3, which reflected existing international law. War crimes could be committed in the context of an internal conflict and must be taken into account in article 5 of the Statute. With regard to the various options under war crimes, option 2 could be a compromise solution. He favoured option 1 for section B, subparagraph (o), as long as weapons of mass destruction were included. Elements of crimes should be included in the Statute. They could be established by the Preparatory Commission, provided that the entry into effect of the Statute was not delayed or its legal status undermined.

58. **Mr. Amehou** (Benin) said that genocide, crimes against humanity, war crimes and the crime of aggression should be included in the Statute. Terrorism should also fall within the jurisdiction of the Court. He suggested that consideration of the other treaty crimes should continue in the Preparatory Commission, with a view to their inclusion at a later stage. Concerning the chapeau on war crimes, he supported option 3. The jurisdiction of the Court was already stated at the beginning of article 5. The burden of proof mentioned in options 1 and 2

would be too great for the Prosecutor. However, for the sake of compromise, he could accept option 2 if that were the majority choice.

59. On the crime of aggression, option 1 was acceptable to him. As the Court was to try individuals and not States, it would be helpful to add the phrase "of which the accused is a national" after the words "a State" in line 3 of option 1. For section B, subparagraph (o), on weapons, he supported option 2. Sections C and D should clearly be included in the Statute. Detailed consideration of the elements of crimes should be referred to the Preparatory Commission for further consideration.

60. **Mr. Effendi** (Indonesia) said that he was flexible on the issues on which he did not comment. However, crimes against humanity and war crimes, with specific reference to crimes against women, should be included in the Statute. There should be no threshold provision on war crimes. For section B, subparagraph (o), he preferred option 2, but option 3 might be preferable as a compromise solution. Failing acceptance of option 3, option 2 would provide a good basis for discussion. The perpetrators of the crimes specified in sections C and D could be punished using the provisions of crimes against humanity, so that those sections need not be included. He was open to a compromise solution, in which context due account should be taken of customary international law.

61. **Ms. Assoumany** (Comoros) said that she favoured the inclusion of aggression in the Statute. On war crimes, she preferred option 2. Further discussion was necessary on sections C and D on non-international armed conflicts. Crimes against humanity should include acts of terrorism, but further work was needed on a definition of the latter. Treaty crimes should be included in the Statute. Recalling her delegation's proposal in document A/CONF.183/C.1/L.46 and Corr.1, she said that acts committed by mercenaries should be included as crimes under the Statute because they constituted a serious threat to the stability and constitutional order of States.

62. **Mr. Al-Shaibani** (Yemen) said that aggression should be included, with an appropriate definition. He could, in a spirit of cooperation, accept the inclusion in the Statute of war crimes committed in non-international conflicts, on the understanding that the Court's jurisdiction began when the political structure of a State collapsed totally, not just partially.

63. With regard to section B, subparagraph (o), on weapons, he preferred option 2. There should not be a selective approach to treaty crimes, which should therefore not be included in the Statute. Finally, he agreed that the elements of crimes should be studied in the context of the Preparatory Commission, once the Conference had been concluded.

64. **Mr. Pham Truong Giang** (Viet Nam) said that he strongly supported the inclusion of aggression as a core crime in the Statute, and noted that the last paragraph under "Aggression" mentioned that elements from General Assembly resolution 3314 (XXIX) might be inserted in the definition. He insisted on

the retention of the words "armed conflict" in the chapeau under "Crimes against humanity". Serious consideration should be given to including economic and other blockades in paragraph 1 (j) on inhumane acts.

65. To achieve a generally acceptable solution, he supported option 1 for section B, subparagraph (o), with the inclusion of nuclear weapons. He strongly advocated excluding sections C and D.

66. Treaty crimes might be punished by the international community, but, owing to time constraints, those crimes should be left, for the time being, to the national jurisdiction of the States concerned.

67. It was important to define elements of crimes, in order to give clear practical guidance to the Court. That task should be undertaken by the Preparatory Commission.

68. **Ms. Kleopas** (Cyprus) said that she strongly supported the inclusion of aggression under the Court's jurisdiction, although she was willing to compromise on its definition and might accept option 1 as a basis for discussion.

69. She opposed the inclusion of treaty crimes for the reasons stated by the United Kingdom delegation. With regard to a threshold for war crimes, she was in favour of option 3, but could accept option 2 as a compromise solution. For section B, subparagraph (o), on weapons, she favoured option 3, but could accept option 1 as a compromise. She had no objection to the inclusion of sections C and D.

70. She saw no need to include elements of crimes in the text, and said that they could be considered at a later stage, provided that the entry into force of the Statute was not affected thereby.

71. **Mr. Bhattarai** (Nepal) said that he favoured the inclusion of aggression in the Statute. However, an acceptable definition of that crime, as well as consideration of the role of the Security Council, were prerequisites.

72. Concerning treaty crimes, he supported option 1 for subparagraph (e) of the chapeau of article 5, but could accept option 2 as a compromise, provided that there would be scope for the inclusion of those crimes at a later stage. Under the "War crimes" heading, he favoured option 2. For section B, subparagraph (o), he supported option 2, owing to its greater clarity. For the sake of compromise, however, he could be flexible towards option 1, with some amendments to accommodate various concerns.

73. The inclusion of sections C and D at that stage would cause difficulties for countries that were not party to Additional Protocol II to the Geneva Conventions of 1949.

74. **Mr. Palihakkara** (Sri Lanka) said that he did not object to the inclusion of genocide. He agreed with the presentation of crimes against humanity contained in the chapeau. However, the recruitment of children into the armed forces of governmental and non-governmental entities should also be covered. It should

also be made quite clear that the final words of paragraph 2 (a) under "Crimes against humanity", reading: "a State or organizational policy to commit such attack" were also intended to cover the policy of non-governmental entities.

75. He asked whether the absence of the word "war" in the text of the provisions under "War crimes" was intended to imply that some international armed conflict was not regarded as war.

76. Concerning weaponry, he could accept option 1 for section B, subparagraph (o), with the inclusion of nuclear weapons, or option 3.

77. The proposed elaboration by the Preparatory Commission of elements of war crimes would constitute a fundamental departure from the way in which general multilateral treaties were negotiated in the United Nations. He had no objection, however, to the formulation of draft Rules of Procedure and Evidence by the Commission.

78. Finding an acceptable definition of aggression was an extremely difficult task, being related to questions of Security Council vetoes or perhaps a consultative role of the General Assembly. He hoped, however, that a definition could be agreed upon and included in the Statute.

79. Further consideration should be given to the inclusion of terrorism, crimes related to drug trafficking and crimes against United Nations personnel.

80. Section C on internal armed conflict was broadly acceptable, but, unless there were a complete breakdown of the judicial and administrative structure, due regard should be paid to the principle of complementarity. He had extreme difficulty with section D, largely because of the assumption that customary international law was generally applicable.

81. **Mr. Moussavou Moussavou** (Gabon) said that he favoured the inclusion of the crime of aggression within the jurisdiction of the Court, since not to do so would be to ignore the cruel reality of such acts. Of course, both the nature of the crime and the role of the Security Council must be defined, the latter so as not to infringe upon the jurisdiction of the Court. Despite the importance of treaty crimes, the jurisdiction of a criminal court should, for the time being, be restricted to the core crimes. Under the threshold for war crimes, he favoured option 3, as options 1 and 2 appeared restrictive in their scope. However, in a spirit of compromise, he could accept option 2. On the lists of crimes, if the Court had to deal with the most serious crimes, it also had to define them, so option 3 had his full support. Option 1 would be acceptable as a compromise. Armed conflicts of a non-international character should be included in the Statute. He favoured option 1 for both section C and section D. Finally, it was not necessary to include the definition of elements of crimes because that would delay the entry into force of the Statute.

*The meeting rose at 9 p.m.*

## 28th meeting

Wednesday, 8 July 1998, at 9 p.m.

*Chairman:* Mr. Ivan (Romania) (Vice-Chairman)

A/CONF.183/C.1/SR.28

### Agenda item 11 (*continued*)

**Consideration of the question concerning the finalization and adoption of a convention on the establishment of an international criminal court in accordance with General Assembly resolutions 51/207 of 17 December 1996 and 52/160 of 15 December 1997 (A/CONF.183/2/Add.1 and Corr.1 and A/CONF.183/C.1/L.53)**

#### DRAFT STATUTE

PART 2. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW (*continued*)

*Discussion paper prepared by the Bureau (continued)*  
(A/CONF.183/C.1/L.53)

Article 5. Crimes within the jurisdiction of the Court (*continued*)

1. **Mr. Nega** (Ethiopia) said that he strongly supported the inclusion of aggression and that, given the political will and

flexibility, a definition could be agreed upon, as a number of proposals could serve as a basis for discussion.

2. He favoured the unified approach to treaty crimes and believed that terrorism should be included. The threshold for war crimes provided in options 1 and 2 was unnecessary; he therefore preferred option 3, though he might be able to accept option 2.

3. Since it would hardly be possible to make an exhaustive listing of all weapons that caused superfluous injury or unnecessary suffering or were inherently indiscriminate, he preferred the generic approach contained in option 3 for section B, subparagraph (o), but could support option 2.

4. Non-international armed conflicts should be included, being the main causes of crimes within the jurisdiction of the International Criminal Court. Wording that would include non-international armed conflicts and would also stress the principle of complementarity could lead to a compromise.



5. **Mr. Bacye** (Burkina Faso) said that he associated himself with the remarks made by Lesotho on behalf of the Group of African States, as well as with the remarks made by South Africa and others. The Statute of the Court should include genocide, crimes against humanity, war crimes and aggression, although aggression was difficult to define.
6. He had reservations concerning the inclusion of treaty crimes but would be flexible if a majority emerged in favour of their inclusion.
7. He agreed to the definitions of genocide and crimes against humanity, preferred option 2 for section B, subparagraph (o), and supported the inclusion of sections C and D. His preference on aggression was for option 1, but a definition should be presented and the proposal by Cameroon should be examined.
8. **Mr. Mahmood** (Pakistan) said that, in a spirit of compromise, he supported the inclusion of genocide as a crime against humanity, although crimes against humanity occurred only in armed conflict.
9. He supported option 1 for the threshold for war crimes, since the Court would deal with exceptional situations. He could not accept the inclusion of sections C and D on internal armed conflicts.
10. Aggression should in principle be included in the Statute, but a proper definition was needed, and the inclusion of that crime should not be used to justify a role for the Security Council in the operation of the Court. He was prepared to examine the question of elements of crimes, provided that they served only as guidelines and that the entry into force of the Statute was not delayed by any discussion on that subject.
11. **Mr. Al Ansari** (Kuwait) said that he supported the proposal by the Syrian Arab Republic with regard to the chapeau of article 5.
12. The Court's jurisdiction should be confined to crimes, including crimes against humanity, that were committed in armed conflicts. He noted that paragraph 1 (g) under crimes against humanity mentioned the need for further discussion. There should also be references to other forms of forced sex, pregnancy and other related matters.
13. Paragraph 1 (h) did not take into account the reference in document A/CONF.183/C.1/L.44 and Corr.1 indicating that the word "gender" referred to both male and female. That aspect should be highlighted.
14. He did not favour the minimum standpoint in the chapeau on war crimes and preferred option 2. Aggression should be included, taking into account the definition of such crimes in General Assembly resolution 3314 (XXIX) of 14 December 1974.
15. If it were the general view that treaty crimes should be included, they should be defined clearly and unequivocally, particularly terrorism. His country was a party to a recent international convention on combating terrorism that contained a definition of the crime. That definition and other positive elements of the convention should be taken into account.
16. **Mr. Kuzmenkov** (Russian Federation) said that his delegation had always been in favour of including aggression within the jurisdiction of the Court and hoped that it would be possible to agree on a definition. It should be understood that the Security Council would take the preliminary decision regarding the determination of aggression.
17. He was in favour of including the most serious and dangerous acts of terrorism in the Statute of the Court but would not insist. Consideration of that issue might be left to a future review conference.
18. Since the Court was to focus on the most serious crimes that represented a threat to peace and security, option 1 was the only choice regarding jurisdiction. He agreed with some delegations that there was no substantial difference between options 2 and 3, so that a compromise based on option 2 would not be easy.
19. As to weapons, he preferred option 1 for section B, subparagraph (o), given a development of subparagraph (vi) to include weapons which would be subject to an overall prohibition in the relevant international agreement. The text would have to be adopted by consensus by the overwhelming majority of members of the General Assembly or by a diplomatic conference convened under United Nations auspices. The parties to the resultant treaty should at least all be parties to the Statute.
20. In view of the polarization of views on the inclusion of conflicts of a non-international character, it would be a great achievement if section C could be included. He understood the efforts of a number of delegations to include section D, but saw little justification for that. Extending standards applied in international armed conflicts to internal conflicts could be discussed at future international humanitarian law forums. The Conference should make use of normal conventional and customary laws relating to internal conflicts, and discussion should not go beyond the framework of Additional Protocol II to the Geneva Conventions of 1949 in that respect.
21. Although his country followed the continental legal system, it did not see any obstacle to developing definitions of elements of crimes for inclusion in the Statute, provided that such elements were an essential constituent.
22. **Ms. Kamaluddin** (Brunei Darussalam) said that she supported option 2 for the chapeau on war crimes. She also supported option 2 for section B, subparagraph (o), but was flexible on that point. She was willing to work towards a solution of the problem regarding differences on sections C and D and shared the majority view for the inclusion of the elements of crimes.
23. She would not object to the inclusion of drug crimes in the Statute and had an open mind on subparagraph (p bis) with regard to rape and other sexual offences.

24. **Mr. Huaraka** (Namibia) said that he associated himself with the remarks made by the representative of South Africa on behalf of the member States of the Southern African Development Community. He hoped that it would be possible to develop an acceptable definition of aggression so that the crime could be included in the Statute.

25. Some treaty crimes should be included, though definitions were not yet clear enough. After having heard the comments of other delegations, he preferred option 2 under the war crimes chapeau. He also preferred option 2 on weapons for section B, subparagraph (o), because that would allow the addition of weapons as yet undeveloped.

26. In common with several African delegations, he believed that the question of internal conflicts must be addressed, since in one case the entire Government had been involved in genocide and the judicial system in situ had not been effective.

27. Efforts to develop certain elements such as jurisprudence should not delay efforts to adopt the Statute and establish the Court.

28. **Mr. Schembri** (Malta) said that he supported the inclusion of aggression and that option 1 under that heading could serve as a reference point for further discussion in order to establish individual criminal responsibility.

29. For paragraph 1 of article 10 on the role of the Security Council, he supported option 1.

30. In article 5 he favoured the inclusion of sections C and D, since international law had developed to a point where individuals could be held criminally responsible for serious violations of humanitarian law in non-international conflicts.

31. He strongly disagreed with the limitation of the Court's jurisdiction embodied in option 1 for the war crimes chapeau, and said that the Prosecutor should be able to prioritize and choose the more serious crimes and that it was the duty of the Court to take into account the gravity of a crime in determining a sentence. The words "shall have jurisdiction in particular when committed as a part of a plan or policy" in option 2 were ambiguous: either the Court had jurisdiction or it did not. In a spirit of compromise, however, he would be prepared to be flexible.

32. He was also ready to compromise on treaty crimes, which might be dealt with in a review conference.

33. **Mr. Florian** (Romania) said that aggression must be included if a generally agreed definition could be obtained and if there were clear provisions regarding the role of the Security Council.

34. His delegation had no strong views on treaty crimes but preferred that the Court deal only with the core crimes. He supported the inclusion of sections C and D. On the question of weaponry in section B, subparagraph (o), he preferred option 1, though further discussion was still needed on subparagraph (vi).

35. Consideration of elements of crimes could be deferred to a future meeting of the Preparatory Commission for the International Criminal Court. Although he did not believe it necessary to have a threshold for war crimes, he could accept option 2 as a compromise.

36. **Mr. Balde** (Guinea) was in favour of including genocide, crimes against humanity and war crimes within the Court's jurisdiction. However, there were difficulties regarding the definition of aggression and the preponderant role of the Security Council in that context. He associated himself with the statement made by the delegation of Lesotho on behalf of the Group of African States.

37. He preferred option 3 regarding a threshold for war crimes, as it seemed more appropriate to deal with the full range of such crimes. It would be premature to include nuclear weapons under section B, subparagraph (o), as there was no treaty banning them, so that he preferred option 1.

38. In view of the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on Their Destruction, anti-personnel mines should be included under subparagraph (vi) of option 1 for section B, subparagraph (o).

39. **Mr. Morshed** (Bangladesh) said that he opposed option 2 on aggression but supported option 1. Treaty crimes should be included, but his delegation was flexible regarding the relevant procedure. Since his country's law had no provision for a threshold for war crimes, he favoured option 3 but could accept option 2.

40. He supported option 2 for section B, subparagraph (o), as a basis for continued discussion. For section C, he supported option 1 but believed that a broader agreement could be achieved by stipulating a higher threshold. For section D, option 2 would facilitate consensus.

41. There were so many substantive and procedural implications regarding elements of crimes that it would probably be impossible to find an ad hoc answer to their inclusion.

42. **Ms. Vega Pérez** (Peru) said that she supported the inclusion of genocide as defined in the Convention on the Prevention and Punishment of the Crime of Genocide of 1948, and of the category of mass or heinous crimes. She hoped that an acceptable definition of aggression would be worked out, particularly as to the role of the Security Council. For the chapeau on war crimes, she preferred option 3. With regard to sections A and B, it was most important to classify the elements of crimes so that the Court could properly deal with offences. She agreed with Mexico that there should be further endeavours to round out the offences aspect. Although the matter was complex and various international instruments already existed on treaty crimes, her delegation was flexible with regard to their inclusion.

43. **Mr. Rochereau** (France) said that his country had always supported the inclusion of aggression and was in favour of the option which provided a strict definition and preserved the prerogatives of the Security Council.

44. His country had a very reserved position on the inclusion of treaty crimes, since they were of quite a different nature from the core crimes. Although other international instruments were already in force with regard to treaty crimes, he did not rule out an imaginative solution.

45. His country joined the emerging consensus on option 2 with regard to the war crimes threshold and was prepared to accept the drafting proposed by the Chair for section B, subparagraphs (a bis) and (b). However, he considered that the provisions taken from Additional Protocol I to the Geneva Conventions of 1949 should be read in the light of the declarations by States parties to that Protocol.

46. His delegation preferred option 1 for section B, subparagraph (o), and supported the comments made by the United Kingdom delegation on subparagraph (vi). He agreed with the comments made by the Austrian representative on behalf of the European Union with regard to sections C and D.

47. In a spirit of compromise, he was prepared to help ensure that the adoption of the text on elements of crimes did not delay the establishment of the Statute.

48. **Mr. Niyomrerk** (Thailand) supported the inclusion of aggression in the Statute and preferred the relevant option 1. However, the role of the Security Council should be mentioned, as well as that of the General Assembly, as in Assembly resolution 377 A (V) of 3 November 1950 entitled "Uniting for peace". The text of option 1 would have to be improved to reflect those elements.

49. Treaty crimes should also be included but, in view of time constraints, it might be preferable to consider them at a review conference, if a provision to that effect were reflected in the documents of the Conference.

50. His delegation supported option 1 for the chapeau on war crimes but would be prepared to accept option 2 if a consensus emerged. With regard to section B, subparagraph (o), he supported the explicit inclusion of nuclear weapons contained in subparagraph (vi) of option 2. However, he would be prepared to join in a general consensus on option 1 if a reference to the use of nuclear weapons could be included as explicitly as possible.

51. He could not accept sections C and D but supported the inclusion of elements of crimes, provided that there was consistency with the Statute and the relevant conventions.

52. **Mr. Zaballa Gómez** (Spain) said that he associated himself with the remarks by the representative of Austria on behalf of the European Union.

53. He supported option 1 on aggression which, though rather restrictive, addressed the concerns of various countries.

54. Since no consensus seemed to be emerging on treaty crimes, they should not be included in the Statute, though a subsequent review might be possible. Crimes against United Nations personnel were not treaty crimes in the strict sense but were being discussed in the context of war crimes. On that understanding, he supported their inclusion. In the chapeau on war crimes, he supported option 2, which used the words "in particular", as it might command consensus. He supported option 1 for section B, subparagraph (o), on prohibited weapons, which had been substantially improved, particularly with regard to the role of the Assembly of States Parties in determining what weapons should be prohibited.

55. War crimes committed in conflicts of a non-international character should also be dealt with; he therefore supported the inclusion of sections C and D. A consensus seemed to be emerging on that point.

56. There were some positive aspects in the list of elements of crimes but difficulties might arise in seeking to obtain consensus, which might impede the entry into force of the Statute. He therefore welcomed the efforts made by the United States delegation to avoid any such eventuality.

57. **Mr. Padilla** (Guatemala) said that he would welcome a solution for including the crime of aggression, along the lines of the Mexican suggestion. If that were impossible, he could agree to option 1 for the reasons expressed by France, among others.

58. Since his country had ratified the Additional Protocols I and II to the Geneva Conventions of 1949, he was prepared to accept the inclusion of sections C and D. However, if, as mentioned by the Mexican delegation, common article 3 could be used to resolve the difficulties of countries that had not signed Additional Protocol II, that would also be acceptable to him.

59. He did not favour the mention of thresholds for war crimes, but if that concept had to be included in order to reach a consensus, he would prefer option 2.

60. As the depositary of the Treaty of Tlatelolco of 1967, he favoured option 2 for section B, subparagraph (o), on prohibited weapons, since it included both nuclear weapons and anti-personnel mines. The difficulties of some delegations might be met if it were considered that nuclear weapons were regarded as essentially prohibited for use in attack but not in defence. However, for the sake of a compromise, he could accept option 1.

61. If necessary in order to arrive at a consensus, terrorism and attacks against United Nations personnel could be left aside for the time being.

62. Correct definition of the elements of crimes was absolutely essential.

63. **Mr. Fadl** (Sudan) said that he supported the inclusion of section B, subparagraph (f). For reasons he had already mentioned, he thought that section D should be deleted.

64. The phrase "not military objectives" in section B, subparagraph (c), was not satisfactory and the original draft was preferable. He would elaborate further on that point in consultations with other delegations. He supported the Egyptian delegation's statement concerning Additional Protocol II to the Geneva Conventions of 1949. If the language contained in those Conventions were not included, it would complicate the problems with regard to sections C and D. The Court would be impartial if internal conflicts were subject to the criterion of admissibility and the powers of the Prosecutor and States parties were also subject to that criterion.

65. He supported inclusion of the crime of aggression but said that, if there were no definition of the crime, perpetrators would not be prosecuted.

66. **Mr. Ballacillo** (Philippines) said that he favoured the inclusion of aggression in the Statute, subject to a clear definition. Treaty crimes should also be included, though he would be willing to consider the views of other delegations.

67. No qualification or conditions should be required with regard to a threshold for war crimes. He therefore supported option 3. With respect to weapons of a nature to cause superfluous injury and unnecessary suffering, he supported option 2 for section B, subparagraph (o).

68. He was in favour of retaining sections C and D on armed conflict of a non-international character.

69. He supported automatic jurisdiction of the Court over core crimes and an opt-in or State-consent regime for other crimes. Accordingly, he also advocated according *proprio motu* power to the Prosecutor over core crimes, subject to adequate safeguards.

70. **Mr. Larrea Dávila** (Ecuador) said that the Court should have universal jurisdiction over the core crimes. Aggression should be included in the Statute, with proper regard for legality and international jurisdiction and law. A clear statement should be made about the role of the Security Council in order to guarantee the independence of the Court in applying the principle of complementarity. With regard to the question of thresholds, his delegation thought that option 3 was the most acceptable. As to the use of weapons and methods causing superfluous injury or unnecessary suffering specified in section B, subparagraph (o), his delegation considered that option 3 was best; however, if option 1 could command consensus, he could support it, but in that case more work would have to be done on subparagraph (vi).

71. His delegation supported the inclusion of sections C and D.

72. **Mr. Doudech** (Tunisia) said that he associated himself with the statements made by the representative of Lesotho on behalf of the Group of African States in reply to the questions posed by the Chair. He also supported the inclusion of terrorism in the Statute as a crime against humanity and would like to see

the adoption of a generally agreed text. Similarly, he supported the inclusion of other treaty crimes and the crime of aggression. On that, as on other issues, a consensual approach would be necessary, taking into account the viewpoints of various delegations and ensuring the adoption of a Statute that would find broad support.

73. **Ms. Peralba García** (Andorra) said that aggression should be included but must be properly defined, taking into account the role of the Security Council. She supported the Belgian proposal that treaty crimes be mentioned in the Final Act as a subject for a later conference.

74. Her original view on thresholds was that they were not needed, but, after listening to the arguments put forward by the United States, she considered that option 2 would be an acceptable compromise. For section B, subparagraph (o), on weapons, she supported option 1. Sections C and D should be included in the Statute.

75. She recognized that some delegations needed a provision on elements of crimes but thought that the matter should be considered later in order not to hinder the work of the Conference.

76. **Mr. Da Gama** (Guinea-Bissau) said that he supported the statements by Lesotho on behalf of the Group of African States in favour of including the core crimes within the jurisdiction of the Court. A satisfactory definition of aggression was also needed.

77. Since it seemed difficult to arrive at general agreement on treaty crimes, he preferred option 2 for article 9 of the draft Statute. On the question of thresholds for war crimes, he preferred option 3 but could accept option 2. For section B, subparagraph (o), he could agree to option 1. Elements of crimes could be established after the Conference, provided that the entry into force of the treaty establishing the Court would not be hampered thereby. He attached prime importance to the inclusion of sections C and D, since his country continued to suffer from non-international armed conflicts.

78. **Mr. Monagas** (Venezuela) said that he supported the inclusion of aggression on the basis of a clear and specific definition and considered that the definition contained in document A/CONF.183/C.1/L.53 under option 1 was acceptable.

79. Since the Court was to be a new body, its initial jurisdiction should cover core crimes. He supported the idea of a future review mechanism for including such offences as treaty crimes.

80. For section B, subparagraph (o), he preferred option 2, which included nuclear weapons and anti-personnel mines. He understood the difficulties of some delegations on that issue and could join in a consensus based on a definition that would make some reference to that category of weapons. He supported the inclusion of sections C and D.

81. The Statute should contain some indication that the Preparatory Commission should prepare texts on elements of crimes after the closure of the Conference. His delegation agreed to the automatic jurisdiction of the Court for genocide in accordance with the Convention on the Prevention and Punishment of the Crime of Genocide but thought that the consent of States parties would be called for with regard to other crimes. He therefore supported option 1 in article 7.

82. **Mr. Al-Amery** (Qatar) said that he accepted the inclusion of aggression as one of the core crimes, but that there must be a precise definition linked to General Assembly resolution 3314 (XXIX). He favoured option 3 for the war crimes chapeau but could support option 2.

83. For section B, subparagraph (o), he preferred option 2 because it included nuclear weapons and anti-personnel mines. As far as sections C and D were concerned, the Court should not have jurisdiction if States were correctly performing their duties.

84. A provision should be included concerning elements of crimes. In his understanding, the word "gender" in paragraph 1 (g) under crimes against humanity referred to both males and females.

85. **Mr. Abdullah M. Mohammed Ibrahim Al Sheikh** (Saudi Arabia) said that aggression must be included within the jurisdiction of the Court, taking into consideration the definition contained in General Assembly resolution 3314 (XXIX).

86. For section B, subparagraph (o), he preferred option 2 because it included a number of weapons whose use should be criminalized.

87. With regard to crimes against humanity, he pointed out that paragraph 1 (g) of the discussion paper said that further discussion was needed on that point. His preference was for the corresponding paragraph 1 (g) in the draft Statute, which mentioned rape, other sexual abuse and enforced prostitution but omitted other elements that might be controversial.

88. War crimes should be included, being grave violations of the Geneva Conventions of 1949 and of Additional Protocol I thereto. However, internal conflicts should be excluded, provided that a State was correctly meeting its obligations. The intervention of the Court would prejudice State sovereignty.

89. He had no objection to the inclusion of terrorism as defined in the Arab Convention for the Suppression of Terrorism of 1998.

90. **Mr. Sayyid Said Hilal Al-Busaidy** (Oman) said that he was in favour of an effective, balanced and independent court with jurisdiction over genocide and crimes against humanity committed during armed conflicts. He favoured option 2 for the war crimes chapeau and also preferred option 2 for section B, subparagraph (o), on weapons.

91. Aggression should be included within the Court's jurisdiction, General Assembly resolution 3314 (XXIX) being

the basis for a definition, and the Security Council's role in bringing a case should also be clearly defined. On the basis of the principle of General Assembly resolution 377 A (V) entitled "Uniting for peace", the Assembly should also have jurisdiction in cases where a veto had been used.

92. Internal conflicts should not come within the Court's jurisdiction, except in the case of a non-functioning Government or central authority. However, he was flexible on that point.

93. Elements of crimes should be within the jurisdiction of the Court.

94. **Mr. Bello** (Nigeria) said that he favoured the inclusion of the core crimes in the Statute. Under crimes against humanity, he favoured the inclusion of paragraph 1 (i bis) on apartheid. His delegation favoured option 1 for the war crimes chapeau. He also favoured option 2 for section B, subparagraph (o), since it was essential to include nuclear weapons and anti-personnel mines.

95. His acceptance of subparagraphs (p bis), (r bis) and (t) would depend on the existence of acceptable definitions. He also supported the inclusion of aggression, if acceptably defined.

96. He would be grateful if the options referred to by the delegation of the Syrian Arab Republic at the twenty-fifth meeting, which were not contained in the discussion paper, could be presented for further deliberation in order to reach a consensus on defining aggression and also on the role of the Security Council.

97. It was necessary to consider not only aggression by States but also by armed bands against States. His country had sponsored a motion leading to the International Convention against the Recruitment, Use, Financing and Training of Mercenaries of 1989. That should be reflected in the final consensus.

98. Without prejudice to the powers of the Security Council under the Charter of the United Nations, the General Assembly and/or the victim of aggression should have the right to refer a matter to the Court.

99. Though he sympathized with the desire to include treaty crimes, the list proposed was selective. Treaty crimes should be left to national courts.

100. His delegation favoured the elaboration of elements of crimes; relevant provisions should be included in the Statute.

101. **Ms. Shahan** (Libyan Arab Jamahiriya) said that the discussion paper did not reflect the principle of an independent, balanced and effective court that would hand out justice to all without any political influence.

102. The definition of aggression contained in option 1 was not comprehensive, confining itself to annexation and occupation; option 2, excluding aggression, was unacceptable. Furthermore, the Court should not be prevented from exercising its jurisdiction in the event of a Security Council veto. The right of members of

the Council to refer cases to the Court was an entrenchment of domination.

103. Although her delegation said that it was necessary to include aggression, it could not accept option 1 in the discussion paper and preferred the option in document A/CONF.183/C.1/L.37 and Corr.1.

104. Embargo should be included as one of the crimes against humanity, in view of the suffering that it caused. She did not wish to see treaty crimes included and had no preference with regard to the war crimes chapeau, but preferred option 2 for section B, subparagraph (o). Sections C and D should not be included. She was ready to consider guarantees that would secure the integrity and sovereignty of States.

105. The question of elements of crimes should be considered at a later stage.

106. **Ms. Doswald-Beck** (Observer for the International Committee of the Red Cross), also speaking on behalf of the International Federation of Red Cross and Red Crescent Societies, said that war criminality did not admit a threshold provision. She recognized the desire to limit the jurisdiction of the Court to certain situations, so that option 2 did not seem to be a negative compromise. With regard to the list of crimes, she pointed out a problem with regard to the word "perfidious", mentioned in section B, subparagraph (e). Perfidy in that context could apply only to objects to which the adversary had to give special humanitarian protection, but not to the uniform of an enemy. The correct word in the context in question would be "improper" rather than "perfidious".

107. Option 3 for section B, subparagraph (o), reflected existing law on weapons. However, if States were to choose option 1

or 2, it should be ensured that existing law was protected, in which context she considered subparagraph (vi) of option 1 to be extremely important. Bullets which exploded in the body had long been prohibited and should therefore feature in subparagraph (iii) of either option 1 or 2, or must be understood as covered by the word "expand".

108. Crimes committed in non-international armed conflicts were crimes under international customary law. She appealed to States to consider each crime separately and identify what conduct should be considered as criminal. Atrocities that had occurred in recent armed conflicts should also be taken into account. The input of States that had experience of internal armed conflicts would be very meaningful.

109. Certain safeguards did exist with regard to non-international armed conflicts, namely, with regard to the lower thresholds. It was necessary to distinguish between armed conflict and internal riots, for example. The normal interpretation was that a non-international armed conflict must be an armed confrontation of a military nature, which excluded sporadic events.

110. With regard to complementarity, she noted the valid concern of many States that Governments should themselves be able to deal with crimes committed in internal armed conflicts. She therefore believed that the Court should have jurisdiction over such crimes only if the national authorities failed to do so.

111. It was extremely important to include a provision such as article Y of the draft Statute in order to protect existing humanitarian law and its development, under both treaties and custom.

*The meeting rose at 10.55 p.m.*

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## 29th meeting

Thursday, 9 July 1998, at 10.15 a.m.

*Chairman:* Mr. Kirsch (Canada)

*later:* Mr. Mochochoko (Lesotho) (Vice-Chairman)

A/CONF.183/C.1/SR.29

### Agenda item 11 (*continued*)

**Consideration of the question concerning the finalization and adoption of a convention on the establishment of an international criminal court in accordance with General Assembly resolutions 51/207 of 17 December 1996 and 52/160 of 15 December 1997 (A/CONF.183/2/Add.1 and Corr.1 and A/CONF.183/C.1/L.53)**

#### DRAFT STATUTE

PART 2. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW (*continued*)

*Discussion paper prepared by the Bureau (continued)*  
(A/CONF.183/C.1/L.53)

Article 6. Exercise of jurisdiction

Article 7. Acceptance of jurisdiction

Article 7 bis. Opt-in for treaty crimes and possibly for one or more core crimes

Article 7 ter. Acceptance by non-States Parties

Article 8. Temporal jurisdiction and non-retroactivity

Article 10. Role of the Security Council

Article 11. Referral of a situation by a State

Article 12. Prosecutor

Article 15. Issues of admissibility

Article 16. Preliminary rulings regarding admissibility

Article 18. *Ne bis in idem*

1. **The Chairman** invited the Committee of the Whole to take up the second set of questions in discussion paper A/CONF.183/C.1/L.53 on other jurisdictional issues, admissibility and applicable law.

2. **Mr. Kourula** (Finland), Coordinator, said that practically the same order of provisions was followed in the discussion paper as in the draft Statute. As to the exercise of jurisdiction, three triggering mechanisms were provided in the discussion paper. With respect to the Prosecutor's right to initiate an investigation, there were two options in article 6 and two in article 12. On the basis of earlier debate in the Committee, the term "situation" was used in article 6.

3. In article 7, covering preconditions to the exercise of jurisdiction, and automatic jurisdiction, it might have been preferable to reverse the order of paragraphs 1 and 2. The existing order had probably been chosen because paragraph 1 might apply both to article 7, paragraph 2, and to possible opt-in jurisdiction. The article governed preconditions to the exercise of jurisdiction, if needed. Furthermore, as the note in bold type stated, if the Statute were to provide for automatic jurisdiction for some crimes but an opt-in or State consent regime for others, then consequential amendments to paragraph 1 would be required and the placement of subsequent provisions would be reconsidered.

4. Article 7, paragraph 2, dealt with automatic jurisdiction, while elements for the opt-in mode were contained in article 7 bis. Article 7 ter contained a provision concerning the acceptance of the jurisdiction of the International Criminal Court by a non-party State.

5. On the issues relating to the Security Council, he recalled that the Committee had already discussed the question of aggression and would have to deal with coordination between the Court and Council action.

6. Article 11, entitled "Referral of a situation by a State", was a technical issue.

7. Consultations continued on the issues pertaining to admissibility, especially with respect to article 16.

8. With regard to article 20, a special working group had been established on the previous day to consider issues that remained open.

9. **The Chairman** said that the Bureau had requested comments on the following issues:

(1) Acceptance of jurisdiction, automatic jurisdiction, opt-in or State consent for one or more core crimes;

(2) Which States must be parties to the Statute or must have accepted jurisdiction before the Court exercised jurisdiction;

(3) An approach to the *proprio motu* power of the Prosecutor to initiate proceedings and the safeguards required;

(4) An approach to the role of the Security Council on issues other than aggression that could form the basis for general agreement.

It would not be useful to go into article 20 at the current meeting since it was being discussed by the working group just established.

10. Delegations were invited to make other suggestions which, he hoped, would be helpful in reaching general agreement.

11. **Ms. Wilmschurst** (United Kingdom of Great Britain and Northern Ireland) said that, with respect to the Chairman's first question, the United Kingdom strongly believed that there should be automatic jurisdiction: if a State became a party to the Statute, it should thereby accept the Court's jurisdiction on all the core crimes within the Court's remit. She assumed that treaty crimes would not be included.

12. On the second point, namely, the difficult question of non-parties, she said that her delegation still believed that its own proposal (option 2 in article 7 in the discussion paper) could achieve consensus.

13. On the question of the Prosecutor, her delegation was in favour of provisions that would support and protect his or her independence and the authority of the office. Appropriate checks and balances should therefore be included to afford such protection as States might require in the light of all the provisions of the Statute, including the principle of complementarity. Her delegation was prepared to work on provisions to meet those objectives.

14. With regard to the role of the Security Council, her delegation believed that the only sensible course would be to allow the Council to refer cases to the Court, since the establishment by the Council of new ad hoc tribunals should be avoided. With regard to deferral by the Court on request of the Council, her delegation considered that some such provision as option 1 for article 10, paragraph 2, would be a good solution.

15. With regard to the issue of complementarity under article 15, she hoped that the current wording of that article could be retained in view of the difficult negotiations that had taken place in the Preparatory Committee on the Establishment of an International Criminal Court.

16. **Mr. Perrin de Brichambaut** (France) said that his delegation had two considerations in mind with regard to the Chairman's four questions. First, the Court should have the widest possible membership. Since a variety of situations existed

in different States and not all States were ready to accept the Court's inherent jurisdiction over their nationals for all crimes, a way had to be found of allowing the greatest possible number to participate.

17. Secondly, the Court would be successful if it worked in a spirit of harmony and trust with existing international institutions, particularly the Security Council. It was therefore important to look again at the methods of cooperation set out in the Statute.

18. In reply to the Chairman's first question, he said that France believed that the Court should have mandatory jurisdiction for all States parties with regard to genocide, crimes against humanity and aggression. For war crimes, consent by the State of which the accused was a national would be preferable. A flexible system allowing each State to accept the Court's jurisdiction for a given crime would meet the concern of his and other delegations. His delegation would therefore propose an additional paragraph to article 7 bis to cover that point.

19. Regarding the Chairman's second question, his delegation was in favour of a compromise solution combining parts of options 1, 2 and 4 in article 7.

20. With regard to the role of the Prosecutor, France had already agreed to the idea of referral to the Court by joint decision of the Pre-Trial Chamber and the Prosecutor, which was reflected in option 1 for article 12.

21. On the role of the Security Council, his delegation was in favour of option 1 for both paragraph 1 and paragraph 2 of article 10. The prerogatives of the Council under the Charter of the United Nations to determine acts of aggression had to be respected, while at the same time the action of the Court and that of the Council had to be consistent in situations where there was a threat to or breach of the peace.

22. **Mr. Brown** (Trinidad and Tobago) said that automatic jurisdiction for all core crimes was absolutely essential. It might be supplemented by opt-in jurisdiction over treaty crimes such as drug trafficking.

23. As to the preconditions to the exercise of jurisdiction under article 7, his delegation considered that option 1 was the best of those presented in the discussion paper, although it would have preferred the universal jurisdiction formula proposed by the German delegation.

24. His delegation strongly supported the power of the Prosecutor to initiate investigations *proprio motu* and therefore preferred option 2 for article 6 (c). Adequate safeguards would be provided by the Pre-Trial Chamber under option 1 for article 12, and articles 17 and 58.

25. Trinidad and Tobago accepted that the Charter of the United Nations recognized the Security Council's role in dealing with aggression, but sympathized with the view that there was no need for an exclusive role of the Council. His

delegation supported the Council's right to refer situations to the Court under article 6 (b), but wondered whether the General Assembly should not be granted similar authority as well, since a State party had that right under article 6 (a).

26. His delegation could accept that the Security Council, acting under Chapter VII of the Charter, might need to request a temporary suspension of an investigation or prosecution by the Court under extraordinary circumstances. However, such suspensions should be limited to a period of six months and should be renewable only once.

27. **Mr. Caflisch** (Switzerland), replying to the Chairman's first question, said that the Court's jurisdiction over all core crimes must be automatic. His delegation considered option 1 in article 7 to be an acceptable compromise.

28. As to which States had to be parties to the Statute if the jurisdiction of the Court was to be established in a given case, in his delegation's view that requirement should apply to the State where the suspect was located rather than to the custodial State, because a suspect could be located in a State but not in custody. However, for the sake of compromise, he could accept option 1 in article 7.

29. With regard to the role of the Prosecutor, his delegation supported option 1 for article 12. To prevent any possible abuse, the independent exercise of the Prosecutor's activities might be subject to control by the Pre-Trial Chamber.

30. With regard to the Security Council's role on issues other than aggression, his delegation considered that the Council should never serve as a filter to prevent matters from being referred to the Court. Nor should the Prosecutor be obliged to notify the Council whenever a State submitted a case to the Court. However, the Council might well wish the Court to defer consideration of a case for a certain period, but that period should not be too long and should not be used to remove or destroy evidence.

