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Summary record of the 2124th meeting

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

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

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.

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.

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.

7. The Commission was faced with three options. First, it could limit itself to the primary rules, as it apparently had done thus far, and not lay down obligations with regard to responsibility. That would involve an implied *renvoi* to the rules under the draft articles on State responsibility and on international liability for injurious consequences arising out of acts not prohibited by international law. Secondly, it could lay down a general principle of responsibility in the event of a breach of the primary rules, together with guidelines of a very general nature to temper that responsibility in the light of the rules and situations concerned, leaving it to States, courts and arbitrators to infer more specific rules therefrom. Thirdly, it could stipulate precisely the type of responsibility incurred for each case and each obligation.

8. Of the three options, he tended to favour the first or the second, since the Commission had to complete the first reading of the draft articles by 1991, and since entering into the problems of responsibility in any rigorous manner would be going a little too far. Also, the Commission's aim was to achieve as broad a draft as possible in order to cover very diverse situations, and it was anxious not to alarm States with rules that were too restrictive, for that might dissuade them from entering into a convention of a multilateral nature. If, therefore, the Commission was to remain within the context of a framework agreement and not to exceed its mandate, it should lay down a very general rule of responsibility along with fairly global guidelines. It would be helpful if, as had been suggested, the Special Rapporteur could produce a provision on responsibility by 1990 to test the feasibility of introducing a secondary norm into the draft.

9. The whole question depended on the way in which States would organize their co-operation, particularly in the special case of some fairly large-scale dangers and hazards. Such co-operation must have a well-defined objective. Wide-ranging phenomena such as that of global warming, referred to in the report (*ibid.*, para. 7), or phenomena connected with the environment in general, went beyond the purview of the riparian States of a given river and raised problems at another level which should be dealt with elsewhere. On the other hand, the question of floods (*ibid.*, paras. 9 *et seq.*) lay at the heart of the topic, being the archetype of a natural phenomenon that man had endeavoured to master throughout the centuries. In that connection, the Special Rapporteur affirmed that "One form of evidence of international custom is the appearance of similar provisions in a wide range of international agreements" (*ibid.*, para. 18). That was a somewhat bold statement which was, however, moderated by the fact that the Special Rapporteur used the words "one form of evidence" rather than "evidence". The matter was none the less far more complex. Not all practice and treaties had the same content and it could not therefore be said that there was an *opinio juris* relating to a precise obligation with respect to flood control. The Special Rapporteur had also cited (*ibid.*, footnote 39) a 1958 Memorandum of the United States Department of State according to which there were "principles limiting the power of States to use systems of international waters without regard to injurious effects on neighbouring States", but that was an extremely general remark which was already reflected in the obligation not to cause appreciable harm laid down in article 8 as provisionally adopted by the Commission at the previous session.[4] Again, the treaties which the Special Rapporteur cited were extremely varied and could not be said to reveal a consistent practice on which international custom could be founded. In any event, disaster control was more a matter of progressive development of the law than of custom.

10. With regard to practice in general, greater account should be taken of the work done by the United Nations in preparation for the International Decade for Natural Disaster Reduction. A group of experts which had been appointed in that connection had already met twice, in Morocco and Japan, and was expected to submit its report to the Secretary-General before the next session of the General Assembly. Useful information for the purposes of the present topic was to be gleaned from that United Nations action.

11. It was clear that there was a growing feeling of interdependence and world solidarity in combating natural disasters. In that connection, the Special Rapporteur, in his summary of the relevant literature, had noted that reference had been made, in the context of what certain authors had termed the "third generation of human rights", to two types of obligation, one being the obligation to aid another State afflicted by a natural disaster and the other being the obligation of the afflicted State to receive aid. The same writers deplored the reluctance of certain countries to call upon external aid to deal with natural disasters. Although such ideas fell outside the strict purview of the law, they could fertilize and promote the development of the law.

12. Draft article 22 was concerned with measures that were not of an immediately urgent nature, since they applied to the period prior to the occurrence of a disaster. The article therefore served no purpose, as it added nothing to what had already been provided for elsewhere in the draft. On the other hand, draft article 23 concerned disasters that had actually occurred and was fully justified. The most interesting point about the article was that it provided for contingency plans which must be elaborated and, in the event of a disaster, implemented as quickly as possible with international assistance. He would have liked that particular provision, however, to be developed further and possibly to be a little more restrictive.

