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COMMITTEE OF THE WHOLE

SUMMARY RECORD OF THE TWENTY-SIXTH MEETING

Held at the Headquarters of the Food and Agriculture Organization of the United Nations
on Wednesday, 8 July 1998, at 3 p.m.

*Chairman*: Mr. P. KIRSCH (Canada)

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V.98-57479 (E)

*The meeting was called to order at 3.15 p.m.*

**CONSIDERATION OF THE QUESTION CONCERNING THE FINALIZATION AND ADOPTION OF A CONVENTION ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT IN ACCORDANCE WITH GENERAL ASSEMBLY RESOLUTIONS 51/207 OF 17 DECEMBER 1996 AND 52/160 OF 15 DECEMBER 1997** (*continued*) (A/CONF.183/2/Add.1; A/CONF.183/C.1/L.2/Add.3; A/CONF.183/C.1/L.4/Add.3; A /CONF.183/C.1/L.11/Add.1 and Corr.1; A/CONF.183/C.1/L.14 and Add.1; A/CONF.183/C.1/L.15/Corr.1; A/CONF.183/C.1/L.45/Add.1; A/CONF.183/C.1/L.49/Rev.1; and A/CONF.183/C.1/L.53)

*Part 9 of the draft Statute* (*continued*)

1. **Mr. MOCHOCHOKO** (Lesotho), Coordinator, introduced the report of the Working Group contained in document A/CONF.183/C.1/L.11/Add.1 and Corr.1. The Working Group had recommended the transmission to the Committee of the Whole, for referral to the Drafting Committee, of article 87, paragraphs 1 and 11, article 90, paragraphs 1, 1 *bis* and 1 *ter*, as well as paragraphs 6 and 7, and articles 90 *ter* and 90 *quater* in their entirety. Some amendments to document L.15/Corr.1 had been agreed upon in the Working Group. In article 90, paragraph 1 and the *chapeau*, the words "in relation to investigations or prosecutions" had been inserted after the word "assistance". In article 90, paragraph 1 (e), the words "witness and experts" had been replaced by "witness or experts". The text of article 90 quater had been changed and now read as follows:

> "The Court may not proceed with a request for surrender/cooperation which would require the requested State to act inconsistently with its obligations under international law with respect to the state or diplomatic immunity of a person or property of a third State unless the Court can first obtain the cooperation of that third State for the waiver of the immunity."

2. **The CHAIRMAN** asked the Committee if it wished to refer to the Drafting Committee the articles contained in the report of the Working Group.

3. *It was so decided*.

*Part 8 of the draft Statute* (*continued*)

4. **Ms. FERNANDEZ de GURMENDI** (Argentina) Coordinator, introduced the report of the Working Group on Procedural Matters pertaining to for Part 8, article 82, paragraphs 1 to 3, paragraph 4, first subparagraph, and paragraph 5; article 83, paragraphs 1 and 3, as contained in document A/CONF.183/C.1/L.2/Add.3.

5. **The CHAIRMAN** asked the Committee if it wished to refer those articles to the Drafting Committee.

6. *It was so decided*.

*Part 3 of the draft Statute* (*continued*)

7. **Mr. SALAND** (Sweden), Coordinator, introduced the report of the Working Group contained in document A/CONF.183/C.1/L.4/Add.3.

8. He said that the Working Group had adopted article 31, paragraph 1, subparagraph (c), dealing with self-defence. Footnote 1 to that subparagraph, reading: "This provision only applies to actions by individuals during an armed conflict" was not intended to apply to the use of force by States, which was governed by applicable international law. Footnote 2 referred to the word "imminent" in the fourth line of the English text and read: "This provision is not intended to apply to international rules applicable to the use of force by States", while footnote 3, reading: "Some delegations were of the view that this was applicable only in the context of a lawful operation" referred to the whole paragraph.

9. Footnote 5 contained the important interpretative statement that cases of voluntary exposure were understood to be dealt with under paragraph 2 of article 31. There was also a footnote that the Drafting Committee would find it useful to consider in view of the very long and difficult negotiations on that paragraph.

10. Regarding paragraphs 5 and 6 of article 23, on the criminal responsibility of juridical persons, all delegations had recognized the great merits of the relevant proposal, but some had felt that it would perhaps be premature to introduce that notion. Consequently, the deletion of those paragraphs was noted.

11. He suggested that it would be easier to conclude work on article 20 if a working group were set up for that purpose.

12. **The CHAIRMAN** asked the Committee if it wished to refer to the Drafting Committee the articles contained in the report of the Working Group and to set up a working group to consider article 20.

13. *It was so decided*.

