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SUMMARY RECORD OF THE 28th MEETING

Chairman:	Mr. AFONSO	(Mozambique)
later:	Mr. SANDOVAL (Vice-Chairman)	(Ecuador)
later:	Mr. NEDELCHEV	(Bulgaria)

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The meeting was called to order at 10.05 a.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. CASTILLO (Venezuela), referring to the draft articles on the non-navigational uses of international watercourses, said his delegation found that article 2, on the use of terms, realistically reflected the hydrological situation, and welcomed the inclusion of groundwater in the definition of an international watercourse. However, the text would be yet clearer if the word "groundwater" were modified by the adjective "free".

2. In article 10, the principle that no use of an international watercourse enjoyed inherent priority over other uses was clearly established in paragraph 1, and the article was vital to the draft; however, it might be more appropriate to specify in paragraph 1 who would be the parties to any agreement to the contrary. His delegation considered that the term 'pacta', in the Spanish version of the article, should be broadly construed, or preferably, replaced by the word 'acuerdo', which was wider in scope.

3. It was essential for States to cooperate in the management of watercourses, as provided in articles 26 and 27. Consultations on cooperation could result from an initiative taken by only one of the watercourse States. Such initiatives had led to bilateral consultations, resulting in the creation of joint commissions by Venezuela and neighbouring countries with which it shared watercourses and a concern for their use.

4. Inter-State cooperation on the regulation of the flow of the waters of an international watercourse was absolutely necessary. His delegation therefore fully subscribed to the principle set out in article 27, paragraph 2, namely that watercourse States should participate on an equitable basis in the construction and maintenance or defrayal of the costs of regulation works. The provision in article 28 to the effect that watercourse States should employ their best efforts to protect installations within their territories was also acceptable to his delegation; that obligation and the consultations mandated in paragraph 2 of the article were important in regulating international watercourses.

5. The draft articles should be adopted at a conference of plenipotentiaries, which should be preceded, if necessary, by the establishment of a working group.

6. Mr. PANDIT (Nepal) said his delegation considered that the concept of a "watercourse" did not necessarily apply to every single part of a watercourse. He shared the view of the Brazilian Government that the definition of an international watercourse in article 2 applied only in those situations where the use of a watercourse or of its water affected uses in other States. Nepal had a special interest in that matter, since several rivers which originated in the country went beyond its boundaries: Nepal being the upper riparian country, the use of watercourses for domestic purposes, such as irrigation and the generation of electricity, should not fall within the scope of the draft articles.

(Mr. Pandit, Nepal)

7. His delegation had some reservations on the rules laid down in articles 5 and 6. In the former, for example, the term "equitable and reasonable manner" needed to be defined clearly. Nepal's economy was heavily dependent on the use of watercourses for irrigation and the generation of electricity, and it therefore considered that article 5 should not oblige watercourse States to share the benefit they derived from the use of a watercourse. The article should be read in conjunction with article 7, which imposed an obligation on watercourse States to utilize an international watercourse in such a way as not to cause appreciable harm to other watercourse States.

8. The concept of "participation' in article 5, paragraph 2, likewise merited further discussion, and should perhaps be replaced by the term "cooperation", which implied mutual understanding between watercourse States in utilizing and managing the international watercourse.

9. The concept of "appreciable harm" used in the draft articles seemed to be vague and ambiguous, and should be replaced by "substantial harm", which would make it clear that insignificant harm was not covered by the draft articles, thus avoiding unnecessary misunderstandings between watercourse States.

10. The problem of pollution, dealt with in part III, was a complex one, resulting from the immense growth in industrialization, transportation and the use of highly toxic substances. The international community had expressed its great concern to ensure that waste disposal and other watercourse activities did not impair the quality of water. Accordingly, watercourse States must take the necessary steps to prevent pollution, and there must be a thoroughgoing discussion of article 21 before the obligation it imposed was brought into effect.

11. Mr. LIU Zhenmin (China) said it was very difficult to draft articles on the law of the non-navigational uses of international watercourses because such watercourses flowed through different States and accordingly constituted natural resources of the respective riparian States. The draft articles should therefore be so formulated as to ensure that international watercourses would be used by watercourse States in a fair and reasonable way without any encroachment on their sovereignty.

12. The draft articles emphasized the role played by watercourse States in concluding bilateral and multilateral agreements; that approach should do much to make the draft articles easily acceptable to all countries.

13. His delegation questioned whether the concept of an international watercourse system should be used in the draft articles. That concept had long been a controversial one in the International Law Commission and the Sixth Committee. In 1980 the Commission had adopted a working hypothesis stating that to the extent that parts of the waters in one State were not affected by or did not affect uses of waters in another State, they should not be treated as being included in the international watercourse system. That provisional working hypothesis, however, was an inviolable whole; the Commission's abrupt

(Mr. Liu Zhenmin (China)

decision at its forty-third session to incorporate the idea of "system" in the definition of watercourses had raised a fundamental question, and the Commission's inconsistent treatment of the working hypothesis deserved further consideration.

