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SUMMARY RECORD OF THE 30th **MEETING**

Chairman: Mr, **DENG** (Sudan)

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

AGENDA ITEM 1341 REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTIETH SESSION (continued) (A/43/10, A/43/539)

AGENDA ITEM 130: DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND (continued) (*A/43/525 and* Add.1, A/43/621-8/20195, b/43/666-6/20211, A/43/709, A/43/716-S/20231, *A/43/744-8/20230*)

1. Mr, (Qatar), referring to agenda item 134 and, in particular, to the topic of international liability for injurious consequences arising out of acts not prohibited by international law, raid that his delegation would like to give its views on the concepts of "risk" and "harm", as requested in paragraph 102 of the report of the International Law Commission. Since the topic dealt with acts not prohibited by law, wrongfulness was not a factor in the type of liability under consideration. It was the ● lomont of risk that justified holding the party benefiting from the activity liable for its injurious consequences. It followed that the concept of rink could not be disregarded in order *to* focus attention on the concept of harm alone. The concerns ● xprerrad by those who favoured the latter approach could be accommodated by combining the concept of special care with that of risk. Such a course of action found rupport in many domestic legal systems. That approach would require adding in draft article 1 between the worde "when such activities" and "create *an* appreciable risk", the following words: "call for special care or". A similar *amendment* would be made in draft articles 6 and 9. Thur, when a certain activity called for special care or involved appreciable risk, tho occurrence of traneboundary harm would constitute an irrefragable presumption of the liability of the State of origin.

2. *On* the question of the law of the non-navigational uses of international watercourses, and in particular the question of pollution and environmental protection, the Commission had requested the views of Government6 as to the degree of elaboration with which the question rhould be dealt. His delegation was of the opinion that in a framework instrument, there was room only for setting forth the principle and broad outlines of the parties' obligations with regard to the protection of the environment and the prevention and control of pollution. The details with regard to each watercourse, au well as the individual and collective régimes for achieving the objectives of environmental protection, were to be adopted by watercourse States in each case. In general, draft articles 16 and 17 covered the question rather adequately.

3. The *Commission* had alro rsqueeted the views of Governments on the concept of "appreciable harm". His delegation did not favour the substitution of the word "substantial" *for* the word "appreciable". It considered that the adoption of the stricter criterion *of* substantiality would permit conridsrably more pollution, as some members *of* the Commission had pointed out (pare. 154).

4. With regard to the draft Code of Crimes against the Peace and Security of Mankind, his delegation would prefer the retention Of the words "under international law", which *now* appeared between square brackets in draft article 1.

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(Mr. Badr, Qatar)

With respect to draft article 7, it believed that thr non bis in idem rule was a fundamental norm of criminal justice. It therefore hrd difficulty with the proposed paragraph8 2, 3 and 4 of that article, which provided for a possible second trial in certain circumr' ices. The provision in paragraph 5 did not ease those misgivings. It should be remembered that protection of the rights of the accused against whom popular sentiment ran high war just a8 important a8 protection of the right8 of the accused whose alleged offence aroused no such reaction. If that war ignored, the line separating a second trial from mere arbitrariness would be difficult to discern.

5. His delegation favoured tha deletion of the word8 "in particular", now appearing between rquars bracket8 in draft article 12, paragraph 4, The basic principle nulla poena sine lege militated againrt a merely illustrative enumeration of the act8 characterised a8 criminal, and against the possibility of adding thereto by way of analogy. His delegation further suggested that paragraph 5, which was also between square brackets, should be retained,

6. For lack of time, the Commission had barn unable to consider, at it8 fortieth session, the topic of jurisdictional immunities of State8 and their property. His Government had submitted its comments on the draft articles provisionally adopted by the Commission, and the Special Rapportrut had taken note of those comment8 in hi8 report (A/CN.4/415). In introducing hi8 report at thr fortieth session of the Commission, the Special Rapportrut had made a number of interesting suggestions; Qatar had noted, in particular, hi8 new formulation of article 3, paragraph 2, with regard to the inclusion of the purpose of the act or contract in the determination of its public or private nature (para. 510). The new formulation brought an element of greater certainty to International legal operations, since it narrowed the scope of the intrusion of the purpose of the act or contract, and made no reference to the practice of the defendant State as the key criterion for determining the public or private nature of the act or contract.

I. As to other aspects of the work of the Commission, hi8 delegation noted with approval that priority in the next three years would be given to State immunity and the status of the diplomatic courier, for they were among the most advanced topics on the Commission's agenda. It was to be hoped that work on them could be concluded within the time-frame established.

