Document:-
A/CN.4/SR.2125

Summary record of the 2125th meeting

Topic:
Law of the non-navigational uses of international watercourses

Extract from the Yearbook of the International Law Commission:-
1989, vol. I

59. The use of the term "potentially" before "affected States" in paragraph 1 of article 23 had attracted some criticism. For his part, he could think of no better expression than "potentially affected States". It was essential not to exclude any State which might be affected in the future, and not to wait until disaster struck before acting. It was true, however, as Mr. Sreenivasa Rao had pointed out, that in the case of certain phenomena virtually the whole of the world was potentially affected. Clearly, the only solution was to adopt a common-sense approach to the application of the rule in question. The form of language employed in article 23 should be examined further, but the underlying approach was very well founded.

60. In that respect, it was interesting to note the remark made by Jan Schneider in her 1979 book[9] postulating "the right of all people in present and future generations . . . to freedom, equality and adequate conditions of life in an environment that permits a life of dignity and well-being". That passage described a conceptual framework which clarified the human rights of mankind in a co-operative and effective law of the environment. For Schneider, that law had both ecological and human rights dimensions. Personally, he tended to see all the branches of the law in question converging on what was increasingly a human rights dimension. The matter called for a holistic, interdisciplinary approach if the problems were to be solved.

61. Some brief comments could be made on the doctrine which based liability solely on risk, and which he would call the "riskability doctrine". If the Special Rapporteur had eliminated all liability based on harm or damage, and had founded liability solely on risk, he would probably have come up with very similar provisions. For his own part, he could agree to risk being taken into account for such matters as prevention, but he had difficulties with any more general "riskability" approach. No one suggested that there should be compensation for an event before it occurred; in other words, the riskability doctrine was based on retroactive recognition of the risk. When an event did occur, it was then concluded that there had been a risk beforehand. Thus it was argued that risk was not predictable and yet that it was measurable—an idea that was somewhat confusing. At the same time, the concept of risk had the advantage of being applicable both to continuing events and to single events. Another difficulty arose in that connection: if the risk was not predictable, how was it possible to determine what to do to prevent it? In the case of someone suffering death, for example, it was difficult to see the use of a retroactive appreciation of the *risk* of death—what was done could hardly be undone. Obviously, the risk approach called for more scrutiny; if adopted, it should be viewed as progressive development, rather than codification, of the law. Risk seemingly involved no legal consequences until the actual event occurred, "event" being used as a neutral term carrying no connotation of fault. For his part, he believed that activities clearly creating a heavy risk should perhaps not be allowed to happen at all. One problem, of course, was who would act as the judge. Engineers who built dams, for example, always took calculated risks. Normally, a risk became known only when it was too late to take any effective action. That was not to reject the concept of risk entirely, however; it no doubt had a role to play in questions of prevention, and perhaps even of mitigation.

62. Lastly, he would suggest that draft articles 22 and 23 strike a balance between the two schools of thought. The concrete approach which had brought that about might also be transposed to other topics currently under consideration by the Commission. The Special Rapporteur had revealed that he was an eminent publicist in the field and one who was fully in touch with the subject; he had given the Commission very complete guidelines for the treatment of the topic.

The meeting rose at 1 p.m.

2125th MEETING

Tuesday, 27 June 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Hayes, Mr. Illueca, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Reuter, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/412 and Add.1 and 2,[1] A/CN.4/421 and Add.1 and 2,[2] A/CN.4/L.431, sect. C, ILC(XLI)/Conf.Room Doc.4)

[Agenda item 6]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

PART VI OF THE DRAFT ARTICLES:

ARTICLE 22 (Water-related hazards, harmful conditions and other adverse effects) *and*

ARTICLE 23 (Water-related dangers and emergency situations)[3] (*continued*)

1. Mr. BARBOZA congratulated the Special Rapporteur on the quality of his fifth report (A/CN.4/421 and Add.1

[9] J. Schneider, *World Public Order of the Environment: Towards an International Ecological Law and Organization* (University of Toronto Press, 1979).

[1] Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

[2] Reproduced in *Yearbook . . . 1989*, vol. II (Part One).

[3] For the texts, see 2123rd meeting, para. 1.

and 2), which gave a lucid account of international practice. But did that practice reflect international custom? Personally, he believed that certain obligations such as notification, information and prevention were well established in international law as forms of co-operation. Whether those obligations were rules of customary international law or not might, moreover, not be of decisive importance. The Special Rapporteur had in fact proposed obligations which were reasonable, necessary for the functioning of the future convention and well anchored in the practice of States. Their legal force would depend not on customary law, but on the convention which would ultimately be adopted.

2. With regard to the question whether secondary rules should be included (*ibid.*, para. 5), he said that, since the draft did not deal with responsibility, it would be better to let the general rules operate, for they covered all possible cases, including the breach of the obligations provided for in the articles. It would also be preferable to avoid complicating the task of the Special Rapporteur entrusted with the topic of State responsibility by introducing special rules in the present draft.

