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Chairman: Mr. Enkhsaikhan ..... (Mongolia)

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98-81778 (E)

The meeting was called to order at 10.20 a.m.

Agenda item 153: Establishment of an international criminal court (A/53/189 and 387)

1. **The Chairman** recalled that after laborious five-week negotiations the United Nations Diplomatic Conference of Plenipotentiaries had taken the giant step of adopting the Rome Statute of the International Criminal Court (A/CONF.183/9). He paid tribute to those who had contributed to a landmark achievement.

2. **Mr. Sucharipa** (Austria), speaking on behalf of the European Union, the associated countries Bulgaria, Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia and Slovenia, and, in addition, Iceland, said that the European Union was extremely satisfied with the outcome of the Diplomatic Conference. The adoption, by an overwhelming majority of the States participating in the Conference, of the Statute of the International Criminal Court represented a great achievement. A major gap in the international legal order had been closed with the agreement on the creation of a permanent court designed to prosecute and try the perpetrators of heinous crimes. Such an institution would make the world a safer place. The purpose of the Court was not only to punish those who committed crimes but through its mere existence to deter individuals from committing crimes in the first place. The culture of impunity had to end. Indeed, the Court would add a new dimension to international relations by reinforcing individual accountability.

3. The European Union had consistently and strongly supported the idea of creating the Court; all the States members of the Union had voted in favour of the Statute at the end of the Diplomatic Conference and 13 had already signed the Statute. All the States would do their best to proceed to ratification without delay. For the Court to succeed in its task it needed the widest support of the international community and he hoped that all States, whether or not they voted for the adoption of the Statute, would recognize the benefits of a universal criminal court.

4. In the same spirit the Union called for the Preparatory Commission to be convened promptly. If the target date of 30 June 2000 for the establishment of the Court was to be met, much preparation of additional legal instruments – especially the Rules of Procedure and Evidence and the Elements of Crimes – would be required, with attention being paid at the same time to the principle of complementarity with national jurisdictions. Given the volume and urgency of its work, no effort should be spared to facilitate the Preparatory Commission's activities. It should be convened for three sessions during 1999 and then, if necessary, reconvened in 2000. Such a schedule might seem ambitious, but it was absolutely necessary.

5. **Mr. Politi** (Italy) said that the adoption and opening for signature of the Statute of the International Criminal Court represented a milestone in the development of international criminal law. The Diplomatic Conference had had two purposes: to create an institution that would deter the commission of crimes that offended the very conscience of mankind and to end the impunity too often granted to the perpetrators of such crimes. Those goals had become particularly urgent with the return of the spectre of unspeakable atrocities that everyone had hoped had disappeared after the Second World War. The creation of the two ad hoc tribunals had been admirable but insufficient; and a permanent international criminal court had been strongly demanded by a large majority of States. Non-governmental organizations had also contributed to the process: over 200 had sent representatives to the Diplomatic Conference.

6. The text of the Statute inevitably reflected a number of compromise solutions to crucial issues. Overall, however, his delegation considered the text satisfactory from a substantive point of view. The Court would be competent to adjudicate so-called "core crimes" under general international law, although in the case of aggression the Court's jurisdiction would have to await an approved definition of the crime. The definitions of genocide, war crimes and crimes against humanity, however, were extremely comprehensive, reflecting the most recent developments in international law and practice.

7. A second achievement was that the Court's complementarity with respect to national jurisdictions was correctly established on the basis of criteria allowing the Court to intervene when national systems of criminal justice were unavailable or unwilling to prosecute and punish those responsible for crimes covered by the Statute.

8. Thirdly, recourse to the Court was not limited to States. The Prosecutor could initiate investigations *proprio motu*, on the basis of information received from any source. That underlined the Court's character as a body acting in the interest of the entire international community. Since the Security Council could also use the Court, the need to establish ad hoc tribunals would be obviated.

9. Fourthly, the Court had "automatic jurisdiction" over the crimes covered by the Statute: in other words, its jurisdiction was not conditional on specific acceptance by the States parties concerned, so long as the accused was a national of a Party to the Statute or of a State that had

accepted the competence of the Court. His Government would have preferred wider criteria but he noted that article 124 of the Statute, allowing States parties to declare their non-acceptance of the Court's jurisdiction over war crimes for seven years, was provisional and he was confident that it would be deleted by the Review Conference. In short, while concessions had been necessary from all sides, the Court remained a solid institution with the necessary effectiveness and independence. Those characteristics must be preserved.

10. It was excellent that only three months after its adoption 58 States had signed the Statute. Further signatures would signal widespread support for the Statute and form a good basis for a quick ratification process. In that context, he said that Italy had started the ratification procedure on 8 October. A rapid entry into force of the Statute would be beneficial to the entire international community, whose support was essential for the effective performance of the Court's functions.