8. Mr. CRAWFORD (Australia) said that the question of the non-navigational uses of international watercourse8 was of great significance, both intrinsically and because of the light that it shed on the principles of co-operation between neighbouring States and the equitable and appropriate use of water resources. Australia had a continent to itself and, accordingly, did not share such resources with any other State. Howevo r, it did have a major river system which was shared between the states of the Australian federation, and principle8 analogour to those of international law might have some room to he applied.

9. The basic principle outlined in article 6, "Equitable and reasonable utilisation and participation", was an important contribution to the development of international law in that field, The Commission's method of proceeding on a

(Mr. Crawford, Australia)

provisional definitional hypothesis was praiseworthy. The premature adoption of a rigid *and* narrow definition, *when a* range of problem8 had to be dealt with, could create problems.

10. One specific matter which might require further attention was the definition of the obligation not to cause apprrciabls harm, contained in article 8. *A8* ruggerted in the commentary to that *article,* a clear distinction should be drawn between the causing of appreciable harm to another State and the causing of appreciable harm to a rhared watercourse ryrtem. The principle that. a State should not, except *in* the context of *an* agreed régime for a watrrcourrr ryrtem, cause appreciable harm to the ryrtem a8 such was an important one. *On* the other *hsnd, in* the context of a resource which war inadequate to cope with the various demands on it, it could not be the case that a State was obliged not to make use of its own reasonable entitlement to the waters of the river, even if the effect of its doing 80 would be to cause harm to other States concerned, In that context, article 8 bad to be read in relation to the basic principle contained in article 6. Perhaps some clearer provision connecting the two articles would be desirable,

11, In paragraph 191 of it8 report, the Commission had asked Governments to *comment on* two issues: the degree of elaboration with which the draft articles should deal with problem8 of pollution and environmental protection, and the concept of "appreciable harm". With regard to the first question, his *delegation* conridered that the Commission ought to deal with those issues, although they also touched on other topics which the Commission was currently discussing. The case was a distinctive one, since it involved a single physical resource that was shared between neigbouring States, Moreover, equitable use and the duty of State8 to co-operate with each other were questions which could not be tackled without regard to their consequences in term8 of pollution. Conservation and the adoption of measures to avoid pollution were integral part8 of the use of a river, and that essential aspect of modern water law needed to be reflected in the draft articles.

12. With regard to the second question, the concept of "appreciable harm", it had already been observed that the term was somewhat vague. If appreciable harm was construed as simply equivalent to the exclusion of minimal harm, as the United Kingdom representative had asserted the day before, it would be difficult to accept. However, it should mean something more than that, It should mean that the harm was considerable or that its effects were not simply transitory or limited. In any event, the term "appreciable harm", which was somewhat imprecise, was preferable to the more specific term "substantial harm". It was impossible to avoid some level of flexibility in that area, provided that the overall régime made adequate provision for the prevention, notification and cure of harm,

13. Mr. VILLAGRAN KRAMER (Guatemala) said that the law of the non-navigational uses of international watercourses had undergone a radical transformation since 1911, the year in which the Institute of International Law had begun considering the topic, His delegation welcomed the progress made by the International Law Commission, which had been able to overcome the obstacles created by the rigid interpretation and application of the Concept Of sovereignty with regard to the use of non-navigable watercourse8 and had succeeded in drafting a tort which took

(Mr. Villagran Kramer, Guatemala)

account of many of the developing countries' concerns. Sovereignty could no longer serve as a pretext enabling States to cause harm to third parties or to prevent international watercourses from being developed for the benefit of the riparian States.

14, His delegation conridered that thr topic could be examined from three closely interrelated angler; (a) abuse of right; (b) pollution and (c) harm and injury. With regard to the first point, it was known that in all legal systems, and in both internal and international law, anyone who went too far in exercising a right and caused harm was hold responsible. It should therefore be made ac clear a8 possible in the draft that the abuse of a right entailed the corresponding responsibility, in addition to the obligation to make reparation. However, there were other situations where a State refraining from ● xorci8ing a right in order to oppose the ● xerci8e of that same right by other joint owners or by other riparian States which, to some extent, likewise involved the abuse of a right, His delegation considered thst in accordance with the current state of international law, the latter case did not give rise to international responsibility or to a duty to make rrparrtion by any harm that might have been caured.