13. The Special Rapporteur raised two questions in paragraphs (5) and (6) of his comments on article 23. The first concerned compensation by States benefiting from measures of protection adopted by other States. Such compensation could indeed be envisaged, provided that it was based on the principle of equitable distribution, as suggested by the Special Rapporteur himself. A problem akin to the private-law notion of unjust enrichment was, after all, involved.

14. The second question was more important and raised philosophical problems that went beyond the law, concerning as it did the duty to intervene for the purpose of providing assistance. It was a notion that smacked somewhat of humanitarian intervention and might be suspect on that ground, since humanitarian intervention had been used throughout the nineteenth century as a pretext for all kinds of violations of the sovereignty of small countries. In the present instance, however, a more disinterested phenomenon was involved, and one to which there were two aspects:

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

the duty of assistance, and the obligation to accept such assistance. There was no problem with regard to the first aspect and, in his opinion, the only modality required for the time being was an international organ of a universal character or a regional organization or institution. Yet it would be desirable as an extension to the future instrument if provision could be made for a highly flexible institution to implement the contingency plans required under article 23. On the other hand, he did not think that an obligation to accept external assistance could be imposed on a country, although it was obviously immoral not to accept such assistance in order to alleviate the sufferings of the population. The most that could be done was perhaps to provide that any refusal must be accompanied by a statement of the reasons or, conceivably, that the State due to receive the assistance could require that it be channelled through an international organization so as to avoid any pressures that might be linked to bilateral aid.

15. Lastly, he trusted that the Special Rapporteur would abide by his undertaking to provide the Commission with all the remaining elements for consideration of the topic by the following session, so that the draft could be finalized before the end of its current term of office.

16. Mr. AL-QAYSI paid tribute to the Special Rapporteur for his well-documented fifth report (A/CN.4/421 and Add.1 and 2), which contained a wealth of technical material.

17. He agreed with the Special Rapporteur's statement that

> there is a continuum of possibilities, ranging from the wholly natural hazard or disaster at one end to that which is entirely man-made at the other. The legal régimes of prevention, mitigation and reparation should therefore take into account not only the nature of the disaster . . . but also the degree to which human intervention contributes to harmful consequences. (*Ibid.*, para. 4.)

He had not, however, been able to arrive at any firm conclusion on the question posed by the Special Rapporteur (*ibid.*, para. 5) as to whether the draft articles should contain secondary as well as primary rules. The catastrophic nature of the occurrences the draft sought to regulate might militate in favour of the inclusion of secondary rules without the need to wait for the outcome of the Commission's work on two other relevant topics: State responsibility and international liability for injurious consequences arising out of acts not prohibited by international law. An integrated approach to the present topic might, moreover, be desirable. On the other hand, the effect might be to introduce an element of imbalance between the various parts of the draft, and it might run counter to the basic conception of a framework agreement laying down primary rules designed to encourage watercourse States to conclude more detailed agreements. The Commission would perhaps be in a better position to respond if the Special Rapporteur were to clarify the scope and substance of the secondary rules involved.

18. In the interests of clarity, paragraph 3 of draft article 22 needed to be fleshed out so far as the object of appreciable harm was concerned. Surely what was meant was appreciable harm to watercourse States in connection with the use of a watercourse. If that point were not made explicit, the scope of the article would go far beyond the topic: indeed, the Special Rapporteur admitted as much in his comments on the article (para. (6) *in fine*). Like Mr. Reuter (2123rd meeting), he wondered why the expression "jurisdiction or control" was used in article 22, while the term "territory" appeared in article 23: the explanation given by the Special Rapporteur in paragraph (6) of his comments was not entirely convincing.

19. As to draft article 23, which was based on draft article 18 [19], on pollution or environmental emergencies, submitted at the previous session,[5] it would be preferable to align the second sentence of paragraph 1 more closely with the substance of draft article 18, paragraph 1, which had sought to define the emergencies in question more clearly. Another possibility would be to include a definition of water-related dangers and emergency situations in the article or the use of terms, and then to modify the second sentence of paragraph 1 accordingly. Actually, he would favour the second alternative.

20. With regard to the suggestion referred to in paragraph (5) of the comments on article 23, he could not accept placing an obligation on States benefiting from protective or other measures to compensate third States for the measures taken, unless a provision requiring contribution on an equitable basis were introduced. Lastly, he had no particular views on the question raised in paragraph (6) of the comments, because the reason for the suggestion had not been adequately explained, apart from the fact that several commentators had highlighted the issue.

