drug trafficking offences which involved an international dimension, and of serious threats to environment.

Proposal was made to reformulate Articles 17 to 20 which define 'crimes'. It was felt that the Article 20, in particular, should be reformulated along the lines of the draft Code with each crime being defined in a separate article identifying the essential elements of the offences and the minimum qualitative and quantitative requirements.

The principle of complementarity to be defined as an element of the competence of the Court ; the conditions timing and procedures for invoking this principle need to be clearly indicated. Some delegations supported inclusion of apartheid and other forms of racial discrimination as defined in the relevant conventions. Some others supported inclusion of torture, as also of the Hostage Convention, of serious drug trafficking offences which involved an international dimension, and of serious threats to environment.

To examine the aspects relating to the effective functioning of the Court vis-a-vis the primary responsibility of the Security Council for the maintenance of international peace and security.

Outlining of final clauses for the transitional arrangement for the transfer of cases from the ad 'hoc tribunals to the Court to avoid concurrent or parallel jurisdiction.

There was broad agreement that the fundamental principles of criminal law should be applied to the crime punishable under the statute should be clearly laid down in the statute in accordance with the principle of legality, *nullum crimen sine lege,, nulla poena sine lege*. The articulation of the fundamental principles of criminal law in the statute was considered consistent with the prerogative of legislative competence of sovereign States. It would give potential States parties a clear understanding of the obligations entailed. It would also provide clear guidance to the court and promote consistent jurisprudence. Furthermore, it would ensure predictability and certainty in the application of law, which would be essential for the protection of the rights of the accused.

It was suggested that, in order to satisfy the requirements of fairness, transparency, consistency and equality in criminal proceedings, not only the fundamental principles of criminal law, but also the general and most important rules of procedure and evidence should be articulated in the statute. It was also suggested that the principle of procedural legality and its legal consequences should be firmly established in the statute itself.

The principle of non-retroactivity was considered fundamental to any criminal legal system and, therefore, having regard to the substantive link between this concept and article 39 of the statute (*nullum crimen sine lege*), this principle was sought to be clearly and concisely set out in the statute, even though some of the crimes referred to in the statute were recognized as crimes under customary international law. It was also noted that the principle of *nulla poena* sine lege also required that the principle of non-retroactivity be clearly spelled out in the statute and that the temporal jurisdiction of the court should be limited to those crimes committed after the entry into force of the statute.

A general view was that since there could be no criminal responsibility unless *mens rea* was proved, an explicit provision setting out all the elements involved should be included in the statute. The need for including a provision setting out an age limit at which an individual could be regarded as not having the requisite *mens rea* was widely supported.

On the question of cooperation between the court and national jurisdiction. it was widely agreed that since the proposed international criminal court would not have its own investigative or enforcement agencies, the effectiveness of the court would depend largely upon the cooperation, of national jurisdiction in obtaining evidence and securing the presence of accused persons before it. It was considered essential, therefore, that the statute provide the court with a sound, workable and predictable framework to secure the cooperation of States. There was the position that the legal framework governing cooperation between the States and the court should be broadly similar to that existing between the State on the basis of extradition and legal assistance agreements. This approach would ensure that the framework of cooperation would be set forth explicitly and the procedure in which each

State would meet its obligations would be controlled by its national law, although there would be instances in which a State must amend its national law in order to be able to meet those obligations. There was also the position, however, that the statute should provide for an entirely new regime which would not draw upon existing extradition and legal assistance conventions, since the system of cooperation between the court and the States was fundamentally different from that between States, and extradition existed only between sovereign States. The obligation to cooperation imposed by the statute on State parties would not prevent the application of national laws in implementing such cooperation.

The principle of complementarity was considered particularly important in defining the relationship and cooperation between the court and the States. It was suggested that the principle called for the establishment of a flexible system of cooperation which would allow for special constitutional requirements of States, as well as their obligations under existing treaties.

There was general support for the view that all basic elements of the required cooperation between the court and states should be laid down explicitly in the statute itself, while the list of such elements need not be exhaustive.

The draft statute on international criminal court outlines the requirements for a fair trial. For this purpose, applicable law, as outlined in article 33, relates to (a) statute itself., (b) applicable treaties and the principles and rules of general international law ; and (c) to the extent applicable, any rule of national law. In the circumstance, though it is difficult to outline the elements of fair trial, there was general agreement on the importance of matters concerning procedural questions and fair trial and rights of the accused, but divergent views were expressed on how best to meet this need. It was stressed that the procedural rules should maintain a balance between different penal systems of States 'and draw from their positive elements and that, therefore, an international criminal court should draw upon the practice of any system that could assist it in the performance of its functions. It should not be used as a standard to test the credibility of penal systems of individual States.