31. His delegation could therefore accept option 2 in article 10.

32. **Mr. Owada** (Japan), replying to the Chairman's first question, said that Japan considered that the Court's jurisdiction should be confined to core crimes but should be automatic. Treaty crimes should not be covered by the Statute and his delegation was therefore not in favour of the system set out in article 7 bis. None the less, his delegation would try to promote general agreement on that matter since it was important to achieve the widest possible participation in the Statute.

33. His delegation had no objection to article 7 ter, which set out the guiding principle for acceptance of jurisdiction.

34. With regard to the second question, Japan considered it important to have the cooperation of the custodial State and also that of the State on whose territory the act or omission had occurred. It was therefore in favour of option 3 but was prepared to listen further to the views of other delegations.



35. Concerning the power of the Prosecutor to initiate investigations *proprio motu*, Japan considered it important that the Prosecutor should act strictly in accordance with the law and that he or she should be totally free from any influence by a country or group. However, the Court's Prosecutor would not be like a prosecutor in a national judicial system, who had legitimacy backed by accountability under that system. In the international context, the Prosecutor had to reflect the legal interest of the international community, and it was therefore important to provide a mechanism ensuring the legitimacy of his or her action. Bearing those considerations in mind, Japan would continue to seek a formula acceptable to all.

36. His delegation was in favour of option 1 in article 10 with regard to both aggression and deferral.

37. **Ms. Fernández de Gurmendi** (Argentina) said that her delegation considered that the Court should have automatic jurisdiction over all crimes within its jurisdiction: genocide, crimes against humanity, war crimes and the crime of aggression, if the latter was included. Any system of opt-in or State consent would undermine the Court's independence and effectiveness.

38. As to which States had to be parties to the Statute, her delegation preferred option 1 in article 7.

39. Her delegation was in favour of giving the Prosecutor power to initiate proceedings *proprio motu*, and of the system of control by the Pre-Trial Chamber set out in article 12.

40. Her delegation believed the Security Council's ability to submit issues to the Court to be important. With regard to the question of deferral, her delegation considered that option 1 for article 10, paragraph 2, provided a good basis for compromise.

41. **Mr. Scheffer** (United States of America) said that his delegation strongly supported option 2 in article 6 for reasons already explained. Option 1 would weaken the Court in practice and would discourage many Governments from joining it.

42. If the principle of universal jurisdiction were adopted, many Governments would never sign the treaty and the United States would have to actively oppose the Court. The principle of universal jurisdiction was not accepted in the practice of most Governments and, if adopted for the Statute, would erode the fundamental principles of treaty law. The possibility that the Court might prosecute the officials of a State that was not a party to the treaty or had not submitted to the Court's jurisdiction in other ways was a form of extraterritorial jurisdiction that would be quite unorthodox. His delegation therefore rejected options 1, 2 and 3 in article 7 and strongly supported option 4, which required the prior consent of the State of nationality of the accused if that State was not a party to the treaty. The United States had grave difficulties with establishing a court that presumed to have jurisdiction over the citizens of a State that had not ratified the treaty creating it, except in situations where the Security Council had taken enforcement action under Chapter VII of the Charter of the United Nations, which was binding on all Member States. Options 1, 2 and 3

did, however, contain elements that could be added to option 4 if desired.

43. With respect to automatic jurisdiction, his delegation believed that any State party to the Statute should, by virtue of its ratification of the treaty, accept the Court's jurisdiction over genocide. The crime mentioned in article 7, paragraph 2, should therefore be "genocide". Automatic jurisdiction over all the core crimes was a recipe for limited participation in the Court. A better solution might be an opt-in provision to allow States parties to accept the Court's jurisdiction over crimes against humanity and war crimes, as proposed in article 7 bis. That approach would encourage broad membership in the Court. Moreover, the principle of complementarity should apply with respect to all crimes within the Court's jurisdiction.

44. Article 7 ter was a useful and necessary provision.

45. His delegation strongly supported article 8, paragraph 1 bis, without which many States would be reluctant to join the treaty.

46. With respect to article 10, paragraph 1, his delegation considered that option 1 was essential. Contrary to some suggestions, the General Assembly was not equivalent to the Security Council as far as the Council's responsibilities under the Charter were concerned.

47. His delegation had long supported the proposal in the original International Law Commission text requiring affirmative action by the Security Council before a complaint concerning a matter under consideration by the Council could be addressed by the Court. However, it realized that a consensus was unlikely on that point.

48. His delegation was examining wording that might better achieve the objective of article 10, paragraph 2. In view of the Security Council's responsibilities under the Charter for restoring and maintaining international peace and security, recognition of its role in the Statute was vital to the proper functioning of the Court, in accordance with the obligations of Member States under the Charter. His delegation was willing to work with others to find a compromise with respect to the Council's proper role, but the powers and functions of the Council must not be rewritten. Wording was needed that did not impose an obligation on the Council to draft its own resolution with a specified period for its applicability. Nevertheless, his delegation supported efforts to find consensus.

49. With respect to article 11, his delegation believed that option 1 for paragraph 3 was a necessary provision for coordination between the Court and the Security Council.

50. His delegation supported the deletion of article 12.

51. The United States delegation had already explained its proposal regarding article 16, and was prepared to review it with other delegations so that the text could be finalized. That was a relatively minimal proposal but would encourage broader membership in the Court because it strengthened the principle of complementarity.

52. If the approaches he had suggested made up an acceptable package, his delegation would seriously consider recommending that his Government should sign the treaty at an appropriate time in the future.

53. **Mr. Meddah** (Morocco) said that his delegation had no problem with including genocide, crimes against humanity and war crimes within the jurisdiction of the Court.

54. Aggression was political in nature and had not been clearly defined. It should therefore be excluded from the Court's jurisdiction, and the same applied to other crimes which were not of extreme gravity. To ensure that the Court could be independent and effective, the Prosecutor should be given all powers to carry out his or her responsibilities effectively and should be subject to no control other than that of the Statute and the Court itself.

55. **Ms. Vargas** (Colombia) said that her delegation supported automatic jurisdiction for genocide, war crimes and crimes against humanity. If consensus was reached on the inclusion of treaty crimes, an express declaration of acceptance of the Court's jurisdiction would be necessary.

56. Her delegation was in favour of option 3 in article 7 regarding States that should be parties or should have accepted jurisdiction before the Court exercised its jurisdiction. In other words, both the territorial State and the custodial State must have accepted the Court's jurisdiction, but, as a compromise, she could agree to a combination of options 3 and 4, thus including the State of nationality of the accused.

57. With regard to the power of the Prosecutor to initiate proceedings, her delegation supported article 12, which provided for control by the Pre-Trial Chamber.

58. As to the Security Council's role on issues other than aggression, she reiterated her country's position that the Council should not intervene in the functioning of the Court.

59. **Mr. Dabor** (Sierra Leone), speaking in connection with article 6, said that his delegation considered it imperative that the Prosecutor should be able to initiate investigations and was therefore in favour of option 1 for article 6 (c). With regard to article 12, his delegation's preference was for option 1.

60. On article 7, his delegation considered that the Court should have automatic jurisdiction over all the core crimes. It regretted that universal jurisdiction had been eliminated from the choices. Paragraph 2 of article 7 should become paragraph 1 and the word "of" should be deleted, so that the paragraph would read: "A State which becomes a Party to the Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5". His delegation preferred option 1 in article 7 because it was selective rather than cumulative.

61. His delegation called for the deletion of article 7 bis, because there should be no opt-in for core crimes. It did not consider that treaty crimes should be included at that time, so

that an opt-in system with regard to those crimes would be unnecessary.

62. His delegation was in favour of including article 7 ter since it would allow non-parties to cede their jurisdiction to the Court when a crime of the most serious concern to the world community had been committed.

63. Referring to the role of the Security Council, he said that his delegation would prefer option 2 for article 10, paragraph 2, if the deferral period was shorter, namely, 6 months rather than 12. Moreover, a revised version should make provision for the concerns of Belgium about the preservation of evidence; the term "evidence" should be interpreted broadly enough to cover witness and victim protection. His delegation considered that the deferral request should be renewable only twice if it was for a duration of 6 months, or once if it remained at 12. Numerous renewals or indeterminate delays might subject accused persons to lengthy detention prior to or during a trial and would thus prejudice the right to a fair trial. His delegation also supported the New Zealand proposal that any decision for deferral be taken by a formal resolution of the Council. However, in a spirit of compromise, his delegation would adopt a flexible attitude on option 1 and would welcome further consultations on the issue.

64. In connection with article 11, paragraph 3, his delegation would prefer that there be no direct interference by the Security Council in the proceedings of the Court. Option 1 might be understandable if the Court were to be an organ of the United Nations, but as a treaty-based organization, notification to the Council was inappropriate; option 2 was therefore preferable.

65. With regard to article 15, his delegation preferred that the text should remain as it stood, since it was the result of a very delicate compromise.

66. His delegation was against the inclusion of article 16, which merely set up another procedural obstacle to the operation of the Court. Taken as a whole, articles 15 and 16 and the possibility of an article 17 would create a system full of checks without any balances. His delegation therefore considered that, if article 16 were included, there must be automatic jurisdiction over the core crimes and the article would need serious improvement.

67. Article 19 raised an important issue and should be included in the Statute. However, in the interests of compromise, his delegation would agree to its deletion.

68. **Mr. Gadyrov** (Azerbaijan) said that, in principle, he favoured automatic jurisdiction but, if a particular State or group of States were allowed to select several modes of jurisdiction, his Government would reserve the right to choose the conditions under which it would accept the jurisdiction of the Court, if at all.

69. Genocide, crimes against humanity and war crimes should be subject to automatic jurisdiction. However, if there was agreement in favour of opt-in jurisdiction, his Government would again reserve the right to select the conditions under which it would accept jurisdiction with regard to a particular crime. If

treaty crimes were to be included in the Statute, they should be subject to opt-in jurisdiction.

70. His delegation was in favour of option 1 for article 7, paragraph 1.

71. His delegation was not in favour of *proprio motu* powers for the Prosecutor and considered that the article in question should be deleted. It was not sufficient to argue that the statutes of the International Tribunals for the Former Yugoslavia and for Rwanda already provided for such *proprio motu* powers. On that analogy, the statutes of those Tribunals were applied retroactively and the Statute of the Court might be so as well, but surely no delegation would accept that.

72. He considered that the Security Council should have the power to refer a situation to the Court, and not only in connection with aggression.

73. As far as deferral was concerned, option 1 for article 10, paragraph 2, was not appropriately formulated. A 12-month period seemed too long. Moreover, his delegation did not favour renewal of the request by the Security Council.

74. **Ms. Li Yanduan** (China) said that her delegation had always maintained its reservations on an automatic jurisdiction provision, which would not encourage States to accede to the Statute.

75. Under customary international law, the three core crimes did not all have the same status. Whereas genocide was accepted by the whole international community as a crime, crimes against humanity and war crimes fell into a different category.

76. With regard to jurisdiction, she said that the effectiveness of the Court would depend entirely on the cooperation of States and that the consent of the interested parties was therefore essential. Her delegation considered, with respect to article 7, that the Court might exercise its jurisdiction if the territorial State, the custodial State and the State of which the accused of the crime was a national were parties to the Statute.

77. With regard to option 3 in article 7, her delegation hoped that the provision contained in the draft prepared by the International Law Commission could be kept intact.

78. As far as the powers of the Prosecutor were concerned, her delegation was unable to accept the current provisions of article 12.

79. With respect to article 6 (c), her delegation was in favour of option 2.

80. She considered that the Security Council should be empowered to refer cases to the Court. With respect to the Council's power of deferral, her delegation was in favour of option 2.

81. **Mr. Rowe** (Australia) said that his delegation was in favour of automatic jurisdiction and therefore did not support article 7 bis.

82. On the question of which States should be parties or should have accepted the Court's jurisdiction before the Court could act in a particular case, his delegation was in favour of option 1 in article 7. Since that option entailed the acceptance of jurisdiction by non-parties, his delegation also supported article 7 ter.

83. He strongly supported *proprio motu* powers for the Prosecutor, subject to appropriate safeguards. He supported option 1 for article 12, which met that requirement, and also option 1 for article 6 (c).

84. With regard to the role of the Security Council, the Statute should strike a balance between the need for independent action by the Court, free from any political influence, and the need to recognize the Council's role in relation to the maintenance of international peace and security under Chapter VII of the Charter of the United Nations. That balance was adequately recognized in article 6, which provided for referral by the Council acting under Chapter VII. With regard to option 1 for article 10, paragraph 2, relating to deferral, he said that to give the Council any greater power in relation to the operation of the Court would unacceptably compromise the Court's independence.

85. On the question of complementarity, his delegation considered that article 15 should be retained in its current form, since it represented a carefully crafted compromise.

86. **Mr. van Boven** (Netherlands) said that his delegation considered it essential that States that ratified the Statute should also accept the automatic jurisdiction of the Court with regard to the core crimes. It therefore did not agree with the opt-in/opt-out modalities or consent regimes as presented in article 7 bis.

87. With regard to the preconditions to the exercise of jurisdiction, his delegation considered that the core crimes would warrant universal jurisdiction. However, since that option was not mentioned in the discussion paper, his delegation would favour option 1 in article 7, which came closest to its views on the subject.

88. His delegation considered the *proprio motu* powers of the Prosecutor mentioned in article 6 (c) and elaborated in article 12 to be essential. Moreover, the elaboration in article 12 of the review function of the Pre-Trial Chamber was highly commendable.

89. He considered that the Security Council should be able to refer situations to the Court, as provided for in article 6 (b). He agreed with the Swiss representative that, in connection with article 10, the Council should not have a filter function. He did, however, recognize that in certain instances the Council might have a legitimate interest in the type of issues before the Court. The proposal in option 1 for article 10, paragraph 2, was therefore acceptable, although the wording needed clarification and it should be specified that the request by the Council to the Court should be made in a publicly adopted resolution.

90. His delegation supported the proposed Belgian amendment that the rights of the Prosecutor to take the necessary measures to preserve evidence should not be affected when an investigation or prosecution was suspended.

91. **Mr. Wenaweser** (Liechtenstein) said that his delegation considered that every State that became a party to the Statute should thereby accept the Court's jurisdiction in respect of the crimes set out in article 5. Automatic jurisdiction was absolutely essential for the Court's effectiveness and independence, but should initially be limited to the core crimes. Article 7 bis was therefore unnecessary.

92. Since the option based on universal jurisdiction that had been favoured by many States no longer appeared in the discussion paper, his delegation considered that option 1 in article 7 on acceptance of jurisdiction offered a good basis for compromise.

93. Regarding the Prosecutor's *proprio motu* powers, his delegation was in favour of option 1 for article 12, providing for the Prosecutor's power to initiate investigations on the basis of information from reliable sources. That power was a constituent of a truly independent court and was of paramount importance.

94. With regard to the role of the Security Council on matters other than aggression, his delegation thought that the Council should have the power, under Chapter VII of the Charter of the United Nations, to refer a situation to the Prosecutor as provided for in article 6 (b).

95. As far as article 10, paragraph 2, was concerned, option 1 provided a sound basis for a compromise; his delegation supported the proposal to include wording on the securing of evidence in that provision. In any discussion on the role of the Security Council, the Court's independence should be the guiding principle.

96. He supported retention of the language in article 15, which reflected a very delicate and carefully drafted compromise.

97. **Mr. Pal** (India) said that he could endorse almost everything that the United States representative had said. Since the aim was to achieve almost universal acceptance of the Statute, automatic jurisdiction was not the way forward. The opt-in provision in article 7 bis was the only acceptable one.

98. As to which States had to be parties to the Statute or had to have accepted its jurisdiction before the Court could proceed, his delegation considered it essential that both the territorial State and the custodial State should be States parties and should have accepted jurisdiction; he would therefore prefer option 3 in article 7.

99. His delegation could not accept a *proprio motu* power for the Prosecutor because it considered that the Court could act only on referral from a State party. Therefore he could not agree to article 6 (c) or to article 12 as a whole.

100. It was on the role of the Security Council that his delegation disagreed with that of the United States, since it considered that the Statute could neither add to nor detract from the powers of the Council under the Charter of the United Nations. The Court's independence could not be preserved if it could act only after the Council had referred a matter to it. The Council's powers would in any case be preserved by the Charter and there should be no reference to the Council in the Statute.

101. He pointed out that an anomalous situation might arise, in violation of the law of treaties, when a non-party to the Statute, as a member of the Security Council, could influence a Council resolution affecting another non-party.

102. Complementarity must be the basis on which the Court should act. In his delegation's view, articles 15 and 16 were needed in the Statute. Both should be strengthened and his delegation would be pleased to embark upon that exercise in cooperation with others.

103. **Mr. Moussavou Moussavou** (Gabon) said that the Court's jurisdiction for all crimes under article 5 should be automatic for States parties. The possibility of allowing States parties to take measures affecting non-parties might run counter to the law of treaties. His delegation therefore preferred option 4 in article 7, but would favour a combination of options 1, 2 and 4.

104. His delegation considered that the Prosecutor should be able to initiate proceedings *proprio motu*, but with judicial control by the Pre-Trial Chamber to obviate the possibility of abuse, and therefore preferred option 1 for article 12.

105. With regard to the role of the Security Council, his delegation agreed that the Council had the power to refer situations to the Court under the Charter of the United Nations. As to its role on issues other than aggression, his delegation had a preference for option 3 for article 10, paragraph 2, though option 2 might provide an acceptable basis for compromise as long as measures were taken to protect witnesses and preserve evidence if there was any deferral. However, the Council should not have the power to defer consideration of a case by the Court for more than six months.

106. **Mr. MacKay** (New Zealand) said that his delegation believed that automatic jurisdiction over all crimes was essential if the Court was to be effective. It did not support article 7 bis.

107. As to which States must be parties or accept jurisdiction, his delegation supported option 1 in article 7, which was already a compromise. The other options in that article were too limiting.

108. His delegation considered it essential for the Prosecutor to have *proprio motu* powers. However, in view of the concerns of others, his delegation was in favour of the safeguards provided in option 1 for article 12, which it hoped would go some way towards meeting those concerns.

109. With regard to the role of the Security Council, his delegation could accept option 1 regarding aggression in article 10.

110. It could accept option 1 on deferral in article 10, and in that connection welcomed the statement made by the United States. However, the process must be transparent, and he agreed with other delegations that any decision for deferral should be by way of a formal resolution.

111. On the issue of complementarity, his delegation regarded article 15 in its current form as essential.

112. **Mr. Gevorgian** (Russian Federation) said that his delegation was in favour of automatic jurisdiction for genocide and State consent for crimes against humanity and war crimes. It could work on the basis of article 7 bis.

113. As to which States had to be parties to the Statute or had to have accepted the Court's jurisdiction before the Court could act, his delegation considered that there had to be preliminary agreement by the State on whose territory the crime was committed and by the custodial State. However, he was sympathetic to the attitude of the delegations that favoured preliminary agreement by the State of nationality.

114. His delegation was opposed to the idea of giving the Prosecutor *proprio motu* powers. Before a case was referred to the Court, a State would have to make a complaint. That would make it possible to remove any political pressure from the Prosecutor. His delegation was therefore opposed to article 6 (c) and article 12 as a whole.

115. As to the role of the Security Council concerning aggression, his delegation favoured option 1 for article 10, paragraph 1. With regard to deferral, his delegation found it difficult to agree with any wording that might be interpreted as modifying the obligations of States under the Charter of the United Nations, in particular under Chapter VII. Moreover, the introduction of any time limit might be interpreted as affecting the Council's powers under Chapter VII. His delegation was prepared to seek a generally acceptable option.

116. Replying to a point made by the representative of India, he recalled that the Security Council as a body was responsible for maintaining international peace and security and that the question of whether a member was or was not a party to the Statute or to any other treaty was not of vital importance, since Article 103 of the Charter would prevail. There would thus be no violation of treaty law.

117. **Mr. Arévalo** (Chile) said that his delegation was in favour of inherent jurisdiction of the Court with regard to the core crimes. It could therefore accept article 7 bis.

118. As far as the States that had to accept jurisdiction before the Court could act were concerned, his delegation was in favour of option 1 in article 7. The provision in article 7 ter would also be useful for non-parties.

119. His delegation was in favour of *proprio motu* powers for the Prosecutor and therefore supported option 1 for article 6 (c) and considered that option 1 for article 12 also provided a good basis for agreement. It could not accept option 1 for article 11, paragraph 3.

120. As to the role of the Security Council on aggression (option 1 for article 10, paragraph 1), his delegation would accept whatever was agreed on the crime of aggression. With regard to deferral, option 1 for article 10, paragraph 2, provided an interesting basis on which further work could be done. He endorsed the point made by the Netherlands and New Zealand on the need for a prior resolution from the Council. He also supported the Belgian point that evidence had to be preserved since it was vital for the future trial.

121. **Mr. Rwelamira** (South Africa), speaking on behalf of his delegation and those of the other member States of the Southern African Development Community (SADC), said that they preferred inherent jurisdiction for all the core crimes under the Court's jurisdiction. However, being aware of the concerns expressed by some delegations on the need for additional requirements of consent, SADC would be in favour of option 1 in article 7. Option 3 was quite unacceptable.

122. There should be no opt-in mechanism for any of the core crimes, but SADC was flexible as to the possibility of an opt-in system for treaty crimes, in particular, drug crimes and attacks on United Nations personnel.

123. The role of the Security Council was probably related to the resolution of the problems of defining the crime of aggression. SADC was flexible as to option 1 in article 10, but was certainly against option 2. It was in favour of *proprio motu* powers for the Prosecutor and supported option 1 for article 12. SADC was flexible as to whether article 16 on admissibility should be contained in the Statute, but consideration might be given to including it if it were redrafted.

124. **Mr. Huaraka** (Namibia) endorsed the remarks of the previous speaker on behalf of the member States of the Southern African Development Community.

125. Namibia considered that the Court should have inherent jurisdiction, at least for the core crimes, once a State had ratified the Statute.

126. With regard to acceptance of jurisdiction, his delegation was in favour of option 1 in article 7.

127. His delegation considered that the Prosecutor should be able to initiate investigations *ex officio* on the basis of information from any reliable source.

128. With regard to the role of the Security Council, he agreed that the Conference could not amend the Charter of the United Nations. Article 10 might be revisited once an appropriate definition of aggression had been found.

129. Article 16 on preliminary rulings regarding admissibility had not really been debated, and he therefore suggested that a small working group should be set up to consider it.

130. **Mr. Fall** (Guinea) said that, with regard to the exercise of jurisdiction, his delegation was in favour of option 1 for article 6 (c).

131. As to acceptance of jurisdiction, his delegation regretted that the German proposal on universal jurisdiction seemed to have been withdrawn. Its second choice was option 1 in article 7. Article 7 bis should be deleted to avoid weakening the jurisdiction of the Court.

132. His delegation supported the maintenance of article 7 ter on acceptance of the Court's jurisdiction by non-parties.

133. He was in favour of ex officio powers for the Prosecutor under the control of the Pre-Trial Chamber, and therefore supported option 1 for article 12.

134. With regard to the role of the Security Council, his delegation supported option 1 for article 10, paragraph 1, and was opposed to option 1 for article 11, paragraph 3.

135. **Mr. Lehmann** (Denmark) said that his delegation regarded it as essential that automatic jurisdiction should be provided for in the Statute, which should not be fragmented by including opt-in or opt-out clauses. Although his delegation was not in favour of preconditions to the exercise of jurisdiction by the Court, it could accept option 1 in article 7 as a starting point.

136. His delegation supported option 1 for article 12 on the role of the Prosecutor.

137. With regard to the role of the Security Council, his delegation would prefer option 3 in article 10. The Council should not be given the power to dictate that the Court suspend proceedings in a particular case. The Court might itself consider that suspending a case would serve the interests of justice, or the Court and the Council might cooperate on the basis of non-binding arrangements, but not through a dictate.

138. **Mr. Schembri** (Malta) said that, under current international law, all States might exercise universal criminal jurisdiction over crimes of genocide, crimes against humanity and war crimes, regardless of the nationality of the offender, the nationality of the victim and the place where the crime was committed. However, in a spirit of compromise, his delegation was prepared to support the replacement of that concept in the Statute by the concept of automatic jurisdiction, but it could not contemplate any form of opt-in or State consent regime for any of the core crimes. For the Court to be effective and credible, State consent should be required only once, namely, when a State became a party to the Statute.

139. With regard to the Chairman's second question, his delegation supported option 1 in article 7 and was also in favour of article 7 ter.

140. Articles 6 and 12 referring to the independent role of the Prosecutor were, in his delegation's view, fundamental. The Court had to have an independent Prosecutor, within a system of appropriate checks and balances. A court relying exclusively on referral by the Security Council or a State party would not suffice to bring to justice those responsible for the crimes to be covered by the Statute. Option 1 for article 10, paragraph 2, would be a suitable compromise accommodating divergent views regarding the Council's role, but should be amended by adding that decisions under Chapter VII of the Charter of the United Nations should be taken only by public resolution.

141. Malta unreservedly supported the inclusion of article 15, since it believed that the principle of complementarity was essential.

142. *Mr. Mochochoko (Lesotho), Vice-Chairman, took the Chair.*

143. **Mr. Ivan** (Romania) said that, in principle, his delegation was in favour of universal jurisdiction but could accept automatic jurisdiction for genocide, war crimes and crimes against humanity, and for aggression, if included.

144. With regard to the States that had to be parties to the Statute or had to have accepted jurisdiction before the Court could exercise jurisdiction, his delegation supported option 1 in article 7, and article 7 ter regarding acceptance by non-parties.

145. His delegation was in favour of giving the Prosecutor ex officio power to initiate an investigation and supported article 6 (c). Option 1 for article 12, as well as the preliminary rulings regarding admissibility in article 16, would provide the necessary safeguards.

146. With regard to the role of the Security Council, his delegation accepted the Council's right to refer a situation to the Court and to request the deferral of proceedings, pursuant to Chapter VII of the Charter of the United Nations.

147. **Mr. Masuku** (Swaziland) said that his delegation associated itself with the statement made by the representative of South Africa on behalf of the member States of the Southern African Development Community.

148. Replying to the Chairman's questions, he said that his delegation considered that option 1 for article 6 (c) relating to the role of the Prosecutor should form part of the Statute.

149. His delegation was also in favour of the Court having automatic jurisdiction in respect of the three core crimes, which could be supplemented by an opt-in mechanism for treaty crimes.

150. With regard to article 7 on acceptance of jurisdiction, his delegation considered that option 1 was acceptable.

151. Recognizing the role of the Security Council under the Charter of the United Nations, his delegation was in favour of option 1 for article 10, paragraphs 1 and 2.

152. With regard to the role of the Prosecutor, his delegation considered that option 1 for article 12 was preferable, since it made provision for all necessary safeguards.

153. **Mr. Maiga** (Mali) said that ratification of the Statute by a State should signify automatic acceptance of the Court's jurisdiction for genocide, crimes against humanity and war crimes. His delegation had therefore supported the German proposal, which, unfortunately, did not figure in the discussion paper. His delegation was unable to accept article 7 bis.

154. The Prosecutor should have the power to initiate proceedings *proprio motu*; his delegation therefore supported option 1 in article 6 and option 2 in article 11.

155. He believed that it was necessary to specify the number of times that the Court might defer proceedings at the request of the Security Council. Moreover, it was important to ensure that evidence was preserved and victims were protected during the deferral period.

156. His delegation supported the Syrian proposal to delete article 16.

157. **Prince Zeid Ra'ad Zeid Al Hussein** (Jordan) said that his delegation was in favour of automatic jurisdiction for all the core crimes under article 7, but did not accept the State consent regime suggested in the note to article 7 and in article 7 bis. Moreover, it considered that, if the State consent regime were adopted, contrary to the preference of many delegations, that might have fatal consequences for the Court that the Conference was trying to create.

158. With regard to the Chairman's second question, his delegation considered that one or more of the four States listed in option 1 in article 7 should be party to the Statute before the Court could exercise its jurisdiction by way of the complementarity mechanism envisaged in article 15. His delegation supported article 7 ter.

159. His delegation strongly supported option 1 for article 12 referring to the *proprio motu* power of the Prosecutor to initiate proceedings and believed that the safeguards contained therein were sufficient, in conjunction with those provided for in articles 47 and 48 of the draft Statute.

160. With regard to the role of the Security Council, his delegation was in favour of option 1 for article 10, paragraph 2.

161. He had two further comments on complementarity. It was essential to include article 15 as currently drafted to ensure that the Court would function effectively. He welcomed article 16 but considered that it required some redrafting in order to gain widespread acceptance.

162. **Mr. Choi Seung-hoh** (Republic of Korea) said that his delegation strongly believed that the Court should have automatic jurisdiction over the core crimes. There was no need for an opt-in mechanism, and article 7 bis was therefore not acceptable to his delegation.

163. Regarding the acceptance of jurisdiction by non-parties, his delegation supported article 7 ter but thought that the text should be modified to cover obligations other than those under part 9 of the draft Statute. His delegation was ready to cooperate in that work.

164. As to the preconditions to the exercise of jurisdiction, his delegation was, of course, in favour of option 1 for article 7, paragraph 1, which it had sponsored. That option was a compromise formulated to bridge gaps between the proponents of universal jurisdiction and those in favour of State consent in each particular case.

165. His delegation supported the *proprio motu* power for the Prosecutor to initiate proceedings, subject to appropriate safeguards, as provided in article 12.

166. He could accept either option 1 or option 2 based on the proposals made by Singapore with regard to the role of the Security Council, in recognition of the Council's primary responsibility for the maintenance of international peace and security.

167. In connection with referral by the Security Council, his delegation considered that the obligations imposed on States parties to supply relevant information needed to be revised.

168. His delegation firmly believed that the issue of complementarity should not be reopened.

169. **Mr. Da Gama** (Guinea-Bissau) said that his delegation supported option 1 in article 6 concerning automatic jurisdiction with respect to genocide, crimes against humanity and war crimes. It would consider the inclusion of aggression once a satisfactory definition had been found.

170. His delegation was in favour of option 1 in article 7.

171. He considered that the Prosecutor should be able to act *proprio motu*, so that option 1 for article 12 was the most appropriate.

172. With regard to the role of the Security Council, his delegation could accept option 1 in article 10; with regard to deferral, option 2 might be used as a basis for compromise.

173. **Ms. Kasyanju** (United Republic of Tanzania) said that she endorsed the views expressed by the representative of South Africa on behalf of the member States of the Southern African Development Community.

174. With regard to exercise of jurisdiction, her delegation strongly supported option 1 for article 6 (c), in conjunction with the safeguards provided in article 12.

175. Her delegation supported universal jurisdiction for all the core crimes but as a compromise could accept automatic jurisdiction. It considered that an opt-in/opt-out regime would undermine the Court's effectiveness and therefore supported option 1 in article 7. She would support articles 7 bis, 7 ter and 8.

176. With regard to the role of the Security Council, her delegation supported option 1 for article 10, paragraph 1. For article 10, paragraph 2, on deferral, its preference was for option 3 but it was willing to explore the matter further.

177. Her delegation supported option 2 for article 11, paragraph 3. With regard to article 12 on the Prosecutor, it was in favour of option 1. It continued to support the provisions of article 15 regarding complementarity.

178. In the light of its strong support for proposals regarding article 17, it saw no need for article 16.

179. **Ms. Betancourt** (Venezuela) said that, for the sake of consensus, Venezuela was prepared to agree that the Court should have automatic jurisdiction in respect of all the crimes under article 5. Article 7 bis was therefore unnecessary. She did not think that treaty crimes should be included in the Statute.

180. With regard to the acceptance of jurisdiction, her delegation could accept option 1 in article 7 and agreed to the inclusion of article 7 ter. The Prosecutor should be enabled to initiate proceedings ex officio, subject to the Pre-Trial Chamber mechanisms. It therefore accepted article 12 and would support option 2 for article 6 (c).

181. As to the role of the Security Council, she said that the Court should be an independent body with clearly defined relations with the Council. Her delegation could accept a reference in the Statute to the Council's role only if the crime of aggression were to be included within the Court's jurisdiction; she therefore supported option 1 for article 10, paragraph 1. Article 6 (b) should be worded accordingly. If the Conference decided to include a deferral clause in the Statute, it should stipulate that any decision by the Council should relate only to an act of aggression.

182. Her delegation considered that the principle of complementarity had to be reflected in the Statute and therefore supported article 15 as drafted in the discussion paper.

183. **Mr. Kaul** (Germany) said, with regard to acceptance of jurisdiction, that his delegation was dismayed that its proposal on universal jurisdiction had not been put forward as an option

in the discussion paper. It still believed that the universal jurisdiction approach was legally sound. The Conference might be criticized for not making that the basis for the Court's jurisdiction.

184. With regard to the proposals for jurisdiction over the core crimes, his delegation considered that neither the State consent regime nor the opt-in proposal outlined in article 7 bis would be acceptable to participants as far as all or any of the three core crimes were concerned. Automatic jurisdiction with regard to those crimes therefore had to be considered.

185. His delegation supported option 1 in article 7. The membership of one or more of the four States mentioned in that option would be sufficient to enable the Court to exercise its jurisdiction.

186. With regard to the *proprio motu* power of the Prosecutor to initiate proceedings, he stressed that option 1 for article 12 provided the important safeguard that the Prosecutor would be under the control of the Pre-Trial Chamber. However, unless the Prosecutor had the right to initiate investigations *proprio motu*, the Court's jurisdiction would be impaired. He therefore appealed to delegations to support option 1. Moreover, there were other safeguards, including the threshold clauses for the various crimes, and the provisions of article 16. Incidentally, his delegation could not accept article 16 in its current form since it constituted an attempt to establish additional procedural hurdles at the start of investigations. Furthermore, some of the points made by delegations in informal consultations had not yet been taken into account. His delegation would participate in any informal efforts to help to improve article 16, perhaps combining it with article 17, which would provide yet another safeguard with regard to the Prosecutor.

187. As to the role of the Security Council, he said that article 10 was a very delicately balanced provision that safeguarded the independence of the Court and reconciled it with the Council's existing prerogatives. If aggression were included, paragraph 1 of that article would be necessary. His delegation supported option 1 for paragraph 2.

*The meeting rose at 1 p.m.*



### 30th meeting

Thursday, 9 July 1998, at 3.10 p.m.

*Chairman:* Mr. Ivan (Romania) (Vice-Chairman)

*later:* Mr. Kirsch (Canada) (Chairman)

A/CONF.183/C.1/SR.30

#### Agenda item 11 (*continued*)

**Consideration of the question concerning the finalization and adoption of a convention on the establishment of an international criminal court in accordance with General Assembly resolutions 51/207 of 17 December 1996 and 52/160 of 15 December 1997**

(A/CONF.183/2/Add.1 and Corr.1, A/CONF.183/C.1/L.7, A/CONF.183/C.1/L.20, A/CONF.183/C.1/L.47/Add.1, A/CONF.183/C.1/L.51, A/CONF.183/C.1/L.53 and A/CONF.183/C.1/WGPM/L.2/Add.4)

#### DRAFT STATUTE

##### PART 5. INVESTIGATION AND PROSECUTION (*continued*)

*Report of the Working Group on Procedural Matters  
(continued)* (A/CONF.183/C.1/WGPM/L.2/Add.4)

1. **Ms. Fernández de Gurmendi** (Argentina), Chairman of the Working Group on Procedural Matters, introduced the report of the Working Group (A/CONF.183/C.1/WGPM/L.2/Add.4), in which the Group submitted to the Committee of the Whole the following articles: article 57; and article 57 bis, paragraphs 1 and 2 and paragraphs 3, (a), (b) and (c).

2. **The Chairman** asked whether he could take it that the Committee of the Whole agreed to refer the provisions contained in the report of the Working Group to the Drafting Committee.

3. *It was so decided.*

##### PART 11. ASSEMBLY OF STATES PARTIES (*continued*)

*Recommendations of the Coordinator  
(A/CONF.183/C.1/L.47/Add.1)*

4. **Mr. S. R. Rao** (India), Coordinator for part 11, said that further informal consultations had been held on article 102, paragraph 5. Document A/CONF.183/C.1/L.47/Add.1, which was self-explanatory, contained a revised version of that paragraph which he commended to the Committee.

5. **The Chairman** asked whether he could take it that the Committee of the Whole agreed to refer the proposed text for article 102, paragraph 5, to the Drafting Committee.

6. *It was so decided.*

##### PART 2. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW (*continued*)

*Discussion paper prepared by the Bureau (continued)*  
(A/CONF.183/C.1/L.53)

Article 6. Exercise of jurisdiction (*continued*)

Article 7. Acceptance of jurisdiction (*continued*)

Article 7 bis. Opt-in for treaty crimes and possibly for one or more core crimes (*continued*)

Article 7 ter. Acceptance by non-States Parties  
(*continued*)

Article 8. Temporal jurisdiction and non-retroactivity  
(*continued*)

Article 10. Role of the Security Council (*continued*)

Article 11. Referral of a situation by a State (*continued*)

Article 12. Prosecutor (*continued*)

Article 15. Issues of admissibility (*continued*)

Article 16. Preliminary rulings regarding admissibility  
(*continued*)

Article 18. *Ne bis in idem* (*continued*)

7. **Mr. Saland** (Sweden) said that he would respond to the questions posed by the Chairman at the previous meeting. His delegation had always favoured a unified regime for acceptance of the jurisdiction of the International Criminal Court, and he supported article 7, paragraph 2, as it appeared in the discussion paper prepared by the Bureau (A/CONF.183/C.1/L.53). There should be automatic jurisdiction for core crimes, but an opt-in system would be appropriate for treaty crimes if they were included in the Statute. He was firmly opposed to any regime based on ad hoc State consent.

8. The question concerning the exercise of jurisdiction related to cases referred by a State party or investigations initiated by the Prosecutor. He favoured option 1 for article 7, paragraph 1, but supported the idea that the notion of "custody" should be replaced by the notion of being present in the territory of a State.

9. On the third question, he was in favour of a *proprio motu* role for the Prosecutor. Article 12 as currently drafted had the right balance between the power of the Prosecutor and the

checks which judicial review by the Pre-Trial Chamber would give. He saw certain overlaps with article 16, and the relationship between the various articles touching on admissibility must be considered. He welcomed, however, the very balanced way in which the material grounds for inadmissibility were stated in article 15.

10. On the fourth question, he was perfectly happy for the Security Council to refer situations to the Court in the exercise of its powers under Chapter VII of the Charter of the United Nations. On balance, he also supported the Council having the power to request deferral; there would be some merit in coordinating action by the Council and the Court. He was very much in favour of option 1 for article 10, paragraph 2. However, the Council decision on deferral should be made by way of the adoption of a resolution.

11. **Mr. Onkelinx** (Belgium) supported option 1 for article 6 (c) and option 1 for article 12. Regarding article 7, his delegation had always been in favour of automatic jurisdiction of the Court over States parties to the Statute. As a compromise, he accepted option 1 for paragraph 1. He was concerned that article 7 bis would give States parties the possibility to refuse consent, something he found alien to the concept of the functions of the Court.

12. In article 10, he was in favour of option 1 for paragraph 1, provided that agreement was reached on the definition of aggression. In paragraph 2, he was in agreement with the spirit of option 1 and could accept option 2. He recalled that his delegation had proposed an amendment (A/CONF.183/C.1/L.7) to ensure that evidence could be preserved during the period of suspension of proceedings in the Court. There were four essential principles involved. The first was the principle of suspension of the work of the Court, the second was the formal character of the relevant Security Council decision, the third was the limit on the duration of the suspension and the fourth was the possibility of preserving evidence.

13. Article 15 on admissibility should be maintained in its entirety because it gave the best expression to the key concept of complementarity. He still had serious reservations about the proposed article 16.

14. **Mr. Robinson** (Jamaica), responding to the Chairman's first two questions, said that in addition to the core crimes the Court should also have jurisdiction over treaty crimes. Automatic jurisdiction would be reasonable for core crimes, but universal participation would in practice be enhanced by an opt-in or consent regime. He supported option 3 for article 7, paragraph 1, but proposed the addition at the end of subparagraph (b) of the phrase "in accordance with international law". The Court should not have jurisdiction on the basis of an unlawful arrest. Jurisdiction in respect of treaty crimes should be based on the opt-in formula in article 7 bis. Article 7 ter should be reformulated, since it appeared to impose an obligation on States that were not parties to the Statute, which would be odd.

15. On the third question, he doubted very much whether the *proprio motu* power of the Prosecutor would yield the anticipated benefits – possibly quite the reverse – but he was prepared to join in any consensus on the issue.

16. On the fourth question, while recognizing the pre-eminent role of the Security Council in matters relating to Chapter VII of the Charter of the United Nations, he could not accept a relationship between the Council and the Court that would jeopardize the latter's independence. Option 1 for paragraph 1 and for paragraph 2 of article 10 would link the exercise of the Court's jurisdiction to decisions by the Council in a way which would jeopardize its independence. He was particularly concerned about option 1 for paragraph 2, which raised the possibility of repeated requests to the Court for deferral of an investigation or prosecution. The solution was for the Court to decide itself as to its jurisdiction, as provided for in article 17 of the draft Statute. That would put the Court on the same footing as the International Court of Justice, which had sometimes had to tackle difficult jurisdictional questions relating to Chapter VII of the Charter. He therefore favoured option 2 for article 10, paragraph 1, and option 3 for article 10, paragraph 2. That did not affect the Security Council's power to refer matters to the International Criminal Court, although he favoured the General Assembly having similar powers. He had no difficulty with referral by the Council under Chapter VII, but doubted the justification for bypassing the regime of State consent in article 7, paragraph 1, in respect of such referrals. That regime should apply regardless of whether referral was by a State, the Council or the Prosecutor.

