Document:-

A/CN.4/SR.2360

Summary record of the 2360th meeting

Topic:

Draft code of crimes against the peace and security of mankind (Part II)- including the draft statute for an international criminal court

Extract from the Yearbook of the International Law Commission:-

1994, vol. I

certain treaties was evidence of the existence of certain rules of general international law. But were a treaty itself and its degree of acceptance sufficient evidence of the existence of a rule of general international law? ICJ had stated further that some resolutions of the Assembly had the status of rules of general international law. Yet was it known how many States had accepted those rules? He preferred to support the cautious position taken by Mr. Tomuschat and not to be so bold as to assert that apartheid was a crime under general international law which should be included in the list in article 20, paragraph 1.

48. The fact that a crime fell in one category or the other clearly had implications for the jurisdiction of the court. In the Working Group's view, in the case of genocide, the court ought to have "inherent jurisdiction", the perhaps unhappy term used in the commentary. It might have been better to speak of jurisdiction *ipso jure*. It was essential for the principle of the jurisdiction *ipso jure* of the future international criminal court to be defined as clearly as possible and to rest on sound legal foundations. He had put forward the idea, which had not been adopted by the Working Group, that acceptance of the court's jurisdiction might be tacit and result from acts unmistakably demonstrating the willingness of a State which had not expressly accepted the jurisdiction of the court by depositing an instrument to that effect to accept that jurisdiction in a specific case. To allow that possibility might be a way of strengthening the exercise of the jurisdiction of the court. The Working Group ought to consider it.

49. His last comment concerned article 23. The phrase "if the Security Council... so determines" used in paragraph 1 and echoed by the phrase "unless the Security Council so determines" in paragraph 3 was not a very happy one. It was not desirable for the court to exercise its jurisdiction by virtue of a mandate of the Security Council. In order to provide a better guarantee of the necessary independence of the court, it would be preferable to replace those phrases by a more flexible formula such as "at the request of the Security Council". He did not, however, support the suggestion that paragraph 3 should be deleted. The provision was based substantially on the Charter of the United Nations provisions concerning the powers of the Council as the guardian of international peace and security. There was some point in referring to that in the present context.

Other business

[Agenda item 10]

50. Mr. Sreenivasa RAO informed the members of the Commission that, in the context of the United Nations Decade of International Law,[13] India was marking in 1994 the centenary of the birth of a distinguished Indian jurist, the late Pramothanath Bandyopadhyay, who had written in particular about the practices and principles of international law which had governed the States of ancient India as between themselves and between them and States outside the Indian subcontinent. He had made a remarkable contribution to international law, not only by demonstrating that international law did not owe its origins exclusively to Europe, but also by inspiring several generations of students of international law to promote the concept of the rule of law based on equality and justice for all.

51. A copy of Mr. Bandyopadhyay's work[14] would be lodged with the secretariat for the members of the Commission to consult if they wished.

52. The CHAIRMAN said that the work was indeed an important one, for it broadened the often very Eurocentric approach, to the history of international law.

The meeting rose at 1.05 p.m.

[13] Proclaimed by the General Assembly in its resolution 44/23.

[14] *International Law and Custom in Ancient India* (New Delhi, Ramanand Vidya Bhavan, 1982).

2360th MEETING

Wednesday, 29 June 1994, at 3.10 p.m.

Chairman: Mr. Vladlen VERESHCHETIN

Present: Mr. Al-Khasawneh, Mr. Barboza, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Villagrán Kramer, Mr. Yankov.

Draft Code of Crimes against the Peace and Security of Mankind[1] (*continued*) (A/CN.4/457, sect. B, A/CN.4/458 and Add.1-8,[2] A/CN.4/460,[3] A/CN.4/L.491 and Rev.1 and 2 and Rev.2/Corr.1 and Add.1-3, ILC(XLVI)/ICC/WP.3 and Add.1-2)

[Agenda item 4]

REPORT OF THE WORKING GROUP ON A DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT (*continued*)

1. The CHAIRMAN invited the Commission to resume its consideration of part three of the draft statute for an international criminal court, which was entitled "Jurisdiction of the Court" (A/CN.4/L.491).

