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COMMITTEE OF THE WHOLE

SUMMARY RECORD OF THE 5th MEETING

Held at the Headquarters of the Food and Agriculture Organization of the United Nations
on Thursday, 18 June 1998, at 10 a.m.

Chairman: Mr. KIRSCH (Canada)

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V.98-57458 (E)

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 (*continued*) (A/CONF.183/2/Add.1; A/CONF.183/C.1/L.1 and L.4)

Part 2 of the draft Statute (*continued*)

Article 5 (*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 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 paragraphs 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 (a) of Additional Protocol I; (b), option 2, see article 57 (2) (b) of Additional Protocol I; (b *bis*), option 1, see article 56 of Additional Protocol I; (c), option 1. A text similar to paragraph (c) appeared in many instruments, including the Geneva Conventions.

5. Paragraphs (d) and (e) should be referred immediately to the Drafting Committee. He favoured option 2 of paragraph (f), which exactly reproduced the text of article 85 (4) (a) of Additional Protocol I; with regard to (g), he favoured option 1.

6. Paragraphs (h) to (n) should be referred immediately to the Drafting Committee as they stood. On paragraph (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 paragraph (p) and entirely supported paragraph (p *bis*), in the light of the latest decrees by the International Criminal Tribunal for the Former Yugoslavia. Paragraphs (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 paragraph (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 paragraphs 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 paragraph (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 paragraph (t).

13. **Mr. HAMDAN** (Lebanon) supported the remarks made by Kuwait. He preferred option 1 of (a *bis*) and said that the position of neutral forces should also be mentioned. On paragraph (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 paragraph (o), but had some reservations on the inclusion of anti-personnel mines. As an occupied country, Lebanon had not signed the Ottawa Convention.

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 paragraph (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. Paragraph (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. Seung-hoh CHOI** (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 paragraphs of section B were as follows: (a), option 1; (a *bis*), option 1; (b), option 3; (b *bis*), option 2; (d), option 1; (f), option 3; (g), option 2; (h) to (n), as drafted; (o), option 4. With regard to paragraph (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 paragraphs 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 paragraph (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 paragraph (q). On other paragraphs, 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. NIYOMRERKS** (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 paragraphs 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) to (e), as drafted; (f), option 3; (g), option 2, owing to the inclusion of educational buildings; (h) to (n), as drafted; (o), option 4, with its extensive lists 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-Free Zone. He preferred option 2 of paragraph (p), since it included a reference to apartheid, and could accept paragraphs (p *bis*), (q), (r) and (s) as drafted. His preference was for option 3 of paragraph (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 preferred option 1 of paragraphs (d) and (g), which reflected provisions of the Hague Convention. He was prepared to accept some flexibility in the drafting of paragraph (f). With regard to paragraph (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 too general terms 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 paragraph (t), he favoured a provision for the protection of children and was prepared to consider an amendment to that paragraph that would facilitate a consensus.

30. **Mr. MEKHEMAR** (Egypt) said that he too attached great importance to the inclusion of war crimes within the jurisdiction of the Court. He 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. He 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, his 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 his delegation; (g), option 2; (o), option 4; (p), option 2. On paragraph (p *bis*), he agreed with previous speakers that enforced pregnancy should be mentioned in the context of rape. He accepted paragraphs (q), (r) and (s) as drafted and preferred option 1 of paragraph (1).

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 paragraphs 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 paragraph (o), any list of banned weapons should include nuclear weapons. Since 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), speaking on section B, noted that most delegations preferred option 1 of paragraph (a). Her preference with regard to paragraph (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 paragraph (b), she preferred option 2 and pointed out that option 3 was too broad and therefore unrealistic. She advocated the deletion of paragraph (b *bis*) as that provision was already covered under paragraph (b). On paragraph (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 Preparatory Committee session.

38. With regard to paragraph (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 paragraph (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 paragraph (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 paragraph (p), as option 2 was duplicative. On paragraph (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 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 paragraph (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 paragraph (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 be reflected in the Court’s Statute, particularly in view of the widespread acceptance of Additional Protocol I, which had already been ratified by some 250 States.

