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Summary record of the 1969th meeting

Topic:
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Extract from the Yearbook of the International Law Commission:-
1986, vol. I

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visionally to adopt article 22 [23] as proposed by the Drafting Committee.

It was so agreed.

Article 22 [23] was adopted.

ARTICLE 23 [24] (Specific categories of property)

105. Mr. RIPHAGEN (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 23 [24], which read:

Article 23 [24]. Specific categories of property

1. The following categories of property of a State shall not be considered as property specifically in use or intended for use by the State for commercial [non-governmental] purposes under subparagraph (a) of article 21:

(a) property, including any bank account, which is in the territory of another State and is used or intended for use for the purposes of the diplomatic mission of the State or its consular posts, special missions, missions to international organizations, or delegations to organs of international organizations or to international conferences;

(b) property of a military character or used or intended for use for military purposes;

(c) property of the central bank or other monetary authority of the State which is in the territory of another State;

(d) property forming part of the cultural heritage of the State or part of its archives which is in the territory of another State and not placed or intended to be placed on sale;

(e) property forming part of an exhibition of objects of scientific or historical interest which is in the territory of another State and not placed or intended to be placed on sale.

2. A category of property, or part thereof, listed in paragraph 1 shall not be subject to measures of constraint in connection with a proceeding before a court of another State, unless the State in question has allocated or earmarked that property within the meaning of subparagraph (b) of article 21, or has specifically consented to the taking of measures of constraint in respect of that category of its property, or part thereof, under article 22.

106. Article 23 was based on the former article 24,¹⁴ which had undergone considerable change and adjustment in the light of the Commission's debate. The new paragraph 1 listed certain property which was not to be considered as being in use by a State "for commercial [non-governmental] purposes" under subparagraph (a) of article 21. The various subparagraphs of the former article 24 had been modified for greater clarity and precision, the territorial link had been stressed and, in the case of the new subparagraphs (d) and (e), so had the non-placement on sale of the property. The former subparagraphs (c) and (d) (property of a central bank and property of any other monetary authority) had been merged, and a new provision had been added concerning property forming part of an exhibition.

107. Paragraph 2 nevertheless allowed such categories of property to be subject to measures of constraint if the State had allocated or earmarked the property under subparagraph (b) of article 21 or if it had specifically consented to the taking of measures of constraint under article 22.

108. Mr. McCAFFREY said that, in his understanding, paragraph 1 (c) referred to property of the central bank which was held for its own account.

109. After a procedural discussion, the CHAIRMAN proposed that the beginning of paragraph 2 should be amended to read: "No property or part thereof belonging to the categories listed in paragraph 1 shall be subject ...". The French text would read: *Aucun bien ou partie d'un bien entrant dans une des catégories visées au paragraphe 1 ne peut ...*; and the Spanish text would be adjusted accordingly.

110. If there were no further comments, he would take it that the Commission agreed provisionally to adopt article 23 [24], subject to any drafting changes required for concordance of the different language versions.

It was so agreed.

Article 23 [24] was adopted.

The meeting rose at 1 p.m.

1969th MEETING

Wednesday, 18 June 1986, at 10 a.m.

Chairman: Mr. Julio BARBOZA

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Thiam, Mr. Tomuschat, Mr. Ushakov.

Draft Code of Offences against the Peace and Security of Mankind¹ (concluded)* (A/CN.4/387,² A/CN.4/398,³ A/CN.4/L.398, sect. B, ILC(XXXVIII)/Conf.Room Doc.4 and Corr.1-3)

[Agenda item 5]

FOURTH REPORT OF THE SPECIAL RAPporteur
(concluded)

SUMMING-UP OF THE DISCUSSION

1. The CHAIRMAN invited the Special Rapporteur to sum up the discussion.

2. Mr. THIAM (Special Rapporteur) said that the Commission's wide-ranging, detailed discussion of his fourth report on the topic (A/CN.4/398) would enable him to widen his field of study. Although he could not,

* Resumed from the 1967th meeting.

¹ The draft code adopted by the Commission at its sixth session, in 1954 (*Yearbook ... 1954*, vol. II, pp. 151-152, document A/2693, para. 54), is reproduced in *Yearbook ... 1985*, vol. II (Part Two), p. 8, para. 18.

² Reproduced in *Yearbook ... 1985*, vol. II (Part One).

³ Reproduced in *Yearbook ... 1986*, vol. II (Part One).

¹⁴ *Ibid.*, pp. 57-58, footnote 206.

at the present stage, reply in detail to all the questions raised, some of which would require long consideration, he would try to deal with the general problems posed by members of the Commission.

3. The division of offences into three categories, to which there had been few objections, was justified by the fact that each category of offences had its own particular characteristics and that it would have been extremely difficult to establish general principles applicable to all the offences covered by the draft code. As he stated in the report: "Some principles will apply more generally to crimes against peace or to crimes against humanity, while others will apply more generally to war crimes" (*ibid.*, para. 260 (d)).

4. For example, the principles relating to justifying facts applied primarily to war crimes. There could be no justification for crimes against humanity, by reason of their motive, from which they were inseparable. The only possible justification for crimes against peace was self-defence in cases of aggression. It would be for the Commission to decide whether a special article should be devoted to that classification.

5. The classification was not, however, intended to place the various categories of offences in watertight compartments. As in internal law, there could be concurrent offences: for example, if genocide was committed in time of war, it was both a crime against humanity and a war crime. Additional Protocol I to the 1949 Geneva Conventions expressly provided that *apartheid* was a war crime when it was committed in time of war (art. 85, para. 4 (c)).⁴ When concurrent offences had been committed, it was for the court to decide whether the severest penalty should be imposed or whether separate penalties should run concurrently. But the fact that one and the same act could be included in several categories did not in any way impugn the validity of the theoretical distinction between those categories.

6. With regard to the content *ratione materiae* of the draft code, two different approaches had been adopted in the Commission: the maximalist approach of those who wished to extend the scope of the code to a range of other offences, and the minimalist approach of those who wished the code to cover only a limited number of offences constituting a "hard core".