*Part 4 of the draft Statute* (*continued*)

14. **Mr. RWELAMIRA** (South Africa), Coordinator, introduced the report of the Working Group contained in document A/CONF.183/C.1/L.45/Add.1 dealing with article 43, paragraph 2, article 45, article 52, paragraph 3, and article 53, paragraph 1.

15. Some delegations had felt that it was also necessary to reflect the discussion on article 105, dealing with the funding of the Court. It was also suggested that the proposed 4 *bis* of paragraph 2 could be included in paragraph 4.

16. A number of delegations had felt quite strongly that the Court should not become operational before the Rules of Procedure and Evidence had been finalized.

17. **The CHAIRMAN** asked the Committee if it wished to refer to the Drafting Committee the articles contained in the report.

18. *It was so decided*.

*Part 10 of the draft Statute* (*continued*)

19. **Ms. WARLOW** (United States of America), Coordinator, introduced the report of the Working Group on article 94, paragraph 3, article 94 *bis*, article 95, article 96, article 97, article 98, article 99, paragraphs 1 and 1 *bis*, as contained in document A/CONF.183/C.1/L.14.

20. **The CHAIRMAN** asked the Committee if it wished to refer to the Drafting Committee the articles contained in the report of the Working Group.

21. *It was so decided*.

*Part 13 of the draft Statute* (*continued*)

22. **Mr. RAMA RAO** (India), Coordinator, introducing document A/CONF.183/C.1/L.49/Rev.1 on the Final Act, said that paragraphs 14, 15 and 16 would be completed following the meeting of the Credentials Committee and that any further resolutions would be included on page 7, subject to decisions by the Committee of the Whole.

23. All the resolutions to be annexed to the Final Act were indicated on page 8 of the report. A new paragraph 3 *bis* had been introduced in the annex in the light of the proposal made by several delegations on the official and working languages of the Preparatory Commission. The text of paragraph 4 (a) would be adjusted in the light of the final decision on the inclusion of elements of crimes under the Rules of Procedure and Evidence, as stated in footnote 1. Paragraph 7 was subject to a decision on article 104, dealing with the funding of the Court.

24. **Mr. GÜNEY** (Turkey) said that, during the previous discussion of the matter, he had proposed that the words "initially prepared by the ILC" be added after the words "International Criminal Court" in line 2 of paragraph 21, so as to reflect the history of preparing the draft Statute. That proposal had been supported by other delegations, and there had been no objection. Therefore, the paragraph should be amended accordingly.

25. **Mr. RAMA RAO** (India) said that a tribute to the immense contribution of the International Law Commission was reflected in paragraphs 3 to 9.

26. **Mr. GÜNEY** (Turkey) said that, although the draft before the Conference was submitted by the Preparatory Committee, the initial basis had been the draft prepared by the International Law Commission. However, he did not wish to create difficulties by pressing the point.

27. **Ms. WILLSON** (United States of America) said that any conference servicing or other expenses in connection with meetings of the Preparatory Commission arranged pursuant to operative paragraphs 1 and 7 of the resolution annexed to the Final Act must be accommodated within the current budget.

28. **The CHAIRMAN** asked the Committee if it wished to refer to the Drafting Committee the articles contained in the report of the Working Group.

29. *It was so decided*.

*Part 7 of the draft Statute* (*continued*) (A CONF.183/L.14/Add.1)

30. **Mr. FIFE** (Norway), Coordinator, introduced the report of the Working Group contained in document A/CONF.183/L.14/Add.1, and announced a number of amendments. The sentence in paragraph 1 reading "The Working Group herewith transmits to the Committee of the Whole the following articles of Part 7 for its consideration" should be deleted. In the next sentence, the word "also" should be deleted. Paragraph 1 should read:

> "The Working Group on Penalties held one additional meeting to consider the remaining articles contained in Part 7, Penalties, on 7 July 1998. The Working Group transmits the following article for inclusion in Part 3: article 21 *bis*. The Working Group further notes the deletion of article 76. The remaining articles will be transmitted at a later stage."

31. In the text of the draft articles, article 21 *bis* was unchanged, with its footnote 1. In article 75, on applicable penalties, the text of paragraph 1 and footnote 2 should be deleted, and a colon and the word "Pending" should be added. The note on page 3 of the English text should be deleted. Article 76 should remain as it was. Article 77, paragraph 3, was still pending.

32. **The CHAIRMAN** asked the Committee if it wished to refer to the Drafting Committee the articles contained in the report of the Working Group.

33. *It was so decided*.