17. On the question of complementarity, he would accept article 15, but noted with regret that, particularly when read in conjunction with article 16, it would weaken the Court, since it would make proof that domestic remedies had been exhausted a precondition.

18. **Mr. da Costa Lobo** (Portugal) supported the principle of automatic jurisdiction.

19. Concerning the Chairman's second question, he would have preferred a system under which no consent was necessary either from States parties or States not parties, but he could, as a compromise, accept option 1 for article 7, paragraph 1.

20. On the third question, he was in favour of the Prosecutor having powers to initiate proceedings *proprio motu*, subject to control by a pre-trial chamber.

21. On the fourth question, he agreed that a matter could be referred to the Court by the Security Council. He could accept option 1 for article 10, paragraph 2, with certain clarifications. The decision of the Council must be a formal resolution. He also supported the addition of a provision such as that proposed by Belgium concerning the preservation of evidence.

22. **Mr. Hafner** (Austria) considered that the Court must have automatic jurisdiction.

23. For article 7, paragraph 1, he was in favour of option 1. To cover States not parties, article 7 ter would be very useful.

24. On the Chairman's third question, the Prosecutor must have power to initiate proceedings *proprio motu*. He could accept option 1 for article 12, which took into account the concerns of States opposed to such powers. The acceptability of article 16 would depend not only on the final formulation but also on the outcome of the negotiations on other basic issues.

25. On the fourth question, he could accept option 1 for both paragraphs of article 10. He was, however, open to any drafting changes to paragraph 2 that would not further threaten the Court's independence. In that respect, he saw no need for the broad obligation proposed in article 11, paragraph 3.

26. On the question of complementarity, he hoped that no changes would be made to article 15, which was the fruit of long and hard labours.

27. **Mr. Ndir** (Senegal) said that the Court must have automatic jurisdiction for all the core crimes. With regard to States not parties, universal jurisdiction should be recognized in respect of genocide, crimes against humanity and war crimes. He could accept option 1 in article 7.

28. Concerning the role of the Prosecutor, he could accept option 1 for article 12 as a good basis for compromise. It was essential for the Prosecutor to be able to initiate proceedings *ex officio*, subject to control by the Pre-Trial Chamber.

29. On the Chairman's fourth question, the Security Council should be able to refer matters to the Court, but it would be preferable for it not to have the power to suspend proceedings. However, he would be prepared to accept option 2 for article 10, paragraph 2, if the period involved did not exceed three or perhaps six months and if the suspension was not renewable. Strong provisions should be included for the protection of witnesses and the preservation of evidence.

30. **Mr. Bello** (Nigeria) wished to see an independent, credible and universally accepted court. He therefore favoured option 2 in article 6 and option 3 in article 7, and supported articles 7 bis and 7 ter. For article 12, he was in favour of option 2. The checks in the proposed article 12 were not sufficient to guarantee the credibility of the Court.

31. In article 10, he was comfortable with option 1 for paragraph 1. For paragraph 2, he supported option 3; there should be no room for the Security Council to dictate to the Court. In article 11, he preferred option 2, in the interests of the Court's independence. He accepted articles 15, 16 and 17.

32. **Ms. Shahen** (Libyan Arab Jamahiriya) favoured express, opt-in acceptance of the jurisdiction of the Court and the preconditions proposed in option 1 for article 7, paragraph 1.

33. The role of the Prosecutor should not be inhibited, but there must be built-in checks to limit his or her powers. She was in favour of option 1 for article 12, but had reservations on

paragraph 1. She would have preferred the term "ex officio" rather than "*proprio motu*", and proposed the deletion of the last part of the paragraph, beginning with the words "organs of the United Nations".

34. She accepted the role of the Pre-Trial Chamber, and article 16.

35. She supported option 2 for article 11, paragraph 3, to ensure an independent and impartial court. The Security Council should not have powers over the Court or be able to suspend proceedings for 12 months. Both article 10 and article 6 (b) should be deleted.

36. **Mr. Bihamiriza** (Burundi) supported option 1 for article 6 (c). He would have liked the Statute to confirm the principle of universal jurisdiction for core crimes, but could accept the proposal providing for automatic jurisdiction for genocide, crimes against humanity and war crimes. He was against article 7 bis.

37. The Security Council could refer cases to the Court under Chapter VII of the Charter of the United Nations, but the independence of the Court must not be jeopardized, and he could not agree to option 1 for article 10, paragraph 2.

38. On article 12, he firmly supported option 1, without which the Court would not be independent or effective.

39. **Ms. Mokitimi** (Lesotho) said that, if an effective and independent court was to be established, there must be no requirement for State consent with regard to the core crimes, and the Court should have automatic jurisdiction. There should be no requirement that the custodial State, the territorial State or the State of nationality must accept the Court's jurisdiction.

40. She favoured option 1 for article 12. The Prosecutor should be able to initiate investigations *proprio motu* on the basis of information obtained from any source. Judicial review of the decision to commence an investigation would be the task of the Pre-Trial Chamber.

41. Regarding the Security Council, given its responsibilities under the Charter of the United Nations, it would have a crucial role to play in referring matters to the Court under Chapter VII of the Charter.

42. **Ms. Tomič** (Slovenia) said that the Court should have automatic jurisdiction in respect of the core crimes of genocide, war crimes and crimes against humanity upon ratification of the Statute by the State concerned. There should be no subsequent opt-in or State consent regime for any of the core crimes, and she was against article 7 bis. She welcomed the provision contained in article 7 ter concerning States not parties.

43. Secondly, regarding preconditions for the Court to exercise jurisdiction, she strongly supported option 1 in article 7. She proposed the addition at the end of paragraph 1 (b) of the words "or the State on the territory of which the accused is present". The term "State that has custody of the suspect" could be construed too narrowly.

44. Thirdly, she strongly supported the power of the Prosecutor to act *proprio motu*, including option 1 for article 12, which contained sufficient judicial safeguards. She also supported option 1 for article 6 (c).

45. Regarding article 10, she supported option 1 for both paragraph 1 and paragraph 2. In the latter, she would favour the inclusion of additional wording regarding measures for the preservation of evidence. Article 11, paragraph 3, should be deleted.

46. **Mr. Tomka** (Slovakia) said that Slovakia had supported automatic jurisdiction from the outset. However, a regime allowing a State to declare that it would not accept the Court's jurisdiction in respect of a particular crime was preferable to an opt-in regime.

47. Concerning preconditions to the exercise of jurisdiction, he fully supported option 1 in article 7. He could agree to giving the Prosecutor power to initiate investigations *proprio motu*, but did not think that that was a precondition for an effective court. Perhaps the issue could be left to be considered during a subsequent review of the Statute.

48. Finally, concerning the role of the Security Council on issues other than aggression, he supported the power of the Council referred to in article 6 (b) and also option 1 for article 10, paragraph 2, with the useful addition proposed by Belgium in document A/CONF.183/C.1/L.7.

49. **Mr. Manyang D'Awol** (Sudan) said that the inherent jurisdiction of the Court should cover genocide and certain other categories of crime. However, the idea of universal jurisdiction might give States that were not parties to the Statute an advantage over those that were, and lead States not to accede to the Statute. The States whose acceptance was needed as a precondition to the exercise of jurisdiction should be confined to the State on whose territory the act took place and the State which had custody of the person suspected of the crime.

50. The Security Council had a special role in matters relating to the question of aggression, but as far as other issues were concerned the General Assembly could perhaps be allowed to refer matters.

51. **Mr. Nguyen Ba Son** (Viet Nam) said that it was generally accepted that the Court's jurisdiction should be complementary to that of the States concerned. He could therefore accept article 7 bis. With regard to article 7, a combination of options 3 and 4 could provide a basis for consensus. The Court could then exercise its jurisdiction when the territorial State, the custodial State and the State of nationality of the accused were parties to the Statute.

52. To give the Prosecutor power to initiate proceedings *proprio motu* was unacceptable, for reasons already explained by his delegation. He therefore supported option 2 for article 6 (c) and option 2 for article 12.

53. His delegation strongly supported the inclusion of the crime of aggression among the core crimes under the jurisdiction of the Court and recognized the rights of the Security Council under Chapter VII of the Charter of the United Nations. He agreed that the General Assembly could also have a role.

54. **Ms. O'Donoghue** (Ireland) considered that, on becoming a party to the Statute, a State should accept automatic jurisdiction for all the core crimes.

55. As to the preconditions to the exercise of the Court's jurisdiction, she could accept option 1 for article 7, paragraph 1. She firmly supported the Prosecutor having the power to initiate proceedings *proprio motu*; that would be essential for the effectiveness of the Court. She could support option 1 for article 12, which contained adequate safeguards.

56. With regard to the role of the Security Council, the Council should have the power to refer situations to the Court. However, its power to defer or delay proceedings of the Court should be strictly limited to action under Chapter VII of the Charter of the United Nations, and should relate to a limited period of time. She could support a solution along the lines of option 1 for article 10, paragraph 2. She could also support the Belgian proposal for the preservation of evidence in the event of any such delay.

57. On the issue of complementarity, she supported the delicate balance struck in article 15.

58. **Mr. Krokmal** (Ukraine) supported automatic jurisdiction with respect to the most serious crimes, including the crime of aggression. The Court's jurisdiction must be effective for all crimes. There would naturally be a problem with automatic jurisdiction in respect of the so-called treaty crimes if they were included in the Statute, as he hoped they would be.

59. Secondly, on the question of which States would be required, as a precondition, to recognize the jurisdiction of the Court, there should be provision for acceptance by States not parties as under article 7 ter in the Bureau discussion paper (A/CONF.183/C.1/L.53). That paper did not take sufficiently into account the German proposal based on the concept of universal jurisdiction. However, option 1 in article 7 would not be a bad basis for an agreement.

60. He supported the proposed power of the Prosecutor to act *proprio motu*, and supported option 1 for article 12, which adequately provided both for the independent role of the Prosecutor and for control by the Pre-Trial Chamber.

61. He did not think that there would be any conflict between the Security Council, acting under Chapter VII of the Charter of the United Nations, and the Court. He certainly supported the role of the Council in encouraging action by the Court. He had no serious objections to the provision concerning deferral at the request of the Council, and supported what had been said by the representatives of Switzerland, the Netherlands and Belgium on that subject.

62. The principle of complementarity should be reflected in the Statute. However, discussion of the issue should be focused on the text proposed for article 16. There should be no unjustified barriers to the exercise by the Court of its jurisdiction.

63. **Mr. Koffi** (Côte d'Ivoire) said that, in ratifying the Statute, States should accept the jurisdiction of the Court in respect of the four categories of core crimes, including aggression. It was understood that the principles of complementarity and *ne bis in idem* applied. He therefore supported option 1 in article 6 and also articles 15 and 18. He did not support article 7 bis.

64. On the second question, concerning prior acceptance of jurisdiction, he agreed regarding acceptance of the jurisdiction of the Court by the State on whose territory the acts were committed and the custodial State. Without such acceptance, and without the cooperation of both those States, the Court's action might prove futile. He also supported article 7 ter on express acceptance by States not parties.

65. On the third question, he was in favour of the power of the Prosecutor to act *proprio motu* on the basis of information obtained from States, international organizations, non-governmental organizations or victims, or indeed from the Security Council. He therefore agreed with option 1 for article 12; the Pre-Trial Chamber would serve as an important control.

66. Concerning the role of the Security Council, he was in favour of option 1 for paragraph 1. He favoured option 1 for paragraph 2, although the wording could be improved to ensure transparency and impartiality.

67. **Ms. Daskalopoulou-Livada** (Greece) said that the jurisdiction of the Court should be automatic with respect to the crimes covered in the Statute, apart from the treaty crimes if they were included. In article 7, she supported option 1.

68. Regarding the role of the Prosecutor, she strongly favoured option 1 for article 12, which would give the Prosecutor the power to initiate proceedings *proprio motu*. The Pre-Trial Chamber would provide the necessary safeguard. She also supported article 6 (c).

69. On deferral at the request of the Security Council, she could accept option 1 for article 10, paragraph 2.

70. Article 15 represented a delicate compromise and should remain as it stood. The inclusion of article 16 would not be useful.

71. **Mr. Deguénou** (Benin) said that his delegation was in favour of the establishment of an independent, effective court, and therefore supported the idea that the Court should have automatic jurisdiction for States parties over all crimes covered in article 5 of the Statute. He was not in favour of article 7 bis, but accepted article 7 ter with regard to States not parties.

72. He supported the provisions in article 12 allowing the Prosecutor to act *proprio motu* and he firmly supported option 1 for article 6 (c).

73. Regarding the Security Council, he was in favour of option 1 for article 10, paragraph 1, but thought that the reference in the first sentence should be to the "State of which the accused is a national". For paragraph 2, he was in favour of option 2; the revised version of the provision should reduce the period of deferral and allow renewal once only. Appropriate measures should be taken to preserve evidence and to protect witnesses. The General Assembly should also be able to refer cases to the Court.

74. **Mr. Kirsch** (Canada) took the Chair.

75. **Mr. Kerma** (Algeria) was not in favour of automatic jurisdiction of the Court over all the crimes covered by the Statute. When ratifying the Statute, States should indicate the crimes for which they accepted the Court's jurisdiction. For the exercise of jurisdiction, the consent of the following States would be necessary: the State of which the victim was a national, the State where the act had been committed and the State of which the accused was a national. With regard to States not parties, he supported article 7 ter.

76. He did not support the power of the Prosecutor to initiate investigations *proprio motu*. Such powers might expose him or her to all sorts of pressures and prevent him or her from carrying out his or her work impartially and independently.

77. While he recognized the importance of the Security Council in maintaining international peace and security under the Charter of the United Nations, its intervention should be confined to referral of cases to the Court. Parallel to that, the General Assembly should also have the right to refer cases to the Court.

78. **Mr. Effendi** (Indonesia) said that he favoured option 2 for article 6 (c) and option 2 for article 12. He supported articles 7 bis and 7 ter, as well as option 4 in article 7, modified to take account of the deletion of article 6 (c). The Security Council should have a role in relation to the issue of aggression. He favoured the inclusion of articles 15 and 16, which might even be strengthened.

79. **Mr. Azoh-Mbi** (Cameroon) said that he would have much preferred universal jurisdiction with respect to all the core crimes, but would settle for automatic jurisdiction. The opt-in regime would run counter to the fundamental concept of the Statute. With respect to the preconditions to the exercise of jurisdiction in article 7, he preferred option 1.

80. An efficient and impartial court required a strong Prosecutor, and option 1 for article 12 was satisfactory in that respect, since it contained adequate safeguards. He also favoured option 1 for article 6 (c). On admissibility, he favoured option 1 for article 16.

81. Finally, the relationship between the Security Council and the Court should be a matter of cooperation and complementarity. The Council needed the Court to help maintain global peace and the Court needed the Council, in particular, to help enforce its decisions. He therefore favoured option 1 for article 10, paragraph 1.

82. **Mr. Al-Shaibani** (Yemen) did not support the automatic jurisdiction of the Court. Neither could he support the power of the Prosecutor to initiate investigations *proprio motu*. He strongly supported the inclusion of the crime of aggression as one of the core crimes within the jurisdiction of the Court. The role of the Security Council, under Chapter VII of the Charter of the United Nations, was a complementary one in that respect. The Council should assist the Court by referring matters, but should not interfere in its work. He supported a similar role for the General Assembly.

83. **Mr. Vergne Saboia** (Brazil) accepted automatic jurisdiction in respect of the crime of genocide. With regard to the other categories of core crimes, there might be a case for some kind of opt-in regime, in the form of a declaration by a State, subsequent to its ratification of the Statute, that it would also accept automatic jurisdiction with respect to one or both of the other categories of core crimes. Brazil would be flexible with regard to automatic jurisdiction over the other core crimes if the provisions on complementarity provided adequate safeguards.

84. In article 7, he preferred option 1. However, to require the consent of the State of nationality of the accused might excessively restrict the jurisdiction of the Court.

85. He strongly supported the power of the Prosecutor to initiate proceedings *proprio motu*, subject to appropriate safeguards. He therefore supported the current draft of article 12. Such a power would fill a potential void if, because of political or strategic considerations, both the Security Council and States parties felt unable to refer a situation involving the crimes covered by the Statute.

86. He favoured option 1 for article 10, paragraph 1, for article 10, paragraph 2, and for article 6 (c).

87. **Ms. Mekhemar** (Egypt) supported automatic jurisdiction over the core crimes, which should include aggression. States not parties to the Statute should not be subject to the Court by virtue of universal jurisdiction, because that would run counter to international law. She supported the idea behind article 7 bis, but core crimes and treaty crimes should be dealt with differently. She supported article 7 ter and article 8.

88. The Security Council should have the right to refer cases to the Court, but she had strong reservations about any further involvement. Any power to request deferral, if accorded, should be limited to a maximum of 12 months, and requests should not be renewable.

89. With regard to the Prosecutor, article 12 was generally acceptable but should be amended to limit sources of information to official sources.

90. She still had reservations concerning article 15. The Court should not be judge in its own cause. She supported article 16 in principle.

91. **Mr. Nyasulu** (Malawi) appealed to delegations to make an effort to achieve compromises. It was unhelpful for powerful countries to attempt to force their point of view on the rest by threatening not to sign the Statute.

92. **Mr. Nathan** (Israel) said that, as it was not yet clear which crimes were going to be included in the Statute, and some had not so far been adequately defined, he would at that stage opt for the solution proposed in article 7 bis. On the second question, the Court should not have universal jurisdiction. The universal nature of a crime did not give a particular body universal jurisdiction. The Statute would confer jurisdiction on the Court by the sovereign consent of States parties. A precondition to the exercise of the Court's jurisdiction should be the adherence to the Statute of specific categories of States. Those States should be the territorial State, the custodial State and the State of nationality of the accused.

93. The Prosecutor should not have the power to initiate investigations *proprio motu*, since that might weaken rather than reinforce his or her independence by exposing him or her to political pressure and manipulation.

94. Regarding the Security Council, it was essential to include the crime of aggression within the Court's jurisdiction, and he supported option 1 for article 10, paragraph 1. He favoured option 1 for paragraph 2, which would strike a balance between the proper exercise of the Council's functions under the Charter of the United Nations and the functions of the Court. He had no difficulty with the Council referring situations to the Court.

95. **Ms. Lehto** (Finland) considered that the Court should have automatic jurisdiction over all the core crimes. She therefore favoured article 7, paragraph 2, and the deletion of article 7 bis.

96. Concerning the second question, an elaborate regime of complementarity had been evolved in articles 15 and 17, to which article 16 might be added. That had considerably raised the threshold for the exercise of the Court's jurisdiction, with the explicit purpose and effect of highlighting the primacy of national jurisdictions. Conversely, there was a trend towards less onerous and more automatic procedures as far as acceptance and exercise of jurisdiction were concerned. She would caution against trying to reverse that second trend, as that might prevent the Court from effectively carrying out its tasks. Although none of the options for article 7, paragraph 1, were without danger in that respect, option 1 seemed to enjoy wide support as a basis for compromise.

97. The Prosecutor should be able to initiate investigations *proprio motu*, subject to appropriate safeguards in the form of judicial control. Article 12 met that need quite adequately.

98. Concerning the Security Council, she would have preferred the "zero option" for article 10, paragraph 2, but in a spirit of compromise she was prepared to work on the basis of option 1. However, the form of the Council decision was important, and the question of preservation of evidence would have to be addressed, along the lines proposed by Belgium.

99. **Mr. Güney** (Turkey) said that the Court should only have jurisdiction where there had been express acceptance and consent through a declaration or through the so-called opt-in/opt-out mechanism. With regard to inherent and automatic jurisdiction, such an approach was unrealistic because it did not reflect current realities. For that reason, article 7 bis could be a good basis for compromise. Article 7 ter should also be retained.

100. The Court's effectiveness depended on the cooperation of States. The State on whose territory the act or omission had taken place, the State with custody of the person who had committed the crime and the State of which the accused was a national must be parties to the Statute or accept the jurisdiction of the Court for the crime in question.

101. To grant the Prosecutor powers to investigate *ex officio* would be damaging to the principle of complementarity, and he or she would be overwhelmed with complaints of a political nature. He therefore favoured option 2 for article 6 (b) and for article 12.

102. Commenting on article 8, he said that the wording in document A/CONF.183/C.1/L.53 needed some amendment. The agreement to combine articles 8 and 22 in the original draft (A/CONF.183/2/Add.1 and Corr.1) had been based on the assumption that the first sentence of the original article 8 ("The Court has jurisdiction only in respect of crimes committed after the date of entry into force of this Statute") would be included.

103. The Security Council had a role under Chapter VII of the Charter of the United Nations, and he was in favour of option 1 for article 10, paragraph 1. He could accept option 1 for paragraph 2 as a compromise.

104. He fully supported article 16 in its current wording.

105. **Mr. Tálice** (Uruguay) said that the exercise of jurisdiction should be within the exclusive domain of the States parties and the Security Council acting under Chapter VII of the Charter of the United Nations. He therefore did not agree with *ex officio* powers for the Prosecutor under articles 6 and 12. That did not affect the independence of the Prosecutor, but a complaint by a State or the Council would give the Prosecutor the legitimacy that he or she would need to act effectively. His delegation's proposal for article 13 in document A/CONF.183/C.1/L.51, under which States would be given the right to be heard prior to a decision by the Pre-Trial Chamber, offered a possible compromise.

106. Jurisdiction should be based on complementarity and cooperation. How, he wondered, could the Court exercise jurisdiction if the State on whose territory the act had been committed as well as the State of nationality of the accused were not parties to the Statute? He therefore preferred options 2 and 4 in article 7.

107. On acceptance of jurisdiction, the most realistic solution would be to combine the options in articles 7 and 7 bis, with automatic jurisdiction for genocide and an opt-in regime for other crimes within the competence of the Court. He agreed with article 7 ter. He also fully agreed with the principle of non-retroactivity of the Court's jurisdiction under article 8.

108. The Security Council acted under specific provisions of the Charter to maintain international peace and security. The idea in article 10, paragraph 2, was that the Council, on the basis of Chapter VII of the Charter, could request the suspension of the proceedings of the Court where it believed that such proceedings might affect its own task of maintaining peace in the world. Such a request would require consensus among the five permanent members, so that no single member could use its veto to block the functioning of the Court. He therefore preferred option 1 for article 10, paragraph 2.

109. He had difficulties with regard to article 15. A harmonious relationship between national systems and the Court would presuppose the existence of clearly established boundaries. He suggested the addition of a new subparagraph in paragraph 1 of article 15 making a case inadmissible if the act in question was based on a decision by a lawfully constituted legislative body under a democratic system. It would of course be up to the Court, not the State concerned, to determine whether it had jurisdiction.

110. **Mr. Hersi** (Djibouti) was in favour of automatic jurisdiction for all crimes under article 5 of the draft Statute, without distinction. Secondly, although he would have preferred the German concept of universal jurisdiction, he would accept option 1 in article 7, for the reasons put forward by many delegations.

111. He was in favour of an independent Prosecutor able to act on his or her own initiative, under the judicial control of the Pre-Trial Chamber.

112. He agreed that the Security Council should play a role in accordance with the provisions of the Charter of the United Nations in referring situations to the Court.

113. **Mr. Yáñez-Barnuevo** (Spain) said that it was absolutely essential that ratification of the Statute should mean the acceptance of the Court's automatic jurisdiction. Article 7 bis, providing for an opt-in regime, was not acceptable. On the other hand, article 7 was useful, as it allowed for acceptance of the jurisdiction of the Court by States not parties for given cases. Careful drafting was needed, however, to exclude possible abuse by non-parties. It should also be made clear that such acceptance bound the State to cooperate fully with the Court.

114. In response to the second question, the only proposal he could accept for article 7, paragraph 1, was option 1, based originally on a proposal by the Republic of Korea. The others would curtail the practical scope of the Court's jurisdiction.

115. On the powers of the Prosecutor, he supported option 1 for article 12, which provided the necessary guarantees. To meet the concerns of other delegations, article 6 might perhaps be widened to allow the General Assembly, for example, to refer situations to the Court, but the Prosecutor must be able to act independently in conducting investigations in situations so referred.

116. It was very important to ensure a proper balance in the relationship between the Court and the Security Council, so that the independence of the Court was not impaired while at the same time it could obtain the necessary backing from the Council. With regard to article 10, if the crime of aggression was included in the list of crimes, the provision in paragraph 1 must be included.

117. Deferral was a separate matter and should be dealt with in a separate article. His delegation had submitted a proposal on that point in document A/CONF.183/C.1/L.20. Of the options in the Bureau discussion paper for article 10, paragraph 2, he preferred option 2. The main point was that the Security Council should interfere as little as possible with the work of the Court.

118. In article 11, paragraph 3 was unnecessary. He accepted the proposed article 15 as a working basis, but it needed certain improvements. He still had reservations about article 16.

119. **Mr. Politi** (Italy) reiterated his support for the automatic jurisdiction of the Court over the core crimes, based on the ratification of the Statute by the States concerned. Article 7, paragraph 2, should be retained and article 7 bis deleted.

120. Secondly, on acceptance of the jurisdiction of the Court, he favoured option 1 for article 7, paragraph 1, with its four alternative jurisdictional links. He also supported article 7 ter.

121. Thirdly, the Prosecutor should have the power to initiate investigations *ex officio* on the basis of information obtained from any source. That was essential if the Court was to operate effectively in the interests of the entire international community. He was therefore in favour of option 1 for article 12, which also provided adequate judicial safeguards against any improper use of that power, and option 1 for article 6 (c).

122. Fourthly, his delegation's position was that, on issues other than aggression, the Security Council should not have the power to block the judicial activity of the Court. Option 1 for article 10, paragraph 2, offered a possible compromise to which he could agree in substance, but the request to defer should be made by formal resolution of the Council, its effects should be limited in time, and the Prosecutor must retain the right to take the necessary measures to preserve evidence during the period of suspension.

123. On admissibility, article 15 represented a delicate balance achieved as the result of some very intensive negotiations, and should be retained as it stood. He still had doubts about the need for article 16, but was ready to work on the text to reach a possible compromise.

124. **Ms. Pibalehon** (Thailand) supported the notion that the Court should have automatic jurisdiction over all core crimes once a State became a party to the Statute, without any need for further declaration. She supported article 7, paragraph 2, for all the core crimes, article 7 bis with respect to treaty-based crimes and article 7 ter.

125. On the Chairman's second question, option 1 for article 7, paragraph 1, would give the Court more opportunity to prosecute the accused than other options. If that option did not secure general agreement, she could agree that the precondition should be acceptance by the territorial State or the custodial State.

126. The role of the Security Council should be recognized in the Statute with regard to the crime of aggression, if it was eventually included. Pending a decision on that issue, she preferred option 1 for both paragraph 1 and paragraph 2 of article 10, with the proviso that the decision to request deferral must take the form of a resolution of the Council. Under article 6 (b), the Council, acting under Chapter VII of the Charter of the United Nations, should refer only situations where a crime of aggression had been committed.

127. Lastly, for article 11, paragraph 3, she supported option 1, to avoid any overlap between the work of the Court and that of the Security Council.

128. **Mr. Sayyid Said Hilal Al-Busaidy** (Oman) preferred opting in by means of a declaration to automatic jurisdiction. In article 7, he preferred option 1, and he supported the inclusion of articles 7 bis and 7 ter. Concerning the role of the Security Council, his delegation had already indicated support, with certain provisos, for the inclusion of the crime of aggression in the list of crimes under the jurisdiction of the Court. However, any interference by the Council, a political body, in the administration of justice by the Court should be precluded. A request by the Council to the Court to suspend its proceedings should be subject to a non-renewable time limit.

129. The Prosecutor should not have the right to initiate investigations *proprio motu*, because he or she might be swamped by requests and exposed to political pressures which would jeopardize his or her impartiality. The Prosecutor might be given some degree of latitude in the case of a complaint by a State, subject to a decision of the Pre-Trial Chamber on the basis of evidence presented to it.

130. **Mr. Fife** (Norway) said that the Court's effectiveness and credibility, in his delegation's view, required it to have automatic jurisdiction over the core crimes: genocide, crimes against humanity and serious war crimes. As a compromise, his delegation was willing to consider option 1 in article 7. He did not find article 7 bis useful, but fully supported article 7 ter.



131. On the power of the Prosecutor to initiate proceedings *proprio motu*, a number of provisions in the draft Statute offered protection against prosecutorial bias, including provision for control by a pre-trial chamber over investigations. He therefore favoured option 1 for article 12.

132. With regard to the role of the Security Council, he favoured option 1 for article 10, paragraph 2. It struck a fine

balance between the independence of the Court and the role of the Council under Chapter VII of the Charter of the United Nations. The Belgian proposal on preservation of evidence (A/CONF.183/C.1/L.7) was very useful.

133. The current draft of article 15 represented an important compromise and should be retained.

*The meeting rose at 6 p.m.*

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### 31st meeting

Thursday, 9 July 1998, at 6 p.m.

Chairman: Mr. Ivan (Romania) (Vice-Chairman)

A/CONF.183/C.1/SR.31

#### Agenda item 11 (*continued*)

**Consideration of the question concerning the finalization and adoption of a convention on the establishment of an international criminal court in accordance with General Assembly resolutions 51/207 of 17 December 1996 and 52/160 of 15 December 1997 (A/CONF.183/2/Add.1 and Corr.1 and A/CONF.183/C.1/L.53)**

#### DRAFT STATUTE

PART 2. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW (*continued*)

*Discussion paper prepared by the Bureau (concluded)*  
(A/CONF.183/C.1/L.53)

Article 6. Exercise of jurisdiction (*continued*)

Article 7. Acceptance of jurisdiction (*continued*)

Article 7 bis. Opt-in for treaty crimes and possibly for one or more core crimes (*continued*)

Article 7 ter. Acceptance by non-States Parties (*continued*)

Article 8. Temporal jurisdiction and non-retroactivity (*continued*)

Article 10. Role of the Security Council (*continued*)

Article 11. Referral of a situation by a State (*continued*)

Article 12. Prosecutor (*continued*)

Article 15. Issues of admissibility (*continued*)

Article 16. Preliminary rulings regarding admissibility (*continued*)

Article 18. *Ne bis in idem* (*continued*)

1. **Mr. Kam** (Burkina Faso) said that his delegation wished to see an independent and effective court, strong enough to prosecute all crimes within its jurisdiction. With respect to

the jurisdiction of the International Criminal Court, therefore, it was in favour of option 2 in article 7, conferring automatic jurisdiction over the core crimes enumerated in article 5 under subparagraphs (a), (b), (c) and (d). It also supported article 7 ter on acceptance by non-States parties. Article 7 bis should be deleted.

2. The Prosecutor must have the independence enabling him or her to initiate procedures which might be blocked by a State or the Security Council. His or her powers should, however, be subject to control by the Pre-Trial Chamber. Burkina Faso therefore favoured option 1 for article 12. The Council should have the power to refer situations other than those involving the crime of aggression to the Court. However, it should not be able to act as a censor of the Court. Any deferral should be for the shortest feasible period of time and should not be renewable.

3. **Mr. Tafa** (Botswana) endorsed the statements made by South Africa on behalf of the member States of the Southern African Development Community and by Malawi. He rejected the opt-in/opt-out approach: in his delegation's view, States ratifying the Statute must accept the Court's automatic jurisdiction in respect of all the core crimes. That did not mean he did not want to see a universally accepted court. However, the ideal of universality should not be achieved at the expense of effectiveness.

4. On the second issue, Botswana preferred option 1 in article 7. It also favoured an independent Prosecutor able to initiate investigations *proprio motu*, subject to control by the Pre-Trial Chamber. Nor was it opposed to the Security Council having the right to refer to the Prosecutor situations in which crimes other than aggression appeared to have been committed.

5. **Mr. Agbetomey** (Togo) said that the Court should be able to exercise its jurisdiction over all core crimes in accordance with article 6 (a), (b) and (c). Consequently, his delegation also supported option 1 for article 12, as it was convinced that the Prosecutor needed ex officio powers. It preferred option 1 in article 7 on acceptance of jurisdiction, and supported article 7 ter.

Article 7 bis should be deleted. On the role of the Security Council, option 1 for article 10, paragraph 1, would be very important if the crime of aggression were included in the list of crimes, as would option 1 for paragraph 2.

6. **Mr. Doudech** (Tunisia) said that his delegation felt that option 2 on the exercise of jurisdiction was the one most likely to ensure the effectiveness of the Court. As for acceptance of jurisdiction, Tunisia favoured a combination of automatic jurisdiction for certain crimes and explicit acceptance for others. Discussions should continue with a view to reaching a consensus on the role of the Prosecutor. The Court should not be prevented by the Security Council from exercising jurisdiction over situations involving the crime of aggression. Nevertheless, due weight must be accorded to the Council's role in the maintenance of international peace and security.

7. **Mr. Mikulka** (Czech Republic) said that, as the trend of the debate had been to limit the number of crimes within the jurisdiction of the Court, that jurisdiction should be automatic. His delegation saw no justification for an opt-in regime, and thus supported article 7, paragraph 2. It was opposed to article 7 bis. An opt-in declaration should be open only to States not parties to the Statute, as envisaged in article 7 ter.

8. On the question of preconditions to the exercise of jurisdiction, it would be sufficient if a single State among those listed in option 1 for article 7, paragraph 1, accepted the jurisdiction of the Court. The Czech delegation was firmly opposed to the idea that the consent of the State of nationality of the accused should be a *sine qua non* for the exercise of jurisdiction. It was flexible on the role of the Prosecutor. Finally, the Statute must absolutely respect the functions of the Security Council, and his delegation thus supported article 6 (b) and option 1 for paragraphs 1 and 2 of article 10. However, it saw no justification for article 11, paragraph 3, which should be deleted.

9. **Mr. Morshed** (Bangladesh) said that his delegation was in favour of automatic jurisdiction in respect of the core crimes, but that, as a compromise, it could consider a combination of automatic jurisdiction and an opt-out regime in respect of particular crimes. On preconditions to the exercise of jurisdiction, he strongly supported the compromise proposed by the Republic of Korea. Acceptance of jurisdiction by the territorial State was indispensable. To endow the Prosecutor with the power to initiate proceedings *proprio motu* would be to invest a single individual with some of the attributes of a State. The checks and balances in the proposal by Germany and Argentina would have to be significantly expanded to obviate the pressures to which a Prosecutor endowed with such powers would be exposed. The regime established under Chapter VII of the Charter of the United Nations must be preserved at all costs, but the language of option 1 for article 10, paragraph 1, was perhaps unduly wide-ranging. The Security Council must also have the power to refer situations to the Court. On deferral, Bangladesh supported the carefully constructed compromise

proposed by Singapore together with the Belgian proposal concerning the preservation and protection of evidence.

10. **Mr. de Saram** (Sri Lanka) said that, given the clarity of general international treaty law and customary law with respect to the crime of genocide, it was reasonable to expect that a State becoming a party to the Statute should thereby accept the Court's jurisdiction with respect to that crime. The same clarity did not obtain with respect to war crimes and crimes against humanity. He therefore agreed with the proposal by the International Law Commission that acceptance of jurisdiction over those crimes should be in accordance with the so-called opt-in procedure.

11. On acceptance of jurisdiction, Sri Lanka supported option 4 in article 7, although it also favoured the additional requirement of the consent of the State in which the suspect was present. As to article 10, once a matter was before the Court, the international criminal law process must be allowed to proceed without interference from extraneous entities. Sri Lanka therefore strongly favoured option 3 for article 10, paragraph 2. It could not agree to the power of the Prosecutor to act *proprio motu*, in article 12, since the position of a prosecutor in international jurisdictions differed from his or her position in national jurisdictions. It fully supported articles 15 and 16. Once the crimes to come before the Court had been determined, the question of complementarity was a necessary but not an essential component.

12. **Ms. Wyrozumska** (Poland), speaking also on behalf of Lithuania, said that her delegation believed strongly that the Court should have automatic jurisdiction over core crimes as an essential precaution to ensure its effectiveness and credibility. On the exercise of jurisdiction, given the nature of the crimes concerned, option 1 for article 7, paragraph 1, offered an acceptable solution. The Prosecutor must have the power to initiate proceedings *proprio motu*, subject to suitable safeguards. Option 1 for article 12 was therefore preferable, and the Polish and Lithuanian delegations consequently also supported the inclusion of article 6 (c). While the Security Council should have some role, there should be a proper balance between the competence of the Council and the independence of the Court. That balance was reflected in option 1 for article 10, paragraph 1.

13. **Ms. Peralba García** (Andorra) said that her delegation was in favour of automatic jurisdiction of the Court over the core crimes. The Prosecutor should be able to initiate an investigation *proprio motu*; Andorra therefore favoured the retention of article 6 (c) and of article 12. A balance between the Security Council's powers and those of the Court was essential. Her delegation thus supported article 6 (b) and the retention of article 10, paragraph 1.

14. **Mr. Larrea Dávila** (Ecuador) said that his delegation favoured the inclusion of article 6 (c), which gave the Prosecutor the power to initiate the investigation of a crime under the jurisdiction of the Court in accordance with article 12. On

article 7, Ecuador was still of the view that the Court should have universal jurisdiction over the crimes included in the Statute. It could, however, support option 1 as a basis for compromise. In article 11, it supported option 2 on the understanding that the Court would be an independent organ created through an international treaty. As to article 12, his delegation believed that the Prosecutor must be strong and independent and have the power to initiate investigations *proprio motu*. It could, however, support the compromise solution in option 1 for the sake of consensus. Article 15 on admissibility was fundamental and should be retained in its current wording so as to safeguard the principle of complementarity.

15. **Mr. Al-Sa'aidi** (Kuwait) said that his delegation preferred option 1 for article 7, paragraph 1. It favoured automatic jurisdiction for the most serious crimes and a consent regime for the others. With respect to article 10, he affirmed the need to guarantee the independence of the Court. Nevertheless, the role of the Security Council with respect to the crime of aggression under Chapter VII of the Charter of the United Nations needed to be clearly spelled out. On article 12, the Prosecutor should be able to exercise his or her powers *ex officio*, subject to appropriate control by the Pre-Trial Chamber. In article 20, paragraph 1 (b), the term "general international law" should be amended to read "public international law".

16. **Mr. Ngatse** (Congo) said that the Statute should provide for automatic jurisdiction of the Court over genocide, war crimes, crimes against humanity and the crime of aggression. His delegation was in favour of universal jurisdiction, and thus regretted the omission of the proposal by Germany from the discussion paper. It would reluctantly accept option 1 for article 7, paragraph 1, as a compromise. However, it was opposed to the jurisdiction of the Court being subjected to a regime of acceptance by States, which should not be allowed the possibility of protecting those responsible for the most odious crimes. Article 7 should be deleted, as it proposed a regime that could considerably weaken the powers of the Court.

17. The Prosecutor should have *ex officio* powers to initiate proceedings and should not be subject to controls by the Pre-Trial Chamber, which should only intervene once proceedings had commenced, to check abuses. The prerogatives of the Security Council with regard to acts of aggression must be respected, provided that they did not encroach on the jurisdiction of the Court. The Council should have the power to refer matters other than aggression to the Court. Although the Congo was opposed to conferring on the Council powers to suspend the Court's proceedings, it could, as a compromise, agree to a suspension for a maximum, non-renewable period of six months. Provision should be made to protect evidence and testimony. Article 10 was acceptable on that condition. The Congo was also in favour of option 2 for article 11, paragraph 3. It endorsed the wording of article 15 and was in favour of the deletion of article 16.

18. **Mr. Mahmood** (Pakistan) said that his delegation could accept option 3 in article 7 with the exclusion of any role for the Prosecutor. It also favoured article 7 bis on opt-in, and article 7 ter. On article 6, only States parties should be able to refer situations to the Prosecutor. Subparagraph (c), and also subparagraph (b), should therefore be deleted. Concerning article 10, the Security Council should not have a role, for the reasons given by India. The Prosecutor should not have the power to initiate proceedings *proprio motu*, so article 12 should be deleted. Article 15 was essential to the Statute, but needed to be strengthened.

19. Article 16, paragraph 1, was acceptable. However, paragraphs 2 and 3 posed some problems, as Pakistan was not in favour of the Prosecutor determining that a State was unwilling or unable genuinely to carry out investigations. However, the Prosecutor should be able to undertake investigations after a State party had referred a matter to him or her and if there had been a fundamental change in the circumstances, resulting in a total breakdown of State authority.

20. **Mr. Ahmed** (Iraq) said that only States parties should be able to trigger investigations and that subparagraphs (b) and (c) of article 6 must therefore be deleted. Conferral of automatic jurisdiction with respect to the crimes included in the Statute could run counter to the principle of complementarity. Iraq therefore preferred an opt-in regime under article 7.

21. With respect to article 10, on the role of the Security Council, in the light of the overriding need to ensure the independence of the Court, Iraq could not support any of the options. Referral of a situation by the Council under the procedure set out in Chapter VII of the Charter of the United Nations would inevitably have an impact on the decision of the Court. Article 11, paragraph 3, should also be deleted, and the title of that article amended to read: "Referral of a situation by a State Party".

22. On article 12, Iraq was opposed to the initiation of an investigation by the Prosecutor *proprio motu*. Article 15 on admissibility should be drafted in such a way as to ensure complementarity between the jurisdiction of the Court and national jurisdictions. Article 16 was acceptable, subject to his comments on article 6. In article 18, on the principle of *ne bis in idem*, Iraq supported paragraphs 1 and 2, but paragraph 3, which contravened the principle of complementarity, should be deleted.