14. While using the terms "watercourse" and "international watercourse" and deleting the term "system" in square brackets, the Commission had none the less used the idea of a "system" in defining a "watercourse" in the draft articles. From a geographical point of view, the hydrographic components of a watercourse, including surface water and groundwater, did constitute a whole system, hence the Commission's decision. In addition, the phrase "flowing into a common terminus" misrepresented the scope of an international watercourse system, for the scope as thus defined could well extend to a large part of the territory of a State, which would then be unreasonably included in the scope of an international watercourse system and placed under joint international jurisdiction, with a consequent encroachment on the sovereignty of the State in question.

15. It was difficult to understand why the idea of the relative international character of watercourses had not been included in the draft articles; his delegation saw that idea as an integral part of the working hypothesis. Of course, a number of members of the Commission believed that the idea, once incorporated, might make the implementation of the draft articles more complicated. China needed to give further consideration to that question.

16. The non-navigational uses of international watercourses were important to national economies, people's livelihoods, and the protection of the environment. As the characteristics of international watercourses were very variable, watercourse States had different interests and were beset by many contradictions. It was therefore not easy to establish a set of legal norms that would be universally acceptable.

17. Mr. Sandoval (Ecuador), Vice-Chairman, took the Chair.

18. Mr. PETROV (Bulgaria) said his delegation would prefer a framework instrument providing States with guidelines for concluding agreements on the non-navigational uses of specific international watercourses. Unfortunately, that approach had not been followed consistently by the Special Rapporteur, particularly in articles 26, 27 and 28. His delegation held that such matters should be left entirely to the discretion of States, and that article 32 was unnecessary as the principle embodied therein had become a norm of general international law.

19. He shared the doubts expressed by some delegations as to the appropriateness of including groundwater, and especially confined groundwater, in the definition of an "international watercourse".

20. His delegation strongly favoured the proposal that in the term "appreciable harm" the word "appreciable" should be replaced by a less

(Mr. Petrov, Bulgaria)

ambiguous one such as "significant" or "substantial". Retention of the word "appreciable" would place an unjustifiably heavy burden on upstream States.

21. Lastly, Bulgaria regretted that the draft did not contain provisions for resolving eventual disputes over conflicting uses of an international watercourse. Mere reference to general international law would not suffice. Therefore, his delegation would welcome the drafting of new articles to address the matter.

22. Mr. VILLAGRAN KRAMER (Guatemala) said that the report of the International Law Commission lucidly described the scope of conventional law and practice regarding the non-navigational uses of international watercourses. As the Chairman of the Commission had observed, there had been a growing number of disputes over diversion of waters, flow reduction, pollution, salinization, sedimentation in tributaries and floods caused by erosion, because the situation had evolved substantially since similar questions had been studied in the 1930s by the Institute of International Law. The draft articles prepared by the Commission provided a useful way of approaching those and other problems relating to the use of international watercourses.

23. The Commission had rightly perceived that whole watercourse systems could not be subject to one agreement; different agreements needed to be reached for different situations, and not all the problems facing the countries involved need be solved at the outset. What the Commission had provided were guidelines for future agreements. Guatemala was very interested in the question, as it shared four rivers with neighbouring countries, two on the Pacific coast and two on the Caribbean coast.

24. Since each watercourse system was different from the others, the regime regulating one system could not necessarily be extended to other systems. The rules suggested by the Commission could be applied to one or more watercourse systems as States might see fit, and States must remain free to adapt their agreements to each situation.

25. His delegation found the Commission's treatment of the concept of a "system" appropriate; that concept made it possible to manage, administer and control common waters in such a way as to ensure their correct use and preserve them from harm. However, like some other delegations, Guatemala found the term "appreciable harm" less acceptable. Legal texts should use clearly defined legal concepts, and the concept of "appreciable harm" was very ambiguous. Guatemala respectfully urged the Commission to reconsider the term and to substitute a more appropriate one indicating that the harm was "substantial" or "considerable".

26. With respect to article 10, he felt that the term "custom" was inappropriate and should be replaced by "tradition" or "practice". His exact words were: "cuando no existe un pacto y si existe por el contrario 'la tradición o la práctica consagrada' la prelación de un uso particular es entonces aceptado"; he contrasted this with the ILC drafting.

(Mr. Villagran Kramer, Guatemala)

27. Articles 26 and 27 were a remarkable achievement on the part of the Commission, but more consideration should be given to the scope of articles 5 and 6, which were clearly logically linked to articles 26, 27, 28 and 29.

