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SUMMARY RECORD OF THE 26th MEETING

Chairman: Mr. AFONSO (Mozambique)

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The meeting was called to order at 3.05 p.m.

AGENDA ITEM 128: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-THIRD SESSION (continued) (A/46/10, A/46/405)

1. Mr. CALERO RODRIGUES (Brazil) said his delegation had had some doubts about the feasibility of drafting articles on the non-navigational uses of international watercourses that would be suitable for application to international watercourses in general since they varied so much in size, location and characteristics; even so, the draft articles could be considered a reasonable basis for an international instrument. The International Law Commission had adopted the only workable approach, the framework agreement approach, thus avoiding the need to tackle the myriad of problems which arose and leaving the specific rules to be applied to specific watercourses to be set out in agreements between the States concerned, as was the current practice.

2. Referring to article 2, his delegation had no objection to defining a watercourse as a "system of waters", on the understanding that that did not mean that the articles would necessarily apply to every single part of the watercourse but would apply only if and when the use of the watercourse or of its waters in the part in question affected uses in another State. Even if hydrologically all the parts of a watercourse constituted a unitary whole, it did not necessarily follow that they came under the purview of the articles. The concept of an international watercourse continued to be, legally speaking, a relative one. Although the term "international" implied that the waters in question were subject to common management, his delegation did not believe it necessary to modify a terminology which had become traditional; the commentary to article 2 was not entirely clear regarding that question, however.

3. His delegation had no fundamental objections to part II, except for article 5; paragraph 2 might not be necessary since the concept of participation seemed non-essential and could give rise to difficulties or misinterpretations. Article 6 might also be unnecessary, since the list of examples of "relevant factors and circumstances" seemed superfluous.

4. His delegation continued to believe that the provisions in part III were far more detailed and constraining than was necessary in a framework agreement. They established procedural rules that would better be left to the discretion of States when they negotiated watercourse agreements. Those rules would restrain the flexibility that States might find useful in their negotiations. It was to be hoped that on second reading the Commission would simplify that part of the draft.

5. His delegation had no substantial problems with part V but felt that it could be made more precise through careful redrafting.

6. The first three articles of part VI could be moved into a separate part since they were all related. His delegation had no difficulty with articles 30

(Mr. Calero Rodrigues, Brazil)

and 31 but had serious doubts about article 32. The article referred to harm suffered in general as a result of activities related to an international watercourse instead of dealing only with harm suffered in another State. There seemed to be no valid reason to state the principle of discrimination in such general terms; the question of non-discrimination in access to judicial procedures had a cogency of its own and was not limited to cases involving international watercourses. At the same time, there was no mention whatsoever of the application of non-discrimination to harm suffered in another State. Moreover, the procedural right of access to judicial procedings was meaningless if no substantial right was recognized. Such a right to compensation or other remedies when the harm was suffered in another State would be essential if the principle of non-discrimination was to be effectively observed. Thus, harm caused in another State as a result of activities related to an international watercourse should be equated to a similar harm caused in a State where the activity was conducted, both in terms of substantive rights to compensation or other remedies, and in terms of procedural rights of access to courts.

7. Mr. MIKULKA (Czechoslovakia) noted that the question of the law of the non-navigational uses of international watercourses had first been taken up by the Commission in 1971. The question was characterized by the need for an interdisciplinary approach; legal considerations were largely determined by the physical nature of watercourses and the state of scientific knowledge in the field of hydrology. The problem of defining international watercourses lay in the need to establish a balance between the interdependence of riparian States and their sovereignty over natural resources and also between different uses of water. His delegation had always supported the idea of defining the term "international watercourse" so as to make it clear that it was a system consisting of hydrographical elements which, by virtue of their physical interdependence, constituted a unitary whole, some parts of which crossed State boundaries. However, on the question of whether the definition should include all elements of a hydrological system, including groundwater, he noted that the Special Rapporteur's preference for a broad definition were inspired by the appeals of various scientific bodies and expert meetings for a systematic approach to water management in view of the interdependence and diversity of the elements of the hydrological cycle. The draft articles submitted by the Commission could be applied both to surface water and to groundwater.