[1] For the text of the draft articles provisionally adopted on first reading, see *Yearbook... 1991*, vol. II (Part Two), pp. 94 *et seq.*

[2] Reproduced in *Yearbook... 1994*, vol. II (Part One).

[3] Ibid.

2. Mr. PAMBOU-TCHIVOUNDA said that the title of article 20 (Jurisdiction of the Court in respect of specified crimes) was inappropriate and should be amended to refer to "acts treated as crimes". He fully agreed with Mr. Robinson (2358th meeting) about the need to include apartheid in the list of crimes contained in the article and was surprised by the failure of the Working Group on a draft statute for an international criminal court to mention the draft Code of Crimes against the Peace and Security of Mankind. Did such silence mean that there was no link at all between the draft statute and the draft Code? Or did it mean that the crimes contained in the Code were to be assimilated to those mentioned in article 20 of the statute? Or was it merely an oversight on the part of the Working Group? Doubtless it was an oversight and, in his opinion, the article should in fact include an express reference to the crimes defined in the Code, either in a separate paragraph or by incorporation in paragraph 1.

3. He was not sure that privileged treatment should be given to the crime of genocide in article 21 (Preconditions to the exercise of jurisdiction), paragraph 1. It would be better to give the same treatment to all the crimes falling within the court's jurisdiction *ratione materiae*. Paragraph 2 posed a problem of construction: once the custodial State had agreed to a request to surrender the accused there seemed to be no reason for the requirement of acceptance by that State of the court's jurisdiction with regard to the crime in question. If the Working Group wanted to make the surrender of the accused dependent on acceptance of jurisdiction, it should make the point clear by rewriting paragraph 2. In any event, he wondered about the functional relationship which would have to be established between acceptance of jurisdiction and surrender of the accused, as that relationship could only operate negatively.

4. The combined effect of paragraphs 2 and 3 of article 21 amounted to a most unusual concession in favour of unilateral voluntarism which would neutralize the system established by the statute, and the Commission would have done all the work for nothing. The implementation of article 21 would challenge the entire body of international treaty law, in particular with regard to the established regimes of interpretation and amendment applicable to the whole of the draft statute. Therefore, the whole structure of article 21 must be thoroughly revised.

5. The title of article 23 (Action by the Security Council) was also inappropriate and should be amended to read "Relations between the Security Council and the Court". As to paragraph 2, he had already stated in the preliminary discussion of the text of the draft statute (2330th meeting) that aggression against a State could hardly be committed by an individual. An individual could commit an act of aggression against a State only when acting as the agent of another State. That raised the question of the criminal responsibility of States and whether they came under the court's jurisdiction *ratione personae*. If they did not, then paragraph 2 should be deleted and the crime of aggression removed from the list contained in article 20.

6. Both the spirit and the letter of article 23 made the functioning of the court subject to possible abuse of the right of veto of the permanent members of the Security Council, and that would mean the end of the court. Consequently, he believed that paragraphs 2 and 3 should be deleted.

7. If the Commission wanted the statute to have real force, it must tackle the essential need to relate part three to the draft Code, which must be made a central criterion for determining the jurisdiction of the court.

8. Mr. GÜNEY said that, although the draft statute did not reflect fully all the points he had raised as a member of the Working Group, he was generally in agreement with the text. With the endeavours of the Working Group and despite the difficulties, the Commission had moved on from a theoretical debate to practical drafting. Its long-standing task had now become more urgent in view of the barbarities committed in local conflicts since 1991, for it was regarded as unacceptable for the guilty parties to go unpunished.