11. The Preparatory Commission should be convened as soon as possible in New York in order to elaborate a number of instruments to integrate or accompany the Statute, particularly the Rules of Procedure and Evidence, the Elements of Crimes and the definition of the crime of aggression. A minimum of eight weeks of meetings was required in 1999 and, if necessary, three additional weeks before June 2000. The Commission should be provided with the required resources and services. Non-governmental organizations should be allowed to participate in its work under the same conditions as they had at the Diplomatic Conference. It was essential to build a lasting edifice against impunity on the foundations that had been laid in Rome, the cradle of law.

12. **Mr. Maqungo** (South Africa), speaking on behalf of the Southern African Development Community, said that the Community was concerned that the achievement of an African renaissance had been delayed by conflict in various regions of Africa, including its own. With the entrenchment of respect for the rule of law, however, the Community was hopeful that Africa would wean itself from conflict and the culture of military coups. It therefore welcomed the adoption of the Statute of the International Criminal Court, which would serve notice to those responsible for acts of genocide and other serious crimes that the culture of impunity was at an end. It sent a message that the international community would no longer stand by and watch the perpetration of horrendous crimes.

13. The Statute would also serve as a reminder that even during armed conflict the rule of law must be upheld. For example, it was unlawful for children under the age of 15 to be robbed of their childhood by being recruited to national armed forces, for attacks to be directed at civilian populations or individuals not taking a direct part in hostilities, for a combatant who had surrendered, having laid down his arms, to be killed or wounded and for the starvation of civilians to be intentionally used as a method of warfare. Any of those acts was a war crime and would be punished.

14. Much remained to be done before the Court could begin to function. First, the necessary number of ratifications had to be attained. States which still entertained misgivings about the Court should be aware that its strengths or weaknesses were not solely dependent on the Statute, so fears on the part of any State that the Court might be used against it could be laid to rest by the participation of that State in the process of establishing the Court. It was to be hoped that States which had voted against the adoption of the Statute would put aside their misgivings and continue to offer their valuable contributions to the establishment of the Court.

15. The Southern African Development Community echoed the recent call by the Movement of Non-Aligned Countries, meeting in Durban, for the early establishment of the Preparatory Commission. The Community also called for the establishment of a trust fund to enable a large number of States to participate in the Commission: it was vital for the universality, effectiveness and impartiality of the Court that the entire international community should contribute to its establishment and, ultimately, its functioning. The States members of the Community hoped to exchange views with other delegations and non-governmental organizations on what technical assistance might be provided to States wishing to ratify the Statute, taking into account the national laws that would have to be promulgated to give effect to the obligations arising from being a State party to the Statute.

16. **Mr. Chimimba** (Malawi) said that a momentous task had been achieved with the adoption of the Rome Statute of the International Criminal Court, which, despite its shortcomings, unequivocally signalled the political will to bring an end to impunity. It was clear from the Final Act of the Conference, however, that many other issues remained.

17. Having fully associated himself with the statement made by the South African representative on behalf of the countries of the Southern African Development Community, he stressed that the process which preceded the adoption of the Statute was as significant as the outcome was monumental, since the establishment of an international criminal court had been a universal goal.

18. Secondly, it was essential to ensure that the Preparatory Commission had the time and resources needed for the successful completion of its mandate, a factor which the

General Assembly should take into account when drafting the relevant resolution.

19. Thirdly, the establishment of a trust fund for the continued participation of as many countries as possible in the work of the Preparatory Commission would do much to further universality and the progressive development of international law, in which context he also supported the participation of both intergovernmental organizations, non-governmental organizations and other entities.

20. He confirmed that Malawi would shortly be in a position to sign and ratify the Statute and urged other States to do likewise as soon as possible, as a fully operational international criminal court would be a befitting legacy to a world that was still despairing of justice and fairness in conditions of peace and security.

21. **Mr. Yañez-Barnuevo** (Spain) said that while the statement made by the representative of Austria on behalf of the European Union had expressed the common position of all States members of the European Union and thus also of his country, his Government wished to underscore its satisfaction at the adoption and opening for signature of the Rome Statute of the International Criminal Court. The Statute represented the realization of a long-held aspiration, namely, to strengthen the principles and purposes of the United Nations, particularly those relating to international peace and security, and to establish human rights and justice, through joint action by States to abolish impunity in respect of those crimes which, by virtue of their gravity and consequences, affected the international community as a whole.

