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**Summary record of the 2123rd meeting**

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

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

fully aware, as was apparent from his preliminary report[16] —for time-reversal was beyond human capacity, or, as Omar Khayyam had said, "the moving finger writes and, having writ, moves on". It was therefore a wonder to find that writers were virtually unanimous in regarding it as the normal or primary right of the injured State. Of the authors cited by Mann in that connection,[17] only Brownlie seemed to regard it as "exceptional" and only Kelsen actually denied it. Nor was that primacy likely to be seriously challenged under the various legal systems. It was of course true that, as Mann had noted, restitution in kind was "largely unknown to the common law, which, in principle and somewhat paradoxically, adheres to the rule of Roman law *omnis condemnatio est pecuniaria*".[18] But the same author had pointed out that, "even in England, for instance, the plaintiff in an action for detinue is by no means confined to monetary relief, but is entitled to delivery-up of the chattel".[19] In Islamic law, the primacy of *restitutio in integrum* could be arrived at by necessary inference from the old rule *Idha batala-l-aslu yusaru ila-l-badal* ( اذا بطل الأصل يصار الى البدل ), meaning "If restoration of the original situation is impossible, seek an alternative". That rule had been codified in the Ottoman Civil Code as article 53. It was also worth noting that Islamic law referred to pecuniary compensation as "imperfect reparation", *al qada'ul nackis* ( القضاء الناقص ).

80. Recent trends in the literature, however, challenged not only the primacy, but also the availability of *restitutio in integrum*. Notable in that regard were two works by Christine Gray published in 1985 and 1987.[20] In those works the author had arrived at the conclusion, on the basis of a review of arbitral awards and decisions by the ICJ and other tribunals, that there was little if anything to support the primacy of *restitutio in integrum* in international arbitral practice and that the dictum in the *Chorzów Factory* case could not be relied upon to support a generally applicable theory to that effect. Without taking issue with that conclusion, he believed that the availability of other modes of reparation, the fact that courts and arbitrators worked in isolation and the fact that the latter rarely granted restitution without an express provision to that effect could equally be interpreted as supporting the primacy of *restitutio*. At any rate, he did not believe that the frequency of resort to other remedies challenged the primacy of *restitutio in integrum*.

81. Similar challenges to the primacy of *restitutio in integrum* emanated from the concept of special régimes. In that connection, he too considered that there was no need, for the time being, for a special régime for the treatment of aliens, although it was a matter that called for further study, especially in view of the fact that the Special Rapporteur had ascribed a large scope to cessation and at the same time did not provide for the exception of "excessive onerousness" in the case of cessation. An injured State would, under those circumstaces, opt for cessation rather than *restitutio in integrum*, and that constituted a gap in the Special Rapporteur's strategy. Ultimately, much would depend on the extent to which the Commission was willing to allow the content and—to use Combacau and Alland's term—the "extrinsic" value of the primary rules to determine the categorization of the secondary rules.

82. He wished to reserve his position on the concept of excessive onerousness as an exception to *restitutio in integrum*, which had been introduced by the Special Rapporteur in the light of the problem of nationalizations carried out in breach of international law.

83. Another problem was that of legal impossibility. While primary rules might, of course, expressly prescribe the consequences of their breach—as did article 50 of the European Convention on Human Rights[21]—he felt that no general conclusion could be reached as to the non-availability of *restitutio in integrum* on the basis of such examples, since they were the exception that proved the rule.

84. Finally, he supported the Special Rapporteur's conclusions (*ibid.*, paras. 109-112) concerning the right of choice of the injured State. Such a right no doubt existed, but the fact that it might lead to abuse if unlimited suggested that limitations should be placed upon it. A rich State might, for instance, pollute an international river to a level above that of appreciable harm. If the injured State or States were to accept pecuniary compensation in lieu of restitution, a situation of servitude would arise. Such cases should be borne in mind in drafting article 7, so as to ensure that limitations on the freedom of a State took account not only of the interests of other States, but also of the environment.

*The meeting rose at 1.10 p.m.*

[16] See *Yearbook . . . 1980*, vol. II (Part One), pp. 112-113, document A/CN.4/330, para. 29.

[17] F. A. Mann, "The consequences of an international wrong in international and municipal law", *The British Year Book of International Law, 1976-1977*, vol. 48, p. 3 and footnotes 6 and 7.

