

Document:-
A/CN.4/SR.2089

Summary record of the 2089th meeting

Topic:
Other topics

Extract from the Yearbook of the International Law Commission:-
1988, vol. I

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ning "It was stated that many instruments . . .". That passage was, in fact, the conclusion of the argument advanced by one member, Mr. Graefrath, who had held that it was possible to establish a list of dangerous activities and had, in the course of the debate, cited numerous international instruments as examples. The paragraph then went on to set out the opposite view, that of the Special Rapporteur, to which many members had subscribed. Changing the order of the sentences would thus affect the logic of the ideas.

73. Mr. GRAEFRATH confirmed what the Special Rapporteur had just said and added that the paragraph might be clearer if it avoided specifying, as did the third sentence, that the instruments were "instruments on the protection of the environment". Indeed, during the debate he had cited a number of instruments on fields other than the environment, such as transport.

74. Mr. BEESLEY said he was concerned to see that, although a great deal of the part of chapter II on "General considerations" had already been dealt with, there had still been no mention of a basic issue on which the debate had focused from the outset, namely whether risk or harm was to be the basis for the draft. That question, which was so important as a guide for further thought on the topic, was mentioned only in paragraph 25, in other words very late on. He therefore formally proposed that paragraph 25 should be placed after paragraph 15.

75. Mr. BARBOZA (Special Rapporteur) explained that the chapter did not necessarily follow the same order as the discussion. In the part on "General considerations", he had sought to include matters which shed light on the topic but still remained pending: creeping pollution, a list of dangerous activities, and so on. It had also seemed preferable to discuss some basic aspects of the debate in connection with the articles which had given rise to them. For that reason, the question whether risk or harm should be the basis for liability was set out in connection with article 1, in other words in paragraph 25 of chapter II.

76. Mr. EIRIKSSON pointed out that the problem raised by Mr. Beesley concerned not only paragraph 25, but paragraphs 21 to 28 as a whole.

77. Mr. BARSEGOV said that, if chapter II of the draft report were changed to such an extent, great attention would have to be paid in order to maintain the balance between the opinion of those who advocated liability based on risk and the opinion of those who advocated liability based on harm.

78. Mr. McCaffrey, supported by Mr. BEESLEY, proposed that the Commission should give further thought to the matter before resolving such an important problem of presentation.

79. Mr. BARBOZA (Special Rapporteur) said that, in view of the extent of the changes envisaged, he would prefer to have proposals set out in writing.

The meeting rose at 1.05 p.m.

2089th MEETING

Tuesday, 26 July 1988, at 3 p.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Present: Prince Ajibola, Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucouas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Draft report of the Commission on the work of its fortieth session (*continued*)

CHAPTER II. *International liability for injurious consequences arising out of acts not prohibited by international law* (*continued*) (A/CN.4/L.424 and Corr.1)

B. *Consideration of the topic at the present session* (*continued*)

New paragraph 12 bis

1. The CHAIRMAN said that there was a proposal to incorporate in section B a new paragraph to explain that some members of the Commission believed that the concept of harm should continue to be the basis of the draft articles, while other members held the opposite view.

2. Mr. BEESLEY suggested that the new paragraph, which would become paragraph 12 *bis*, might read:

"In this connection, the Special Rapporteur had proposed that the scope of the topic be limited to activities involving risk, excluding those situations where appreciable harm occurred despite the fact that the risk of harm had not been considered appreciable or foreseeable. Some members, however, were of the view that, while the concept of risk might play an important role with regard to prevention, it would limit the topic unduly to base the entire régime of liability on appreciability of risk, since there could be activities for which the risk appeared slight, yet from which catastrophic consequences could ensue. These members pointed out that the law was never indifferent to the occurrence of harm when it threatened the rights of other States, citing the *Trail Smelter*, *Corfu Channel* and *Lake Lanoux* cases, Principle 21 of the 1972 Stockholm Declaration, and part XII of the 1982 United Nations Convention on the Law of the Sea."

3. Mr. BARSEGOV said that he had no objection to the Commission recording the views of some of its members in its report, but believed that those of other members should also be included. He therefore suggested the following addition to the text proposed by Mr. Beesley:

"Other members considered that refusal to acknowledge the causal link between appreciable harm and risk demolished the conceptual framework proposed by the Special Rapporteur, was not justified by existing rules of international law and, in many

instances, directly contradicted the legal concepts formulated in national laws.”