3. Referring to the titles of part VI of the draft and of draft article 22, he pointed out that, in English, the term "hazard" had two meanings: it referred to the risk of an event and to the event itself, namely to the "harmful condition". A flood, for example, was a "hazard" connected with the existence of the watercourse, but it was also a "harmful condition" once it had occurred. Those titles and the text of article 22 thus repeated the same concept; perhaps the words "harmful conditions" could be deleted. Moreover, the meaning of the words "adverse effects" was too broad: the Commission's concern was not every imaginable effect of the uses of watercourse systems, but only the harm deriving from water-related hazards. In Spanish, the expression *condición dañina* did not have any particular meaning in the present context and would give rise to problems.

4. Article 22 was divided into two parts, the first relating to natural hazards and the second to hazards which either were man-made or to the occurrence of which human activities contributed. In the first part, it was clear that the Special Rapporteur had reverted to the "basin" concept, which highlighted the relationship not only between the waters of a watercourse, but also between those waters and various other factors. Who could then deny that the waters of a watercourse system were a shared natural resource? Was there anything more convincing than the wording of draft articles 22 and 23 to show that a watercourse system was a shared natural resource? If it were agreed that there was an interrelationship between the waters of a watercourse and the other factors in question, however, the square brackets around the word "system" in the earlier articles would have to be deleted.

5. Paragraph 3 of article 22, which dealt with man-made risks, did not appear to serve any useful purpose: article 8 as provisionally adopted at the previous session[4] already prohibited States from causing appreciable harm to other watercourse States and that prohibition must naturally include the obligation of due diligence, which would take account of prevention. In any case, the Special Rapporteur recognized in paragraph (6) of his comments on article 22 that "this obligation is nothing more than a concrete application of article 8". Furthermore, the provisions of part III of the draft (Planned measures) could also apply to a great extent to the activities referred to in article 22, paragraph 3. Article 11,[5] in particular, was very broad in scope, since it related not only to planned measures for a watercourse, but also to planned measures in general.

6. From another standpoint, however, article 22, paragraph 3, went much further than the prohibition not to cause appreciable harm and appeared to introduce a very general concept of environmental law into the draft. It would be noted that the text referred to activities under the "jurisdiction or control" of watercourse States, a formulation which had been used in other instruments, as was known, in order to refer to activities outside the territory of a State. But how could an aircraft or a ship on the high seas cause a flood? Watercourses were eminently territorial and any appreciable harm or disaster in a particular country was bound to produce sufficiently important effects in a more or less neighbouring territory. While he had no objection to the expression "jurisdiction or control", he believed that it might make article 22 too broad in scope.

7. In his comments (para. (6) *in fine*), the Special Rapporteur explained that paragraph 3 was "somewhat broader" than the provision he cited from article 1 of the articles on "The relationship between water, other natural resources and the environment" adopted by ILA in 1980, "since the harm against which it is intended to protect would not be confined to 'injury to . . . water resources'". Since the ILA text stated that the management of natural resources must not cause substantial injury to the "water resources of other States", it might be asked how far draft article 22 would lead the Commission. Did the Special Rapporteur have in mind activities conducted in the territory of a watercourse State or anywhere under its jurisdiction or control that might affect the waters of a system and thus cause a water-related hazard or other "adverse effects" which had no relation with the watercourse? That might lead the Commission too far away from the subject of watercourses. It was in fact difficult, if not impossible, to determine the contribution of human behaviour to the occurrence of certain disasters. In his report, the Special Rapporteur referred, for example, to the effects of the phenomenon of global warming on water-related dangers: how was it possible to determine the influence of each of such factors on a watercourse system or in the occurrence of a flood? In what cases would the future convention apply and when would other instruments dealing with the protection of the environment be applicable? It was also significant that the many examples of international practice included in the report did not refer to human activities: they related either to natural phenomena or to fields other than watercourse law. He therefore supported paragraphs 1 and 2 of article 22, but did not think that paragraph 3 had a valid legal basis or served any useful purpose.

8. The measures proposed in article 23, on water-related dangers and emergency situations, were sensible. In paragraph 2, the words "all practical measures" should be replaced by "the best practical available measures", in order

[4] *Yearbook . . . 1988*, vol. II (Part Two), p. 35.

[5] *Ibid.*, p. 45.

to take account of the situation of developing countries; moreover, the words "prevent" and "neutralize" meant the same thing.

9. Lastly, with regard to paragraph 3 and to paragraph (4) of the Special Rapporteur's comments on article 23, it could be asked how States in the affected area and international organizations which were not parties to the future convention could be required to co-operate in eliminating the causes and effects of the danger or emergency situation and in preventing or minimizing harm therefrom. The obligation was not one *erga omnes*, and the legal effect of the convention was the only relevant consideration.