[18] *Ibid.*, p. 2.

[19] *Ibid.*, p. 3.

[20] C. D. Gray, "Is there an international law of remedies?", *The British Year Book of International Law, 1985*, vol. 56, p. 25; and *Judicial Remedies in International Law* (Oxford, Clarendon Press, 1987).

[21] See 2104th meeting, footnote 10.

## 2123rd MEETING

*Thursday, 22 June 1989, at 10 a.m.*

*Chairman*: Mr. Bernhard GRAEFRATH

*Present*: Prince Ajibola, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Al-Qaysi, 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. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

## The law of the non-navigational uses of international watercourses (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

PART VI OF THE DRAFT ARTICLES

1. The CHAIRMAN invited the Special Rapporteur to introduce the first part of his fifth report on the topic (A/CN.4/421 and Add.1 and 2), namely chapter I on water-related hazards and dangers, which contained articles 22 and 23 of part VI of the draft, reading as follows:

PART VI

WATER-RELATED HAZARDS, DANGERS AND EMERGENCY SITUATIONS

*Article 22. Water-related hazards, harmful conditions and other adverse effects*

**1. Watercourse States shall co-operate on an equitable basis in order to prevent or, as the case may be, mitigate water-related hazards, harmful conditions and other adverse effects such as floods, ice conditions, drainage problems, flow obstructions, siltation, erosion, salt-water intrusion, drought and desertification.**

**2. Steps to be taken by watercourse States in fulfilment of their obligations under paragraph 1 of this article include:**

**(*a*) the regular and timely exchange of any data and information that would assist in the prevention or mitigation of the problems referred to in paragraph 1;**

**(*b*) consultations concerning the planning and implementation of joint measures, both structural and non-structural, where such measures might be more effective than measures undertaken by watercourse States individually; and**

**(*c*) preparation of, and consultations concerning, studies of the efficacy of measures that have been taken.**

**3. Watercourse States shall take all measures necessary to ensure that activities under their jurisdiction or control that affect an international watercourse are so conducted as not to cause water-related hazards, harmful conditions and other adverse effects that result in appreciable harm to other watercourse States.**

*Article 23. Water-related dangers and emergency situations*

**1. A watercourse State shall, without delay and by the most expeditious means available, notify other, potentially affected States and relevant intergovernmental organizations of any water-related danger or emergency situation originating in its territory, or of which it has knowledge. The expression "water-related danger or emergency situation" includes those that are primarily natural, such as floods, and those that result from human activities, such as toxic chemical spills and other dangerous pollution incidents.**

**2. A watercourse State within whose territory a water-related danger or emergency situation originates shall immediately take all practical measures to prevent, neutralize or mitigate the danger or damage to other watercourse States resulting from the danger or emergency.**

**3. States in the area affected by a water-related danger or emergency situation, and the competent international organizations, shall co-operate in eliminating the causes and effects of the danger or situation and in preventing or minimizing harm therefrom, to the extent practicable under the circumstances.**

**4. In order to fulfil effectively their obligations under paragraph 3 of this article, watercourse States, together with other potentially affected States, shall jointly develop, promote and implement contingency plans for responding to water-related dangers or emergency situations.**

2. Mr. McCAFFREY (Special Rapporteur) said that he would first make some general observations, then comment on chapter I of his fifth report (A/CN.4/421 and Add.1 and 2), which contained draft articles 22 and 23, and finally make a few remarks on the draft articles themselves.

3. His fifth report contained four draft articles covering three subtopics as set out in the outline which he had proposed in his fourth report (A/CN.4/412 and Add.1 and 2, para. 7) and which had met with general agreement in the Commission. In addition to articles 22 and 23, on water-related hazards and dangers, he was proposing, in chapters II and III of the report, articles 24 and 25 on the relationship between non-navigational and navigational uses and on the regulation of international watercourses, respectively. He suggested that the Commission focus its discussion on articles 22 and 23. He hoped, however, to introduce articles 24 and 25 briefly before the end of the session, so that members could take note of them and discuss them at the next session.

4. He intended to submit the remaining material on the topic at the next session. That would enable the Commission to complete the first reading of the draft articles before the end of its current term of office, assuming that progress of work in the Drafting Committee so permitted. There might also be an additional part on the settlement of disputes.