28. Mr. VERENIKIN (Union of Soviet Socialist Republics) said that, at its forty-third session, the Commission had discussed such important issues as the use of the terms "international watercourse" and the concept of a watercourse as a "system", the inclusion of groundwater within the concept of a watercourse system and the notion that a watercourse had a "relative international character". It was evident that solutions to those questions would determine the future definition and regulation of all the legal relations governing cooperation between States in the protection of water resources and the security of watercourse installations.

29. In view of the global and interdependent nature of ecological problems, his delegation considered that the preparation of a legal instrument on water utilization would be of benefit to environmental protection.

30. Article 2 of the draft was aimed at providing the broadest interpretation of the concept of a watercourse, including the whole system of interdependent hydrological components. His delegation recognized the need for an overall approach to an international watercourse as a system in constant motion, an approach which would take full account of the principle of equitable and reasonable utilization of the watercourse. At the same time, his delegation assumed that, at the current stage of scientific, technological and industrial development, an unduly broad approach might to some extent restrict the right of each country to utilize its own resources in accordance with national priorities and interests.

31. Like some previous speakers, he considered that it would not be appropriate to include groundwater in the scope of the draft articles without some qualification. Particular attention should be paid to resolving such problems as the demarcation between "free" and "confined" groundwater and the physical link between the latter and surface water. It should be noted that in preparing the draft articles less account had been taken of the specific features of groundwater, the conditions for its exploitation and its protection from pollution. The question of including groundwater within the sphere of application of the draft should be the subject of further consideration by legal and other specialists.

32. With regard to the relative international character of a watercourse, it would not be appropriate at the current stage entirely to overlook the working hypothesis that a watercourse was international only inasmuch as utilization of its water affected the water in another system.

33. His delegation supported the establishment of broad cooperation between States in order to protect water resources and to ensure the security of watercourse installations. It also stressed the need to take into account the common and individual interests of watercourse States. It supported the idea

(Mr. Verenikin, USSR)

of setting up joint commissions of riparian States in order to solve problems when they arose. It also wished to point out that the introduction of joint management of a watercourse, unlike agreement on the individual management by each State of its portion of the watercourse, would require in each instance the conclusion of a specific agreement.

34. Mr. MONTES DE OCA (Mexico) said that his country's interest in the topic under discussion stemmed from the fact that its territory was bounded on three sides by international watercourses. Part II of the draft articles adopted by the Commission, dealing with the principles which should govern the activities of States with regard to the non-navigational uses of international watercourses, was of great importance, since States must act within a clearly defined code of conduct based on justice and equity. For that reason, his delegation proposed that some principles which had been included in earlier versions of the draft, but deleted from the current one, should be reincorporated, namely, good faith and the prohibition of the abuse of rights. Indeed, articles 5 to 10 dealt with various obligations of States, all of which must be complied with in a spirit of good faith.

35. His delegation believed that the above-mentioned provisions should be strengthened; for example, in article 5, paragraph 1, the term "optimal utilization" should be changed to "optimally sustainable utilization".

36. With regard to the use of the term "appreciable harm" in articles 7, 12, 21, 22, 28 and 32, his delegation believed that the ambiguity of the word "appreciable" would make it difficult to determine whether harm had been caused. That was particularly true in the case of article 12 (Notification concerning planned measures with possible adverse effects). If the State which planned to implement the measures did not believe that they might have "an appreciable adverse effect' on another State, it would not provide notification and might in fact cause harm to that State.

37. It might be advisable to include in all the draft articles provisions similar to those in articles 4 and 18 which gave every watercourse State the right to participate in the negotiation of any agreement applying to the entire watercourse. Furthermore, the wording of article 9, concerning the regular exchange of data and information, and of articles 11 to 19, concerning notification, should be more forceful. In addition, the notification of planned measures should be accompanied by a statement of the impact of such measures on the environment.

38. Mr. ROSENSTOCK (United States of America) said that while his country, as both an upper and a lower riparian State, had largely solved most of its problems in connection with international watercourses with its two neighbours or had established mutually satisfactory procedures to that end, he believed that the draft articles responded to a global need. The decision to develop a framework agreement containing general, residual rules designed to be complemented by more specific agreements concluded by States sharing a

(Mr. Rosenstock, United States)

watercourse had been shown to be altogether appropriate. The fact that some principles contained in the draft articles did not apply only to rivers did not detract either from their validity or the usefulness of the exercise.

39. The scope of the draft was judicious, in that it constituted a coherent whole, but refrained from trying to deal with every potential issue. His delegation concurred with the decision to dispense with a detailed annex.