23. **Ms. Simone** (Armenia) said that her delegation supported automatic jurisdiction over genocide and State consent for jurisdiction over crimes against humanity and war crimes. However, it would not stand in the way of consensus on that issue. Regarding which States should be parties to the Statute before the Court exercised jurisdiction, it supported option 1 in article 7. Armenia strongly supported the power of the Prosecutor to act *proprio motu*, and believed that option 1 for article 12 contained sufficient safeguards, with the procedure for

screening of requests by the Pre-Trial Chamber. It also supported the inclusion of article 6 (c) in the Statute.

24. Concerning the role of the Security Council, Armenia supported option 3 for article 10, paragraph 2. However, it might be able to accept a revised option 1 with tighter time limits and the addition of a provision to ensure preservation of evidence and protection of witnesses. Armenia also supported the proposal by the Netherlands and New Zealand that any request for deferral pursuant to Chapter VII of the Charter of the United Nations should take the form of a resolution so as to ensure transparency.

25. **Ms. La Hye** (Bosnia and Herzegovina) said that her delegation would have preferred the Court to have universal jurisdiction. However, for the sake of compromise, it could reluctantly accept option 1 for article 7, paragraph 1, with automatic jurisdiction over all core crimes. Options 3 and 4 in article 7 were unacceptable. She noted with concern that the discussion paper did not reflect the original option of an independent ex officio Prosecutor; however, her delegation could accept option 1 for article 12 as a compromise solution. Article 16 was not acceptable in its current form.

26. Triggering of the Court's jurisdiction must not relieve the Security Council of its primary role in the maintenance of peace. The Council should have the power to trigger the jurisdiction of the Court with respect to situations in which one or more of the core crimes had been committed. Concerning its powers to suspend the Court's proceedings, her delegation could, as a compromise, accept option 1 for article 10, paragraph 2, with a provision to ensure protection of witnesses and preservation of evidence. A request to suspend an investigation should take the form of a resolution adopted by the Council under Chapter VII of the Charter of the United Nations.

27. **Mr. Bazel** (Afghanistan) said that his delegation favoured the deletion of article 6 (c) and of article 12. Concerning article 7, it supported option 3. It was in favour of inherent jurisdiction for the crimes of genocide and aggression. It favoured article 7 bis, subject to the reservation it had expressed on treaty crimes. It supported paragraph 1 bis in article 8. It favoured option 1 for article 10, paragraph 1,, limiting the role of the Security Council to that provided for under Chapter VII of the Charter of the United Nations. It had no problem with option 1 for paragraph 2, but favoured a period of 6 rather than 12 months, with only one renewal to be permissible. His delegation also supported the Belgian proposal concerning preservation of evidence. With regard to article 11, it favoured option 2.

28. **Mr. Nega** (Ethiopia) said that his delegation supported option 2 in article 6 and consequently, regarding the *proprio motu* power of the Prosecutor, option 2 for article 12. On acceptance of the jurisdiction of the Court, it supported an opt-in approach. On the preconditions required for the exercise of jurisdiction by the Court, subject to its position on article 6 (c), it supported option 1 in article 7.

29. Ethiopia supported option 1 for article 10, paragraph 1, which it took to mean that the Court would have jurisdiction over the crime of aggression once the Security Council had determined the existence of an act of aggression. In that connection, he reiterated Ethiopia's view that the crime of aggression should be included in the Statute. The General Assembly should also have the power to refer cases to the Court. Any power of deferral conferred on the Council should not lead to undue delay in the Court's proceedings or compromise its independent and effective functioning. Ethiopia therefore favoured option 2 for article 10, paragraph 2, with a shorter period not exceeding six months, renewable for no more than six months, to be decided by formal resolution of the Council. Finally, he again emphasized the importance of the principle of complementarity in articles 15 and 16 as currently formulated.

30. **Mr. Hadi** (United Arab Emirates) said that his delegation found it difficult to accept automatic jurisdiction. It therefore supported article 7 bis on the need for express acceptance by States of the jurisdiction of the Court over the three core crimes. It also supported the role of the Security Council under the Charter of the United Nations in respect of the crime of aggression but did not believe that the Council should be able to interfere with the Court's jurisdiction. The General Assembly should have the same power as the Council to refer situations to the Prosecutor. The Prosecutor should not have the power to initiate investigations *proprio motu*, and article 12 should thus be deleted. As for admissibility, an alternative formulation of article 15 consistent with the principle of complementarity was needed. Article 16 was acceptable in principle.

31. **Mr. Al-Amery** (Qatar) said that his delegation was in favour of option 1 in article 7 as a satisfactory compromise on acceptance of jurisdiction. Concerning the Prosecutor, it supported option 1 for article 12, with the term "*proprio motu*" replaced with the term "ex officio". The Court must be protected from any pressures that would undermine its independence and impartiality. In option 1 in article 10, the Security Council's role should thus be limited to initiating the proceedings under Chapter VII of the Charter of the United Nations.

32. **Ms. Reffi** (San Marino) said that her delegation strongly supported automatic jurisdiction as being essential to a really effective court. With regard to preconditions to the exercise of jurisdiction, it favoured option 1 in article 7. The Prosecutor should be empowered to act *proprio motu*. San Marino thus favoured the inclusion of article 12, which also provided sufficient safeguards, notably in the form of the Pre-Trial Chamber. Regarding the role of the Security Council in relation to crimes other than aggression, the best solution would be to avoid any interference by the Council in the functions of the Court. It might, however, be possible to compromise on a solution which provided a proper balance between the two bodies.

33. **Mr. Mwangi** (Kenya) said that his delegation was prepared to support automatic acceptance by States of jurisdiction over the core crimes upon ratification. On preconditions to the exercise of jurisdiction, it preferred option 1 for article 7, paragraph 1. Article 7 ter on acceptance by non-States parties was also necessary. Kenya continued to doubt the desirability of conferring *proprio motu* powers on the Prosecutor, particularly because of the danger that pressure might be exerted on him or her to act or not to act, to the detriment of his or her independence. However, it would not stand in the way of consensus on that issue.

34. Option 1 for article 10, paragraph 2, on deferral, represented a necessary balance that recognized the current state of international law with regard to the primary responsibility of the Security Council regarding international peace and security. However, the period of 12 months should be reduced to 6, with the possibility for one 6-month extension. On the Council's role with regard to the crime of aggression, Kenya preferred option 1 for article 10, paragraph 1.

35. **Mr. González Gálvez** (Mexico) said that it was essential for the Court to have automatic jurisdiction over those crimes on which there was general agreement. That did not mean that some crimes might not fall within an opt-in regime. Option 1 in article 7 was the most promising, subject to certain amendments. Its paragraph 1 (b) should be amended by the addition of the words "in accordance with international law", to exclude the possibility of nationals of one country being kidnapped and brought before the courts of another country in violation of the rights of the territorial State.

36. On the Security Council, the most serious concern was deferral of the Court's consideration of a case. Mexico had circulated an informal paper on that question, containing a revised version of the Spanish proposal on the same matter. Concerning referral by the Council, practice had shown that there was a residual power of the General Assembly to act on the basis of Chapter VII of the Charter of the United Nations. Furthermore, situations should be referred to the Court by the Council pursuant to Article 27, paragraph 2, of the Charter; in other words, they should constitute a procedural matter not subject to veto by the permanent members.

37. In article 16, paragraph 2, the sentence beginning "At the request of that State, the Prosecutor shall defer to" should be restated in more affirmative terms. Lastly, in article 15, paragraph 3, the word "partial" should be replaced by "substantial", since the "partial" collapse of a judicial system would be difficult to determine in practice.

38. **Ms. Plejić-Marković** (Croatia) expressed great concern over the omission of the proposal of Germany, which reflected widespread views on the need for automatic jurisdiction. It was far from certain that automatic jurisdiction would limit States' participation. A weak court would be worse than no court at all. Her delegation rejected the idea of an opt-in/opt-out approach or, worse still, a State consent regime. The Prosecutor should be able to act *ex officio*. The Security Council should have no role

except in relation to the crime of aggression. On the issue of deferral, Croatia feared that the proposed 12-month period might provide sufficient time for Governments to conceal traces of crimes. More safeguards were needed. Finally, Croatia saw no need for article 16, which would be a further obstacle to the work of the Prosecutor.

39. **Mr. Rhenán Segura** (Costa Rica) said that States' acceptance of the jurisdiction of the Court should be automatic by virtue of their ratification of the Statute. His delegation favoured inclusion of the crimes listed in article 5, although it did not agree to the use of the word "systematic" to qualify crimes. Article 7 bis, which provided for optional participation, was unacceptable. Costa Rica was in favour of conferring *ex officio* powers on the Prosecutor and supported the idea of a pre-trial chamber. The Court should be an autonomous and independent body, and the Security Council should therefore intervene only in respect of the crime of aggression. Costa Rica would support a solution that respected the independence of the Prosecutor and struck a proper balance between the roles of the Court and the Council, such as those proposed by the delegations of Spain and Mexico. Lastly, in the interests of consensus his delegation would support article 15 as currently drafted.

40. **Mr. Mirzaee Yengejeh** (Islamic Republic of Iran) said that automatic jurisdiction should be limited to the crime of genocide. The wording of article 7, paragraph 2, should reflect that preference. Article 7 bis should be the basis for the jurisdiction of the Court over the remaining crimes.

41. As for the role of the Security Council, his delegation favoured the deletion of article 10 in toto, preferring a parallel role for the Court in the determination of aggression, to enable it to act in case of failure by the Council to discharge its responsibilities.

42. His delegation was not convinced that conferring *proprio motu* powers on the Prosecutor would serve any useful purpose. It seemed inconceivable that, where crimes covered by the Statute were committed, States themselves would fail to react. His delegation thus supported the deletion of article 6 (c) and article 12. On State consent, it preferred option 4 in article 7. Lastly, the principle of complementarity, essential to the smooth functioning of the Court, must be clearly defined, and articles 15 and 16 provided a good basis in that regard. However, article 15, paragraph 2 (c), needed some amendment to bring it into line with that principle.

43. **Mr. Prandler** (Hungary) said that his delegation favoured automatic jurisdiction over all core crimes, and therefore supported option 1 in article 7, and article 7 ter. The Prosecutor should have the power to initiate proceedings *proprio motu*, and article 6 (c) should thus be retained. Article 15 struck a delicate balance on the important issue of complementarity. Hungary did not favour article 16, but might be able to accept it if a compromise proved necessary. Concerning the role of the Security Council, it was in favour of option 1 for both

paragraph 1 and paragraph 2 of article 10. Lastly, he noted that article 10 omitted to mention the important issue of referral of situations by the Council acting under Chapter VII of the Charter of the United Nations, which was, however, mentioned elsewhere, in article 6 (b).

44. **The Chairman** said that consideration of the Bureau discussion paper on part 2 (A/CONF.183/C.1/L.53) was thus concluded.

*The meeting rose at 7.30 p.m.*

## 32nd meeting

Friday, 10 July 1998, at 3.15 p.m.

*Chairman:* Mr. Kirsch (Canada)

A/CONF.183/C.1/SR.32

### Agenda item 11 (*continued*)

**Consideration of the question concerning the finalization and adoption of a convention on the establishment of an international criminal court in accordance with General Assembly resolutions 51/207 of 17 December 1996 and 52/160 of 15 December 1997** (A/CONF.183/2/Add.1 and Corr.1, A/CONF.183/C.1/L.45/Add.2 and Corr.1, A/CONF.183/C.1/L.57, A/CONF.183/C.1/WGP/L.14/Add.2 and A/CONF.183/C.1/WGPM/L.2/Add.5 and Corr.1)

#### DRAFT STATUTE

PART 5. INVESTIGATION AND PROSECUTION (*continued*)

PART 6. THE TRIAL (*continued*)

*Report of the Working Group on Procedural Matters (continued)* (A/CONF.183/C.1/WGPM/L.2/Add.5 and Corr.1)

1. **Ms. Fernández de Gurmendi** (Argentina), Chairman of the Working Group on Procedural Matters, introducing the report of the Working Group (A/CONF.183/C.1/WGPM/L.2/Add.5 and Corr.1), said that the Group was transmitting to the Committee of the Whole for consideration article 54 bis, paragraph 1 (c), and article 72. Paragraph 4 of article 72 had been deleted. The footnote to paragraph 1 of that article was also to be deleted in the light of the fact that a proposal for a new paragraph was currently awaiting discussion.

2. **The Chairman** said that, if he heard no objection, he would take it that the Committee of the Whole wished to refer the provisions contained in the report, as orally amended, to the Drafting Committee.

3. *It was so decided.*

PART 4. COMPOSITION AND ADMINISTRATION OF THE COURT (*continued*)

*Recommendations of the Coordinator (continued)* (A/CONF.183/C.1/L.45/Add.2 and Corr.1)

4. **Mr. Rwelamira** (South Africa), Coordinator, introducing his report on part 4 of the draft Statute (A/CONF.183/C.1/L.45/Add.2

and Corr.1), drew attention to the new text being recommended for article 37, paragraph 1. That text would have implications for article 37, paragraph 5 (a), which had already been submitted to the Drafting Committee, and which would now need to be amended so as to specify that the number of judges of the International Criminal Court was 18. Article 37, paragraph 4 bis, as currently worded, would entail the consequential deletion of the words "[on each of the lists referred to in paragraph 4 bis]" from paragraph 8 (b). The words "violence against women and children", in article 37, paragraph 7 (2), should be amended to read: "violence against women or children". In article 40 a footnote should be added at the end of paragraph 1, to read: "Some delegations expressed the view that the predominance of judges with criminal trial experience should be reflected in the composition of the Chambers."

5. One paragraph of article 49 was still pending, and would be transmitted to the Committee at a later stage.

6. **Mr. Krokmal** (Ukraine) said that his delegation welcomed the text of article 37 submitted in document A/CONF.183/C.1/L.45/Add.2 and Corr.1, which was a significant improvement on the original text proposed by the Preparatory Committee on the Establishment of an International Criminal Court. However, it was extremely important that the principle of equitable geographical representation should be applied not only at the candidate selection stage but also at the stage of the elections proper. The text of article 37, paragraph 1, as originally submitted by the Preparatory Committee had included a bracketed wording providing for a figure to serve as a criterion for equitable geographical representation. That provision had been omitted from the text proposed by the Coordinator, and should be reinstated. Accordingly, his delegation, together with the delegations of Belarus and Kazakhstan, was submitting a draft resolution on the question (A/CONF.183/C.1/L.57), which he urged the Committee to support.

7. **Mr. Shukri** (Syrian Arab Republic) said that he wished it to be recorded that his delegation strongly opposed article 37, paragraph 4 bis, and also the consequential amendment to paragraph 8 (b).

8. **The Chairman** asked if he could take it that the Committee of the Whole agreed to refer the provisions contained in the report of the Coordinator, as orally amended, to the Drafting Committee.

9. *It was so decided.*

PART 7. PENALTIES (*continued*)

*Report of the Working Group on Penalties (continued)*  
(A/CONF.183/C.1/WGP/L.14/Add.2)

10. **Mr. Fife** (Norway), Chairman of the Working Group on Penalties, introducing the report of the Working Group (A/CONF.183/C.1/WGP/L.14/Add.2), said that the Group was transmitting to the Committee for consideration article 75,

paragraph 1. In that connection, he drew attention to a footnote indicating that the adoption of the paragraph was without prejudice to the issue of the inclusion or the non-inclusion of the death penalty, and also without prejudice to the structure of article 75. The Working Group also transmitted for consideration article 77, paragraph 3.

11. **The Chairman** said that, if he heard no objection, he would take it that the Committee of the Whole wished to refer the provisions contained in document A/CONF.183/C.1/WGP/L.14/Add.2 to the Drafting Committee.

12. *It was so decided.*

*The meeting rose at 3.35 p.m.*

### 33rd meeting

Monday, 13 July 1998, at 10.20 a.m.

*Chairman:* Mr. Kirsch (Canada)

A/CONF.183/C.1/SR.33

**Agenda item 11 (*continued*)**

**Consideration of the question concerning the finalization and adoption of a convention on the establishment of an international criminal court in accordance with General Assembly resolutions 51/207 of 17 December 1996 and 52/160 of 15 December 1997 (A/CONF.183/2/Add.1 and Corr.1, A/CONF.183/C.1/L.45/Add.3, A/CONF.183/C.1/L.59 and Corr.1, A/CONF.183/C.1/L.61 and Corr.1, A/CONF.183/C.1/WGAL/L.2, A/CONF.183/C.1/WGE/L.14/Add.1 and Corr.1 and A/CONF.183/C.1/WGPM/L.2/Add.6 and Corr.1)**

**DRAFT STATUTE**

PART 2. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW (*continued*)

*Proposal prepared by the Bureau (A/CONF.183/C.1/L.59 and Corr.1)*

Article 5. Crimes within the jurisdiction of the Court

Article 5 bis. Genocide

Article 5 ter. Crimes against humanity

Article 5 quater. War crimes

Article xx. Elements of crimes

Article Y

Article 6. Exercise of jurisdiction

Article 7. Preconditions to the exercise of jurisdiction

Article 7 bis. Acceptance of jurisdiction

Article 7 ter. Acceptance by non-States Parties

Article 8. Temporal jurisdiction and non-retroactivity

Article 10. Role of the Security Council

Article 11. Referral of a situation by a State

Article 12. Prosecutor

Article 15. Issues of admissibility

Article 16. Preliminary rulings regarding admissibility

Article 18. *Ne bis in idem*

1. **The Chairman** invited the Committee of the Whole to begin consideration of the proposal for part 2 prepared by the Bureau and contained in document A/CONF.183/C.1/L.59 and Corr.1, some of whose provisions repeated or modified those contained in document A/CONF.183/C.1/L.53. Ways must now be found of resolving a number of hitherto intractable issues. It was not enough merely to advocate inclusion of elements in the Statute, without also giving thought to the problems that would result from their inclusion.

2. The Bureau invited comments on five specific issues: acceptance of the jurisdiction of the International Criminal Court, automatic or opt-in; preconditions to the exercise of jurisdiction; the options for suspension of investigation or prosecution by the Security Council; the desirability of additional safeguards for the Prosecutor's role; and the desirability of a provision – binding or otherwise – on elements of crimes.

3. **Mr. von Hebel** (Netherlands), Coordinator, introducing document A/CONF.183/C.1/L.59 and Corr.1, said that, with respect to article 5, the Bureau proposed that the jurisdiction

of the Court should be limited to genocide, crimes against humanity and war crimes. If no agreement was reached in the course of that day as to whether the crime of aggression and one or more of the treaty crimes should be included, the interest in addressing those crimes might have to be reflected in some other manner.

4. The inclusion of crimes of sexual violence under crimes against humanity and war crimes was taken for granted. However, differences remained as to the drafting of the relevant provisions. Certain proposals made on the inclusion of terrorism and economic embargoes under crimes against humanity also required further discussion.

5. Two options were proposed for the chapeau of article 5 quater dealing with the Court's jurisdiction in respect of war crimes. Section B of the definition of war crimes contained a new subparagraph (*a ter*) relating to United Nations and other personnel involved in humanitarian assistance or peacekeeping missions.

6. Subparagraph (*o*) on weapons was based on the first of the three options contained in the corresponding provision in discussion paper A/CONF.183/C.1/L.53, and contained a short list of weapons generally considered to be prohibited in international armed conflicts. Subparagraph (*o*) (vi), on weapons that might subsequently be prohibited in accordance with the articles on amendments and on review procedure, might require further drafting.

7. The chapeau of section D on internal armed conflicts had been amended, and a higher threshold was now proposed with respect to what should be considered an armed conflict not of an international character. Subparagraph (*e*) had been deleted, as it duplicated subparagraph (*b*) of section C. In subparagraph (*f*), the words "or groups", which had been inadvertently omitted, should be inserted after the words "armed forces". Section D now concluded with a clause stating that nothing in sections C and D affected the responsibility of Governments to maintain or re-establish law and order by all means consistent with international law. The drafting of a new provision, article xx on elements of crimes, might require further clarification or improvement.

8. Articles 6, 7, 7 bis and 7 ter related to the acceptance and exercise of jurisdiction. Jurisdiction involved three stages: acceptance, preconditions and exercise proper. The first stage was covered in article 7 bis, which contained two options. Option I provided for automatic jurisdiction over all three core crimes without the need for any extra measure or declaration on the part of the State party. Option II provided for automatic jurisdiction for genocide and opt-in for crimes against humanity and war crimes.

9. As for preconditions to the exercise of jurisdiction, the second stage, under article 7, paragraph 1, the Court would be able to exercise jurisdiction over genocide if one or more of the States mentioned in subparagraphs (*a*) to (*d*) had accepted its

jurisdiction. However, there were three options with respect to preconditions for crimes against humanity and war crimes. Option 1 was identical to the proposal relating to the preconditions for genocide. Option 2 required a higher threshold, because the Court would have jurisdiction only if both the territorial State and the custodial State had accepted that jurisdiction. Option 3 required only the State of nationality of the accused to have accepted jurisdiction. However, if the State in question was not a party to the Statute or had not accepted jurisdiction, then, under article 7 ter, it could by declaration consent to the exercise of jurisdiction with respect to the crime in question.

10. As to exercise of jurisdiction, the third stage, under article 6 (*a*) taken in conjunction with article 11, the Court could exercise jurisdiction if a situation was referred to it by a State party. Under article 6 (*b*), the Security Council, acting under Chapter VII of the Charter of the United Nations, could refer such a situation to it. Under article 6 (*c*), the Prosecutor could initiate an investigation in accordance with article 12.

11. Article 10 concerned not the Security Council's role in referring a matter or situation to the Court but its power of requesting the suspension of an investigation or prosecution if an issue under Chapter VII of the Charter arose that was also the subject of an investigation or prosecution by the Court. Of the options, the first provided for a period of 12 months for which a suspension might apply, while the second provided for "a specified period of time" but did not specify its duration.

12. Article 12 provided for two options in relation to the role of the Prosecutor in initiating investigations *proprio motu*. A version of option 1 had already featured in discussion paper A/CONF.183/C.1/L.53. Option 2 raised the general question of whether additional safeguards were needed before the Prosecutor could act.

13. **Mr. Hafner** (Austria), speaking on behalf of the European Union and its member States, said that the Union strongly supported the procedure adopted in the Bureau proposal as the most appropriate way of achieving a compromise on a number of very difficult issues. It noted that the Bureau had not yet been able to find a way of including the crime of aggression in the draft Statute but would propose that the interest in addressing that crime should be reflected in some other manner. The European Union was of the view that the issue could best be dealt with either directly in the Final Act or in a resolution attached to it.

14. As to the chapeau of article 5 quater on war crimes the European Union supported the formulation contained in option 2. Article 5 quater, section D, was preceded by a reference to armed conflict between armed forces and dissident armed forces or other organized armed groups. That reference needed also to cover conflicts in which only organized armed groups were engaged, regardless of whether they exercised control over territory.



15. The new article xx on elements of crimes should be seen as an effort to achieve a compromise. The European Union considered that elements of crimes should take the form of guidelines so as not to pose an obstacle to the entry into force of the Statute. In the light of the two footnotes to that article, some redrafting would clearly be required.

16. Article Y met with the European Union's full support. As to article 10, option 1, based on the proposal by Singapore, seemed to strike the right balance between opposing views. However, the European Union also favoured inclusion of language specifying the need for preservation of evidence and other precautionary measures. It also remained convinced that the independence of the Prosecutor must be preserved.

17. **Mr. Mirzaee Yengejeh** (Islamic Republic of Iran), speaking on behalf of the member States of the Movement of Non-Aligned Countries, said that those countries were disappointed that the Bureau proposal contained no provision or option concerning the crime of aggression. Many of the difficulties that would allegedly result from its inclusion seemed merely to be pretexts for excluding that "mother of crimes" – which had been recognized by the Nuremberg Tribunal some 50 years previously – from the Statute. The Conference owed it to future generations to ensure that both aggression and the use of nuclear weapons were included as crimes in the Statute, as called for in the declaration by the Ministerial Meeting of the Coordinating Bureau of the Movement of Non-Aligned Countries, held at Cartagena de Indias, Colombia, on 19 and 20 May 1998.

18. **Mr. Caflisch** (Switzerland) said that Switzerland saw no need for a threshold limiting jurisdiction over war crimes, but was willing, in a spirit of compromise, to accept option 2 in article 5 quater, despite its regret at the elimination of option 3, which had commanded far more support than option 1. Switzerland also regretted the deletion of its preferred option concerning prohibited weapons, the raising of the threshold for article 5 quater, section D, and the inclusion in sections C and D of additional reservations concerning the re-establishment of law and order and the defence of territorial integrity.

19. All those changes were clearly intended to restrict the Court's jurisdiction. If they were the price that must be paid for a system of automatic jurisdiction, inherent and unconditional, along the lines of the model proposed by the Republic of Korea, that price would perhaps be worth paying. However, Switzerland could not endorse the adoption of some other model, particularly if it took the form of an opt-out mechanism for war crimes. It also had the gravest reservations regarding the new article xx. It was particularly concerned that elements of crimes seemed to have ceased to play a purely indicative function.

20. In accepting the definitions of crimes proposed by the Bureau, his delegation would have to make concessions on matters to which it attached great importance – something it would be willing to do if the Court were to have automatic jurisdiction over all three core crimes. In that case, however, the

only acceptable option for article 7 bis was option I. As for article 7, his delegation called for the adoption of option 1 with regard to crimes against humanity and war crimes, and also for the replacement of the words "the State that has custody of the accused/suspect" with the words "the State on whose territory the accused/suspect is present". The requirement in option 3 in article 7 that the State of nationality of the accused or suspect must accept the jurisdiction of the Court would have the consequence that nationals of a non-party State would be outside the jurisdiction of the Court regardless of their whereabouts, whereas currently they were subject to the jurisdiction of States other than their own as soon as they crossed their national frontiers. Acceptance of option 3 would lead to an absurd situation in which such persons would be subject to foreign courts but not to the Court. That option must thus be firmly rejected.

21. As to article 10, in a spirit of compromise Switzerland could accept option 1, provided that proper account was taken of the need for preservation of evidence. However, it could not accept option 2, as the duration of the suspension established therein was not specified. For article 12, it favoured option 1. The procedures laid down in article 16 were extremely cumbersome and would seriously impair the effectiveness of the system: article 16 was thus unacceptable.

22. **Mr. Scheffer** (United States of America) said that the threshold for war crimes was a critical issue for many delegations. Not all war crimes were necessarily very serious: isolated violations of the Geneva Conventions of 1949, however gross, did not justify referral to the Court. His delegation had heard no persuasive argument that option 2 would prevent the prosecution of an individual war crime that fell below the threshold that the Court should be addressing.

23. With regard to subparagraph (o) of article 5 quater, subparagraph (o) (vi) was an improvement on previous versions, but the treatment of additions to the prohibited weapons list was still too ambiguous. It must be made clear that any changes to the list must be approved by all States to whose nationals it would apply, under an appropriate mechanism in article 110. The term "inherently indiscriminate", which appeared in the chapeau of subparagraph (o), was not grounded in Hague Law and should be avoided.

24. The United States noted the changes made to the chapeaux of sections C and D in an endeavour to facilitate consensus. It believed, however, that the change raising the threshold of applicability of section D to that of Additional Protocol II to the Geneva Conventions of 1949 should be rejected. The bulk of armed conflicts encountered in the real world were non-international, and that change would send the wrong message to civilian victims of internal armed conflicts.

25. His delegation was dismayed that the issues of gender justice dealt with in subparagraph (p bis) remained unresolved at that late stage in the Conference. It was also concerned that under article xx, paragraph 2, elements of crimes would be

adopted only after the entry into force of the Statute. Elements of crimes should be negotiated and adopted by the Preparatory Commission for the International Criminal Court so as to encourage early ratification by as many States as possible.

26. Section B, subparagraph (f), should ideally not be included in the Statute. If it was to be included, the words "directly or indirectly", which were not drawn from Additional Protocol I to the Geneva Conventions of 1949, should be deleted.

27. On article 7, the section dealing with preconditions to the exercise of jurisdiction over genocide had only one option, to which his delegation objected strongly in principle, because it allowed the Court to exercise jurisdiction over the nationals and official acts of States not parties, also contradicting the purpose of article 7 bis and its reference to automatic jurisdiction for genocide. Likewise, his delegation continued to reject option 1 in article 7 regarding preconditions for crimes against humanity and war crimes. The only approach consistent with well-established principles of international law was to combine options 2 and 3 so that the Court would have jurisdiction over the nationals and official actions of non-party States only with the consent of the State of which the accused or suspect was a national and the State in the territory of which the crime had occurred.

28. As to article 7 bis, option II offered the most realistic and acceptable alternative. It could, however, be improved by making it clear that case-by-case consent to jurisdiction was also a possibility. With regard to article 10, his delegation did not believe that a specific time limitation could be imposed by a treaty separate from the Charter of the United Nations. Option 2 was thus to be preferred. As to articles 6 and 12, a substantial number of countries were completely opposed to the Prosecutor acting *proprio motu*, and those proposals should thus be deleted. Lastly, his delegation continued to support the inclusion of article 16 in the Statute.

29. **Mr. Shukri** (Syrian Arab Republic) said that his delegation strongly supported the statement by the representative of the Islamic Republic of Iran on behalf of the Movement of Non-Aligned Countries concerning the crime of aggression, inclusion of which was supported by over a hundred States, and which had been described by the Nuremberg Tribunal as the supreme international crime. The fact that no comprehensive definition had been found did not justify eliminating that crime entirely or placing it on the same footing as the treaty crimes. Unless the crime of aggression was included, his delegation might have to reconsider its position with regard to the Statute as a whole.

30. Many proposals submitted with regard to the role of the Security Council were not properly reflected in the Bureau proposal. If it was to be left to the Council, with its notorious right of veto, to determine what matters were to be referred to the Court, the latter's independence would be severely compromised.

31. Although Singapore's amended proposal, reflected in option 2, perhaps offered a solution to the problem of the

Court's jurisdiction, a unified approach to all crimes was called for. If the Court did not have automatic jurisdiction over all crimes to be included in the Statute, the State of nationality would have the right to block the Court. His delegation thus supported article 7 ter and option I for article 7 bis.

32. Article xx concerning elements of crimes would create an unacceptable precedent, whereby unresolved problems were consigned to an annex in the interests of meeting the deadline for finalization of the Statute. It must also be asked what role would be left to the Court itself if the Statute were to lay down the elements of every crime. The relationship between the Charter of the United Nations and the Statute of the International Court of Justice offered a salutary example in that regard; determination of the elements of the crime should be left to the International Criminal Court.

33. With regard to internal conflicts, his delegation continued to oppose section D and to support section C, provided that the threshold was modified. It was also dismayed to find that, contrary to the wish of the vast majority of States present and in disregard of the declaration by the Ministerial Meeting of the Coordinating Bureau of the Movement of Non-Aligned Countries, held at Cartagena de Indias, Colombia, on 19 and 20 May 1998, nuclear weapons had been eliminated from the Statute. It was incomprehensible that, while chemical and biological weapons were prohibited, the most pernicious of all weapons were to be excluded from the scope of the Statute.

34. **Mr. Lahiri** (India) said that the Bureau proposal made little effort to address several of his delegation's most serious concerns. First, the draft continued to insist on the Security Council having the power to bind States not parties to the Statute. As the Council would almost certainly include non-party States among its members, that provision would confer on such States the power to compel both States parties and other non-party States to submit to the Court's jurisdiction, in violation of the law of treaties, as well as conferring on the Council a role never envisaged for it by the Charter of the United Nations.

35. Secondly, nuclear weapons were excluded from the list of weapons whose use was considered inherently indiscriminate, on the grounds that their exclusion would ensure the widest possible acceptance of the Statute. That was a shameful compromise. The International Court of Justice, in its advisory opinion on the question, had confirmed that the use of nuclear weapons would be a contravention of international humanitarian law, and the fact that no convention banning their use had been negotiated did not mean that the Statute could ignore their existence.

36. Thirdly, while his delegation could accept automatic jurisdiction for genocide, it would insist on opt-in jurisdiction for all other crimes. As safeguards against interference by the International Criminal Court, the territorial State and the State of custody must give their consent before it could exercise its jurisdiction. The complementarity provisions must also be

strengthened. Nor did his delegation accept *proprio motu* powers for the Prosecutor: only States parties should have the power to refer situations to the Court.

37. India continued to believe that the Court should not have jurisdiction over internal armed conflict except where a State's administrative and legal machinery had ceased to function. Lastly, his delegation found it incomprehensible that the Statute should fail to address terrorism and drug trafficking – truly international crimes that had taken more lives than the so-called core crimes in recent decades. India reserved the right to table formal amendments on all those concerns when the Committee met to adopt the draft Statute for referral to the plenary.

38. **Father Coughlin** (Holy See) said there was an urgent need for some international juridical body to exercise jurisdiction over international drug trafficking, an organized criminal activity with which national Governments found themselves ill-equipped to cope. His delegation was also deeply concerned about the illegal arms trade carried on by organized criminal groups, which increased the likelihood of international and internal armed conflict and resulted in the destruction of national structures and cultures. The Holy See strongly endorsed the Bureau proposal that those crimes should be placed under the jurisdiction of the Court by a subsequent protocol or review conference.

39. With respect to article 12, his delegation favoured a strong and independent Prosecutor, and believed that the Statute as a whole provided for adequate safeguards against possible abuses of prosecutorial power. It was also confident that only individuals of the highest moral principles and ethical conduct would be chosen to serve as Prosecutor and that the appointment process would rise above narrow political and ideological concerns. The process for bringing an accused person to justice must include the right to competent legal counsel – free of charge where appropriate. In addition, as the Rules of Procedure and Evidence were drafted, more specific language should be developed to protect such fundamental rights as specific notice of the charges, availability of all evidence, adequate time and resources to prepare the defence, cross-examination of all witnesses, admissibility of evidence and protection of customary privileges.

40. **Mr. Liu Daqun** (China) said that his delegation preferred option 1 for the chapeau of article 5 quater and that, as currently worded, section B, subparagraph (o), did not meet its concerns. The addition of safeguards in section D was welcome, but his delegation had difficulty in accepting subparagraphs (d), (f), (h), (j) and (k); the safeguards contained in sections C and D should reproduce the wording of article 3 of Additional Protocol II to the Geneva Conventions of 1949.

41. With regard to the preconditions to the exercise of jurisdiction over genocide in article 7, China could accept the possibility of automatic jurisdiction. However, for non-party States, the consent of the State of nationality and of the territorial State should be required. As for preconditions in the

case of crimes against humanity and war crimes, there should be opt-in jurisdiction with consent of the State of nationality and the territorial State. Consequently, a compromise between options 2 and 3 was needed.

42. For article 7 bis, his delegation favoured option II. In article 7 ter, it favoured deletion of the second sentence, as the problem of cooperation was covered in part 9 of the draft Statute. His delegation was still engaged in consultations regarding article 10; option 2 might be acceptable if its drafting were improved. In his delegation's view, article 12 should be deleted.

43. **The Chairman** invited the Committee of the Whole to turn to consideration of the reports of the Working Groups and Coordinators.

#### PART 5. INVESTIGATION AND PROSECUTION (*continued*)

#### PART 6. THE TRIAL (*continued*)

#### PART 8. APPEAL AND REVIEW (*continued*)

#### *Report of the Working Group on Procedural Matters (continued)* (A/CONF.183/C.1/WGPM/L.2/Add.6 and Corr.1)

44. **Ms. Fernández de Gurmendi** (Argentina), Chairman of the Working Group on Procedural Matters, introducing the report of the Working Group relating to parts 5, 6 and 8 contained in document A/CONF.183/C.1/WGPM/L.2/Add.6 and Corr.1, said that the report transmitted for consideration article 57 bis, paragraphs 3 (d) and (e), article 58, paragraph 5, and the complete text of article 60, paragraph 2, from part 5; article 67, paragraphs 1 (a) and (f) and paragraph 2, article 68, paragraphs 3, 4, 5 and 7, and article 69, paragraphs 1 and 4 ter, from part 6; and article 81, paragraph 1 (e), from part 8. It also announced the deletion from part 6 of article 68, paragraphs 8 and 9, and of article 69, paragraph 7.

45. **The Chairman** said that, if he heard no objection, he would take it that the Committee of the Whole wished to refer to the Drafting Committee the articles contained in the report of the Working Group.

46. *It was so decided.*

#### PART 2. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW (*continued*)

#### *Report of the Working Group on Applicable Law* (A/CONF.183/C.1/WGAL/L.2)

47. **Mr. Saland** (Sweden), Chairman of the Working Group on Applicable Law, introducing the report of the Working Group on article 20 ("Applicable law") (A/CONF.183/C.1/WGAL/L.2), said that the Working Group had reached agreement as to article 20, paragraphs 1 and 2, which it now transmitted to the Committee for consideration. Discussions were still pending on paragraph 3.

48. **The Chairman** said that, if he heard no objection, he would take it that the Committee of the Whole wished to refer to the Drafting Committee the articles contained in the report of the Working Group.

49. *It was so decided.*

PART 4. COMPOSITION AND ADMINISTRATION OF THE COURT (*continued*)

*Recommendations of the Coordinator (concluded)*  
(A/CONF.183/C.1/L.45/Add.3)

50. **Mr. Rwelamira** (South Africa), Coordinator for part 4, said that it would be seen from document A/CONF.183/C.1/L.45/Add.3 that article 49, paragraph 1, the last outstanding article in part 4, dealt with the privileges and immunities of the Court. The paragraph covered immunities relating to assets, properties of the Court, archives and communications of the Court. The view had been taken in the informal consultations that the matter would need further discussion and elaboration, preferably within the Preparatory Commission. He commended the article to the Committee for consideration and transmission to the Drafting Committee.

51. **The Chairman** said that, if he heard no objection, he would take it that the Committee of the Whole wished to refer article 49 to the Drafting Committee.

52. *It was so decided.*

PART 10. ENFORCEMENT (*continued*)

*Report of the Working Group on Enforcement (continued)*  
(A/CONF.183/C.1/WGE/L.14/Add.1 and Corr.1)

53. **Ms. Warlow** (United States of America), Chairman of the Working Group on Enforcement, said that the report of the Working Group on part 10 ("Enforcement") (A/CONF.183/C.1/WGE/L.14/Add.1 and Corr.1), referred to the Committee article 94; article 99, paragraph 3; and article 100. She drew attention to the deletion of article 93 and of article 99, paragraph 2. The Working Group recommended those articles for consideration by the Committee and referral to the Drafting Committee. Consideration of one remaining article, article 101, was still pending.

54. **The Chairman** said that, if he heard no objection, he would take it that the Committee of the Whole wished to refer the articles contained in the report of the Working Group to the Drafting Committee.

55. *It was so decided.*

PREAMBLE (*continued*)

PART 13. FINAL CLAUSES (*continued*)

*Recommendations of the Coordinator*  
(A/CONF.183/C.1/L.61 and Corr.1)

56. **Mr. Slade** (Samoa), Coordinator for the preamble and the final clauses, introducing document A/CONF.183/C.1/L.61 and Corr.1, said that the fact that the entire text of the preamble was enclosed within brackets reflected the need for further discussion. However, the current provision was accepted as the basis for further work. In the penultimate preambular paragraph, the brackets in the word "relation[ship]" could now be deleted.

57. As to the final clauses, article 108 was recommended to the Committee for reference to the Drafting Committee. Article 109 still retained its four options. Article 110 also required final decisions, particularly as to the time periods referred to in paragraph 1 and the voting methods and majorities referred to in paragraphs 2 to 6. In the fourth line of article 110, paragraph 1; the eighth line of article 110 bis, paragraph 1; the second line of article 111, paragraph 1; and the third line of article 111, paragraph 2, the words "some other person" should be replaced with the words "such other person". Article 110 bis also needed to be finalized as to the time period and voting majorities. There was one outstanding issue relating to the time period in article 111, paragraph 1. Articles 112, 115 and 116 were ready for submission to the Drafting Committee. Article 113 was still the subject of consultations, and article 114 required decisions on the relationship between entry into force and the Rules of Procedure and Evidence, as well as on the number of required ratifications.

58. **Mr. P. S. Rao** (India) said that his delegation would require further consultations before it was able to endorse article 108.

59. **Mr. Al-Adhami** (Iraq) said that his delegation also had reservations regarding article 108.

60. **The Chairman** said that, if he heard no objection, he would take it that the Committee of the Whole wished to refer articles 108, 112, 115 and 116, as orally amended, to the Drafting Committee, on the understanding that it might return to certain aspects thereof in due course.

61. *It was so decided.*

PART 2. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW (*continued*)

*Proposal prepared by the Bureau (continued)*  
(A/CONF.183/C.1/L.59 and Corr.1)

62. **The Chairman** invited the Committee to resume consideration of the Bureau proposal for part 2 contained in document A/CONF.183/C.1/L.59 and Corr.1.

63. **Mr. Asamoah** (Ghana) said that aggression was the mother of war crimes and it was absolutely essential that the Statute should reflect that fact. As for nuclear weapons, their exclusion from the list of prohibited weapons rendered that list well-nigh meaningless. While accepting the position of the Movement of Non-Aligned Countries with regard to the inclusion of other crimes, his delegation believed that, in the interests of securing a satisfactory outcome to the Conference, those crimes should be incorporated in the Statute at a later date.

