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SUMMARY RECORD OF THE 36th MEETING

Chairman: Mr. AZZAROUK (Libyan Arab Jamahiriya)

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The meeting was called to order at 10.15 a.m.

AGENDA ITEM 135: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS THIRTY-NINTH SESSION (continued) (A/42/10, 179, 429)

AGENDA ITEM 130: DRAFT CODE OF OFFENCES AGAINST THE PEACE AND SECURITY OF MANKIND: REPORT OF THE SECRETARY-GENERAL (continued) (A/42/484 and Add.1)

1. Mr. SZEKELY (Mexico) said that the Committee had before it seven draft articles, provisionally adopted by the International Law Commission, and six other articles submitted by the Special Rapporteur, on the law of the non-navigational uses of international watercourses.

2. Draft article 5 primarily established the right of a State to participate in and become a party to any agreement that applied to all or a part of a watercourse which affected its territory. The recognition of such a prerogative would be incomplete if the draft article did not include a provision establishing the obligation of other States to refrain from negotiating such agreements without the participation of a third State whose territory the watercourse in question also affected, especially if such an agreement might affect, even if minimally and not "to an appreciable extent", the interests and rights of that third State. Such an addition would be consistent with the prohibition contained in draft article 9.

3. Draft article 6 appeared to be the cornerstone of the draft articles, because it contained the general principles that should be respected by States in the non-navigational use and conservation of international watercourses. The provision, however, listed exiguous general principles in a very restricted way; they could actually be narrowed down to four, namely, the legal imperative of equitable and reasonable utilization; the duty to attain such utilization, which should not be merely "optimum" but also "sustained", which was surely what was meant by the use of the phrase "optimum ... benefits therefrom consistent with adequate protection of the international watercourse"; the right to participate in the use, development and protection of the watercourse; and the duty to co-operate in the said protection and development.

4. In the emerging international law of transboundary natural resources, other general principles could be identified that were applicable to international watercourses: juridico-ecological principles, such as that of optimum sustainable utilization, and other typical principles of general international law, such as those of good faith (to which only draft article 10 referred), good-neighbourliness, abuse of right and liability for damage. The absence of the first two was more surprising in that they had been eliminated from paragraph 2 of the previous draft article 8 (now article 7).

5. With regard to the abuse of right, use should be made of the progressive way in which that principle had been codified in article 300 of the 1982 United Nations Convention on the Law of the Sea, in conjunction with the concept of good faith. A similar exercise of incorporation into the draft articles should be attempted in

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relation to both draft article 6 and draft article 9 on the basis of article 304 of the Convention on the Law of the Sea, relating to liability for damage.

6. Draft article 7 regulated the essential general principle of article 6, concerning the equitable and reasonable utilization of the international watercourse. In the new draft article 7, the list of criteria and circumstances was much smaller than that of the previous draft. The draft article had been simplified to such an extent that the enormous step forward which had been taken with the previous version - in which the original list, contained in article IV of the 1966 Helsinki Rules, had been expanded - had been lost. What had been lost from that article, for example, were the criteria relating to the past utilization of the waters of the basin, including existing utilization, the population dependent on the waters of the basin in each State, etc. It was regrettable that a backward step had been taken in such an important matter, and his delegation urged the Commission to reconsider it. He expressed concern at the contrast with studies such as that carried out by the United Nations Development Programme's group of experts on the harmonious use of transboundary resources, or that conducted by the group of experts of the World Commission on Environment and Development, the latter of which had submitted an important report several days earlier to the General Assembly. Such efforts should be taken into account by the Commission, because it was alarming how differently they reflected the international practice of States.

7. The simplification was not consistent with the detailed way in which regulatory or secondary - although important - draft articles had been drafted, such as those proposed for articles 11 to 15, relating to the obligations of notification and consultation. The latter did not make much sense either unless the obligation proposed by his delegation for draft article 5 was incorporated, since such articles were merely corollaries of that obligation, which could be called abstention by exclusion.

8. Apart from the commentary with regard to the term "appreciable" in article 11, in the following article two variants had been proposed which gave the impression that the notifying State was imposing a kind of ultimatum of reply on the notified State. Article 12 could be strengthened by a more complete legal drafting of the general principles contained in part II of the draft articles. The same could be said of articles 14 and 15, which would also be enhanced by the incorporation of the obligation of abstention that had been proposed in respect of draft article 5.

9. His delegation had made suggestions which, by affecting not only the initial draft articles but also the whole series of articles, would establish the appropriate legal relationships among them all, using a global approach.