7. In its report on its thirty-sixth session, the Commission had indicated that, after carefully considering the advantages and disadvantages of the two approaches, it

... tended to take the view that the effect of the draft would be weakened if it were extended so far that the essential considerations were lost sight of. To go beyond the minimum content ... would blur the distinction between an international crime and an offence against the peace and security of mankind; ... The code ought to retain its particularly serious character as an instrument dealing solely with offences distinguished by their especially horrible, cruel, savage and barbarous nature. These are essentially offences which threaten the very foundations of modern civilization and the values it embodies. It is these particular characteristics which set apart offences against the peace and security of mankind and justify their separate codification.⁵

If the content of the code were made too broad, it would be deprived of its specificity and transformed into a

veritable international penal code, in which it would be very difficult to distinguish offences against the peace and security of mankind from other international crimes.

8. As to the content *ratione personae*, some members of the Commission still believed that international criminal responsibility for offences against the peace and security of mankind should be attributable to States. He noted, however, that, in its report on its thirty-fifth session, the Commission had said:

With regard to the subjects of law to which international criminal responsibility can be attributed, the Commission would like to have the views of the General Assembly on this point, because of the political nature of the problem;⁶

Having received no reply from the General Assembly, the Commission, at its thirty-sixth session, had taken the following position:

With regard to the content *ratione personae* of the draft code, the Commission intends that it should be limited at this stage to the criminal liability of individuals, without prejudice to subsequent consideration of the possible application to States of the notion of international criminal responsibility ...⁷

Thus, although the draft articles sometimes referred to the responsibility of the State, that meant only its civil responsibility. It was indeed obvious that, if agents of the State committed an offence when acting on its behalf, they engaged the civil responsibility of the State. That was, moreover, a principle that should be enunciated in the draft code.

9. In its report on its thirty-sixth session, the Commission had recognized that

... the criminal responsibility of individuals does not eliminate the international responsibility of States for the consequences of acts committed by persons acting as organs or agents of the State. But such responsibility is of a different nature and falls within the traditional concept of State responsibility. ...⁸

That was the frame within which the Commission had to work, and it must avoid mixing the different kinds of responsibility.

10. Moreover, the concept of the criminal responsibility of States was still far from clear, and if it had to be studied some day, the question would arise whether it came under the draft code or under the draft articles on State responsibility. Although for the time being only the criminal responsibility of natural persons would be considered, it still had to be decided whether those natural persons were private individuals or State authorities.

11. In his third report (A/CN.4/387, chap. III), he had submitted a draft article 2 consisting of two alternatives, the first applying to offences committed by natural persons, whether authorities of a State or private individuals, and the second applying only to offences committed by the authorities of a State. The Commission's decision had been to reject the second alternative and refer only the first to the Drafting Committee.⁹

⁴ See 1959th meeting, footnote 6.

⁵ *Yearbook ... 1984*, vol. II (Part Two), p. 17, para. 63.

⁶ *Yearbook ... 1983*, vol. II (Part Two), p. 16, para. 69 (b).

⁷ *Yearbook ... 1984*, vol. II (Part Two), p. 17, para. 65 (a).

⁸ *Ibid.*, p. 11, para. 32.

⁹ *Yearbook ... 1985*, vol. II (Part Two), pp. 13-14, para. 60.

12. The “authorities of a State” were referred to in some of the draft articles because the offences in question, particularly aggression and *apartheid*, could be committed only by the authorities of a State, that was to say natural persons acting on behalf of a State. States did, of course, commit offences, but they did so through the intermediary of their organs or agents. The State was an abstraction, so it could not be said that an offence could be committed only by a State. The draft articles dealt with offences committed by natural persons, whether they were acting in their personal capacity or on behalf of a State.

13. Many members of the Commission had questioned the legal basis of the offences covered by the draft code. Some had expressed doubts about the legal force of the conventions on which the draft articles were based, arguing that not enough States had ratified the 1973 International Convention on the Suppression and Punishment of the Crime of *Apartheid* and the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, for example.

14. In his view, that argument was not well founded. The judgments of the ICJ were a source of international law even though the Court’s compulsory jurisdiction had been recognized by only 48 States. The same was true of the awards of arbitral tribunals, although they were only temporary bodies. The legal force of the resolutions adopted by the General Assembly had also been called into question. Many of those resolutions, however, in particular the one prohibiting mercenarism and those relating to national liberation movements, had contributed to the formulation of rules of law, so that their legal force could not be denied.

15. In fact, whatever the effect of those instruments, the offences covered by the draft code were so serious that they necessarily constituted violations of peremptory norms of international law. If conventions and other international documents could not be taken as a basis, the Commission could rely on the concept of *jus cogens*. Besides, the draft articles on State responsibility provided that international crimes had effect *erga omnes* and that all States could be held responsible for them—even those which had not acceded to the relevant conventions or had not supported the relevant General Assembly resolutions. When it came to punishing offences as serious as those dealt with in the draft code, the criterion to be adopted was not that of contractual obligations, but that of peremptory norms of international law.

16. With regard to “intent”, since every offence—and *a fortiori* an offence against the peace and security of mankind—presupposed a criminal intent by definition, he had not gone into that concept at great length, but he was quite willing to do so if that was the Commission’s wish.

17. The problem of intent arose primarily in connection with damage to the environment, which could, of course, be damaged involuntarily. But where offences were concerned, intent was absolutely essential. In internal law, some offences and even certain crimes could be committed without intent. That was true, in particular, of assault and battery leading to involuntary homicide.

Similarly, employers who did not take the necessary sanitary measures or precautions to prevent accidents at the workplace could be prosecuted and convicted in the event of an accident, regardless of whether there had been a wrongful intent. Gross negligence was thus, in a way, equivalent to wrongful intent. In other words, when intent could not be established, it was the consequences of the offence that had to be taken into consideration.

18. But however serious it might be, damage to the environment was not always a crime against humanity; for such crimes had racial, religious or political motives which could not always be ascribed to serious damage to the environment. That question required more thorough study.

19. With regard to the content of certain notions, and more particularly war crimes, some members had said that the customs of war could not be codified and should therefore not be referred to in the definition of war crimes. But it should not be forgotten that, in the matter of war crimes, customary law had often come before treaty law. The 1907 Hague Convention respecting the Laws and Customs of War on Land,¹⁰ which had been applied before it had been ratified, contained a provision stating:

Until a more complete code of the laws of war has been issued ... the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.