8. His delegation welcomed the reintroduction into the definition of the term "watercourse" of the concept "common terminus"; without that term the definition could artificially treat two or more natural watercourse systems flowing into different seas as a single watercourse because they were linked by canals.

9. The Commission had devoted scant attention to the need to define "non-navigational uses"; it was necessary to define what was meant, not by "non-navigational", but by "uses" of a watercourse, or of water itself, and to make a clear distinction between water use activities, which were covered by

(Mr. Mikulka, Czechoslovakia)

the draft articles, and activities on land, which were not. The Special Rapporteur, in paragraph 59 of his seventh report (A/CN.4/436), noted that it was almost impossible to exclude totally actions on land from the scope of the draft. However, the title of the draft articles referred to "uses of watercourses" while the example mentioned in footnote 112 to the seventh report of a plant discharging toxic waste was a question of the protection and conservation of watercourses, which was beyond the Commission's mandate. In order to avoid an ever broader interpretation, article 2 should be supplemented by a general definition of "uses" of international watercourses; it would otherwise be difficult to exclude other land-based or even atmospheric activities such as massive air pollution.

10. The formulation of a general definition of the term "non-navigational uses of international watercourses" could also help to reduce the problems in defining the term "international watercourse". The Commission had not sufficiently taken into account the entirely legitimate concerns of States which feared that the broad concept of "water systems" in the definition of the term "watercourse" might constitute a massive and unjustified interference in the territorial sovereignty of the State. Although it had been impossible to define the term "international watercourse" so as to balance a global and comprehensive approach to water use with the protection of the legitimate interests of territorial sovereignty, a definition of the term "uses" could help to achieve that balance.

11. When considering concrete obligations, it could be seen that the differences between the two schools of thought - one emphasizing State sovereignty over natural resources and the other the desirability of global water resources management - were not irreconcilable and that both concepts could usefully contribute to the formulation of substantive rules. That was the case with article 10; taking paragraph 1 of that article in the light of article 3, paragraph 1, his delegation would have no difficulty in approving article 10. However, the agreements envisaged in article 3, whether they concerned an entire watercourse, any part thereof or a particular project or programme, should not substantially impede the use of a watercourse by one or more other States.

12. Since the draft articles were a draft framework agreement, his delegation could also support articles 26 to 33.

13. His delegation wished to stress the importance of the principle of equitable and reasonable utilization, in the context of the obligations of States, along with the principle of cooperation. That concept determined the obligations of States and provided a framework within which the rights and duties of States could be logically ordered. The finalization of the draft articles would receive fresh impetus from the results of the United Nations Conference on Environment and Development and the draft articles would undoubtedly be a valuable contribution to the work of Working Group II of that Conference.

14. Mr. SCHARIOTH (Germany) said that, in view of the increased use of watercourses and growing concern about environmental damage, he welcomed the Commission's draft articles on the non-navigational uses of international watercourses.

15. The principle of equitable and reasonable utilization laid down in articles 5 and 6 was an important preventive measure in that it provided a basis for the settlement of conflicts concerning the use of international watercourses. Although article 6 contained a partial list of factors to be taken into account, both draft articles remained flexible enough to ensure that particular interests could be weighed in individual cases, so that a negotiated settlement acceptable to all watercourse States could be reached.

16. He also welcomed the Commission's focus on the establishment of procedural rules, as exemplified in articles 11, 13 and 19. That approach reflected a concern for the prevention of harm, rather than compensation for harm already caused.

17. Since the problem of water pollution required a comprehensive approach to the protection of watercourses, he supported the inclusion of groundwater in the definition of the term "watercourse". However, since the problems and principles that applied to "free" groundwater also applied to "confined" groundwater, the latter should be included in the definition to avoid the necessity of drafting a separate convention on "confined" international groundwater. He would welcome the views of other States on that question.