34. **Mr. KATUREEBE** (Uganda), referring to document A/CONF.183/C.1/L.53, said that the crimes over which the Court had jurisdiction should be clearly defined, in order to avoid objections on technicalities. He had no objection to the definitions of genocide or crimes against humanity contained in the document. With respect to war crimes, he supported option 2. However, those crimes for which no agreed definition could be found should be left for further consideration, either by the Preparatory Commission or by the Assembly of States Parties. Situations of internal conflict must be included, the threshold being armed conflict. He felt very strongly that the Court should also concern itself with the systematic abduction, rape and abuse of children

35. **Mr. GÜNEY** (Turkey), referring to crimes against humanity, said that he favoured the updated version contained in document A/CONF.183/C.1/L.44, which included, in brackets, the crime of terrorism, and explained that its inclusion had received substantial support. The inclusion of war crimes was essential, and he strongly supported option 1. He was fully aware of the problems of finding an acceptable definition of aggression, while keeping in mind the role of the Security Council as established under the Charter.

36. There should be a unified approach to treaty crimes, covering terrorism and drug trafficking, as well as crimes committed against United Nations personnel. The elements of any crime must be determined before it could be placed under the jurisdiction of the Court.

37. **Mr. WENAWESER** (Liechtenstein) said that, since problems of definition persisted with regard to aggression and the related role of the Security Council, that crime should not initially be included in the jurisdiction of the Court. He also advocated a unified regime of jurisdiction for treaty crimes, subject to review after the entry into force of the Statute. On the question of the war crimes threshold, he preferred option 3, but would continue to work on option 2, which seemed to find the broadest support.

38. It would be unacceptable if the Court were not competent to deal with crimes committed in internal armed conflict. He therefore strongly supported the inclusion of both sections C and D.

39. Under section B (o) on weapons, he had always preferred option 3, but was ready to work on option 1, which seemed to find the broadest support. It was not necessary to include the elements of crimes.

40. **Mr. PFIRTER** (Switzerland) said that major complications might arise in defining jurisdiction over treaty crimes, and that the question should be left to a review conference. The *chapeau*, which touched on a jurisdictional issue, was inappropriate in a definition of war crimes. He preferred option 3, but could compromise, somewhat reluctantly, on option 2. As for the list of prohibited weapons contained in section B (o), he favoured option 3. For the sake of consensus on that matter, he could accept option 1, if the words "or with indiscriminate effects" were added to the *chapeau*. Subparagraph (ix) of option 2 should refer not only to article 111 on a review conference, but also to article 110 on amendments. Subparagraph (iii) of options 1 and 2 should also include weapons that exploded within the human body, and should begin with the words "explosive or dilating bullets".

41. Without wishing to limit the rights of States to ensure internal security, he pointed out that the majority of atrocities stemmed from internal conflicts. Section C undoubtedly reflected customary international law. It was precisely because some countries had not ratified Additional Protocol II that the Preparatory Committee had been very selective in the crimes it included under section D. That list had since been further shortened, by the omission of the crimes listed under option II. He drew attention to the abuses that had occurred in many countries and asked those delegations that had problems with section D to consider the merits of including such crimes, so as to arrive at a consensus.

42. It would be superfluous to include elements of crimes, since the crimes were well defined in international case law and international practice. There was the potential danger of giving rise to contradictions. However, he could consider adopting such a list, if it did not prevent the adoption and entry into force of the Statute, and was of a strictly advisory nature.

43. **Mr. NYASULU** (Malawi) supported the statement made by South Africa on behalf of the South African Development Community (SADC), adding that there seem to be an emerging sense that it might be useful to elaborate the elements of crimes.

44. **Mr. PAULAUSKAS** (Lithuania) said that he endorsed the statement made by Austria on behalf of the European Union. He was fully in favour of including the three core crimes and strongly supported the inclusion of aggression, based on the definition in option 1. The role of the Security Council in determining the fact of aggression should be acknowledged. With regard to the threshold for war crimes, he preferred option 3, but could accept option 2. He also supported the proposal to include crimes against United Nations and associated personnel as a separate paragraph under war crimes. He strongly favoured the inclusion of sections C and D. The proposal on elements of crime had merit and deserved consideration.

45. **Mr. VERGNE SABOIA** (Brazil) said that he was very much in favour of the early establishment of an efficient, independent and impartial court. In the context of a reasonable compromise, however, nothing should be done to undermine what had already been achieved in terms of international law. Article Y should be retained as a safeguard for existing international law and its progressive development.

46. The Court's jurisdiction should be limited to the three core crimes. He would be more in favour of the early inclusion of aggression if an acceptable definition of that crime could be found, bearing in mind the related role of the Security Council, but that was so far not the case.

