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SUMMARY RECORD OF THE 27th MEETING

<u>Chairman</u>: Mr. AFONSO (Mozambique)

iater: Mr. SANDOVAL (Ecuador)

(Vice-Chairman)

later: Mr. AFONSO (Mozambique)

(Chairman)

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The meeting was called to order at 10.05 a.m.

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

- 1. Mr., RIVAS-POSADA (Colombia) said that his Government's position on the main elements of the issue of the uses of international watercourses was based on the principle of the right of the State of origin to use end exploit its natural resources. That right, which derived from the legal and political sovereignty of the State, must be exercised, in a spirit of international solidarity an cooperation, in such A way as not to cause appreciable harm to other watercourse States. Consequently, his delegation welcomed the fact that the principle of equitable and reasonable utilization and participation had been adopted as a guiding principle from which the rules in the draft articles were derived.
- 2. One of the areas which called for the broadest spirit of cooperation among the Staten concerned was that of the obligation of States to protect and preserve ecosystems and to implement planned measures. The principles set forth in the draft articles provided a general framework and some useful guidelines to govern the actions of States; nevertheless, only firm determination to set those actions on a foundation of solidarity and just and equitable collaboration could yield positive results. It should be remembered that the proposed rules were of a supplementary nature, which meant that watercourse States enjoyed unlimited right.8 with regard to defining the nature of sny watercourse agreement into which they might onter, in the spirit which had informed the elaboration of the drnft articles,
- 3. His delegation continued to believe that the use of tha word "appreciable" in draft article 7 was not sufficiently precise for such a critical matter, which had an enormous bearing on relations between States. The word failed to indicate the gravity or seriousness of the harm, which represented a basic aspect of the topic, Ha suggested, therefore, tho possibility of using an expression such as "substantial" or "significant harm".
- 4. He stressed the potential significance for relations between States of the issue of "confined" groundwater when the aquifer in which St was contained was intersected by a boundary. Nevertheless, his delegation agreed that confined groundwater should not be covered by the term "watercourse" and should accordingly not be included in the scope of the draft articles; at the tame time, there was no question that the concept was relevant to the general settlement at some later time of issues relating to international waters.
- 5. In respect of the topic of jurisdictional immunities of States and their property, he wished to highlight the afforts of the International Law Commission to neek a compromise between those members advocating the doctrine of absolute State immunity and those favouring a restrictive concept of

(Mr. Rivas-Posada, Colombia)

immunity, Instead of attempting to solve a politically unsolvable theoretical problem, the Commission had wisely decided to limit itself to identifying those activities with **regard** to which a State could **not** invoke jurisdictional **inumuni** ty. It was the view of his delegation that the **proposed formulation was** acceptable in general **terms**.

- **6.** With regard to determining whether **a transaction was commercial in nature,** he noted **that the Commission had had** to settle the differences **of**opinion between those members **who** advocated examining the nature **of** the
 transaction in order to determine whether it was commercial **or not and those**members who believed that the purpose of the contract or **transaction** should
 serve as the main criterion in determining whether it **was** commercial in
 character. In view of the difficulty of omitting entirely the criterion of
 purpose, which **continued to prevail in many** national legislations, his
 delegation found acceptable the solution proposed by the Commission, **whereby**the criterion of the nature of the **transaction** would **first** be applied and it
 would then be left open to the State concerned to contest **the** apparent
 commercial nature of the transaction if, in the practice of that **State**, **the purpose** of that transaction was relevant to determining its **character**.
- 7. In respect of **the** proposal to **convene** a conference of plenipotentiaries to consider the draft articles and conclude a convention on the topic, his delegation believed that it was first necessary to surmount the difficulties that remained with regard to **several** of the draft articles; that task should be undertaken by a working **group** of the Sixth Committee. **As** to the view that the differences of opinion, among **Commission** members **were** slight **and not** significant enough to delay **the convening of** the **conference**, it was **precisely for** that reason that a final **effort** was justified so that there would **be** no risk of reopening **a** debate which might block **a** final agreement.
- 8. He applauded the Commission's work on the draft Code of Crimes against the Peace and Security of Mankind and emphasized the importance of article 25, dealing with illicit raffic in narcotic drugs. His country, which had in recent years been suffering from that contemporary blight which was affecting the entire world, had been stressing that matter in every international forum so that it would be dealt with in the manner in which it had finally been treated in the draft articles. The draft articles should be given further consideration in order to incorporate in them the necessary modifications and precisions; however, it should be acknowledged as of now that the Commission had taken a major step forward in dealing with a topic of great significance,
- 9. Referring to the list of topics for consideration submitted by the Commission, he said that his delegation agreed that it was important to give priority to those topics on which a substantial amount of work remained to be done. In addition, it was obvious that some of the topics on the list did not fall within the purview of the Commission but rather of other bodies in the system. Other topics did not really lend themselves to codification, and there were yet others whose relative importance did not justify their