Since then, there had been little progress on codification of the laws and customs of war, and Additional Protocol I to the 1949 Geneva Conventions, adopted in 1977, contained a similar provision reading:

In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from *established custom** ... (Art. 1, para. 2.)

In its Judgment, the Nürnberg Tribunal had stated:¹¹

The law of war is to be found ... in the customs and practices of States which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practised by military courts. ... in many cases treaties do no more than express and define for more accurate reference the principles of law already existing.

20. Hence he did not think that the reference to the “customs of war” could be deleted from the definition of war crimes. The Commission would have to revert to the question whether the expression “laws or customs of war” should be retained as it stood in that definition or whether it should be expanded.

21. The concepts of “complicity”, “conspiracy” and “attempt” had also been much discussed during the Commission’s debate. The practice of transposing those internal law concepts to international law without indicating their content was particularly dangerous because, in internal law, their content varied from one country to another. Some members of the Commission had said that they would have liked him to have pro-

¹⁰ See 1958th meeting, footnote 7.

¹¹ See United Nations, *The Charter and Judgment of the Nürnberg Tribunal*. ..., p. 64.

vided examples taken from African comparative law. But although, since their independence, the penal codes of African countries had gradually moved away from the penal codes of the former metropolitan powers to reflect African realities, the general principles of law on which they were based and which were of universal scope had fortunately remained the same. Moreover, since the offences covered by the draft code were well-known offences, most of which had been defined in international conventions, it was difficult to see how they could be any different in Africa. Thus, instead of making a comparative law study—which was in any case not within his terms of reference—he had tried to define the content of those concepts.

22. With regard to complicity, whose content in internal law could be either limited or extended, the discussion seemed to show that most members of the Commission believed that it should be given an extended content, so that a charge of complicity could be brought not only for acts committed prior to or concurrently with the offence, but also for certain subsequent acts, such as concealment of malefactors and receiving stolen goods.

23. The same problem arose with regard to *complot*. According to Continental law, *complot*, whether with a view to insurrection, civil war or action against the territorial integrity of a State, was solely a crime against the State. But in international law there were cases in which *complot* had a broader meaning and was regarded not only as a crime against the State, but also as an offence against the peace and security of mankind. That raised the question of “conspiracy”. If *complot* were defined as a crime against the State, it would certainly not include all the elements of conspiracy; but if it were considered that *complot* could also be directed against mankind or result in an act constituting a war crime, and if it were further recognized that it could engage the collective responsibility of those who had instigated it, the concept of *complot* could then be assimilated to that of conspiracy.

24. Opinions on that important question were still divided. He noted, however, that conspiracy was expressly referred to in conventions designed to prevent and punish certain offences against the peace and security of mankind, such as the 1948 Convention on genocide and the 1973 Convention on *apartheid*. If conspiracy was recognized for genocide and *apartheid*, it could hardly be ruled out for other crimes against humanity. The main characteristic of such crimes was that they were usually committed through participation in groups within which it was difficult to distinguish a principal perpetrator from accomplices. Since the crimes in question were extremely serious and had to be effectively prevented and punished, some writers had taken the view that it was not unreasonable to recognize conspiracy in certain cases. At the current stage in the work, however, he had no very definite opinion on the question.

25. As to “attempt”, members of the Commission generally appeared to take the view that it should not include preparatory acts. For there to be an attempt, there must be commencement of execution.

26. Comments had also been made on the term *auteur* (“person who commits”). Some members had said that draft article 3 should refer not to *l'auteur*, but to *l'auteur présumé* (“person presumed to have committed”). He did not entirely agree, because the *auteur* was the person whose guilt had been established by the competent court. Moreover, the idea of an *auteur présumé* was contrary to the principle of criminal law whereby any person being prosecuted was presumed innocent. While benefiting from the presumption of innocence he could not, at that stage, be presumed to have committed the offence.

27. It had also been argued that the term *auteur* was too vague and that a minister or even a head of State might not have taken part in an act of aggression against another State or might not even have been informed of it. But that theory was not acceptable. It was contrary to the principle of government solidarity. The members of a Government were jointly responsible for its acts. They could be relieved of their responsibility only by publicly expressing disapproval of the act or by resigning. Silence made them accomplices. Moreover, if the Nürnberg Tribunal had accepted that theory, it would have had to acquit most of the major Nazi war criminals.

28. Referring to the position of certain offences in the draft code, some members had taken the view that the provisions relating to complicity, conspiracy and attempt should appear in chapter I, part II, on general principles. But complicity, conspiracy and attempt were not principles; they were offences, and if they were not included in the list of offences, it would be impossible to determine what penalties were applicable to them. Besides, complicity, conspiracy and attempt were characterized as offences in national penal codes, which specified the penalties to be imposed on anyone found guilty of them.

29. There might also be some doubt about the place to be assigned to terrorism and the category in which it should be included. As a recent example had shown, hostilities might well break out as a result of terrorism carried out by one State against another State, which was referred to in the draft code. That type of terrorism was thus a crime against peace; but since not all terrorist acts were directed against a national, ethnic, racial or religious group, it was more difficult to affirm that they were also crimes against humanity.

30. Turning to the question of method, he observed that there were two ways of defining an offence. One was to formulate a general definition, as the Commission had done for war crimes in the 1954 draft code. If the Commission chose that method, simply stating that a war crime was a violation of the laws and customs of war—that term being used in a very broad sense—and leaving it to the competent court to determine whether the act complained of was in fact a violation of the laws and customs of war, it would avoid having to deal with a number of sensitive issues.

31. The other way was to make a non-limitative enumeration. But if it were decided to refer, by way of example, to a certain number of acts constituting war crimes, they would have to be the most representative acts. It was difficult to see how the Commission could

refer to the use of asphyxiating gases, for example, and omit the use of nuclear weapons, as some members wished.

32. That was an issue on which both politicians and lawyers were divided. The advocates of positive law maintained that, since it was not prohibited by any international convention, the use of nuclear weapons could not be classed as a war crime. On the basis of *lex lata*, they distinguished between the first use of force, which was assimilated to aggression, and the second use of force, which, unless the response was disproportionate to the attack, was simply equivalent to the exercise of the right of self-defence provided for in Article 51 of the Charter of the United Nations. But it was not possible to disregard the political considerations underlying that reasoning. Politically, it could well be argued that, if States undertook never to make first use of nuclear weapons, it was because they had a large enough stock of conventional weapons to make that unnecessary. So if a *lex lata* position was adopted, it was extremely difficult to decide one way or the other.