64. His delegation had difficulty in understanding a number of passages in the Bureau proposal on account of the way in which they were drafted. For instance, in article 5, the words "as such" preceding the enumeration of acts of genocide should presumably read: "such as". In article 5 ter, paragraph 2 (a bis), the phrase "infliction of conditions of life" was incomprehensible.

65. In article 5 quater, concerning war crimes, his delegation favoured option 2. Regarding section B, it was somewhat concerned that the scope of subparagraph (a ter) was restricted to activities in accordance with the Charter of the United Nations, as regional organizations were often also involved in such exercises. That provision should be expanded to take account of such situations.

66. His delegation found it hard to see what article xx was intended to achieve, as some elements of crimes had already been indicated in earlier proposals. With regard to preconditions to the exercise of jurisdiction over crimes against humanity and war crimes, his delegation favoured option 1 in article 7 and option I for article 7 bis. With regard to the role of the Security Council, it preferred option 2 for article 10. However, whichever option was adopted, it would still be possible for the Council to repeat its request *ad infinitum*, thereby undermining the work of the Court. It might therefore be wise to specify some limit beyond which further requests by the Council would not be entertained.

67. For article 12, his delegation favoured option 1. In article 16, it had difficulty in understanding the last sentence of paragraph 2, which referred to situations in which the Prosecutor was not aware that an investigation was taking place. How could the Prosecutor defer to investigations of which he or she was unaware?

68. **Mr. Westdickenberg** (Germany) said that, like the United States delegation, his delegation continued to believe that the same standards should apply in section D as in section C of article 5 quater. It thus had reservations regarding the second part of the chapeau prefacing section D.

69. With regard to article xx, his delegation's position was that the principle of legality was fully ensured by the definitions of the three core crimes to be contained in the Statute, which had been meticulously worked out in a process that had taken several years, and that there was thus no need to embark on a new discussion. Neither the entry into force of the Statute nor the commencement of the Prosecutor's investigations should be dependent upon general agreement on, or even formal adoption

of, so-called elements of crimes. Paragraph 4 of that article should thus either be deleted or made non-binding, for example, by amending the word "shall" to read: "should".

70. With regard to acceptance of jurisdiction, his delegation, like so many others, could not accept option II for article 7 bis, which would lead to an *à la carte* jurisdiction and would also confer on States parties all the benefits and privileges of membership without their concomitant obligations. An opt-in approach could have the further disadvantage of reducing the core crimes – which had already dwindled to three – to the single core crime of genocide. What was needed was the opposite approach – a uniform and coherent regime for all three core crimes. His delegation thus strongly advocated adoption of option I.

71. With regard to article 7, Germany concurred with those States – a large majority – that found paragraph 1 and option 1 for paragraph 2 acceptable. In its view, option 3 would be an incentive for States not to become parties to the Statute. With regard to article 10, his delegation continued to support option 1. In article 12, it continued to regard option 1 as of crucial importance. Viable and effective safeguards already existed against frivolous investigations by a *mala fide* Prosecutor.

72. Article 15 must be retained in its entirety. Article 16, on the other hand, still required, at the very least, substantial amendment. With regard to paragraph 1, it should be sufficient to notify only the four States mentioned in the proposal of the Republic of Korea. The burden of challenge should lie, not with the Court, but with the State, which was much closer to the information. Furthermore, if a non-party State chose the challenge procedure, it would in return have to accept the obligation to cooperate fully with the Court. Pending the outcome of the consultations, his delegation continued to reserve its position on article 16.

73. Lastly, his delegation deplored the fact that the efforts of a number of delegations over a period of two years to have the crime of aggression included in the Statute had proved vain. It noted with appreciation that the Bureau would, if necessary, propose that the interest in addressing that crime should be reflected in some other manner.

74. **Mr. Slade** (Samoa) said that the relationship between articles 6, 7 and 7 bis raised fundamental difficulties which led to confusion. "Custody" jurisdiction and "custody ... with respect to the crime" were new concepts in international law that seemed fraught with possibilities for slippage. His delegation agreed with much that had been said by the delegation of Switzerland on that issue, and strongly supported inherent universal jurisdiction with no possibilities for opting in or opting out.

75. Article 5 quater, section D, on non-international armed conflict had been drained of much of its content. In particular, the reference to prohibited weapons seemed to have vanished. He understood why nuclear weapons had been forced out; but gone, too, was any reference to other devices. Did the

Conference really want to send the message that it was acceptable to use poison, dum-dum bullets, biological and chemical weapons in internal conflict?

76. Section B, subparagraph (o), came as a disappointment. Its chapeau was based on the premise of proscribing weapons in certain general categories; however, all that was left of those categories was a short list of absolutely prohibited weapons. Subparagraph (o) (vi) was also void of operational effect. The reference made by some delegations to exploding bullets seemed to have been ignored. Article Y, however, was a crucial provision that his delegation welcomed. Article 10 was now much improved, and Samoa favoured its option 1. Elements of crimes had a useful role to play, if presented in the form of guidelines. Finally, his delegation strongly supported the provisions concerning the *proprio motu* power of the Prosecutor, which provided sufficient safeguards.

77. **Sir Franklin Berman** (United Kingdom of Great Britain and Northern Ireland) said that a successful outcome to the negotiations on article 5 must necessarily involve abandoning attempts to include therein aggression, the treaty crimes and, indeed, nuclear weapons – notwithstanding the remark by one delegation which had grossly distorted the tenor of the advisory opinion of the International Court of Justice on the question. The statement by the presidency of the European Union had indicated how the crime of aggression might be addressed once the Statute had been adopted.

78. As to the definitions, he endorsed other delegations' views about the wisdom of having a reasonably short list of proscribed weapons under article 5 quater, section B, subparagraph (o). However, the phrase "which are inherently indiscriminate", which had been included in the chapeau, seemed both factually incorrect and undesirable: it would, for example, have extremely restrictive consequences in relation to subparagraph (o) (vi), which allowed for the inclusion of additional weapons in the future. It was perfectly possible that a decision might be taken to proscribe weapons on grounds other than their inherently indiscriminate nature.

79. The cluster of articles relating to exercise of jurisdiction was, as the representative of Ghana had noted, extremely confused and difficult to follow, and would require re-ordering along the lines suggested by the Coordinator. Further clarification was needed of the position of States not parties to the Statute. In that context, one must guard against a situation arising in which the operation of the Statute would be dependent on the consent of the very persons against whom the jurisdiction of the International Criminal Court should be operating.

80. The notion of automatic jurisdiction with respect to core crimes was one to which his delegation was deeply attached, and the objective must be to create the greatest possible measure

of automatic jurisdiction over the broadest reasonable definition of what constituted the core crimes. His delegation was gratified to note that very considerable progress was being made with regard to crimes in internal conflicts, under in article 5 quater, sections C and D. The chapeau of section D posed a problem: it was important to avoid setting a threshold so high as to remove from the Court's jurisdiction the very cases that had given rise to such grave concerns of late.

81. With regard to the clause at the end of section D, that clause was inspired by article 3 of Additional Protocol II to the Geneva Conventions of 1949 – indeed, one representative had asked for the whole of that article to be included. In his delegation's view, article 3 of Additional Protocol II as worded was not suitable for inclusion in the Statute. But the ideas expressed therein were valuable ones, and their essence could be reproduced as part of the endeavour to ensure that the widest possible range of crimes in internal armed conflict fell within the jurisdiction of the Court.

82. With regard to article 10, the member States of the European Union saw option 1 as striking a proper balance. However, there was still room for drafting improvements, perhaps incorporating some elements of option 2 so as to capture both the inherent powers of the Security Council and the judicial independence of the Court.

83. **Ms. Plejić-Marković** (Croatia) said that her delegation broadly endorsed the statement made by the representative of Austria on behalf of the European Union. However, in article 5, it continued to favour subsequent inclusion of the crime of aggression in the Statute at the review conference to be convened in accordance with article 111. On war crimes, its preference was for option 2 in article 5 quater. With regard to section B, subparagraph (o), it was concerned that landmines were not included in the list of proscribed weapons. On elements of crimes, it endorsed the comments of the representative of Germany. If article xx were adopted, its paragraph 4 should either be made non-binding or else deleted.

84. On the cluster of jurisdictional issues, Croatia favoured automatic jurisdiction in article 7 bis. On preconditions to the exercise of jurisdiction, it could accept article 7, paragraph 1, and it favoured option 1 for paragraph 2. Options 2 and 3 were completely unacceptable.

85. On the role of the Security Council, Croatia favoured option 1 for article 10, provided that reference was made to the need for preservation of evidence. It also supported an independent Prosecutor with *proprio motu* powers. The procedures under article 16 were too cumbersome and the article should be deleted.

*The meeting rose at 1.05 p.m.*

### 34th meeting

Monday, 13 July 1998, at 3.05 p.m.

*Chairman:* Mr. Ivan (Romania) (Vice-Chairman)

*later:* Mr. Kirsch (Canada) (Chairman)

A/CONF.183/C.1/SR.34

#### Agenda item 11 (*continued*)

**Consideration of the question concerning the finalization and adoption of a convention on the establishment of an international criminal court in accordance with General Assembly resolutions 51/207 of 17 December 1996 and 52/160 of 15 December 1997 (A/CONF.183/2/Add.1 and Corr.1 and A/CONF.183/C.1/L.59 and Corr.1)**

#### Statement on behalf of the Secretary-General of the United Nations

1. **Mr. Corell** (Representative of the Secretary-General) said that the Secretary-General was following the negotiation process very carefully and was confident of a positive outcome to the Conference. However, time was running short. Unless a solution to the major outstanding substantive issues emerged very soon, it would be difficult to assemble and coordinate all the provisions in such a way that the Statute would be ready for adoption later in the week. Many participants had been working extremely hard, in working groups and informal consultations during the Conference. However, some delegations had taken very firm positions. The Conference was engaged in creating an international institution to serve the world at large, and national positions must be harmonized in the interests of common objectives. On behalf of the Secretary-General, he urged those delegations that were still insisting on very firm positions to make every possible effort to work with other delegations to find common ground. The Secretary-General sincerely hoped that the necessary consensus would emerge, and that it would be possible to adopt the Statute of the International Criminal Court during the Conference.

#### DRAFT STATUTE

##### PART 2. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW (*continued*)

*Proposal prepared by the Bureau (continued)*  
(A/CONF.183/C.1/L.59 and Corr.1)

Article 5. Crimes within the jurisdiction of the Court (*continued*)

Article 5 bis. Genocide (*continued*)

Article 5 ter. Crimes against humanity (*continued*)

Article 5 quater. War crimes (*continued*)

Article xx. Elements of crimes (*continued*)

Article Y (*continued*)

Article 6. Exercise of jurisdiction (*continued*)

Article 7. Preconditions to the exercise of jurisdiction (*continued*)

Article 7 bis. Acceptance of jurisdiction (*continued*)

Article 7 ter. Acceptance by non-States Parties (*continued*)

Article 8. Temporal jurisdiction and non-retroactivity (*continued*)

Article 10. Role of the Security Council (*continued*)

Article 11. Referral of a situation by a State (*continued*)

Article 12. Prosecutor (*continued*)

Article 15. Issues of admissibility (*continued*)

Article 16. Preliminary rulings regarding admissibility (*continued*)

Article 18. *Ne bis in idem* (*continued*)

2. **Mr. Saland** (Sweden) said that the Bureau proposal (A/CONF.183/C.1/L.59 and Corr.1) pointed towards broadly acceptable solutions.

3. He agreed that if generally acceptable provisions on the crime of aggression and treaty crimes were not found, those issues might be deferred to a review conference.

4. He could just accept option 2 in article 5 quater on war crimes, but not option 1. Sections C and D must fall within the jurisdiction of the Court. He found it hard to accept the deletion of the weapons clause in section D, since that could allow, for example, the use of chemical weapons in non-international armed conflicts.

5. Turning to article xx, he might possibly accept the "elements of crimes" as guidelines. The enabling resolution annexed to the Final Act should contain some kind of time limit, preferably a specific date, for their elaboration by the Preparatory Commission for the International Criminal Court.

6. He strongly favoured a uniform system of jurisdiction covering all core crimes. He opposed an opt-in possibility for one or more crimes, as he saw no reason to differentiate between genocide, crimes against humanity and war crimes. Concerning preconditions to the exercise of jurisdiction, he had a strong preference for option 1 in article 7, paragraph 2, for all crimes.

7. On the Security Council and article 10, he supported option 1, perhaps with the addition of a clause on measures to preserve evidence.

8. On the Prosecutor, he strongly urged the adoption of article 12 (option 1). The safeguards mentioned in option 2 were adequately covered by article 16. Indeed, article 16 should be streamlined so as to fit with article 17.

9. **Ms. Chatoor** (Trinidad and Tobago) said that aggression and all the treaty crimes should be included in the Statute. On war crimes (article 5 quater), she still preferred option 2 for the chapeau. She regretted the non-inclusion of nuclear weapons in section B, subparagraph (o), and supported the statement made by the Islamic Republic of Iran on behalf of the Movement of Non-Aligned Countries.

10. Problems remained with regard to war crimes committed in non-international armed conflicts. The draft assumed that those crimes would fall within the jurisdiction of the Court, and thus sections C and D were no longer just options. However, the wording of the chapeaux was not satisfactory.

11. Article xx, paragraph 2, which provided that the elements of crimes were to be adopted by the Assembly of States Parties, did not in itself create a problem. However, she was troubled by paragraph 4, which could indefinitely delay action by the Court. In her view, the elements of crimes should serve only as guidelines.

12. The division made in article 7 between genocide, on the one hand, and war crimes and crimes against humanity, on the other, was confusing. Some further redrafting was desirable. For paragraph 2, she preferred option 1, requiring the consent of any one of four States to jurisdiction.

13. In article 7 bis, she preferred automatic jurisdiction in line with option I. With regard to article 10 and the role of the Security Council, she preferred option 1, and could accept a 12-month period in the interests of consensus. She also supported provisions for preserving evidence. She continued to support the thrust of article 12.

14. **Mr. Robinson** (Jamaica) thought that aggression, terrorism and drug trafficking should be listed in article 5. The Preparatory Commission should define them and elaborate their elements. Jurisdiction over the treaty crimes should be under an opt-in regime.

15. In article 5 ter, he was concerned about the reference to "civilian population", which seemed to imply the existence of an armed conflict. Crimes of the kind in question could occur in a context not involving an armed conflict. Nor was he happy with the phrase in the definition in paragraph 2 (a) limiting the concept of an attack directed against a civilian population to acts in furtherance of a State or organizational policy.

16. In order to advance the negotiations, he would support the inclusion of elements of crimes as formulated in article xx, and

thought that they should be binding on the Court. A problem would arise, however, if the elements were not adopted before entry into force of the Statute; a State should not be asked to express its consent to be bound by the Statute before the elements of crimes had been elaborated.

17. In article 6, he supported the right of the Security Council, under Chapter VII of the Charter of the United Nations, to refer to the Prosecutor a situation in which a crime appeared to have been committed. On article 7 bis, he would have preferred an opt-in procedure for all crimes, but could accept option II, with automatic jurisdiction for genocide and opt-in for the other crimes.

18. It would be useful to include in the Statute a provision similar to the fourth preambular paragraph of the definition of aggression annexed to General Assembly resolution 3314 (XXIX) of 14 December 1974, to the effect that nothing in the Statute should be interpreted as in any way affecting the scope of the provisions of the Charter with respect to the functions and powers of the organs of the United Nations. The Security Council's paramount role under Chapter VII of the Charter and the Court's independence would best be secured by leaving it to the Court to determine its own jurisdiction, adopting option 3 for article 10. Under option 1, the Council could, at any stage of its work, under Chapter VII, adopt a resolution requiring the Court to suspend proceedings. Option 2 was worse than option 1, since deferral under option 1 would be for 12 months rather than for an indeterminate period.

19. **Mr. MacKay** (New Zealand) said that, in article 5 quater, option 2 for the chapeau offered the best solution. As the Court would only have jurisdiction in those cases where national courts were unable to act, it was unlikely to be dealing with a large number of minor or isolated cases.

20. With regard to section B, he welcomed subparagraph (a ter), which would help to resolve a troublesome issue. For clarity and consistency with the text elsewhere, he thought that the words "law of armed conflict" should be replaced by "international humanitarian law".

21. He welcomed the reference in subparagraph (o) to "inherently indiscriminate" weapons, although the list of weapons should be expanded. He would support a reference to safe areas, if that commanded general agreement.

22. The fundamental problem raised by article 5 quater was the new chapeau of section D, which would leave very serious gaps in the Statute. It should either be deleted or tightened up. He also shared the concerns of other delegations about the absence of any reference to weapons in section D.

23. He did not regard article xx as necessary, but would support its inclusion for the sake of consensus. However, he had serious concerns about paragraph 4, because protracted negotiations on the elements of crimes might significantly delay the commencement of the Court's work. The elements should be guidelines rather than binding provisions. Article Y was very



useful. He welcomed the reference in article 6 (c) to the role of the Prosecutor. With regard to article 7, he would still prefer universal jurisdiction for genocide, but as there seemed to be a large degree of agreement on the approach taken in option 1 for paragraph 2, he could support that approach for all the core crimes. With regard to article 7 bis, he supported automatic jurisdiction over all three core crimes.

24. With regard to article 10, he welcomed the reference to resolutions of the Security Council in both options; that introduced a very positive element of transparency into the process. He preferred option 1.

25. He welcomed article 12 and supported option 1. Any additional safeguards introduced must not weaken the power of the Prosecutor to act *proprio motu*.

26. **Mr. Owada** (Japan) said that it was of paramount importance that general agreement be reached on creating an effective international criminal court that would have the blessing of the international community as a whole. To that end, he was willing to be as flexible as possible, within the limits of the basic principles that he regarded as essential.

27. He was definitely in favour of the automatic jurisdiction of the Court in relation to the core crimes. What must be avoided was a system of jurisdiction in which the perpetrator of a core crime escaped prosecution through the loophole of the requirement for ad hoc consent by the State of which the perpetrator was a national. To achieve a satisfactory system, it was necessary to create an objective regime in which international criminal justice could prevail to punish all genuine criminals, while recognizing that the existing system of international law would still apply for States not parties to the Statute. The issue at hand was how to reconcile those two requirements.

28. In conclusion, he suggested that the possibility for fuller utilization of the review process envisaged under article 111 might be usefully explored as a way of dealing with issues unresolved at the Conference.

29. **Mr. van Boven** (Netherlands) said that he was committed to automatic jurisdiction in respect of all three core crimes. Genocide, crimes against humanity and war crimes were all serious crimes. He could not accept an opt-in/opt-out regime as proposed in option II for article 7 bis. Likewise, regarding the preconditions to the exercise of jurisdiction, he favoured a uniform regime for all three core crimes. He strongly supported the option requiring one out of the four categories of interested States to have accepted the jurisdiction of the Court.

30. Finally, he favoured the Prosecutor having the power to act *proprio motu*. The safeguards outlined in article 12, especially the role for the Pre-Trial Chamber, were fully adequate. Additional safeguards were not only not needed, but might adversely affect the Prosecutor's independence. On the same issue, while he did not oppose the basic idea behind

article 16, it raised many practical issues, including possible lengthy delays. Perhaps article 16 should be revised in the light of the provisions on investigation and prosecution in part 5 of the Statute and those in part 9 on international cooperation and judicial assistance.

31. **Mr. Yáñez-Barnuevo** (Spain) said that, with regard to article 5, he well understood why the Bureau considered it preferable at that stage to focus on the core crimes on which, in principle, there was general agreement. Other matters could be included subsequently. A sentence could perhaps be included in the article leaving the way open for subsequent developments.

32. With regard to article 5 ter, it would be important, both in that article and in article 5 quater, to take account of crimes involving sexual violence. There was no need specifically to cover acts of terrorism.

33. Moving to article 5 quater, he noted with appreciation that section B, subparagraph (a ter), and section D, subparagraph (b bis), now included acts against peacekeeping missions. The current wording was broad enough to cover humanitarian assistance or peacekeeping missions organized in a regional context in accordance with the Charter of the United Nations.

34. He was concerned that the second sentence of the chapeau of section D seemed to restrict the scope of the section excessively. It would be better to speak of conflicts "involving" a State's armed forces and dissident armed forces or other armed groups, so as to cover conflicts between different factions, and the reference to control over a part of a State's territory would excessively restrict the scope of the section.

35. He seriously doubted the need for article xx, especially paragraph 4. Article Y was particularly important to ensure that matters not fully covered by the Statute were understood as remaining within the scope of existing or developing rules of international law. For article 7 bis, option I was to be preferred. In article 7, he saw no valid reason for the distinction between genocide and the other core crimes. All three should be subject to the same jurisdictional regime, based on the proposal originally made by the Republic of Korea for alternative jurisdictional links. The complementary acceptance of jurisdiction by States not parties under article 7 ter was useful. However, there would need to be safeguards, or States might be tempted to use the advantages of the Court without accepting obligations by ratifying the Statute. The second sentence of article 7 ter could be strengthened by requiring the accepting State to cooperate with the Court without any reservation in conformity with the whole Statute, and not just part 9.

36. For article 10, he favoured a combination of options 1 and 2, but the period of deferral should not exceed 12 months. Article 12 on the role of the Prosecutor should be retained as it stood. However, to address the concerns of some delegations, some differentiation might be made in article 6 between referral of situations to the Court under subparagraphs (a) and (b) and investigations by the Prosecutor under subparagraph (c).

37. Finally, he had reservations about article 16. The existing text would allow a State not party to the Statute to challenge the authority of the Court without having made a declaration under article 7 ter. That was quite unacceptable. A non-party State must explicitly declare that it accepted the jurisdiction of the Court, at least for the purpose of the case in question; otherwise it would have the advantages without the disadvantages.

38. **Mr. Onkelinx** (Belgium) said that he had always favoured automatic jurisdiction for the Court, as reflected in option I for article 7 bis. The opt-in formula could allow States to evade their obligations under the Statute, and seriously undermine the Court's credibility and effectiveness.

39. On the issue of preconditions to the exercise of jurisdiction under article 7, he continued to prefer the principle of universal jurisdiction, but could accept the formula allowing the exercise of the jurisdiction of the Court when one or more of the States concerned had accepted jurisdiction.

40. Under article 12, the power of the Prosecutor to initiate investigations *proprio motu* was essential. The safeguards provided for in article 12 appeared to be sufficient, but he would have no problem with additional safeguards if that would meet the concerns of certain States.

41. **Mr. Gadyrov** (Azerbaijan) said that, in drafting the Statute, a balance had to be struck between the so-called realistic approach and the so-called idealistic approach.

42. He had, in principle, always been in favour of automatic jurisdiction. However, he could accept option II for article 7 bis as a compromise. Regarding the preconditions to the exercise of jurisdiction, the approach proposed by the Republic of Korea represented a realistic compromise. Universal jurisdiction was not a realistic approach if the Court's jurisdiction was to be widely recognized.

43. He was disappointed that the crime of aggression and the treaty crimes were not covered in article 5, although he recognized that that reflected current political realities. As a compromise, since there was insufficient time to work out an appropriate definition for such crimes, perhaps they could be added to the list without any definition. There could be a transitional clause stating that, pending a definition thereof, the provisions on the crime of aggression and treaty crimes would not come into force. How they were to be eventually defined – by a preparatory commission or at a review conference – was an issue on which he was quite flexible.

44. On the third issue raised by the Chairman at the previous meeting, concerning suspension of investigation or prosecution by the Security Council, he felt that, since provisions concerning the crime of aggression would not come into force at the same time as the other provisions, option 3 for article 10 could be accepted. Any disputes between the Court and the Council could be resolved under existing international law.

45. He was not in favour of the Prosecutor having powers to act *proprio motu*, and favoured deletion of article 12 and of article 6 (c). That would not undermine the independence of the Prosecutor, but would simply underline the principle of complementarity.

46. On the fifth issue, concerning a provision on elements of crimes, a concern was whether such elements should be binding or be guidelines. After careful consideration, and bearing in mind the possible provision for the definition of the crime of aggression and treaty crimes, he saw the merit of including elements of crimes within the Statute. They should have binding force, subject to the provisions of existing international law.

47. **Mr. Güney** (Turkey) supported the view that terrorism and drug trafficking should be under the jurisdiction of the Court. The definition of the elements of crimes could be left to the Preparatory Commission.

48. In the case of war crimes, a very high threshold was necessary, because the Court must not concern itself with measures taken to maintain national security. He therefore favoured option 1 for the chapeau of article 5 quater. In that connection, he preferred the new wording for the chapeau of section D but, for the time being, maintained his position that sections C and D should be deleted.

49. Under article xx, elements of crimes should be agreed on before a particular crime came under the jurisdiction of the Court. However, to be constructive, he could support the proposed article provided that the elements of crimes to be formulated would serve merely as guidelines.

50. On the preconditions to the exercise of jurisdiction, he would prefer a combination of options 2 and 3 for article 7. Thus, exercise of jurisdiction would require the acceptance of jurisdiction with respect to a given crime by the territorial State, the custodial State and the State of which the accused or suspect was a national. With regard to article 7 bis, he would have preferred a provision requiring explicit consent of States in respect of all the crimes under the Court's jurisdiction. However, upon reflection and in a spirit of compromise, he could accept option II for article 7 bis.

51. On article 8, he wished to point out that the agreement to combine articles 8 and 22 had been based on the understanding that the first sentence would read: "The Court has jurisdiction only in respect of crimes committed after the entry into force of this Statute."

52. He had great difficulties with article 12 on the powers of the Prosecutor to act *proprio motu*. To maintain paragraph 1 as it stood could mean the Prosecutor being overwhelmed by allegations of a political and legal nature, which would not be conducive to his or her effectiveness or credibility. Article 12 should be deleted. He supported article 16.

53. **Mr. Kirsch** (Canada) took the Chair.

54. **Mr. Rwelamira** (South Africa), speaking on behalf of the member States of the Southern African Development Community, supported the view that the three core crimes set out in article 5 should be within the jurisdiction of the Court. It would be regrettable for the crime of aggression not to be covered in the Statute. The issue should at least be kept open for consideration by the Preparatory Commission or a review conference at a later stage.

55. He supported automatic and uniform jurisdiction over the crimes of genocide, crimes against humanity and war crimes, and, if possible, aggression. He was concerned about the attempt to create different consent regimes for different crimes, and opposed to the opt-in regime for crimes against humanity and war crimes under option II for article 7 bis. Concerning the preconditions to the exercise of jurisdiction, option 1 for article 7, paragraph 2, was the only acceptable approach. The built-in veto granted to the State of nationality under option 3 had no basis in general international law.

56. He still favoured option 2 for the chapeau of article 5 quater, concerning war crimes. On weapons, he could accept the current formulation in subparagraph (o) subject to the retention of subparagraph (o) (vi), which allowed for the inclusion of other weapons and weapons systems. In that regard, he could not support the proposal that any action under subparagraph (o) (vi) should be subject to the normal amendment procedure under article 110, since that would make the process unduly cumbersome.

57. He had similar concerns regarding article xx, in particular paragraphs 3 and 4. Linking the procedure for amending elements of crimes in paragraph 3 to that for amending the Statute would make it extremely difficult, by virtue of paragraph 4, for the Court to start its work. He therefore opposed the inclusion of article xx, at least in its current formulation.

58. He supported a strong Prosecutor, with the power to act *proprio motu*, as critical to the independence and effectiveness of the Court. Article 12, as presently formulated, contained adequate safeguards. With regard to article 16, he shared the concerns of other delegations about its practical utility.

59. For article 10, he could accept option 1, but had serious problems with option 2, which would allow the Security Council to suspend investigations and prosecutions for an unspecified period. Such a provision would neither enhance the work of the Court nor create a harmonious relationship with the Council.

60. He was still strongly in favour of the inclusion of both section C and section D of article 5 quater. He was concerned, however, that the new chapeau of section D not only restricted the scope of application but also, by implication, excluded conflicts between organized armed groups.

61. **Mr. Momtaz** (Islamic Republic of Iran) said that the crime of aggression should come under the jurisdiction of the Court. The same applied to the use of nuclear weapons. There was no reason to treat different weapons of mass destruction differently.

The use of such weapons necessarily violated such principles of international humanitarian law as the obligation to distinguish between civilian and military targets, the principle of proportionality between the means used and the military advantage obtained, and the prohibition of pointless suffering.

62. In article 5 quater, he preferred option 1 on the threshold of application. The inclusion of section C was related to the outcome of other pending issues, especially the role of the Security Council and the powers of the Prosecutor.

63. Despite the threshold proposed in its chapeau, section B still posed problems because the provisions were taken mainly from Additional Protocol II to the Geneva Conventions of 1949, which his country had not yet ratified, rather than reflecting general international law.

64. His position on article xx remained flexible. The idea of formulating elements of crimes for adoption at a later stage was useful.

65. He still had problems with article 6 (c) because to give the Prosecutor the right to initiate an investigation *ex officio* would be to give the Court supranational jurisdiction.

66. For article 7, paragraph 2, he favoured option 2. For article 7 bis, he favoured option II.

67. With regard to article 10, option 3 would ensure the independence of the Court. In article 12, neither of the two options met his concerns but, in a spirit of compromise, he could accept option 2 providing for additional safeguards to be introduced before the Prosecutor could act.

68. **Mr. Peraza Chapeau** (Cuba) favoured the inclusion of the crime of aggression in the Statute and supported the position of the Movement of Non-Aligned Countries concerning its definition. The use of nuclear weapons should be recognized as a war crime in the Statute. He absolutely rejected any subordination of the Court to the Security Council, and therefore supported option 3 for article 10.

69. With regard to article 12, the Prosecutor should not be empowered to initiate investigations *proprio motu*.

70. He welcomed the reference in document A/CONF.183/C.1/L.59 and Corr.1, under article 5 ter on crimes against humanity, to his delegation's proposal for a mention of economic embargoes as acts causing great suffering.

71. **Mr. Quintana** (Colombia) expressed support for option I in article 7 bis. Secondly, on preconditions to the exercise of jurisdiction, he supported the position that the consent of the territorial State and the custodial State should be required in respect of the three core crimes. Thirdly, on the role of the Prosecutor, he reiterated his support for article 6 (c) and for option 1 in article 12. With regard to the role of the Security Council, he supported option 3 for article 10 – the proposal to have no provision on the matter.

72. **Mr. Sadi** (Jordan) would have preferred to maintain the reference to aggression as a crime subject to the jurisdiction of the Court, deferring its definition for a later stage if an acceptable formula could not be found.

73. With regard to article 5 ter, paragraph 1 (g), he understood that the sticking point in the negotiations concerned enforced pregnancy. In his delegation's view, abortion was not the issue; to force a woman to bear the child of a rapist was torture in extreme form, and should be included as a crime against humanity.

74. Following consultations with other delegations, he proposed the following refinement of the definition of enslavement in paragraph 2 (a ter): "Enslavement means the exercise of any or all of the powers attaching to the right of ownership of a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children."

75. For the chapeau of article 5 quater, he favoured option 2. He welcomed the retention of sections C and D, and, in a spirit of compromise, he could accept the additional language at the end of section D. He maintained an open mind on the question of elements of crimes, but would prefer to delete paragraph 4 in article xx.

76. He supported article 6 (c).

77. In article 7, he supported paragraph 1 and option 1 for paragraph 2, but thought that the text should say that the States concerned must either be parties to the Statute or have accepted jurisdiction. For article 7 bis, he preferred option I.

78. For article 10, he preferred option 1, although he still failed to understand why the Security Council would need to suspend consideration of a case for such a prolonged period. The Court and the Council could enjoy concurrent jurisdiction.

79. He favoured option 1 for article 12.

80. On weapons, he accepted the formulation in the Bureau proposal, although he would find it hard to explain to anyone why bullets which expanded or flattened were prohibited while nuclear weapons and laser guns were not.

81. **Mr. Panin** (Russian Federation) regretted the omission of the crime of aggression, but recognized that it was probably the only way of achieving general agreement on the Statute as a whole.

82. He still preferred option 1 for the chapeau of article 5 quater. He could not accept the words "inherently indiscriminate" in the chapeau of section B, subparagraph (o). Subparagraph (o) (vi) needed further consideration. He still had serious problems with the chapeau and the last sentence of section D. In that sentence, after the words "shall affect", a reference to State sovereignty should be retained.

83. In article xx, he could support the development of elements of crimes as an integral part of the Statute. As to jurisdiction, he

favoured automatic jurisdiction over genocide, and acceptance by States' consent in respect of crimes against humanity and war crimes.

84. Options 1 and 2 for article 7, paragraph 2, could perhaps be combined. On the role of the Security Council, a compromise could be sought on the basis of option 2 for article 10. Concerning article 12, he maintained that the jurisdiction of the Court should be based only on a complaint by a State or a decision by the Council. Articles 15, 16 and 18 were acceptable.

85. **Mr. Sangiambut** (Thailand) preferred option 1 in article 5 quater relating to war crimes. He still had reservations concerning sections C and D, but proposed, as a compromise, the inclusion of a provision that sections C and D would not apply if there was any foreign interference in the non-international armed conflict. Secondly, in order to balance sections C and D, he would like terrorism to be included. In article 6, on exercise of jurisdiction, he accepted subparagraphs (a) and (b), but still had a reservation on subparagraph (c).

86. In article 7, he supported the preconditions to the exercise of jurisdiction for genocide, and preferred option 1 for paragraph 2. He had reservations on options 2 and 3 because of the mention of the role of the Prosecutor. For article 7 bis, he preferred option II.

87. For article 10, he preferred option 2, which would give the Security Council more flexibility, but he could also accept option 1. He still had a reservation about the role of the Prosecutor in article 12.

88. **Mr. Vergne Saboia** (Brazil) said that the changes to the provisions of the Statute proposed in document A/CONF.183/C.1/L.59 and Corr.1 enabled him to accept automatic jurisdiction for the three core crimes. He therefore favoured option I for article 7 bis.

89. With regard to the preconditions to the exercise of jurisdiction, he preferred the formula in option 1 for article 7, paragraph 2, in respect of all three core crimes.

90. With regard to the triggering mechanisms, he accepted article 6, including the power of the Prosecutor to act *proprio motu*. He also accepted article 12; any additional safeguards introduced must not unduly affect the independence of the Prosecutor. Some of the provisions of article 16 might meet concerns about possible abuse of power by the Prosecutor.

91. Option 1 for article 10 took care of the need both to preserve the independence of the Court and not to affect the provisions of the Charter of the United Nations on the role of the Security Council. Provision could perhaps be made for the preservation of evidence.

92. The issue of elements of crimes should not delay the commencement of the Court's work. Article xx should provide for additional guidelines rather than binding elements. He very much supported the retention of article Y.

93. He supported the inclusion of the three core crimes. He regretted that aggression could not be included for lack of a definition, but the matter could be dealt with in the context of a further review. With regard to article 5 quater, he supported option 2 for the chapeau. He welcomed the provision relating to attacks against United Nations personnel in section B, subparagraph (a ter). With regard to weapons, he looked forward to a compromise that could preserve the idea of incorporating the existing weapons prohibited under international law, while providing for the subsequent addition of further categories of weapons.

94. **Mr. Fadl** (Sudan) supported the view that the crime of aggression should be included. Concerning the new chapeaux of sections C and D on war crimes, he supported the statement made at the previous meeting by the representative of Austria on behalf of the European Union, and thought that there should be a reference to conflicts among armed groups.

95. In article 6, and again in article 11, a State party referring a case should be an interested party. He supported option 2 in article 7, with the addition of a mention of the State of nationality of the accused. He was flexible on the reference to the custodial State. For article 7 bis he supported option I.

96. On article 10, a request by the Security Council for deferral should be renewable only once, if at all, and for a maximum of half of the initial period.

97. **Ms. Wyrozumska** (Poland) said that article 7 ter raised a problem in that it allowed for ex post facto acceptance of the jurisdiction of the Court by a State not a party, in violation of the *nullum crimen sine lege* principle. She could support a provision allowing a non-party State to accept the jurisdiction of the Court in advance, in relation to a particular category of crime under the Statute, but she was against allowing a non-party State to accept jurisdiction in respect of a crime which had already been committed.

98. She shared some of the concerns expressed by other delegations. She strongly supported the inclusion of the crime of aggression in the Statute, and regretted that a generally acceptable definition had not been found. The interest in its inclusion should be mentioned either in the Final Act or in a resolution attached to it.

99. With regard to article 7 bis, the Court should have automatic jurisdiction over all three core crimes. She did not accept the rationale behind the differentiation between the three core crimes in relation to the exercise of jurisdiction. The regime should be uniform. She strongly supported the option originally proposed by the Republic of Korea.

100. The new version of article 10 was an improvement, and she favoured option 1.

101. She doubted the need for article 16.

102. **Mr. Skillen** (Australia) supported automatic jurisdiction for the crimes listed in articles 5 bis, 5 ter and 5 quater, as reflected in option I for article 7 bis. A coherent jurisdictional regime was essential to the effective operation of the Court.

103. On the preconditions to the exercise of jurisdiction, he supported a jurisdictional regime which made no distinction among the crimes. In regard to the Security Council, he continued to support option 1 for article 10. A period of time during which the Council's suspension would remain operative must be specified.

104. Regarding the power of the Prosecutor to act *proprio motu*, he supported option 1 for article 12, which contained adequate safeguards.

105. He could support the formulation of elements of crimes, but that must not in any circumstances delay the entry into force of the Statute. Article xx, paragraph 4, should be deleted, because there was no justification for preventing the Prosecutor from commencing an investigation in the absence of the adoption of the elements.

106. In regard to the threshold provision at the beginning of article 5 quater, he thought that the reference in the chapeau of article 5 itself to "the most serious crimes" should meet the concerns of delegations, and allow agreement on option 2 for the chapeau of article 5 quater.

107. He was opposed to the additional language in the chapeau of section D of article 5 quater. It would not cover conflicts between two or more dissident groups or those in which the dissident group failed to meet the criteria of responsible command or territorial control.

108. He did not understand the deletion of the provision on prohibited weapons in section D. It was illogical to prohibit the use of certain weapons in international armed conflict but remain silent as to their use in internal conflicts. He would favour the reintroduction of what had originally been subparagraph (f) of section D.

109. **Mr. González Gálvez** (Mexico) said that, from the outset, he had urged the inclusion of the crime of aggression. Informal consultations suggested that the issue might be taken up in the form of a draft resolution to be adopted by the Conference, asking the Preparatory Commission to give it priority consideration. He unreservedly supported the inclusion of gender-related and sexual crimes.

110. Another issue that he considered fundamental was preserving the option of making reservations to the Statute.

111. On article 5 quater, he was not in favour of including either of the two options for a threshold but would prefer option 2. He was concerned that nuclear weapons were no longer included in section B, subparagraph (o), but merely left as a possible option for the future under a regime for amending the Statute.

112. The chapeau of section D needed to be simplified. He also had reservations about article xx, since many delegations would delay signing the Statute until the process of adoption of the elements had been completed.

113. In article 6 (b), and in other similar provisions, he suggested using the phrase "relevant principal organs of the United Nations" instead of the reference to the Security Council. In article 7, he was in favour of option 1 for paragraph 2, but there was a problem regarding subparagraph (b), which could be solved by the addition of the words "as long as the detention was in accordance with international law". He accepted automatic jurisdiction regarding the three core crimes. In article 8, the introductory sentence should provide that the Court had jurisdiction only in respect of crimes committed after the entry into force of the Statute. On article 15, he said that "partial" in paragraph 3 should be replaced by "substantial". Lastly, article 16, paragraph 2, should be redrafted in more positive terms.

114. Mr. Hafner (Austria) said that Croatia, the Czech Republic, Estonia, Hungary, Iceland, Norway, Poland and Slovenia wished to associate themselves with the statement that he had made at the previous meeting on behalf of the European Union.

115. Speaking on behalf of Austria, he shared the concern that the list of crimes in article 5 quater, section B, had been reduced. In section B, subparagraph (a ter), and in section D, subparagraph (b bis), he assumed that the terms "civilians" and "civilian objects" included personnel engaged in peacekeeping and humanitarian assistance as well as the materials used by them.

116. Concerning article 7 bis, he was firmly in favour of automatic jurisdiction, as reflected in option I, and he supported a uniform approach for all crimes as far as the exercise of jurisdiction was concerned. He continued to favour the proposal originally submitted by the Republic of Korea in that regard.

*The meeting rose at 6 p.m.*

### 35th meeting

Monday, 13 July 1998, at 6.05 p.m.

Chairman: Mr. Ivan (Romania) (Vice-Chairman)

A/CONF.183/C.1/SR.35

#### Agenda item 11 (continued)

**Consideration of the question concerning the finalization and adoption of a convention on the establishment of an international criminal court in accordance with General Assembly resolutions 51/207 of 17 December 1996 and 52/160 of 15 December 1997 (A/CONF.183/2/Add.1 and Corr.1 and A/CONF.183/C.1/L.59 and Corr.1)**

#### DRAFT STATUTE

PART 2. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW (continued)

*Proposal prepared by the Bureau (continued)*  
(A/CONF.183/C.1/L.59 and Corr.1)

Article 5. Crimes within the jurisdiction of the Court (continued)

Article 5 bis. Genocide (continued)

Article 5 ter. Crimes against humanity (continued)

Article 5 quater. War crimes (continued)

Article xx. Elements of crimes (continued)

Article Y (continued)

Article 6. Exercise of jurisdiction (continued)

Article 7. Preconditions to the exercise of jurisdiction (continued)

Article 7 bis. Acceptance of jurisdiction (continued)

Article 7 ter. Acceptance by non-States Parties (continued)

Article 8. Temporal jurisdiction and non-retroactivity (continued)

Article 10. Role of the Security Council (continued)

Article 11. Referral of a situation by a State (continued)

Article 12. Prosecutor (continued)

Article 15. Issues of admissibility (continued)

Article 16. Preliminary rulings regarding admissibility (continued)

Article 18. *Ne bis in idem* (continued)

1. Mr. El Masry (Egypt) noted with regret the proposal made in document A/CONF.183/C.1/L.59 and Corr.1 that, if no generally accepted provisions were developed that day, the crime of aggression should not be included in the Statute. The group of countries belonging to the Movement of Non-Aligned Countries had decided to continue the quest for a simplified definition of aggression, referring to armed aggression against

the political independence or territorial integrity of States, occupation of territories or annexation, which might enable the Conference to come up with a text acceptable to all.