9. Fortunately, the court was to have jurisdiction over exceptionally serious crimes of international concern, which would include systematic acts of terrorism committed by a group or organization against civilians. Undoubtedly, such acts were crimes under general international law and were in fact crimes against humanity. International terrorism, however practised, was an international crime and must be recognized as such. In most cases, terrorism supported by drug trafficking also merited inclusion among the crimes for which the court was to have jurisdiction.

10. He endorsed the comments made by Mr. Pambou-Tchivounda about the title of article 20 and agreed with those members of the Commission who favoured the most practicable modalities for the functioning of the statute. Similarly, he agreed with Mr. Robinson's remarks (2358th meeting) concerning article 21, paragraph 2. The Working Group should look carefully at all the suggestions and requests for changes made by members of the Commission and determine how far they could be acted upon.

11. Mr. YANKOV said he joined in the expressions of appreciation addressed to the Chairman of the Working Group and would also point out that the active participation in the Working Group of the Special Rapporteur, Mr. Thiam, had proved extremely helpful, given the need to harmonize the work on the draft statute and on the draft Code against the Peace and Security of Mankind.

12. It was apparent from the discussion that a number of substantive issues still merited careful consideration. The draft statute under consideration was, however, a significant improvement on the one placed before the Commission at the previous session. Possibly, had the Commission had another year to consider the matter, the draft would have been better still, but the Commission had rightly respected the sense of urgency reflected in the relevant General Assembly resolutions and had accorded priority to the issue.

13. Article 2, on the relationship of the court to the United Nations, was now couched in far more precise terms and made for greater clarity with regard to the grounds for the establishment of the court by treaty. It was hard to conceive of a permanent international criminal court with broad jurisdiction being created by a resolution of the General Assembly, or for that matter of the Security Council, since the jurisdiction and functioning of the court would obviously impose obligations on States. In that connection, he doubted the wisdom of drawing an analogy with the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991.[4] In the first place, the International Tribunal was an ad hoc body whose jurisdiction was much more limited in time and scope than the jurisdiction of the proposed international criminal court. There were also some reservations about whether it had been proper for the Security Council to establish that body. In any event, it was too early to take the Tribunal as a model, since it had not produced any jurisprudence or practice on which conclusions could be based. In fact, it was not a model but an innovation, and a permanent court should not be founded on innovations of the kind peculiar to United Nations peacekeeping operations. Accordingly, he firmly endorsed the treaty approach.

14. As far as article 20 was concerned, while the enumeration of the crimes set forth in paragraph 1 created no difficulties for him, the article would require further examination, particularly with respect to aggression. It had been said that, in the case of aggression, there was no treaty law and no treaty practice apart from the general provisions of the Charter of the United Nations and, specifically, Article 2 thereof. One point that would require particular scrutiny in the context of the consideration of the draft Code against the peace and security of mankind was whether a distinction should be made between an act of aggression and a war of aggression. On common sense principles alone, it was quite clear that a single act of aggression could not give rise to all the consequences of a war of aggression. In the case of border incidents—which were often characterized as acts of aggression—the full machinery of a court of the kind contemplated should not, therefore, be set in motion.

15. Further consideration should also be given to the question of apartheid and it should be recognized that it had the main elements of a crime under general international law. Not only States but also persons acting on behalf of States could commit the crime of apartheid and could come within the court's jurisdiction *ratione personae*. Admittedly, there was no State practice on the combatting of apartheid as an international crime, and *opinio juris* had not yet crystallized. None the less, apartheid was treated as a crime and punishable as such under the criminal codes of many countries. Sometimes, too, internal law could be evidence of the state of *opinio juris*.

16. The provisions of article 21 on the obligations of the custodial State and of the State on whose territory the act or omission in question occurred were an improvement, yet the article as a whole was one of the weak points in the statute. He appreciated, however, that that was because the article had been based on so-called realistic considerations.

17. The provisions of article 22 (Acceptance of the jurisdiction of the Court for the purposes of article 21) concerning reservations represented a compromise—a compromise which, in his view, was a departure from the principle of compulsory jurisdiction. While he had agreed to the provision in the Working Group, he feared that, through reservations, that principle could be nullified. It should not be forgotten that the jurisdiction of ICJ had, until some 15 years ago, been seriously eroded by reservations to Article 36, paragraph 2, of its Statute.