18. The term "appreciable harm" was also problematic, since the word "appreciable" could mean either "detectable" or "significant". He therefore proposed that the term "substantial harm" should be substituted. Furthermore, the difficult problem of responsibility for harm was not adequately reflected, since harm could result from an insignificant action by one State which merely compounded the effects of existing harmful uses in another. He reiterated his delegation's suggestion that paragraph 5 of the commentary on the term "appreciable harm" contained in the Commission's 1988 report (A/43/10) should be reflected in the draft article.

19. Mr. SIDDIQUI (Bangladesh) said that his country attached special importance to the non-navigational uses of international watercourses, since its largely agricultural economy was critically dependent on water resources from its rivers, most of which were international watercourses. Moreover, as a lower riparian country, Bangladesh was at a comparative disadvantage.

20. Despite the vital interdependence of riparian States, only one third of all international river basins were the subject of agreements between such States. Where no such agreements existed, problems concerning the sharing of water resources had remained a constant source of tension and even of serious conflict. A universal legal framework on the subject was therefore essential to international peace and security.

(Mr. Siddiqui, Bangladesh)

21. With respect to article 2, the definition of a watercourse derived essentially from the unity of the hydrological cycle. Thus, the international character of a watercourse must be determined by both its geographical extent and the requirements of the riparian States.

22. Implementation of the principle of equitable and reasonable utilization, set forth in article 5, required close cooperation between upper and lower riparian States. In that connection, he strongly supported the inclusion of environmental and demographic considerations and of the vital needs of riparian States among the factors relevant to equitable and reasonable utilization set forth in article 6.

23. It followed from the principle of equitable utilization that States should be prohibited not only from causing appreciable harm to other riparian States in their use of an international watercourse, but also from engaging in any such use that could have adverse effects on other States. Article 7 should therefore include criteria for determining appreciable harm and adverse effects on riparian States. For example, the site at which a watercourse was used significantly influenced the effects of such use. The liability of States which caused such harm, as well as their compensation obligations, should also be made clear.

24. With respect to article 21, riparian States should have the right to receive information on any activities of other riparian States which could affect water quality in an international watercourse. An international mechanism should be developed to monitor the pollution level of international watercourses and to suggest remedial measures to the riparian States concerned. To protect and preserve ecosystems, not only contamination but also the drying up or diversion of international watercourses should be strictly prohibited. His delegation proposed that the draft articles should stipulate that upper riparian States did not have the right to divert the natural flow of an international river through unilateral action; were obliged to refrain from implementing any projects that could cause alterations in the existing water system without the consent of lower riparian States; and should respect the existing or traditional water uses of lower riparian States. A provision concerning the breach of those obligations should also be included.

25. Mr. ROUCOUNAS (Greece) said that the draft articles on the non-navigational uses of international watercourses were based on a few fundamental principles: that an international watercourse was a set of interconnected elements in which any modification of one element necessarily affected the others; that the utilization of international watercourses and participation in their benefits must be equitable and reasonable; that such utilization and participation entailed an obligation not to cause appreciable harm; and that effective mechanisms for cooperation among the States concerned should be instituted.

26. Since the principle of equitable and reasonable utilization should not be left in the abstract, he welcomed the enumeration, in article 6, of factors to

(Mr. Roucounas, Greece)

be considered. Article 7, despite its brevity, set up a legal framework for regulations which had proved effective in practice. The general obligation to cooperate, set forth in article 8, was described in detail in part III of the draft articles, while part IV focused specifically on the protection and preservation of ecosystems and the prevention, reduction and control of pollution.