33. But according to the advocates of normative law, that was to say on the basis of *lex ferenda*, the situation was quite different. Relying on the fact that the law of war had always aimed at protecting civilian populations and that other types of weapon had already been prohibited, they maintained that prohibition of the use of nuclear weapons should be the subject of a peremptory norm of international law. But if that thesis prevailed, it would be necessary, as some members of the Commission had suggested, to condemn not only the use of nuclear weapons in general, without any distinction between first and second use, but also the manufacture and possession of nuclear weapons. That was a good illustration of the problems posed by the enumerative method. If the Commission decided to list some acts constituting war crimes, it could not omit the use of nuclear weapons.

34. With regard to general principles, there had been no real objection to the definition of offences against the peace and security of mankind in draft article 1. Some members had made proposals designed to improve the wording of that article, but they would be mainly for the Drafting Committee to consider. Other members had suggested that "seriousness" should be added to the criteria adopted. He was willing to include that criterion, even though unanimous agreement had not been reached on it, since some members of the Commission regarded it as a subjective idea that would add nothing to the text. He was also quite willing to specify that the offences referred to in the draft code were offences committed by individuals.

35. Draft article 3 (Responsibility and penalty) and draft article 4 (Universal offence) had been favourably received, and there seemed to have been no objections to draft article 5, which provided for the non-applicability of statutory limitations to offences against the peace and security of mankind. Nevertheless, some members had raised the questions whether, after a lapse of time, it might not be difficult to obtain evidence, and whether the principle of imprescriptibility might not cause difficulties. That problem also arose in internal law; for some countries had a 10-year period of

prescription in criminal matters, and there might well be doubts about the possibility of producing evidence 10 years after an offence had been committed and about the value of testimony taken so long after the event. In any case—as was too often forgotten—it was for the competent court to decide whether the evidence produced was admissible or not.

36. The principle of non-retroactivity stated in draft article 7 had also been accepted. No one had disputed the fact that, in the maxim *nullum crimen sine lege*, the word *lex* referred not only to treaty law, but also to custom and the general principles of law.

37. Although agreement in principle had been reached on exceptions, a number of reservations had been made on draft article 8. The first had related to the use of the negative form. But he had drafted the article in that form only in order not to leave the door too wide open for exceptions. Since the draft code related to the most serious offences, it could not provide for the exceptions applicable under ordinary law without imposing specific limits on them.

38. It had also been said that coercion should be accepted as a defence for certain crimes against humanity. He had doubts on that point, because a crime against humanity presupposed a specific motive, and a person acting under coercion had no motive. It was true that international courts had recognized the exception of coercion, but only in very few cases and subject to such conditions that very few persons had invoked it successfully.

39. In fact the solution might be to make a distinction between justifying facts and non-responsibility. In the case of offences against the peace and security of mankind, it could hardly be said that coercion was a justifying fact, but it might be said that it was a factor precluding or attenuating responsibility. For although it would be difficult to find any fact that could justify an offence against the peace and security of mankind, it was possible to find causes of non-responsibility, such as coercion, or factors attenuating responsibility. That, too, was a question that needed deeper study.

40. Some members of the Commission considered that certain subjective elements such as insanity and minority should also be taken into account. But the concept of insanity must be handled with great caution, for how was it possible to determine where it began and ended? As to minority, it was inconceivable that a minor could commit a war crime, since minors were not required to do military service; and it was also difficult to see how a minor could commit a crime against humanity.

41. The most controversial question was that of the criminal court that would be competent to try offences against the peace and security of mankind. Some members had objected to the principle of universal competence, while others had expressed reservations about the possibility of establishing an international criminal jurisdiction. At the present stage in the development of the law it would be difficult to establish an international criminal jurisdiction or to secure acceptance of the principle of universal competence, but that was no reason for not going forward. It would, indeed, be irrespon-

sible not to do so. There were, of course, many difficulties, but the Commission must try to surmount them.

42. The solution proposed in draft article 4, which stated the principle of universal competence without excluding the possibility of establishing an international criminal jurisdiction, was doubtless not perfect; but although it could easily be criticized, it was much more difficult to suggest acceptable alternatives. He himself was not an ardent supporter of that principle and he would be prepared to support any proposal that was more satisfactory.

43. It had been said that the applicable rule in criminal matters was that of territoriality. That was indeed so in internal law, but there was no justification for affirming that it was so in international law as well. The Nürnberg Tribunal and the other international tribunals set up at the end of the Second World War under Law No. 10 of the Allied Control Council had not had exclusive jurisdiction. War crimes had been tried by German and French courts, which had exercised concurrent jurisdiction. In fact, there had always been a combination of several systems and it was difficult to see how the position could be different today.

44. The 1948 Convention on genocide did not anywhere provide that the principle of territoriality was an absolute rule. According to article VI of that Convention:

Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction ...

The Convention thus recognized that there could be two jurisdictions.

45. The 1973 Convention on *apartheid* also did not recognize the principle of exclusive territorial jurisdiction. Article V provided:

Persons charged with the acts enumerated in article II ... may be tried by a competent tribunal of any State Party to the Convention which may acquire jurisdiction over the person of the accused or by an international penal tribunal having jurisdiction ...

Similarly, principle 2 of the Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity¹² provided:

Every State has the right to try its own nationals for war crimes or crimes against humanity.

while principle 5 provided:

Persons against whom there is evidence that they have committed war crimes and crimes against humanity shall be subject to trial and, if found guilty, to punishment, *as a general rule** in the countries in which they committed those crimes. ...

46. It had also been argued that, if the principle of universal competence were applied, courts might take contradictory decisions. But that often happened in internal law; there was nothing more inconsistent than the judgments of national criminal courts, which, depending on the circumstances, imposed heavier or lighter penalties for the same crime. The problem of the

pressure to which judges might be subject arose both in internal law and in international law.