18. Paragraph 3 of article 23 was perhaps superfluous and in any event went too far in the distinction it drew. He looked forward to the time when international organizations would also be subject to judicial supervision of the legality of their decisions. That, however, was something for the future.

19. He would suggest that the draft statute should be regarded as a final compromise and that it should not be considered further in the Drafting Committee. Moreover, the Commission should give priority to the consideration of the draft Code with a view to completing the work on that part of the topic. He for one could not conceive of a viable international criminal court unless there was a clearly drafted applicable law that enjoyed the same international standing as the court itself.

20. Mr. Sreenivasa RAO said he wished to clarify the statement he had made at the previous meeting concerning paragraph 1 of article 23, or action by the Security Council. In his view, the powers given to the Security Council under that paragraph could not be justified. The Council's powers under Chapter VII of the Charter of the United Nations were essentially related, not to serving the cause of the international criminal justice system—as in the case of any other prosecutor—but to dealing with threats to and breaches of the peace and security of mankind. Hence, while it was argued with some logic that the Security Council could use its powers under Chapter VII to refer cases for punishment of criminals who were otherwise responsible for or involved in the breakdown of international peace and security, the power to refer such cases could be related only to the objective of maintaining international peace and security. The purpose of the statute, on the other hand, was essentially to establish and maintain an international criminal justice system, not to maintain peace and security as such.

21. Further, even if the Security Council's powers could be admitted to extend to the field of prosecution of specific criminal cases in the interest of maintenance of international peace and security, such a power as was given under article 23, paragraph 1 was not justifiable, as it would tend to discriminate against States that did not have a veto power.

22. Mr. VILLAGRÁN KRAMER said that a question of criminal procedural law was involved. When administrative, civil or criminal organs had specific powers but the exercise of one power depended on the determination of another, that situation was referred to in Spanish as a

[4] Hereinafter referred to as the "International Tribunal". See Security Council resolutions 808 (1993) of 22 February 1993 and 827 (1993) of 25 May 1993.

cuestión prejudicial, a preliminary issue. In the present case, the court would not be acting on a decision or mandate of the Security Council, but because a specific situation had been procedurally established, delimited or clarified. The Security Council exercised its own powers, and only those powers; and the same was true of the court. Thus the legal problem was that when the Security Council, pursuant to its powers, resolved a specific situation or preliminary issue, the court could then act; but it acted neither by permission, nor on instructions; rather, its action was temporally contingent on the exercise of power by another organ. He drew attention to that point because he had spoken in favour of retaining article 23, paragraph 3. All that was necessary was to modify the wording of paragraph 1, and use the formulation *a instancias del Consejo de Seguridad* (at the request of the Security Council), which, in Spanish at least, made it clear that that organ was exercising its own power.

23. Mr. ROBINSON said that, at the 2358th meeting, the Chairman of the Working Group had indulged in what was fast becoming his favourite pastime of categorization, describing him as a "maximalist". He had then gone on to describe himself as a "minimalist plus one". If that was indeed the case, for his own part he was inclined to describe himself as a "maximalist minus one". But what useful purpose would be served? It merely illustrated the tendency to over-categorization and refinement of which he had complained with regard to some of the articles.

24. Mr. CRAWFORD (Chairman of the Working Group on a draft statute for an international criminal court) said that he would attempt not to categorize any member of the Commission, past, present or future.