27. Among the most important developments at the Commission's forty-third session had been the decision to include groundwater, which constituted 97 per cent of fresh water on Earth, within the scope of the draft articles, at least in the case of "free" groundwater. He supported such a hydrologically realistic approach, and also endorsed the inclusion of the word "system" in article 2 (b). With respect to article 10, which dealt with the difficult problem of the relationship between uses, he felt that the "vital human needs" referred to in paragraph 2 should be given a broad interpretation that went beyond the provision of water for drinking or for food production.

28. Articles 26, 27 and 28 offered international watercourse States a variety of mechanisms for cooperation. Article 32 gave the internal law of States direct responsibility for ensuring non-discrimination; more detailed provisions on that point would be necessary.

29. He reiterated his delegation's preference that the draft articles should be complemented by model rules for the settlement of disputes concerning the non-navigational uses of international watercourses.

30. Mr. BOS (Netherlands) said that although the Commission's efforts were laudable, it had taken too long to reach the current stage in the elaboration of the draft articles on the non-navigational uses of international watercourses and the draft Code of Crimes against the Peace and Security of Mankind. Since it could be assumed that the Commission was requested to study a given topic because the codification and development of the relevant rules were thought to be useful, the Commission should arrange to conclude its work on each topic within a fixed period of time, such as five years, while allowing for swifter responses to more urgent matters.

31. Notwithstanding the title of the draft articles, the navigational uses of international watercourses were rightly included within their scope by virtue of article 1, paragraph 2. The definition of an international watercourse was satisfactory in its breadth of application. Although the Commission had taken a realistic approach by requiring only that watercourse States should consult with each other on the uses of international watercourses, an obligation for such States to enter into formal agreements might have been preferable.

32. The relationship between equitable and reasonable utilization and participation (art. 5) and the obligation not to cause appreciable harm (art. 7) was problematic. In the case of uses not involving pollution, the obligation not to cause appreciable harm should be subject to the principle of equitable utilization. However, he welcomed the strict provisions in

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article 21 on the prevention, reduction and control of pollution. Although he endorsed article 8 on the general obligation to cooperate, it should be borne in mind that such an obligation could, in some cases, preclude the optimal utilization of an international watercourse.

33. Part III of the draft articles, concerning planned measures, appeared to provide for equitable treatment of all States using an international watercourse. However, the notification provisions did not require the notifying State to undertake an environmental impact assessment, in which the notified State could participate, before a final decision on the implementation of planned measures was taken. That requirement was included in the Convention on Environmental Impact Assessment in a Transboundary Context, concluded in Espoo, Finland in Februrary 1991.

34. The Commission's draft was also somewhat weaker than the Espoo Convention in respect of the rights accorded to the public. Unlike article 32 of the draft before the Committee, the Espoo Convention not only prohibited discrimination between the public in the State of origin and in the affected State but also required the State of origin to ensure that the public in the affected State could participate in the environmental impact assessment procedure. It also made it obligatory for the State of origin to provide the public of the affected State with possibilities for making comments on, or objections to, the planned measures, as well as with the necessary environmental impact assessment documentation. However, the position of a State not notified in accordance with draft article 12 seemed stronger than that of the potentially affected State which had received no notification under the Espoo Convention. Referring to article 18, paragraph 2, of the draft, he said that the consultations and negotiations in question would presumably not be restricted to the question as to whether notification was required but would also deal with the planned measures' compatibility with the principle of equitable and reasonable utilization set forth in article 5 and the prohibition on causing appreciable harm set forth in article 7.

35. He noted with satisfaction that the provisions on planned measures (part III of the draft) were purely procedural in nature and did not affect the substantive legal position, even in cases where the notified State failed to react to the notification of the notifying State within the prescribed period of time (art. 16). In that connection, he remarked that the Special Rapporteur on international liability for injurious consequences arising out of acts not prohibited by international law appeared, in his sixth report (A/C.4/428 and Add.1), to adopt a different approach.