40. There was, however, need for detailed adjustments to the text; the system by which the draft articles underwent a first reading, followed by written comments from Governments and a subsequent second reading anticipated the likelihood of such a need. His Government would be making some concrete suggestions in its written comments, dealing in particular with the term "appreciable harm", which seemed to it too broad, and the need for consistent application throughout the draft of the fundamental rule of equitable and reasonable utilization. He noted that the statements made by the delegations of Germany and Colombia seemed to be in agreement on many of the issues on which his Government would be communicating in writing. He hoped that as many States as possible would take the opportunity to submit their comments, noting that in recent years the Commission had not always received as wide and candid a response as would be desirable. That shortcoming had contributed to some of the problems which had plagued the final or legislative phase of the codification effort. His delegation pledged itself to contribute to the process of "fine tuning" a text which was in general acceptable.

41. Mr. AL-BAHARNA (Bahrain) said his delegation welcomed the fact that the Commission had successfully concluded its first reading of the draft articles on the law of the non-navigational uses of international watercourses, focusing its attention principally on the definition of an international watercourse and, secondly, on the concept of a watercourse as a "system". In the latter context, the Special Rapporteur had examined the views of geographers, hydrologists and other exports and had stated that it was the view of such specialists that surface water and groundwater should not be treated separately for legal and planning purposes. The necessity of regulating the rights and obligations of international watercourse States became evident when it was realized that underground waters constituted approximately 97 per cent of the fresh water resources on Earth, excluding ice-caps and glaciers. His delegation was pleased to note from paragraph 55 of the Commission's report that the debate had indicated clearly that groundwater should be included in the scope of the articles, at least in so far as it was related to surface water. His delegation welcomed the fact that the definition of a watercourse as finally adopted on first reading included underground waters within its ambit.

42. The issue of using the "system" concept in the draft articles was one of the most difficult before the Commission. Although the geographical and legal implications of the "system" approach over the "territorial" approach were not yet fully clear, the former had been steadily gaining ground in doctrine and

(Mr. Al-Baharna, Bahrain)

State practice, as had become evident from the Helsinki Rules adopted by the International Law Association in 1966.

43. At its forty-third session, the Commission had also considered the question whether, for the purpose of the draft articles, a watercourse should be regarded as having a relative international character. As the Special Rapporteur had noted, the debate had indicated clearly that the notion of the relative international character of a watercourse should not be included in the definition in so far as the concept was thought to be no longer necessary. In his delegation's view, the Commission had given a persuasive reason why part of the so-called working hypothesis should be abandoned, and he would accordingly support the Commission's conclusion that the notion of relativity should be dropped.

44. In conclusion, he said that after carefully examining the draft articles, his delegation considered that the time had come for the transmission of the draft articles to Member States, and it would be glad to support a resolution to that effect. It also wished to reiterate its view that the objective of the draft articles was to produce a framework agreement on the topic. The articles adopted on first reading adequately served the purposes and requirements of such an agreement, and he hoped that they would not be subject to prolonged discussion or unduly altered on second reading.

45. Mrs. FLORES (Uruguay) said that the draft articles on the law of the non-navigational uses of international watercourses, were of special interest to her country, whose borders consisted largely of international watercourses and 75 per cent of whose territory was situated in a major South American river basin. The topic was also of concern to the international community as a whole since it was related to the use of fresh water, an area in which international law should be codified as soon as possible in order to regulate the equitable and reasonable utilization of that resource. It was now more urgent than ever to protect ecosystems and to establish appropriate guidelines for the protection and preservation of the environment. Consequently, the draft articles should be codified in the form of a convention and should not aim at the establishment of model rules or guidelines.

46. With respect to part I of the draft articles, her delegation believed that draft article 2 should also cover "confined" groundwater since the utilization of such water would have an impact on the system as a whole. Article 3, paragraph 3, should be amended in such a way as to place an obligation on States to negotiate in good faith. Article 4, paragraph 2, should confer on a watercourse State which considered that some of its current or proposed uses of an international watercourse might be affected to an appreciable extent by the implementation of a watercourse agreement that applied only to a part of the watercourse or to a particular project, programme or use the right to participate in consultations on, and in the negotiation of, such an agreement, and to become a party thereto. The draft article should also require a watercourse State that participated in consultations on, or in the negotiation or elaboration of, a watercourse agreement and which was aware of the possible

(Mrs. Flores, Uruguay)

appreciable effect of the use which another watercourse State made or planned to make of the watercourse, to inform such State of the possibility as early as possible.

47. With respect to part II of the draft articles, her delegation wished to suggest the inclusion in article 6, paragraph 1, of a subparagraph referring to a balance between the benefits and drawbacks which a new use or modification of an existing use could entail for watercourse States. Paragraph 2 of the same article should provide for an obligation to negotiate, having regard to the factors listed in paragraph 1, with a view to determining in the specific case what was equitable and reasonable. Article 7 should impose the obligation to adopt all necessary measures to prevent harm. Article 10, paragraph 2, could be complemented by provisions relating to the procedures necessary to achieve a concrete solution to a dispute, such as the obligation to negotiate or the establishment of a system for the peaceful settlement of disputes. Certain requirements for current and new uses of international watercourses should be standardized, as had been done in a number of conventions relating to specific activities concerning the sea.