4. Mr. GRAEFRATH suggested that, in the first sentence of the text proposed by Mr. Beesley, the word “appreciable” should be inserted between the words “involving” and “risk”, and that the remainder of the sentence, from the words “excluding those situations” to the end, should be deleted, in the interests of accurately reflecting the Special Rapporteur’s intentions regarding the scope of the topic. Similarly, the accuracy of the second sentence could be improved by replacing the words “appeared slight” by “was not recognizable”.

5. Mr. BEESLEY said that he endorsed Mr. Graefrath’s proposal to insert the word “appreciable”. He wished to give further thought, however, to the proposals to delete the last part of the first sentence and to amend the wording of the second sentence. Although he could understand the reasoning behind those proposals, he believed that the wording he himself had proposed reflected the positions actually expressed on the issues.

6. He wished, however, to suggest two minor revisions to his proposed text, with the intention of promoting equity and accuracy. In the first sentence, the words “In this connection” should be replaced by “Some members considered that”; and, at the end of the last sentence, the following phrase should be added: “as well as the third principle referred to by the Special Rapporteur in his conclusions at the end of the debate on the topic at the thirty-ninth session”.

7. Mr. EIRIKSSON said that he endorsed Mr. Graefrath’s proposal to delete the last part of the first sentence of the text proposed by Mr. Beesley. As to the reference in the second sentence to the catastrophic consequences of risk, he had not been among those members of the Commission who believed that the topic was limited because of that possibility. He therefore suggested that the second sentence should end after the words “appreciability of risk”, and that a new sentence, beginning “There could, furthermore, be activities . . .”, should be formed out of the remainder of the second sentence. The last sentence would be better placed in a later part of chapter II.

8. Mr. BARBOZA (Special Rapporteur) said that he fully understood the reasoning behind the proposal to insert a new paragraph 12 *bis* and the suggested amendments. He had no intention of criticizing those proposals, but feared that the technique of rewriting the report, if taken to its logical conclusion, would result in the creation of an illogical line of reasoning.

9. Mr. Graefrath’s proposals to insert the word “appreciable” and delete the last part of the first sentence of the text proposed by Mr. Beesley were acceptable. He would further suggest that the part of the second sentence which Mr. Eiriksson had suggested should be made into a separate sentence (“since there could be activities for which the risk appeared slight, yet from which catastrophic consequences could ensue”) should be deleted altogether, since it referred to a complex matter that was dealt with in detail later in chapter II.

10. The CHAIRMAN, speaking as a member of the Commission, said that he endorsed Mr. Beesley’s proposal for the insertion of a new paragraph 12 *bis*, since it accurately reflected the Commission’s debate. It was perfectly true that some members—including himself—had rejected the notion of “appreciable” harm, and that view should be communicated to the General Assembly in the Commission’s report.

11. Mr. BEESLEY explained that the phrases whose deletion from his proposed text had been suggested were intended to enlighten the reader about what was really at stake: there was a tendency to view the issue in purely theoretical terms. In fact, he himself did not see the two approaches as being mutually exclusive. He would urge that the new paragraph 12 *bis* be adopted as originally proposed, but with the insertion of the word “appreciable” in the first sentence as suggested by Mr. Graefrath. Mr. Eiriksson had suggested that the last sentence be moved to a later part of chapter II; he himself would have no objection if it were deleted altogether.

12. Prince AJIBOLA said that he supported the text proposed by Mr. Beesley and would not oppose the insertion of the word “appreciable” in the first sentence, even though he did not subscribe to the notion of “appreciable risk”. The application of qualifying adjectives such as “appreciable” or “foreseeable” to the term “risk” merely made that term less precise and might do more harm than good by restricting the scope of the draft articles.

13. Mr. AL-BAHARNA said that he supported the text of paragraph 12 *bis* as proposed and revised by Mr. Beesley, but would like to suggest a small amendment. Because he was among the members of the Commission who believed that harm or injury was the basis of liability, he would prefer the first part of the last sentence, ending with the words “rights of other States”, to be retained; the remainder could be deleted.