10. Mr. CALERO RODRIGUES said that, although the Special Rapporteur's fifth report (A/CN.4/421 and Add.1 and 2) contained a wealth of information, it was somewhat unbalanced, in so far as there were only five pages on the texts of draft articles 22 and 23 and the comments on them, as against more than 80 pages on the sources. Was there really a connection between the topic and all that documentation? For example, it was not at all certain that principles applicable to the Amazon or the Mekong could be drawn from a convention on ice-conditions concluded by the countries of northern Europe. The Special Rapporteur had also dealt with world problems such as global warming, which might or might not be relevant to the present topic. In introducing his report, he had referred at length to the recent floods in Bangladesh: what could be learned from that example about the rights and obligations of States in the situations referred to in articles 22 and 23? All that documentation could really be useful only if it were analysed in depth—and that was something members of the Commission had been unable to do because of the lack of time. It would be better, in future, if the Special Rapporteur could distil the content of his information in the draft articles themselves.

11. Articles 22 and 23 involved difficult problems of terminology. He recalled in that connection that the Special Rapporteur had proposed a subtopic on water-related hazards and dangers in the outline submitted in his fourth report (A/CN.4/412 and Add.1 and 2, para. 7); that draft article 18[19] as submitted in 1988[6] dealt with emergency situations caused by pollution or other environmental emergencies, in other words with "any situation affecting an international watercourse which poses a serious and immediate threat to health, life, property or water resources" (para. 1); that paragraph 2 of article 18[19] related to conditions or incidents which created an emergency situation as a result of pollution or other environmental emergencies; and that it had been suggested at the previous session that a more general approach should be adopted to the question of emergency situations without necessarily linking them to pollution, since the scope of article 18[19] was relatively easy to understand, whereas it was not so easy to decide whether States were faced by a hazard or a danger.

12. The texts now proposed for articles 22 and 23 seemed to take a different line. The Special Rapporteur had explained that the former addressed chronic situations and the latter unforeseen situations, but the language used in the two articles did not bring out that distinction clearly. For instance, the expression "emergency situations" in article 23 was diluted by the words "water-related dangers", which came before it. In article 22, moreover, the concept of "water-related hazards" was rather vague and it seemed difficult to relate "harmful conditions" to "adverse effects": conditions lay at one end of the spectrum and effects at the other. The reference to harmful conditions and "other" adverse effects seemed to imply that a "harmful condition" was an adverse effect. Because of that uncertain terminology, there were problems with the scope of the two articles, although they could be solved by characterizing the situations which each article was intended to cover. Rather than entrusting the Drafting Committee with the task of finding suitable wording, the Commission might request the Special Rapporteur to propose a revision along those lines.

13. Draft articles 22 and 23 contemplated situations which, as a result of human activities or natural events, created serious danger for the watercourse or other interests. The main thing was, therefore, to define the obligations and rights of the States concerned. In both cases—impending danger and emergency situations—the general obligation to co-operate laid down in article 9 as provisionally adopted[7] found specific application. In that connection, he noted that article 22, paragraph 1, referred to co-operation "on an equitable basis", a qualification which had already given rise to criticism. Moreover, the Special Rapporteur did not explain its exact meaning and it did not appear in article 23, paragraph 3. Were the conditions of co-operation any different in the latter case? In any event, it would be better to rely on the concept of "mutual benefit", which was one of the bases of the general obligation to co-operate stated in article 9.

14. Furthermore, the purpose of co-operation was, under article 22, to prevent or mitigate situations of impending danger and, under article 23, to eliminate the causes and effects of emergency situations "to the extent practicable under the circumstances" (para. 3), a qualification which did not appear in article 22 since it was implicit in the words "on an equitable basis", as the Special Rapporteur explained in his comments on article 22 (para. (2)). Perhaps the Special Rapporteur had found it necessary to include that qualification in article 23 because the article went so far as to provide that one of the aims of co-operation was to eliminate the causes of an emergency situation. But how could the causes of an imminent flood, for instance, be eliminated? The purposes of co-operation in both articles should be set forth in more modest and general terms to preclude the need for any qualification.

15. He had no major difficulty in accepting that co-operation should be required from watercourse States (art. 22) and even from States in the area affected and from competent international organizations (art. 23), but he believed that article 23, paragraph 3, should be redrafted. It was for the parties to the future convention to seek the co-operation of such States and of international organizations and it would not be technically correct to impose an obligation to co-operate on States and international organizations that were not parties.

16. Article 22, paragraph 2, under which co-operation took the form of the exchange of data and information and the

[6] *Ibid.*, p. 32, footnote 94.