2. With respect to article 5 quater, his delegation believed that the Statute should deal only with those crimes deemed to be war crimes by customary international law. Egypt was reluctant to accept any threshold for war crimes in accordance with the Geneva Conventions of 1949 and the Additional Protocols of 1977, but was prepared to accept option 2 as a compromise.

3. With regard to section B, subparagraph (o), he was disappointed to note that the Bureau proposal offered only one option, which was supported by the nuclear States but which was totally unacceptable to his delegation because it made no reference to nuclear weapons. If the International Criminal Court was to be an international, rather than a European body, a text acceptable to all must be found.

4. As for internal conflicts, section D was unacceptable, as its contents were not yet recognized as customary international law. Section D, subparagraph (f), relating to children, should be relocated in section C, and the remainder of section D deleted. Article xx, on elements of crimes, was too imprecise to serve any useful purpose. Article Y, however, was acceptable as it stood. With regard to article 6, Egypt was one of a number of States that had requested that the General Assembly be given the right to refer situations to the Court. Article 7, paragraph 1, was acceptable as it stood, and his delegation favoured option 1 for paragraph 2. It favoured option II for article 7 bis, and article 7 ter was acceptable as it stood.

5. As to the role of the Security Council, Egypt preferred option 3 for article 10, but would be prepared to review its position if the crime of aggression was included in the Statute and an equal role conferred on the General Assembly, subject, however, to three conditions. First, a time limit – preferably non-renewable, and in any case not indefinitely renewable – must be fixed for any suspension requested by the Council; secondly, such request must take the form of a Council resolution; thirdly, the Court must have the right to request the Council to look into a situation of aggression if the Council had not done so of its own motion.

6. Egypt had serious reservations about conferring *proprio motu* powers on the Prosecutor: to do so might hamper the Prosecutor's effectiveness in practice. As to article 15, the criteria set forth therein were not objective: the only criterion that could be assessed objectively was the total collapse of the national judicial system. As to article 17, challenges to the jurisdiction of the Court should be brought before the Pre-Trial Chamber or the Appeals Chamber. The decision should be unanimous, or else taken by a two-thirds majority.

7. **Mr. Maema** (Lesotho) reiterated his delegation's view that the Court should have automatic jurisdiction in respect of all core crimes. Lesotho accepted option I for article 7 bis. With regard to article 10, the fact that the Security Council was seized

of a matter under Chapter VII of the Charter of the United Nations should not impede or suspend the Prosecutor's powers to investigate or prosecute crimes under the Statute. On article 12, the judicial review mechanism envisaged elsewhere in the Statute provided sufficient safeguards with respect to the Prosecutor's role. Lastly, while his delegation appreciated the need for inclusion of elements of crimes in the Statute, it believed that those elements should serve only as guidelines, and should be without binding effect.

8. **Mr. Dabor** (Sierra Leone) said that his delegation urged that sections C and D should be included in the new article 5 quater, but it had reservations, for example, regarding the chapeau of section D, which referred to organized armed groups that exercised "control over a part of [a State party's] territory". That wording was very restrictive: in his own country, for example, the rebel forces did not occupy a territory. Thus, as presently drafted, section D would exclude the type of internal conflict presently taking place in Sierra Leone. His delegation therefore proposed that the second sentence of the chapeau should be replaced by the text: "It applies to armed conflicts that take place in a territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups."

9. With respect to the jurisdictional modalities, his delegation would prefer the order of articles 7 and 7 bis to be inverted, and favoured option I, namely, automatic jurisdiction over the three core crimes. For article 10, his delegation favoured option 1 and welcomed the new safeguard requiring the Security Council's request to take the form of a resolution. Such requests, however, must not be renewable indefinitely; his delegation therefore proposed that they should cease six months after the first renewal. With regard to article 12, sufficient safeguards already existed and option 2 should be deleted. As for article xx, that provision, too, could be deleted.

10. **Ms. Daskalopoulou-Livada** (Greece) noted that, despite the fact that an overwhelming majority of participants favoured its inclusion, the crime of aggression was not to be included in the Statute. Her delegation was not convinced that the obstacles to its inclusion were insurmountable. The same was true of the question of the role of the Security Council. Matters should not be allowed to rest there: the Preparatory Commission for the International Criminal Court should be mandated to formulate a definition of aggression and explore the mode of involvement of the Council, perhaps in a resolution appended to the Final Act. The outcome of that work could then be submitted to the review conference for consideration and action.

11. On the question of jurisdiction, Greece had consistently expressed its strong preference for automatic jurisdiction over all core crimes, and thus favoured option I for article 7 bis. It also favoured option 1 for article 7, paragraph 2. With regard to article 10, it supported option 1, which more accurately reflected the proposal originally submitted by Singapore. It also supported option 1 for article 12, as the inclusion of additional

safeguards would impede the effectiveness of the Prosecutor's functions.

12. **Mr. Bello** (Nigeria) said that his delegation was dismayed that the Bureau proposal did not include aggression among the core crimes within the Court's jurisdiction, in spite of the support for its inclusion expressed by more than 90 per cent of speakers. Nigeria strongly supported inclusion of the crime of aggression in the Statute, and the problem of a definition should be the subject of further discussions in the Committee of the Whole. It was also disappointed that nuclear weapons and anti-personnel mines, methods of warfare that were inherently indiscriminate, were not included in article 5 quater, section B, subparagraph (o), and hoped that that issue would be reconsidered. Nigeria favoured the inclusion of subparagraph (p bis), and looked forward to agreement on a definition of crimes of sexual violence.

13. Nigeria also supported article xx, but the elements of crimes should be finalized before signature of the Statute. On article 7, it favoured the uniform approach set forth in the Bureau's previous discussion paper (A/CONF.183/C.1/L.53), as well as option I for article 7 bis. For article 10, it supported option 3. It continued strongly to favour the deletion of article 12, and was not convinced that additional safeguards under option 2 would allay fears as to the credibility and independence of the institution of Prosecutor. Nigeria also supported articles 15 and 16, but endorsed the comments by the representative of Ghana regarding the drafting of the last sentence of article 16, paragraph 2. Without prejudice to the further discussion on article 17, it strongly supported its inclusion in the Statute.

14. **Mr. Politi** (Italy) said that he had two observations to make concerning the definition of crimes. The first related to article 5 quater, section B, subparagraph (o), which reflected option 1 set forth in the earlier discussion paper (A/CONF.183/C.1/L.53). The insertion in the chapeau of a reference to weapons inherently indiscriminate in violation of international humanitarian law was very helpful, and subparagraph (o) (vi) offered a potentially promising solution to the problem of weapons not included in the list.

15. Secondly, it was clear that the new chapeau of section D and the last paragraph of sections C and D provided for substantial restrictions on the applicability of the Statute to internal conflicts. The acceptability of those new formulations was contingent on the acceptance of the entire package of provisions contained in sections C and D, to which Italy attached the greatest importance. It also endorsed other delegations' concerns about the absence of provisions on prohibited weapons in internal armed conflicts.

16. Italy's position with regard to the difficult issue of jurisdiction had always been very clear: it favoured granting the Prosecutor the power to initiate investigations *ex officio*, and thus supported article 6 (c) and option 1 for article 12; it also supported automatic jurisdiction over all three core crimes under general international law with the provision of alternative

jurisdictional links indicated in option 1 for article 7, paragraph 2. It was opposed to option 3 for the reasons already given by previous speakers.

17. Italy also supported the suggestion made that the articles on acceptance of jurisdiction and preconditions to the exercise of jurisdiction should be reordered. Such a reordering should also help to clarify the differing situations of States parties and States not parties. Finally, he did not believe that additional safeguards were needed with respect to the role of the Prosecutor, but the drafting of article 16 could be reviewed in that connection.

18. **Mr. Mansour** (Tunisia) said that there was still time to reach agreement concerning the crime of aggression. With regard to article 7, paragraph 2, his delegation believed that the State of nationality of the victim must accept the Court's jurisdiction. Although it was prepared to accept article 8, it considered that paragraph 1 of the original article 8 was a better text, and should be reinstated. As to article 10, the text still required further clarification. Tunisia wished to see the Security Council assigned a role in accordance with international instruments. The new text of article 12 represented an improvement on the previous texts, as it contained a safeguard in the form of the Pre-Trial Chamber. He had reservations about article 15, the provisions of which were not sufficiently clear.

19. **Mr. Bihamiriza** (Burundi) said that his delegation would have liked the crime of aggression to have been defined during the Conference so that it could be included in the Statute. Proposals to include economic embargoes violating international law among crimes against humanity should be considered at a review conference.

20. On article 5 ter, his delegation proposed that the word "multiple" should be deleted from paragraph 2 (a), as an individual act might well be a crime against humanity. It supported option 2 in article 5 quater, and deplored the exclusion of nuclear weapons and anti-personnel landmines. It saw no need for article xx; the crimes concerned were already adequately defined, and the Court should be left some latitude. On the other hand, his delegation supported the inclusion of article Y.

21. With regard to exercise of jurisdiction and preconditions thereto, the Statute should not differentiate between genocide and the other core crimes; Burundi thus supported option 1 for article 7, paragraph 2, which should be merged with paragraph 1. For article 7 bis, it favoured option I. On article 10, it would have liked the suspension period to be shorter, but could accept the provision as worded, provided that the need for preservation of evidence was addressed. Finally, it reaffirmed its support for option 1 in article 12.

22. **Mr. Katureebe** (Uganda) said that the Court's jurisdiction should extend to all the core crimes defined in the Statute. The Court must have a strong, independent Prosecutor with the power to initiate investigations. The language of option 1 for article 12 was acceptable to his delegation, although he did not rule out additional safeguards.



23. Uganda shared other delegations' concern about the watering down of the Court's jurisdiction over situations of internal conflict. As currently worded, the second sentence of the chapeau of article 5 quater, section D, severely limited the Court's scope in that regard. Whether or not the perpetrators controlled territory was immaterial: they might be operating from a neighbouring country, with or without that country's consent, as was currently the case in Uganda. His delegation thus supported the proposal by the representative of Sierra Leone with regard to the chapeau of section D.

24. **Mr. Nathan** (Israel) said that he did not support the view that the threshold for war crimes given in options 1 and 2 in article 5 quater was unnecessary because the chapeau of article 5 already restricted the Court's jurisdiction to the most serious crimes of concern to the international community as a whole. That chapeau dealt with general categories of crimes; it would still be necessary to make clear, under the war crimes heading, that the Court would be concerned only with crimes which were part of a plan or policy or a large-scale commission of such crimes, in line with option 1 in article 5 quater.

25. His delegation reserved its position with regard to section B, subparagraph (f), concerning the transfer of a civilian population, and particularly opposed the words "directly or indirectly", which had no basis in customary international law.

26. With regard to section B, subparagraph (t), the insertion of the word "national" before the words "armed forces" did not reflect the object and purpose of the Convention on the Rights of the Child of 1989. He noted that the adjective "national" was not used to qualify the words "armed forces" in section D, subparagraph (f), which also dealt with conscription of children.

27. Israel favoured the inclusion of a definition of elements of crimes as provided for in article xx: many of the criminal acts covered by article 5 had been identified some 90 years previously and were in dire need of redefinition. It favoured option II for article 7 bis, to give expression to the consensual nature of the Statute and help to secure its widest possible acceptance by the international community. For article 7, paragraph 2, it favoured a combination of options 2 and 3, requiring acceptance of jurisdiction by the territorial State, the custodial State and the State of nationality.

28. On article 12, Israel had already expressed concern that conferral of *proprio motu* powers on the Prosecutor might adversely affect his or her independence by exposing him or her to all kinds of constraints and pressures. Either provision should be made for additional safeguards before the Prosecutor could act, or article 12 should be dispensed with. On article 8, while his delegation favoured merging the original articles 8 and 22, it was essential that the article contain a provision relating to the non-retroactivity of the Court's jurisdiction. With regard to article 10, a balance should be struck between the position of the Security Council as laid down in the Charter of the United Nations and the proper functioning and independence of the Court.

29. **Mr. Bazel** (Afghanistan) said that most of his delegation's comments with regard to the earlier discussion paper (A/CONF.183/C.1/L.53) were also applicable to the new proposal (A/CONF.183/C.1/L.59 and Corr.1). His delegation considered aggression to be the "mother of crimes", and strongly supported the position of the Movement of Non-Aligned Countries in that regard. It favoured the definition of aggression proposed in document A/CONF.183/C.1/L.56 and Corr.1, paragraph 2 (g) of which reflected the language of article 3 (g) of the definition of aggression annexed to General Assembly resolution 3314 (XXIX) of 14 December 1974. For article 10, his delegation continued to support option 1, provided that: (a) the period of suspension was limited to six months; (b) the period was renewable once only; (c) the gathering of evidence and investigation should continue during that period; and (d) if no decision was taken by the Security Council at the end of the period, the Court could proceed independently. With regard to article 12, his delegation associated itself with the views expressed by the representatives of Turkey and Egypt.

30. **Mr. Bouguetaia** (Algeria) said that the Bureau proposal gave his delegation some grounds for hoping that the obstacles to the success of the Conference might still be overcome. Algeria's firm support for the inclusion of the crime of aggression in article 5 scarcely needed reiterating. Despite near-unanimous support for its inclusion, that crime appeared no longer to feature on the Conference's agenda. With sufficient political will, the definitional problem could have been overcome and the crime of aggression included in the Statute.

31. On war crimes, Algeria endorsed the call for the inclusion of nuclear weapons in the list of proscribed weapons in article 5 quater, section B, subparagraph (o). It continued to oppose inclusion of internal armed conflicts under the Court's jurisdiction, on account of the practical difficulty of distinguishing between true armed conflict and policing operations intended to restore public order. His delegation noted with satisfaction that a provision had been inserted at the end of section D, taking account of the need to defend the territorial integrity of States by all means consistent with international law. It might be willing to accept sections C and D subject to some redrafting.

32. Algeria regarded the explicit consent of the State as fundamental to article 7 bis. In the interests of consensus, it could, if necessary, accept option II. For article 10, it favoured option 1 with a few additional safeguards. On article 12, it opposed *proprio motu* powers for the Prosecutor, which would be detrimental to his effectiveness and credibility. Its preferred option was the deletion of article 12; failing that, it would favour option 2 with provision for additional safeguards before the Prosecutor could act. Article 16 might provide an initial safeguard, as well as affirming the principle of complementarity.

33. **Mr. Effendi** (Indonesia) said that his delegation fully endorsed the position of the Movement of Non-Aligned Countries concerning the crime of aggression and nuclear

weapons. It continued to favour the deletion of article 6 (c) and of article 12. However, it could consider a package based on option 2 for article 12 and the reformulation of articles 15 and 18, together with the provision for the protection of national security information.

34. Over-politicization had added to the difficulties of the negotiation process. It now appeared that the Court would no longer have jurisdiction only over situations where a national criminal justice system had totally or partially collapsed, but would also have the power to hear and overrule decisions on purely domestic matters taken by the executive and judicial branches of sovereign States in accordance with their national laws and constitutions. The danger of investigations being initiated for political motives could not be disregarded. While some had argued that the integrity of the Prosecutor and the filtering role of the Pre-Trial Chamber would provide safeguards against such investigations, neither Prosecutor nor judges could be expected to have a full understanding of the situation and internal security problems of each and every developing society. Article 6 (c) and article 12, as well as articles 15 and 18 as currently drafted, eroded the principle of complementarity that was one of the fundamental bases for the Court's jurisdiction.

35. With regard to article 5 quater, in a spirit of compromise his delegation was now prepared to accept the inclusion of sections C and D, provided that option 1 was chosen for the chapeau and that the provisions were supplemented in the manner proposed by the representative of Thailand. On article 7, it could accept the proposal to combine options 2 and 3 for paragraph 2. It continued to believe that option II for article 7 bis was essential if the goal of universal accession was to be achieved.

36. It might be better to leave the problem posed by article 10 to be resolved by the Assembly of States Parties and the States Members of the United Nations, should a case of conflicting jurisdiction between the Court and the Security Council arise in the future. The integrity of Articles 39 and 103 of the Charter of the United Nations would not be jeopardized if option 3 were chosen. His delegation also strongly supported the inclusion of article 16, which embodied the principle of complementarity.

37. **Ms. Lehto** (Finland) said that her delegation supported what had been proposed by the representative of Austria at the Committee's thirty-third meeting concerning the chapeau of section D in article 5 quater. Alternatively, the second sentence of the chapeau could be deleted.

38. Her delegation attached great importance to the inclusion of article 5 ter, subparagraph (g), and article 5 quater, subparagraph (p bis), in their entirety, and was pleased to note that considerable progress had been made towards achieving a widely acceptable definition of crimes of sexual violence. It supported the suggestion that articles 6, 7 and 7 bis should be reordered. On article 7 bis, it firmly believed that there was no viable alternative to the automatic jurisdiction of the Court over

all three core crimes. Especially in the light of articles 15 and 17, retention of option II would amount to a double threshold for the exercise of the Court's jurisdiction. Finland also favoured a unified regime with regard to preconditions along the lines of option 1 for article 7, paragraph 2. To draw a distinction between genocide and other core crimes did not really make sense, as in practice those crimes often overlapped.

39. Article xx would require considerable redrafting so as to make it clear that elements of crimes would not be binding on the Court, and that their completion would not delay its operation. Option 1 for article 10 was acceptable, on the condition that the language concerning the need for preservation of evidence was included. On article 12, Finland strongly favoured *proprio motu* powers for the Prosecutor. It continued to think that option 1 already contained sufficient safeguards. Too many procedural obstacles should not be placed in the way of the Court's operations.

40. **Mr. Rodríguez Cedeño** (Venezuela) said that the Bureau proposal constituted a sound basis from which to work towards an acceptable text for part 2. The crime of aggression should be included in the Statute only if sufficiently clearly defined. That matter could best be considered by the Assembly of States Parties in a procedure that would enable the Court's material jurisdiction to be reviewed without the need for a complete review of the Statute.

41. With regard to war crimes, Venezuela supported option 2 for the chapeau of article 5 quater, and also inclusion of the use of nuclear weapons in section B, subparagraph (o). It also supported reference to internal armed conflicts: what was important was the nature and seriousness of the crime, rather than the context in which it was committed. It favoured the inclusion of subparagraph (c) in article 6, and option 1 for article 12. Article 6 (b) was important, but did not imply that the Court was in any way beholden to the Security Council. Its decision whether to exercise jurisdiction must be taken independently.

42. With regard to article 7, his delegation supported the proposals regarding genocide, and for paragraph 2, although it was flexible, it would prefer option 2. It favoured option II for article 7 bis, but would join any consensus that emerged with regard to that article. It supported article 7 ter without the last sentence, which was superfluous.

43. On article 10, while the competence of the Security Council in political matters could not be ignored, the Court must enjoy the necessary autonomy in exercising its jurisdiction. A more flexible clause should be inserted calling on the Court to take account of recommendations of the Council in exercising jurisdiction. However, his delegation would be prepared to discuss a compromise solution based on option 1. On article 12, it believed that the Prosecutor should have the necessary independence to trigger investigations, in conjunction with the pre-trial procedures and taking into account the legislation of the States concerned. On article 16, notification that there would be

a reasonable basis to commence an investigation should be confined to States parties. Article 16 established a series of prerogatives for States not parties without any reference to article 7. It required redrafting.

44. **Mr. Perera** (Sri Lanka) said that there was a need for a high threshold with respect to war crimes, as not all crimes committed in time of war amounted to grave breaches of the rules of war. His delegation therefore supported option 1 in article 5 quater. On internal conflicts, section D continued to pose problems when applied to situations in States with functioning legal systems and institutions, as there would be a conflict with the principle of complementarity. In a spirit of compromise, however, his delegation was prepared to consider accepting the provision contained in section D, subparagraph (f), on the clear understanding that an opt-in regime would be adopted in respect of war crimes.

45. To exclude terrorism and drug trafficking from the scope of the Statute would constitute a grave omission. The distinction between core crimes and treaty crimes was an artificial one: the infliction of indiscriminate violence on innocent civilians was legally unacceptable and morally reprehensible in times of war and peace alike. However, although his delegation strongly favoured inclusion of those crimes in the Statute, it would be willing to support the compromise proposal for a nominal enumeration of those crimes, leaving the elaboration of elements to the Preparatory Commission, pursuant to article xx, paragraph 2. The same approach should be adopted with respect to the crime of aggression, the absence of which from the Statute would be a serious lacuna.

46. On the question of prohibited weapons in article 5 quater, section B, subparagraph (o) (vi), contained the elements of a compromise. However, he strongly advocated the inclusion of nuclear weapons in the list of prohibited weapons. His delegation favoured a cumulative approach to the question of preconditions to the exercise of jurisdiction, requiring acceptance of jurisdiction by the territorial and custodial States. For article 7 bis, on acceptance of jurisdiction, it supported option II, as the legal clarity that existed under the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 did not extend to other crimes. On the role of the Security Council, option 1 for article 10 provided a basis for compromise. On the *proprio motu* powers of the Prosecutor, there was no justification in international law for the powers envisaged under article 12, which seriously threatened the principle of complementarity.

47. **Mr. Manongi** (United Republic of Tanzania) said that his delegation shared the concern expressed that the necessary political will to secure inclusion of the crime of aggression in the Statute was lacking. His delegation had consistently supported automatic jurisdiction over all three core crimes, as provided for in option I for article 7 bis. However, while it had become resigned to option II, it reiterated its strong concerns

about the inherent weakening of the Court implied by that approach.

48. On the role of the Security Council, his delegation would have preferred the "no such provision" option, as the Court should not only be independent but should also be seen to be independent. In the interests of progress, however, his delegation was willing to support option 1 for article 10. Article 12 had prompted strong reservations, which might be allayed by the adoption of additional safeguards. Article 16 could be seen as offering such safeguards, and his delegation hoped that those with reservations regarding the *proprio motu* powers of the Prosecutor would reconsider them.

49. His delegation failed to see how elements of a crime could not be considered an integral part of the definition thereof. If article xx was adopted, the elements should be binding. Lastly, on war crimes, his delegation continued to favour option 2 for the chapeau of article 5 quater and the inclusion of nuclear weapons in section B, subparagraph (o), and was highly concerned at the formulation of the chapeau of section D. The new threshold contained therein was too high to allow the Court to play any meaningful role in the situations of non-international armed conflict with which the international community was increasingly faced.

50. **Mr. Wenaweser** (Liechtenstein) said that the Bureau proposal (A/CONF.183/C.1/L.59 and Corr.1) offered a very good basis on which to achieve a compromise for part 2. The question of the inclusion of aggression and treaty crimes was linked to articles 110 and 111, which were of crucial importance for the Statute as a whole and must be drafted so as to accommodate the legitimate concerns of delegations that favoured inclusion of those crimes.

51. On acceptance of jurisdiction, his delegation reiterated its strong preference for option I for article 7 bis. Automatic jurisdiction over the three core crimes was crucial for the effective functioning of the Court. The principle of equal treatment of the core crimes also applied to article 7, and his delegation favoured the language contained in its paragraph 1.

52. For article 10 it continued to favour option 1, although it might be possible to bridge the gap between the two options. Discussion should be devoted to the need for preservation of evidence and to the question of the "specified period of time" referred to in option 2, which his delegation found unacceptable. On article xx, his delegation favoured inclusion of elements of crimes in the Statute, provided that its entry into force was not thereby delayed. It favoured deletion of paragraph 4. On the question of additional safeguards, it continued to believe that article 12 was adequately drafted, taking into account article 16.

53. Agreement seemed to be closer on the thorny issue of war crimes. His delegation was unhappy with some of the changes made in the draft, but was willing to look at the language proposed in a wider context. With respect to article 5 ter, paragraph 1 (g), and article 5 quater, section B,

subparagraph (*p* bis), the time had come to reach an agreement on the inclusion of the crime of forced pregnancy.

54. **Mr. Mahmood** (Pakistan) said that his delegation was prepared to consider option II for article 7 bis, and supported article 7 ter. With regard to war crimes, it was opposed to the Court having jurisdiction over armed conflicts not of an international character, except in a situation where the State structure had collapsed. It would thus prefer to see article 5 quater, sections C and D, eliminated from the Statute. In a spirit of compromise, his delegation was prepared to consider elements of crimes, provided that they served only as guidelines and did not delay the entry into force of the Statute. Pakistan's position on exercise of jurisdiction was that the State should be the trigger mechanism for initiating the Court's jurisdiction, and it therefore favoured article 6 (*a*).

55. On the role of the Security Council, his delegation favoured option 3 for article 10. With regard to article 12, it was of the firm view that conferral of *proprio motu* powers on the Prosecutor would contravene the principle of complementarity. Consequently, it was also unable to support any reference in article 16 to the Prosecutor initiating an investigation pursuant to article 6 (*c*). Furthermore, the investigation by the Prosecutor should be stayed while the Pre-Trial Chamber was considering admissibility.

56. On article 15, paragraph 1 (*a*), his delegation had difficulty with the words "unwilling or", which violated the principle of complementarity. Those words should therefore be deleted, as should paragraph 1 (*b*). Paragraph 2 was unacceptable, but paragraph 3 could be retained, as it elaborated on the term "unable genuinely" contained in paragraph 1 (*a*).

57. **Mr. Al-Baker** (Qatar) said that the crime of aggression should fall within the Court's jurisdiction, and that agreement should be reached on a definition. Qatar could not accept the jurisdiction of the Court over internal conflicts, except in cases of total collapse of a State's judicial system, and wished to reaffirm the principle of complementarity between national systems and the Court. It also favoured the independence of the Prosecutor, who should not, however, be given total latitude with regard to *proprio motu* triggering.

58. **Mr. Magallona** (Philippines) endorsed the position of the Movement of Non-Aligned Countries concerning inclusion of the crime of aggression in the Statute. The review conference must give the highest priority to resolving that outstanding concern. On the role of the Security Council, his delegation proposed that article 10 should read: "In the event that the Court is requested by the Security Council, acting by resolution adopted under Chapter VII of the Charter of the United Nations, not to commence or to suspend its investigation or prosecution of a situation for a period of 12 months from receipt of such request by the Court, the Court may refrain or suspend such activity for such period of time." The provision allowing renewal of the request should be deleted.

59. On war crimes, his delegation preferred option 2 in article 5 quater. Section B, subparagraph (*g*), should include a reference to "ancestral homes" to take account of the interests of indigenous communities. Section B, subparagraph (*o*), should include a reference to nuclear weapons. Article xx should be deleted, as it would create problems of interpretation of the crimes defined in article 5. If elements of crimes were intended to serve only as guidelines, then they had no place in an instrument embodying the legal rights and duties of States. If, on the other hand, they were essential to understanding the legal nature of crimes, they must form part of the definition of crimes and could not be entrusted to the Preparatory Commission or consigned to an annex.

60. **Mr. Jurgelevičius** (Lithuania) endorsed the statement made by the representative of Austria on behalf of the European Union. His delegation favoured option I for article 7 bis. It also favoured option 1 for article 7, paragraph 2, as the most likely basis for compromise. On the role of the Security Council, Lithuania would accept option 1 for article 10, with the inclusion of a paragraph concerning the need for preservation of evidence. It also favoured *proprio motu* powers for the Prosecutor, and believed that no safeguards were needed other than those provided for in the proposed text for article 12. Its position with regard to elements of crimes was that they should have no binding effect. Lastly, it strongly favoured inclusion of the crime of aggression in the Statute and hoped that, if efforts to agree on a definition failed, it would be included under the appropriate amendment procedure in the near future.

61. **Mr. Nega** (Ethiopia) said that his delegation regretted the fact that, although inclusion of the crime of aggression was favoured by the overwhelming majority of States, the wish of the majority had been disregarded. Treaty crimes should also be included in the Statute and their definition entrusted to the Preparatory Commission. Ethiopia reiterated its support for subparagraph (*a*) of article 6; subparagraph (*b*) should be clarified through a specific reference to the relevant crime or crimes, and the Security Council's power of referral should be confined to acts of aggression. As it stood, subparagraph (*b*) would transform the Court into a subsidiary organ of the Council. Subparagraph (*c*) was unacceptable to his delegation, as was the current wording of article 12, to which subparagraph (*c*) was closely related.

62. Ethiopia favoured an opt-in approach, but it was prepared to consider option II for article 7 bis. It supported option 1 for article 7, paragraph 2, subject to the deletion of the reference to article 6 (*c*). On the threshold for war crimes in article 5 quater, it was now willing to accept option 2. On weapons, it was disappointed that option 2 for section B, subparagraph (*o*), of the provisions on war crimes in document A/CONF.183/C.1/L.53, which had commanded overwhelming support, had been discarded, but could accept the new subparagraph (*o*) subject to inclusion therein of nuclear weapons and anti-personnel landmines.

63. Ethiopia's position concerning article 10 remained unchanged. Article 12 was unacceptable as currently worded: conferral of *proprio motu* powers on the Prosecutor would be detrimental to the independence, universality and effectiveness of the Court. Article 18 set forth the important principle of *ne bis in idem*, but the exceptions provided for in subparagraphs (a) and (b) of its paragraph 3 required careful consideration. Subparagraph (b) might lead to undue interference in internal judicial matters, and should be deleted.

64. **Mr. Al-Adhami** (Iraq) said that the Bureau proposal did not reflect the views expressed in the Conference, particularly by member States of the Movement of Non-Aligned Countries. Iraq favoured inclusion of the crime of aggression in the Statute and adoption of the definition of aggression annexed to General Assembly resolution 3314 (XXIX). Economic embargoes should be added to the list of crimes against humanity. With regard to war crimes, nuclear weapons should be included in the list in article 5 quater, section B, subparagraph (o). Internal armed conflicts not of an international nature should not fall within the jurisdiction of the Court. On exercise of jurisdiction, situations should be referred to the Prosecutor only by a State party, and subparagraphs (b) and (c) of article 6 should therefore be deleted. On article 7 bis, Iraq favoured automatic jurisdiction over all three core crimes. For article 10, it favoured option 3, as the best guarantee of the Court's independence. It opposed conferral of *proprio motu* powers on the Prosecutor; an investigation should be initiated by the State party directly affected.

65. Article 15 must be drafted so as to make it consistent with the principle of complementarity between the Court and national jurisdictions. The words "unless the State is unwilling or unable genuinely to carry out the investigation or prosecution" should be deleted from subparagraph (a) of paragraph 1, as should the words "unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute" from subparagraph (b) and the words "and a trial by the Court is not permitted under paragraph 3 of article 18" from subparagraph (c). Paragraphs 2 and 3 should be deleted in toto. Article 16 was acceptable. Article 18, paragraph 3, should be deleted, to take account of the principle of complementarity.

66. **Mr. Kessel** (Canada) said that Canada was committed to automatic jurisdiction for the three core crimes, as proposed in option I for article 7 bis. On article 7, it supported paragraph 1 on genocide and option 1 for paragraph 2. For article 12, option 1 was its preferred choice: the necessary checks and balances were already in the text. On article 10, Canada recognized that, in order to maintain international peace and security the Security Council might need to request the suspension of investigations or prosecution by the Court. Option 1 provided a good basis for compromise.

67. As for article 5 quater, sections C and D, it was essential that non-international armed conflict should be included in the Statute. The new chapeau for section D might have set too high

a threshold and should be reviewed. As for elements of crimes, the language of article xx needed considerable revision. His delegation was concerned at the suggestion that the elements should be binding and must be adopted before the Prosecutor commenced an investigation. Furthermore, the paragraph might be better located in the resolution on the work of the Preparatory Commission. Lastly, Canada fully supported article 15 as currently drafted.

68. **Mr. Skibsted** (Denmark) said that his delegation shared the misgivings expressed concerning the threshold in relation to war crimes committed in internal armed conflicts, which was too high and unduly restrictive. It also regretted that article 5 quater, section D, contained no provision on prohibited weapons corresponding to the one in section B, subparagraph (o).

69. Denmark supported option 1 for article 12, and would be opposed to additional safeguards before the Prosecutor could act. It endorsed the views expressed at the thirty-third meeting by the representative of Germany concerning the crime of aggression and article xx, and would prefer to see article xx, paragraph 4, deleted or at least redrafted. Denmark firmly believed that the Court should have automatic jurisdiction over all three core crimes, and thus saw option I for article 7 bis as being of crucial importance. As to article 7, it was vital that the Court should have a uniform jurisdictional regime for all core crimes, and Denmark would favour the redrafting of article 7, paragraph 1, to make it applicable also to crimes against humanity and war crimes.

70. **Mr. Jeichande** (Mozambique) said that, despite events in Rwanda and the former Yugoslavia, the belief apparently persisted that it was more important to refine definitions than to treat aggression as a crime. With sufficient political will, questions concerning the definition of crimes or the role of the Security Council could be solved. While the proposal submitted by the Movement of Non-Aligned Countries was not perfect, it could serve as the basis for a definition of aggression that could be supported by all participants, subject to further clarification.

71. On war crimes, Mozambique accepted option 2 for the chapeau of article 5 quater, but believed that the article should include a reference to nuclear weapons and anti-personnel mines. Article 6 was acceptable. Mozambique believed that preconditions to the exercise of jurisdiction should be the same for all core crimes, and supported option 1 for article 7, paragraph 2. It also supported option I for article 7 bis. For article 10 it preferred option 3, but could accept option 1 on the understanding that the request of the Security Council could be renewed for no longer than six months, and once only. His delegation favoured conferral of *proprio motu* powers on the Prosecutor, and thus supported option 1 for article 12, which already contained the necessary safeguards. Lastly, article 20 should set out a clear hierarchy of applicable law. However, case law must not be taken as a binding source of applicable law, but only as a source of interpretation.

72. **Mr. Castellón Duarte** (Nicaragua) said that, with regard to acceptance of jurisdiction, his delegation preferred option I for article 7 bis, for the reasons adduced by the representative of Germany. It also favoured option 1 in article 7. It preferred option 1 for article 10, and also option 1 for article 12. Nicaragua accepted article 5, but wished to see the treaty crimes included in the Statute at a later stage, at a review conference or by means of a protocol. The crime of aggression should also be included in the not-too-distant future, and a resolution to that effect might be adopted. With regard to article 5 quater, Nicaragua favoured option 2, and regretted the deletion of the reference to nuclear weapons, and to anti-personnel landmines, which continued to cause loss of life and limb in his country. Lastly, Nicaragua favoured retention of article xx, paragraph 4, as proceedings could not be initiated without proper prior definition of the crime.

73. **Mr. da Costa Lobo** (Portugal) said that the proposed new text for article 5 quater, section D, on internal armed conflicts, would have the merit of covering situations in which the most serious crimes took place, and would also bring the Statute closer to existing international humanitarian law. With regard to the jurisdiction of the Court, although it subscribed to the principle of universal jurisdiction, Portugal was willing, in a spirit of compromise, to accept option I for article 7 bis and option 1 for article 7, paragraph 2. It also believed that the core crimes should be given uniform treatment.

74. With regard to the powers of the Prosecutor, option 1 for article 12 struck an appropriate balance. Article 16, however, still posed problems, particularly with regard to the status of States not parties, which would enjoy prerogatives without assuming the concomitant obligations. Portugal also had reservations concerning article xx, paragraph 4, and endorsed the comments made by the representative of Austria concerning the role of the Security Council.

75. **Mr. Prandler** (Hungary) said that the Bureau proposal required his delegation to make a number of painful concessions, which it was willing to make in a spirit of compromise. Hungary favoured automatic jurisdiction for all three core crimes and a unified regime for the preconditions to the exercise of jurisdiction. On the question of weapons, it could accept article 5 quater, section B, subparagraph (o), with its important reference to "inherently indiscriminate" weapons. The chapeau of section D could be accepted with some revision. Article xx was acceptable as a compromise text, but its application should not delay the entry into force of the Statute. Option 1 for article 10 was acceptable, as were articles 12 and 15. Article 16 was only acceptable as part of a package.

76. **Ms. Talvet** (Estonia) said that conferral of *proprio motu* powers on the Prosecutor was important for the credibility of the Court; her delegation thus supported the inclusion of article 6 (c) and of article 12. It also strongly favoured automatic jurisdiction over all three core crimes, as under option I for article 7 bis, and endorsed the reservations expressed by others

regarding the chapeau of article 5 quater, section D. As to preconditions to the exercise of jurisdiction, it favoured a unified regime and supported option 1 for article 7, paragraph 2. Her delegation was uncomfortable with article xx, paragraph 4, but could accept option 1 for article 10.

77. **Mr. Florian** (Romania) said that his delegation supported the statement made by the representative of Austria on behalf of the European Union. Romania favoured automatic jurisdiction of the Court over the three core crimes and option I for article 7 bis. On preconditions to the exercise of jurisdiction, it supported article 7, paragraph 1, on genocide, and option 1 for article 7, paragraph 2. It preferred option 1 for article 10, on the role of the Security Council, and considered article 12 a good basis for a compromise concerning the role of the Prosecutor. As to elements of crimes, article xx required substantial redrafting.

78. **Mr. Masuku** (Swaziland) said that his delegation favoured option I for article 7 bis and, concerning preconditions to the exercise of jurisdiction, had a strong preference for option 1 for article 7, paragraph 2. Concerning the role of the Security Council, it supported option 1 for article 10. Article 12 was well drafted, and already contained sufficient safeguards. Article xx, however, required further drafting, and elements of crimes should serve as guidelines, with no binding force.

79. **Mr. Clapham** (Solomon Islands) said that his delegation, too, favoured automatic jurisdiction for all three core crimes and option I for article 7 bis. On preconditions to the exercise of jurisdiction, it favoured option 1 for article 7, paragraph 2, and opposed option 3, which placed too much emphasis on the State of nationality. On the role of the Security Council, option 1 should be retained for article 10, subject to inclusion of a provision on the preservation of evidence. A combination of options 1 and 2 specifying a definite time period might also provide an acceptable solution. For article 12, option 1 was acceptable, and sufficient safeguards already existed. On article xx, the question of elements should not delay the entry into force of the Statute, and paragraph 4 should be amended or deleted.

80. On the question of war crimes in internal armed conflict, his delegation supported the inclusion of sections C and D in article 5 quater. However, the new chapeau of section D did not take account of the sort of contemporary conflict that the Court was designed to address. If the chapeau was retained, it should be amended to cover armed conflict between armed groups, as suggested by the representative of Sierra Leone.

81. **Ms. O'Donoghue** (Ireland) said that her delegation was not convinced that article xx was necessary, but would be willing to see a provision on elements of crimes included in the Statute. The elaboration of elements of crimes must not delay its entry into force or the operation of the Court, and elements of crimes should constitute guidelines of a non-binding nature. Consequently, paragraph 4 should be deleted.

82. On jurisdictional matters, the Court should have automatic jurisdiction over the three core crimes, and Ireland thus

favoured option I for article 7 bis. On preconditions to the exercise of jurisdiction, it believed that option 1 in article 7 should apply to all three crimes. *Proprio motu* powers for the Prosecutor were essential to the effectiveness of the Court, and option 1 for article 12 already contained sufficient safeguards. However, in a spirit of compromise, she could accept additional safeguards, and suggestions made concerning article 16 might be useful in that regard. Lastly, on the role of the Security Council, she could accept option 1 for article 10, but not the "specified period of time" referred to in option 2.

83. **Mr. Ruphin** (Madagascar) said that the international community must not remain indifferent to the plight of defenceless countries or allow aggressors to act with impunity. The crime of aggression should be included among the crimes over which the Court had jurisdiction. As for the treaty crimes, if it proved impossible to give them proper consideration at the Conference, they should be considered at a review conference to be held in the not-too-distant future. With regard to acceptance of jurisdiction, he favoured automatic jurisdiction over the most serious crimes, as under option I for article 7 bis. On article 8, he favoured non-retroactivity.

84. **Mr. Skelemeni** (Botswana) said that he looked forward to seeing the final text of the provisions on crimes of sexual violence, provisions to which he attached great importance. In article 5 quater, he favoured option 2, and deplored the exclusion of nuclear weapons and landmines from the list of prohibited weapons. Sections C and D were acceptable, although the latter, in particular, might be further improved. With regard to article xx, elements of crimes were acceptable if they took the form of guidelines, but they would need to be negotiated before signature of the Statute.

85. He was at a loss to understand the difficulties regarding definition of the crime of aggression. As to the acceptance of jurisdiction, he favoured automatic jurisdiction over all core crimes. On the role of the Security Council, the question of the period of time for which the Council could request a suspension needed further negotiation. In principle, however, options 1 and 2 for article 10 were acceptable. Option 1 for article 12 was also acceptable, particularly when the article was read in conjunction with article 16.

*The meeting rose at 9 p.m.*

### 36th meeting

Monday, 13 July 1998, at 9 p.m.