15, Thr progress made in that connection thus indicated that at the current stage there was a very clear conception of aburo of right. The aim was to devise an instrument that would enable the riparian State8 of a non-navigable international watercourse system to promote, on the basis of the principle of international co-operation, the ● 8tablimhment of a régime for the development of the waters and of a meohanism that would to some extent compel all riparian States to take a decision on that matter. Guatemala conridered that the use of waters was of particular importance and that a distinction should be drawn in that connection between lawful and unlawful acts, It was general knowledge that if a State, in ● xorci8ing its right to use ths resources of a non-navigable watercourse, deliberately caused harm, it incurred responsibility and consequently had a duty to oure that harm. That point raised two question8 that could be examined1 the obligation to make reparation and the magnitudo of the harm, i.e. whether the harm was significant and hence produced effect8 that were prejudiced to or significantly affected other riparian States, The international treaties and decisions referred to by the Commission in its report indicated that the international community paid little attention to minor harm, which simply entailed inconvenience, but that on the other hand it attached importance to the consideration of substantial harm, i.e. harm of a certain magnitude,

16. With regard to pollution, hi8 delegation had followed with interest the methodology used by ths European countries with respect to some European rivers, for example the Rhine, and the serious way in which the Governments of Canada and the United State8 of America were dealing with the same problem, It had thus come to the conclusion that a distinction should be drawn between water pollution caured by direct acts, i.e. through the introduction of substances into watercourses, and pollution generated by industrial activity which affected water resource8 indirectly, i.e. gradual or continuous pollution.

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17, With regard to the third point, harm *and* injury (daños y perjuicios), Guatemala felt that it was necessary to proceed with caution in the use of the Spanish terminology. The violation of a rule, or an rat which caused harm and thus entailed responsibility, did in fact cause harm but also gave rise to an element which it would be better to call injury (perjuicio). Harm was the material 1088 suffered, and injury was deprivation of an ● aonomic benefit. Consequently, his delegation requested the Spanish-speaking members *of* the Commission to insist on retaining the precision of thr term daños y perjuicios and not to allow the word perjuicio to be used in an inappropriate context, which would make it. difficult for Spanish-speaking jurists to deal with it *r't a* latar stage.

18. In the light of tho foregoing, hi8 delegation drew the Committee's attention to the need to seek congruity in the law of international watercourses, a8 had been done with regard to ohaptrr II of the Commission's report, relating to acts not prohibited by international law. However, there wan one point on which it was ● aaontial to be inflexible: unlawful acts. Attention should be devoted to that problem in connection with the non-navigational uses of international watercourses, ● specially at a time when effort8 were being made to define pollution as a phenomenon detrimental to thr development of oountrirr, whiah might even give rise to penal ties , Reparation aould be one form of penalty,

19. Mr. VAN DE VELDE (Netherlands), referring to thr law of the non-navigational uses of international watercourses, observed that, given their importance, thr article8 proposed by the Special Rapporteur in his fourth report concerning environmental protection, pollution and related matterr, i.e. article ' 16, 17 and 18, had rightly been dealt with in a separate part (part V) of the draft articles. The definition of water pollution in article 16, paragraph 1, did not describe the manner in which the alteration in the aompoaition or quality of the water must have taken place. Thus, water pollution oould also result from human conduct other than the introduction of certain substances into the water, for example, by a mere alteration of the régime *of* the water in the form of a change in its volume, velocity or turbulence. Such changes in the régime of the water would more appropriately be governed by a rule concerning equitable use of an international watercourse than by a rule governing pollution of the waters.

20. His delegation favoured the rtraightforward approach takrn by the Special Rapporteur in paragraph 2 of article 16, where the use of the concept "appreciable harm" in the sense of harm that was significant - i.e., not trivial *or* inconsequential - but was less than "substantial" appeared to be adequate, Nevertheless, it might be wondered whether it was necessary to include in paragraph 2 the phrase "or to the ecology of the international watercourse [system]". The concept of causing appreciable harm to other watercourse States would seem to include not merely appreciable harm to the use of the watercourse but also appreciable harm to its ecology.

21. His delegation shared the view expressed by the Special Rapportour that the obligation contained in article 16 of paragraph 2 was an obligation of due diligence *and* was not in principle an obligation involving strict liability for States where the pollution had originated. The obligation to counteract

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(Mr. Van de Velde, Netherlands)

inadmissible trnnaboundary watrr pollution would be determined by the circumstances of the case and the nature of the pollutants involved. In thr case of toxic pollutants, the obligation of duo diligence would naturally call for greater precnutions and efforts.

22. In his report, the Special Rapporteur had raised thr important question of thr relationship between the principle of rquitablo utilisation of thr watrra of an international watercourse embodied in artialr 6, the "no ● pprooiablo harm" principle contained in articlr 8 (formerly ● ❒♦)♓♋●□ 9), and tho prohibition against causing appreciable harm to other watercourse States through tho pollution of the international watercourse, as laid dawn in articlr 16, paragraph 2. His delegation took tho viaw that, with regard to water uses not involving pollution, the "no appreciable harm" principle contained in article 8 rhould be subject to the principle of equitable utilisation contained in article 6. Like thr Special Napportrur, however, his delegation believed that there were good reasons for not treating pollution which eaurad appreciable ● xtratarritorial harm In the same way as water uses causing appreciable ha.m which did not involve pollution, State conduct and opinion concerning tranrboundary watrr pollution pointed in thr direction of the application of a "no appreciable harm" principle which wax not subject to thr principle of ● quitabla utilixation of the waters *of* an international watercourse. Thst somewhat stricter approach could be ● xplainod by the general recognition of the need to maintain the quality of the water for current and future use.