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immediate inclusion in the Commission's programme of work. Just two or three new topics should be selected, on a provisional basis. Those topics might include: the law concerning international migrations) the law of confined international ground waters, a topic which would serve as a supplement to the draft articles on international watercourses; and international commissions of fact-finding, a matter on which the Sixth Committee had had the chance to hear views when it had considered the report of the Special Committee on the Charter.

- 10, Mr. GRÖNBERG (Finland), speaking on behalf of the Nordic countries, said that in accordance with established procedure they would submit writhen comments on the draft articles, 80 that he would confine himself to underscoring the special inte st they had in the non-navigational uses of international watercourses, given the fact that General Assembly resolution 2669 (XXV) recommending that the Commission should take up a study of the topic had resulted from a Nordic initiative,
- 11. Although the Commission had been criticized because of its slow progress in completing it8 assigned task, that was to a large extent due to its extensive programme of work and the fact that a number of significant issues had to be considered simultaneously in the course of relatively short yearly sessions.
- 12. He believed that after the comment8 and observation8 made by Member State8 on the draft article8 were analysed, a second reading would follow in a not too distant future. The results of the first reading were: promising.
- 13. Mr. Sandoval (Ecuador). Vice-Chairman. took the.
- 14. Mr. YAMADA (Japan) underscored the growing practical importance of the law of international watercourses in terms of protection of ecological systems and preservation of the environment. Hence the significance of the work of the Commission, which was aiming to produce a general convention that would provide the basic framework for dealing with the topic and would regulate the various uses of international watercoursea. He expected that the Commission would continue trying to establish a framework of international cooperation in that area.
- 15. Regarding the definition of the term "watercourses", the approach to a watercourse as a system of waters composed of hydrographic component8 constituting by virtue of their physical relationship a unitary whole was interesting, and his delegation supported it. It also welcomed the detailed consideration given to the question of groundwater, and the Special Rapporteur's report had convinced it that the physical relationship should not be ignored in the deliberation8 on the topic. On the other hand, when groundwater was included as a component of a system of waters, it was necessary to bear in mind that there would be situations where the physical relationship between a groundwater source and an international watercourse

(Mr. Yamada, Japan)

might be difficult to determine, and others where it would be very difficult to prove scientifically in what form and under which countries groundwater existed. Therefore, owing to the dearth of scientific data and studies on the subject, it was possible that the question of groundwater might present insurmountable difficulties. In proceeding with codification in that area, a consideration of the physical relationship had to be combined with an approach aimed at establishing rights and duties with regard to a core issue by providing a single, clear definition of that issue.

- 16. In view of the increasing importance of the use, management and protection of watercourses, it was hoped that a convention would be drafted establishing a broad international framework of cooperation, thus providing an incentive for concluding individual agreements on specific matters.
- 17. Mr. BOWETT (United Kingdom) said that the Commission's work on the non-navigational uses of international watercourse8 was a valuable contribution to the international protection of the environment. His delegation was in general content with the direction in which the work was progressing and had noted many improvements in the draft articles, particularly the revisions of article 29 on international watercourses and inatallations in time of armed conflict.
- 18. The decision to include groundwater within the definition of an international watercourse struck his delegation as both imaginative and sensible. In many areas of the world the substantial water resources were groundwater, which provided the main source of drinking water. However, the Commission was planning a set of articles to be embodied, in due course, in a framework agreement, which would impose obligations on the ratifying States. It most probably would be supplemented by specific agreements dealing with particular watercourses, whose provisions would prevail. But the question was whether a State, at the time when it accepted the framework agreement, would know precisely what obligations it was undertaking.
- 19. In the case of surface water, its location and extent was more or less readily apparent, so that a State could identify the scope of its obligations. With underground water, the location and size of the resource or its interaction with the watercourses of other States, might not be known. While such questions could, with time, money and expertise, be investigated, States and in particular developing States might have other, prior calls on their resources. Thus, there remained the question whether States would be prepared to bind themselves to a framework agreement before they knew exactly what they were undertaking.
- 20. One solution would be to aim for a set of model rules rather than a framework agreement. States would then embody those rules, as necessary, in a specific agreement relating to an identified watercourse and, presumably, any necessary scientific studies as to the extent of the watercourse would be carried out before a State subscribed to it. A framework agreement would, in