[7] *Ibid.*, p. 41.

planning and application of joint measures, was unnecessarily complicated. The consultations provided for in subparagraph (*b*) added a superfluous procedural element and the expression "structural and non-structural" had already attracted criticism. Similarly, subparagraph (*c*) should refer simply to the follow-up of the measures. In general, he wondered whether it was possible, or even necessary, in article 22 and also in article 23, under which co-operation took the form of development and implementation of contingency plans, to provide for the forms or modalities of co-operation other than on an indicative basis. Would it not be better to establish the obligation to co-operate and indicate its aims, leaving it to States to determine the forms and modalities of that co-operation?

17. With regard to the obligation of information set forth in article 10 as provisionally adopted[8] and referred to in article 22, paragraph 2 (*a*), and in article 23, paragraph 1, he considered that information played such a prominent role in cases of impending danger or emergency situations that a separate provision should be devoted to it to emphasize its importance and indicate the specific features it should have. Such a provision should be the first paragraph of each draft article, since information was the basis for all subsequent measures. To that end, the structure of article 22 should be brought into line with that of article 23.

18. On the question of structure, he noted that the obligation of States to take immediate "practical"—or, as he would prefer, "appropriate"—measures was clearly set forth in article 23, paragraph 2, whereas, in article 22, a similar obligation was referred to only in paragraph 3 and in terms that were not entirely satisfactory. That provision probably restated the terms of article 8,[9] whereby States were required to utilize an international watercourse in such a way as not to cause appreciable harm to other watercourse States. It went further, however, since it applied not only to activities related to the utilization of the watercourse, but to all activities under the jurisdiction or control of the State. That meant that States had a general obligation to prevent any human activities under their control, regardless of whether they were connected with the watercourse, from creating a situation of impending danger for other States. Although that was a considerable extension of a State's obligations, it might perhaps be acceptable if it were made clear that the situation must be one in which the impending danger was of considerable magnitude and was much more serious than the "appreciable harm" referred to in article 8. Such situations could, however, result from natural causes and the question then was whether States had an obligation to take individual measures in such cases. The answer could be given only after detailed consideration of all the elements involved and, in particular, of the scope of article 22.

19. In conclusion, he recommended that the scope of articles 22 and 23 be clearly defined, with a precise indication in each case of what was required of States in the fields of information, individual measures and co-operation.

20. Mr. AL-BAHARNA expressed appreciation for the Special Rapporteur's fifth report (A/CN.4/421 and Add.1 and 2), which was based on a wealth of material and contained highly instructive scientific and hydrological information.

21. Water-related hazards, whether due to man-made causes or to natural phenomena, entailed disastrous consequences and thus called for international control and regulation. From the standpoint of obligations, however, a distinction should probably be made between the various causative factors. As the Special Rapporteur stated, "the legal régimes of prevention, mitigation and reparation should . . . take into account not only the nature of the disaster . . . but also the degree to which human intervention contributes to harmful consequences"; consequently, "the obligations of watercourse States would increase with the degree of human involvement" (*ibid.*, para. 4). Those obligations had to be translated into practical action, however, and that was no easy task.

22. The Special Rapporteur raised the question (*ibid.*, para. 5) whether the draft articles on the subtopic should contain, in addition to the primary rules setting forth the obligations of watercourse States, secondary rules specifying the consequences of the breach of such obligations. His own view was that the Commission should, in so far as possible, restrict itself to the primary rules, as the secondary rules were being dealt with in the draft articles on State responsibility. In that way, the Commission would avoid duplication of effort while promoting uniformity of treatment in respect of the rules on State responsibility.

23. He was pleased to note that the Special Rapporteur referred in the report to the possible effects of climatic changes, and especially global warming, on fresh water—a matter which had figured prominently at ecological conferences in the past two years. Whether or not it was direct, the link between the "greenhouse effect" and floods should be contemplated in the draft articles, for to ignore such problems could have highly detrimental consequences in the long term.

24. The Special Rapporteur had rightly given a prominent place in the report to floods and their main causes, since floods were the most serious form of water-related hazards. For that reason, several agreements had been concluded between watercourse States to provide for consultation, exchange of data and information, the operation of warning systems, planning and execution of flood control measures and the operation and maintenance of works. Such agreements no doubt signified the existence of norms of international law on the subject. Care would, however, have to be taken in determining the precise nature of those rules, which seemed to derive their force from the "conventional rule" as such, rather than from custom. In that connection, he recalled that the judgment of the ICJ in the *North Sea Continental Shelf* cases had stated that not all conventional norms were accepted as customary norms by the *opinio juris*: the applicable test in such a case was that "the States concerned must . . . feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough."[10] He

[8] *Ibid.*, p. 43.

[9] See footnote 4 above.