5. The part of the fifth report now before the Commission contained two draft articles provisionally numbered article 22 (Water-related hazards, harmful conditions and other adverse effects) and article 23 (Water-related dangers and emergency situations). The distinction between the problems dealt with in the two articles was essentially a matter of time-frame: those covered by article 22 were normally of an ongoing, chronic nature, while those addressed in article 23 usually took the form of calamitous events which gave rise to emergency situations. He would point out in that connection that article 23 was based on draft article 18 [19] (Pollution or environmental emergencies), which had been submitted to the Commission at its previous session[3] and dealt with only one category of emergency situations. A number of members of the Commission, as well as certain representatives in the Sixth Committee of the General Assembly, had supported the inclusion of that category in a broader context.

6. With regard to the subtopic under consideration, namely water-related hazards and dangers, it was very easy and tempting to become transfixed by such spectacular problems as floods and chemical spills and to lose sight of more chronic, and sometimes equally significant, problems such as those caused by ice conditions, siltation, erosion, droughts and desertification, which could contribute to or exacerbate catastrophic events.

7. In referring to floods and related problems, he would not discuss the question of pollution incidents, which had been considered at the previous session. The reason why floods had received more attention than other problems in treaties and generally in the work of international organizations was probably that they were the type of natural disaster that resulted in the greatest loss of life and most widespread destruction. The terrible losses recently caused by floods in Bangladesh were a particularly dramatic

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

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

[3] See *Yearbook . . . 1988*, vol. II (Part Two), p. 32, footnote 94.

example. The disaster in Bangladesh was, however, not an isolated one; it was the kind of event that had prompted the General Assembly, in 1987, to designate the 1990s as the International Decade for Natural Disaster Reduction, a decade in which the international community, under the auspices of the United Nations, would "pay special attention to fostering international co-operation in the field of natural disaster reduction".[4]

8. Although floods were only one kind of natural disaster, they did the greatest damage and their prevention or mitigation required a combination of measures such as forecasting, contingency planning, provision of early warning and the construction of physical works for the control of flood waters. At the same time, the tremendously increased capacity of humans to alter their physical environment had resulted in activities which also, directly or indirectly, caused flooding; that was the case, for example, with improper range management, deforestation and the construction of river embankments. In that connection, it would be noted that most of the international agreements surveyed in his fifth report (A/CN.4/421 and Add.1 and 2, paras. 18-53) seemed to assume that the causes of floods were entirely natural; by and large, they were confined to requiring the collection and exchange of information and the establishment of warning systems. Doubtless the parties to those treaties simply assumed that they were under an obligation not to undertake or permit any activities which would cause appreciable—and, in the case of flooding, serious and widespread—harm to the other party or parties. Nevertheless, human activity as a contributing cause of floods, as well as of many of the other problems dealt with in chapter I of the report, should not be ignored.

9. Other water-related hazards and adverse effects often dealt with in watercourse agreements were ice conditions, drainage problems, flow obstructions, siltation and erosion. Illustrations of treaty provisions addressing those problems were contained in the report (*ibid.*, paras. 31-53). In view of the limited time available, he would not go into each of those problems, but would merely say that many of them were often interrelated. For example, floods could be caused in part by siltation and, in turn, could cause erosion of river banks. The breaking up of ice-jams could also result in floods and could obstruct not only navigation, but also the normal flow of water.

10. The few relevant examples of diplomatic correspondence and official statements he had been able to discover (*ibid.*, paras. 54-65) revealed that States did not seem to disagree with the proposition that a State was under an international legal duty not to engage in conduct that would cause flooding damage, other similar damage or other adverse effects to another State or States.

11. The other authorities surveyed in the report also supported that principle. He would not go through that material at present, but was prepared to answer any questions in that connection. He noted, however, that, in his view, those authorities uniformly supported several fundamental principles: the duty to refrain from conduct that would cause or exacerbate conditions of the kind under consideration, when such conduct would result in appreciable harm in other watercourse States (which was really nothing more than a concrete application of the general rule contained in article 8 (Obligation not to cause appreciable harm) as provisionally adopted at the previous session[5]); the general obligation to co-operate with other watercourse States in preventing or mitigating water-related hazards and adverse effects; the obligation to warn other watercourse States of any known water-related danger or emergency situation; and the obligation of a watercourse State in whose territory a water-related danger or emergency situation originated to take, without delay, all feasible measures to eliminate or mitigate it and to prevent damage to other watercourse States. Many of the instruments and other authorities reviewed went much further than that, and none took a contrary position.