10. His delegation again stressed the urgent need and importance of the broadest possible dissemination of international law and reaffirmed its support, which it had expressed at the fortieth and forty-first sessions, for the adoption during the current session of concrete steps towards the publication of the judgements and advisory opinions of the International Court of Justice in the official languages of the United Nations other than English and French, pursuant to its rules. That proposal had already received considerable support from a large number of delegations in the Committee. It was puzzling that the international law which had been

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formulated under the auspices of the United Nations, especially through its highest judicial organ, was not readily available to all Members. That contradicted the role assigned by the Preamble of the Charter to international law for the maintenance of peace, and the General Assembly's responsibility for encouraging the progressive development of international law and its codification (Article 13 of the Charter). It was also inconsistent with the appeals made in all forums to members of the international community that they should appeal to the International Court of Justice to settle their disputes, when that meant, for most countries, participating in legal proceedings in languages other than their own, and in a forum whose judicial practice could not easily be learned, precisely because of the languages in which it was published.

11. The findings regarding cost-effectiveness arrived at by the Joint Inspection Unit, as set forth in its latest report (A/42/34), were encouraging since the report concluded that the Judgments and Advisory Opinions of the Court could be printed and distributed in the other official languages of the United Nations with substantial savings and without additional budgetary implications if the number of copies published in English and French was reduced, modern techniques were introduced for the production of publications in paperback editions and competitive bidding procedures concerning printing costs were followed. The Committee should adopt a favourable decision with regard to the report of the Joint Inspection Unit.

12. Mr. CALERO RODRIGUES (Brazil), referring first to the topic of relations between States and international organizations, said that, as stated in paragraphs 218 and 219 of its report (A/42/10), the Commission had "held an exchange of views on various aspects of the topic" and had requested the Special Rapporteur "to continue his study of the topic in accordance with the guidelines laid out in the schematic outline contained in his third report". The Special Rapporteur had rightly taken it for granted that the outline submitted by the previous Special Rapporteur was still valid (third report, A/CN.4/401, para. 27). Thus, the outline presented in 1987 was no different from the one suggested by the previous Special Rapporteur in his preliminary report in 1977. In practical terms, all that the Commission had done at its latest session had been to confirm a decision taken 10 years previously.

13. In the table annexed to the report, the Special Rapporteur indicated his intention to submit three reports with a view to allowing completion of the first reading of the articles on the topic by the end of the mandate of the current members of the Commission. Understandably, that goal was not mentioned in paragraph 232 of the Commission's report. Within the next four years, the Commission would endeavour to complete the second reading of the draft articles on jurisdictional immunities of States and their property, and of the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, as well as the first reading of the draft articles on the Code of Offences against the Peace and Security of Mankind and the draft articles on the law of the non-navigational uses of international watercourses. The Commission would also endeavour to make substantial progress on State responsibility, international liability for injurious consequences arising out of acts not prohibited by international law, and relations between States and international organizations.

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14. At the current stage in the Commission's programme of work, the proposed articles on relations between States and international organizations did not seem to merit very high priority, and his delegation even considered that, if the Commission found it difficult to follow the timetable set for other topics, it should take a decision to defer consideration of that topic.

15. His delegation welcomed the first six articles on the law of the non-navigational uses of international watercourses, submitted by the Commission. By resolution 41/81, the General Assembly had requested the Commission to indicate the subjects and issues on which views expressed by Governments would be of particular interest for the continuation of the Commission's work. In paragraph 118 of its report, the Commission indicated its interest in receiving comments on the draft articles provisionally adopted on the uses of international watercourses.

16. The draft articles, which were generally acceptable, represented a genuine effort at compromise between differing views. Articles 2 to 5 were an introduction to the draft, to be completed with article 1, which would be devoted to "use of terms". His delegation could accept the postponement of a decision on that article, which involved a choice between the expressions "watercourse" and "watercourse system".

17. Article 2 defined the scope of the articles: accordingly, they would apply to all non-navigational uses of international watercourses (or watercourse systems) and to measures of conservation related to such uses. "Measures of conservation", as explained in the commentary, had a dynamic meaning and covered not only measures of conservation in the strict sense, but also measures designed to facilitate the utilization and development of watercourses. Article 3, which defined "watercourse States", was a simple, descriptive article.

18. Articles 4 and 5 dealt with watercourse agreements, and recognized that the diversity of watercourses and of uses made it impossible for a single international instrument to solve all the problems that might arise. The solution of the problems specific to any watercourse could only be sought through agreements concluded between the riparian States concerned.