22. While the text of the Statute was not satisfactory in every respect, it was a cogent and well-grounded document which made possible the establishment and coming into operation of a permanent international criminal court of a universal character. Such a court would be independent and truly effective, provided that it received the necessary support and cooperation from States.

23. His Government, which had been one of the first signers of the Statute, noted with satisfaction that the number of signatories was already at 58, which augured well for the prompt entry into force of the Statute and the subsequent bringing into operation of the Court. Another hopeful indication was the resolution adopted by the Inter-Parliamentary Union in Moscow on 12 September 1998, urging national parliaments to take the measures needed for the prompt and universal ratification of the Statute.

24. As indicated in resolution F annexed to the Final Act of the Rome Conference, the Preparatory Commission linked to the United Nations system must be convened as soon as possible. His delegation believed that the convening of the Commission should be approved at the current session of the General Assembly, that the Commission should have at its disposal the meeting time in 1999 and the secretariat services which it required, and that every effort should be made to finalize the preparatory work, including the draft texts of the Rules of Procedure and Evidence and of the Elements of Crimes, before 30 June 2000, as proposed by the Rome Conference.

25. His Government intended to participate actively in the work of the Preparatory Commission, and had taken the first steps towards completion of the formalities for the ratification of the Statute.

26. **Mr. Chowdhury** (Bangladesh) said that the adoption of the Statute of the International Criminal Court represented a giant leap forward in the establishment of justice and human rights worldwide.

27. His country, which had been a victim of genocide during its liberation struggle, took great satisfaction in the observation that the Statute had discarded the age-old concept of impunity under the shield of State. While his Government would have preferred the International Criminal Court to be more independent and to have jurisdiction over such crimes as the use of nuclear weapons and weapons of mass destruction, it nonetheless believed that if the Court was allowed to work to its full capacity in conformity with the Statute, it had a great potential to promote human rights around the world.

28. Work on the establishment of the International Criminal Court remained to be completed. The note by the Secretary-General (A/53/387) drew attention to resolution F adopted by the Conference, which established the Preparatory Commission for the International Criminal Court. His delegation would welcome an opportunity to participate in the Preparatory Commission and believed that it should be convened no later than the first trimester of 1999. Bangladesh also hoped that the draft texts of the Rules of Procedure and Evidence and of the Elements of Crimes would be finalized before 30 June 2000. His delegation supported the clause in resolution F requesting the Secretary-General to provide to the Commission such secretariat services as it might require.

29. His Government expressed its appreciation to the contributors to the trust fund which had supported the participation of the least developed countries in the Preparatory Committee and the Conference of Plenipotentiaries, and called for the establishment of a similar trust fund to ensure the participation of the least developed countries in the Preparatory Commission.

30. **Mr. Qu Wensheng** (China) said that the establishment of an international criminal court had been a goal of the international community for nearly a century. His Government had always maintained that an international criminal court should be rooted in reality, not an ideal, and that its statute should accurately and fully embody international political realities and the current state of development of international law. It was regrettable, therefore, that the Rome Conference had been unable to reach consensus on a number of important questions and had had to adopt the Statute on the basis of a vote.

31. Some of the provisions of the Statute did not take into account the legitimate rights and interests of countries. Moreover, the manner in which the Conference had conducted its work had not been the best way to ensure the participation of all States on a basis of equality, democracy and transparency. A majority of countries had been excluded from the negotiations concerning key articles. Some draft articles had not even been discussed in an open forum and had been circulated to delegations only at the last minute before the vote. Owing to time pressure, the text of the Statute finally adopted was riddled with deficiencies that should have been remedied. Like other countries, China looked forward to the early establishment of the International Criminal Court; however, the quality of the document and the democracy and transparency of the working methods of the Conference should not have been sacrificed to the pressure to meet deadlines.

32. His delegation had serious reservations concerning the universal jurisdiction provided for in the Statute, which directly infringed on the judicial sovereignty of States. Under article 12, the Court could exercise its jurisdiction with respect to the crimes concerned if one or more of the following States were parties to the Statute or had accepted the jurisdiction of the Court: (a) the State on the territory of which the conduct in question had occurred (the territorial State); (b) the State of which the person accused of the crime was a national. In his delegation's view, that provision posed several problems.

33. First, under the current rules of international law, far more States than those in the two categories referred to had equal and parallel jurisdiction over the crimes concerned, including States detaining the suspects and States of which the victims were nationals. Article 12 in effect negated the equal jurisdiction of the latter States, thus infringing on their judicial sovereignty. In short, States not parties to the Statute which had jurisdiction over the relevant crimes under current international law would no longer be able to invoke their non-acceptance of the Court's jurisdiction in order to prevent the Court's interference with their judicial sovereignty. That represented a serious blow to the current system of international judicial assistance in criminal matters.