(Mr. Bowett, United Kingdom)

principle, apply to all international watercourses throughout the territory of a State, and it would be a very different matter, and possibly unrealistic, to expect to have knowledge of all such watercourses and of the full extent of the obligations resulting from such an agreement.

- 21. He endorsed the importance attached by the Commission and the Special Rapporteur to ensuring that the draft articles **and** the terms **used** were soundly based on scientific reality, and appreciated the care they had taken to present the relevant data. His Government would carefully study the matter in order to prepare comments and suggestions within the **timetable** requested by the Commission.
- 22. Mr. VASYLENKO (Ukraine) observed that the Commission had concluded its study of the item on jurisdictional immunities of States and their property by approving the final version of the corresponding draft articles. That opened up the possibility of adopting a convention on the topic that would help develop international economic relations and protect the economic interests of States. The Commission had also provisionally adopted the draft articles on the law of the non-navigational uses of international watercourses, which was highly important for the equitable regulation of that area of international relations and for the maintenance of good-neighbourly relations between States. The Commission had, further, continued its study of the second part of the item on relations between States and international organizations. The Commission had made modest but meaningful progress in its efforts to establish a solid legal basis for cooperation through international organizations of a universal character.
- 23. Unfortunately, very little progress had been made on tht topic entitled "State responsibility". He hoped that everything possible would be done to speed up the debate on that topic, not only because it was relevant to the maintenance of international peace and order but also because the Commission was about to conclude its work on the draft. Code of Crimes against he Peace and Security of Mankind, which was closely related to the question of State responsibility. The conclusion of work on those two topics should be synchronized so that an agreement in principle could be reached on both drafts. In most cases, crimes against the peace and security of mankind entailed State responsibility, since such crimes were committed by individuals in the service of States.
- 24. The draft Code of Crimes against the Peace and Security of Mankind could serve as a basis for a debate at an international conference of plenipotentiaries. Moreover, there seemed to be no justification for setting 1 January 1993 as the deadline for Member States to submit comments and observations on the draft articles. That time-limit could be shortened by at least six months.
- 25. A few provisions of the draft articles, particularly those contained in Part II of the draft Code entitled "Crimes against the peace and security of

(Mr. Vasylenko, Ukraine)

mankind", might require further clarification. The draft Code should not deal with any individual but only to civil servants or persons acting as agents of the State.

- 26. There was no need to establish a standing international criminal court since international criminal courts could be established though agreements among interested States whenever it was necessary to consider specific situations. To that end, the Commission could prepare rules for the establishment and functioning of such special courts, which would be annexed to the Code.
- 27. The Commission was currently examining Part Two of the draft articles on State responsibility, which concerned the content, forms and degrees of international responsibility. In order to ensure progress on Part Two, which was the most important part, a clear distinction must be made between responsibility and sanctions and between the various forms of responsibility and sanctions, bearing in mind that the State that had committed the internationally wrongful act always bore responsibility and that the injured State had the right to take countermeasures. Responsibility entailed not only reprisals as a means of re-establishing the status quo ante but also compensation and reparation. A distinction should therefore be made between compensation and reparation for an internationally wrongful act, on the one hand, and compensation and reparation for other violations of the provisions of the Code, on the other.
- 28. The draft articles on State responsibility should include criteria for determining the extent of the injury to a State and assessing the responsibility of the State that had committed the internationally wrongful act. The determination of the extent of the injury should be useful in assessing responsibility. The draft articles should also contain a third part devoted to the settlement of disputes and methods of invoking international responsibility.
- 29. To that end, an optional protocol should be prepared on the compulsory jurisdiction of the International Court of Justice with respect to disputes arising from internationally wrongful acts.
- 30. His delegation was pleased that the Commission was continuing its work on the topic entitled "International liability for injurious consequences arising out of acts not prohibited by international law", which would provide a solid legal base for compensating anyone who suffered such injurious consequences. The Commission's completion of its work on the topic would contribute to the stability of the international legal system, which was essential for dealing with the serious problems facing mankind.
- 31. Mr. OSHODI (Nigeria) said that, since its establishment, the International Law Commission had justified the confidence placed in it, since it encouraged the progressive development of international law and its