21. Mr. NJENGA thanked the Special Rapporteur for a scholarly yet realistic analysis that made it possible for the Commission to see the light at the end of the tunnel on a topic whose finalization had formerly appeared so elusive. It would be helpful if all of the draft articles so far submitted, including the latest ones, were reproduced in a single document to enable members to see the amount of ground covered up to now. He fully endorsed draft articles 22 and 23, and his comments were intended not as criticism, but simply as encouragement to the Special Rapporteur.

22. The fifth report (A/CN.4/421 and Add.1 and 2) represented a determined effort to concretize the obligation of States, particularly States sharing watercourses, to co-operate to their mutual benefit. The imperative need for co-operation in the exploitation of the international "commons" and the environment, not only among States but also between States and competent international organizations, had never been as great as at present, when such exploitation was fast approaching the maximum sustainable level. The report of the World Commission on Environment and Development (*ibid.*, para. 78) and the report of that Commission's Experts Group on Environmental Law, entitled *Environmental Protection and Sustainable Development: Legal Principles and Recommendations* (*ibid.*, para. 79), amply demonstrated the need for a general obligation to co-operate in the collection and dissemination of data. That obligation also covered the provision of pertinent information to other States concerned in order to prevent or minimize transboundary harm, whether occasioned by emergency situations or by other activities with the potential to create appreciable harm. As the Special Rapporteur pointed out (*ibid.*, para. 80), intergovernmental and international non-governmental organizations alike recognized the need for co-operation, and indeed for collaboration, in preventing and mitigating water-related hazards and dangers. The global warming effect and the depletion of the ozone layer also attested to the need for co-operation in environmental matters.

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

23. In his report, the Special Rapporteur referred to many pertinent observations made in studies by individual experts, but one must not be carried away by the enthusiasm of such experts. It was difficult to agree with E. Brown Weiss (*ibid.*, para. 81) that customary international law now recognized the "duty to minimize environmental injury by giving prompt notification, providing information, and co-operating in minimizing injury" and that "there appears to be a consensus that under international law breaches of obligations . . . to prevent accidents and to minimize damage incur responsibility for resulting injuries". International co-operation should not be viewed from the standpoint of duties and rights of States but rather in the context of the obligations of States based on good-neighbourly relations. That approach was borne out by the examples of bilateral and multilateral arrangements or co-operation agreements among States sharing river basins on planning, policy-making and implementation cited by the Special Rapporteur in his report. Certainly, that was the African experience, as demonstrated by the paper prepared by R. D. Hayton for the Interregional Meeting on River and Lake Basin Development with Emphasis on the Africa Region, in October 1988 (*ibid.*, para. 83).

24. As the Special Rapporteur noted (*ibid.*, para. 86), the general duty to prevent or minimize injury included the obligations to exchange information relating to conditions bearing on the problem involved; to enter into consultations, on request, with potentially affected States in order to establish safety measures; to afford prompt notification of dangers; and to co-operate in the mitigation of damage. The relevance in that context of the obligation not to cause appreciable harm already reflected in article 8 as provisionally adopted at the previous session[6] had been rightly emphasized.

25. On the subject of the judicial decisions and arbitral awards cited in the report (*ibid.*, paras. 89 *et seq.*), it should be noted that the prevailing tendency to quote *obiter dicta* in support of a given point of view, while ignoring the essence of the decisions, had recently been criticized by Sir Robert Jennings at a meeting organized by the Netherlands Institute for the Law of the Sea. The criticism had been levelled at international law conferences and the ICJ, but it could very well have been directed at the Commission. It was not possible to recall offhand the number of times the *Corfu Channel* case, the *Lake Lanoux* arbitration, the *Trail Smelter* arbitration and the *North Sea Continental Shelf* cases had been cited in support of a particular point of view. Yet each of those cases dealt with a very specific issue. While the importance of general pronouncements made in connection with such judgments or awards must not be underestimated, there was call for caution regarding the extent to which they could be considered as statements of general customary law: they merely constituted evidence of emerging principles of international law.

26. He greatly appreciated the Special Rapporteur's useful comments on other water-related problems and conditions (*ibid.*, paras. 105 *et seq.*), with special reference to salt-water intrusion and to drought and desertification. Although the entire international community faced those problems, it was the third world, and especially Africa, that experienced them most acutely, owing to the lack of the necessary infrastructure and resources to deal with them. One could not fail to agree with the Special Rapporteur's conclusion that the draft should cover salt-water intrusion and drought and desertification, particularly in relation to regional and international co-operation.