[10] *North Sea Continental Shelf* (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands), Judgment of 20 February 1969, *I.C.J. Reports 1969*, p. 3, at p. 44, para. 77.

therefore urged the Commission to proceed with caution in inferring customary norms from international treaties and agreements on watercourses. More particularly, since the draft articles were to take the form of a framework agreement, he invited the Commission to formulate the provisions on floods in more general terms, so that watercourse States might fill out the specifics according to the circumstances.

25. The need for caution in the case of floods also arose in the case of other factors causing water-related hazards or dangers, which included ice conditions, drainage problems, flow obstructions, siltation and erosion. The provisions on those factors should also be formulated in broad terms to enable States to adapt them to their specific requirements by means of more detailed and comprehensive regulations.

26. With regard to draft articles 22 and 23, he wished to make a few general comments on methodology. First, it would have been better if the articles had been presented first, followed by detailed comments and an analysis of the law and practice on the subject; that would have given a better indication of the direction in which the law was being developed. Secondly, the fact that the Special Rapporteur had tried to deduce the rules applicable to water-related hazards from general principles of international law, such as those laid down in the *Corfu Channel* case (*ibid.*, para. 90) and the *Trail Smelter* case (*ibid.*, para. 103), meant that, wittingly or unwittingly, the draft articles had acquired the character of general propositions. Thirdly, he would have preferred the Special Rapporteur to treat the obligations of watercourse States in the event of water-related emergency situations separately depending on whether those situations were caused by natural phenomena or by human activities. The degree of culpability was greater in the latter case and, consequently, the nature of the obligations had to be different.

27. His first comment on draft article 22 was that the formulation was too general. In paragraph 1, the words "on an equitable basis", which were used to qualify the obligation of watercourse States to co-operate in order to prevent or mitigate water-related hazards, made the principle of co-operation too elusive to serve as a guide. The beginning of the paragraph should read: "Watercourse States shall co-operate in accordance with the provisions of the present Convention". That change would, on the one hand, make it possible to avoid the use of the words "on an equitable basis" and, on the other, relate co-operation to all the relevant provisions of the future instrument.

28. Paragraph 2, which listed the steps to be taken by watercourse States pursuant to paragraph 1, was, on the other hand, too strict; the steps indicated in subparagraphs (*a*), (*b*) and (*c*) seemed to suggest that the obligations were cumulative and applied equally to all the situations referred to in paragraph 1, whereas, in fact, each type of situation might require a different kind of response. He therefore suggested that paragraph 2 be redrafted in such a way as to indicate the kind of action to be taken with regard to each particular danger under consideration. Furthermore, he preferred the word "measures" to "steps", had reservations concerning the use of the word "obligations" and was not sure that he understood the meaning of the words "structural and non-structural".

29. With regard to paragraph 3, he pointed out that the proposed text owed a great deal to the decision of the ICJ in the *Corfu Channel* case (*ibid.*, para. 90). He had no disagreement with the Court's dictum, but he doubted whether it could be used in the context of paragraph 3, which might well be unnecessary, since article 8 (Obligation not to cause appreciable harm) as provisionally adopted[11] would also apply to water-related hazards; the Special Rapporteur himself, in his comments on article 22, admitted that the obligation provided for in paragraph 3 was "nothing more than a concrete application of article 8" (para. (6)). The Commission therefore did not have to go beyond article 8, which was more generally applicable. For the reasons already given by other members, he would prefer paragraph 3 to refer to activities conducted "in the territory" of watercourse States, rather than to activities "under their jurisdiction or control", an expression which he found ambiguous. In short, the whole of article 22 needed to be reviewed.

30. Draft article 23 did not differ much from article 22 and also did not make a clear-cut distinction between situations caused by human activities and those arising from natural phenomena. Its provisions should be confined to emergency situations and should spell out separately the legal consequences flowing from the two different kinds of situations. Furthermore, the reference to "intergovernmental organizations" (para. 1) and to "international organizations" (para. 3) was inappropriate. There was no international organization vested with competence in matters relating to international watercourses, as there was, for example, in the case of the environment. True, certain watercourse States had set up various kinds of intergovernmental machinery that was entrusted with specific functions. If the reference in paragraphs 1 and 3 was to such machinery, the two expressions should be amended accordingly.

31. Commenting further on drafting points, he asked why the Special Rapporteur had used the words "all practical measures" in article 23, paragraph 2, rather than the words "all measures necessary", which were contained in article 22, paragraph 3, and would be more appropriate in the case of article 23, dealing as it did with emergency situations. He also asked why the verb "minimize" was used in article 23, paragraph 3, instead of the verb "mitigate", which was used in article 23, paragraph 2, as well as in article 22, paragraphs 1 and 2. Unless there was a special reason for using the verb "minimize", the verb "mitigate" should be employed in both articles. Article 23 as a whole needed to be further streamlined.