In fact,, there was an overwhelming view, at least among some Asian-

African countries, that, in the interest of economy, extensive pre-trial investigations should be left to the charge of the complainant State and not be taken over or initiated suo moto by the prosecutor's office. This, it was believed, would facilitate in keeping the prosecutor's office as a professional body, and not merely an investigating agency, without in any manner interfering in the sovereign and domestic jurisdiction of a State.

State consent, for instance, becomes crucial in matters relating to 'arrest' and 'surrender'. Arrest of a suspect will always be carried out by a State pursuant to the judicial assistance which it renders to the court under para 7 of the draft statute. In the case of pre-trial detention as enunciated in article 29, the predominant view seems to be that it should only be confined to situations in which the accused is being detained by the court pending trial and not by the State party pending a transfer to the court. At this stage, matters concerning the grant of bail, the legality of detention and the conditions of detention should be wholly left to the purview of the detaining State and should not be subject to the control of the court.

Although the complexities involved in surrendering the accused by a State to the court were addressed, this subject deserves further consideration. There could be internal legal impediments or a constitutional bar against surrender of nationals to any foreign forum. The question of extradition or dual criminality, i.e., the conduct alleged to be a crime, must be regarded as a crime by the requested State also needs further consideration. Apart from the legal or constitutional bar, the other grounds for refusal to surrender need examination. For these reasons, it would be necessary to take into account national laws and procedures and harmonize them to the extent possible. The procedures incorporated in the national laws, for instance, become particularly important while evolving the rules of evidence.

The procedural laws which could be adopted from the national laws could also be identified. There are, for instance, , notification of indictment, establishment of *prima.facie case*, right to legal assistance for the suspect, scope for objections of jurisdictional as well as merits phase, fair and expeditious trial (with full respect to the rights of the accused trials should generally be open to public), presumption of innocence until proven guilty, *non bis in idem*

(rule against double jeopardy), consideration of aggravating or mitigating factors in award of punishment, appeal and review for material error of law or miscarriage of justice or manifest disproportion in sentencing, revision on the basis of a new material fact, rule of speciality (prohibition of trial for any offence other than that for which accused was surrendered), and pardon and parole or commutation of sentence under appropriate circumstances.

(i) On the question of financing the Court it was suggested that it could be from the regular budget of the UN. On the other hand, according to some suggestions the independence of the Court required States parties to finance it through their own contributions on the basis of the scale of assessments of the UN.

(i) On the role of the Prosecutor *vis-a-vis* on-site investigations spectrum of views were expressed. For instance, such investigations should only be conducted with the consent of the State concerned to ensure respect for its sovereignty with the possible exception of situations in which the national criminal justice system was not fully functioning.

While concluding the meeting, the Preparatory Committee noted the usefulness of its discussions and the cooperative spirit in which the debates took place. Further, considering the progress made, and also considering the commitment of the international community to the establishment of an ICC the Preparatory Committee proposed to meet three or four times up to a total of 9 weeks before the Diplomatic Conference in 1998. With a view to allow the widest possible participation of States, it decided to continue the work in the form of open ended working groups, concentrating on the negotiation of proposals to facilitate producing a widely acceptable draft consolidated text of a convention to be submitted to the diplomatic conference.

On the basis of this recommendation the GA in its 5 1 th Session adopted the resolution 51/207 dated 17 December, 1996, in which the GA,

Decided to reaffirm the mandate of the Preparatory Committee, and directs it to proceed in accordance with paragraph 368 of its report;

Decided also that the Preparatory Committee shall meet from 1 1 to

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

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

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

PREPCOM held from 11 to21 February,1997

The Preparatory Committee met in New York in February, 1997. At that session an open ended Working Group was constituted on General Principles of Criminal Law and Penalties. The open ended working group considered several proposals on such key issues as (i) the definition of 'crimes' and 'war crimes' ; (ii) crime of terrorism ; (iii) crime of aggression ; (iv) criminal (individual) responsibility (v) crimes against humanity ; (vi) alternative to the review mechanism; (vii) command responsibility.

In the open ended Working Group particular, drafts on 'crimes of terrorism' and 'crimes of aggression'l' were suggested, discussed and approved. This meeting was inconclusive and no substantial progress was made on any of the important issues.

The Working Groups also recommended to the PrepCom the text of a number of articles concerning general principles of criminal law, as a first draft for inclusion in the draft consolidated text of the Convention for an international criminal court. The text dealt with the following subject matters : *nullem crimen sine lege* (no crime without law) ; non retroactivity ; irrelevance

of official position ; individual criminal responsibility and command responsibility *mens rea* (mental elements of crime) ; *actus rea* (act and/or omission) ; mistake of factor of law ; age of responsibility and end of statute of limitation.