27. As he had already said, he fully endorsed draft articles 22 and 23 on water-related hazards, dangers and emergency situations. Article 22, which dealt with co-operation in handling a number of hazards, contained a list, namely floods, ice conditions, drainage problems, flow obstructions, siltation, erosion, salt-water intrusion, drought and desertification. Presumably, the list was not intended to be exhaustive, and the obligation to co-operate would extend to other water-related hazards, including water-borne diseases such as river blindness. He would like clarification of the expression "structural and non-structural" in paragraph 2 (*b*), and did not think that Mr. Reuter's suggestion (2123rd meeting, para. 27) to modify paragraph 2 (*c*) to read "pursuance of . . .", rather than "preparation of . . .", would be an improvement in English.

28. In article 23, he would propose that the scope be widened to encompass not only watercourse States and intergovernmental organizations, but also other States that might have relevant information on water-related dangers or emergency situations. Countries which possessed modern technology and, more particularly, made use of satellites could obtain information on impending disasters such as floods, earthquakes and hurricanes well before many watercourse States could. Information of that kind should be promptly communicated to all States likely to be affected.

29. The suggestion made in the Sixth Committee of the General Assembly that States benefiting from protective or other measures should be required to compensate third States for such measures was acceptable, but it would be better to require contribution in an equitable manner, rather than compensation. He could agree to a formulation along those lines, as suggested by the Special Rapporteur in his comments on article 23 (para. (5)).

30. Lastly, he supported the idea of including a provision requiring or encouraging a State affected by a disaster to accept the assistance proffered if it did not have adequate means to respond to an emergency or disaster. The generous international assistance given to Ethiopia and other African countries in the recent drought and famine had been appreciated throughout the African continent. Other instances of such international assistance had been for the devastating hurricane in Jamaica, the severe earthquake in Armenia and the large-scale flooding in Bangladesh. Such a provision would be akin to the principle that was well established in refugee law, namely that granting asylum was neither a hostile act nor interference in the internal affairs of the country of origin.

31. Mr. TOMUSCHAT said that the Special Rapporteur had made the Commission's task easy and difficult at the same time: easy, because he had so scrupulously identified and detailed the source materials on which he had drawn, and difficult because he had made it hard to disagree with him. The Commission was now on the right track and might well be able to complete its consideration of the set of draft articles on first reading.

[6] See footnote 4 above.

32. The source materials proved that the Special Rapporteur was on safe ground in his treatment of the new draft articles 22 and 23, although he had not been entirely successful in showing that the relevant rules must be considered as having acquired the force of customary international law. However, the Commission's task comprised the progressive development of international law, and it could not ignore general trends in recent international agreements or other instruments on watercourses. Most of what the articles set forth was practically self-evident: even someone with no experience in international watercourse law, using only logic or common sense as his or her main tool, would have come to similar conclusions. He certainly did not mean by that that the proposals were trivial. Yet even if they were, the most basic requirements of natural justice often seemed trivial from a conceptual point of view, although that in no way diminished their intrinsic importance.

33. With regard to article 22, he would prefer to put the duty of prevention, now set out in paragraph 3, at the beginning. In an international treaty, the primary element remained the individual obligation of each of the contracting parties. It was only on the basis of that specific duty of prevention that the duty of co-operation arose. Co-operating with other States with a view to preventing or mitigating water-related hazards was but one method of discharging the general duty of prevention that formed the substance of the article. Individual action still took precedence over collective action, even in the present day, when forms of collective action were developing at an increasingly rapid pace.

34. He did not agree with Mr. Bennouna that article 22 was not useful because it merely repeated the terms of article 8 (Obligation not to cause appreciable harm) as provisionally adopted at the previous session.[7] Article 8 covered only the uses of watercourses, whereas draft articles 22 and 23 set forth a general duty to prevent certain harmful effects: even if a State did not use a watercourse, it must take action to prevent such harmful effects. Article 22 thus elaborated on article 8 and was broader in scope. Furthermore, there was no inherent drawback in repetition: the general obligation to provide data and information set out in article 10, for example, was repeated in a specific context in article 11.[8]

35. He objected to the word "problems" in paragraph 2 (*a*) of article 22 because the subparagraph referred back to natural occurrences or phenomena listed in paragraph 1 which, by a value judgment, could be qualified as "hazards". That raised a drafting point relating to paragraph 1: could a flood be called an "adverse effect"? He would prefer the list of key concepts to be modified by using the word "hazards" alone, as the mention of "harmful conditions" and "adverse effects" added nothing to the substance of the provision and failed to make it more precise.