19. Under the terms of article 4, agreements could apply to an entire watercourse, and to all uses, or to only a part of a watercourse or to particular projects, programmes or uses. Article 5 also provided for flexibility with regard to participation in the agreements. If an agreement was to be applied to the entire watercourse, all watercourse States were entitled to participate in its negotiation; otherwise, only those international watercourse States which might be affected to an appreciable extent by the agreement were entitled to such participation.

20. Paragraph 3 of article 4 dealt with the situation in which one watercourse State considered that a watercourse agreement was required because of the characteristics and uses of a particular watercourse. The other States concerned were then under an obligation to enter into consultations with it. That was a satisfactory solution. There was no obligation to conclude an agreement. There could be no guarantee that the negotiation would necessarily lead to an agreement. On the other hand,

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consultations, which would offer an opportunity for an exchange of views, would necessarily take place. If conducted in good faith, and in a spirit of co-operation and good-neighbourliness, consultations would produce a preliminary agreement on whether or not a watercourse agreement was needed. Such preliminary agreement was a prerequisite for the successful conduct of any negotiations and for the conclusion of a watercourse agreement. In the absence of preliminary agreement, the States concerned would have to try to solve the problems on the basis of the convention that would embody the articles being prepared.

21. Articles 6 and 7 concerned general principles, but actually dealt with two principles, both of which were stated in article 6, namely, the principle of "equitable utilization" and that of "equitable participation". Article 7 was merely a complement to paragraph 1 of article 6, since it indicated factors and circumstances to be taken into account in ascertaining whether a watercourse was being used in an equitable and reasonable manner. There was no attempt to define what an "equitable and reasonable manner" was, since such a definition would in any event be impossible. The list set forth in article 7 was not exhaustive, since "all" relevant factors and circumstances had to be taken into account.

22. His delegation reiterated the view that a basic limitation on the right of a State to use an international watercourse should be accepted. That limitation was the obligation not to cause harm to other States. Brazil had said earlier that the whole law of international watercourses could be developed on the basis of the principle of not causing harm, which should be the essence of the relationship between States having parts of an international watercourse in their territories. Further elements could, of course, be added to that obligation, through various forms of co-operation, but in principle the State could, in its territory, utilize the international watercourse as it wished, provided that it caused no harm to other States. The articles proposed by the Commission, however, took a different approach, and provided that States should use the watercourse in an equitable and reasonable manner although it was impossible to define what was reasonable and equitable.

23. The reference to an "equitable share, or portion, of the uses" in paragraph (2) of the commentary to article 6 was not a very felicitous one, but it could be accepted if it was just a way of saying that in an international watercourse, taken as a whole, there was an aggregate of uses by different States and the use by each State in its own territory was considered to be a "share" or "portion" of that aggregate of uses. However, the main point made in the commentary seemed to be that a use which deprived other States of their right to equitable utilization was not an "equitable and reasonable use". He wondered if that could not be considered an affirmation, in a different way, of the "no harm" principle. The commentary to article 6 went to considerable lengths to demonstrate that there was overwhelming support for the doctrine of equitable utilization as a general rule of law for the determination of the rights and obligations of States in that field. However, the examples used to justify the principle of equitable utilization could also be used in favour of the "no harm" principle; indeed, some of them, such as the Declaration of Asunción and principle 21 of the Stockholm Declaration on the Human Environment (paras. (16) and (17) of the commentary) were more suited to be a justification for

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the latter principle. To find specific support for the concept of reasonable and equitable utilization, it was necessary to turn to article IV of the Helsinki Rules (1966), which had nothing to do with the practice of States, being simply the work of an association of jurists.

24. Despite what he had said, his delegation was prepared to accept the principle of equitable utilization, provided that the remaining articles to be submitted by the Commission were also reasonable and equitable. However, it believed that the results being sought could be better achieved through acceptance of the "no harm" principle, which was far simpler and clearer and easier to apply.

25. On a different subject, his delegation supported what the representative of Mexico had said concerning the publication of the decisions of the International Court of Justice in all official languages, in view of the fact that additional budgetary resources would not be required.

26. Mr. HANAFI (Egypt) praised the fifth report of the Special Rapporteur (A/CN.4/404 and Corr.1 and 2) which had enabled the International Law Commission to discuss in detail some aspects of the draft Code of crimes against the peace and security of mankind and provisionally adopt articles 1 (Definition), 2 (Characterization), 3 (Responsibility and punishment), 5 (Non-applicability of statutory limitations) and 6 (Judicial guarantees). In addition, the Commission had referred draft articles 4 and 7 to 11 to the Drafting Committee. All of those draft articles represented a great achievement by the Commission in its work of codification.