In the course of the deliberations of the Working Group, it was generally believed while the ICC should definitely be an independent court, a careful balance between the different responsibilities of the ICC and the Security Council will have to be found. Further, the establishment of the ICC should not alter or diminish the competence of the Security Council, one of the main Organs of the United Nations.

Recalling that the General Assembly at its 51st session had expressed its deep appreciation for the renewed Offer Of the Government of Italy to'host a Conference on Establishment of an International Criminal Court in June 1998 the PREPCOM at the conclusion Of its February Session recommended that the General Assembly accept Italy as host of plenipotentiary conference, on the establishment of the Proposed court, in Rome in June, 1 998.

PREPCOM held from 4 to 5 August 1997

At the August 1997 meeting the PREPCOM considered the reports of the two working groups on (i) complementarity and trigger mechanisms and on (ii) procedural matters. One working group Presented texts corresponding with articles 21 to 25 and article 35, dealing with the issues Of complementarity and the trigger mechanism and recommended their inclusion in the draft consolidated text of the Statute of the Proposed court.

(a) Complementarity

The issue of complementarity involves the relationship between the international criminal court and national jurisdiction. The third preambulatory paragraph of the draft Statute of the ICC adopted by the ILC emphasizes that the international criminal court is intended to be complementary to national criminal justice systems in cases where such trial Procedures may not be available or may be ineffective. A view was, therefore, expressed that complementarity should reflect the jurisdictional relationship between the

international criminal court and national authorities including national courts. It was generally agreed that a proper balance between the two was crucial in drafting a statute that would be acceptable to a large number of States. Different views were expressed on how, where, to what extend and with what emphasis complementarity should be reflected in the statute.

It has been suggested that the principle of complementarity be defined as an element of competence of the court and that the conditions, timing and procedure for invoking this principle be clearly indicated. It was Proposed in this regard that the person named in the submission to the court or the State party invoking this principle should provide supporting information. It has further been suggested that consideration be given to how thecomplementarity regime would take account of national reconciliation initiatives entailing legitimate offers of amnesty or internationally structured peace processes.

It was noted that oesides the third preambulatory paragraph the principle of complementarity involved a number of articles of the statute central among which was article 35 on admissibility. It was said that the principle of *non bis in idem* (rule against double jeopardy), set out in article 42, was closely linked with the issue of complementarity and that, therefore, this article should apply only to *res judicata* and not to proceedings discontinued for technical reasons It was argued that the principle of *non his in idem* should not be construed in such a way as to permit criminals to escape any procedure A view was expressed that provisions of articles 26 and 27 adequately reflected the issue of complementarity and avoided the risk of 'double jeopardy'.

(b) Trigger Mechanism

Trigger mechanism refers to the question of what, or which actors, could initiate or 'trigger' court proceedings, i.e., Member States, the United Nations, Security Council and/or the Court prosecutor. The issue of trigger mechanism touches upon two main clusters of issues : acceptance of the court's jurisdiction, States consent requirements and the conditions for the exercise of jurisdiction (article 21 and 22) ; and who can trigger the system and the role of the prosecutor (article 23 and 25).

As regards the acceptance of court's jurisdiction, view was expressed that the inherent jurisdiction of the court should not be limited to genocide but should extend to all the core crimes as well. It was noted that the question of acceptance the court's jurisdiction was inextricably linked to the question precondition for the exercise of that jurisdiction, or consent, as well as to the question of who might bring complaints. As regards the requirement of consent of the State where the crime was committed, it was suggested that article 21(1)(b)(ii) be modified to cover situations where the crime might have been committed outside the territory of any State, such as on the high seas. It was also noted that the court could not exercise jurisdiction in relation to States not party to the statute. This, it was also noted, could become a particularly difficult issue when the State party was the custodial state or its cooperation was indispensable to the prosecution.

On the question of the trigger mechanism it was generally agreed that the statute would not affect the role of the Security Council as prescribed in the Charter of the United Nations. The Council would, therefore, continue to exercise primary authority to determine and respond to threats to and breaches of the place and to acts of aggression and the obligation of Member States to accept and carry out the decision of the Council under Article 25 of the Charter would remain unchanged. However, the following three concerns were voiced, namely:

(i) that it was important, in the design of the statute, to ensure that the international system of dispute resolution - and in particular the role of the Security Council would not be undermined;

(ii) that the statute should not confer any more authority on the Security Council that already assigned to it by the Charter; and

(iii) that the relationship between the Court and the Council should not undermine the judicial independence and integrity of the sovereign equality of States.