36. The expression "structural and non-structural", in paragraph 2 (*b*), needed further explanation, and he wondered whether it was really necessary to include the phrase "where such measures might be more effective than measures undertaken by watercourse States individually". Again, paragraph 2 (*c*) should be made more concise. He understood it to refer to an assessment of the measures and strategies employed within the framework of mutual co-operation. The examples of possible forms of co-operation in those provisions were, of course, useful, in that they created a certain awareness of what steps might be taken to give concrete shape to co-operation.

37. The Special Rapporteur's assertion in paragraph (3) of his comments on article 22 about the duty of an actually or potentially injured watercourse State to provide compensation for protective measures seemed much too general. It might well be that such an obligation arose under specific circumstances, but that could not be the normal situation, since the "source State" would be under a general duty of prevention in accordance with the articles.

38. He agreed with other members that article 23 should identify its specific object more precisely. Simplifying the title to "Emergency situations" might be an improvement, or a definition might be incorporated in the article on the use of terms.

39. Paragraph 3 of article 23 raised an interesting legal point: could a convention, which might be accessible only to States, enjoin international organizations to co-operate in trying to overcome an emergency situation? In strictly legal terms, an international organization was an independent subject of international law. It might therefore be advisable to use the word "should" in relation to such organizations.

40. He did not think that such general reservation clauses as "to the extent practicable under the circumstances", also in paragraph 3, needed to be used. It was perfectly clear that the duty of co-operation had inherent limitations. Whenever international law set forth an obligation to take positive action, that obligation was to be understood not as absolute, but as conditioned by a standard of reasonableness. Since combating emergency situations was in the mutual interests of the States concerned, it was their own well-being that they were promoting, and practicability constituted a natural limitation on what they might be required to do, in line with the concept of due diligence.

41. With regard to the question raised in the fifth report (A/CN.4/421 and Add.1 and 2, para. 5) as to the possibility of including both primary and secondary rules, he agreed with Mr. Al-Qaysi that no general answer could be given at the present juncture. Once all the substantive articles were before the Commission, it might draw distinctions if it considered that certain obligations under the draft went so far that some limitation of the consequences of their breach would be appropriate. The idea of an international watercourse authority mentioned by Mr. Bennouna was an ideal, but it was not a viable prospect. Watercourse authorities might be desirable on a regional basis, but would be too cumbersome at the broader international level.

42. Mr. Sreenivasa RAO congratulated the Special Rapporteur on his thought-provoking fifth report (A/CN.4/421 and Add.1 and 2), which, besides being highly stimulating, was also eminently readable. The broad sweep with which the Special Rapporteur had tackled his difficult topic

[7] See footnote 4 above.

[8] For the texts of articles 10 and 11, provisionally adopted by the Commission at its previous session, see *Yearbook . . . 1988*, vol. II (Part Two), pp. 43 and 45.

was welcome; the overall perspective needed in order to encompass such factors as global warming, the "greenhouse effect", etc. was much in evidence, and the sense of idealism which permeated the text was to be commended. He sympathized with the Special Rapporteur's desire to broaden the scope of the duties of States in establishing international co-operation mechanisms and rendering assistance to the victims of emergency situations. Nevertheless, there were a number of questions of both a general and a more specific nature.

43. First, he wondered to what extent the series of bilateral treaties cited in the report in connection with floods and related problems could be regarded as indicative of principles of international law. Treaties were, by their very nature, binding only on the parties and could never impose obligations on non-parties. A great deal of caution had to be exercised in drawing conclusions as to their role in customary international law. Of course, where non-party States had drawn upon existing treaties in their mutual relations, the practices which thus evolved represented additions to an *opinio juris* and contributed to the development of customary international law. Without discounting that possibility, he none the less questioned whether it was really necessary for the Commission to concern itself with all the numerous existing treaties in the field under consideration.