27. He then indicated some of the basic premises of his country's attitude towards the formulation of the draft articles. In the first place, the draft Code was an international convention which, through the accession of States, would become an integral part of their respective national legislations. There was no need therefore to burden the text by repeating legal terms and principles that already existed in national law. Secondly, one of the basic principles of criminal law was the need to characterize offences and their constituent elements clearly. Thirdly, the crimes to which the draft Code referred were of a special nature which must be clear from the formulation of its provisions and from the elements constituting the commission of those crimes. Fourthly, with regard to the competent jurisdiction, his delegation believed it most appropriate, at least at the current stage, to rely on the original competence of national courts, because the idea of establishing an international criminal court had given rise to a prolonged discussion which could delay progress towards finalizing the draft Code. His delegation therefore recommended the Commission to be in no hurry to adopt a definitive decision on the establishment of an international criminal court, so as not to impede the work of drafting the Code.

28. With regard to the articles provisionally adopted by the Commission listed in chapter II of the report (A/42/10), his delegation agreed with the criterion adopted by the Commission in formulating the definition in article 1, namely, that of referring to a list of crimes individually defined in the draft Code. That criterion accorded with a fundamental principle of criminal law, which was the clear, precise

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and specific characterization of the offence and its constituent elements. Some members of the Commission had expressed the opinion that the element of "intent" should be included in the definition of a crime. For others, criminal intent was presumed on the basis of the acts themselves. In his delegation's view, intent was a fundamental element among the various aspects of an offence and should not therefore be presumed but established. Moreover, the participating judge would have his own opinion and discretion. In that connection, it was worth recalling draft article 9, which had been referred to the Drafting Committee and which mentioned such exceptions to the principle of responsibility as cases of self-defence, coercion, error of law or of fact, and the order of a Government or of a superior, provided a moral choice was in fact not possible to the perpetrator.

29. In his delegation's opinion, the words "under international law" in square brackets in draft article 1 should not be retained. Although the draft Code accorded with the principles of international law, once it was accepted by a country and entered into force, would become an integral part of the national legal order and crimes punishable in accordance with the Code would therefore be added to the list of offences punishable in conformity with the norms of the national legislation.

30. For the same reasons, his delegation considered the provision in draft article 2 unjustified. Whatever legal order a country had, once the draft Code was accepted and entered into force it would become part of the legal order of that country.

31. In article 3, paragraph 1, reference was made to the responsibility of an individual for crimes committed irrespective of any motives invoked by the accused that were not covered by the definition of the offence. However, the definition in article 1 made no mention of any motive. In his delegation's opinion, no reference to motives should be made. The crime would have been committed in so far as its constituent elements and the intent to commit it were present. The motives were not a constituent element of the crime, although in some cases they could be pleaded before the court with a view to obtaining mitigation of the punishment.

32. As for article 3, paragraph 2, relating to the responsibility of a State for crimes committed by one of its nationals, which could give rise to compensation for injury and losses caused by such crimes, that was a norm which conformed with recognized legal principles.

33. His delegation accepted in principle the formulation of draft article 5, concerning the non-applicability of statutory limitations to crimes against the peace and security of mankind, although the possibility remained of reconsidering that provision in the light of the list of crimes designated in the draft Code, since the question should not be tackled in general terms.

34. Draft article 6, dealing with the judicial guarantees to which any individual charged with a crime against the peace and security of mankind would be entitled, was uncontroversial so far as the guarantees themselves were concerned. However, two of them, namely the provision that the accused should have the right to be presumed innocent until proved guilty and that he should not be compelled to testify against

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himself or to confess guilt, were principles already enshrined in all national criminal legislations and there was, therefore, no need to repeat them in the draft Code.

35. He then turned to draft articles 4 and 7 to 11, which had been referred to the Drafting Committee. With regard to article 4, paragraph 1, his delegation felt that it was necessary to provide for a system of priorities which accorded priority first to the State where the crime had been committed, then to the country which had suffered its consequences and, lastly, to the State of which the perpetrator was a national. With regard to article 4, paragraph 2, he felt it was appropriate to establish an international criminal juridiction provided that recourse to it was optional and that it did not take precedence over national jurisdiction. That approach might be useful in order to overcome obstacles, since the precedents showed that the original competence of national courts was an essential principle.