47. As regards treaty crimes, he shared the views expressed by the United Kingdom delegation and Japan, among others. Including such crimes raised substantive and practical difficulties because of their different nature and the different circumstances under which they occurred. He agreed that such acts were serious and should be the subject of international cooperation to fight them, but the Court was being set up to deal with the core crimes. It would be impractical and costly to include treaty crimes during the early stages of the Court's existence. The question could be reviewed later.

48. He warmly supported the text on crimes against humanity. A balance had been achieved in paragraph 1, taken in combination with paragraph 2 (a). He doubted whether terrorism could be included, but would adopt a flexible attitude if a satisfactory definition could be found. Economic embargoes should not be included, because the Statute dealt with criminal acts on a personal and individual basis.

49. Option 2 on war crimes represented a possible compromise; any higher threshold would threaten the existing rules of international law, particularly in view of the threshold provision at the beginning of article 5.

50. With regard to weapons, he was initially inclined to favour option 2 of section B (o), including nuclear weapons, anti-personnel mines and blinding laser weapons; however, realistically, it would be more constructive to use option 1 at the current stage. He shared the views of Switzerland on inherently indiscriminate weapons and explosive bullets.

51. He supported the inclusion of sections C and D, since their introductory paragraphs already contained safeguards relevant to the concerns of some delegations. With regard to section B (t) of the draft Statute, he said that the minimum age for recruitment of children should be 18 and certainly not less than 15. Any solution taking account of concerns about the inclusion of internal armed conflicts must ensure that existing commitments under customary international law were in no way undermined. His position on the inclusion of the elements of crimes was fairly flexible, though he had noted with interest the comments by Switzerland.

52. **Mr. Kak-Soo SHIN** (Republic of Korea) said that he strongly supported the inclusion of aggression in the Statute, and would accept the current option 1, including its reference to the role of the Security Council, but recalled his delegation's proposed compromise between options 1 and 2 contained in article 10, paragraph 4, option 2 of the draft Statute.

53. While he sympathized with those who had suffered from drug trafficking and terrorism, he said that time constraints at the Conference required a sense of realism. A gradual approach to the inclusion of treaty crimes, involving the review process, could be adopted. On the *chapeau* for war crimes, his original preference had been for option 3 but, in a spirit of compromise, he could accept option 2.

54. He strongly supported option 1 of sections C and D. If a court were set up without jurisdiction over war crimes committed during non-international armed conflicts, its *raison d'être* would be seriously undermined.

55. In section B (o), he favoured option 1, in the light of the principle of *nullum crimen sine lege* and the conviction that the list of prohibited weapons must be based on customary international law.

56. The proposed inclusion of elements of crime would be useful as a guideline rather than a binding rule.

57. **Mr. MAQUIEIRA** (Chile) said that he favoured the inclusion of aggression. However, for the reasons that had emerged during the Conference concerning the definition, and complexities of a jurisdictional nature, he would be open

to other solutions. Treaty crimes should not be included, for the reasons given by many other delegations. On war crimes, he supported option 3, but, to achieve a consensus, he was prepared to accept something along the lines of option 2.

58. Although his delegation had always favoured option 1 of section B (o) on weapons, he had, for the sake of making progress, considered the possible merits of option 3. He hoped agreement could be reached on the inclusion of crimes against United Nations personnel and supported the inclusion of non-international armed conflicts.

59. Regarding aggression and the related role of the Security Council, he said that the formula currently proposed was acceptable. He expressed surprise that the elements of crime needed to be set out in the Statute, but was prepared to move in that direction, provided that it did not affect the entry into force of the Statute.

60. **Mr. ODOI-ANIM** (Ghana) said that he associated himself with the general thrust of the statement by Lesotho on behalf of the African Group.

61. The Court should have jurisdiction over genocide, crimes against humanity, and war crimes, but not, at the current juncture, over aggression, as that would inevitably cause conflict with the Security Council.

62. The inclusion of the treaty crimes, particularly terrorism and drug trafficking, would only heighten national sensitivities, and would therefore not be conducive to the desired cooperation envisaged for their effective prosecution.

63. He welcomed the general approach to crimes against humanity and preferred option 1 on war crimes.

64. The judges of the Court must display flexibility in applying the Statute, bearing in mind the need to ensure successful prosecutions, without conflicting with national systems. The purpose of the Court was to make sure that national systems worked efficiently so that there would be no need for it to intervene.

65. **Mr. OUMAR MAIGA** (Mali) said that he concurred with the statement made by Lesotho on behalf of the African Group. He favoured the inclusion of genocide, crimes again humanity and war crimes. In the *chapeau* on war crimes, he preferred option 3. Aggression should not be included at that stage, because it was an act for which no generally acceptable definition had yet been found. He favoured a list of weapons such as that in option 1 of section B (o), taking into account the comments made by Switzerland.