32. Finally, he had no objection to the principle of compensation referred to in paragraph (5) of the Special Rapporteur's comments on article 23. With regard to the question raised in paragraph (6) of the comments, he did not think that a provision requiring a State affected by a disaster to accept proffered assistance and not to regard offers thereof as interference in its internal affairs was desirable or necessary.

33. Mr. SHI congratulated the Special Rapporteur on his excellent fifth report (A/CN.4/421 and Add.1 and 2) and on draft articles 22 and 23, which had solid foundations in

[11] See footnote 4 above.

international practice, treaties, doctrine and court decisions. All those sources would be of great assistance in preparing the commentaries to the articles.

34. He agreed with the Special Rapporteur that all types of water-related hazards and dangers, whether natural, man-made or a combination of both, should be treated in a single article or set of articles. On the one hand, it was sometimes difficult to separate natural phenomena from the results of human activity and, on the other, the treaty practice of States showed that obligations were imposed with regard to water-related dangers caused both by natural forces and by human intervention. The form, content and scope of the legal consequences of a breach of such obligations could differ depending on whether the danger was caused by nature, human activity or a combination of the two. In that connection, he noted that the question whether the draft articles should include secondary rules was a complex one on which no quick decision could be taken. Moreover, now was not the time to raise that question, for the Commission aimed to complete the consideration of the draft articles on first reading by the end of its current term of office, in 1991. He was therefore in favour of leaving the question aside, at least for the time being.

35. Draft articles 22 and 23 were acceptable on the whole. He agreed with other members of the Commission that parts of the wording of article 22, for example the expression "structural and non-structural" in paragraph 2 (*b*), should be further clarified. He also wondered whether there was much difference between "hazards", "harmful conditions" and "other adverse effects". He was still unconvinced by the argument the Special Rapporteur had put forward in paragraph (6) of his comments on article 22 to justify the use of the expression "jurisdiction or control", rather than "territory", in paragraph 3.

36. Replying to the questions raised by the Special Rapporteur in his comments on article 23, he said that he was in favour of the inclusion of a definition of "water-related dangers or emergency situations" in article 1, on the use of terms.

37. With regard to the question whether States benefiting from protective or other measures should be required to compensate third States for the measures taken, he thought that no general rule should be laid down, since everything depended on the circumstances. If, for instance, the protective measures were taken specifically or mainly for the benefit of another State, the requirement of compensation was justified; however, if a protective measure was taken by a riparian State mainly to meet its own needs and the downstream State could objectively or indirectly benefit from the measure, it should not be required to pay compensation.

38. The question whether a State affected by a disaster should be required to accept proffered assistance was, in his opinion, a theoretical one. One State could not, as a matter of law, compel another State to accept assistance; acceptance of assistance was a matter of the State's own volition and could not be made a legal obligation. On the other hand, a State affected by a disaster would normally know whether it could cope with the disaster by its own efforts and would request assistance from other States if there were an urgent need and if it did not have the technical, material or financial means to meet that need. He agreed that offers of assistance should not be regarded by the affected State as interference in its internal affairs, provided that such offers were not politically or otherwise conditioned.

39. Mr. BARSEGOV thanked the Special Rapporteur for his extremely interesting fifth report (A/CN.4/421 and Add.1 and 2), which contained much useful information on the relevant practice of States, including the Eastern European countries and particularly the Soviet Union.

40. Draft articles 22 and 23 dealt with an extremely important aspect of international watercourse law, namely hazards connected with phenomena such as floods, drainage problems, flow obstructions, siltation, erosion, salt-water intrusion, drought and desertification, which were capable of causing large-scale damage. Some of those phenomena occurred gradually, while others happened suddenly and required emergency measures. In some cases, it was natural phenomena that were involved; in other cases, it was human activity, which could aggravate natural phenomena, but could also mitigate them. The prevention of such hazards and dangers required intensive international co-operation whose form would vary according to the situation. It therefore seemed appropriate to draw a distinction between projected and planned day-to-day co-operation, and co-operation in emergency situations, in other words the adoption of extraordinary measures to handle extraordinary situations.

41. In dealing with co-operation in connection with international watercourses, it was also important to take account of the features that were common to all watercourses and those which were specific to individual ones. It was unfortunate that, in article 22, paragraph 1, the Special Rapporteur had omitted the phrase "as the circumstances of the particular international watercourse system warrant", or its equivalent, which, as the Special Rapporteur pointed out in paragraph (2) of his comments on the article, had been included in the corresponding texts proposed by the previous Special Rapporteurs, Mr. Evensen and Mr. Schwebel. He was not entirely convinced by the Special Rapporteur's argument that that phrase was implicit in the expression "on an equitable basis", for the concept of an equitable basis, which was absolutely essential as the foundation for co-operation, was not relevant in that context. It was hard to see why, in explaining his use of the "equitable basis" concept, the Special Rapporteur adduced his concern to limit the number of possible exceptions, since international co-operation must come into play wherever necessary, although with due regard for the features of each individual watercourse.