*Chairman:* Mr. Ivan (Romania) (Vice-Chairman)

A/CONF.183/C.1/SR.36

#### Agenda item 11 (*continued*)

**Consideration of the question concerning the finalization and adoption of a convention on the establishment of an international criminal court in accordance with General Assembly resolutions 51/207 of 17 December 1996 and 52/160 of 15 December 1997 (A/CONF.183/2/Add.1 and Corr.1 and A/CONF.183/C.1/L.59 and Corr.1)**

#### DRAFT STATUTE

PART 2. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW (*continued*)

*Proposal prepared by the Bureau (concluded)*  
(A/CONF.183/C.1/L.59 and Corr.1)

Article 5. Crimes within the jurisdiction of the Court (*continued*)

Article 5 bis. Genocide (*continued*)

Article 5 ter. Crimes against humanity (*continued*)

Article 5 quater. War crimes (*continued*)

Article xx. Elements of crimes (*continued*)

Article Y (*continued*)

Article 6. Exercise of jurisdiction (*continued*)

Article 7. Preconditions to the exercise of jurisdiction (*continued*)

Article 7 bis. Acceptance of jurisdiction (*continued*)

Article 7 ter. Acceptance by non-States Parties (*continued*)

Article 8. Temporal jurisdiction and non-retroactivity (*continued*)

Article 10. Role of the Security Council (*continued*)

Article 11. Referral of a situation by a State (*continued*)

Article 12. Prosecutor (*continued*)

Article 15. Issues of admissibility (*continued*)

Article 16. Preliminary rulings regarding admissibility (*continued*)

Article 18. *Ne bis in idem* (*continued*)

1. **Mr. Fife** (Norway) said that automatic jurisdiction and a uniform jurisdictional regime for the three core crimes were essential for the credibility of the International Criminal Court.



His delegation was still not persuaded that the crime of aggression or any of the treaty crimes could be inserted at the current stage, but thought they could be addressed in some other manner at a later stage.

2. On war crimes (article 5 quater), his delegation favoured the threshold in option 2. It could support the listing of weapons in section B, subparagraph (o), but was not yet persuaded that the drafting of subparagraph (o) (vi) was suitable. Regarding armed conflicts not of an international character, Norway still wished to see the inclusion of both section C and section D. In restricting the application of section D to conflicts between armed forces and dissident armed forces, the new chapeau unduly limited the scope of well-established norms of international law.

3. Norway could basically support the inclusion of article xx on elements of crimes, but was not persuaded that the wording proposed was useful. It should be made absolutely clear that the elements to be considered would be guidelines of a non-binding nature. In paragraph 4, the word "shall" needed to be replaced by the word "should" so as to avoid the possibility of an interpretation that would allow a single State to veto the initiation of an investigation.

4. With regard to article 6 on exercise of jurisdiction, his delegation had difficulty in accepting that a distinction should be drawn between genocide and other crimes against humanity. On preconditions to the exercise of jurisdiction, Norway favoured option 1 for article 7, paragraph 2. It agreed that option 3 would actually be an incentive for States not to ratify the Statute, as it would effectively give non-party States the right to veto the possibility of prosecuting their nationals. Norway thus favoured option I for article 7 bis on acceptance of jurisdiction and could support the proposal in article 7 ter.

5. On the role of the Security Council, his delegation definitely favoured option 1 for article 10 and did not see how a waiting period of 12 months could be at variance with Article 103 of the Charter of the United Nations. Norway had no objection to article 11. As for article 12, it strongly favoured option 1, conferring *proprio motu* powers on the Prosecutor. The existing safeguards were basically satisfactory, although article 16 also contained safeguard provisions that might be worth exploring.

6. **Ms. Shahen** (Libyan Arab Jamahiriya) said that the proposal before the Committee of the Whole took into account only one point of view and did not represent a balanced approach. The crime of aggression must be included in the Statute. Economic embargoes should be included in article 5 ter as a crime against humanity. The exclusion of nuclear weapons from article 5 quater, section B, subparagraph (o), was a grave omission. Her delegation opposed the inclusion of sections C and D on armed conflicts not of an international character, although, if section C had been amended to indicate that its provisions were without prejudice to the sovereignty of States, her country might have been able to accept it.

7. Concerning preconditions to the exercise of jurisdiction, she said that jurisdiction must be uniform and preferably of the opt-in type, which was not reflected in the Bureau proposal. The power vested in the Prosecutor should be restricted. He or she should be able to commence an investigation on the basis of information obtained from a State, but not on the basis of information from non-governmental organizations, victims or their representatives.

8. With regard to article 10, her delegation could not agree to any role for the Security Council. The Court would be paralysed if the Council could impede its investigations because of the veto power of individual States. Her delegation therefore favoured the deletion of article 10.

9. **Mr. R. P. Domingos** (Angola) said that, although the Bureau proposal was commendable, his delegation regretted that it did not take into account the definition of aggression proposed in document A/CONF.183/C.1/L.56 and Corr.1. Angola also regretted that, in connection with weapons to be prohibited, no reference was made to nuclear weapons and anti-personnel mines. It advocated automatic jurisdiction for the gravest crimes and endorsed the inclusion of subparagraph (c) in article 6.

10. On the role of the Security Council, his delegation could support option 1 for article 10 but believed that limits must be set: the Council must not be permitted to suspend the jurisdiction of the Court indefinitely. Angola also supported a strong and independent Prosecutor with ex officio powers and therefore favoured option 1 for article 12. That option already provided sufficient safeguards.

11. **Mr. Okoulatsongo** (Congo) said that his delegation was surprised to note that, disregarding the views of the majority, the Bureau had not included the crime of aggression as a core crime within the jurisdiction of the Court, instead setting a deadline for agreement on a definition. Failure to meet that deadline would mean, however, not – as the Bureau apparently hoped – that the interest in addressing that crime would have to be reflected in some other way, but that the crime of aggression would have to be included in the Statute and the question of its definition deferred to some future date.

12. Irrespective of whether or not a conflict was international, it was children, women and the elderly who suffered the most. Efforts must continue to find an acceptable formulation for the provisions protecting those vulnerable sectors of the population, particularly women victims of sexual violence during armed conflicts.

13. The phrase "‘Torture’ means the intentional infliction of severe pain or suffering ... upon a person in the custody or under the control of the accused", in article 5 ter, paragraph 2 (c), was badly formulated, as, at the time when the torture was carried out, the person who inflicted it had not yet been an accused person. The phrase should therefore read: "‘Torture’ means the intentional infliction by a person of severe pain or suffering ... upon another person under his or her custody or control". The



phrase “pursuant to or in furtherance of a State or organizational policy to commit such attack”, in article 5 ter, paragraph 2 (a), constituted an unacceptable threshold that in no way reflected contemporary realities or international law. Most delegations had supported option 3 in discussion paper A/CONF.183/C.1/L.53. That option was not included in the Bureau proposal, and should be reinstated. Option 2 could be accepted only for lack of anything better.

14. Both options for the chapeau of article 5 quater on war crimes should be deleted, as the words “as a part of a plan or policy or as part of a large-scale commission of such crimes” might result in impunity for those who committed war crimes. The chapeau of that article should consist only of the words “For the purpose of the present Statute, war crimes means:”.

15. With regard to preconditions to the exercise of jurisdiction, his delegation was surprised to see that the proposal by Germany in that regard had not been retained. Nevertheless, in a spirit of cooperation, his delegation could accept option I for article 7 bis, which proposed automatic jurisdiction over the three core crimes.

16. On the role of the Security Council, the period of time during which the Court must suspend an investigation at the request of the Council must not exceed six months and must not be renewable. Protection of witnesses and of evidence must be ensured. The Prosecutor must be able to initiate investigations *proprio motu*, but article 12 established an unacceptable regime. The Pre-Trial Chamber should be entitled to act only after the Prosecutor had done so, and the latter must have very broad powers in order to carry out an effective investigation. His delegation accordingly rejected both option 1 and option 2 for article 12.

17. **Mr. Maquieira** (Chile) said that acceptance of jurisdiction must be automatic. The options for preconditions to the exercise of jurisdiction set out in the Bureau proposal could form the basis for a solution. There was no major difference between the two options for article 10 on the role of the Security Council. Perhaps a compromise could be found that would make it possible, with the agreement of the Pre-Trial Chamber, to take the necessary measures to safeguard evidence.

18. Additional safeguards for the Prosecutor could be acceptable provided they were not merely a device for reducing or eliminating the Prosecutor’s *proprio motu* capacity by roundabout means. Finally, the provisions on elements of crimes should serve as guidelines without binding effect.

19. **Mr. Sayyid Said Hilal Al-Busaidy** (Oman) said that his delegation shared the views expressed by the representative of the Islamic Republic of Iran on behalf of the Movement of Non-Aligned Countries concerning article 5. Like many other countries of that Movement, Oman was disappointed to see that the crime of aggression had not been included among the core crimes within the jurisdiction of the Court, and supported the inclusion of a clear definition of that crime along the lines

proposed by the delegations of the Syrian Arab Republic and Bahrain.

20. Although Oman believed that there should be no threshold for war crimes, it could, in a spirit of compromise, support the threshold in option 2 for the chapeau of article 5 quater. Nuclear weapons should be included in the list. Internal conflicts should not fall within the jurisdiction of the Court except in the event of total collapse of the judicial system. With regard to preconditions to the exercise of jurisdiction, following the withdrawal of option 3 his delegation had no choice but to accept option 2.

21. For article 7 bis, Oman supported option II, which provided for automatic jurisdiction for genocide and opt-in jurisdiction for crimes against humanity and war crimes. Article 7 ter should be retained. On article 10, the Security Council should in no circumstances be allowed to hinder the work of the Court. The duration of the period during which the Court could be requested to suspend its investigation or prosecution must be specified, and that period must be brief and non-renewable.

22. The Prosecutor should have a prominent role, but should not be able to initiate investigations *proprio motu*. However, if he or she were accorded such powers, Oman would support option 2 for article 12.

23. **Mr. Díaz La Torre** (Peru) said that there appeared to be a consensus that genocide, crimes against humanity and war crimes should constitute the core crimes; it was to be hoped that consensus could also be reached on acceptance of automatic jurisdiction over all three core crimes. Options 1 and 2 for article 10 could be combined so that the Court would suspend its activity at the request of the Security Council for a period of 12 months, renewable once, if the accused person was not under detention. If the accused was detained, the suspension should be for six months only, renewable once only.

24. On the role of the Prosecutor, Peru was satisfied with option 1 for article 12, particularly its paragraph 3. It saw no need to include a provision for additional safeguards before the Prosecutor could act. Elements of crimes should be defined before the Statute entered into force. Peru supported article Y as currently drafted. It preferred option 2, covering sections A and B, in article 5 quater. The crime of sexual violence should of course be included in both article 5 ter and article 5 quater. Lastly, Peru also supported the Spanish proposal that the second sentence of article 7 ter should be strengthened so as to require the accepting State to cooperate with the Court in accordance with all the provisions of the Statute – not merely with part 9 thereof.

25. **Mr. Agius** (Malta) said that his country was strongly opposed to any opt-in or opt-out possibility with regard to the acceptance of jurisdiction and firmly in favour of automatic jurisdiction over all three core crimes. With regard to preconditions to the exercise of jurisdiction, Malta favoured uniformity for all the core crimes, along the lines of the proposal

by the Republic of Korea. It reiterated its support for a Prosecutor with *proprio motu* powers. For article 12 it preferred option 1, which contained adequate safeguards. A provision for additional safeguards would be acceptable only as a compromise.

26. Malta preferred option 1 for article 10 on the role of the Security Council: option 2 carried the inherent risk that Council deliberations might be protracted indefinitely. With regard to article xx, the end result of the inclusion of that provision would be to render the Statute ineffective for as long as it took to achieve consensus on a formulation. In any event, Malta was against the retention of paragraph 4.

27. The crime of aggression should be included in the Statute, and Malta held out hope for a last-minute consensus on an acceptable definition. Failing that, it would fully support the recommendation made by the representative of Germany in that regard. As for treaty crimes, Malta agreed with the Bureau's recommendation that they should be deferred for future consideration.

28. Ms. Tomič (Slovenia) said that, on the acceptance of jurisdiction and its exercise, her delegation favoured a uniform approach to all three core crimes, namely, automatic jurisdiction upon ratification of the Statute and the application of the formula proposed by the Republic of Korea on preconditions. Accordingly, Slovenia favoured article 7, paragraph 1, and option 1 for paragraph 2. It would prefer paragraph 2 (b) to be reformulated in order to refer to the State on whose territory the accused or suspect was present, rather than to the State that had custody, a wording that could be interpreted too narrowly. Her delegation strongly supported option I for article 7 bis.

29. As to the chapeau of article 5 quater, Slovenia favoured option 2 for the general threshold and supported the inclusion of subparagraph (a ter) in section B. It had already proposed inclusion of a reference to civilians or civilian objects within United Nations safe areas but, despite considerable support, that wording had not been reflected in the Bureau proposal. In view of the late stage of negotiations, her delegation would not insist on its proposal, but wished to place on record its understanding of section B, subparagraph (a), concerning attacks against civilian populations as also providing protection to civilians in safe areas.

30. Slovenia had noted with concern the heightened threshold in section D, the shortened list of crimes, and especially the deletion of the weapons provision. It endorsed the amendment proposed by the delegation of Sierra Leone for the chapeau of section D. It firmly supported inclusion of crimes of sexual violence in their various manifestations, including enforced pregnancies, both under war crimes and under crimes against humanity.

31. On article xx, Slovenia favoured the deletion of paragraph 4, as adoption of elements of crimes should not delay the Statute's entry into force and the future Court's functioning. Elements of crimes should serve as guidelines of a non-binding nature.

Slovenia could support option 1 for article 10 on the role of the Security Council, with a precisely defined time frame of 12 months, and would favour the inclusion of additional language concerning the preservation of evidence. Finally, her delegation reiterated its support for conferring *proprio motu* powers on the Prosecutor and its belief that the safeguards already set out in article 12 were sufficient.

32. Mr. Patel (Zimbabwe) said that his delegation endorsed the view that aggression was an international crime par excellence and that it should be included in article 5. Regarding article 5 quater, option 2 was clearly preferable, as it allowed for the widest possible jurisdiction over war crimes. The concern that inclusion of minor breaches might undermine the Court's effectiveness was covered by the reference in article 15, paragraph 1 (d), to cases not of sufficient gravity to justify further action by the Court.

33. On section B, subparagraph (o), and the listing of weapons, Zimbabwe would prefer to include nuclear weapons and landmines because they were inherently indiscriminate. If that was not possible, the entire list could be deleted and only a general reference to weapons which were disproportionate or indiscriminate in their effects included. Failing all else, subparagraph (o) could be accepted in the light of the provisions of its subparagraph (vi). The lower threshold for sections C and D was to be preferred, and consistency between the two chapeaux should be ensured.

34. With regard to article 7, paragraph 2, his delegation favoured option 1 as being consistent with the principle of universal jurisdiction. For article 7 bis, his delegation also supported option I providing for automatic jurisdiction over all three core crimes. Article 10 on the role of the Security Council would be appropriate only if the crime of aggression were included in the Statute. Otherwise, the article should be deleted.

35. Article xx was unclear in object and content, and should be deleted. If it was retained, its paragraph 4 should certainly not be allowed to stand.

36. Mr. Morshed (Bangladesh) said that his delegation wished to join those of Botswana and Jordan in expressing the strong hope that adequate language would be found to cover crimes of sexual violence in article 5 quater, section B, subparagraph (p bis). Bangladesh preferred option 2 for article 12 on the powers of the Prosecutor: the Pre-Trial Chamber should consist of five judges with mandatory review powers, and a unanimous, affirmative vote of all five members should be necessary before the Prosecutor could act.

37. Mr. Rhenán Segura (Costa Rica) said that there should be automatic jurisdiction over all three core crimes. Costa Rica supported option 2 for the chapeau of article 5 quater and was satisfied with the wording of section D, subparagraph (b bis). It hoped that a definition would soon be found for crimes of sexual violence. Nuclear weapons should be included in section B, subparagraph (o). Armed conflicts not of an international character

should be covered by the Statute, and article 5 quater, section D, should be strengthened so as to cover conflicts between different armed groups or involving armed groups that did not control territory. Paragraph 4 of article xx on elements of crimes posed serious problems. His delegation supported article Y and the inclusion of subparagraph (c) in article 6. Paragraph 1 of article 7 and option 1 for paragraph 2 should be merged so as to produce a single text. His delegation supported option 1 for article 10 on the role of the Security Council and option 1 for article 12 on the Prosecutor.

38. **Mr. González Daza** (Bolivia) said that his delegation regretted the fact that the crimes of aggression, drug trafficking and terrorism, which were new threats to international and internal peace and security, had not been included in the Statute. The suggestion that they should be dealt with later at a special conference left his delegation fearful that extension of the Court's jurisdiction to cover such crimes might be postponed indefinitely. On article 6, Bolivia endorsed Mexico's view that not only the Security Council but also the General Assembly should be able to refer situations to the Prosecutor. On article 7 bis, Bolivia supported automatic jurisdiction over all core crimes. Lastly, it favoured deletion of article 10, as options 1 and 2 would limit the autonomy of the Court and make it dependent upon the political decisions of the Council.

39. **Mr. Minoves Triquell** (Andorra) said that his delegation would have been able to support inclusion of the crime of aggression, but that, since the definition of that crime posed problems, it might be best to defer consideration of the matter and to try to make progress on other subjects. Andorra supported option 2 for the chapeau of article 5 quater on war crimes and favoured the inclusion of sections C and D. On the exercise of jurisdiction, it endorsed article 6 and option 1 for article 12. The role of the Security Council was properly covered in option 1 for article 10, and the Belgian proposal on the need for preservation of evidence was of interest. While, in a spirit of compromise, his delegation could agree to the inclusion of article 16, it believed that article should be simplified.

40. **Mr. Zappalà** (Bosnia and Herzegovina) said that his delegation could support only option I for article 7 bis, namely, automatic jurisdiction over all three core crimes. A uniform approach to the core crimes should be retained in article 7, and his delegation therefore supported option 1 for paragraph 2. It preferred option 1 for article 10 on the role of the Security Council but believed that options 1 and 2 could be combined to form a composite text, including a provision to ensure the protection of witnesses and the preservation of evidence during any suspension of the Court's action by the Council.

41. Option 1 for article 12 on the *proprio motu* powers of the Prosecutor was the only possible solution, and already contained sufficient safeguards. On article xx, his delegation believed that elements of crimes should be guidelines only and should not prevent the entry into force of the Statute. Consequently, the

word "shall" in paragraph 4 of that article needed to be amended to read: "should".

42. His delegation was concerned about raising the threshold for war crimes under article 5 quater, section D, but thought that, if a different threshold had to be established, the wording proposed by the delegation of Sierra Leone would be acceptable. Regarding the list of crimes in article 5 quater, he shared the regret expressed by the representative of Slovenia over the exclusion of the reference to civilians and civilian objects within United Nations safe areas. On article 7, he supported the Slovenian proposal that the phrase "the State that has custody of the accused/suspect" should be amended so as to refer to the State in whose territory the accused was present.

43. **Mr. Belinga Eboutou** (Cameroon) said that article 18, paragraphs 3 (a) and (b), raised the problem of complementarity. The questions as to who should decide that proceedings had not been conducted independently, and on the basis of what criteria, also arose. Those two subparagraphs should be deleted, along with the words "unless the proceedings in the other court" that immediately preceded them.

44. For article 12, further improvements needed to be made to dispel any remaining ambiguity. Paragraph 1 of option 1 might read: "The Prosecutor may initiate a preliminary investigation in the following circumstances", with those circumstances enumerated thereafter. On article 10, his delegation favoured the Security Council's involvement. The idea that the Court could not restrict or violate the prerogatives of the Council had been reflected in a working paper submitted by his delegation (A/CONF.183/C.1/L.39). Cameroon therefore favoured option 1, which preserved the prerogatives of the Council as well as the autonomy of the Court. For article 7 bis on acceptance of jurisdiction, his delegation was inclined to favour option II.

45. On article 5, exclusion of the crime of aggression would be a grave omission. His delegation wished to propose a formulation to serve as a basis for the search for consensus, to read: "The jurisdiction of the Court shall cover the most serious crimes of concern to the international community as a whole. The Court shall have jurisdiction in accordance with this Statute with respect to the following crimes: the crime of genocide, crimes against humanity, war crimes and the crime of aggression, whose elements will be adopted by the Assembly of States Parties." Such a formulation would refocus participants' attention on the expectations of the international community.

46. **Mr. Tomka** (Slovakia) said that his delegation, too, would have welcomed inclusion of the crime of aggression among the crimes within the jurisdiction of the Court under article 5. However, that matter should now be left for the review conference. Concerning article 5 quater on war crimes, Slovakia had strongly favoured option 3 set out in the earlier discussion paper (A/CONF.183/C.1/L.53). Since there seemed to be very little support for option 1, his delegation believed that it should be deleted.

47. Concerning article xx, elements of crimes should not be binding on the Court but should simply serve as guidelines. The International Tribunals for the Former Yugoslavia and for Rwanda had been able to function effectively without any provisions relating to the elements of crimes. Similarly, the Court would be able to function perfectly well on the basis of the Statute. Article xx, paragraph 4, should be deleted.

48. The order of articles 7 and 7 bis should be reversed. His delegation favoured automatic jurisdiction, and considered that an opt-in formula for crimes against humanity and war crimes would be the worst possible solution because it would discourage States from accepting obligations. There was no reason to make a distinction between preconditions to the exercise of jurisdiction over genocide and over crimes against humanity and war crimes: the paragraph on preconditions for genocide should be applicable to the two other categories of crimes. Regarding article 7 ter, the introductory phrase "If the acceptance of a State that is not a Party to this Statute is required under article 7" should be replaced by the words "If the acceptance of a State that is not a Party to the Statute is a precondition to the exercise of its jurisdiction under article 7", as acceptance by a non-party State could not be required under article 7.

49. Slovakia had a slight preference for option 1 for article 10 on the role of the Security Council but could also accept option 2, provided that a provision concerning preservation of evidence, along the lines proposed by Belgium in document A/CONF.183/C.1/L.7, was included. Article 10 could form part of a package deal on jurisdictional issues, as could article 12, for which his delegation preferred option 1.

50. **Ms. Dobrája** (Latvia) expressed support for the statement made by the representative of Austria on behalf of the European Union. With regard to article 5, she said that, like the overwhelming majority of delegations, Latvia was disappointed at the fact that the crime of aggression was not to be covered by the Statute. A resolution or clause in the Final Act should be drafted to reflect the views of the majority in that regard. Concerning jurisdiction, her delegation favoured option 1 for article 7 and option I for article 7 bis. On article xx, Latvia

supported the views expressed by the representative of Canada. On the role of the Security Council, it supported option 1 for article 10. As for the role of the Prosecutor, Latvia favoured option 1 for article 12.

51. **Ms. Doswald-Beck** (Observer for the International Committee of the Red Cross) said that acceptance of jurisdiction was a fundamental issue. Would-be war criminals must realize that, if they were not tried at the national level, the likelihood was that they would be tried at the international level. The Court must thus have automatic jurisdiction over war crimes and crimes against humanity, not just over genocide. Her organization was particularly concerned at the suggestion that there should be no universal jurisdiction for war crimes, given that all the States present were parties to the Geneva Conventions of 1949, which provided for compulsory universal jurisdiction over grave breaches. Following the Second World War, war criminals had been tried on the basis of such universal jurisdiction. Suggestions that universal jurisdiction was a utopian dream were thus the opposite of the truth. Under international law, every State had the right, and most had the duty, to prosecute or extradite suspected war criminals. Any form of additional consent, such as an opt-in precondition to the exercise of the Court's jurisdiction, might give the impression that States could lawfully protect war criminals from prosecution. That would be a retrograde step for international law and would severely limit the Court's effectiveness.

52. With regard to armed conflicts not of an international character, she pointed out that, under the new threshold added to section D, many conflicts, and indeed most internal armed conflicts, would not be covered, and that many atrocities would thus not be triable under the Statute. Furthermore, many of the acts listed in section D were recognized as crimes by customary law. It was therefore most important that section D should not be omitted.

53. **The Chairman** said that the Committee of the Whole had thus concluded its consideration of the Bureau proposal contained in document A/CONF.183/C.1/L.59 and Corr.1.

*The meeting rose at 10.50 p.m.*

### 37th meeting

Tuesday, 14 July 1998, at 3.10 p.m.

*Chairman:* Mr. Kirsch (Canada)

A/CONF.183/C.1/SR.37

#### Statement by the Minister for Foreign Affairs of Italy

1. **Mr. Dini** (Minister for Foreign Affairs of Italy) said that not since the adoption of the Charter of the United Nations in San Francisco had the United Nations set itself such an

ambitious goal as the drafting of the Statute of the International Criminal Court. He was sure that all present were conscious of their own personal responsibility to history and to the world. None could fail to sense that what was at stake was the legitimacy of the United Nations itself as a body capable of

establishing rules and principles that were consonant with the times. All must be aware of their responsibility to future generations. He trusted that the United Nations Secretary-General would participate personally in the concluding phase of the Conference, given his personal standing and the contribution that he could make to ensuring a successful conclusion.

2. Difficulties had understandably emerged. The aim was to consolidate an international community underpinned by the primacy of the individual. The institution of the Court would prevent national sovereignty from being used as a convenient shield behind which violence and outrage were committed. Human rights would henceforth be protected by an international jurisdiction superimposed on national jurisdiction. The vital balance to be struck between national prerogatives and international demands could not be at the expense of the independence, authority and effectiveness of the institution that was about to be brought into existence.

3. There was manifest public concern that the Conference should bring its work to fruition. Intense emotions had been generated by recent conflicts which ignored the traditional rules of war and were revealing undreamed-of reserves of ferocity and brutality.

4. Crucial decisions were about to be taken. In the negotiations, Italy had aimed high from the start, taking into account the expectations of the public, but had also borne in mind the need to seek acceptable compromises on the various issues involved.

5. The Statute of the new Court was to be signed in Rome on 18 July by the representatives of all participating countries. The opportunity to make a fundamental stride forward in the history of the United Nations must not be allowed to slip away.

#### Agenda item 11 (*continued*)

**Consideration of the question concerning the finalization and adoption of a convention on the establishment of an international criminal court in accordance with General Assembly resolutions 51/207 of 17 December 1996 and 52/160 of 15 December 1997 (A/CONF.183/2/Add.1 and Corr.1, A/CONF.183/C.1/WGIC/L.11/Add.2 and Corr.1 and Add.3 and Corr.1 and 2 and A/CONF.183/C.1/WGIC/L.15 and Corr.1)**

#### DRAFT STATUTE

##### PART 9. INTERNATIONAL COOPERATION AND JUDICIAL ASSISTANCE (*continued*)

##### *Report of the Working Group on International Cooperation and Judicial Assistance (continued)* (A/CONF.183/C.1/WGIC/L.11/Add.2 and Corr.1 and Add.3 and Corr.1 and 2)

6. **Mr. Mochochoko** (Lesotho), Chairman of the Working Group on International Cooperation and Judicial Assistance, introduced the reports of the Working Group contained in documents A/CONF.183/C.1/WGIC/L.11/Add.2

and Corr.1 and Add.3 and Corr.1 and 2. Document A/CONF.183/C.1/WGIC/L.11/Add.2 and Corr.1 contained a number of proposed provisions for the consideration of the Committee of the Whole. In connection with additional paragraph 2 for article 90 quater, he pointed out that article 90 quater itself had been forwarded to the Committee in the Group's previous report and was to be found in document A/CONF.183/C.1/WGIC/L.15 and Corr.1.

7. Regarding document A/CONF.183/C.1/WGIC/L.11/Add.3 and Corr.1 and 2, the attention of the Committee was drawn in particular to paragraph 2 of the introduction, indicating amendments proposed to provisions previously transmitted to the Committee.

8. He commended the provisions contained in the reports to the Committee of the Whole with the recommendation that they should be forwarded to the Drafting Committee.

9. **Mr. Al Awadi** (United Arab Emirates), supported by **Mr. Khalid Bin Ali Abdullah Al-Khalifa** (Bahrain), said that article 91, paragraph 4, as it appeared in document A/CONF.183/C.1/WGIC/L.11/Add.3 and Corr.1 and 2 would give the Prosecutor the right to take certain measures without the approval of the State concerned, which was incompatible with the principle of complementarity. The Prosecutor should have the agreement of the State party which he or she wished to visit. The paragraph should be redrafted in order to take into account the right of the State party concerned to approve the Prosecutor's opening an investigation or travelling to its territory.

10. **Mr. Mochochoko** (Lesotho), Chairman of the Working Group on International Cooperation and Judicial Assistance, said that the proposed text represented a balanced compromise between competing views on the issue. It had been realized that the Prosecutor could not travel to any State without that State's consent, but it would have made the provision too cumbersome to spell out all the mechanisms that could be used in such circumstances.

11. **Mr. Madani** (Saudi Arabia) expressed his delegation's reservations in respect of article 91 as it stood.

12. **Mr. S. R. Rao** (India), referring to paragraph 2 of document A/CONF.183/C.1/WGIC/L.11/Add.2/Corr.1, said that he wished to reiterate his delegation's position that the phrase which had been placed in brackets should be deleted.

13. **Mr. Al-Baker** (Qatar) fully endorsed the views expressed by the representatives of the United Arab Emirates, Bahrain and Saudi Arabia.

14. **The Chairman** suggested that article 91 should be considered further by the Working Group. The remaining provisions could be submitted to the Drafting Committee.

15. *It was so decided.*

**Agenda item 12 (continued)**

**Adoption of a convention and other instruments deemed appropriate and of the final act of the Conference**

(A/CONF.183/2/Add.1 and Corr.1 and

A/CONF.183/C.1/L.49/Rev.1/Add.1)

*Recommendations of the Coordinator (continued)*

(A/CONF.183/C.1/L.49/Rev.1/Add.1)

16. **Mr. S. R. Rao** (India), speaking as Coordinator, introduced document A/CONF.183/C.1/L.49/Rev.1/Add.1. It contained recommendations, based on informal consultations, concerning two subparagraphs of paragraph 4 of the draft resolution on the establishment of the proposed Preparatory Commission for the International Criminal Court, to be annexed to the Final Act. For paragraph 4 (a), agreement had been reached on a text on the understanding that there would be a footnote to take into account the views of certain delegations. With regard to paragraph 4 (f), it had been agreed that the brackets could be removed. The Committee of the Whole might wish to refer the two subparagraphs to the Drafting Committee.

17. *It was so decided.*

**Agenda item 11 (continued)**

**Consideration of the question concerning the finalization and adoption of a convention on the establishment of an international criminal court in accordance with General Assembly resolutions 51/207 of 17 December 1996 and 52/160 of 15 December 1997** (A/CONF.183/2/Add.1 and Corr.1, A/CONF.183/C.1/L.64, A/CONF.183/C.1/L.65/Rev.1, A/CONF.183/C.1/L.66 and Add.1, A/CONF.183/C.1/L.67/Rev.1, A/CONF.183/C.1/L.68/Rev.2 and A/CONF.183/C.1/WGPM/L.2/Add.7 and Corr.1)

**DRAFT STATUTE**

PART 1. ESTABLISHMENT OF THE COURT (*continued*)

PART 3. GENERAL PRINCIPLES OF CRIMINAL LAW (*continued*)

PART 4. COMPOSITION AND ADMINISTRATION OF THE COURT (*continued*)

PART 9. INTERNATIONAL COOPERATION AND JUDICIAL ASSISTANCE (*continued*)

PART 11. ASSEMBLY OF STATES PARTIES (*continued*)

*Report of the Drafting Committee*

(A/CONF.183/C.1/L.64, A/CONF.183/C.1/L.65/Rev.1, A/CONF.183/C.1/L.66 and Add.1, A/CONF.183/C.1/L.67/Rev.1 and A/CONF.183/C.1/L.68/Rev.2)

18. **The Chairman** invited the Chairman of the Drafting Committee to introduce that Committee's report on parts 1, 3, 4, 9 and 11 of the draft Statute (A/CONF.183/C.1/L.64,

A/CONF.183/C.1/L.65/Rev.1, A/CONF.183/C.1/L.66 and Add.1, A/CONF.183/C.1/L.67/Rev.1 and A/CONF.183/C.1/L.68/Rev.2).

19. **Mr. Bassiouni** (Egypt), Chairman of the Drafting Committee, said that the Committee consisted of 25 delegations representing all the geographic areas and various legal systems of the world. Under the established rules, it did not deal with matters of substance but was responsible for ensuring that the text as a whole was a homogeneous and cohesive one which avoided ambiguities and matters which were not clear. A great deal of time had been spent ensuring consistency of expression and clarity throughout the text.

20. **The Chairman** thanked the Chairman of the Drafting Committee and its members for their efforts.

21. **Mr. Güney** (Turkey) said that the proposed text for article 22 raised a substantive issue. The proposed draft did not reflect the agreement reached during the discussions that had taken place on the proposal to combine the original articles 8 and 22. In that connection, he drew attention to what he had said at the thirtieth meeting of the Committee of the Whole.

22. **Mr. Yáñez-Barnuevo** (Spain), supported by **Mr. Hamdan** (Lebanon) and **Mr. Baker** (Israel), suggested that article 22 should be considered along with article 8 in the context of part 2.

23. **The Chairman** said that the matter would be considered further at the next meeting.

PART 5. INVESTIGATION AND PROSECUTION (*continued*)

PART 6. THE TRIAL (*continued*)

PART 8. APPEAL AND REVIEW (*continued*)

*Report of the Working Group on Procedural Matters (continued)* (A/CONF.183/C.1/WGPM/L.2/Add.7 and Corr.1)

24. **Ms. Fernández de Gurmendi** (Argentina), Chairman of the Working Group on Procedural Matters, introduced the latest report of the Working Group (A/CONF.183/C.1/WGPM/L.2/Add.7 and Corr.1), submitting a number of proposed provisions for parts 5, 6 and 8 of the draft Statute.

25. **The Chairman** asked whether he could take it that the Committee of the Whole agreed to refer the text of the articles contained in the report of the Working Group to the Drafting Committee.

26. *It was so decided.*

*The meeting rose at 4.05 p.m.*

### 38th meeting

Wednesday, 15 July 1998, at 3.15 p.m.

*Chairman:* Ms. Fernández de Gurmendi (Argentina) (Vice-Chairman)

A/CONF.183/C.1/SR.38

#### Agenda item 11 (*continued*)

**Consideration of the question concerning the finalization and adoption of a convention on the establishment of an international criminal court in accordance with General Assembly resolutions 51/207 of 17 December 1996 and 52/160 of 15 December 1997** (A/CONF.183/2/Add.1 and Corr.1, A/CONF.183/C.1/L.47/Add.2, A/CONF.183/C.1/L.73, A/CONF.183/C.1/WGAL/L.2/Add.1 and Corr.1, A/CONF.183/C.1/WGE/L.14/Add.2 and A/CONF.183/C.1/WGIC/L.11/Add.4 and Corr.1)

#### DRAFT STATUTE

##### PREAMBLE (*continued*)

##### *Recommendations of the Coordinator* (A/CONF.183/C.1/L.73)

1. **Mr. Slade** (Samoa), Coordinator for the preamble, said that, as a result of further consultations, agreement had now been reached on a text for the preamble, set out in document A/CONF.183/C.1/L.73.
2. **The Chairman** asked whether she could take it that the Committee of the Whole agreed to refer the text contained in document A/CONF.183/C.1/L.73 to the Drafting Committee.
3. *It was so decided.*

##### PART 2. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW (*continued*)

##### Article 20. Applicable law (*continued*)

##### *Report of the Working Group on Applicable Law* (*concluded*) (A/CONF.183/C.1/WGAL/L.2/Add.1 and Corr.1)

4. **Mr. Saland** (Sweden), Chairman of the Working Group on Applicable Law, introducing the second report of the Working Group (A/CONF.183/C.1/WGAL/L.2/Add.1 and Corr.1), said that, after intensive consultations on article 20, paragraph 3, it had been decided to propose the inclusion of a definition of the word "gender" in the article in which it appeared for the first time, namely the proposed article 5 ter on crimes against humanity. The proposed definition would become paragraph 3 of article 5 ter, and, whenever the word "gender" appeared subsequently in the Statute, it would be accompanied by a footnote referring to the definition in article 5 ter (see footnote 2 in document A/CONF.183/C.1/WGAL/L.2/Add.1 and Corr.1).
5. The Working Group's consideration of article 20 was now concluded, and he suggested that it could be forwarded to the Drafting Committee.

6. **Mr. Al Awadi** (United Arab Emirates) thought that it would be preferable not to have footnotes but to include the text in the body of the article concerned.

7. However, footnote 1 to article 20, paragraph 3, in document A/CONF.183/C.1/WGAL/L.2/Add.1 and Corr.1 stated that some delegations had been of the view that the paragraph should end with the words "human rights"; in other words, consensus had not in fact been reached. Further discussion was needed before the text could be transmitted to the Drafting Committee.

8. **Mr. Saland** (Sweden), Chairman of the Working Group on Applicable Law, said that it could be left to the Drafting Committee to decide whether the content of footnote 2 should be included in the article itself.

9. With regard to footnote 1, he hoped that, in view of the shortage of time, the text could be referred to the Drafting Committee: it would always be possible to come back to the matter at a later stage.

10. **Mr. Shukri** (Syrian Arab Republic) supported the views expressed by the representative of the United Arab Emirates.

11. **Mr. Piragoff** (Canada) said that the text contained in the document was the product of lengthy discussions and represented a carefully crafted compromise. All delegations had had an opportunity to state their positions, and he did not think anything would be gained by reopening the debate.

12. **Ms. Shahen** (Libyan Arab Jamahiriya), **Mr. Al-Shaibani** (Yemen) and **Mr. Madani** (Saudi Arabia) associated themselves with the statement made by the representative of the United Arab Emirates.

13. **Ms. Sharraf** (Costa Rica) said that it had been her understanding that agreement had been reached on the wording of article 20, paragraph 3. If that was not the case, however, the best solution might be to delete all references to gender from the text of the Statute.

14. **Mr. Saland** (Sweden), Chairman of the Working Group on Applicable Law, said that, if the proposed text was accepted, the wording of footnote 2 could instead be included in the text of article 20, paragraph 3, so that it would read: "grounds such as gender as defined in article 5 ter".

15. **The Chairman** said that, if she heard no objection, she would take it that the Committee of the Whole agreed that the report should be forwarded to the Drafting Committee, with the suggestion that a reference to the definition of gender might be incorporated in article 20, paragraph 3, instead of appearing in a footnote.

16. *It was so decided.*

PART 9. INTERNATIONAL COOPERATION AND JUDICIAL ASSISTANCE (*continued*)

*Report of the Working Group on International Cooperation and Judicial Assistance (concluded)*  
(A/CONF.183/C.1/WGIC/L.11/Add.4 and Corr.1)

17. **Mr. Mochochoko** (Lesotho), Chairman of the Working Group on International Cooperation and Judicial Assistance, introduced the report of the Working Group contained in document A/CONF.183/C.1/WGIC/L.11/Add.4 and Corr.1.

18. **Mr. Vergne Saboia** (Brazil), said that he wished to refer to the proposed deletion of article 87, paragraph 3 (*b*), concerning nationality, and to footnote 2 in document A/CONF.183/C.1/WGIC/L.11/Add.4, with the addition in document A/CONF.183/C.1/WGIC/L.11/Add.4/Corr.1. In view of the footnote, Brazil could agree that the report should be forwarded to the Drafting Committee, but reserved the right to revert to the question, particularly in the light of the decision taken on the issue of reservations.

19. **Mr. Fadl** (Sudan), referring to article 87, paragraph 3 (*b*), and article 91, paragraph 4, said that the constitutions of a number of countries, including his own, prohibited the surrender of nationals. His delegation hoped that the International Criminal Court, once established, would take that difficulty into account.

20. **Mr. Al Awadi** (United Arab Emirates) thought that the footnotes to article 87, paragraph 3 (*b*), and article 91, paragraph 4, should be included in the Statute, or their content incorporated in the articles themselves.

21. **Mr. Nathan** (Israel) said that his delegation had accepted the deletion of article 87, paragraph 3 (*b*), in a spirit of compromise. However, under Israel's domestic law, the extradition of nationals under any extradition arrangement was prohibited. That point would have to be covered in any reservation to the Statute.

22. **Ms. Shahen** (Libyan Arab Jamahiriya) said that she wished to record her delegation's reservation on the deletion of article 87, paragraph 3 (*b*), in view of the fact that the prohibition of the surrender of nationals was one of the most important provisions in her country's legislation. She endorsed the statements made by the representatives of the United Arab Emirates and the Sudan.

23. **Mr. Bouguetaia** (Algeria) said that his country's Constitution and legislation prohibited the extradition of nationals. Algeria therefore wished to record its reservation on the deletion of article 87, paragraph 3 (*b*), pending a final decision as to the issue of reservations in general.

24. **Mr. Josipović** (Croatia) said that, as far as the surrender or extradition of persons was concerned, his delegation's view was that the requirements of the Statute should prevail over any national legislation or constitutional provisions. If the laws of a State were not in compliance with the Statute in that respect, the

State could change its laws, as Croatia itself had done in order to meet the requirements of the International Tribunal for the Former Yugoslavia.

25. His delegation regretted that no provision had been made in part 9 of the draft Statute empowering the Court to issue a binding order if a State party failed to comply with a request for cooperation.

26. **Ms. Mekhemar** (Egypt), **Mr. Madani** (Saudi Arabia) and **Mr. Al-Sa'aidi** (Kuwait) supported the statement made by the representative of the United Arab Emirates.