47. Attention had also been drawn to extradition, which, although subject to very specific rules, was not a simple procedure; even in internal law, cases of extradition were relatively rare. Contrary to what had been said during the debate, however, offences against the peace and security of mankind were not political offences; they were ordinary crimes. Consequently, States were required to extradite anyone who had committed such an offence. But it was not only the rule that offences against the peace and security of mankind were ordinary crimes that had been laid down. All the relevant conventions contained provisions on extradition. Article XI, paragraph 1, of the 1973 Convention on *apartheid*, for example, provided:

Acts enumerated in article II ... shall not be considered political crimes for the purpose of extradition.

and article VII of the 1948 Convention on genocide provided:

Genocide and the other acts enumerated in article III shall not be considered as political crimes for the purpose of extradition. ...

The principle of extradition was thus well established in the case of offences against the peace and security of mankind and the possible difficulties in applying that principle in practice could not be advanced as an argument for rejecting the system of universal competence.

48. The only really difficult problem was that of offences against the peace and security of mankind committed by members of a Government. Some members of the Commission had questioned whether that case should be dealt with in the draft code. According to some writers, the establishment of an international criminal jurisdiction would help to solve the problem. In their view, if the perpetrator of the act did not appear before the court, he would be convicted *in absentia*. There would thus be condemnation by the international community; but he realized that that was a matter requiring further reflection.

49. The last difficulty pointed out had related to the rule *non bis in idem*. Some members of the Commission feared that a plurality of competent courts might jeopardize that rule. But that was a matter that could be settled by agreement; there was nothing to prevent States from concluding a convention providing that crimes tried by a court of one State could not be retried by a court of another State. Moreover, as early as 1883, the Institute of International Law had stated the principle that:

Sentences pronounced after fair trial by the courts of any State ... shall prevent any further prosecution of the guilty person for the same act.¹³

50. If an international criminal jurisdiction were established, the difficulty would arise from the fact that the same act was not characterized in the same way in international law and in internal law. By virtue of the principle of the autonomy of international law, an international criminal court would not, in principle, be bound to respect a judgment of a national court. But,

¹² General Assembly resolution 3074 (XXVIII) of 3 December 1973.

¹³ Resolution on conflict of criminal laws, art. 12 (*Annuaire de l'Institut de droit international, septième année* (Brussels), 1885, p. 158).

there again, there were a number of possible solutions. First, States could conclude agreements; but it might also be provided in the statute of the international court that, where there had already been a conviction for an offence, the court, by virtue of the principle of the autonomy of international law, would pronounce a purely declaratory judgment without any sentence.

51. Thus, although there certainly were difficulties, they should not be an insurmountable obstacle to the elaboration of the draft code.

52. He realized that the Commission would one day have to deal with the question of penalties, but it might perhaps be better to wait until its work was much further advanced and the members of the international community had taken a clear-cut position on the implementation of the code.

53. Mr. USHAKOV said that, under the penal codes of some States, such as the Soviet Republics, conspiracy was not recognized only in connection with crimes against the State. It also meant association of persons to commit any crime jointly. He did not think that government solidarity could be referred to in criminal matters, since it could exist only as a result of a particular political philosophy.

54. Mr. FRANCIS said that three questions deserved further consideration by the Special Rapporteur. The first concerned *apartheid*. The Special Rapporteur, in chapter II, part II, of the draft articles, appeared to assume that *apartheid* could be committed only by a State. But in his own view, while the State would establish the general framework for *apartheid*, the State alone could not make that policy effective. Therefore any private individual who helped to implement the policy in any way would be committing the crime of *apartheid* and, depending on the circumstances, would be punishable as an accomplice or a conspirator, for example. The second question concerned terrorism. He believed that the Special Rapporteur had conceded, in a previous debate,¹⁴ that individuals could commit the crime of terrorism, and Mr. Malek had vividly illustrated such a possibility. Lastly, the Special Rapporteur held that crimes against humanity could be committed only with respect to groups, which might be ethnic, racial or religious. He doubted whether that was entirely true, since the world was currently witnessing an abundance of crimes against humanity which were not based on race or religion. Crimes committed in a country populated by a single race naturally did not have the same connotation as crimes committed in a country having a plurality of races.

55. Mr. CALERO RODRIGUES, noting that the debate had been concluded, said that the time had come for the Commission to decide how to proceed. He had previously made three suggestions: first, that the Special Rapporteur should present revised draft articles at the next session, without a new analysis; secondly, that the Planning Group should draw up a plan for future study of the topic; and thirdly, that the Commission should remind the General Assembly that it had not yet replied

to the questions previously put to it by the Commission, and that its replies were necessary for the orderly continuation of the Commission's work. Those questions were whether the Commission should proceed with the preparation of an instrument for the establishment of an international jurisdiction, and whether it should proceed on the basis that only individuals would be responsible under the code.

56. Chief AKINJIDE said that he endorsed Mr. Francis's views on *apartheid* and would have liked more attention to have been paid to that matter in the Special Rapporteur's summing-up. It was not enough to say that *apartheid* was a crime by a State: the tap-root of *apartheid* lay outside South Africa and was primarily economic. If the economic basis for *apartheid* were removed, the political basis would collapse. Those benefiting economically from *apartheid* should also be treated as criminals for the purposes of the draft code.

57. Mr. THIAM (Special Rapporteur), replying to the comments made and questions raised by several members of the Commission, said that he had dealt with the concept of conspiracy precisely because its meaning varied from one country to another. The members of a Government were obviously bound by political solidarity; it would be unthinkable for a minister to dissociate himself from aggression after the act, and if he did not resign before the act had been committed, he would, of course, also be responsible for it.

58. He saw no objection to the idea of broadening the concept of a crime against humanity: in the broader sense, a crime against humanity would be committed when one ethnic group massacred another or when a minority was the target of criminal acts. The 1954 draft code did not mention *apartheid*, and he would welcome any specific proposals that members of the Commission might wish to make on that subject. But he did not see how it would be possible to prosecute the Government of a Western country which benefited from *apartheid*. Moreover, it would be rather difficult to add new elements to the relevant conventions, of which he had taken due account. He warned members of the Commission against the dangers of drafting the code from a political point of view.

59. Although slavery had been dealt with in draft article 12, paragraph 3, he planned to devote a separate article to it in his next report.