12. The other problems dealt with in chapter I of the report were salt-water intrusion (*ibid.*, paras. 105-108) and drought and desertification (*ibid.*, paras. 109-117). While those problems were no less serious—in fact, drought and desertification could be much more serious in the long run—the law governing them was not nearly so well developed. Except for the problem of salt-water intrusion, the applicability of the "no harm" rule was less clear in such cases. On the other hand, recent studies and intergovernmental meetings had stressed the importance of regional and international co-operation in combating problems of drought and desertification. The latter phenomenon was particularly alarming; it was estimated that 50,000 to 70,000 square kilometres of arable land were lost to "creeping desert" every year in Africa alone, and Asia and South America were also affected. Moreover, problems of drought and desertification were likely to become more severe in the future owing to the phenomenon of global warming; and they, in turn, contributed to the "greenhouse effect" by reducing the amount of vegetation that absorbed carbon dioxide.

13. Turning to the proposed articles, he said that the problems addressed in the report were dealt with according to the type of action to be taken by watercourse States, in other words according to whether they were problems of a chronic nature (art. 22) or conditions which gave rise to emergency situations (art. 23). The one exception was the case of floods, which were dealt with, expressly or by implication, in both articles, the reason being that, while floods did give rise to emergency situations, they could be prevented and mitigated only through long-term efforts involving co-operation and active collaboration between watercourse States. Since the articles and the comments accompanying them were self-explanatory, he would refer to them only briefly.

14. Paragraph 1 of draft article 22 set forth the general duty to co-operate with regard to water-related hazards, harmful conditions and other adverse effects, paragraph 2 defined the steps to be taken to fulfil that obligation and paragraph 3 set forth the obligation of watercourse States to ensure that activities under their jurisdiction or control did not cause water-related hazards, harmful conditions and other adverse effects that resulted in appreciable harm to other watercourse States. As stated in paragraph (3) of his comments on the article, co-operation "on an equitable basis" (para. 1) encompassed, in addition to the usual

[4] General Assembly resolution 42/169 of 11 December 1987, para. 3.

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

communication of relevant information, 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. As indicated in paragraph (4) of the comments, moreover, article 22—in particular, its paragraphs 1 and 3—would apply to the harmful effects of water on activities not directly related to the watercourse. That was important because a flood could have effects outside the watercourse itself which it would be wrong to overlook.

15. The concept of "jurisdiction or control" (para. 3) as opposed to the concept of "territory" was discussed in paragraph (6) of the comments. Without completely dismissing the latter concept, he considered that the former, which was to be found in other draft articles prepared by the Commission and in the 1982 United Nations Convention on the Law of the Sea, was sufficiently well known to be warranted in the present context. Lastly, he explained that paragraph 3 of draft article 22 would apply, for example, to uses of land or water which led to such problems as flooding, siltation, erosion or flow obstruction; it was a concrete application of the rule embodied in article 8 as provisionally adopted.

16. Draft article 23, paragraph 1, stated what was perhaps the most fundamental obligation in the subtopic under consideration, namely prompt notification of any water-related danger or emergency situation to potentially affected States and relevant regional or international intergovernmental organizations, which were, as had been pointed out in the Commission and in the Sixth Committee, in a position to provide valuable services. As stated in paragraph 1, the expression "water-related danger or emergency situation" included both natural dangers and situations and those resulting from human activities. The Commission might wish to include a definition of that expression in the article on the use of terms.

17. Paragraph 2 provided that a watercourse State within whose territory a water-related danger or emergency situation originated was obliged immediately to take all practical measures to prevent, neutralize or mitigate the danger or damage; quite simply, that State was in the best position to do so. In many cases, however, the situation would be beyond its control and that was the reason for the "all practical measures" proviso.