34. Secondly, the provisions concerning jurisdiction in the Statute could create a situation in which non-parties assumed more obligations than parties. For example, under article 124, a State, on becoming a party to the Statute, could declare that, for a period of seven years after the entry into force of the Statute for the State concerned, it did not accept the jurisdiction of the Court with respect to war crimes. Under article 121, paragraph 5, any amendment to articles 5 to 8 of the Statute would not have effect with regard to States parties that had not accepted the amendment. States parties could invoke the two provisions referred to in order to reject the Court's jurisdiction over the crimes in question. On the other hand, as long as the territorial State or the State of nationality of the accused was a State party or had accepted the Court's jurisdiction, a non-party would not be able to invoke the same grounds to refuse the Court's jurisdiction over the crime in question.

35. Thirdly, there were conflicts between articles 11 and 12. On the one hand, article 11, paragraph 2, provided that the Court could exercise its jurisdiction only with respect to crimes committed after the entry into force of the Statute for that State, unless that State had declared its acceptance of the Court's jurisdiction. On the other hand, article 12 provided that even if a State was not a party to the Statute and had not accepted the Court's jurisdiction, the Court could still exercise its jurisdiction with respect to the crime concerned if the territorial State or the State of nationality of the accused was a party to the Statute or had accepted the jurisdiction of the Court. The question arose as to which article the Court would apply in exercising its jurisdiction. It was also unclear whether, if a non-party was both the territorial State and the State of nationality of the accused, it could take advantage of article 11, paragraph 2, to become a party to the Statute and escape the jurisdiction of the Court.

36. With regard to the definition of crimes, China had doubts about the inclusion of domestic armed conflicts under the Court's jurisdiction within the definition of war crimes, because the provisions of international law concerning war crimes committed during such conflicts were still incomplete. The provisions of Geneva Protocol II Additional to the Geneva Conventions of 12 August 1949 were very weak in comparison with those of Additional Protocol I and the question of whether some of those provisions had acquired the status of customary international law was still in debate. The definition of war crimes committed during domestic armed conflicts in the Statute had far exceeded not only customary international law but also the provisions of Additional Protocol II.

37. With regard to crimes against humanity, in accordance with customary international law, they were crimes committed during wartime or during an extraordinary period related to wartime. Both the Nürnberg Charter and the Statute of the International Criminal Tribunal for the Former Yugoslavia contained provisions explicitly defining war crimes as crimes committed during armed conflicts. The Statute, however, failed to link those crimes to armed conflicts and thereby changed the major attributes of the crimes. In listing specific acts constituting crimes against humanity, the Statute added a heavy dose of human rights law. Hence, crimes against humanity as defined in the Statute represented "new wine in old bottles". His delegation believed that what the international community needed at the current stage was not a human rights court but a criminal court that punished international crimes of exceptional gravity. The injection of human rights elements would lead to a proliferation of human rights cases, weaken the mandate of the Court to punish the most serious crimes and thus defeat the purpose of establishing such a court.

38. The crime of aggression was dealt with in the Statute in a highly ambiguous manner. His delegation had no objections to the crime of aggression being included within the Court's jurisdiction provided that a proper definition of the crime could be arrived at. As such a definition had not yet been agreed on, the inclusion of the crime in the Statute would not only render the Court incapable of exercising its jurisdiction over such crimes, but would further complicate the definition of aggression. Such a move was deeply regrettable.

39. With regard to the approach for accepting the jurisdiction of the Court, a number of countries were in favour of establishing a mechanism that would allow States, in becoming parties to the Statute, to choose whether they would accept the Court's jurisdiction over all crimes or only over certain crimes. His delegation had always been of the view that that such a mechanism should be one of the approaches for accepting the jurisdiction of the Court, especially since countries still had differences over which crimes should fall under the jurisdiction of the Court and how those crimes should be defined. Nevertheless, article 12, paragraph 1, ruled out the opt-in approach. As a result, many countries might be prevented from becoming parties to the Statute.

40. The power of the Prosecutor to initiate investigations *proprio motu* was a controversial issue. In the first place, article 15 of the Statute stipulated that the Prosecutor could initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court. As a result of a compromise reached during the negotiations, there was no modifier next to the word "information" in the article. Nevertheless, the implied meaning of "information from any sources" was not thereby weakened. The article empowered individuals, non-governmental organizations and other bodies to bring cases before the Court and gave them virtually the same right as States parties and the Security Council to trigger the Court's jurisdiction mechanism. As a result, the Court would be faced with a huge number of complaints from individuals and non-governmental organizations, and therefore would not be able to concentrate its limited resources on dealing with the most serious international crimes.