60. He thought it was for the Commission to pronounce on the proposals made by Mr. Calero Rodrigues. The Commission could, of course, make suggestions to the Sixth Committee of the General Assembly, but it would be difficult to take decisions on future work that would be binding on the new members of the Commission.

61. Mr. KOROMA said he agreed with the Special Rapporteur that it was not desirable to bind the future members of the Commission to a schedule of work. Nevertheless, he endorsed Mr. Calero Rodrigues's suggestions concerning revision of the draft articles and a reminder to the General Assembly.

¹⁴ See *Yearbook ... 1985*, vol. I, p. 81, 1889th meeting, para. 19.

62. Sir Ian SINCLAIR suggested that a decision on the reminder to the General Assembly could be taken immediately. The replies to the questions submitted were central to the continuation of the Commission's work on the topic, and the reminder should be included in the Commission's report to the General Assembly. Mr. Calero Rodrigues's suggestion regarding the plan for future study of the topic was sound, but the Special Rapporteur should be allowed full freedom of action. He might, for example, wish to include in his next report an indication of how the topic should be studied in the future.

63. Mr. DÍAZ GONZÁLEZ said that it would be very useful if the Special Rapporteur could submit revised draft articles at the Commission's next session, but it might not be entirely appropriate for the Commission to draw up a programme of work for that session. Any suggestions to be made should be formulated by the Planning Group. Similarly, it was for the Special Rapporteur to indicate in his next report how he wished the questions dealt with in the draft code to be considered. It was quite right to urge the Sixth Committee to answer the questions already put to it, particularly with regard to an international criminal jurisdiction.

64. Mr. THIAM (Special Rapporteur) said that he would formulate the questions to be put to the Sixth Committee in the chapter of the Commission's report dealing with the draft code. He had taken note of the proposals made by Mr. Calero Rodrigues, but thought that it would be better to leave it to the Commission to decide, at its next session, what course of action was to be followed, so that it would not be prematurely bound by one method or another.

65. Mr. KOROMA said that the discussion had left him wondering how the Commission would proceed with the draft code at its next session.

66. Mr. CALERO RODRIGUES pointed out that a programme of work would be extremely useful to the new members of the Commission in proceeding with the study of the topic. He therefore urged the Planning Group to propose a tentative plan.

67. The CHAIRMAN said there appeared to be agreement that the Special Rapporteur should submit, at the next session, revised draft articles based on his own wisdom and on the wishes of the Commission, and that the Planning Group should prepare a programme of work for the Commission's next session. The Special Rapporteur would draft, for the Commission's report, the questions that should be put to the Sixth Committee.

It was so agreed.

Jurisdictional immunities of States and their property
(continued) (A/CN.4/396,¹⁵ A/CN.4/L.399, ILC
(XXXVIII)/Conf.Room Doc.1)

[Agenda item 3]

DRAFT ARTICLES PROPOSED BY THE
DRAFTING COMMITTEE (continued)

ARTICLE 24 [26] (Service of process)

68. Mr. RIPHAGEN (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 24 [26] which read:

Article 24 [26]. Service of process

1. Service of process by any writ or other document instituting a proceeding against a State shall be effected:

(a) in accordance with any special arrangement for service between the claimant and the State concerned; or

(b) failing such arrangement, in accordance with any applicable international convention binding on the State of the forum and the State concerned; or

(c) failing such arrangement or convention, by transmission through diplomatic channels to the Ministry of Foreign Affairs of the State concerned; or

(d) failing the foregoing, and if permitted by the law of the forum State and the law of the State concerned:

(i) by transmission by registered mail addressed to the head of the Ministry of Foreign Affairs of the State concerned requiring a signed receipt; or

(ii) by any other means.

2. Service of process by the means referred to in paragraph 1 (c) and (d) (i) is deemed to have been effected by their receipt by the Ministry of Foreign Affairs.

3. These documents shall be accompanied, if necessary, by a translation into the official language, or one of the official languages, of the State concerned.

4. Any State that enters an appearance on the merits in a proceeding instituted against it may not thereafter assert that service of process did not comply with the provisions of paragraphs 1 and 3.

69. Article 24 was the first article in part V of the draft, entitled "Miscellaneous provisions". As he had said at the previous meeting, the elements included in the former article 25 (Immunities of personal sovereigns and other heads of State) had been either deleted or incorporated in earlier articles. The present text was based on paragraphs 1 and 2 of the former article 26,¹⁶ dealing with service of process. Paragraphs 3 and 4 of that article, concerning default judgment, formed the basis of the new article 25.

70. Paragraph 1 had been amplified and spelt out the various means by which service of process could be effected. It employed the word "shall" instead of "may". It should be noted that a hierarchy of such means was provided, beginning first with special arrangements. Transmission by registered mail addressed to the head of a foreign ministry, or by any other means, was possible as the last means available, if permitted by the law of the forum State and that of the defendant State.

71. Paragraphs 2 and 3 were new and were taken from similar provisions in the 1972 European Convention on State Immunity.¹⁷ Paragraph 4 was based on paragraph 2 of the former article 26, which had been modified to make it clear that the appearance in question related to the merits and was not, of course, an appearance for the sole purpose of challenging the jurisdiction of the court.

¹⁶ See 1942nd meeting, para. 10.

¹⁷ *Ibid.*, footnote 6.

¹⁵ Reproduced in *Yearbook ... 1986*, vol. II (Part One).

72. Sir Ian SINCLAIR said that he was content in principle with article 24. At the Commission's 1944th meeting, he had expressed concern about the provision on service by registered mail. His concern had been partly allayed by the Drafting Committee's decision to make that method very subsidiary and to qualify it, in paragraph 1 (*d*), with the words "if permitted by the law of the forum State and the law of the State concerned".

73. He suggested a minor amendment to the text of paragraph 2. In the last part of the paragraph, the reference to "their" receipt by the Ministry of Foreign Affairs was ambiguous, since it was not clear what the word "their" referred to. He therefore suggested that the words "their receipt" should be replaced by the words "receipt of the documents".

74. Mr. KOROMA proposed that, in paragraph 1 (*b*) and (*c*), the words "failing such arrangement" should be replaced by the words "in the absence of such an arrangement".