14. Mr. MAHIU said that, at the present stage of the proceedings, amendments should be confined to views expressed during the debate that had been entirely omitted from the report, and should be clear and concise. He shared many of the opinions expressed during the discussion on paragraph 12 *bis*, but thought it unwise for the Commission to start discussing which opinions should be more fully reflected in the report.

15. The CHAIRMAN said that the main object of the Commission’s report to the General Assembly was to bring the Assembly up to date on the Commission’s discussions. All the opinions that had been expressed during a discussion should therefore be reflected in the report. Hence he believed that Mr. Beesley’s amendment was entirely appropriate, as was any amendment designed to inform the General Assembly of the range of views held by members of the Commission.

16. Mr. SEPÚLVEDA GUTIÉRREZ said that he endorsed the text proposed by Mr. Beesley, as amended by Mr. Graefrath and Mr. Eiriksson, because it reflected his own position on risk, and particularly on the concept of “appreciable risk”, which he believed should be clarified.

17. Mr. Sreenivasa RAO said he subscribed to the view that the Commission should develop the concept of liability in the broadest possible sense, without unduly restricting it to risk.

18. Mr. KOROMA said that he had objected to basing liability on risk and therefore supported the proposed paragraph 12 *bis*.

19. Mr. BEESLEY offered to consult with the Special Rapporteur and the members of the Commission who had suggested amendments to his proposed text, with a view to streamlining it.

20. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to defer consideration of the proposed paragraph 12 *bis* pending the outcome of those consultations.

It was so agreed.

New paragraph 13 *bis*

21. Mr. BARSEGOV, referring to a proposal he had made at the previous meeting (2088th meeting, para. 32), proposed the insertion of a new paragraph 13 *bis* reading:

“Some members considered that the statement by the Special Rapporteur to the effect that there was no norm in general international law under which there must be compensation for every injury was of fundamental importance and opened prospects for the development of international law in the present field through the formation of new rules.”

22. In reply to a suggestion by Mr. Calero Rodrigues, he agreed that the word “injury” in that text should be replaced by “harm”. Replying to a further point raised by Mr. Pawlak, he said that the expression “general international law” was taken from the Special Rapporteur’s fourth report (A/CN.4/413) and should therefore be retained.

It was so agreed.

New paragraph 13 bis, as amended, was adopted.

Paragraph 15 (concluded)

Paragraph 15, as amended at the 2088th meeting, was adopted.

Paragraphs 16 and 17

23. Mr. BARBOZA (Special Rapporteur) said that the last three sentences of paragraph 17 should be transferred to the end of paragraph 16. Replying to a point made by the Chairman, speaking as a member of the Commission, he agreed that the last of those three sentences, reading: “Such an approach was unnecessary”, should be reworded so as to indicate that the opinion expressed was that of some members of the Commission and not of the Commission as a whole.

24. In response to a suggestion made by Mr. Tomuschat and supported by Mr. Sreenivasa Rao, he agreed to the deletion of the word “expressly” in the second sentence of paragraph 16.

25. Replying to a point raised by Prince Ajibola, he said that he saw no inconsistency between the last

sentence of paragraph 16 and the text of paragraph 9. On a further point raised by Prince Ajibola, he confirmed that the expression “general principles of law”, in the last sentence of paragraph 16, was taken from Article 38, paragraph 1 (c), of the Statute of the ICJ and said that it should not be replaced by a reference to the principles of international law.

26. In reply to points raised by Mr. Sreenivasa Rao and Mr. Koroma, he agreed that the word “prudent”, in the seventh sentence of paragraph 17, should be replaced by “judicious” and that the word “unnecessary”, at the end of that paragraph, should be replaced by the words “to be avoided”.

It was so agreed.

Paragraphs 16 and 17, as amended, were adopted.

Paragraph 18 and new paragraph 18 *bis*

27. Mr. Sreenivasa RAO proposed that the following passage should be added to paragraph 18 or be inserted as a new paragraph 18 *bis*:

“The view was also expressed that, in dealing with the subject of liability, the Commission should not develop it only as an instrument for punishment. It should be promoted as a framework for prevention and international management of activities relevant to a new ethic of development and transfer of resources and technology. Concepts such as insurance, international emergency relief, rehabilitation, aid and assistance also appeared to be very pertinent for development under the present topic.”