48. Part III of the draft articles should provide for an obligation to undertake studies on the effect which planned measures could have on current or future uses of international watercourses and a duty to communicate the results to the other watercourse States. Article 12 should not place upon the State implementing the measures the sole responsibility for determining whether such measures could have an appreciable adverse effect on other watercourse States. Article 17, paragraph 3, could provide for the suspension of the implementation of the planned measures until agreement was reached, with a time-limit set for negotiations. Where no solution was reached, recourse would be had to other means of peaceful settlement, and to the courts in the final instance. The provisions of article 17 containing the amendments suggested above should also apply to article 18, paragraph 2. In article 18, paragraph 3, the provisions of article 17, paragraph 3, should apply. The formal declaration referred to in article 19, paragraph 2, should be communicated to all watercourse States to permit each of them to evaluate the extent to which it would be affected. Provision should be made that, after the urgent situation had passed, the State which had implemented the measures should negotiate with the other watercourse States a definitive solution to the problem. The State which had implemented the measures should also repair the damage which the measures caused to the other watercourse States. Any watercourse State, and particularly one that had been notified, should have the right to inspect the work being implemented in order to determine whether it corresponded to the project that had been proposed.

49. With respect to part IV of the draft articles, in article 20 and in article 21, paragraph 2, the word "and" should be substituted for the word "or", so that the protection would be both individual and joint. Provision should also be made for the establishment of environmental standards, and the draft articles should require States to undertake environmental impact

(Mrs. Flores, Uruguay)

assessments prior to the implementation of any measure and to communicate the results to the other watercourse States without delay. It would also be useful to include the principle of non-discrimination with respect to the environment. That meant that watercourse States should not make distinctions between their environment and the environment of other watercourse States in elaborating and implementing legislation on the prevention and abatement of pollution. The draft articles should also provide that a State which polluted an international watercourse should incur liability. Lastly, States should not be allowed to invoke immunity from jurisdiction in cases of harm caused by the use of an international watercourse and a procedure for the peaceful settlement of disputes should be established.

50. Mr. Nedelchev (Bulgaria) took the Chair.

51. Mr. VUKAS (Yugoslavia) said that the Commission's completion of three sets of draft articles was a major contribution to the ongoing process of codification and progressive development of international law. In the draft articles on the law of the non-navigational uses of international watercourses, the Commission had solved several problems relating to the definition of a "watercourse". Some of the difficulties concerning groundwater could be resolved by the conclusion of the envisaged watercourse agreements between watercourse States. However, the adopted formulation, which based the definition on the flowing of the whole system of waters into a common terminus, was vague since it was not clear whether the definition covered a system of waters composed, for example, of lakes, groundwater and even canals unrelated to any river and therefore not flowing anywhere. It might be more logical to define first the generic term "watercourse" and then the specific term "international watercourse".

52. With regard to article 10, on the relationship between uses of international watercourses, his delegation would like to see preference given to domestic and agricultural utilization of watercourses. The existing text of article 10 was still based on the principle that no use of an international watercourse enjoyed inherent priority over other uses and requirements of vital human needs were mentioned merely as the most important factor to be taken into account in the event of conflict between different uses of a watercourse. While the basic principle stated in that article was correctly deduced from State practice, in view of the scarcity of drinking water and the vital importance of water to agriculture, the draft should invite States to accept the principle that domestic and agricultural utilization should have priority. The development of international law in that area was indispensable in view of current population growth.

53. In respect of article 22, which enjoined watercourse States to take all measures necessary to prevent the introduction of species, alien or new, into an international watercourse, the text gave the impression that the introduction of such species was prohibited only if it caused harm to other watercourse States and not if it was detrimental to the ecosystem of the watercourse itself.

(Mr. Vukas, Yugoslavia)

54. The Commission's statement in paragraph (3) of its commentary to article 29 that "the present articles themselves remain in effect even in time of armed confict" was a far-reaching conclusion that was difficult to accept in respect of all the draft articles. Indeed, only the provisions concerning the protection and preservation of the ecosystems of international watercourses had some chances of remaining operative in time of war. All the provisions on inter-State cooperation between the belligerents would necessarily be considered as suspended.

55. Mr. PAL (India) said that Governments would undoubtedly take account of the Special Rapporteur's clear and precise seventh report in their consideration of the development of a universally acceptable regime of non-navigational uses of international watercourses. The report had shown a preference for the adoption of hydrological unity as the basis of a legal regime to govern water resources in general and international watercourses in particular. While his delegation agreed that geographical and hydrological factors deserved some attention, it doubted the relevance of those factors to the development of a regime on watercourses which crossed international boundaries, thereby bringing into play other equally relevant factors such as State sovereignty, mutual benefit and the primacy of the interest of the State over its natural resources. Such factors did not necessarily support the argument for an integrated treatment of the regime on watercourses. The protection, planning, and development of water resources should be based on the needs of the population of the territory through which the river first flowed, in accordance with the principles of optimal, reasonable and equitable distribution of water resources. While integrated basinwide and regional development, protection and planning were desirable, cooperation in those areas should be based on the common interests of States in the region and should not result from mandatory legal obligations developed without due regard for such common interests.