75. Mr. SUCHARITKUL (Special Rapporteur) suggested that that proposal should be held over until the second reading. The Drafting Committee had already considered it, but had retained the present wording, among other reasons because the formula suggested could not be introduced into paragraph 1 (*d*), which began with the words "failing the foregoing".

76. Mr. KOROMA said that he would not press his proposal but wished his preference to be placed on record. If the wording of paragraph 1 (*d*) was the only reason for not accepting his proposal, consideration could be given to improving that wording.

77. Mr. RAZAFINDRALAMBO, referring to the suggestion made by Sir Ian Sinclair, proposed that, in the French text of paragraph 2, the words *au ministère* should be replaced by the words *par le ministère*.

78. Mr. BALANDA suggested that paragraph 1 (*a*) should be shortened by deleting the words "for service". With regard to paragraph 1 (*d*), he did not think that the law of the forum State and the law of the State concerned need both permit transmission by registered mail; such a requirement would be excessive. In order to simplify matters, paragraph 1 (*d*) should be amended to read: "... if permitted by the law of the forum State or the law of the State concerned ...".

79. Mr. RIPHAGEN (Chairman of the Drafting Committee) said that the question raised by Mr. Balanda had been discussed at length in the Drafting Committee. The problem was that the document to be served had legal force. It was a matter of performing an act of authority in another State, whose consent was obviously required. Clearly, therefore, the law of that State would have to permit service by registered mail. Similarly, the law of the forum State would have to permit that method. That was why the Drafting Committee had specified that the method of service must be permitted by the law of both countries.

80. Mr. BALANDA pointed out that the Special Rapporteur had not established any hierarchy for the various procedures and that the order proposed in

paragraph 1 had been established during the debate, with diplomatic channels coming first and transmission by registered mail as a last resort. In his opinion, the nature of the document required should be determined in accordance with the law of the forum State.

81. Chief AKINJIDE propounded the hypothetical example of two States, of which State A permitted service by registered mail and State B did not. If a plaintiff in State A tried to serve process upon State B, the legal adviser of State B would advise that no service had taken place and that the communication should be ignored. Clearly, therefore, the method of service by registered mail had to be lawful in both the States concerned.

82. Mr. USHAKOV said that, because procedures varied from country to country, there was a significant difference between the English and French titles of article 24. On second reading, the Commission should therefore choose more general and neutral terms, which should be defined in article 2; otherwise, persons unfamiliar with the legal systems on which the draft was based might have some difficulty in understanding the provisions of article 24, as it would be difficult to use different texts concurrently.

83. Mr. TOMUSCHAT observed that, in the French text, the term "service" had been rendered as *signification ou notification*, which gave the impression that article 24 contained a general rule applicable to all notifications—of judgments, for example—and a special rule for the service of documents instituting proceedings. The English text contained no such ambiguity; it simply dealt with service of process.

84. Mr. SUCHARITKUL (Special Rapporteur) pointed out that the 1972 European Convention on State Immunity, which was a bilingual instrument, used "service" in English and *signification ou notification* in French as equivalent terms.

85. Mr. LACLETA MUÑOZ said that the Spanish text of article 24 was very clear and referred only to *notificación*. He did not think that the words *signification* and *notification*, as used in the French text, referred to two different things. They would seem, rather, to be synonymous.

86. Mr. KOROMA proposed the deletion of paragraph 4 as being unnecessary. Objection to service could be raised at any point in a proceeding.

87. Mr. DÍAZ GONZÁLEZ suggested that, in order to make the Spanish text of paragraph 4 clearer, the words *Ningún Estado que comparezca en relación con el fondo en un proceso promovido contra él podrá* should be replaced by *El Estado que comparezca en relación con el fondo en un proceso promovido contra él no podrá*.

88. Mr. SUCHARITKUL (Special Rapporteur) said that paragraph 4 reflected the existing practice. Once a court was seized of the merits of a case, it was too late to raise any procedural objection.

89. Mr. KOROMA pointed out that, in some cases, a court could join the procedural objection to the merits and consider them both together.

90. Mr. BALANDA said that the words "Any State that enters an appearance on the merits" in paragraph 4 were not very clear. Despite the rather awkward wording of paragraph 4, however, there was no doubt that the members of the Commission unanimously agreed on the principle that objections could be raised only at the start of a proceeding, *in limine litis*. Consequently, once a State had begun to defend itself in a proceeding instituted against it, it could no longer claim that service of process had not been properly effected.

91. Chief AKINJIDE said that the Nigerian rules of procedure contained a rule expressed in exactly the same terms as paragraph 4. Upon being sued, a defendant could appear in court in either of two ways: he could appear on the merits, in which case no procedural issues could be raised; or he could appear on protest and could raise any procedural objections. Of course, it was open to the court to join the procedural objections to the merits.

92. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed provisionally to adopt article 24 [26] with the amendments proposed by Sir Ian Sinclair, by Mr. Razafindralambo for the French text, and by Mr. Díaz González for the Spanish text.

It was so agreed.

Article 24 [26] was adopted.

ARTICLE 25 [26] (Default judgment)

93. Mr. RIPHAGEN (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 25 [26], which read:

Article 25 [26]. Default judgment

1. No default judgment shall be rendered against a State except on proof of compliance with paragraphs 1 and 3 of article 24 and the expiry of a period of time of not less than three months from the date on which the service of the writ or other document instituting a proceeding has been effected or is deemed to have been effected in accordance with paragraphs 1 and 2 of article 24.

2. A copy of any default judgment rendered against a State, accompanied if necessary by a translation into the official language or one of the official languages of the State concerned, shall be transmitted to it through one of the means specified in paragraph 1 of article 24 and any time-limit for applying to have a default judgment set aside, which shall be not less than three months from the date on which the copy of the judgment is received or is deemed to have been received by the State concerned, shall begin to run from that date.

94. Article 25 was based on paragraphs 3 and 4 of the former article 26.¹⁸ The earlier text had been redrafted in the light of the discussion and paragraph 1 now specified a minimum time-limit of three months from the date of service of process before a default judgment could be rendered. It had been considered preferable to specify a time-limit, rather than rely on the subjective notion of a period of time subject to a reasonable extension.