25. At first glance, the Commission seemed to be so extraordinarily divided on the question of the court's jurisdiction that it would prove impossible to reach agreement on any meaningful provisions. That preliminary impression needed, however, to be contrasted with the impression left by the debate three sessions ago, at which the Commission had truly been divided on every issue that had arisen.[5] Since then, progress had been made: there were now significant areas of agreement among many members on specific points, with those who wished to go much further, tending to cancel out those who wished to do even less. Although, listening to individual parts of the debate, one might be inclined to despair, an impartial observer listening to the discussion as a whole would understand the process whereby the Working Group had ended up by providing for some cases in which the court could operate without the consent of all States concerned, but within a general framework requiring such consent and also within the existing system of international judicial cooperation.

26. No one suggested that part three was perfect, but, having regard to the range of views within the Commission, it struck a reasonable balance, making concessions to every position taken, and provided what Mr. Pellet had called "windows". As a construction, the court was now compatible with existing constructions in the field of international judicial cooperation. The problem was that Mr. Pellet conceived of it as one consisting only of windows, whereas others conceived of it as having no windows at all.

27. With regard to article 20, although the view had been expressed, either that the distinction between crimes under general international law and crimes under treaties should be abolished, or alternatively, that there should be no crimes under general international law, the prevailing tendency had been to support retention of that distinction. There were good reasons for so doing. Under the *nullum crimen sine lege* principle, a distinction had to be drawn between crimes under international law as such and crimes under national law, even where the latter might give effect to treaties. The two categories should not be confused.

28. Having regard to the debates in previous years, there had been a remarkable degree of support for the general list contained in article 20, paragraph 1, and apparently no opposition to the principle of the listing. There had been justified criticisms of the form of language used in subparagraph (*c*). He had already expressed his view on the issue of whether apartheid should be added to paragraph 1. In substance, it was possible to meet the concerns expressed about possible future occurrences of apartheid under the terms of the statute as it was currently drafted. If the crime of apartheid were incorporated into paragraph 1, there was a danger that the peace settlement now being painfully achieved in South Africa might be retrospectively undone.

29. As with every other article, there had of course been criticisms of article 21, but there had been a general acceptance that it represented an improvement on previous versions. Some members had been understandably unhappy about the extent of the authority given to the territorial State under article 20, paragraph 1 (*b*) (ii). That had simply been a concession to the reality of primary territorial State concern over crimes in the majority of cases. There had been very little support for the idea of additions to that list, for example in relation to the State of nationality.

30. The idea, put forward by Mr. Robinson (2358th meeting), that paragraph 3 should be relocated, seemed to him to be probably correct. In the matter of extradition, there was a case for the view that paragraph 2 should be extended to cope with situations of existing extradition requests duly made by a State, as distinct from subsequent extradition requests. On the other hand, the Working Group had carefully considered that question, and a majority of its members—and, he sensed, other members of the Commission—had favoured the view that, taken with other protection in relation to extradition contained in part seven, sufficient security was provided. In any event—and the remark applied, *mutatis mutandis*, to all articles of the statute—the important point was to ensure that the text contained the various elements which would be a necessary part of a future debate on the statute. The Commission was not codifying a court: that would be a contradiction in terms. It was elaborating a text which would form a draft for discussion by States, and which must contain the necessary elements of that debate.

[5] See *Yearbook ... 1991*, vol. I, 2207th to 2214th meetings.

31. With reference to article 22, although some members still preferred an "opting-out" system, it seemed that, if there was to be some requirement of acceptance, there was fairly general support for an "opting-in" system on the grounds that it would make for greater flexibility. In his own view, an "opting-out" system would also require an "opting-back-in" system for those States that discovered after the event that they should not have opted out in a given case—a convoluted form of acceptance that would perhaps be less honest (and certainly less direct) than the procedure under article 22 as it now stood.

32. He wished to stress that the statute's requirements regarding acceptance of jurisdiction did not involve a situation of complete voluntarism on the part of States parties. To suppose as much was a serious mistake, because under article 21, paragraph 3—which no one had opposed—a State which became a party to the statute was obliged to consider whether it should prosecute someone in relation to a crime when it was a party to the treaty which established the crime, once there had been a complaint which was found to have a measure of justification. Thus, in effect there was a multilateral system in which States could be called upon, if they did not accept the jurisdiction of the court, at least to extradite or prosecute. Therefore, no State party could act as a State of asylum in relation to anyone properly charged with an international crime which that State accepted in principle as being a crime. That itself was a significant step forward. It would also extend to crimes under general international law in certain cases—a further advance.