41. Secondly, if the Prosecutor could initiate investigations *proprio motu* on the basis of such information, that meant that the authority of the Prosecutor was so extensive that he or she could influence or interfere directly with the judicial sovereignty of a State. Although a Pre-Trial Chamber was provided for in the Statute with a view to preventing the abuse of authority by the Prosecutor, in order for such a mechanism to be effective, either the members of the Pre-Trial Chamber, or the members of the Chamber and the Prosecutor, should be the product of different legal systems and different political and cultural backgrounds. The Statute, however, contained no such provision. It was possible, therefore, that both the members of the Pre-Trial Chamber and the Prosecutor might come from the same region or share the same legal, political or cultural background. That would neutralize the Pre-Trial Chamber's check-and-balance role.

42. Lastly, the principle of complementarity was a fundamental basis for the establishment of the Court. During the years of negotiations, a consensus had been reached as to the primary role that national judicial systems played in the prevention and punishment of crimes and the maintenance of social order. The International Criminal Court had only a complementary role to play in the event that a State's judicial system collapsed. Some provisions of the Statute, however, hardly reflected the principle of complementarity; on the contrary, the Court seemed to have become an appeals court sitting above the national court. As stipulated in article 17, the Court could judge ongoing legal proceedings in any State, including a non-party, in order to determine whether the intention existed to shield the criminal or whether the trial was fair, and could exercise its jurisdiction on the basis of that decision. In other words, the Statute authorized the Court to judge the judicial system and legal proceedings of a State and negate the decision of the national court. What was worse, the criteria for determining whether a trial was fair or whether a State had the intention to shield a criminal were very subjective and ambiguous. For instance, under article 17, paragraph 2, the normal legal proceedings of a State might be determined to be unfair or intended to shield the criminal.

It was highly possible that such a provision would be abused for political purposes. In Rome, his delegation had worked hard for the adoption of a more objective set of criteria, but without success.

43. Failure to solve the problems outlined above would inevitably obstruct the process of ratification and accession to the Statute, thereby affecting the authority and universality of the Statute. His delegation believed that instead of sidestepping those problems, the international community should find a proper solution on the basis of democracy and transparency. The draft resolution adopted on the item at the current session should be balanced and should objectively and accurately reflect the comments of all States, not just one voice and one view.

44. **Mr. Koffi** (Côte d'Ivoire) said that his country had been involved in the efforts to establish an international criminal court since the creation of the Preparatory Committee. His Government supported any instrument or institution that could help to create an atmosphere conducive to peace and justice. The International Criminal Court was such an institution. While it might not eliminate all the barbarities perpetrated systematically and on a large scale, it would put an end to impunity by imposing the penalties which such acts warranted.

45. Notwithstanding the legal and political progress which the establishment of the Court represented, his Government was not yet satisfied. The international community had failed in its duty, to establish a definition of and acceptable criminal penalties for the most heinous of all crimes, namely, the crime of aggression. That goal had been within reach on the basis of the consensus proposals put forward by the German delegation and many others which had participated in the gruelling negotiations, and his delegation expressed its appreciation to them.

46. All was not lost, however; the forthcoming Preparatory Commission or the review conferences could go beyond merely mentioning the crime of aggression and could elaborate full and punitive provisions against it. History might otherwise accuse the international community of wishing to combat evils without seeking to eradicate their roots. In that spirit, his Government had signed the Statute of the International Criminal Court on 7 October 1998 in Rome. It was prepared to participate in the work of the Preparatory Commission on the basis of transparency and consensus. His delegation called upon the States Members of the United Nations to devote their joint efforts to the early entry into force of the Statute of the Court.

47. **Miss Ramoutar** (Trinidad and Tobago), speaking on behalf of the Caribbean Community (CARICOM) member States that were also Members of the United Nations, said it was most gratifying that after many years of indecision, the international community should have finally convened the Diplomatic Conference for the Establishment of an International Criminal Court, which had met in Rome and adopted the Statute of the International Criminal Court. It was regrettable, however, that the text of the Statute should not have been adopted by consensus.

48. CARICOM was aware of the number of difficult and controversial issues that had had to be resolved, such as the independence of the Prosecutor, the principle of complementarity, the definition of crimes and the relationship of the Court to the United Nations. CARICOM was disappointed, however, that two issues of particular concern to the region had not been included in the Rome Statute, namely, the extension of the jurisdiction of the Court to the crime of illicit traffic in narcotic drugs and psychotropic substances and the question of the death penalty as a penalty available to the Court. The issue of the death penalty should be revisited and included as a priority on the agenda of the first Review Conference.