95. Paragraph 2 similarly specified a minimum period of time to be allowed for applying to have a default

judgment set aside, if such a time-limit was set by the court under internal law. That part of the provision assumed that procedures existed under internal law for setting aside or appealing against a default judgment. Such procedures might not exist, or might be at the discretion of the court, depending on the applicable rules of civil procedure of the forum State. Finally, provision had been made for transmission of a translation of the judgment, if necessary.

96. The CHAIRMAN said that, in the absence of any comment, he would take it that the Commission agreed provisionally to adopt article 25 [26].

Article 25 [26] was adopted.

ARTICLE 26 [27] (Immunity from measures of coercion)

97. Mr. RIPHAGEN (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 26 [27], which read:

Article 26 [27]. Immunity from measures of coercion

A State enjoys immunity, in connection with a proceeding before a court of another State, from any measure of coercion requiring it to perform or to refrain from performing a specific act on pain of suffering a monetary penalty.

98. The new text was based on paragraph 1 of the former article 27.¹⁹ The rule had been modified, however, to make it relate only to measures of coercion requiring a State to perform, or refrain from performing, a specific act, on pain of suffering a monetary penalty. The Drafting Committee believed that it was not advisable or realistic to prohibit a court from exercising its usual power to order a party to perform or refrain from performing a specific act. The enforcement of such an order against a State was, of course, a different question and was covered by part IV of the draft. Thus article 26 was limited to providing immunity from a court order for specific performance that carried with it the coercive measure of a monetary penalty for non-compliance with the order. In some legal systems, including the French system, the penalty was termed *astreinte*.

99. It had been thought preferable to formulate the provision as a separate article, instead of including it in article 27, since it related to something more than a "procedural immunity".

100. Mr. RAZAFINDRALAMBO proposed that, at the end of the French text, the word *financière* should be replaced by *pécuniaire*.

101. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed provisionally to adopt article 26 [27] with the amendment to the French text proposed by Mr. Razafindralambo.

It was so agreed.

Article 26 [27] was adopted.

¹⁸ *Ibid.*, para. 10.

¹⁹ *Ibid.*

ARTICLE 27 (Procedural immunities)

102. Mr. RIPHAGEN (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 27, which read:

Article 27. Procedural immunities

1. Any failure or refusal by a State to produce any document or disclose any other information for the purposes of a proceeding before a court of another State shall entail no consequences other than those which may result from such conduct in relation to the merits of the case. In particular, no fine or penalty shall be imposed on the State by reason of such failure or refusal.

2. A State is not required to provide any security, bond or deposit, however described, to guarantee the payment of judicial costs or expenses in any proceeding to which it is a party before a court of another State.

103. The two paragraphs of the new text were based on paragraphs 2 and 3 of the former article 27.²⁰ Those paragraphs had been reformulated in the light of the debate. Paragraph 1 first spoke of “no consequences” being entailed by the conduct in question, although it stated that the consequences which might ordinarily result from such conduct in relation to the merits of the case would still obtain. That wording preserved the applicability of any relevant rules of the internal law of the forum State. The second sentence of paragraph 1 specified that no fine or penalty could be imposed. Paragraph 2 drew on paragraph 3 of the former article 27 and a corresponding provision of the 1972 European Convention on State Immunity. It should be noted that both paragraphs applied whether a State was plaintiff or defendant.

104. Sir Ian SINCLAIR said that he wished to place on record his reservation on paragraph 2 with regard to the position of the State as a plaintiff. He could accept the provisions of paragraph 2 when the State was a defendant.

105. Mr. TOMUSCHAT made the same reservation. In his view, the rule set out in paragraph 2 had no justification when the State was involved in a proceeding as plaintiff; it would then confer a privilege on the defendant. It should also be borne in mind that, in many cases, it was very difficult to recover monies deposited as security.

106. Mr. BALANDA proposed that, in paragraph 2 of the French text, the word *caution*, which referred to a person, should be replaced by *cautionnement*.

107. Mr. MAHIU said that security was required of a plaintiff, not of a defendant, for if a defendant were required to provide security, he would not appear. Thus article 27, paragraph 2, would make sense only if it referred to the plaintiff. It was in the light of his own country's internal law that he made that comment.

108. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed provisionally to adopt article 27 with the amendment to the French text proposed by Mr. Balanda.

It was so agreed.

Article 27 was adopted.

²⁰ *Ibid.*

ARTICLE 28 (Restriction of immunities)

109. Mr. RIPHAGEN (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 28, which read:

Article 28. Restriction of immunities

A State may restrict in relation to another State the immunities provided in the present articles to such extent as appears to it to be appropriate for reasons of reciprocity, or conformity with the standard practice of that other State, or as required by any international agreement applicable in the matter between them. However, no such restriction shall prejudice the immunities which a State enjoys in respect of acts performed by it in the exercise of sovereign authority (*acta jure imperii*).

110. The former article 28²¹ had been modified in a number of respects. The reference to “extension” of immunities had been deleted as being unnecessary. Such extension was possible in any case and to make provision for it would add nothing to the draft. Thus the new article referred only to “restriction” of immunities.

111. The first sentence contained the essential elements of the original text, with appropriate drafting improvements. The second sentence was new and incorporated what was considered to be an essential element, namely that in no event could restriction of immunities prejudice the immunities of a State in respect of acts performed by it in the exercise of its sovereign authority (*acta jure imperii*). That provision was intended to protect the “hard core” of State immunities and to draw a line beyond which restrictions were not permitted.

112. The wording of that provision had, of course, been the subject of some discussion. The French expression *les prérogatives de la puissance publique* seemed to express the basic idea most accurately. Again drawing on the 1972 European Convention on State Immunity, the Drafting Committee had decided to include in all language versions, after the phrase “exercise of sovereign authority”, the Latin expression *acta jure imperii* in parentheses, in order to bring out within the context of that particular article the fundamental nature of the sovereign authority in question.

113. The CHAIRMAN suggested that the discussion on article 28 should be deferred until the next meeting.

It was so agreed.

The meeting rose at 1.05 p.m.

²¹ *Ibid.*

1970th MEETING

Wednesday, 18 June 1986, at 3.15 p.m.

Chairman: Mr. Motoo OGISO

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Koroma, Mr. Laclea Muñoz, Mr.