28. In reply to a suggestion by Mr. Beesley, he agreed that the word “concepts”, at the beginning of the last sentence of the proposed text, should be replaced by “incentives”.

It was so agreed.

Paragraph 18 and new paragraph 18 bis, as amended and subject to further minor drafting changes, were adopted.

Paragraph 19

29. Mr. OGISO criticized the use of the expression “polluting activities” in the last two sentences. He asked the Special Rapporteur whether the intention was to state that all such activities were wrongful or that only some of them were wrongful, that was to say, above a certain level of pollution.

30. Mr. McCAFFREY suggested that the words “the scope of the article”, at the end of paragraph 19, should be amended to read “the scope of the topic”.

31. Mr. TOMUSCHAT said that the question whether certain matters fell within the present topic or outside it was academic. The Commission should be concerned with matters of legal policy, not with academic choices. He therefore suggested that the last sentence should be cast in terms of legal policy.

32. Mr. GRAEFRATH said he did not share that view. The topic under consideration was not pollution; it was international liability for injurious consequences arising out of acts not prohibited by international law. It therefore covered not only pollution, but other mat-

ters as well, such as accidents. Even if pollution were outside the topic, the topic itself would not fall apart.

33. Mr. YANKOV said that it was the first time he had met the expression "polluting activities" in environmental law. The expression was used in paragraph 19 for the sake of brevity, but it was not felicitous. The reference should be to "activities that may cause pollution".

34. Mr. BARBOZA (Special Rapporteur) said that the point raised by Mr. Ogiso was well taken. It could be met by referring to "polluting activities producing appreciable harm".

35. He did not agree with Mr. Tomuschat and thought that the last sentence of paragraph 19 was undoubtedly a statement of legal policy. His concern was not with the content of the topic, but with the important point of not leaving an innocent victim defenceless. That would be the result if the activities in question were not considered wrongful. He accordingly proposed the insertion at the end of the paragraph of the words "and leave the innocent victim defenceless".

36. Lastly, he suggested that the point made by Mr. McCaffrey should be met by replacing the singular "article" by the plural "articles".

37. The CHAIRMAN, speaking as a member of the Commission, said that, if a polluting activity was prohibited as such, it would fall outside the present topic: the act would be wrongful and hence would not come under the heading of acts not prohibited by international law.

38. Mr. ARANGIO-RUIZ agreed with Mr. Yankov that the expression "polluting activities" was not correct. Actually, the whole of the last sentence of paragraph 19 was unfortunate. The important question was not whether a matter fell within one topic or another. The Commission should be concerned with substance. It had to consider whether it intended to say that pollution as such was not prohibited. For his part, he thought it would be better to say nothing at all, since otherwise the result might be to encourage pollution.

39. The CHAIRMAN pointed out that paragraph 19 recorded the views of the Special Rapporteur; it was therefore his sole responsibility and did not commit the Commission.

40. Mr. CALERO RODRIGUES said he fully agreed with that remark.

41. Prince AJIBOLA suggested that the expression "polluting activities" in the last two sentences could be replaced by "pollution".

42. Mr. BARBOZA (Special Rapporteur) said he did not wish to make that change in a paragraph which expressed exclusively his own opinion. His intention had been to refer to activities. The only amendments he was prepared to make were to add the words "producing appreciable harm" after "polluting activities", to take account of the point made by Mr. Ogiso, and to insert the words "and leave the innocent victim defenceless" at the end of paragraph 19.

43. Mr. GRAEFRATH pointed out that the victim would not be defenceless, since he could invoke State responsibility; and defence under State responsibility was stronger than defence under international liability for injurious consequences arising out of acts not prohibited by international law.

44. Mr. BARBOZA (Special Rapporteur) pointed out that the last sentence of paragraph 19 expressed concern that a "definitive presumption" by the Commission that polluting activities were wrongful could remove those activities from the scope of the topic. If general international law did not accept that presumption, the victim would be left defenceless.

45. Mr. BEESLEY suggested that the expression "definitive presumption" could be replaced by "working hypothesis".

46. The CHAIRMAN, speaking as a member of the Commission, suggested that the words "by the Commission", in the last sentence, should be deleted; that sentence would then express concern that "a presumption that polluting activities were wrongful would remove those activities from the scope of the topic".