33. As to article 23, it should first be stressed that paragraph 1 did not add to the powers of the Security Council, but recognized that those powers might well exist. To say as much was hardly surprising, having regard to the existence of the International Tribunal. *Pace* Mr. Yankov, the commentary did not go out of its way to praise that Tribunal for being an ad hoc tribunal, although it did pay considerable attention to legal judgements made by the Council as to its jurisdiction *ratione materiae*. Those judgements were of considerable significance, as were various of the procedural aspects of the statute. The dominant view in the Working Group had been that a system should not be created that had the effect of encouraging the Council to set up separate ad hoc tribunals, but that a system should be introduced under the control of States parties, one which, provided the crimes in question fell within the jurisdiction of the court, the Council would be encouraged to use and perhaps would have no effective option but to use, because of the court's very existence. Any State asked to support a resolution creating an ad hoc tribunal would simply point to the existence of the court created by the statute to which it and other States were parties. Article 23, paragraph 1, was a crucial "window" in the statute. There was controversy as to the extent of the powers of the Council, and all positions on that question were plainly reserved in the commentary. Any precise issues concerning the drafting of article 23, paragraph 1, could of course be reconsidered.

34. By comparison with paragraph 1 of article 23, paragraph 2, had given rise to less concern. It was held, and he had some sympathy with the opinion, that there was no room for aggression as a crime of individuals under international law, and that paragraph 2 and the reference to an act of aggression under general international law should therefore be deleted. The Working Group had not taken that view, because it had included in article 20, paragraph 1, only those crimes under general international law where there was actual practice, and not merely *opinio juris*, in support of the proposition that they were crimes of individuals. For all of the crimes listed in article 20, paragraph 1—and only for those crimes—there was some actual international practice to back up the assertion that they were crimes under international law: either prosecutions, or action to set up systems with a view to the prosecution of those crimes. The feeling had been that, having regard to the endorsement of the Nürnberg Principles[6] by the General Assembly, and to the general development of international law since that time, and having regard also to the Commission's provisional decision to retain aggression as a crime in the draft Code of Crimes against the Peace and Security of Mankind aggression could not be omitted from the statute. He would even go so far as to say that, in his view, if aggression were to be omitted from the statute, its inclusion in the draft Code was precluded. He could see no basis for arguing that aggression should be a crime triable only before national courts. If anything, it should be the one crime which would be triable only before an international court. And it must be borne in mind that, with considerable assistance from the Special Rapporteur, every step had been taken to ensure that the draft statute was consistent with the draft Code as now envisaged. In any event, assuming that aggression was retained, there was very little support for the deletion of paragraph 2, and quite widespread support for its being retained.

35. The position regarding paragraph 3 was obviously rather different. The paragraph reflected a certain paramountcy given to the Security Council by the Charter of the United Nations. On the other hand, it could be argued that, if the Council had that paramountcy, it should simply be allowed to exercise it *ab extra*, while if it did not, such a paramountcy should not be created. He personally would fight much less hard to retain paragraph 3 than paragraph 1.

36. He had not been able to deal with every issue arising under part three. It was gratifying to note that no one appeared to be opposed to article 24. As to the other articles, the matters raised should be referred back to the Working Group for consideration. Notwithstanding the vigour and good sense with which the different views had been expressed, it seemed to him that, if the Commission's task was perceived in terms of creating a discussion draft for States that could lead them to establish a court, then the general balance struck in part three was the best for which the Commission could hope.

37. Mr. de SARAM asked that the principal points made in the plenary debate on part three, which had been

[6] Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal (*Yearbook . . . 1950*, vol. II, pp. 374-378, document A/1316, paras. 95-127. Text reproduced in *Yearbook . . . 1985*, vol. II (Part Two), para. 45).

of extreme importance, should be reflected in the report of the Commission, as was the usual practice.