(Mr. Oshodi, Nigeria)

codification through studies and useful and coherent recommendations.

Moreover, by encouraging the developing countries to appreciate and understand the rules of international law, the Commission was carrying out important work that gave rise to hope for a better future.

- 32. The Commission had concluded its consideration of the topic entitled "Jurisdictional immunities of States and their property" and had adopted the final text of the draft articles. A convention on the subject would be of particular importance to weaker States whose sovereignty could be easily violeted in spite of the rule of law. The scope of the draft articles was satisfactory and would help minimize friction between States, Commercial disputes between nationals of a foreign State acting in their private capacity and the State of the forum should not be used as a pretext to derogate from the sovereign right of the foreign State to claim immunity from jurisdiction.
- The draft articles had extended the concept of "State" to cover a number of categories of constituent units of sovereign States. While that was a development, the inclusion of the second category of constituent units of a federal State was rather intriguing. His delegation accepted the inclusion of that category in the context of acts performed by such constituent units in the exercise of the sovereign authority of the fedoral However, instances occurred where constituent units or "States" of a federation acted for themselves. A distinction should therefore be made between acts of a constituent State of a federation that involved a foreign State and acts that involved another constituent State within the same federnt ion. It should be possible to plsad immunity only in the first case since, in the second, the two States would be seen as parts of an integral sovereign State. That distinction would be in keeping with the commentary to article 1 contained in the report, which noted that the existence of a foreign State and a State of the forum, was a prerequisite to the question of jurisdictional immunities. That matter should be further examined from the point of view of State practice and the spirit of the draft articles with a view to laying the groundwork for uniformity in the interpretation of the proposed convention,
- 34. His delegation welcomed the inclusion of articles 5 to 9 in the draft articles. Those articles laid down the modalities for ensuring that the jurisdictional immunity of a sovereign State was not violated at random, but only with the consent, expressed or implied, of the State itself. The most important guarantee was the obligation imposed on the State of the forum to ensure that its courts determined that the immunity of the other State under article 5 was respected.
- 35. His delegation supported the Commission's recommendation requrding the convening of an international conference of plenipotentiaries, at which his delegation would comment in detail on all the draft articles.

(Mr., Qahodi, Nigeria)

- 36. With regard to chapter III of the report, it was gratifying that the Commission had been able to complete the first reading of articles designed to ensure cooperation among watercourse States in regulating the use of international rivers and watercourses, Nigeria was a member of several international river basin organizations which gave particular attention to the economic and environmental effects of the use of international watercourses; it would continue to contribute to the elaboration of an appropriate legal regime with a view to eliminating the causes of friction along such watercourses.
- 37. With regard to the draft Code of Crimes against the Peace and Security of Mankind (chap. IV), he said that, at its forty-third session, the Commission had endeavoured to rationalize the efforts which it had made over many yours, but that the inherent difficulties of the item were still apparent. In his ninth report, the Special Rapporteur had indicated that, in international law, the diversity of concepts and philosophies was hardly conducive to a uniform system of punishment, whereas in domestic law there was in each Stato a certain unity of moral and philosophical concepts. That was a question which must be tackled and resolved if the principle nulla poena sine lege was to be adhered to.
- 38. Even in domestic law there were instances in which there was no such uniformity, instances which had created conflicts in society. It the draft. Code of Crimes against the Peace and Security of Mankind was to be respected by all nations, there was a need to strike a balance among diverse concepts.
- 39. With regard to the proposal to establish a court to administer tha Code, it should be possible to set up a body to exercise international criminal jurisdiction on the same basis on which the International Court of Justice and the Nürnberg Tribunal had been sot up.
- 40. With regard to chapter V of the report, his delegation was of the view that the obligation to exercise one's rights without causing injury or long to others applied not only to individuals but also to States, and that whoever violated the principle sic utere two ut alienum non laedes should make adequate reparations to the injured persons. Modern jurisprudence even supported the view that it was not only necessary to act with care but also to take the initiative to prevent any act likely to cause injury to others. For example, in the context of protecting the environment, attention should be given to those activities which were likely to cause transboundary harm and attempts should be made to prevent it. The issue was currently being examined in various international forums and the Nigerian delegation hoped that an acceptable solution to the various problems posed by the topic would eventually emerge.