36. Article 7 (non bis in idem) was satisfactory and in keeping with the general principles of criminal law. That was also true of article 8, paragraph 1, which excluded retroactive punishment for crimes. Paragraph 2 of that article, however, contradicted the basic norm of criminal law no ha poena sine lege, and for that reason his delegation thought that it should be deleted.

37. With regard to article 9, on exceptions to the principle of responsibility, it was first necessary to define the criteria which determined cases of self-defence. Second, there was no clear distinction between the concepts of coercion, state of necessity and force majeure. With respect to error of law or of fact, it should be determined whether there had been good faith and it would be for the perpetrator to demonstrate that, before committing the act, he had carried out all the appropriate inquiries in order to reach a reasonable conviction.

38. Referring to article 10, on responsibility of the superior, and article 11, on the official position of the perpetrator, he said that although he considered logical the position that responsibility of the superior could be based on the theory of complicity, he was not opposed to the inclusion of a special provision on that question.

39. His delegation supported the request by Mexico that the documents of the International Court of Justice should be translated into all the official languages, since that would make it possible to derive maximum benefit from the decisions of that body. Lastly, in view of the importance of the questions dealt with in the Commission's report, his delegation reserved the right to refer to other topics at a later date.

40. Mr. OESTERHELT (Federal Republic of Germany) said that the success of the work of the International Law Commission, whose members were independent experts, was subject to the acceptance by the community of States of the rules which it proposed. Draft conventions drawn up by the Commission should be such that they met with the approval of the great majority of States. The Commission should not propose that certain rules should be accepted as reflecting existing international law before it

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determined scrupulously and without exception whether the vast majority of States actually applied and accepted such rules as legally binding. His Government appreciated the realistic practice of not holding a substantive debate on draft articles adopted in first reading until the comments and observations made on them by Governments were available. It attached considerable importance to those comments, which the following year were to focus on jurisdictional immunities of States and their property and the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.

41. One of the most important topics considered by the Commission was State responsibility. That was because international law must be particularly clear with regard to questions which arose when its basic rules were violated. Only then could it represent a body of rules by which States could peacefully reconcile their divergent interests. Nevertheless, before his delegation commented on that question, he felt that the new Special Rapporteur should be given an opportunity to make his views known.

42. His country, which shared four major watercourses, was particularly interested in the law of non-navigational uses of international watercourses and the Commission's work on that topic. Although work remained to be done, the Commission's deliberations had, to a large extent, helped to clarify existing principles of international law. In that regard, account should be taken not only of existing practice but also of the principles governing related areas and new rules which were being developed in response to the need for better international protection of the environment.

43. The Commission's work was therefore of an exploratory nature, responding to growing needs, rapid developments and changing views. Its aim was to establish a legal framework, encourage the conclusion of specific agreements among the States concerned, clarify and reaffirm existing customary rules and principles and define their content, thus setting general standards for co-operation in an area in which disputes between neighbouring States had not been uncommon.

44. His delegation in general supported draft articles 2 to 7. However, it preferred the expression "international watercourse" to the expression "international watercourse system" because the latter was perhaps too broad. The Commission had taken a realistic approach to draft articles 6 and 7. Although he recognized that the general rule in draft article 6 was to be specified in draft article 7, he felt that the possibilities offered by draft article 7, paragraph 1, of referring to special circumstances influencing the evaluation of what was to be considered equitable and reasonable offered ample room for diminishing the effect of the general rule. The expression "affect[ed] to an appreciable extent", which appeared in draft articles 4 and 5, was of a rather general nature, and the future would show whether it was applicable. The extent to which a State might be affected must be established in relation to the principle of equitable and reasonable utilization as reaffirmed and, to some extent, spelled out in draft articles 6 and 7. The same could be said with respect to the term "appreciable harm" as used in draft articles 11, 13, 14, and 15. The expression "seriously affect" would be more neutral and practical.

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45. His delegation supported the general obligation to co-operate provided for in draft article 10. Nevertheless, it would be useful not only to include "new uses" in the procedures of co-operation outlined in draft articles 11 to 15, but also, for example, the intensification or cumulation of existing uses seriously affecting a neighbouring State.

46. Further consideration of the "procedural" articles 11 to 15 would have to take into account the current, more general debate in the field of transboundary environmental protection, since many of the legal provisions discussed there were closely related to matters under consideration in the Sixth Committee. The development of the law of non-navigational uses of international watercourses could, in many respects, indicate the way to be followed, since countries linked by a common international watercourse were already interrelated in a particular way.

The meeting rose at 11.45 a.m.