23, With regard to article 17 proposed by the Special Rapporteur, it was clear that the impairment of the ● nvironmant need not have barn occasioned by pollution of an international watercourse. To the ● xtant that that war so, it might be wondered whether such a provision rhould figure *in* a draft concorning non-navigational uses of international watercourses. Apart from that., it might also bo wondered what was the precise relationship between, on the onr hand, article 17, paragraph 1 and, on thr other, ● rticla 16 (which daalt with pollution) and articles 6 to 8 (which concerned ● quitablm utilixation of an international watercourse and the obligation *of* a watercourse State not ta cause appreciable harm to other watercourse States). A more detailed explanation of that relationship would be appreciated.

24. His delegation also wondered whether the obligations laid down in article 17, paragraphs 1 and 2, did not in fact constitute obligations ● we.- and differed in that respect from those cantainrd in articles 6 to El and 16. According to article 1'1, paragraphs 1 and 2, watercourse States murt take reasonable measures to prevent a serious danger of impairment of thr environment. He wondered whether, in the view *of* the Special Rapportour, thr careless creation *of* a serious *danger* of pollution which might cause appreciable harm was alro covered by the obligation laid down in article 16. His delegation whole-heartedly rupportrd article 17, paragraph 2, although it believed that ● rtuarino waters aould (at least to a certain axtrnt) be conoidored pert of the environment of an international watsrcouroo as reforred to in article 17, paragraph 1.

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25. With regard to article 18 proposed by the Special Rapporteur, his delegation wished to plead for the inclusion of a provision concerning the joint preparation and implementation of contingency plans to combat pollution, along the lines of article 199 of the United Nations Convention on the Law of the Sea, and of a provision requiring third States to take remedial action to minimixe the adverse consequences of pollution or an environmental emergency.

26. With regard to the provisions provisionally adopted by the International Law Commission on planned measures (arts. 11 to 21), his delegation welcomed the insertion of the new article 11. The broadly formulated obligation to exchange information had the considerable merit of avoiding problems inherent in unilateral assessments of the actual nature of the effects of planned measures. His delegation also generally approved of articles 12 to 19 which provided for special rules applicable when the planned measures had an "appreciable adverse effect" (rightly intended to involve a lower standard than that of "appreciable harm:' under article 8) upon other watercourse States. Those articles appeared to strike a reasonable balance between tha rights of States which planned to take certain measures and those of States which might be adversely affected thereby. However, the period of six months provided for in articles 13 and 15 might be too short in many cases.

27. Furthermore, the obligation of the notifying State provided for in article 14 appeared somewhat weak. In his delegatitn's view, a watercourse State which planned to undertake measures that might have an appreciable adverse effect on other watercourse States was obligated to obtain the necessary data, even when they were not readily available. That obligation might already be considered implicit in the obligation laid down in article 8. Moreover, in article 17, paragraphs 1 and 2, article 18, paragraph 2, and article 19, paragraph 3, it was stated that the State planning the measures and the State which might be adversely affected thereby should enter into consultations and negotiations and that each State must in good faith pay reasonable regard to the rights and legitimate interests of the other State. He wondered whether that did not merely imply the duty of States to comply with the obligations laid down in articles 6 and 8, and, if so, why explicit reference was not made to those articles as had been done, for example, in articles 15, 16 and 19. Finally, if a difference existed, what was it?

28. The draft articles on international liability for injurious consequences arising out of acts not prohibited by international law were both timely and relevant. The ever-increasing interdependence of States and the constant progress of science and technology meant that many national actions and decisions had transboundary consequences, a fact which had prompted the international community to give serious consideration to the phenomenon. An example was the resolution adopted by consensus in September 1988 by the General Conference of the International Atomic Energy Agency requesting the Board of Governors to convene an open-ended working group to study all aspects of liability for nuclear damage, and the application of article X of the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, of 1972, calling for the establishment of a régime of liability and compensation. Accordingly, at the eleventh consultative meeting in October 1988, a task group had been formed to take

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stock of existing domestic and international legislation applicable to civil liability for damage resulting from dumping at sea and existing public international law applicable to State responsibility or liability for such damage.