66. Most conflicts were internal in nature, so sections C and D should be included in the Statute. It would be premature to include treaty crimes in the Statute, which should be referred to a review conference.

67. **Mr. POLITI** (Italy) said that he fully concurred with the remarks made by Austria on behalf of the European Union. He was strongly in favour of the inclusion of aggression in the Statute. However, if no agreement were reached on a definition and on the relationship with the Security Council relatively soon, it would be necessary to revert to option 2, at least temporarily.

68. While he was sympathetic to at least some of the reasons given for considering the inclusion of treaty crimes, he thought that it was unrealistic to expect that agreement would be reached at the current juncture; the issue should therefore be left to a review conference.

69. Crimes against United Nations personnel could be addressed in the context of war crimes. Concerning the war crimes threshold, he favoured option 3, but was prepared to accept option 2. On weaponry, option 1 under section B (o) offered a possible basis for compromise. The inclusion of sections C and D was an essential element of Italy's position.

70. He doubted the need to include the elements of crimes, because it was a notion foreign to his country's legal system, but he was ready to discuss their elaboration, perhaps in the form of guidelines, after the opening of the Statute for signature at the end of the Conference.

71. **Mr. AGBETOMEY** (Togo) said that he was not, in principle, opposed to the inclusion in the Statute of all the crimes mentioned in the document. However, no appropriate definition of aggression had emerged. He saw no particular reason to include treaty crimes. As for the war crimes threshold, he preferred option 3, although he remained flexible. Concerning weaponry, he preferred option 3 of section B (o), since it was open and could be changed with respect to both cause and effect.

72. Sections C and D on non-international armed conflicts must be included in the Statute, as the credibility of the Court depended on it.

73. **Mr. BAZEL** (Afghanistan) said that he favoured including aggression, for the reasons he had set out in the general debate at the beginning of the Conference. As far as the definition of aggression was concerned, he preferred option 1, provided that it incorporated some elements of General Assembly resolution 3314 (XXIX), such as the sending by a State of armed bands, groups, irregulars or mercenaries which carried out acts of armed force against another State.

74. Concerning the war crimes threshold, he was in favour of option 2. In section B (o), he supported option 1, with the inclusion of blinding laser weapons as subparagraph (vii).

75. On the question of non-international armed conflict, while he again emphasized the principle of complementarity, he expressed his preference for option 1 of section C, for the reasons given by Syria. He also supported the inclusion within the jurisdiction of the Court of crimes against United Nations and associated personnel.

76. **Mr. PERAZA CHAPEAU** (Cuba) said that the Court must be competent to deal with a crime such as aggression, since an aggressor generally committed other war crimes as well. Aggression should not be linked to a role of the Security Council. Even if the Security Council were to play a part, the General Assembly would have to be involved. With regard to aggression falling within the jurisdiction of the Court, exercise of the veto should not be allowed.

77. Genocide, as defined in the 1948 Convention, must clearly come under the Court's jurisdiction. The thresholds of war crimes should be based on the definitions in the Geneva Conventions of 1949; he could accept option 2. Option 1 (vi) of section B (o) required revision in order to find agreed wording.

78. As regards sections C and D, a generally acceptable formulation must be found on non-international armed conflicts. The use of weapons of mass destruction with indiscriminate effects on combatants and non-combatants, should also constitute a crime within the jurisdiction of the Court.

79. The crimes falling under the jurisdiction of the Court must be precisely defined, in accordance with the general principle of *nullum crimen sine lege*.

80. The imposition of a permanent economic blockade should be included as a crime against humanity under the jurisdiction of the Court. That was the basis of the Cuban proposal contained in document A/CONF.183/C.1/L.17.

81. **Mr. DA COSTA LOBO** (Portugal) said that his delegation fully associated itself with the statement made by Austria on behalf of the European Union. He favoured including aggression, provided that agreement could be reached on an adequate definition and on the role of the Security Council.

82. Treaty crimes were of great concern to the international community, but, for reasons given by previous speakers, the matter would be better left to a future revision of the Statute. In the war crimes *chapeau*, he would prefer option 3 but could accept option 2. Regarding the provisions on weapons in section B (o), he preferred option 1. He strongly supported the inclusion of sections C and D on non-international armed conflicts, because the scope of the Court should not exclude situations where the most serious crimes occurred. He had doubts about including the elements of crimes, but was prepared to continue to examine the issue.