56. The principle of the sovereign equality of States required that, while they had the freedom to engage in any activity, States should refrain from injuring the interests of other States. Specific policies aimed at developing a regime of international watercourses should, however, promote the interests of all States and should not shift natural priorities or accord unacceptable rights of interference to one or more States in the sovereign domain of another State.

57. The Special Rapporteur's emphasis on the unity of the hydrological cycle required further study and the draft articles should continue to be based on the working hypothesis adopted by the Commission concerning the relative international character of watercourses. International watercourses could be treated as a system only in the limited sense that their use could cause substantial harm or injury to co-riparian States.

58. Lastly, his delegation believed that the regime on international watercourses should not deal with groundwater in general, since that required a separate and wholly different analysis.

59. Mr. KIRSCH (Canada) said that the law of the non-navigational uses of international watercourses was of considerable importance to his country. It was a major achievement for the Commission, after 20 years of work, to have completed the first reading of a proposed framework agreement on the question. At a time of rapidly increasing demands for fresh and pure water supplies, it was urgent for the international community to adapt appropriate measures to safeguard such supplies for future generations. His delegation agreed with the Special Rapporteur that the draft text should consist of a framework of residual rules and not merely a code of conduct. The complexity and the diversity of geographical, political, economic, environmental and legal issues relating to particular watercourse systems made it impossible to establish one set of binding legal obligations for all international watercourses. It must be clear at the outset that States had the right to opt into the framework agreement, partially or wholly, or to opt out of it when, for example, existing international treaties adequately covered a particular situation. Thus, his delegation was of the view that the Commission had taken the right approach.

60. Article 10 appeared to reflect the evolution which had taken place over the past century. Since watercourses were no longer used mainly for navigation, the Special Rapporteur had been justified in stating that no single use should have priority over others.

61. With regard to article 26, dealing with the joint management of international watercourses, he felt that the precedent established by the 1909 Treaty between Canada and the United States relating to boundary waters, which had led to the establishment of the International Joint Commission, was one which other States might well emulate. While political differences might make it impossible to establish joint management systems for all States interested in a particular international watercourse, such a system would seem to be appropriate for the efficient fulfilment of such obligations as those embodied in articles 6, 8, 9 and 10 and in part III. Indeed, it might be desirable to involve in joint management all States which had an interest in or which might be affected by the actions of watercourse States.

62. While article 27 addressed the concerns which his delegation had previously expressed as to the need for clarification of the term "regulation", paragraph 2 did not go far enough. The Commission should consider other means of giving effect to the obligation to cooperate, namely, through bilateral, regional or international organizations, thus providing for situations in which political realities did not allow for direct cooperation between States.

63. His delegation believed that article 28 should be further strengthened. As currently drafted, it merely called on States to enter into consultations with regard to the safe operation or maintenance and the protection of watercourse installations. In his view, the article should clearly establish the duty of watercourse States to use their best efforts to maintain and to protect such facilities from natural hazards or from wilful or negligent acts.

64. With regard to article 29, his delegation welcomed the inclusion of a reference to the rules of international law governing armed conflicts.

(Mr. Kirsch, Canada)

65. A number of other substantive issues required further consideration, such as the question raised by article 2 (b), namely, whether both surface and underground waters should be covered by the proposed framework agreement as "a unitary whole", and whether the basic criterion should be that the waters in question were "flowing into a common terminus". On principle, the proposal appeared to be sound, since self-contained underground reservoirs not physically connected with the watercourse system were excluded from the scope of the draft articles. However, the provision could create serious difficulties for certain States if their water resources were not already covered by specific agreements. Questions might arise, for example, as to the duty of States with underground reservoirs in respect of other States interested in the same international watercourse.

66. Some members of the Commission had suggested that "confined" groundwater could be the subject of a separate study with a view to the preparation of draft articles. Views differed as to whether canals should be included in the definition of a watercourse. Similarly, views differed with regard to the statement in paragraph (5) of the commentary to article 2 that the term "watercourse" encompassed not only rivers, lakes, reservoirs and canals but also glaciers. While the argument developed in the commentary was persuasive from the philosophical, environmental and legal points of view, the issue raised serious political problems for many States.

67. With regard to the use of the phrase "appreciable harm" in article 7, his delegation was of the view that it was appropriate. Eliminating the adjective could impose an intolerable burden on any State wishing to carry out any kind of activity which might have even a minor impact on an international watercourse; on the other hand, altering the text by including a phrase such as "major harm" could enable the upstream States to act as they wished without regard for the interests of downstream States unless "major harm" was likely to ensue.