29. The importance of the draft articles derived from the generally felt need for international rules on liability and compensation. The ongoing discussion on the topic served as an incentive to States to conclude agreements establishing specific régimes to regulate activities in order to minimize potential damage. Further ideas and proposals by the International Law Commission would greatly contribute to the co-ordination of the discussions on the topic in the Sixth Committee and in other forums.

30. Mr. GORÖG (Hungary) said that since ILC had again been unable, for lack of time, to consider the item on jurisdictional immunities of States and their property, thereby reducing to four the number of substantive topics to be commented on, his delegation would at the current session refer briefly to chapters II, III and V jointly.

31. He noted with satisfaction the progress made by ILC concerning international liability for injurious consequences arising out of acts not prohibited by international law. The year before, his delegation had stated that it would be extremely difficult to draft a general régime of liability, or for that matter a general treaty, in the absence of a solid basis in general international law. As could be seen from the ILC report (A/43/10), its members still held entirely different opinions on fundamental questions, such as whether the concept of international liability for acts not prohibited by international law did or did not exist. The report itself had in a way circumvented the answer to that question, although it touched on it indirectly in paragraph 98. However, general acceptance of the draft depended on the answer given to that problem. During the debate held the year before in the Sixth Committee, several speakers had held the view that direct material liability - not to mention strict liability - of States could only be provided for by undertaking express treaty obligations to that effect. For that reason, it was necessary to elaborate general principles serving as guidelines for the conclusion of such treaties. His delegation wished only to point out the concerns raised by the present draft, the basis of which had not yet been sufficiently clarified. It was not in a position to take a final position on such a general and central question at the present early stage of work.

32. With respect to the general considerations contained in section 1 of chapter II, he supported the view of the Special Rapporteur reflected in paragraph 32 of the report that a list of dangerous activities should not be drawn up because it could never be exhaustive and would therefore be impractical in a document of a general nature. Instead, it would be preferable to provide criteria for identifying such activities.

33. Article 1 of chapter I of the draft was of utmost importance, since it created the framework upon which the topic should be based. His delegation believed that the replacement of the term "territory" by the new formula "jurisdiction" and "effective control" was quite correct. His delegation was prepared to accept it,

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provided that thm trrm "control" was defined more clearly, as suggested in paragraph 59 of the ILC rrport, Wit, respect to the term "appreciable risk", it agreed with the basic approach of th: report, and it too considered it a solid basis for the draft, However, it shared thr concerns of the members of ILC that activities of low risk - like building a *dam* - which had a great potential for danger, had been left out. There was therefore *a* need to introduce modifications in that respect in article 2, which aovrrrd such ● ctivitier, His delegation agreed with thr members of ILC who had urged the Special Rapportour to reinstate the word "situation" in the draft, possibly in article 1, Yor thr simple reason that not everything with potential transboundary harm could be correctly identified as an activity. The term "situation" combined with the term "activities" provided a broader approach and would therefore be more useful. The term "physical consequence" had boon relocated in subparagraph (a) of article 2, but should again be placed in article 1. Since it was undisputed that activities under the topic rhould be limited to those with physical consequences, it seemed evident that the term belonged to thr question of scope. The last quortion concerning article 1 referred to whether there war a need for the phrase "as vested in it by international law" after the word8 "jurisdiction of a State". His delegation was *firmly* convinced that that clause rhould be deleted, since all act8 performed by a State within it8 territory were carried out on the basis of it8 sovereignty and did not depend on any outside jurisdiction.

34, With respect to article 2, hi8 delegation, like others, preferred the word "harm" t o "injury". Thr former was more appropriate because it suggested that what had happened was not only wrong, but was against the law. The year before, hi8 delegation had declared that it was in agreement to those general principles upon which article 6 rhould be based. That article ● mbodiod one of the most ● minont principle8 of the draft, namely, the freedom of States to conduct activities within their territories or area8 under their jurisdiction. Even though it held that principle in high ● 8toom, it had, *and* in a..cordunce with its general approach to the principle of sovereignty, nothing against tho second sentence of the article, which stated that that freedom must be compatible with thr protection of right8 emanating from the sovereignty *of* other States. With regard to articles *7* and 8, it shared the opinion of *many* other delegations that participation was merely another form of co-operation, so that article 8 could conveniently be dropped without loos to the draft. Article 10 again raised the question ovoked *in* paragraph 98 *of* the ILC report whether strict liability a8 a general principle of international law did or did nat exist. Many delegations, including his own, had already expressed serious concern8 in that regard.