83. **Mr. PAL** (India) said that aggression, if properly defined, should in principle be included under the ICC Statute. Treaty-based crimes must also be included since, like the core crimes, they affected people's daily lives.

84. With regard to the *chapeau* on crimes again humanity, he very strongly believed that such crimes applied only to situations of armed conflict. He noted that China shared that concern.

85. There was general agreement in the context of the threshold for war crimes that the ICC would deal only with situations of an exceptional nature. He could therefore support only option 1. The wording of options 2 and 3 would leave it open to the ICC to seek jurisdiction even in situations below the threshold.

86. If the ICC was to deal with the most heinous crimes, it must also address the means of committing them, namely, weapons. Nuclear weapons, with the potential to create the most widespread damage, must be brought within the provisions of the Statute.

87. On principle, he did not agree to the inclusion of either section C or D.

88. Regarding the elements of crimes, the Preparatory Commission procedure could be used to elaborate the elements of the so-called core crimes, and also of aggression and treaty-based crimes.

89. **Mr. SINJELA** (Zambia), speaking also on behalf of Swaziland, said that most of his comments had already been expressed by the representative of South Africa, speaking on behalf of the SADC countries. However, he wished to state that he strongly believed that aggression should come under the jurisdiction of the Statute.

90. **Mr. SLADE** (Samoa) said that he continued to advocate the inclusion of aggression. However, he recognized the problem of defining the crime itself and the related role of the Security Council, which should not jeopardize the success of the Conference. Treaty crimes should also be included, bearing in mind that it was concerns about one of those crimes that had originally inspired the Conference. However, if the related difficulties could not be resolved in time, he would join those who insisted that provision be made for the future inclusion of those crimes, perhaps through the review of the Statute.

91. In the area of war crimes, the inclusion of nuclear weapons was of particular importance. He strongly supported option 3 of section B (o), the language of which was consistent with that of the Hague Conventions. Article Y should

be included in the Statute, under war crimes or elsewhere. In respect of both options 1 and 2, he agreed with the suggestion by New Zealand on explosive bullets.

92. The elaboration of the elements of crime could be beneficial but could appropriately be left to a future meeting.

93. **Mr. DALTON** (United States of America) said that the effectiveness of the Court would largely be judged by the willingness of a significant number of States to join in the treaty and assist the Court in bringing individuals to justice. Its membership would be limited if it sought to overreach established customary international law or set aside national judicial principles.

94. The Court's jurisdiction should be limited to genocide, crimes against humanity and war crimes. The inclusion of terrorism would serve no useful purpose. It would be neither appropriate nor wise for the Court to address isolated war crimes, action against which must be taken through concerted national action.

95. With respect to war crimes thresholds, he supported option 1. The fundamental premise was that the Court must deal only with certain heinous crimes of concern to the international community, which were committed at a relatively high threshold of criminal activity. How to apply the appropriate threshold should be left to the Prosecutor and the judges, but they had a duty to use the limited resources of the Court only in the case of crimes committed as part of a plan or policy, or on a large scale.

96. In section B, paragraph (o), he strongly favoured option 1, subject to a revision of subparagraph (vi) to provide for amendment of the list to avoid the risk of adding weapons to the list without appropriate deliberation. The United States could not accept option 2. Option 3 failed to determine precisely which weapons it would be criminal to use under any circumstances, which was the standard required to establish individual criminal responsibility.

97. Sections C and D were vital to the integrity and rationale of the Court. He hoped that the concerns of certain delegations could be accommodated by appropriate wording, in the *chapeau* or elsewhere, that clearly established the high threshold to be covered by those two sections. The rules were not intended to apply to internal disturbances, nor to affect the responsibility of a Government to establish and maintain law and order by all legitimate means. He supported option 1 in section C and option 2 in section D, and looked forward to further discussion on subparagraphs (b *bis*), (e *bis*), (f) and (l), as well as on article Y.

98. He emphasized the importance of work by the Preparatory Commission on elements of crimes after the Conference and before the entry into force of the treaty. Work on the Rules of Procedure and Evidence could also proceed after the Conference, and ideally should be completed prior to the entry into force of the treaty.

99. An impasse had been reached on the definition of aggression in the context of individual criminal responsibility and on whether to require prior determination by the Security Council regarding State responsibility for aggression.

100. **Mr. MOMTAZ** (Islamic Republic of Iran) said that aggression should be included as one of the crimes within the jurisdiction of the Court. He therefore favoured option 1 of the *chapeau*. However, he was opposed to the inclusion of treaty crimes, because of the difficulty of deciding which to include. With respect to crimes against humanity, he welcomed the proposal that economic embargoes be the subject of further in-depth consideration.