47. Mr. BARSEGOV said that he agreed with Mr. Graefrath. He had not been totally convinced by the Special Rapporteur's reply. Perhaps the last sentence of paragraph 19 could be worded so as to express concern at the possible absence of a rule on liability for injurious consequences arising out of acts not prohibited by international law. The Commission should be optimistic and expect to achieve equal success with the present topic and the topic of State responsibility.

48. Mr. BARBOZA (Special Rapporteur) suggested that the Commission should suspend consideration of paragraph 19 so as to give him an opportunity to submit a redraft at the next meeting.

It was so agreed.

New paragraph 12 bis (concluded)

49. The CHAIRMAN announced that the informal working group on the new paragraph 12 *bis* proposed the following agreed text:

"Some members of the Commission observed that the Special Rapporteur had proposed that the scope of the topic be limited to activities involving appreciable risk, excluding those situations where appreciable harm occurred although the risk of harm had not been considered appreciable or foreseeable. They, however, were of the view that, while the concept of risk might play an important role with regard to prevention, it would limit the topic unduly to base the entire régime of liability on appreciability of risk. Other members considered that the disruption in the causal link between appreciable risk and harm totally undermined the concept of the topic."

50. Mr. TOMUSCHAT said that he was at a loss to understand the meaning of the concluding words, "the concept of the topic".

51. Mr. BARSEGOV said that the meaning of the paragraph was that there must be a link between the

harm and the risk. On that point, he drew attention to paragraph 23 of the Special Rapporteur's fourth report (A/CN.4/413). The link between harm and risk was the basic concept under consideration by the Commission with regard to the present topic.

52. Mr. TOMUSCHAT suggested that the word "concept", in the last sentence of the proposed text, should be replaced by "essence".

53. Mr. CALERO RODRIGUES, also referring to the last sentence, said that it would not be adequate to speak of the "disruption in the causal link". Perhaps the reference should be to "disregard of the causal link".

54. Mr. Sreenivasa RAO suggested replacing the words "the disruption in the causal link" by "ignoring the causal link", and the words "the concept of the topic" by "régime of liability".

55. Mr. ARANGIO-RUIZ pointed out that logically there was no causal link between appreciable risk and harm, since harm did not depend on risk. The problem at issue was that of the causal link between risk and liability. Perhaps the Special Rapporteur could provide an explanation on that point.

56. The CHAIRMAN pointed out that the proposed paragraph 12 *bis* expressed the views of certain members and not the views of the Commission itself or those of the Special Rapporteur.

57. Mr. KOROMA pointed out that the last sentence described the views of members of the Commission who did not agree with the views expressed in the first two sentences. The proposed paragraph 12 *bis* thus reflected both positions. He suggested that, in the last sentence, the words "the disruption in the causal link" be replaced by "breaking the causal link". As to the concluding words, he supported the proposal by Mr. Tomuschat to refer to "the essence of the topic".

58. Mr. MAHIOU suggested that the last sentence be reworded to read: "Other members considered that the absence of links between appreciable risk and harm totally undermined the foundations of the topic." He thought that that formulation adequately reflected the ideas of Mr. Barsegov, who was one of the members referred to in the first two sentences of the proposed text.

59. Mr. ARANGIO-RUIZ stressed that the causal link was certainly not between risk and harm; it was between some event or act, on the one hand, and a danger or harm, on the other.

60. Mr. RAZAFINDRALAMBO said that the text of paragraph 12 *bis* was intended to reflect the views of certain members, and he saw no real need to change its wording. In any event, the words "absence of links" (*absence de liens*), proposed by Mr. Mahiou were not strong enough and should be replaced by "a break in the link". He agreed, however, that it would be preferable to refer to the "foundations of the topic" rather than to the "concept of the topic".

61. Mr. MAHIOU said that he had omitted the word "causal" from the text he had proposed because of the

controversy provoked by the different concepts of a causal link in his country, and no doubt *a fortiori* between countries having different legal systems. A reference simply to a link would allow each legal system the necessary margin to determine how it interpreted that link.

62. Mr. GRAEFRATH said he did not think that the problem could be solved by simply omitting certain controversial terms. He therefore suggested that the last sentence of paragraph 12 *bis* should read: "Other members considered that the break in the causal link between activities involving an appreciable risk and harm totally undermined the foundations of the topic."