68. Mr. GODET (Observer for Switzerland) said that having adopted, on first reading, the draft Code of crimes against the Peace and Security of Mankind, the International Law Commission would be able to give further consideration to the question of an international jurisdiction, including the possibility of establishing an international criminal court or other international criminal trial mechanism. The Code should aim at establishing a system of universal competence in accordance with the principle aut judicare aut dedere. It was, after all, primarily for States to prosecute crimes against the peace and security of mankind. The progress made within the international community in respect of reciprocal judicial assistance should make it easier for national courts to overcome the obstacles encountered in establishing facts and assembling evidence. His delegation did not object in principle to the establishment of an international court which would be competent to review decisions taken by national courts; that formula would have the advantage of preserving the sovereignty of States while ensuring the application of the Code since the international criminal court would be able to hear appeals from

(Mr. Godet, Observer, Switzerland)

convicted persons or from the victim State if it considered a penalty to be too lenient or if the national courts concerned had declared that they were not competent. Thus the international court would primarily serve the function of an appeal court. If required, the court could also settle disputes of competence between States.

69. Acceptance of the statute of an international criminal court should mean acceptance of its competence. The crimes envisaged in the Code were so serious that the competence of an international criminal court could not depend on the separate consent of the States parties.

70. On the question of applicable penalties, it was noteworthy that despite the variety of national legal systems, all of them made provision for deprivation of liberty. It was therefore indisputable that crimes against the peace and security of mankind should be punishable by long-term imprisonment, subject to commutation where there were extenuating circumstances. Respect for the rule nulla poena sine lege required that crimes envisaged by the Code should be subject to different penalties taking into account their degree of seriousness. While all the crimes included in the Code were extremely serious, some, such as genocide, were particularly objectionable to the human conscience.

71. With regard to the respective roles of an international criminal court and the Security Council in cases of crimes of aggression or threat of aggression, it would not be desirable to make the institution of criminal proceedings contingent on a prior determination by the Security Council of an act or threat of aggression. The court, a judicial body, and the Security Council, a political body, would not operate at the same level; moreover, in the past the Security Council had sometimes been paralysed by the exercise of the right of veto. It would be incompatible with a proper concept of criminal justice to make incrimination dependent on the decision or non-decision of a political body.

72. Turning to the draft articles, he noted that article 3, paragraph 1, rightly limited criminal responsibility for crimes against the peace and security of mankind to the individual. States could still be liable for reparations within the context of the international responsibility of States, as noted in article 5. With regard to article 4, his delegation believed that the motives that had inspired a person accused of a crime against the peace and security of mankind were not irrelevant and could be taken into account in determining the penalty. Article 14 should be made more precise and should include an exhaustive list of the defences and extenuating circumstances it referred to. The reference to general principles of law was not sufficiently clear. Moreover, defences were a question of responsibility, or of attributability, while extenuating circumstances came into play in determining the penalty once responsibility had been attributed. There should therefore be two separate articles, which would not necessarily be consecutive.

(Mr. Godet, Observer, Switzerland)

73. Article 22 referred to the use of unlawful weapons as an exceptionally serious war crime; while the 1868 St. Petersburg Declaration laid down the customary rule prohibiting weapons that would cause unnecessary suffering, if the prohibition or regulation of such methods or means of combat was to be effective it should be covered in a convention. A number of the conventions regulating the use of certain weapons had been ratified by only a limited number of States and the question then arose as to whether a weapon prohibited under treaty law was illegal for nationals of a State which was not party to the convention in question. Nevertheless, his delegation could accept the wording of article 22 which, as noted by the Commission, did not prejudge the question of punishment, under international law applicable to armed conflicts, of crimes not covered in the Code.

AGENDA ITEM 126: PROGRESSIVE DEVELOPMENT OF THE PRINCIPLES AND NORMS OF INTERNATIONAL LAW RELATING TO THE NEW INTERNATIONAL ECONOMIC ORDER (continued) (A/C.6/46/L.6)

74. The CHAIRMAN announced that China, Uganda and Yemen should be added to the list of sponsors of draft resolution A/C.6/46/L.6.

AGENDA ITEM 135: DEVELOPMENT AND STRENGTHENING OF GOOD-NEIGHBOURLINESS BETWEEN STATES (continued) (A/C.6/46/L.5; A/46/605-S/23176)

75. Mr. HAMAI (Algeria) said that the concept of good-neighbourliness between States was universally accepted in international relations. It was embodied in the Charter of the United Nations, the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations and the Manila Declaration on the Peaceful Settlement of International Disputes, while those texts mentioned were not specifically concerned with good-neighbourliness, that concept was one of their principal underlying themes and was essential to their implementation. Moreover, individual States had often reaffirmed their commitment to the principle of good-neighbourliness, which was one of the major components of Algeria's foreign policy in its efforts to promote the establishment and development of a peaceful and united Maghreb.