44. The second general question was whether, and to what extent, all the materials cited in the report were relevant to the draft articles submitted by the Special Rapporteur. In his view, rather than reflecting faithfully the principles enunciated in the treaties, declarations, resolutions and recommendations referred to in the report, the articles were a projection of the Special Rapporteur's personal preference for a more absolutist régime. For example, two of the treaties cited on the subject of providing early warning of flood danger (*ibid.*, para. 21) employed the phrase "as far in advance as practicable" in connection with the information to be communicated, yet no similar emphasis on practicability was to be found in the articles before the Commission. Similarly, all the recommendations by the intergovernmental organizations mentioned were unanimous in placing emphasis on institutional mechanisms for prevention, planning and co-operation.

45. The lesson to be drawn from the experience of many countries was that no State could deal with massive disaster situations unaided; a global response was needed, not only from other Governments but also from private sources such as industrial and trade circles and from science and technology. If that was true of relatively simple problems caused by transboundary flooding, how much more would it apply to the effects of global warming, rain-forest deforestation or the "greenhouse effect"? A balanced approach was called for; each of those factors had to be considered separately, instead of being lumped together for the purposes of establishing liability. For example, certain patterns of land and water use were not only traditional but, in some cases, inevitable because of population growth or rapid industrialization. Governments were sometimes obliged by practical necessity to cut down trees or occupy flood-plains. It would be wrong, in such cases, to apportion blame to the countries concerned. All the international community could do was to try to provide an institutional framework for international assistance and for co-operative and educational measures. A full understanding of the problem required closer and more thoughtful consideration of all of the factors involved.

46. He did not wish to suggest that countries should not be held responsible for acts which they wilfully committed in full knowledge of the possible harmful effects on neighbouring or other countries. In the presence of clear proof of a direct causal link between an activity conducted in one State and harmful effects suffered in another, a situation of liability clearly existed. Without trying to undermine that concept in any way, he merely wished to advocate caution in less straightforward cases where a multiplicity of factors and traditional patterns of behaviour might be involved. There again, the main emphasis should be placed on international co-operation and assistance and on the institutionalization of preventive measures and contingency plans. The Special Rapporteur's report itself was more circumspect and moderate in that respect than the proposed articles.

47. Considerations of humanity were cited in the report (*ibid.*, paras. 90-91) as one of the basic foundations for drawing certain conclusions from the judgments of the ICJ in the *Corfu Channel* case and the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*. Those judgments did not, in his opinion, offer very useful guidance in the present context. Nor did he see the logic of invoking considerations of humanity in connection with floods and other natural disasters, rather than with more fundamental problems such as poverty, disease and hunger or with principles of international trade. Practical realities did not allow practical conclusions to be drawn from principles of so-called "soft law". While he personally would greatly welcome the development of such doctrines, he doubted whether, until the advent of a more enlightened world, they could be applied to specific situations. Similarly, it seemed far-fetched to introduce human rights issues into the consideration of the present topic.

48. Turning to the draft articles themselves, he would prefer the words "on an equitable basis" to be omitted from paragraph 1 of article 22. In cases where the watercourse States concerned had attained different levels of development, it seemed to go without saying that they would co-operate in the light of their respective capabilities; there was no need to introduce a legal rule to that effect and, moreover, no such provision was to be found in the materials surveyed in the report.

49. The words "all measures", in paragraph 3, were an instance of the absolutist approach he had referred to earlier. The expression "all practicable measures" would appear to be more appropriate and less hard on watercourse States, which, as the text read at present, would be required to prove that they had done everything possible not to cause a disaster. As a general comment in that connection, he would remark that the Special Rapporteur was evidently trying to reconcile two diametrically opposed concerns, that of bringing to account watercourse States which engaged in harmful activities and that of encouraging co-operation in the longer term. From that point of view, too, a reference to "all practicable measures" was to be recommended.

50. The phrase "under their jurisdiction or control", also in paragraph 3, could be shortened to "under their

jurisdiction", for "control" added nothing to the meaning of "jurisdiction" if the two terms were to be taken together. If, on the other hand, the intention was to treat "jurisdiction" and "control" as alternatives, the result would not be very helpful: it was difficult to accept the notion of control without jurisdiction.

51. He was not altogether satisfied with the idea, in the same paragraph, that watercourse States should ensure that their activities were "so conducted as not to cause water-related hazards . . .", a form of language that seemed to place an unduly heavy burden on watercourse States. It could be taken to mean, for example, that a State should not allow its population to expand unduly and thereby bring about some undesirable effects. Article 22 should not impose on States responsibilities which they could not discharge. Accordingly, the words in question should be replaced by "so conducted as to prevent, mitigate and, as far as possible, not to cause water-related hazards. . .". A formulation of that kind would not place States in an impossible situation and would ensure broader acceptance of the draft.