101. As to the war crimes threshold, he preferred option 1. In section B (o), option 1 was preferable, as it included an exhaustive list of prohibited weapons. Nuclear weapons should be included.

102. In principle, he opposed the inclusion of section C on non-international armed conflicts, but his final position would depend on the results of the negotiations on the respective roles of the Security Council and the Prosecutor. He was firmly opposed to the inclusion of section D, since its provisions were not the expression of well-established international customary law.

103. It would be useful to define elements of crimes. If necessary, the task could be undertaken after the adoption of the Statute, and entrusted to the Preparatory Commission.

104. With regard to the exercise of jurisdiction covered by article 6, he said that the General Assembly should be given the same role in the maintenance of international peace and security as that of the Security Council specified in paragraph (b). He opposed option 2 of article 6 and the assignment to the Prosecutor of a role in initiating an investigation.

105. **Ms. O'DONOGUE** (Ireland) said that she endorsed the remarks made by the representative of Austria on behalf of the European Union. Her delegation's position had consistently been to support the inclusion of aggression, subject to an acceptable definition and respect for the role of the Security Council under the Charter. Option 1 was a good basis for further progress on formulating a definition. In the past, her delegation had favoured including treaty crimes, but, bearing in mind the time constraints, that issue could be left to a review conference.

106. She would have preferred not to specify a threshold for war crimes, i.e. option 3, but, in a spirit of compromise, could work on the basis of option 2. With regard to section B (o), she was prepared to show some flexibility. Ireland was actively working towards a global and comprehensive ban on nuclear weapons. Without prejudice to her position on that or other weapons such as anti-personnel mines and laser weapons, she was prepared to work on the basis of option 1. However, she emphasized the importance of including some wording along the lines of subparagraph (vi) in option 1 that would allow the Court to have jurisdiction in rapid response to developments in that area of law. She could also support the proposals of Sweden and Switzerland with respect to the *chapeau* of option 1, namely, to add a reference to inherently indiscriminate weapons and methods of war.

107. She regarded the inclusion of sections C and D as fundamental. The inclusion of elements of crimes was unnecessary, but she would not object, if that did not delay the entry into force of the Statute.

108. **Mr. van BOVEN** (Netherlands) said that he associated himself with the statement made by the representative of Austria on behalf of the European Union.

109. In principle, he favoured the inclusion of aggression, provided that a satisfactory definition could be found and the role of the Security Council could be respected. He doubted, however, whether the Conference could reach a basis for agreement, so that it might be advisable not to include it. He had always regarded the inclusion of treaty crimes to be inadvisable. The Statute should confine itself to the core crimes: genocide, war crimes, and crimes against humanity.

110. He preferred to have no threshold for jurisdiction on war crimes. However, in a spirit of compromise, he could agree to option 2 as being closer to the "no threshold" position than option 1.

111. In section B (o), he preferred option 1, if a better formulation of the review clause under subparagraph (vi) could be found. Jurisdiction on war crimes in conflicts of a non-international nature should be an essential part of the Court's jurisdiction. Further work could be done on elements of crimes after the Conference, provided that the entry into force of the Statute was not delayed.

112. **Mr. EL MASRY** (Egypt) said that he had no objection to the inclusion of genocide, crimes against humanity and war crimes. It was important to include aggression, provided that the issue of its definition could be solved. He pointed out that the discussion paper omitted option 3 of the consolidated text, which he favoured, as being the closest to General Assembly resolution 3314. Even if no definition of aggression were reached, that crime should still be included, but the Court should not be allowed to exercise its jurisdiction until an acceptable definition had been found. As to the role of the Security Council, he supported the proposal by the Syrian Arab Republic that the Court could exercise its jurisdiction if the Security Council decided that an act of aggression had been committed. However, if the Security Council failed to do so because of a veto by one of the permanent members, the General Assembly must be able to trigger the action of the Court.

113. Terrorism, which he condemned in all its forms, should be included within the jurisdiction of the Court. However, a distinction should be made between terrorism and national liberation movements for self-determination and independence.

114. He did not favour a threshold for jurisdiction over war crimes, but could, for the sake of compromise, accept option 2. With regard to section B (o), he could not accept any list of weapons that did not include nuclear weapons. Thus he supported option 2, while reserving his position regarding anti-personnel mines.

115. He did not favour the inclusion of sections C and D, but could consider section C if safeguards such as non-interference in the internal affairs of States, a higher threshold and the guarantees contained in Additional Protocol II to the Geneva Conventions were stipulated. Elements of crimes must be included in the Statute, but, in view of time constraints, the Preparatory Commission might be charged with their examination, for possible inclusion at the first review conference.