18. Paragraph 3 required States in the area affected by a water-related danger or emergency situation to co-operate in eliminating the causes and effects of the danger or situation and in preventing or minimizing harm therefrom. As explained in paragraph (4) of his comments on article 23, the expression "States in the area affected" included, in addition to watercourse States, non-watercourse States that were, or might be, affected by a danger or emergency situation, as in the case of a coastal State that might be affected by pollution which originated in a watercourse State and found its way to the sea. The obligation embodied in paragraph 3 was essential, for it might well be that a watercourse State that was not severely affected was the only one that had the technological means required to remedy the emergency situation.

19. Paragraph 4 dealt with contingency plans and, like paragraph 3, was derived from article 199 of the 1982 United Nations Convention on the Law of the Sea. In paragraphs (5) and (6) of the comments, the Commission was invited to indicate whether it wished States benefiting from protective or other measures to be required to compensate third States that took such measures and whether article 23 should include a provision requiring a State affected by a disaster to accept the assistance offered to it and not to regard offers of assistance as interference in its internal affairs. Several of the publicists whose works he had cited in the report placed particular emphasis on the latter obligation, comparing it to the rights which international human rights instruments granted to citizens affected by danger.

20. In his report (A/CN.4/421 and Add.1 and 2, para. 5), he suggested that the Commission might wish to consider whether the draft articles should contain not only primary rules setting forth the obligations of watercourse States to warn, co-operate, mitigate and prevent, but also secondary rules specifying the consequences of the breach of those obligations. Clearly, the consequences of breaches of obligations relating to man-made water-related hazards and dangers would be more extensive than the consequences of breaches of obligations relating to purely natural water-related hazards and dangers. His own view was that the question should be left to the general field of State responsibility, the rules of which would be applied to water-related problems on a case-by-case basis. It would be helpful for the Commission to explore the question of secondary rules, but he feared that it might find itself on shaky ground, in an area where he had been unable to compile documents or materials on which to base a thorough discussion.

21. Mr. REUTER thanked the Special Rapporteur for his interesting introduction to his fifth report (A/CN.4/421 and Add.1 and 2), which was just as remarkable as the earlier ones, but which called for two general comments.

22. First, it was surprising that the Special Rapporteur seemed to agree with the view that the existence of a number of treaties with provisions that closely resembled one another created a customary rule of international law. He himself had serious reservations on that point and would warn the Commission against being too quick to generalize such a principle. Clearly, treaties were the principal instrument of international relations, but a customary rule was not formed simply because a number of treaties had the same provisions.

23. Secondly, with regard to the arbitral award in the *Lake Lanoux* case,[6] which was so often cited in reports and documents on strict liability, pollution and international watercourses, he noted that the arbitral tribunal had based its decision primarily on texts relating to that specific case, and, in its brief incursion into the area of general principles, it had drawn only negative conclusions. The tribunal had indicated in its findings that there was no rule in international law "which forbids a State, acting to protect its legitimate interests, from placing itself in a situation which enables it in fact, in violation of its international

[6] Original French text of the award in United Nations, *Reports of International Arbitral Awards*, vol. XII (Sales No. 63.V.3), p. 281; partial translations in *Yearbook . . . 1974*, vol. II (Part Two), pp. 194 *et seq.*, document A/5409, paras. 1055-1068; and *International Law Reports, 1957* (London), vol. 24 (1961), pp. 101 *et seq.*

obligations, to do even serious injury to a neighbouring State".[7] Yet he wondered whether the tribunal would have adopted the same position if it had had to deliberate and rule following a disaster such as the one which had been caused by the bursting of a dam upstream from the town of Fréjus in France and in which there had been hundreds of victims. It was highly unlikely that, under international law at present, as it had developed since the *Lake Lanoux* award, a State could be said to have the right, in exercising its territorial sovereignty, to subject a neighbouring State to serious hazards.

24. Referring to draft articles 22 and 23 submitted by the Special Rapporteur, he welcomed the courageous step the Special Rapporteur had taken in reconsidering matters already dealt with in earlier articles. In introducing his report, the Special Rapporteur had said that the difference between the two articles was essentially temporal in nature, since article 22 dealt with ongoing situations and article 23 related to single events such as disasters. It was on the basis of that analysis that he had split the single article he had originally devoted to pollution into the texts now contained in articles 22 and 23 and he was to be commended on that initiative, for the members of the Commission must, in their capacity as jurists, try to identify the general features common to different situations instead of treating those situations individually and successively, although there was certainly much to be gained, from the technological and human-interest point of view, from a detailed examination of various types of water-related hazards and dangers.