The meeting rose at 4.25 p.m.

2361st MEETING

Tuesday, 5 July 1994, at 10.20 a.m.

Chairman: Mr. Vladlen VERESHCHETIN

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Yamada, Mr. Yankov.

Cooperation with other bodies (*concluded*)*

[Agenda item 8]

STATEMENT BY THE OBSERVER FOR THE EUROPEAN COMMITTEE FOR LEGAL COOPERATION

1. The CHAIRMAN welcomed Mr. Hans Nilsson, observer for the European Committee for Legal Cooperation, and invited him to address the Commission.

2. Mr. NILSSON (Observer for the European Committee for Legal Cooperation) thanked the Commission for inviting him to attend one of its meetings and to present a report on the most recent work of the Council of Europe in fields of interest to the Commission. He welcomed what seemed to be becoming a regular practice, particularly now that the Council of Europe was kept regularly informed of the work of the Commission, *inter alia*, through the excellent report presented by Mr. Eiriksson to the European Committee for Legal Cooperation.

3. He represented the secretariat of the European Committee for Legal Cooperation, but he was also involved with the Committee of Legal Advisers on Public International Law, on which Mr. Eiriksson represented his country. That Committee comprised 32 members, together with a number of observers from European and non-European countries that were not yet full members of the Council of Europe. Foremost among the problems considered recently by the Committee was the problem of State succession, which had become particularly important in the Council of Europe in the last few years, for, in May 1989, the Council had had only 23 member States, while that number had risen to 32 following the admission of nine countries of central and eastern Europe. The Council of Europe had also received nine other applications for admission from countries such as the Russian Federation, Ukraine and Albania.

4. The Committee of Legal Advisers on Public International Law had also considered the question of the creation of an international tribunal to prosecute crimes committed in the former Yugoslavia. Other Council of Europe bodies had also studied that question, among them the European Committee on Crime Problems, which had held an exchange of views of experts in October 1993 on the repercussions on international legal cooperation and domestic law of the creation of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991.[1] One of the issues examined had been the question of the links between human rights protection and the creation of the International Tribunal. According to one view, States were under an obligation to relinquish their jurisdiction in favour of the International Tribunal, and were therefore no longer in a position to comply with the Convention for the Protection of Human Rights and Fundamental Freedoms or the International Covenant on Civil and Political Rights. Article 103 of the Charter of the United Nations would corroborate that view. According to another view, defended by the majority of experts, while States were under an obligation to cooperate with the International Tribunal, such cooperation was subject to respect for other obligations under international law, namely, obligations at the same level or at a higher level with regard to the principles, including the humanitarian principles, in the name of which Security Council resolution 827 (1993) had been adopted. International human rights law thus had precedence over the law created by States, including law deriving from procedures set up by States through international treaties such as the Charter. Therefore, States could derogate from their obligations under international human rights instruments, including the International Covenant on Civil and Political Rights and the European Convention on Human Rights, only to the extent strictly necessary for complying with the humanitarian exigencies of the situation on the basis of which Council resolution 827 (1993) had been adopted. He would transmit an informal note concerning that exchange of views to the secretariat of the Commission.

5. Other issues considered by the Committee of Legal Advisers on Public International Law and in the broader framework of the Council of Europe included the creation of a permanent court. The Parliamentary Assembly of the Council of Europe had recently adopted a recommendation in which it had deemed it desirable to set up a court and had proposed, with a view to expediting that process, that a European Chamber should first be established. That recommendation had been communicated to the Committee of Ministers of the Council of Europe, which had transmitted it to the Committee of Legal

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* Resumed from the 2358th meeting.

[1] Hereinafter referred to as the "International Tribunal". See Security Council resolutions 808 (1993) of 22 February 1993 and 827 (1993) of 25 May 1993.