76. There had been a loss of interest in considering the topic of good-neighbourliness in the Committee on the ground that the concept was non-legal in nature. His delegation did not share the view that the concept was merely a type of attitude or moral behaviour but believed that it was a major political principle of international relations and that it had clear legal implications. The concept of good-neighbourliness involved the question of frontiers, which was clearly legal in nature, as evidenced by the theory of uti possidetis juri in Latin America and the principle of the inviolability of the frontiers in existence at the time of accession to independence upheld by the Organization of African Unity. The principle also had clear legal content when it was viewed in the light of respect for the general principles of international law, including sovereignty, the inviolability of frontiers,

(Mr. Hamai, Algeria)

non-use of force, the peaceful settlement of disputes and non-interference in the internal affairs of States, all of which were incontestably legal in nature, but also had an undeniable political basis. The report of the International Law Commission provided two significant examples of the legal content of the principle of good-neighbourliness: the draft articles on the law of the non-navigational uses of international watercourses, which were all based on the principle of good-neighbourliness, and the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law which would regulate the liability of States for acts causing transboundary damage to neighbouring States.

77. Although some aspects of the principle of good-neighbourliness were already regulated by existing international legal instruments, that had been true of other principles in respect of which the international community had been prepared to draw up international conventions bringing together scattered provisions, such as the draft articles on the status of the diplomatic courier and the diplomatic bag. There was therefore no justification for removing the question of good-neighbourliness from the Committee's agenda.

78. Since draft resolution A/C.6/46/L.5 left all possibilities open, including a reinclusion of the item in the General Assembly's agenda, his delegation would join the consensus if there was general agreement on that course. However, it would have preferred an automatic reinclusion of the item in the agenda of the forty-seventh or forty-eighth session of the General Assembly and a decision either to revive the Subcommittee on Good-Neighbourliness or to establish another appropriate body. The results already achieved by the Subcommittee on Good-Neighbourliness on a highly controversial topic could be a good basis for continued consideration of the question. The Committee would then be able to make a significant contribution to the United Nations Decade of International Law.

79. Mr. MBURI (United Republic of Tanzania) said that the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations laid down adequate principles for the conduct of good-neighbourly relations. General Assembly resolution 43/171 A and B referred to the unprecedented interdependence of nations as a result of major political, economic and social changes; since then the changes had been multifold and the need to reaffirm and strengthen good-neighbourliness in response to them had increased. The new international climate of cooperation and the role played by the United Nations in peacemaking and peace-keeping had enhanced further prospects for good-neighbourly relations between States. Isolated incidents of violations of that principle had been dealt with in their proper perspective.

80. His delegation had always had serious doubts about the usefulness of considering agenda item 135 because of the difficulty of identifying and clarifying the elements of good-neighbourliness, the impracticability of persuading States to follow a certain pattern of conduct in relations with

(Mr. Mburi, Tanzania)

their neighbours, geographical and historical diversity, and the existence of other instruments which were adequate for the purpose. His delegation therefore fully supported the draft resolution. Good-neighbourliness had always been one of his country's principal foreign policy objectives and it would continue to support all positive efforts intended to foster good-neighbourly relations between States in accordance with international law.

81. Mr. IBRAHIM AHMED (Yemen) said that within the context of the political, economic and social changes in the modern world and the efforts of peoples and States to establish a new international order in which relations were based on the rule of law and the respect for the national sovereignty of States regardless of their size or economic status, the application of the principles of good-neighbourliness as defined in the Charter and in the Declaration on Principles of International Law concerning Friendly Relations was vitally necessary in order to promote coexistence in a changed world in an atmosphere of security, stability and peace. The Republic of Yemen which had been established by a peaceful and democratic merger of its two parts in May 1990, had adopted a democratic approach based on pluralism and human rights. It was very well aware of the great importance of allowing countries and nations to choose their own political course and attached special importance to the principle of good-neighbourliness. Yemen intended to be a factor of stability in its own region.

82. It would be worth considering the possibility of reviving the activities of the Subcommittee on Good-Neighbourliness. His delegation welcomed draft resolution A/C.6/46/L.5, although it would have preferred to specify that the item should be taken up at the next session of the General Assembly.

83. 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.5 without a vote.

84. It was so decided.

85. Mr. VILLAGRAN KRAMER (Guatemala) expressed appreciation to the delegation of Romania for its efforts in sponsoring consideration of the question of the development and strengthening of good-neighbourliness between States. At one time a great wall had existed in Europe and it had not been possible to discuss such matters tranquilly, but lawyers had looked forward to the day when that wall would disappear and the United Nations would be able to take up the matter

The meeting rose at 12.35 p.m.