35. The law of the non-navigational uses of international watercourses was a topic on which considerable progress had been achieved. In response to the request made by ILC in paragraph 191 of its report, his delegation was in favour of dealing with the sub-topic of pollution and environmental protection in a separate part of the draft. Hungary, situated midway along the course of the Danube, one of the largest and moet yolluted international watercourses in Europe, had long recognised the utmost danger8 *of* the phenomenon and the extreme importance of the issue. It shared the view expressed in paragraph 135 of the ILC report that dealing with that question separately was justified because the pollution of international

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watercourses war likely to 90 beyond the area of national jurisdiction and could also affect other Stat.8 that were not necessarily part of the respective watercourse system. Despi to that, it should be borne in mind that, according to the prevailing general view, the draft being elaborated nhould be, *in form* and in substance, a framework agreement. His delegation agreed with the suggestion contained in paragraph 137 of the ILC report that the articles in the sub-topic should be kept to a minimum, reflecting widely accepted rules. That would enable States to adopt more specific and detailed rule8 in agreements concluded on a bilateral or regional level or between riparian States.

36. His delegation supported on a preliminary basis the use of thr concept "appreciable harm", which had already born widely used *in* State practice in the field of international watercourses and was therefore regarded a8 a reflection of contemporary international law, as was *rightly* observed in *paragraph* 153 of the ILC report. In its view, the underlying idea of the concept war that it did not prohibit any pollution a8 such, but only that causing appreciable harm, It agreed with the argument that the interdependence of States and good-neighbourliness made it necessary for a certain level of pollution to be tolerated, since it would hardly be realistic to require *a* totally pollution-free ● nvironmrnt. A review of practices in Europe, including that of Hungary, revealed that that principle *was* widely applied. Hi8 delegation did not believe that the word "substantial" would be any more precise and less subjective: on the contrary, its inclusion could permit even more pollution thrn was covered by the term "appreciable harm". In addition, the Committee should have some consistency in using terminology, not only in the article8 on th• topic *in* question, notably article 8, but also in the articles on other topic8 dealt with in the ILC report.

37, The concept of rtrict liability surfaced again in that chapter. Hi8 delegation agreed with the observation made by the Special Rapporteur in paragraph 162 of the Commission's *report* that there was little, *if* any, evidence of State practice which recognised strict liability a8 a general principle of international law, It seemed evident that paragraph 2 of article 16 referred to responsibility for wrongfulness, not to strict liebility a8 such. As to the obligation of "due diligence" as a standard of responsibility, him delegation agreed that some sort of standard must be worked out, Due diligence would essentially be an exculpating circumstance placing the burden of proof on the source State, However, his Government would advocate a very cautious approach to the problem, especially since it might be very difficult to apply such a concept *in* a framework agreement, not to mention the rightful concern8 of some ILC members reflected in paragraph 165.

38. With regard to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, all the delegations had had ample opportunity to voice their opinions on the draft already completed in first trading. Thr acceptance or refusal of articles 17, 18 and 28 would determine the future of the whole draft. If the Commission failed to agree to a widely acceptable set of rules in that respect, the current situation would be preferable, because it would make no sense to create a new, second courier system applied by a handful of countries.

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39. As to article 17, those delegations that wanted to have even the current level of protration decreased deemed that article unnecessary. Other delegations, including that of Hungary, advocated the strengthening of the concept of *inviolability of* the courier and the bag and felt that the text provided was an acceptable compromise solution. As paraqraph 3 of article 17 provided reasonable possibilities for protecting the interests of the receiving and the transit State, his delegation strongly supported the retention of that draft article.

40. The provisions concerning immunity from jurisdiction contained in article 18 were the very core of the whole draft, The Commission had committed itself to the principle of functional immunity, and in article 18 it had offered less protection to the courier than had already been provided in general practice bared on paragraph 5 of article 27 of the Vienna Convention on Diplomatic Relations. His delegation was *convinced* that the immunity of the courier should not be restricted to the acts performed in the exercise of hi8 funationr and that thr functional approaah should therefore be abandoned. The same functional restriction appeared in article 16.

41, Regarding the protection of the diplomatic bag as provided for in article 28 of the draft, his delegation strongly supported Alternative A, which was the previous paragraph 1 of article 28 without the brackets, It shared the view reflected in paragraph 441 of the report that the other two alternatives would bring down the régime of the diplomatic bag to that of the consular bag, a8 well as paragraph 445 of the report not permitting the scanning by electronic or any other devices. His delegation supported the partly new, partly revised torts submitted by tho Special Rapportrur concerning articles 1, 3, 5, 6, 8, 9, 11, 19 and 26,

42. With regard to the technical or drafting aspect of the ILC report, the Commission was overestimating the capabilities of delegates, who had no more than two or three weeks to absorb the 280-page report. Some parts of the report were too long and disproportionate, and it had taken a great deal of time to understand the numbering and renumbering system applied in some chapters, most notably in chapter III, in which the Commission had provisionally adopted articles 2 to 21, but it was currently necessary to comment on articles 15 to 18, which had been renumbered and were again part of the original articles.