52. The reference in paragraph 1 of draft article 23 to "potentially" affected States posed some difficulty. The term certainly stood in need of clarification. In certain situations, such as floods, the meaning of "potentially affected States" would be fairly clear. In others, such as that of the effects of deforestation, it would be difficult to determine which States were likely to be affected. The test would, of course, be impossible to apply with regard to such phenomena as global warming or the "greenhouse effect". As far as watercourses were concerned, it would be remembered that a lengthy debate had taken place on the subject at the previous session: where waters flowed into an ocean, carrying pollution with them, the number of potentially affected States would be great and there might be uncertainty in identifying them. He also had doubts about the words "or of which it has knowledge", in the same paragraph. A country like the United States of America had, with the aid of its satellites, knowledge of much that was going on all over the world. It was questionable whether, in that situation, the State concerned could be said to have a legal obligation to inform other States. His own preference would be for the issue to be treated as a matter of co-operation, and not one of legal obligation.

53. In paragraph (5) of his comments on article 23, the Special Rapporteur referred to a suggestion made in the Sixth Committee of the General Assembly that States benefiting from protective or other measures should be required to compensate third States for the measures taken, adding that he had no objection in principle so long as the contribution was to be only on an equitable basis. His own preference would be for a more balanced approach based on the concept of mutual reimbursement. In paragraph (6) of the comments, the Special Rapporteur invited the Commission to consider whether a provision should be included requiring a State affected by a disaster to accept proffered assistance and not to regard offers thereof as interference in its internal affairs. Clearly, no State could be forced to accept assistance. Bearing in mind the fact that the assistance offered in cases of drought or famine often had strings attached, the right of the State concerned to decide whether or not to accept it should be preserved.

54. Mr. BEESLEY commended the Special Rapporteur's clarity of thought and deep scholarship, so evident in his fifth report (A/CN.4/421 and Add.1 and 2).

55. There had been some unjust criticism of the Special Rapporteur for relying largely on the contents of bilateral agreements. The fact was, however, that most of the problems relating to international watercourses were bilateral problems which were solved by bilateral treaties. As far as the present topic was concerned, they were in practice the main sources available. Similar criticisms had been voiced of the Special Rapporteur's reliance on the decisions of tribunals as evidence of State practice. However, one could not ignore those decisions, even if some of them had not commanded unanimous approval. Whether those decisions reflected customary law was another matter, but at the very least they were relevant for the common threads of State practice that could be found in them. He himself was accustomed to taking tribunals seriously, and in his experience what was enunciated as a general principle of law usually reflected such principles or led to their acceptance. In the absence of some more authoritative ruling, for example by the ICJ, tribunal decisions in bilateral disputes constituted the best source for the substance of the draft articles.

56. The important point, however, was that the principles reflected in draft articles 22 and 23 did not conflict with the provisions of any bilateral agreement or with the rulings of arbitral tribunals. He himself did not experience any difficulty with the substance and common-sense approach of those articles, although his remarks on that point, as well as on others, were conditional on the question of the ultimate purpose of the draft articles, a question on which he had an open mind. As far as he knew, the Commission had not yet decided whether the outcome of the draft should be a residual agreement, an umbrella agreement or a framework agreement. The Special Rapporteur's reports indicated in any case that the final draft would not emerge as a proposal for an instrument intended to legislate hard and fast law for all of mankind. Since its intended purpose would be more to provide guidelines for States, the text need not spell out each and every situation. Thus there was a marked difference between the present topic and that of international liability for injurious consequences arising out of acts not prohibited by international law, the draft articles on which were framed in a legislative mode.

57. Opinion had been divided as to whether liability under the present topic should be based on harm or on risk, but no one in either school of thought had attacked the substance of the draft articles. On the contrary, he saw a convergence of both schools on the issue of preventive measures. In that connection, he was not wedded to the formula in paragraph 1 of article 22 to the effect that co-operation with regard to preventive measures should be "on an equitable basis", although co-operation on an equitable basis was certainly preferable to co-operation on an inequitable basis. There was, in fact, some jurisprudence in support of the formula "on an equitable basis".

58. The reference to "all measures", in paragraph 3, should be retained, since it was better than a weaker formulation such as "most measures" or "some measures". The same was true of "all measures necessary", as compared with "all practicable measures".

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.