25. He urged the Special Rapporteur to explain the meaning of the words "as the case may be" in paragraph 1 of article 22. Was he right in believing that those words referred to the material or physical circumstances of the case in question?

26. In the French text, the words *risques, conditions dommageables et autres effets préjudiciables provoqués par les eaux*, which formed the title of article 22 and were also used in paragraphs 1 and 3, were neither clear nor felicitous: but he could not judge the English text.

27. He would like to know what was meant by the expression "both structural and non-structural" in paragraph 2 (*b*). Was he correct in assuming that it referred to institutional or operational measures, in other words to measures which had some sort of legal or physical continuity? In paragraph 2 (*c*), the word "preparation" should be replaced by "pursuance", because it was to be hoped that studies of the efficacy of measures would be carried out before such measures were taken.

28. In paragraph 3, the Special Rapporteur had replaced the term "territory" by the words "jurisdiction or control", but had indicated that he was prepared to accept another formulation. If the term "jurisdiction" had the very general meaning it normally carried in English, he wondered whether the use of the term "control" was really necessary, but he would endorse any solution adopted by the Special Rapporteur. It was interesting to note, however, that the Special Rapporteur had retained the word "territory" in article 23, paragraph 2.

29. The Special Rapporteur's comments in his report on article 22, paragraph 3, appeared to be the written reflection of the general idea he had put forward in his oral introduction, when he had said—somewhat apprehensively—that it might be appropriate to consider the consequences of a "breach" as far as compensation or reparation were concerned. Yet there was no breach involved in the context of paragraph 3: it was simply a matter of requesting compensation *ex post facto* from a State because it had benefited from activities in which it had not taken part. The Commission thus had to decide whether the matter related to the topic of international liability or whether it should be studied under the present topic. Although he would not wish to decide the matter out of hand, he was in favour of the second approach, since the topic of international liability was much more general and it was often a good idea to proceed from the particular to the general. The Special Rapporteur might well ask which legal mechanism would come into play in such a situation and draw on internal law mechanisms, such as proceedings *in rem verso* and the various types of agency in common law.

30. In connection with article 23, the Special Rapporteur had asked whether the expression "emergency situation" should be defined. He would have no objection, but did not think that such a definition was necessary, since an emergency was an exceptional situation *per se* and what was exceptional could not be categorized.

31. In the reference to some types of pollution in paragraph 1, the word "immediately" should be added before the words "dangerous pollution incidents". The subject of the paragraph was, after all, the types of pollution that resulted in a disaster and precision was necessary in order to avoid reopening the debate on the question of pollution.

32. In paragraph 3, in which an obligation to co-operate was placed upon States, the Special Rapporteur used the phrase "States in the area affected", whereas, in paragraph 4, which spelled out the obligation more clearly, he used the phrase "watercourse States, together with other potentially affected States". He had no specific proposal to make, but thought that the concept of "the area affected" should be explained in greater detail.

33. In order to reply to the question raised by the Special Rapporteur in paragraph (5) of his comments on article 23, it would first be necessary to know whether the obligation to compensate would take effect before or after the danger had materialized or the disaster had occurred. In the first case, a compulsory measure of prevention would be required and he feared that it would give rise to problems. However, he fully agreed to the inclusion of a provision establishing an obligation to compensate that would take effect once the disaster had occurred, in accordance with the theory of agency or some similar concept.

34. Lastly, in reply to the question raised by the Special Rapporteur in paragraph (6) of his comments, he said he could agree that article 23 should expressly state that no offer of assistance could ever be regarded as interference in the internal affairs of the State to which it was made, but he did not believe that a State could be required to accept such assistance. An obligation of that kind would be contrary to the principle of sovereignty, to which States were still very much attached.

[7] Para. 9 (second subparagraph *in fine*) of the award (*Yearbook ... 1974*, vol. II (Part Two), p. 196, document A/5409, para. 1064).

35. Mr. CALERO RODRIGUES said that, while he fully understood that draft article 22 related to chronic or ongoing situations and draft article 23 to sudden occurrences, he did not think that the terms used were at all satisfactory, inasmuch as the first article referred to "hazards, harmful conditions and other adverse effects" and the second to "dangers and emergency situations". The concept of "emergency situations" was clear enough, but he would like further explanations on the relationship between "hazards" and "dangers".