49. CARICOM was optimistic that at the first Review Conference, an acceptable definition would be drafted for the crime of illicit traffic in narcotic drugs and psychotropic substances. The draft definition submitted by CARICOM States at the Diplomatic Conference, with the support of many other States, could form the basis of those discussions.

50. The CARICOM States were concerned that the provision wherein a State, on becoming a party to the Statute, could opt out for a period of seven years from the Court's jurisdiction over war crimes committed by its nationals or on its territory would seem to condone impunity for war crimes and could impede the Court's ability to function. They were equally uncomfortable with the provision according to which the Court could not exercise jurisdiction unless the State of nationality of the accused or the State where the crimes had taken place had ratified the Statute.

51. CARICOM was aware that a number of instruments still needed to be negotiated and approved, including the Rules of Procedure and Evidence, and therefore supported and recommended the early convening of the Preparatory Commission which would be responsible for drafting those texts. They stood ready to cooperate with all States to ensure the successful adoption of all the instruments necessary to enable the Court to commence its functions. The signature and ratification of the Rome Statute by the required number of States must be accomplished in the shortest possible time if the Court was to be firmly established. There must also be

adequate and reliable funding to support the Court in the fulfilment of its mandate, once it was operational.

52. **Mr. Scheffer** (United States of America) said that the treaty negotiated recently in Rome, which a large number of Governments had already signed, had many provisions that the United States supported; nevertheless, in its present form, it contained flaws that rendered it unacceptable.

53. The United States had hoped that the Rome conference would achieve a consensus on the resolution adopting the treaty. The Clinton Administration had a record that pointed towards that objective, and had ensured that United States support for the two existing international criminal tribunals for the former Yugoslavia and Rwanda was second to none. Many other Governments had also made important contributions to the success of the tribunals. But not only did the United States provide both tribunals with significant financial resources, it also used its diplomatic resources, made in-kind contributions of personnel and equipment, offered the tribunals important information, and even brought United States military capabilities to bear to ensure that the tribunals were effective. Thus, the United States had hoped in Rome for a consensus that would allow it to begin planning the kind of support that the permanent court would need if it was also to be effective. So long as the United States was unable to join the treaty, it would be unrealistic to expect it to give the Court that level of support. His Government was concerned that without the United States, the effectiveness of the permanent international criminal court might fall short of its potential.

54. All of the States represented in Rome had shared the common goal that an international court should be able to prosecute tyrants who committed mass murder, mass rape, or mass torture against their own citizens, while at the same time not inhibiting States from contributing to efforts to help protect international peace and security. The irony of the Rome outcome on article 12 was that it left open the potential for situations such as the following. A State not a party to the treaty launched a campaign of terror against a dissident minority inside its territory. Thousands of innocent civilians were killed. International peace and security were imperilled. The United States participated in a coalition to use military force to intervene and stop the killing. Unfortunately, in so doing, bombs intended for military targets went astray. A hospital was hit. An apartment building was demolished. Some civilians being used as human shields were mistakenly shot by United States troops. The State responsible for the atrocities demanded that United States officials and commanders should be prosecuted by the International Criminal Court. The demand was supported by a small group of other States. Under the terms of the Rome treaty, in the absence of a Security Council referral, the Court could not investigate those responsible for killing thousands, yet the United States officials, commanders and soldiers could face an international investigation and even prosecution.

55. The complementarity regime had often been offered as the solution to such a dilemma. However, complementarity was not the answer, to the extent that it involved States investigating the legality of humanitarian interventions or peacekeeping operations that they already regarded as valid official actions to enforce international law. The Court could decide there was no genuine investigation by a 2-to-1 vote. The United States had other concerns of principle about the relationship between article 12 and international law. His Government's fundamental concern was that, in the absence of a Security Council referral, the Court would be able to assert jurisdiction over non-party nationals.

56. Another fundamental concern of the United States Government was the way in which the Rome treaty provided for the adoption and application of amendments to crimes. In its current form, the amendment process for the addition of new crimes to the jurisdiction of the Court or revisions to the definitions of existing crimes in the treaty would create an extraordinary and unacceptable consequence. After the States parties decided to add a new crime or change the definition of an existing crime, any State that was a party to the treaty could decide to immunize its officials from prosecution for the new or amended crime. Officials of non-parties, however, were subject to immediate prosecution. For a criminal court, that was an indefensible overreach of jurisdiction.

57. Likewise, there would be some who would regard the idea that States parties could opt out of prosecution for war crimes for seven years, while non-parties could not, as an incentive to join the court. Criminal jurisdiction – individual criminal jurisdiction – should not be played with in that way.

58. Another concern which his Government had was that the treaty included provisions relating to an undefined crime of aggression. Aggression carried with it an extremely problematic process of definition. How that would be resolved was too unclear for so important an issue.