43. Mr. ROSENSTOCK (United States of America) said that him delegation preferred the system of making a distinction between those speakers who were referring to a particular topic and those who were referring to all the topics at the same time,

44. With regard to the law of the non-navigational uses of international watercourses, ILC had made considerable progress, and all members of the Commission who had addressed the issue had approved of the outline and schedule Submitted by the Special Rapporteur as the basis of future work, which should make it possible for the Commission to complete the first reading of the draft articles in 1991,

45. Part II was devoted to general principles. The interrelationship between the articles had become more apparent, ILC had adopted the approach that watercourse Stater would be obliged to consult and negotiate on matters *covered* by the articles

(Mr. Rosenstock, United States)

in that pert, rather than have a more limited obligation of consulting with a view to negotiating, That war a round position, ● 8pacially when dealing with States in geographic proximity that had continuing material interests in the matter.

46. A fundamental issue in part II was the relationship between article 8, which contained en obligation not to cause appreciable harm, and article 6, which dealt with equitable and reasonable utilisation. As most water-law expert8 considered that the principle of equitable utilisation was the cardinal rule, the duty not to cause harm (article 8) should be subordinated to equitable utilisation (article 6). Although the Special Rapporteur had advocated subordinating article 8 to article 6, neither article referred to the other, The commentary to article 8 raid that the use of an intmrnetional watercourse that caused appreciable harm to other watercourse States was prima facie inequitable, If that was 80, article 6 was, in effect, subordinated to article 8. Under the structure of part II, once a State claimed that it was being harmed by another State's use of a watercourse, the two States would be required to enter into discussions to reach a 8olution that might well constitute an equitable allocation of the watercourse. However, that was not the only possible result. It Seemed curious that the Commission should have decided to give priority to ertiole 8 when the result might not lead to equitable use in all cases. That was a matter to which IDC should give additional consideration when it took up the article8 on second reading.

47. Pert III dealt with planned measures snd consisted of articles of a procedural character governing provision of information, notification concerning planned measure8 with possible adverse effects, the period for reply to notification, obligations of the notifying State during the period for reply, reply to notification and the absence of reply to notification. Other articles referred to further procedural aspects of the exchange of information.

48. Although the articles in part III did not as a whole constitute customary international law, some had a basis in State practice, striking a fair balance between the interests of States planning the measures and States likely to be affected by such measures.

49. In paragraph 191 of the report, the Commission stated that it would welcome the views of Governments on the degree of elaboration with which the draft articles should deal with problems of pollution and environmental protection, His delegation had reviewed the problems discussed in paragraphs 134 to 137, 169 to 170 and 175 to 176 of the report end the proposed articles on environmental protection, pollution and related matter8 contained in addendum 2 to the Special Rapporteur's fourth report (A/CN.4/412/Add.2). The draft articles proposed for pert V represented a compact treatment of the sub-topic, an effort to concentrate on those areas that were most firmly supported by State practice, Given that that was a framework agreement, the sub-topic should be limited to the most essential general ruler, leaving to the States concerned to adopt, in special agreements, more specific and detailed measures with respect to protection of the environment end control of pollution of particular international watercourses.

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(Mr. Rosenstock, United States)

50. The Commission had alro asked Governments for their views on the concept of "appreciable harm" under paragraph 2 of draft article 16. The concept of "appreciable harm" was used in other draft articles besides article 16. Article 8 included the obligation not to cause appreciable harm, Article 12 dealt with the concept of planned mrasurea which might have adverse effects. The United States favourrd the term "appreciable harm" in the draft articles as an appropriate criterion for determining the threshold of unacceptable pollution of an international watercourse. The explanation *given* in paragraph 138 of the report war sufficiently clear.

51. Some members of the Commission had expressed their preference for *an* adjective other than "appreciable". A comparison of the shades of meaning of A number of synonyms made it apparent that the adjective "appreciable" was more apt. The term "substantial" would increase the threshold beyond thr level which had been widely established by State practice. The possibility of not qualifying the term "harm" had also been suggested. In drafting the convention on the rrgulation of mineral resource activities in Antarctica, an international conference had recently found it necessary to modify the term "harm" in a similar way to the one proposed by the Special Rapporteur in draft article 8 and in paragraph 2 of draft article 16. His dolegation therefore believed that the concept of "appreciable harm" should be maintained.