(Mr. Oshodi, Nigeria)

- 41. **His** delegation also hoped that, with the passage of time, progress could be made in the **work** on the two remaining items in the Commission's report (chaps. VI and VII).
- 42. Mr. Afon .: Mozambique) resumed the Chair.
- 43. Mr. AL-BAHARNA (Bahrain) said his delegation welcomed the fact that the Commission had adopted on second reading a complete set of articles on the topic "Jurisdictional immunities of States and their property" (A/46/10, chap. II) and supported the Commission'r recommendation to the General Assembly that it should convene un international conference of plenipotentiaries to conclude a convention on the subject (A/46/10, pare. 10).
- 44. With the growth of international trade and participation in it by States and State commercial enterprisea, the question of regulating jurisdictional immunities of States and their property had acquired prominence, as there was a need to unify and to hermonize the divergent practices of States in that ar a. Controversies must be settled such as the conflict between the theories of absolute and limited State immunity and the rules of international law concerning State immunity must be spelled out.
- **45.** With **regard to the draft articles**, he noted that the controversy which **had** arisen during **previous** sessions of the Commission and of the Sixth Committee as to the test for determining whether a contract or transaction was a "*commercial **transaction**" had been settled in article 2, paragraph 2, with the inclusion of the "purpose" test. The delegation of Bahrain supported both the inclusion of that test and the manner in which **it was** applied in the **commentary** on paragraph 2 (A/46/10, pp. 29-30, pares. (25) and (26)).
- 46. His delegation also strongly supported the basic criterion adopted by the Commission in draft article 5, namely, accepting the principle of immunity with certain specific exceptions. He recalled that the text of article 5 adopted on first reading had contained, in square brackets, the phrase "and to the relevant rules of general international law", apparently in order to stress that the draft articles were not intended to prevent the development of general international law. However, owing to the intense controversies aroused by the phrase, the Commission had agreed to delete it on second reading, believing that any immunity or exception to immunity accorded under draft article 5 would not prejudice the future development of State practice (A/46/10, p. 39, para. (3)). The delegation of Bahrain therefore supported the deletion of the phrase in question from the text of article 5.
- 47. His dslegation also agreed with the position adopted in article 10, paragraph 3, concerning commercial transactions engaged in by State enterprises. He noted with satisfaction that former article 11 bis concerning "segregated property", about which his &legation had expressed reservations, had been deleted on second reading.

(Mr. Al-Bahama. Bahrain)

- 48. With regard to article 20 concerning service of process, he said that, at the forty-fifth session of the General Assembly, his delegation had proposed that a new clause should be added guaranteeing that service of process should be effected in accordance with the domestic law of the forum State; while that proposal had not been accepted, both the current text of article 20 and the commentary thereon in the Commission's report (A/46/10, p. 146, para. (1)) were satisfactory. In his view, the provision in article 20, paragraph 1 (b) (ii) constituted a sufficient guarantee of service.
- **49.** With **regard to** article 21, he noted with appreciation the change made on second reading in paragraph 1 **(b)**, extending the expiry period from three to four months from the date on which service was effected. However, he was of the **view** that that period would not be sufficient to protect the interests of **some** of tile developing countries, especially the least developed countries, and suggested that it should be extended to six months. For the same reason, he suggested that an identical amendment should be made to article 21. paragraph 3.
- 50. Mr. KOTLIAR (Secretary of the Committee) said that Rwanda and Cameroon had joined the sponsors of draft resolution A/C.6/46/L.6 concerning the progressive development of the principles and norms of international law relating to the new international economic order.

The meeting rose at 11.40 a.m.