27. **Mr. Krokhmal** (Ukraine) associated his delegation with those speakers who had drawn attention to the importance of the footnote mentioning that some States reserved their position with respect to the deletion of article 87, paragraph 3 (*b*).

28. **The Chairman** said that note had been taken of the reservations of delegations and of their desire to raise the matter at a later stage.

29. She took it that the Committee of the Whole agreed to refer the provisions contained in the report to the Drafting Committee.

30. *It was so decided.*

PART 10. ENFORCEMENT (*continued*)

*Report of the Working Group on Enforcement (concluded)* (A/CONF.183/C.1/WGE/L.14/Add.2)

31. **Ms. Warlow** (United States of America), Chairman of the Working Group on Enforcement, introduced the report of the Working Group contained in document A/CONF.183/C.1/WGE/L.14/Add.2 and said that the Group had now concluded its work.

32. **The Chairman** asked whether she could take it that the Committee of the Whole agreed to refer the proposed text for article 101 contained in the report to the Drafting Committee.

33. *It was so decided.*

PART 11. ASSEMBLY OF STATES PARTIES (*continued*)

*Recommendations of the Coordinator (concluded)*  
(A/CONF.183/C.1/L.47/Add.2)

34. **Mr. S. R. Rao** (India), Coordinator for parts 2, 11 and 12, introducing document A/CONF.183/C.1/L.47/Add.2, pointed out that article 102, paragraph 2 (*f*), had been reformulated in the light of the decisions taken in relation to article 86.

35. **The Chairman** asked whether she could take it that the Committee of the Whole agreed to refer the text in document A/CONF.183/C.1/L.47/Add.2 to the Drafting Committee.

36. *It was so decided.*

*The meeting rose at 4.10 p.m.*



### 39th meeting

Wednesday, 15 July 1998, at 6.25 p.m.

*Chairman:* Mr. Kirsch (Canada)

*later:* Ms. Fernández de Gurmendi (Argentina) (Vice-Chairman)

*later:* Mr. Kirsch (Canada) (Chairman)

A/CONF.183/C.1/SR.39

#### Agenda item 11 (*continued*)

**Consideration of the question concerning the finalization and adoption of a convention on the establishment of an international criminal court in accordance with General Assembly resolutions 51/207 of 17 December 1996 and 52/160 of 15 December 1997** (A/CONF.183/2/Add.1 and Corr.1, A/CONF.183/C.1/L.64, A/CONF.183/C.1/L.65/Rev.1, A/CONF.183/C.1/L.66 and Add.1 and A/CONF.183/C.1/L.67/Rev.1)

#### DRAFT STATUTE

##### PART 1. ESTABLISHMENT OF THE COURT (*continued*)

*Report of the Drafting Committee (continued)*  
(A/CONF.183/C.1/L.64)

1. **Mr. Bassiouni** (Egypt), Chairman of the Drafting Committee, introduced the first part of the report of the Committee, in document A/CONF.183/C.1/L.64, containing its proposed text for part 1 of the draft Statute.
2. The Drafting Committee's text for part 1 of the draft Statute was adopted.

##### PART 3. GENERAL PRINCIPLES OF CRIMINAL LAW (*continued*)

*Report of the Drafting Committee (continued)*  
(A/CONF.183/C.1/L.65/Rev.1)

3. **Mr. Bassiouni** (Egypt), Chairman of the Drafting Committee, introduced document A/CONF.183/C.1/L.65/Rev.1 on part 3 of the draft Statute. The title, "General principles of criminal law", did not mean that the intention was to set forth all the general principles of criminal law; part 3 would merely state the general principles of criminal law contained in the Statute.
4. Article 22 was being called "Non-retroactivity *ratione personae*", to differentiate the concept from that of jurisdiction *ratione temporis*, which was covered in article 8.
5. **Mr. Yáñez-Barnuevo** (Spain) wondered whether the word "principles" in the title should not be replaced by "provisions".
6. **Mr. Saland** (Sweden) thought that it might be preferable to retain the existing title for part 3 rather than change the title at the current stage.

7. **Mr. Hamdan** (Lebanon) said that article 22 raised issues that his delegation considered should be discussed in connection with article 8 in part 2 of the draft Statute.

8. After a discussion in which **Mr. Patel** (Zimbabwe), **Mr. Güney** (Turkey) and **Mr. Al Ansari** (Kuwait) took part, **Mr. Tomka** (Slovakia), supported by **Mr. Yáñez-Barnuevo** (Spain) and **Mr. Güney** (Turkey), proposed that the Committee of the Whole should adopt the report of the Drafting Committee on part 3 on the understanding that action on article 22 would be postponed until article 8 was considered.

9. *It was so decided.*

##### PART 4. COMPOSITION AND ADMINISTRATION OF THE COURT (*continued*)

*Report of the Drafting Committee (continued)*  
(A/CONF.183/C.1/L.67/Rev.1)

10. **Mr. Bassiouni** (Egypt), Chairman of the Drafting Committee, introduced document A/CONF.183/C.1/L.67/Rev.1 on part 4 of the draft Statute.

11. **Mr. Krokhmal** (Ukraine) said that his delegation had reservations regarding article 37, paragraph 8. The question of geographical representation had not yet been satisfactorily resolved.

12. **Mr. Hamdan** (Lebanon) said that his delegation had reservations on article 43, paragraph 2. Lebanon believed that the Prosecutor and the Deputy Prosecutors should come from different legal systems and not simply be of different nationalities.

13. His delegation also had reservations on article 45, paragraph 4, allowing use of the expertise of gratis personnel offered by States parties, intergovernmental organizations or non-governmental organizations. Lebanon opposed the acceptance of such offers by the Prosecutor, believing that it would be a violation of the principle of independence of staff.

14. **Mr. Al-Thani** (Qatar), **Mr. Kerma** (Algeria), **Mr. Matri** (Libyan Arab Jamahiriya), **Ms. Mekhemar** (Egypt), **Mr. Khalid Bin Ali Abdullah Al-Khalifa** (Bahrain) and **Mr. Abdullah M. Mohammed Ibrahim Al Sheikh** (Saudi Arabia) said that their delegations also had reservations on article 43, paragraph 2, and article 45, paragraph 4.

15. **Mr. Tomka** (Slovakia) thought that it would be important for article 41, paragraph 3, to be compatible with article 36. All judges serving on a full-time basis should be treated equally.

16. **Mr. Magallona** (Philippines) noted that, under article 36, paragraph 1, all judges would be elected as full-time members of the International Criminal Court. The requirement not to engage in any occupation of a professional nature should apply to all judges.

17. **Mr. Yee** (Singapore), referring to article 40, paragraph 1, said that it was extremely important that members of the Trial Chamber and the Pre-Trial Chamber have criminal trial experience.

18. **Ms. Claverie D. de Sciolli** (Guatemala), referring to article 43, paragraph 9, thought that there should be a reference to the definition of the term "gender" to be included in part 2.

19. *Ms. Fernández de Gurmendi (Argentina), Vice-Chairman, took the Chair.*

20. **Mr. Shukri** (Syrian Arab Republic), **Mr. Sayyid Said Hilal Al-Busaidy** (Oman), **Mr. Baigzadeh** (Islamic Republic of Iran) and **Mr. Mahmoud** (Iraq) expressed reservations on article 43, paragraph 2, and article 45, paragraph 4.

21. **Mr. Al-Thani** (Qatar) said that his country had reservations on article 41, paragraph 4.

22. **Mr. Skelemeni** (Botswana) said that he had difficulty with the proposed text for article 41, paragraph 3.

23. Referring to article 47, paragraph 2 (b), he expressed the view that the term "absolute majority" required clarification.

24. **Mr. Matsuda** (Japan) thought that the reference to the Rules of Procedure and Evidence in article 49, paragraph 3, should be replaced by a reference to the agreement on privileges and immunities which was to be drafted by the Preparatory Commission for the International Criminal Court after the adoption of the Statute.

25. **Mr. Bassiouni** (Egypt), Chairman of the Drafting Committee, agreed with that suggestion.

26. Referring to the questions raised regarding article 41, paragraph 3, he pointed out that, as decided by the Committee of the Whole, article 36 would provide for all judges to be elected as full-time members of the Court but for some of them not to be required to work on a full-time basis.

27. **Mr. Chimimba** (Malawi), referring to article 49, asked whether the Chairman of the Drafting Committee thought that the reference to the agreement on privileges and immunities should also be included in paragraph 4 dealing with the treatment of counsel, experts and others.

28. **Mr. Bassiouni** (Egypt), Chairman of the Drafting Committee, replied in the affirmative.

29. **Mr. Yáñez-Barnuevo** (Spain) thought that article 41, paragraph 3, should perhaps refer to a "remunerated occupation". The purpose was presumably to preserve the independence of judges by excluding the possibility of their receiving payment from a State or an institution.

30. **Mr. Tomka** (Slovakia) felt that further thought was needed on the proposed provisions concerning the conditions of service of judges. One option might be to have article 36, paragraph 1, provide that all judges were to be "available to serve full-time from the commencement of their terms of office". There was no need to speak in article 36 of judges being available "at the seat of the Court".

31. **Mr. Rwelamira** (South Africa), Coordinator for part 4, said that the concern had been not to cause unnecessary expense for the Court by requiring all judges to be present permanently at the seat of the Court. It had also been felt that judges who were not required to be at the seat of the Court should be free to engage in other professional occupations or should be eligible for some kind of allowance under article 50.

32. **Mr. Vergne Saboia** (Brazil) said that his understanding was that article 41, paragraphs 1 and 2, applied to all judges, whereas paragraph 3 applied to judges who were not required to be permanently at the seat of the Court, and who would be allowed, always subject to the provisions of paragraphs 1 and 2, to engage in some other activity.

33. After some further discussion in which **Mr. Bello** (Nigeria), **Mr. Tomka** (Slovakia) and **Ms. Wilmshurst** (United Kingdom of Great Britain and Northern Ireland) took part, the Chairman said that, if she heard no objection, she would take it that the Committee of the Whole wished to adopt part 4 with the changes in article 49 suggested by the Chairman of the Drafting Committee and on the understanding that further thought would be given to the drafting of articles 36 and 41.

34. *It was so decided.*

35. *Mr. Kirsch (Canada) resumed the Chair.*

#### PART 11. ASSEMBLY OF STATES PARTIES (*continued*)

##### *Report of the Drafting Committee (continued)* (A/CONF.183/C.1/L.66 and Add.1)

36. **Mr. Bassiouni** (Egypt), Chairman of the Drafting Committee, introduced document A/CONF.183/C.1/L.66 and Add.1 on part 11 of the draft Statute, consisting of article 102. Paragraph 2 (f) was still pending, but he suggested that the Committee of the Whole should adopt part 11 subject to review of paragraph 2 (f) at a later time.

37. *It was so decided.*

*The meeting rose at 7.55 p.m.*

## 40th meeting

Thursday, 16 July 1998, at 10.25 a.m.

*Chairman:* Mr. Kirsch (Canada)

A/CONF.183/C.1/SR.40

### Organization of work (*concluded*)

1. **The Chairman** said that, in view of the fact that time was running out and that work remained to be done, it was the intention of the Bureau to put together in a single document the texts of the articles adopted by the Drafting Committee, the texts formulated by the Working Groups and the Coordinators and the texts that had emerged through consultations, in order to facilitate the work of the Committee of the Whole. It was suggested that the Committee should meet again the following day to take a decision on that document. At the current meeting, the Committee would consider a report of the Working Group on Procedural Matters on parts 5, 6 and 8 of the draft Statute and a report of the Coordinator for part 12.

### Agenda item 11 (*continued*)

**Consideration of the question concerning the finalization and adoption of a convention on the establishment of an international criminal court in accordance with General Assembly resolutions 51/207 of 17 December 1996 and 52/160 of 15 December 1997** (A/CONF.183/2/Add.1 and Corr.1, A/CONF.183/C.1/L.78 and Corr.1 and A/CONF.183/C.1/WGPM/L.2/Add.8 and Corr.1)

### DRAFT STATUTE

PART 5. INVESTIGATION AND PROSECUTION (*continued*)

PART 6. THE TRIAL (*continued*)

PART 8. APPEAL AND REVIEW (*continued*)

*Report of the Working Group on Procedural Matters (concluded)* (A/CONF.183/C.1/WGPM/L.2/Add.8 and Corr.1)

2. **Ms. Fernández de Gurmendi** (Argentina), Chairman of the Working Group on Procedural Matters, introducing the Working Group's last report (A/CONF.183/C.1/WGPM/L.2/Add.8 and Corr.1), said that the Group was transmitting to the Committee for consideration a series of provisions that had been left pending. She thanked all delegations which had participated in the Group for their cooperation.

3. **Mr. Harris** (United States of America) thought that, in order to correctly reflect what had been agreed, the words "shall hold a hearing in the absence of the accused" in article 61, paragraph 1 bis, should be amended to read: "may hold a hearing in the absence of the accused".

4. *It was so decided.*

5. **Mr. Buchet** (France) thought that, after the word "may", the words "upon the request of the Prosecutor or on its own motion" should be added.

6. *It was so decided.*

7. **The Chairman** said that he took it that, with those amendments, the Committee of the Whole agreed to refer the provisions contained in the report to the Drafting Committee.

8. *It was so decided.*

### PART 12. FINANCING OF THE COURT (*continued*)

*Recommendations of the Coordinator*  
(A/CONF.183/C.1/L.78 and Corr.1)

9. **Mr. S. R. Rao** (India), Coordinator, introducing document A/CONF.183/C.1/L.78 and Corr.1, said that the financing of the International Criminal Court was a question of critical importance which had been the subject of delicate and sensitive negotiations. An agreed solution had finally been arrived at.

10. Article 103 was a new provision; the original article 103 had become article 103 bis. A new element was that the provisions covered not only the expenses of the Court but also those of meetings of the Assembly of States Parties, including its Bureau and subsidiary bodies, if any. The travel costs of those attending the Assembly would not, of course, be covered.

11. The scope of article 104 had, likewise, been extended to cover the Assembly of States Parties. He also drew attention to a correction to be made in the chapeau which was contained in the corrigendum to the document.

12. Articles 105 and 106 represented a delicate compromise. The whole text submitted was the result of lengthy negotiations and he urged the Committee to accept it as it stood.

13. **Mr. Al-Shaibani** (Yemen) said that the Arabic version of article 105 should be brought into line with the English version.

14. **The Chairman** asked whether, subject to that understanding, the Committee of the Whole agreed to refer the articles recommended by the Coordinator to the Drafting Committee.

15. *It was so decided.*

16. **Ms. Sundberg** (Sweden) said that the text of part 12 had been painstakingly negotiated, with substantial concessions made on both sides, but she particularly regretted that no agreement had been reached on the financing of the Court in its initial phase. In her view, the wording of article 104 (b) should be interpreted as making it possible for the Court to seek funds

from the United Nations during its initial phase, should that be necessary in order to ensure its proper functioning. Concerning article 105, her delegation's view was that the expression "as additional funds" should be interpreted as meaning that voluntary contributions should not be used for meeting core expenses of the Court: those expenses should be met by assessed contributions.

17. **Ms. Chatoor** (Trinidad and Tobago) associated herself with the views expressed by the representative of Sweden. She deeply regretted that more had not been achieved, but was prepared to go along with the text proposed in order to help to achieve the objectives of the Conference.

*The meeting rose at 10.55 a.m.*

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### 41st meeting

Thursday, 16 July 1998, at 3.15 p.m.

*Chairman:* Mr. Kirsch (Canada)

*later:* Mr. Mochochoko (Lesotho) (Vice-Chairman)

A/CONF.183/C.1/SR.41

#### Agenda item 11 (*continued*)

**Consideration of the question concerning the finalization and adoption of a convention on the establishment of an international criminal court in accordance with General Assembly resolutions 51/207 of 17 December 1996 and 52/160 of 15 December 1997 (A/CONF.183/2/Add.1 and Corr.1, A/CONF.183/C.1/L.47/Add.2, A/CONF.183/C.1/L.68/Rev.2, A/CONF.183/C.1/L.84, A/CONF.183/C.1/L.85 and A/CONF.183/C.1/WGP/L.14/Add.3/Rev.1)**

#### DRAFT STATUTE

##### PART 7. PENALTIES (*continued*)

##### *Report of the Working Group on Penalties (concluded)* (A/CONF.183/C.1/WGP/L.14/Add.3/Rev.1)

1. **Mr. Fife** (Norway), Chairman of the Working Group on Penalties, introduced the report of the Working Group contained in document A/CONF.183/C.1/WGP/L.14/Add.3/Rev.1. It contained a proposed text for article 79 bis and a statement which the Group recommended that the President of the Conference make in connection with the fact that the proposed Statute would not provide for the death penalty.

2. **Mr. Villagrán Kramer** (Guatemala) said that the proposals in the report resolved a complex problem for States whose legislation included the death penalty. He urged their acceptance by the Conference.

3. **Mr. Yee** (Singapore) said that it was an important principle of criminal justice that the penalty should be commensurate with the gravity of the crime. Singapore believed that the International Criminal Court should be able to impose the most effective penalty, including the death penalty, for the crimes under its jurisdiction. That was why it had co-sponsored the proposal providing for the death penalty in document A/CONF.183/C.1/WGP/L.13. No delegation had claimed that the death penalty was prohibited under international law.

Article 6, paragraph 2, of the International Covenant on Civil and Political Rights of 1966 allowed the sentence of death to be imposed for the most serious crimes. The right to life, recognized in article 3 of the Universal Declaration of Human Rights of 1948, must not be interpreted in a way that would threaten the right of individuals and of the community, including the international community, to security.

4. Conscious of the need to advance the negotiations in order to ensure the early establishment of a strong, effective and independent court, his delegation had supported the efforts of the Chairman which had culminated in the compromise package now before the Committee of the Whole. It wished to place on record its understanding that the decision not to include the death penalty in the Statute would in no way affect the sovereign rights of States to determine the appropriate legal measures and penalties to combat serious crimes effectively, including the right to impose the death penalty in accordance with international safeguards. The debate on that issue in the Conference had clearly demonstrated that there was no international consensus on the abolition of the death penalty.

5. **Mr. Maharaj** (Trinidad and Tobago) said that his country remained committed to the establishment of an international criminal court and had played a leading role in the initiation and development of the process that had led up to the Conference.

6. The legislation of Trinidad and Tobago, like that of more than 90 other countries, provided for the death penalty for murder. His Government could not support the exclusion of the death penalty from those provided for in the Statute, and the proposals in the Working Group's report would go only some way towards meeting the position of Trinidad and Tobago and of the States of the Caribbean Community. However, his Government would not stand in the way of the finalization of the text concerning penalties.

7. **Mr. Woldwolde** (Ethiopia) said that crimes like genocide, war crimes and crimes against humanity called for penalties

commensurate with their gravity. Exclusion of the death penalty for such crimes was unacceptable.

8. **Mr. Hamdan** (Lebanon) said that Lebanon's legislation provided for the death penalty. His delegation would have wished capital punishment to be provided for in the Statute, but it accepted the compromise.

9. **Mr. Abdulmalik Ahmed M. Al Sheikh** (Saudi Arabia) associated his delegation with the position of Lebanon.

10. **Mr. Ubalijoro** (Rwanda) endorsed the statements of the representatives of Singapore, Ethiopia and Trinidad and Tobago. The exclusion of the death penalty could not affect the right of sovereign States to apply it in aggravated circumstances, particularly in situations involving great loss of life.

11. **Mr. Al Gennan** (United Arab Emirates) said that his country also applied the death penalty and considered that it should have been provided for in the Statute, but would not stand in the way of the proposed compromise.

12. **Mr. Al-Amery** (Qatar) supported the statement of the representative of Lebanon. Capital punishment was provided for in his country's legislation, but his delegation would not break the consensus.

13. **Mr. Ahmed** (Iraq) said that the fact that capital punishment was not provided for in the Statute would have no legal effect whatever on Iraq's national legislation.

14. *The Working Group's proposals were approved.*

PART 9. INTERNATIONAL COOPERATION AND JUDICIAL ASSISTANCE (*continued*)

*Report of the Drafting Committee (continued)*  
(A/CONF.183/C.1/L.68/Rev.2)

15. **Mr. Bassiouni** (Egypt), Chairman of the Drafting Committee, introduced document A/CONF.183/C.1/L.68/Rev.2 containing the proposed provisions for part 9 of the draft Statute. It was recommended that some of the provisions be left in abeyance pending the approval of part 2 of the draft Statute.

16. **Mr. Hamdan** (Lebanon) said that his delegation had reservations concerning the proposed wording in article 90 allowing the Court to cooperate with a requesting State in connection with conduct that constituted a serious crime under the national law of that State, but not necessarily a crime within the jurisdiction of the Court.

17. **Mr. Yee** (Singapore), referring to article 90, paragraph 3, drew attention to the footnote to the words "fundamental legal principle" in article 90, paragraph 2 bis, in document

A/CONF.183/C.1/WGIC/L.11/Add.3 and Corr.1 and 2, to the effect that the proviso in question would cover laws preventing the freezing or seizure of certain types of property, in which case other alternatives such as seizure of the proceeds of sale or disposal should be relied on. His delegation had agreed to the relevant text on that understanding.

18. **The Chairman** said that he took it that the Committee of the Whole agreed to adopt the Drafting Committee's recommendations for part 9.

19. *It was so decided.*

PART 7. PENALTIES (*continued*)

PART 8. APPEAL AND REVIEW (*continued*)

*Report of the Drafting Committee (continued)*  
(A/CONF.183/C.1/L.84 and A/CONF.183/C.1/L.85)

20. **Mr. Bassiouni** (Egypt), Chairman of the Drafting Committee, introduced documents A/CONF.183/C.1/L.84 and A/CONF.183/C.1/L.85 relating to parts 7 and 8 of the draft Statute.

21. *The Drafting Committee's text was adopted.*

PART 11. ASSEMBLY OF STATES PARTIES (*continued*)

*Report of the Drafting Committee (continued)*  
(A/CONF.183/C.1/L.47/Add.2)

22. **Mr. Bassiouni** (Egypt), Chairman of the Drafting Committee, recalled that part 11 of the draft Statute, consisting of article 102, had been adopted at the thirty-ninth meeting of the Committee of the Whole with the exception of paragraph 2 (f). He drew attention to the text for paragraph 2 (f) in document A/CONF.183/C.1/L.47/Add.2, and recommended that it be adopted.

23. *It was so decided.*

**Agenda item 12** (*continued*)

**Adoption of a convention and other instruments deemed appropriate and of the final act of the Conference**  
(A/CONF.183/2/Add.1 and Corr.1 and A/CONF.183/C.1/L.83)

*Report of the Drafting Committee on the Final Act*  
(A/CONF.183/C.1/L.83)

24. **Mr. Bassiouni** (Egypt), Chairman of the Drafting Committee, introduced the report in document A/CONF.183/C.1/L.83 containing the text proposed by that Committee.

25. *The Drafting Committee's text for the Final Act, including the annex thereto, was adopted with a minor editorial amendment.*

**Agenda item 11 (continued)**

**Consideration of the question concerning the finalization and adoption of a convention on the establishment of an international criminal court in accordance with General Assembly resolutions 51/207 of 17 December 1996 and 52/160 of 15 December 1997 (A/CONF.183/2/Add.1 and Corr.1, A/CONF.183/C.1/L.78 and Corr.1, A/CONF.183/C.1/L.82 and Corr.1, A/CONF.183/C.1/L.86, A/CONF.183/C.1/L.87, A/CONF.183/C.1/L.88, A/CONF.183/DC/R.31 and A/CONF.183/DC/R.191–R.194)**

**DRAFT STATUTE**

**PART 12. FINANCING OF THE COURT (continued)**

*Recommendations of the Coordinator (concluded)*  
(A/CONF.183/C.1/L.78 and Corr.1)

26. **Mr. Bassiouni** (Egypt), Chairman of the Drafting Committee, said that the Committee of the Whole had recently approved document A/CONF.183/C.1/L.78 and Corr.1 containing the recommendations of the Coordinator for part 12. Perhaps the Drafting Committee would be authorized to do minor editing.

27. *It was so decided.*

28. **Mr. Gadyrov** (Azerbaijan) said that his delegation wished to reserve its position on the reference in article 105 to voluntary contributions from individuals, corporations and other entities.

**PART 13. FINAL CLAUSES (continued)**

*Texts adopted by the Drafting Committee on first and second readings (14 July 1998)*  
(A/CONF.183/DC/R.191–R.194)

29. **Mr. Bassiouni** (Egypt), Chairman of the Drafting Committee, introduced documents A/CONF.183/DC/R.191–R.194 on part 13 of the draft Statute.

30. *The Drafting Committee's texts were adopted.*

**PART 2. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW (continued)**

*Text adopted by the Drafting Committee on second reading (26 June 1998) (A/CONF.183/DC/R.31)*

31. **Mr. Bassiouni** (Egypt), Chairman of the Drafting Committee, introduced document A/CONF.183/DC/R.31 containing a proposed text for the definition of the crime of genocide in article 5.

32. *The Drafting Committee's text was adopted.*

*The meeting was suspended at 3.55 p.m. and resumed at 4.30 p.m.*

**PART 10. ENFORCEMENT (continued)**

*Report of the Drafting Committee (continued)*  
(A/CONF.183/C.1/L.86)

33. **Mr. Mochochoko** (Lesotho), Vice-Chairman, took the Chair.

34. **Mr. Bassiouni** (Egypt), Chairman of the Drafting Committee, introduced document A/CONF.183/C.1/L.86 on part 10 of the draft Statute, and drew attention to some minor typographical errors.

35. In regard to article 97, the question had been raised whether it was intended to exclude the right of a person who had completed a sentence to return to his or her country of origin, as provided for under international law. If that was not intended, article 97 should perhaps be amended.

36. **Mr. Hamdan** (Lebanon) suggested that wording should be introduced to allow such a person to choose which State to be transferred to, provided that that State agreed or was legally obliged to receive him or her.

37. **The Chairman**, after considerable discussion, said that, if he heard no objection, he would take it that the Committee of the Whole agreed to amend article 97 in the manner suggested by the representative of Lebanon.

38. *It was so decided.*

39. **Mr. Al-Sheikh** (Syrian Arab Republic), referring to article 94, said that the provisions as they stood failed to take into account the concern expressed by many delegations regarding the proposal to require the Court to take into account, inter alia, the nationality of the sentenced person in designating the State of enforcement. He wished to express his delegation's reservations on the provision concerned.

40. **The Chairman** asked if he could take it that the Committee of the Whole wished to adopt the Drafting Committee's text for part 10, as amended.

41. *It was so decided.*

**PART 5. INVESTIGATION AND PROSECUTION (continued)**

*Report of the Drafting Committee (continued)*  
(A/CONF.183/C.1/L.87)

42. **Mr. Bassiouni** (Egypt), Chairman of the Drafting Committee, introduced document A/CONF.183/C.1/L.87 on part 5 of the draft Statute.

43. **Mr. Gadyrov** (Azerbaijan), referring to article 54 bis, asked whether the term "gender" should not be accompanied by a cross-reference to the definition of "gender" in part 2.

44. **Mr. Bassiouni** (Egypt), Chairman of the Drafting Committee, agreed and said that the text should be amended accordingly. He also noted that certain provisions in part 5 were

dependent on decisions to be taken on articles in part 2. He recommended that the Committee of the Whole adopt part 5 and delegate to the Drafting Committee the task of ensuring that, once part 2 was approved, the appropriate changes were made in part 5.

45. **Mr. Al-Sheikh** (Syrian Arab Republic) expressed his delegation's reservations regarding the provisions in article 54 allowing the Prosecutor to stop an investigation in the supposed interests of justice.

46. **The Chairman**, after some further discussion, asked if he could take it that the Committee of the Whole agreed to adopt the recommendations of the Chairman of the Drafting Committee.

47. *It was so decided.*

PART 6. THE TRIAL (*continued*)

*Report of the Drafting Committee (continued)*  
(A/CONF.183/C.1/L.88)

48. **Mr. Bassiouni** (Egypt), Chairman of the Drafting Committee, introduced document A/CONF.183/C.1/L.88 on part 6 of the draft Statute, and drew attention to some minor errors.

49. **Mr. Al-Sheikh** (Syrian Arab Republic) expressed his delegation's reservations on the provisions concerning trial in absentia.

50. *With minor drafting changes, the Drafting Committee's text for part 6 was adopted.*

PREAMBLE (*continued*)

*Report of the Drafting Committee (concluded)*  
(A/CONF.183/C.1/L.82 and Corr.1)

51. **Mr. Bassiouni** (Egypt), Chairman of the Drafting Committee, drew attention to document A/CONF.183/C.1/L.82, containing a proposed text for the preamble to the Statute. The text had since been further modified, and the final text proposed was the following:

*"Conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time,*

*"Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity,*

*"Recognizing that such grave crimes threaten the peace, security and well-being of the world,*

*"Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,*

*"Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,*

*"Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,*

*"Reaffirming the Purposes and Principles of the Charter of the United Nations, and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations,*

*"Determined to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole,*

*"Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions,*

*"Resolved to guarantee lasting respect for and the enforcement of international justice,*

*"Have agreed as follows:"*

52. *The proposed text was adopted.*

*The meeting rose at 5.35 p.m.*

## 42nd meeting

Friday, 17 July 1998, at 7.15 p.m.

*Chairman:* Mr. Kirsch (Canada)

A/CONF.183/C.1/SR.42

### Agenda item 11 (*concluded*)

**Consideration of the question concerning the finalization and adoption of a convention on the establishment of an international criminal court in accordance with General Assembly resolutions 51/207 of 17 December 1996 and 52/160 of 15 December 1997 (A/CONF.183/C.1/L.76 and Add.1, Add.2 and Corr.1, Add.3 and 4, Add.5 and Corr.1, Add.6 and Corr.1, Add.7 and 8, Add.9 and Corr.1 and Add.10–14, A/CONF.183/C.1/L.70, A/CONF.183/C.1/L.81, A/CONF.183/C.1/L.90, A/CONF.183/C.1/L.94 and A/CONF.183/C.1/L.95)**

1. **The Chairman** thanked delegations for the cooperation, patience and understanding that they had shown over the past few days when the Conference had been under pressure to complete its task on time. He suggested that delegations reserve any statements of position that they might wish to make for the plenary, which was the highest organ of the Conference and thus the best place for such statements to be recorded.

2. He welcomed Mr. Bos (Netherlands), former Chairman of the Preparatory Committee on the Establishment of an International Criminal Court, who had hitherto been unable to attend the Conference owing to illness.

3. **Mr. Bos** (Netherlands) thanked participants and the Secretariat for their tokens of support, which reflected the spirit of solidarity that had developed among all those involved in the work of the Preparatory Committee and of the Conference itself.

4. The establishment of an international criminal court would represent a great step forward for the international community. In his view, the possibilities of compromise had now been fully exploited, and no purpose would be served by further delay, since the positions of States were already known. He urged the Conference to adopt the draft Statute by consensus.

5. **The Chairman** drew attention to the text for the Statute of the International Criminal Court proposed by the Bureau of the Committee of the Whole and contained in documents A/CONF.183/C.1/L.76 and Add.1, Add.2 and Corr.1, Add.3 and 4, Add.5 and Corr.1, Add.6 and Corr.1, Add.7 and 8, Add.9 and Corr.1 and Add.10–14. The text reflected a very delicate balance between the views of delegations, and it was essential that that balance be preserved. It was the recommendation of the Bureau that the text should be adopted as a complete package.

### *Amendments proposed by India (A/CONF.183/C.1/L.94 and A/CONF.183/C.1/L.95)*

6. **Mr. Lahiri** (India) said that, although his delegation would very much have liked to associate itself with the text proposed, it was unable to do so because two of India's major concerns had not been accommodated. The first related to the role of the Security Council and the second to the list of weapons whose use would constitute a war crime.

7. He drew attention to document A/CONF.183/C.1/L.94, which contained amendments proposed by his delegation to article 8 concerning war crimes, as it appeared in document A/CONF.183/C.1/L.76/Add.2 and Corr.1. The effect of these amendments would be to include weapons of mass destruction, i.e. nuclear, chemical and biological weapons, among the weapons whose use would constitute a war crime. The absence of any mention of such weapons in the draft represented a retrograde step.

8. A second Indian proposal, contained in document A/CONF.183/C.1/L.95, related to the role of the Security Council. Article 16 concerning the deferral of investigation or prosecution at the request of the Council would be deleted, along with subparagraph (b) of article 13 on exercise of jurisdiction, and there would be a consequential amendment in article 12 concerning preconditions to the exercise of jurisdiction. The role of the Council proposed in the draft was unacceptable.

### *Motion proposed by Norway*

9. **Mr. Fife** (Norway) said that the Bureau proposal represented a compromise formula designed to achieve broad support and reflecting as far as possible a consensus approach. A package, almost by definition, would contain elements which displeased some delegations. It was essential to maintain the integrity of the package offered in order to avoid destroying the balance achieved with such difficulty and making it impossible to achieve the ultimate goal of an independent, effective and credible international court.

10. His delegation therefore proposed that no action be taken on the proposals submitted by the delegation of India.

11. **The Chairman** said that, under the rules of procedure of the Conference, two delegations would be permitted to speak in favour of the no-action motion put forward by Norway and two against it. He could therefore give the floor to a maximum of four speakers.



12. **Mr. Chimimba** (Malawi) said that, while he appreciated the rationale behind the Indian proposals, he considered that the issues they raised had already been fully discussed, and therefore supported the Norwegian proposal. The delegations of Angola, Botswana, Lesotho, Mozambique, South Africa, Swaziland, Zambia and Zimbabwe associated themselves with his delegation's view.

13. **Mr. Maquieira** (Chile) said that the Indian proposals had been debated at length but had not received the level of support to warrant inclusion in the text. His delegation thus also supported the Norwegian proposal.

*Action taken by the Committee*

14. **The Chairman** said that, since no delegations had expressed a wish to speak against the Norwegian proposal, he would invite the Committee to vote on it.

15. *The Norwegian proposal was adopted by 114 votes to 16, with 20 abstentions.*

16. **Mr. González Gálvez** (Mexico) said that his delegation did not intend to block the consensus which seemed to be emerging on the text proposed by the Bureau, but wished to draw attention to its proposal in document A/CONF.183/C.1/L.81.

17. Mexico considered that the Statute was not the right place to resolve differences of interpretation concerning the powers of the principal organs of the United Nations, particularly in view of the fact that the United Nations itself was now undergoing a process of far-reaching reform which could include changes in the role and powers of the Security Council. To link the Court solely to the Council, many of whose decisions were limited by the right of veto, was in Mexico's view not only a grave political error but also a decision which was without foundation in law.

18. Mexico considered that any treaty establishing an international court which included clauses subordinating the juridical activities of that court to decisions taken by another body would not be in conformity with article 53 of the Vienna Convention on the Law of Treaties of 1969, which stated that a treaty which at the time of its conclusion conflicted with a peremptory norm of international law (*jus cogens*) was void. Any such clauses would contravene the principle of the independence of the judiciary and the right of everyone to a hearing by an independent tribunal, which were both peremptory norms enshrined in article 10 of the Universal Declaration of Human Rights of 1948, article 14 of the International Covenant of Civil and Political Rights of 1966, and paragraphs 1 and 2 of the Basic Principles on the Independence of the Judiciary approved by the General Assembly in its resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985. They would also attribute to the Security Council functions and powers not conferred on it by the Charter of the United Nations.

19. Mexico would not insist that its proposed amendment be put to the vote, but the non-inclusion of its tenor would affect Mexico's eventual decision on the Statute as a whole.

*Amendments proposed by the United States of America  
(A/CONF.183/C.1/L.70 and A/CONF.183/C.1/L.90)*

20. **Mr. Scheffer** (United States of America) said that his delegation deeply regretted that, following four years of work, it faced the end of the Conference with profound misgivings. The draft Statute was strong on paper but weak in reality. It did not contain the necessary opt-out provision to attract many States, and it attempted to exercise jurisdiction over the official actions of non-parties, a significant departure from the established principles of international law. It burdened the Court with a *proprio motu* Prosecutor, an institutional weakness which could result in the Court being overwhelmed with complaints and embroiled in controversy. Consequently, his delegation was obliged to request consideration of two proposals for amendment of the draft Statute, originally submitted in documents A/CONF.183/C.1/L.70 and A/CONF.183/C.1/L.90.

21. The United States supported the Geneva Conventions of 1949 and acknowledged the importance of universality of jurisdiction in its proper context for the effective vindication of international law. However, the proposed Statute took the principle of universal jurisdiction far outside any acceptable context. Moreover, the attempt to impose the jurisdiction of the Court on States which did not become parties to the Statute would violate an elementary rule set out in the Vienna Convention on the Law of Treaties. The proposed Statute would also seek to place States parties in a privileged position vis-à-vis non-party States, by permitting prosecution of officials and nationals of non-parties while shielding officials and nationals of parties from prosecution for the same crimes.

22. His delegation's first proposal, in line with that in document A/CONF.183/C.1/L.70, was that article 12 on pre-conditions to the exercise of jurisdiction should be amended by the deletion in paragraph 2 of the words "one or more of", so that acceptance of jurisdiction by both the State on whose territory the crime had occurred and the State of nationality of the accused would be required. Under his delegation's second proposal, the content of article 7 ter, paragraph 1, in document A/CONF.183/C.1/L.90 would be inserted as a new paragraph following article 12, paragraph 2. Article 7 ter, paragraph 2, in document A/CONF.183/C.1/L.90 coincided with the current paragraph 3.

23. He requested that his delegation's proposals be put to the vote in accordance with the rules of procedure of the Conference.

*Motion proposed by Norway*

24. **Mr. Fife** (Norway) said that in his view the package proposed by the Bureau was both credible on paper and

responsible in reality. In the light of the urgent need to maintain the integrity of the package and to adopt the text as a whole, he proposed that no decision be taken on the proposals made by the representative of the United States.

25. **The Chairman** said that, as in the previous case, permission to speak on the no-action motion just put forward by the delegation of Norway would be granted to two representatives in favour of it and two opposing it, whereupon the motion would be put to the vote. He would therefore ask the other speakers on his list to defer their statements.

26. **Mr. Saland** (Sweden) said that his delegation believed that it was important to maintain the integrity of the text, whose delicate balance could be seriously upset if amendments were introduced at the current stage. Sweden therefore supported the Norwegian proposal.

27. **Mr. Al-Thani** (Qatar) said that his delegation had difficulty in accepting the package proposed, which had been inadequately considered. He accordingly endorsed the views expressed by the representative of the United States.

28. **Mr. Liu Daqun** (China) said that article 12 concerning the issue of jurisdiction was the most important article in the whole Statute. As currently drafted, it would mean violating the sovereignty of States parties, and would not only impose obligations on States not parties, contrary to the Vienna Convention on the Law of Treaties, but would in fact place greater obligations on them than on the parties. China was therefore opposed to the Norwegian proposal.

29. **Mr. Mikaelsen** (Denmark) said that Denmark regarded the text as a package that should be adopted as a whole and without amendments. His delegation thus supported the motion put forward by Norway.

*Action taken by the Committee*

30. **The Chairman** invited the Committee to vote on the Norwegian proposal.

31. *The Norwegian proposal was adopted by 113 votes to 17, with 25 abstentions.*

32. **Monsignor Martin** (Holy See) said that he wished to explain his vote concerning the Indian proposals. His delegation condemned the use of nuclear weapons and other weapons of mass destruction, and fully understood the position of the delegation of India on that question. He hoped that when the Statute came to be reviewed attention could be given to that important issue, and that States would move forward rapidly to a balanced, multilateral and universal agreement for the

elimination of all nuclear weapons. However, in the absence of agreement on that question at the moment, it had wished to support the package proposed by the Bureau.

33. **Mr. Matri** (Libyan Arab Jamahiriya) said that his delegation considered that to give the proposed prerogatives to the Security Council would reduce the Court to completely dependent status. His delegation also found it contradictory to regard the use of certain types of weapons as a crime but not the use of the most destructive and dangerous weapons of all. It was for that reason that his delegation had voted to maintain the Indian proposal.

34. **Mr. Bouguetaia** (Algeria) said that, although the proposals by India and the United States would have met some of his delegation's concerns, he had responded to the Chairman's appeal so as not to re-open the debate. However, he wished to express his deep regret that the Committee had been obliged to resort to a vote.

35. **The Chairman** asked if the Committee of the Whole was ready to adopt the draft Statute as contained in documents A/CONF.183/C.1/L.76 and Add.1, Add.2 and Corr.1, Add.3 and 4, Add.5 and Corr.1, Add.6 and Corr.1, Add.7 and 8, Add.9 and Corr.1 and Add.10-14.

36. *The documents were adopted on the understanding that the Arabic version would be corrected in the light of the English version.*

*Report of the Committee of the Whole  
(A/CONF.183/C.1/L.92 and Corr.1)*

37. **Mr. Nagamine** (Japan), Rapporteur, introduced the draft report of the Committee of the Whole (A/CONF.183/C.1/L.92 and Corr.1).

38. **Mr. Krokmal** (Ukraine) noted that the draft resolution submitted jointly by the delegations of Belarus, Kazakhstan and Ukraine on the question of equitable geographical distribution (A/CONF.183/C.1/L.57) had not been reflected in paragraph 28 of chapter III of the draft report.

39. **The Chairman** said that that omission would be rectified.

40. He took it that, subject to that amendment, the Committee of the Whole agreed to adopt the report of the Committee contained in document A/CONF.183/C.1/L.92 and Corr.1.

41. *It was so decided.*

42. **The Chairman** said that the Committee of the Whole had completed its work.

*The meeting rose at 9.20 p.m.*











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