36. Mr. MAHIOU, referring to the question raised in the fifth report (A/CN.4/421 and Add.1 and 2, para. 5) as to whether the draft articles should contain not only primary rules setting forth the obligations of watercourse States, but also secondary rules specifying the consequences of the breach of those obligations, said that the Special Rapporteur was touching on the problem of the overlapping between the topic under consideration and other topics with which the Commission was dealing. The issue was in fact whether rules on responsibility should be included in the draft articles on international watercourses or whether the draft should simply refer to the articles on State responsibility or those on international liability for injurious consequences arising out of acts not prohibited by international law.

37. It was also clear from the section of the report relating to studies by individual experts (*ibid.*, paras. 81-88) that those experts faced the same problem: they were trying to identify both the foundations and the content of State responsibility in that regard. That was the case, for example, of J. W. Samuels (*ibid.*, para. 81), who had referred to a threefold responsibility: the obligation to take preventive measures against natural disasters, the obligation to assist other States and the obligation to accept relief from other States. Was it appropriate, in the framework of the topic under consideration, to make provision for the specific consequences of State responsibility or should there simply be a reference, as he had just indicated, to strict liability and responsibility for wrongfulness? If there were consequences which pertained specifically to the topic under consideration and which might not be dealt with elsewhere, perhaps they should be stated in draft articles 22 and 23.

38. All the international watercourse agreements analysed by the Special Rapporteur (*ibid.*, paras. 18-53), which offered the advantage of illustrating relations between riparian States, appeared to be bilateral agreements and he wondered whether there were not any broader, multilateral, regional or continental agreements or conventions between river-basin countries. If there were any, how did they relate to bilateral conventions? In other words, should the régime of co-operation which was to apply in the situations covered by articles 22 and 23 be the sum total of the bilateral agreements or should it go beyond those agreements and constitute a multilateral system? Depending on the answer, the position would be very different, since co-operation between countries that were far away from each other necessarily took different forms from co-operation between neighbouring countries. The possibility of broadening the draft in that way therefore had to be considered in the light of whether it would be acceptable to States.

39. He welcomed paragraph 86 of the report, where the Special Rapporteur expressed his preferences through the writers he had cited. The approach he had adopted in drafting articles 22 and 23 was thus clearer. Such a presentation, which summarized the legal thinking on the subject in a few words, was very interesting, but he was not sure that it would lead to proposals that would be acceptable to all States.

40. In the report (*ibid.*, para. 104), the Special Rapporteur cited a passage from the *Lake Lanoux* arbitral award which stated that international law did not prohibit a State, "acting to protect its legitimate interests, from placing itself in a situation which enables it in fact, in violation of its international obligations, to do even serious injury to a neighbouring State". He had been concerned about the use of the words "even serious injury", but what Mr. Reuter had just said had allayed his fears. The protection of a State's interests, however legitimate, could in no case serve as a justification for that State causing injury—much less serious injury—to the interests of its neighbours. That development in case-law was reassuring.

41. With regard to the texts of draft articles 22 and 23, he noted that the title of article 22 mentioned only "hazards, harmful conditions and other adverse effects". Until now, however, reference had been made to "appreciable" harm, as in the title of article 8 as provisionally adopted at the previous session.[8] Although agreement had not yet been reached on the adjective to be used ("substantial", "considerable", etc. had also been suggested), it might be useful to include that qualification in article 22.

42. In paragraph 1 of article 22, the phrase "such as floods, ice conditions, drainage problems . . .", which qualified the expression "water-related . . . adverse effects", did not make it clear whether the list was exhaustive or not. If it was not exhaustive, the words "such as" should be replaced by "in particular".

43. In paragraph 2 (*b*), the meaning of the expression "both structural and non-structural" was by no means obvious. Those terms were used by economists and other technical experts, but what did they mean in legal parlance and, more precisely, in the context of the topic under consideration?

44. In paragraph 3, the Special Rapporteur had used the expression "jurisdiction or control" rather than the term "territory". He had explained why in paragraph (6) of his comments on article 22, but the arguments he had put forward were not as clear as they might be. Moreover, the example he had given would seem to point to the opposite conclusion. Article 22 dealt with phenomena whose territorial nature was indisputable: a river definitely formed part of the territory of a State, whereas, for example, the sea did not. Thus, although paragraph 3 was acceptable, the comments on it would have to be looked at again.