59. Having considered the matter with great care, the United States would not sign the treaty in its current form. Nor was there any prospect of its signing the current treaty text in the future.

60. There were a number of important issues that the Sixth Committee would address in its resolution on the Preparatory Commission. It had been agreed in Rome that the sessions of the Preparatory Commission could be funded from the United Nations annual budget. Those sessions, however, must be

absorbed so that the regular budget of the United Nations did not exceed US$ 2.533 billion.

61. The Preparatory Commission would consider many important issues, including the Elements of Crimes and the Rules of Procedure and Evidence. As a signatory of the Final Act in Rome, the United States was entitled to participate in the Preparatory Commission. It was also essential, however, that the Preparatory Commission should afford the opportunity for Governments to address their more fundamental concerns. When building an international institution that was intended to last for the ages, a solid foundation of support was essential.

62. It had been suggested that the United States should exercise "benign neglect" or that it should wait until the Review Conference seven years after entry into force of the treaty – a conference in which the United States, as a non-party, would not be entitled to participate fully. His Government had rejected both of those options. Another option would be to oppose the treaty in a variety of ways. His Government preferred, however, a policy of positive and forward-looking engagement in the hope of ensuring a treaty that would stand for values and goals common to all Member States.

63. In conclusion, he stressed that the advantages deriving from strong United States support for the International Criminal Court should not be sacrificed for a concept of jurisdiction that might not be effective and even ran the risk of dividing the international community on an issue – international justice – that would be difficult enough to achieve if all members were together. The credibility of the Court would be demonstrated in how it built its relationships with sovereign Governments and in how well it supported, and was supported by, the requirements of international peace and security. The international community's willingness and ability to prevent and, where necessary, respond effectively to atrocities was of fundamental importance to all concerned. The opportunity remained for the International Criminal Court to achieve its full potential. The United States held the stakes for international peace, security and justice to be too great to accept anything else.

64. **Mr. Slade** (Samoa), speaking on behalf of the members of the South Pacific Forum that were represented at the United Nations said that they warmly welcomed the adoption of the Rome Statute of the International Criminal Court, which was an important step towards ending the culture of impunity and stood as a strong deterrent to potential perpetrators of the most serious crimes of concern to the international community as a whole.

65. He welcomed the news that 58 States had already signed the Statute and urged other States to demonstrate their commitment by signing the Statute at the earliest possible time and by setting in train the domestic processes required for ratification.

66. He looked forward to the establishment of the Preparatory Commission that would prepare proposals for practical arrangements for the establishment and coming into operation of the Court. He noted in particular that the Rules of Procedure and Evidence and the Elements of Crimes were required to be finalized by 30 June 2000. The work of the Preparatory Commission must be accorded a high priority in the work of the Sixth Committee, and it was of great importance that adequate time and resources should be provided to enable the Preparatory Commission to fulfil its important mandate.

67. **Mr. Salleh Said** (Malaysia) said that, in principle, Malaysia supported the expeditious establishment of a truly independent international criminal court and was pleased that the Rome Statute of the International Criminal Court had accommodated some of its concerns.

68. His delegation endorsed the position of the Movement of Non-Aligned Countries concerning the need to ensure the coming into operation of the International Criminal Court without undue delay.

69. Referring to the proposals on aggression to be formulated by the Preparatory Commission in accordance with resolution F of the Rome Conference, he recalled Malaysia's previously expressed concern over inclusion of the crime of aggression within the jurisdiction of the Court and stressed that the circumstances which gave rise to individual criminal responsibility should be specifically laid down, as not every act of State amounting to a crime of aggression entailed such responsibility. His delegation therefore looked forward to a mutually acceptable resolution of the issue which would increase the willingness of States to ratify the Statute.

70. In addition, given his country's stated position on the question of including the death penalty within the jurisdiction of the Court, his delegation welcomed the declaration of the President of the Conference that the exclusion of the death penalty from the Statute had no bearing on the legislation and practice of a State in that connection and should not influence the development of customary international law.

71. Similarly, given his delegation's belief that the so-called treaty crimes were more effectively dealt with under the national criminal justice system of the relevant State, it endorsed the call for the proposed Review Conference.

However, the inclusion of such crimes in the list within the jurisdiction of the Court should not overburden its financial obligations, manpower and other resources.

72. His Government had already signed the Final Act of the Conference and was currently studying the Statute with a view to its signature and ratification.