36. The articles on protection and preservation (part IV of the draft) were generally satisfactory. It would be noted that article 20 on protection and preservation of ecosystems was particularly stringent in that it made no mention of possible appreciable harm to other watercourse States. A question which might arise in that connection was how that article related to articles 21 and 22, both of which were phrased in less stringent terms.

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Problems might also arise with regard to the proper relationship between the provision on water pollution in article 21 and that in article 24, which obliged watercourse States to take measures to prevent or mitigate conditions that might be harmful to other watercourse States, whether resulting from natural causes or human conduct. Articles 25, 27 and 28 appeared to strike a reasonable balance between the interests of upstream and downstream watercourse States and could be regarded as satisfactory. The draft articles were, however, rather weak on the subject of institutional arrangements for permanent or regular cooperation between watercourse States. Such arrangements were not mentioned at all in articles 3 and 4 on watercourse agreements but only in article 26 on management, where the establishment of a joint management mechanism was not made obligatory.

37. Turning to the draft Code of Crimes against the Peace and Security of Mankind, he said that, in view of the importance of the topic and the number of difficult legal issues involved, the Netherlands Minister for Foreign Affairs had in May 1991 requested the Netherlands Advisory Committee on Questions of International Law to draw up a report on the draft Code. An interim report had been issued early in October, and he was therefore in a position to present some preliminary observations. With regard to the scope of the draft Code, he took the view that too many crimes had been included. A clear link should exist between the types of crimes eligible for inclusion in the Code and the system of international enforcement envisaged. The crimes to be included in the Code therefore had to meet certain requirements. An international enforcement system should not be sought automatically whenever national enforcement problems arose or were likely to arise. The following criteria could be employed in selecting crimes eligible for inclusion in the draft Code: first, only those crimes which conflicted with fundamental humanitarian principles - with the "conscience of mankind" - should be included; second, only those crimes which, by their very nature, virtually precluded national enforcement should be eligible; and, third, the Code should only include crimes which related to acts perpetrated by individuals in their official capacity and which, at the same time, constituted a violation of a State's international obligations. On the basis of those criteria, only crimes of aggression, genocide, systematic or mass violation of human rights and exceptionally serious war crimes were eligible for inclusion in the Code.

38. With regard to the legal character of the draft Code, a close relationship between the envisaged system of international enforcement and the crimes to be included in the Code was again of the utmost importance. In that connection, he took the view that a convention should be drafted instead of a code, irrespective of whether the crimes and the enforcement machinery were to be covered by only one instrument or by two separate ones.

39. With regard to enforcement machinery, he wished to confine himself to the general comment that the procedure to be applied by an international criminal court, the penalties to be imposed and their enforcement should be in conformity with relevant universal and regional human rights instruments. The question of appropriate punishment for the crimes in question was a most

(Mr. Bos, Netherlands)

delicate one, as was that of the relationship between national and international enforcement systems. A choice had to be made between concurrent jurisdiction or application of the principle of subsidiarity; in the latter case, the question of whether the national or the international system should have priority remained to be settled. In conclusion, he suggested that, at least so far as some of the crimes in the Code were concerned, the Security Council might play a role; once again, such a role would have major consequences for the international enforcement system.

40. Mr. GODET (Observer for Switzerland), speaking on the law of the non-navigational uses of international watercourses, recalled the statements made by his delegation on that topic at the forty-third and forty-fifth sessions (A/C.6/43/SR.28 and A/C.6/45/SR.25). His delegation continued to feel that the Commission's draft should have been more explicit on the question of the status of a framework agreement vis-à-vis any specific agreements that might be concluded between watercourse States. So far as the draft's general acceptability was concerned, he noted that although in certain respects, particularly with regard to procedural rules, the draft went beyond existing rules of customary law, in most other respects it represented a codification of existing rules.