52. The Commiesion had also asked Governments for their views on the way to reconcile the concept of appreciable harm under paragraph 2 with detrimental effects under paragraph 1 of draft article 16. After considering the summary of the discussion contained in paragrapha 157 to 159 *of* the Commission's report, his initial reaction was that the matter should be clarified, His delegation intended to review that question before the forty-first session of the Commission, taking into account the views expressed in the debate,

53, Mr. ORDZHONIKIDZE (Union of Soviet Socialist Republics) said that considerable progress had been achieved in the work of the International LAW Commission on the law of the non-navigational uses of international watercourses at its fortieth session. A few articles on co-operation and the exchange of information concerning planned measures had been adopted. At the current stage, the Commission was addressing problems posed by the ecology of watercourses and the responsibility of States for water pollution, both of which were questions of paramount importance for mankind as a whole.

54. His delegation believed that increased co-operation was needed in environmental protection, both bilaterally and within the framework of international organisations, and that environmental problems, because of their international scope, could only be resolved with the collaboration of all countries. The Soviet Union had suggested that an environmental council should be set up with a view to facilitating such collaboration,

55. His delegation did not object to addressing that complex question without reservations. However, bearing in mind that the drafting of the first universal instrument on that subject was involved, a more thorough review of the issue was

(Mr. Ordzhonikidze, USSR)

necessary in the light of existing regulations. An analysis of current practice showed that the agreements neither regulated pollution in general nor provided for its total prohibition, which in any case would be practically impossible. Everything seemed to indicate that the control of any watercourse had to be based on its particular characteristics, determined by mutuel agreement between the riparian States, It would be unrealistic for the Commission to endeavour to establish general criteria of international scope. Tho instrument formulated by it should consist of a number of recommendations or guideline6 which the State6 could use as models, as befitted the nature of a framework agreement. That agreement should also govern the liability of State8 for the pollution of watercourses.

56, The Special Rapporteur had suggested such terms as "appreciable harm" and "clue diligence", which were too subjective and unsuitable for a universal instrument. Moreover, the combination of the adjective "appreciable" with the adjective "significant" did not provide a sufficiently objective criterion, He drew attention to paragraph 168 of the Commission's report, which stated that the Special Rapporteur himself had indicated that many of the question6 raised in connection with responsibility for appreciable harm and due diligence had arisen from questions related to other topics,

57, As to the concept of strict liability, he emphasized that the Special Rapporteur had indicated that there was little, if any, evidence that States recognized such liability for water pollution damage which was non-accidental (para. 162 of the report), and believed that the introduction of such a vague concept into the draft would not facilitate the search for solution8 to regulate the liability of States for pollution, On the contrary, it would give rise to furthnr disagreements. Lastly, he emphazized that consideration of the item was still at the beginning of the drafting stage.

AGENDA ITEM 135: REPORT OF THE SPECIAL COMMITTEE ON THE CHARTER OF THE UNITED NATIONS AND ON THE STRENGTHENING OF THE ROLE OF THE ORGANIZATION (continued) (A/C.6/43/L.6)

58. Ms. HILL.0 (Finland) introduced draft resolution A/C. 6/43/L. 6, sponsored by Cyprus, Czechoslovakia, Finland, Ghana and Venezuela, and containing a declaration on the prevention and removal of disputes and situations which might threaten international Peace and security and on the role of the United Nations in that field.

59. Mr. ALZATE (Colombia) raid that his delegation wished to become a sponsor of the draft resolution.

60. Draft resolution A/C.6/43/L.6 was adopted without a vote.

61, Mr. FERJANI (Libyan Arab Jamahiriya), speaking in explanation of his delegation's position, indicated that Libya had accepted the draft resolution 60 as not to disrupt the unanimity within the Committee and to show its respect for the constructive spirit which characterised the report of the Specie1 Committee on the Charter. Ite acceptance did not mean that the text Appeared to be satisfactory to

(Mr. Ferjani, Libyan Arab Jamahiriya)

his delegation, because the mrchanirm of Security Council aonrultationr had oftrn boon urrd by the permanent members in violation of the principles of thr Charter, It had alro impeded the implrmrntation of a number of resolutions adoptrd by the Security Council and the General Assembly, had denied the right of self-determination to the peoples and had hindered the application of Chapter VII of the Charter, against the will of thr international community. The draft resolution rhould contain a provision clearly ● rtablirhinq that the rationalisation of United Nations procedures rhould strengthen the role of the General Assembly and the Security Council,

62. Mr. VILLAGRAN KRAMER (Guatemala), speaking *in* explanation of his delegation's position, raid that his Government welcomed the adoption of the draft resolution, which it considered to be a significant step towards opening wider channels of communication between States which might be involved in disputes and would enable the General Assembly to play a prominent role in international life, He urged the permanent members of the Security Council to use the established mechanisms more frequently.

The meeting rose at 12.10 p.m.