42. As to the content of the "equitable basis" concept, he was prepared to accept the elements referred to in paragraph (3) of the comments on article 22, which indicated that co-operation "on an equitable basis" encompassed the duty of an actually or potentially injured watercourse State to contribute to or provide appropriate compensation for protective measures taken, at least in part, for its benefit by another watercourse State. He believed that those were valid principles and that they should be incorporated in the text of the article, after being suitably expanded and elaborated on in greater detail. The texts cited by the Special Rapporteur, particularly article 6 of the set of articles on flood control adopted by ILA in 1972 (*ibid.*, para. 77), also seemed to point to the existence of such principles. What was even more important, however, was the practice

of States, which took account in a reciprocal manner of their duties and obligations on an equitable basis.

43. He agreed with other members that the expression "both structural and non-structural", in paragraph 2 (*b*) of article 22, was not very clear and should be explained. Paragraph 3 was also not clear enough and should be reworked; it should be explicitly stated that the measures in question were those taken by States "individually or jointly". He would also prefer to refer to activities "carried on in the territory" of the States concerned, rather than to activities "under their jurisdiction or control". Unlike the Special Rapporteur, he believed that clarity should be the predominant concern and that, in that particular case, using the 1982 United Nations Convention on the Law of the Sea as a model was not justified.

44. In short, therefore, the entire structure of articles 22 and 23 should be revised in order to make their presentation more logical. In addition, the articles should be brought into line not only with one another, but also with all the other articles, while keeping the draft as a whole as coherent as possible.

45. He had no objection to the substance of article 23, but found that it was somewhat lacking in legal precision. For example, it would be better to spell out what was meant by "water-related dangers and emergency situations". He failed to understand the meaning of the word "primarily" in the second sentence of paragraph 1. The intention behind the second sentence had to be clear from the article, but the wording should be improved. Paragraph 2 was similarly imprecise. The greatest possible clarity was necessary in drafting such provisions.

46. With regard to the question raised by the Special Rapporteur as to whether the draft articles should establish a legal obligation to assist a State affected by a disaster and require such a State to accept offers of assistance—issues referred to in the report (*ibid.*, para. 81 *in fine*)—he pointed out that, in the absence of agreement, the problem of assistance had so far been solved on the basis of political and moral considerations and that various types of political restrictions had hampered the development of broader co-operation. The provision of assistance was decided on the basis of political considerations or at least had a political element in most cases. Acceptance of assistance might also be restricted by fears of political consequences of one kind or another. That was changing nowadays, thanks to new thinking on the question and owing to the proliferation of hazards to which States were subjected by the use of new technologies and by the growth of interdependence. Fate had had it that that new attitude should become apparent in the Soviet Union, first during the Chernobyl disaster and, even more so, after the earthquake in Soviet Armenia. While generosity during the first disaster had not always been free from political motivation, the international reaction to the tragedy in Armenia had been an important turning-point in the expression of human solidarity, which had been made possible by *perestroika* in the Soviet Union and by the general change in the international community's attitude to such disasters. In that connection, he expressed his gratitude for the disinterested assistance provided to the people of Soviet Armenia and thanked all those peoples which had reacted in the right way to the tragedy.

47. If that solidarity was to be expanded and strengthened, however, it now had to be shored up by means of a legal framework. In connection with liability for transboundary harm arising out of lawful activities, he had stressed the need for mutual assistance between the State of origin and the affected State and had explained during the Commission's consideration of the topic of international liability for injurious consequences arising out of acts not prohibited by international law that he disagreed with the decision by the Special Rapporteur for that topic to delete the provision on mutual assistance in article 7 as already referred to the Drafting Committee.[12] That unacceptable approach was related to the change in the concept of liability reflected in Mr. Barboza's fifth report on that topic (A/CN.4/423).

48. He therefore believed that it was necessary to stipulate in draft article 23 under consideration that the provision and acceptance of assistance must be entirely free from all political considerations and in line with the common interests of the watercourse States and, ultimately, those of the international community as a whole. That would pave the way for close co-operation among States in conserving an extremely precious resource, namely water, which was essential to life.

49. In order for provisions on responsibility in connection with the use of international watercourses to be elaborated, the primary rules governing the use of international watercourses must already have been formulated, for it was clear that secondary rules could be devised only after primary rules had been established. Only after obligations of conduct relating to the use of watercourses had been defined would it be possible to determine the scope of those two types of international responsibility and the legal foundation on which they were based. For many years, the Commission had been studying the question of responsibility in connection with two other topics and care must be taken in saying that rules already applied to watercourses, whereas, in fact, they were still being worked out in more general fields. Once they had come into being, they would have to be adapted to the specific topic of international watercourses. Attempting to define responsibility only in terms of the use of international watercourses would jeopardize the rest of the Commission's work. Although he did not think that the Commission should give up the idea of considering the problem of responsibility in due course, he agreed with Mr. Barboza that it was not helpful to study the question in the context of international watercourse law.

