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Check against delivery

**EXPLANATION OF VOTE BY MR. DILIP LAHIRI, HEAD OF DELEGATION
OF INDIA,
ON THE ADOPTION OF THE STATUTE OF THE INTERNATIONAL COURT**



Mr. Chairman,

Throughout the long process of preparing for this Conference, India negotiated in the expectation that an International Criminal Court will emerge to which we can be a signatory. As the world's largest democracy, which is fortunate to have in addition one of the most independent and far-sighted judiciaries in the world, whose contribution to the jurisprudence on the rights of individuals is almost unmatched, we would have wanted to be one of the first signatories of the ICC; equally, it should have been in the interests of the ICC to have a country like India on board.

We have always had in mind a Court that would deal with truly exceptional situations, where the State machinery had collapsed, or where the Judicial system was either so flawed, inadequate or non-existent that justice had to be meted out through an International Court, because redress was not available within the country. If this is our common understanding, and we have always been told that it is, it must follow that the Statute should have been drafted so that it was clear that the ICC was being established to deal with truly exceptional situations. That, however, has not happened. Instead of legislating for the exception, the scope of the Statute has been broadened so much that it could be misused for political purposes or through misplaced zeal, to address situations and cases for which the ICC was not intended, and where, as a matter of principle, it should not intrude. What the zealots have achieved, therefore, is a contradiction in terms: a Court framed with Armageddon in mind is set in Utopia.

The question this Conference must ask itself is, how will it measure success? Will it be counted a success if the Conference adopts a Statute, even if this does not find wide acceptance? We are reminded again and again that the ICC is being set up to try individuals who, on the grossest scale, violate the rights of individuals. It will act, in the name of humanity, to protect the interests of humanity. But, as we said during the negotiations, it was odd, for instance, that the draft adopted a definition of crimes against humanity with which the representatives of over half of humanity did not agree. And we are now about to adopt a Statute to which the Governments who represent two-thirds of humanity would not be a party. This is an unusual measure of success.

Allow me, Mr. Chairman, to explain to this meeting of plenipotentiaries our fundamental objections to this Statute. Firstly, the Statute gives to the Security Council a role in terms that violate international law. We have been told that the Council must have a role built into the Statute because it had set up the ad hoc tribunals for the former Yugoslavia and

for Rwanda, and has therefore established its right to do so. Those were decisions of a dubious legality. The Charter did not give the Council the power to set up Courts, the Council did so in any case, and can do so again, only because its power cannot be challenged. But what the Council seeks from the ICC through the Statute, and what the draft gives it, is something else - it is the power to refer, the power to block and the power to bind non-States Parties. All three are undesirable.

The power to refer is now unnecessary. The Security Council set up the ad hoc tribunals because no judicial mechanism then existed to try the extraordinary crimes committed in the former Yugoslavia and in Rwanda. Now, however, the ICC would exist and States Parties would have the right to refer cases to it. The Security Council does not need to refer cases, unless the right given to it is predicated on two assumptions. First, that the Council's referral would be more binding on the Court than other referrals; this would clearly be an attempt to influence justice. Second, it would imply that some members of the Council do not plan to accede to the ICC, will not accept the obligations imposed by the Statute, but want the privilege to refer cases to it. This too is unacceptable.

The power to block is in some ways even harder to understand or to accept. On the one hand, it is argued that the ICC is being set up to try crimes of the gravest magnitude. On the other, it is argued that the maintenance of international peace and security might require that those who have committed these crimes should be permitted to escape justice, if the Council so decrees. The moment this argument is conceded, the Conference accepts the proposition that justice could undermine international peace and security.

The power to bind non-States Parties to any international treaty is not a power given to the Council by the Charter. Under the Law of Treaties, no state can be forced to accede to a treaty or be bound by the provisions of a treaty it has not accepted. The Statute violates this fundamental principle of international law by conferring on the Council a power which it does not have under the Charter, and which it cannot and should not be given by any other instrument. This is even more unacceptable, because the Council will almost certainly have on it some non-States Parties to this Statute. The Statute will, therefore, give non-States Parties, working through the Council, the power to bind other non-States Parties. If that is indeed the intention, why have we gone through this charade of a Conference of Plenipotentiaries, and the agonising over optional jurisdiction and State consent? Why wait now for signature and ratification? The permanent members of the Security Council could have got together with the like-minded and cobbled together a Statute with which the rest of the world in any case has no option but to comply if the Security Council, acting under Chapter VII, demands it. We believe, Mr. Chairman, that the role for the Security Council built into the Statute of the ICC sows the seeds of its destruction.

But while we tried, unsuccessfully, to ensure that the Court would be free from political influence, and its Statute in full conformity with the Law of Treaties, on the penultimate day of the Conference, the purists resurrected and forced into the Statute the concept of universal or inherent jurisdiction, which too makes a mockery of the distinction between States Parties and those who choose not to be bound by a treaty. It is truly unfortunate

that a Statute drafted for an institution to defend the law should start out straying so sharply from established international law. Before it tries its first criminal, the ICC would have claimed a victim of its own - the Vienna Convention on the Law of Treaties.

The third point of principle for us was that an ICC, whose Statute was being negotiated 50 years after the invention and first use of nuclear weapons should explicitly ban their use as a crime. This, however, has not happened. Expediency has prevailed. As a nuclear weapon state, we tabled a draft amendment to list nuclear weapons among those whose use is banned for the purposes of the Statute. To our very great regret, this was not accepted. The message this sends is that, at the level of Plenipotentiaries, the international community has decided that the use of nuclear weapons, the most inherently indiscriminate of weapons, is not a crime. The appropriate conclusions should flow from this, though we will continue our campaign to have the international community outlaw nuclear weapons.

What is worse, the Statute does not list any weapon of mass destruction among those whose use is banned as a war crime. We all know that in a variety of options, these weapons have been considered for inclusion in the Statute. What this final decision means is that the Statute of the ICC lays down, by clear implication, that the use of weapons of mass destruction is not a war crime. This is an extraordinary message to send to the international community.

For these fundamental reasons of principle, we cannot accept the Statute. It is a matter of very great regret to us, but the Government of India will not be able to sign the Statute.

Thank you, Mr. Chairman.