116. **Mr. CHKHEIDZE** (Georgia) said that it was his Government's view that large-scale violations of international humanitarian law committed in non-international armed conflicts should fall within the jurisdiction of the Court. He therefore strongly endorsed the inclusion of sections C and D in the Statute. As for the threshold for war crimes, option 2 could serve as the basis for a compromise, to elicit the widest possible support from delegations.

117. **Mr. MAEMA** (Lesotho) said that he supported the views expressed by South Africa on behalf of SADC. The ICC should have automatic jurisdiction over genocide, crimes against humanity and war crimes. An acceptable definition of aggression must be found, so that it could also be included in the Statute. In view of the controversy that still surrounded questions of definition and scope, as well as time constraints, treaty crimes should be included at a later stage. The definition of genocide contained in the 1948 Genocide Convention should be adopted.

118. Crimes against humanity were acts committed on a widespread or systematic basis. Under the war crimes heading, he preferred option 2. Should option 1 be chosen, he would like to see subparagraph (vi) of section B (o) included, so that the Assembly of States Parties could add further weapons to the list. The Court's jurisdiction should extend to attacks on civilians in non-international armed conflict, as well as in international armed conflict; he supported the inclusion of sections C and D.

119. He was open-minded regarding the elaboration of elements of crimes soon after the conclusion of the Conference, but there should be no linkage between work on those elements and the entry into force of the Statute.

120. **Ms. DASKALOPOULOU-LIVADA** (Greece) said that she supported the statement made by Austria on behalf of the European Union. Despite the attendant difficulties, she firmly supported the inclusion of aggression as a crime

within the jurisdiction of the Court and therefore preferred option 1 of subparagraph (d). On the definition of aggression, she was ready to work on the basis of option 1, although she would have preferred a text that encompassed all the instances of aggression and covered all concerns. However, even a restricted definition was better than no definition at all, and better than the exclusion of aggression from the Court's jurisdiction.

121. On the other hand, treaty crimes were not of the same fundamental nature as the core crimes, for which reason they should not, at that stage at least, come within the jurisdiction of the Court.

122. She could accept the proposal concerning crimes against humanity, except that terrorism should not be listed under that heading, being adequately covered elsewhere in international law.

123. She would have preferred option 3 in the war crimes *chapeau*. However, she could accept option 2 if that met with general agreement. On the list of weapons in section B (o), she favoured option 1. The inclusion of sections C and D was crucial to the relevance of the Statute and the Court.

124. Further reflection on the elements of crimes was clearly needed. The issue could certainly be addressed by the Preparatory Commission after the Conference, provided that the entry into force of the Statute was not delayed.

125. **Mr. KAMTO** (Cameroon) said that he fully supported the inclusion of aggression in the Statute, and option 1 under the war crimes *chapeau*. He would welcome any improved draft that would achieve consensus. He was open-minded as to the inclusion of treaty crimes. As to war crimes, he preferred option 3 for reasons of principle and for technical reasons, although, for the sake of consensus, he could accept option 2. In section B (o), he could accept option 1, although he would prefer the inclusion of elements from the other options.

126. Sections C and D should be included. Consideration of the elements of crimes could be kept under review, either by referring to them in the Final Act or by introducing an explicit clause in the Statute that would give the Preparatory Commission a mandate to produce a paper on the subject.

127. **Mr. TOMKA** (Slovakia) said that he had strongly supported the inclusion of aggression but that a generally acceptable definition would probably not be found. He therefore believed that option 2 should be adopted, as that would enable the Conference to complete its work. That did not preclude the inclusion of aggression in the future, when the Statute was reviewed, once an agreement on a definition had been reached.

128. Treaty crimes differed in nature from crimes against humanity, war crimes and genocide, and should not be included in the Statute at the current stage.

129. As he saw it, the war crimes threshold was not an element in the definition of such crimes, but rather a condition for establishing the jurisdiction of the Court. He would prefer option 3, but option 2 seemed to offer a basis for compromise.

130. With regard to section B (o), he said that option 2, which had the most support, did not reflect the current state of international law. Option 1 could serve as a basis for compromise, especially as subparagraph (vi) would make it possible to take into account future developments in the area of armed conflicts and international humanitarian law.

131. Sections C and D should be included, as the majority of the conflicts in the world were non-international in nature.

132. There was no need to include the elements of crimes, as the Statute should be sufficient for the functioning of the Court. He had no objection to discussion of the issue by the Preparatory Commission, but questioned the legal force of any document produced by the Commission and its relevance to decisions of the Court's judges.

*The meeting rose at 6 p.m.*