50. With regard to the sources of law cited by the Special Rapporteur, he agreed with Mr. Reuter (2123rd meeting) and other members that what was perhaps too daring an interpretation of existing agreements might create an artificial legal foundation for the formulation of rules governing the use of watercourses. Legal precedents could properly be invoked to confirm the existence of a rule of international law, but they must relate to a legal situation that was exactly like the one to be covered in the topic under consideration. In the *Corfu Channel* case,[13] the rights and obligations of riparian or user States had been determined within the

[12] See 2113th meeting, para. 22.

[13] Judgment of 9 April 1949, *I.C.J. Reports 1949*, p. 4.

framework of the legal régime governing territorial waters, but the situation was entirely different in the case of watercourses.

51. In his fifth report, the Special Rapporteur had called on the authority of the great seventeenth and eighteenth-century jurists who had set forth their sometimes naive or mystical conceptions of international law. While he had nothing but respect for the classics, he thought that, in all fairness, the position of the positivist school should also be brought out. However, the main authorities were to be found in bilateral and multilateral agreements and conventions, for the Commission had to focus its work on the study and generalization of the experience gained and the practice developed by States in solving problems that might arise during the use of international watercourses.

52. In conclusion, he said that he had referred only *in fine* to the subject of the sources of law on the uses of international watercourses in order not to give the wrong impression about his generally positive reaction to the ideas expressed in the draft articles. He did believe, however, that the articles should be revised, taking into account the comments made and the sometimes serious reservations expressed during the Commission's discussion.

The meeting rose at 11.45 a.m.

2126th MEETING

Wednesday, 28 June 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Hayes, Mr. Illueca, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Reuter, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/412 and Add.1 and 2,[1] A/CN.4/421 and Add.1 and 2,[2] A/CN.4/L.431, sect. C, ILC(XLI)/Conf.Room Doc.4)

[Agenda item 6]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

PART VI OF THE DRAFT ARTICLES:

ARTICLE 22 (Water-related hazards, harmful conditions and other adverse effects) *and*

ARTICLE 23 (Water-related dangers and emergency situations)[3] (*concluded*)

1. Mr. OGISO said that the wealth of detailed material the Special Rapporteur had provided in his excellent fifth report (A/CN.4/421 and Add.1 and 2) and brilliant oral introduction (2123rd meeting) would be of great assistance to the Commission in its task of codifying the law of the non-navigational uses of international watercourses.

2. Referring to draft article 22, paragraph 1, he said that he had doubts about the use of the words "on an equitable basis" to describe the way in which watercourse States were required to co-operate. The wording used in article 6, paragraph 2, and article 7, paragraph 1, was "in an equitable and reasonable manner", and he drew attention in that regard to paragraph (5) of the commentary to article 6.[4] Although the area of co-operation covered by articles 6 and 7 differed from that covered by draft article 22, the conceptual basis for co-operation should, in his view, be the same. Readers would find the articles easier to understand if the same terminology were used throughout. However, if the Special Rapporteur had meant to emphasize the difference between the areas of co-operation covered, an appropriate explanation should be included in the commentary.

3. With regard to article 22, paragraph 2 (*a*), which referred to the "regular and timely exchange" of data and information, he recalled that paragraph 1 of article 10 as provisionally adopted[5] comprehensively covered the issue of data and information exchange. It might be enough to refer to that provision in article 22, adding that, in the case of water-related hazards, the exchange should be conducted with greater frequency, in the light of developments in the situation.

4. Draft article 23, paragraph 3, referred to co-operation between "States in the area affected by a water-related danger or emergency situation, and the competent international organizations" and, in that connection, the Special Rapporteur had mentioned the example of the recent floods in Bangladesh. He joined the Special Rapporteur and other members of the Commission in expressing his sympathy for the suffering of the people of Bangladesh. That country's experience showed that there were two types of emergency assistance, namely assistance to stop the flood damage itself and assistance to mitigate the suffering of the victims through supplies of food and medical care. In the case of the Bangladesh floods, immediate assistance had been offered by many members of the international community, including countries not directly affected by the disaster, both through international organizations and on a

[1] Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

[2] Reproduced in *Yearbook . . . 1989*, vol. II (Part One).

[3] For the texts, see 2123rd meeting, para. 1.

[4] For the texts of articles 6 and 7 and the commentaries thereto, provisionally adopted by the Commission at its thirty-ninth session, see *Yearbook . . . 1987*, vol. II (Part Two), pp. 31 *et seq.*

[5] *Yearbook . . . 1988*, vol. II (Part Two), p. 43.