73. **Mr. Mwakawago** (United Republic of Tanzania), having associated himself with the statement made by the South African representative on behalf of the countries of the Southern African Development Community, said that the adoption of the Rome Statute of the International Criminal Court was a welcome step towards bridging a critical gap in international criminal law and international humanitarian and human rights law. The establishment of the Court, which represented the resolve to ensure that all individuals were accountable and punishable, would also provide concrete reassurance concerning the need to respect and protect humanity.

74. However, the failure of the Rome Statute to provide for the attribution of criminal responsibility to legal persons was a serious and regrettable flaw that demanded redress. The genocide in Rwanda, for instance, could not have occurred so swiftly without the aiding and abetting of such entities, whose role had been shamefully disregarded in order to protect corporate interests. His delegation also regretted the outcome concerning the crime of aggression, but was hopeful that the Court would eventually be able to exercise fully its jurisdiction over that supreme international crime.

75. Despite his country's reservations concerning the Statute, it was a step in the right direction. He hoped that those who did not currently feel that they could be party to it would continue to make their constructive contribution to the process of improving it, particularly in view of the importance of sustaining and developing the broad partnership which had resulted from the endeavour to make the Court a reality.

76. **Ms. Royo** (Panama), speaking on behalf of the members of the Rio Group, said that they were pleased that the international community would finally have an international criminal court. The Statute adopted in Rome stated that it was the duty of every State to exercise its criminal jurisdiction over those responsible for the crimes defined in the Statute. The objective of the International Criminal Court was to put an end to impunity, and its creation had demonstrated the willingness of the international community to investigate international crimes and punish their perpetrators. Although the Court was not a human rights court, its establishment would help protect human rights and strengthen the rule of law.

77. The Rome Statute was not perfect, and some of the members of the Rio Group would certainly have preferred different solutions to some important issues; nevertheless, they recognized that the Statute was the result of complex diplomatic negotiations aimed at finding a balance between national aspirations and the need to achieve universal acceptance.

78. The foundations for the Court had been laid, but much remained to be done before it would be operational. The members of the Rio Group were prepared to play an active role in the work of the Preparatory Commission, and would be particularly interested in the deliberations on the Rules of Procedure and Evidence. They hoped that the resolution to be adopted by the Sixth Committee would enable the Preparatory Commission to meet as soon as possible, and would provide for sufficient time and resources to be assigned to the Commission to enable it to fulfill its mandate by June 2000.

79. **Mr. Caflisch** (Observer for Switzerland) said that, as a result of the conflicts in the former Yugoslavia and Rwanda, the international community had fully realized the consequences of the impunity of individuals for acts of genocide, crimes against humanity and war crimes, consequences which also affected the prevention of such crimes.

80. From the outset, Switzerland had actively participated in the work leading to the adoption of the Rome Statute of the International Criminal Court and had been among the first signatories of the new instrument, as it believed that individuals should both enjoy rights and have obligations. Although the Court would offer a mechanism that punished war crimes more efficiently than in the past, his Government would have preferred a more complete list of war crimes that was more easily amendable, as well as a system of automatic or inherent jurisdiction enabling the Court to adjudicate a case as soon as the State detaining the suspect became a party to the Statute. It would also have preferred more flexibility in the criteria governing the choice of judges and more precision in the definition of penalties in order to conform more fully with the principle of legality (*nulla poena sine lege*).

81. On the positive side, the new Court would be permanent, thus allowing for the development of a consistent and uniform case law. Secondly, the Court's jurisdiction would be automatic, rather than dependent on the specific agreement of the State or States concerned. Thirdly, the future Court would be assisted by a prosecutor who could act *proprio motu* in matters of inquiries and prosecution, thus strengthening the independence of the new organism. Fourthly and importantly, in keeping with the principle of

complementarity, the Court would not replace national jurisdictions. A final positive point was the legislative aspect of the Rome Statute, which included general rules of substantive criminal law, procedural rules, particularly to protect witnesses and victims, and articles governing cooperation between States Parties and the new Court, without which the latter would be prevented from playing its full role.

82. Having thus welcomed the adoption of the Rome Statute, which was one of the most significant developments of international law in the past 25 years, his Government intended to ratify it as soon as possible and hoped that other members of the international community would do likewise in order to give it the required efficiency and stature. He hoped that the Preparatory Commission would commence work immediately. His Government intended to participate actively in the Commission's discussion relating to paragraph 9 of resolution F (elements of crime) and submit relevant proposals. It was also due to start preparing domestic legislation with a view to ensuring that the Court was fully operational on the very day of its constitution.

83. In view of the nature of the functions entrusted to the new Court, States should act without delay; the true value of the results achieved in Rome would be measured against the way in which they were implemented, which depended on the political will of States. In that connection, he urged States to seize the opportunity offered by the work accomplished in Rome.

The meeting rose at 12.35 p.m.