44. **Mr. VERGNE SABOIA** (Brazil) said that section A presented no problems for his delegation.

45. In section B, paragraph (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 paragraphs 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 paragraph (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 heading of the paragraph. His preferences with regard to other paragraphs 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 paragraphs 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. RODRIGUEZ CEDEÑO** (Venezuela) supported the proposal to refer section A to the Drafting Committee as it stood.

50. With regard to the various paragraphs 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 to paragraph (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 paragraph (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 in terms of 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 paragraphs 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 paragraph (a *bis*), option 1; he was critical regarding paragraph (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. Paragraph (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 paragraph (g), while paragraphs (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 paragraph (o); his delegation would participate with keen interest and an open mind in the discussion on that very difficult matter. With regard to paragraph (p), he preferred option 2, as option 1 was not clear enough. Paragraphs (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 paragraphs of section B were: (a), option 1; (a *bis*), option 1, though he would not insist, provided that option 1 of paragraph (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" of 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 paragraphs 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 paragraphs (q) to (s) and preferred option 4 of paragraph (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 paragraphs 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 paragraph (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 paragraph (p *bis*) and, under paragraph (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** (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 paragraphs (a) and (a *bis*). She favoured option 1 of paragraph (b) and of paragraph (b *bis*), with the deletion of the words "excessive" and "to civilians" in the third line of the latter. She preferred option 2 of paragraph (c). With regard to paragraph (e), she proposed the deletion of the words "resulting in death or serious personal injury". She favoured option 3 of paragraph (f) and option 2 of paragraph (g). Option 1 of paragraph (o) was preferable, with the addition of a new subparagraph (vi) reading "nuclear weapons" and a new subparagraph (vii) reading "blinding laser weapons". On

paragraph (p), she preferred option 2, and on paragraph (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 paragraphs 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 paragraph (o). She preferred option 2 of paragraph (p) and of paragraph (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 paragraph (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 paragraphs (q), (r) and (s) and preferred option 1 of paragraph (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 paragraph (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 paragraphs (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 Offences 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 paragraphs 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 the Additional Protocol 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. GARCIA LABAJO** (Spain) presented the proposals of his delegation on sections B and D that had been distributed under symbol A/CONF.183/C.1/L.4. In paragraph (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 paragraph (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, paragraph (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 Red Cross.

83. **Mr. DIOP** (Senegal) said that he basically agreed with paragraphs (b), (b *bis*), (c), (f), (g), and (p) of section B. His preferences with regard to other paragraphs 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 limit age to 18 in accordance with the relevant International Labour Organisation 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 section B, paragraph (c), 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 paragraph (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 paragraph (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. RAMA 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 paragraph (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 Non-Aligned Movement. The best way of including nuclear weapons would be under option 1 of (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 Conference's task did not include the progressive development of international law, it had been convened under Article 13 (1) of the Charter, 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 paragraph (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 paragraph (p), he preferred option 1 and, on paragraph (t), he would accept option 2. However, his preference with the regard to the limit age 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 paragraph (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 paragraph (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 paragraph (t). He preferred option 2 of paragraph (p), which covered the crime of apartheid.

98. **Mr. ABDELLA AL HAMEDI** (Iraq) said that his positions on the options under section B were flexible, except that he preferred option 4 of paragraph (o); he suggested that the words "weapons that contain enriched uranium" should be added.

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 State's need to keep the peace internally or to justify interference in the internal or external affairs of a State had been neglected. Common article 3 of 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 common article 3 of 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 article.

106. **Mr. DIAZ 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. Seung-hoh CHOI** (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. RAMA 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 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 "Elsewhere in the Statute", but was ready to consult with delegations that preferred other options.

117. **Ms. WILMSHURST** (United Kingdom) strongly favoured the inclusion of sections C and D.

118. Regarding the section “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 “Elsewhere in the Statute”.

120. **Mr. QU Wencheng** (China) supported the deletion of sections C and D and preferred option 1 in the section “Elsewhere in the Statute”.

The meeting rose at 1.10 p.m.