On the question of the role of the Prosecutor, some delegations found

that the role of the posecutor, under article 25, was too restricted and that States or the Security Council, for a variety of political reasons, would be unlikely to lodge complaint. It was therefore urged that the Prosecutor should be empowered to initiative investigations ex officio or on the basis of information obtained from' any source.

In order to prevent any abuse of the process by any of the triggering parties it was proposed that in the event of a complaint being lodged by a State or an individual or initiated by 'the Prosecutor, the Prosecutor would first have to satisfy him self or herself that *Prima facie* case against an individual existed and that the requirements of admissibility had been satisfied. Some delegations did not however agree with the notion of an independent power for the Prosecutor to institute a proceeding before the court as, in their view, such an independent power would lead to politicisation of the court and allegations that the Prosecutor had acted for political motives.

The other group presented consolidated text on the following subjects; notification of the indictment ; trial in presence of the accused proceedings on an admission of gulit ; investigation of alleged crimes, functions and power of the chamber : commencement of Prosecution ; presumption of innocence; right of the accused ; and protection of the victims and witnesses.

The Chairman of the PREPCOM, Mr Adriaan Bos (Netherlands) said the work of the Working Group on procedural matters had established a firm basis for future discussions. There was a possibility of arranging some inter-sessional activity to prepare for the session in December.

PREPCOM held from 1 to 12 December 1997

During the PREPCOM session held from 1 to 12 December, 1997, the following five Working Groups were constituted by the Preparatory Committee at its 54th Meeting held on 1 December 1997 namely:

(a) Working Group on Definitions and Element of crimes, chaired by Mr. Adriaan Bos ;

(b) Working Group on General Principles of Criminal Law, chaired by Mr. Per Saland;

(c) Working Group on procedural Matters, chaired by Ms. Silvia Feernandez de Gurmendi ;

(d) Working Group on International Co-operation and Judicial Assistance, chaired by Mr. Pieter Kruger; and

(e) Working Group on Penalties, chaired by Mr. Rolf Fife.

The Preparatory Committee, on 12 December, 1997 took note of the reports of the above Working Groups. It also noted that, pursuant to paragraph 7 of the General Assembly resolution 51/207 of 17 December 1996 a trust fund was established for the participation of the least developed countries in the work of the Preparatory Committee and in the diplomatic conference of plenipotentiaries, and in the said resolution States were called upon to contribute voluntarily to the said trust fund. By August 1977 contributions to the fund had been made by 7 States viz. Belgium, Canada, Denmark, Finland, the Netherlands, Norway and Sweden and 12 States had utilized the Trust Fund to facilitate their participation in the December session.

(a) Working Group on Definitions and Elements of Crimes

In the report of the Working Group on Definitions and Elements of Crimes, it was recommended that, in supersession of the existing text, the text of the article concerning the definition of war crimes contained in document A/AC.249/1997/WG.I/CRP.9 be included in the draft consolidated text of the convention from international criminal court.For the Purposes of the Statute, 'war crimes' are defined to mean the crimes listed in article 2O C, which is divided is sections A, B, C and D. The new article also states that, without Prejudice to the application of the Provisions of the Statute, nothing in this part of the statute shall be interpreted was limiting or prejudicing in any way existing or developing rules of international law.

(b) Working Group on General Principles of Criminal Law

The Working Group on General Principles of Criminal Law recommended to the Preparatory Committee the text of the articles concerning general principles of Criminal law as a first draft for inclusion in the draft consolidated text of a convention for an international criminal court.

(C) Working Group on Procedural Matters

The Working Group on Procedural Matters has recommended to the Preparatory Committee the text of the articles concerning procedural matters as a first draft for inclusion in the draft consolidated text of the convention for an international criminal court. In order to facilitate the Working Group deliberations at the March-April ' 1998 session of the PREPCOM, individual delegations presented draft revised abbreviated compilations on relevant articles.

(d) Working Group on International Cooperation and Judicial Assistance

The Working Group on International Cooperation and Judicial Assistance recommended to the Preparatory committee the text of the articles concerning international cooperation and judicial assistance as a first draft for in the draft consolidated text of the convention for an international criminal court.

(e) Working Group on Penalties

The Working Group on Penalties has recommended to the Prepacatory Committee the text of the, provisions concerning penalties as a first draft for inclusion in the draft consolidated text of a convention for an intemational,criminal court. The issue of the death penalty was not discussed by the working group' which recommended that the text concerning the death penalty be included in the draft consolidated text. The issue of the effect of the judgment, compliance and implementation was not discussed by the working group, which suggested that it be dealt with in the context of enforcement of sentences.