41. Referring to the definition of an international watercourse supplied in article 2, he noted that the concept adopted by the Commission was a relatively broad one, including groundwater and canals. While such a definition was no doubt justified from the scientific point of view, its acceptance by all watercourse States, especially upstream States, was by no means assured. With reference to the question of balance between the interests of upstream and downstream States, he recalled that in its statement at the forty-third session his delegation had pointed out that any watercourse State could effectively veto any new use of the watercourse by claiming that such use entailed a risk of appreciable harm. His delegation strongly supported the principle of equitable and reasonable utilization of the watercourse set forth in article 5 and felt that the draft should be more explicit on the subject of its implementation.

42. Article 7 on the obligation not to cause appreciable harm also gave rise to difficulties. By employing the term "appreciable" the Commission probably intended to convey that minor harm was excluded from the scope of the article. As he had pointed out on previous occasions, and as the representative of Germany had done earlier in the meeting, the term "appreciable" was open to misinterpretation and should be replaced by a more precise one throughout the draft. On the more fundamental issue of whether the obligation not to cause appreciable harm should or should not take precedence over the principle of equitable utilization, he thought that the Commission's approach was somewhat contradictory and, moreover, failed to take account of historical developments; the principle of equitable utilization should not be subordinated to the prohibition on causing appreciable harm because it had originally been introduced in order to modify that prohibition. The draft as it stood appeared to be more favourable to existing

(Mr. Godet, Observer, Switzerland)

utilizations of international watercourses than to possible new ones. It might be advisable to reverse that order of priorities by reverting to the approach advocated by the International Law Association in 1966.

43. Another imbalance between the relative positions of upstream and downstream States was apparent in article 21, paragraph 2, of the draft which, in effect, extended the scope of article 7 to the sphere of environmental protection. Clearly, upstream States would be the most severely affected by the introduction of such a rule.

44. In conclusion, after referring to more detailed comments included in the text of his statement circulated unofficially to members of the Committee, he stressed the usefulness of the work accomplished by the Commission in a difficult area of international law and expressed his delegation's view that, with a few adjustments, the text provisionally adopted by the Commission would provide an excellent basis for future negotiations.

AGENDA ITEM 125: MEASURES TO PREVENT INTERNATIONAL TERRORISM WHICH ENDANGERS OR TAKES INNOCENT HUMAN LIVES OR JEOPARDIZES FUNDAMENTAL FREEDOMS AND STUDY OF THE UNDERLYING CAUSES OF THOSE FORMS OF TERRORISM AND ACTS OF VIOLENCE WHICH LIE IN MISERY, FRUSTRATION, GRIEVANCE AND DESPAIR AND WHICH CAUSE SOME PEOPLE TO SACRIFICE HUMAN LIVES, INCLUDING THEIR OWN, IN AN ATTEMPT TO EFFECT RADICAL CHANGES (continued) (A/C.6/46/L.4)

(a) REPORT OF THE SECRETARY-GENERAL

(b) CONVENING, UNDER THE AUSPICES OF THE UNITED NATIONS, OF AN INTERNATIONAL CONFERENCE TO DEFINE TERRORISM AND TO DIFFERENTIATE IT FROM THE STRUGGLE OF PEOPLES FOR NATIONAL LIBERATION

45. The CHAIRMAN invited the Committee to take action on the draft resolution entitled "Measures to eliminate international terrorism" contained in document A/C.6/46/L.4.

46. Mr. NATHAN (Israel), speaking in explanation of position before the Committee proceeded to take a decision on the draft resolution, said that his delegation had joined the consensus on the draft because it considered that concentrating on the measures to eliminate international terrorism was the right approach towards combating that crime. In respect of paragraph 15, his delegation wished to reiterate its position according to which it condemned as criminal and unjustifiable all acts, methods and practices of terrorism, wherever and by whomever committed without any exception whatsoever, irrespective of the motives and purposes for which such acts might purport to be committed.

47. The CHAIRMAN said that, if he heard no objection, he would take it that the Committee wished to adopt draft resolution A/C.6/46/L.4 without a vote.

48. It was so decided.