45. Turning to draft article 23, he said that he had doubts about the need to define "dangers and emergency situations", as was done in paragraph 1; if it were retained, however, that definition should be included in article 1, on the use of terms.

46. With regard to paragraphs 3 and 4 and the question raised by the Special Rapporteur in paragraph (6) of his comments on article 23, his own position was similar to that of Mr. Reuter: States had to be encouraged to accept

[8] See footnote 5 above.

relief assistance, but they should certainly not be compelled to do so. Perhaps, as a matter of caution, it would be advisable to add a safeguard clause which would be based on article 194, paragraph 4, of the 1982 United Nations Convention on the Law of the Sea and which might read:

> "In taking measures to prevent, reduce or control water-related hazards, dangers and emergency situations, watercourse States shall refrain from unjustifiable interference with activities carried on by other States in the exercise of their rights and in pursuance of their duties in conformity with the watercourse agreement."

47. The CHAIRMAN proposed that the Commission should adjourn to allow the Planning Group to meet.

*It was so agreed.*

*The meeting rose at 11.35 a.m.*

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## 2124th MEETING

*Friday, 23 June 1989, at 10 a.m.*

*Chairman*: Mr. Bernhard GRAEFRATH

*Present*: Prince Ajibola, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Al-Qaysi, 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. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

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### 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. McCAFFREY (Special Rapporteur) said that, to assist members in their further discussion of the topic, he wished to clarify two points that had been raised. The first concerned the expression "structural and non-structural" in paragraph 2 (*b*) of draft article 22, about which both Mr. Reuter and Mr. Mahiou (2123rd meeting) had expressed some doubts. What he had had in mind was simply consultations between watercourse States concerning physical structures such as dams and embankments that would help to alleviate the problem of flooding in particular. It had not been his intention to ascribe any more theoretical meaning to the expression. However, if it was considered to be confusing, some other expression could easily be found.

2. The second point concerned the term "hazards". While he had indeed said that draft article 22 was concerned with chronic situations and draft article 23 with emergency situations, he had also said that, under article 22, there was one exception, relating to floods or other calamities, that could be prevented by ongoing co-operation between watercourse States in the form, for instance, of study teams and the exchange of data and information. Perhaps one source of confusion was that the term "hazard" had been translated into French as *risque*, which was not felicitous. The Commission might therefore wish to find another term for "hazard" to convey the underlying idea more accurately.

3. He had, however, also used the term "hazard" in a second sense, namely in reference to accumulations of sediment which formed sandbanks in the middle of a channel and in reference to ice-floes or ice-jams which might not in themselves constitute an emergency situation such as to give rise to the obligations under article 23, but which none the less constituted a hazard to navigation and other uses of the water.

4. In short, under the terms of article 22, watercourse States were required to co-operate on measures to prevent such dangers as floods and serious drifting ice-floes, and to migitate the harmful effects thereof, possibly by the construction of appropriate works. Article 23, on the other hand, covered situations in which there was an actual or imminent emergency, in which event any State having knowledge of the emergency was required to warn other watercourse States in order to prevent any harmful effects. It was really a matter of a difference in the time-frame.

5. Mr. BENNOUNA extended his thanks to the Special Rapporteur for the exhaustive documentation presented on both the legal and the technical aspects of the topic. As was apparent from that documentation, the risk of disaster was evenly distributed throughout the world. Although the sombre picture painted by the Special Rapporteur was a source of pessimism, the solutions proposed contained elements of optimism.

6. After analysing the concept of hazards and dangers, the Special Rapporteur, in his fifth report (A/CN.4/421 and Add.1 and 2, para. 5), raised the very important question of the structure of the draft as a whole, suggesting that the Commission might wish to consider "whether the draft articles relating to this subtopic should contain not only primary rules setting forth the obligations of watercourse States, but also secondary rules specifying the consequences of the breach of those obligations". For his own part, he wished that that question could have been raised much earlier. If indeed it were decided to include secondary rules, those rules should apply not only to the part of the draft dealing with situations of danger and emergency situations, but to the draft as a whole. It was in the light of that consideration that the consequences of the choice to be made in that regard must be assessed.

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[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.