63. Mr. BEESLEY said that he would prefer the original text to stand, unless Mr. Barsegov accepted the amendments proposed by Mr. Graefrath and other members. He did not think that the Commission could tell Mr. Barsegov what he had meant to say.

64. Mr. BARSEGOV said that, in any event, his views were already expressed in paragraph 23. All he wanted to do was to add a short sentence to introduce some balance into the new paragraph 12 *bis* by underlining what was stated in paragraph 23. With that in mind, he proposed that the last sentence of paragraph 12 *bis* should be amended to read: "In the opinion of some other members, the elimination of risk from the chain leading to liability undermined the concept of the topic."

It was so agreed.

New paragraph 12 bis, as amended, was adopted.

Paragraphs 20 to 23

Paragraphs 20 to 23 were adopted.

Paragraph 24

65. Mr. MAHIOU proposed that the second part of the third sentence should be amended to read: ". . . a concept incorporated in the Preamble and in Article 74 of the Charter of the United Nations and also in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States".

66. Mr. TOMUSCHAT said that, in his view, it would be incorrect to say that the principle of good-neighbourliness was incorporated in the Declaration referred to. It was not one of the seven principles laid down in the Declaration, although the second preambular paragraph made a passing reference to it.

67. Mr. MAHIOU, agreeing with Mr. Tomuschat, proposed that the relevant part of the sentence should be amended to read: ". . . a concept incorporated in the Preamble and in Article 74 of the Charter of the United Nations and which underlay the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States".

It was so agreed.

Paragraph 24, as amended, was adopted.

Paragraph 25

68. Mr. CALERO RODRIGUES said that the twelfth sentence, beginning "It precluded, for example, the ac-

tivities . . .”, was expressed in very poor English. That point could perhaps be taken care of by the Rapporteur in consultation with the Secretariat.

It was so agreed.

69. Mr. OGISO proposed that the following sentence should be added at the end of paragraph 25:

“However, one member expressed the view that legal principles governing activities such as the operation of nuclear installations, which might cause extensive damage in the case of an accident, although risk was low, should be left to specific agreements providing for a special régime covering such activities, separately from the general principles under the present topic.”

It was so agreed.

70. Mr. EIRIKSSON proposed that paragraph 25 should be divided into two paragraphs. The first would deal with the general topic; the second, starting with the tenth sentence, “It was also pointed out that the concept of risk was ambiguous”, would deal with the catastrophic consequences of low-risk activities and end with the text proposed by Mr. Ogisso.

It was so agreed.

The meeting rose at 6.05 p.m.

2090th MEETING

Wednesday, 27 July 1988, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Present: Prince Ajibola, Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogisso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Draft report of the Commission on the work of its fortieth session (continued)

CHAPTER II. International liability for injurious consequences arising out of acts not prohibited by international law (continued)
(A/CN.4/L.424 and Corr.1)

B. Consideration of the topic at the present session (continued)

Paragraph 19 (concluded)

1. The CHAIRMAN said that the Special Rapporteur proposed that the last sentence of paragraph 19 should be replaced by the following text:

“With regard to activities which produced appreciable harm through pollution, he stated that, in the light of the debate on the matter, such activities

would, in his opinion, fall within the scope of the topic.”

It was so agreed.

Paragraph 19, as amended, was adopted.

Paragraph 25 (concluded)

2. The CHAIRMAN said that Mr. Beesley proposed that the following sentence should be added at the end of paragraph 25:

“These members pointed out that the law was never indifferent to the occurrence of harm when it threatened the rights of other States, citing the *Trail Smelter*, *Corfu Channel* and *Lake Lanoux* cases, Principle 21 of the 1972 Stockholm Declaration, and part XII of the 1982 United Nations Convention on the Law of the Sea.”

3. Mr. BEESLEY said that he had drafted that sentence in order to minimize the contrast between the opinion expressed in it and the position stated in the preceding paragraph.

4. Mr. TOMUSCHAT said that it was not clear to whom the words “These members”, in the text proposed by Mr. Beesley, referred.

5. Mr. McCAFFREY said that the last sentence of paragraph 25 in its original form, beginning “In their view . . .”, should be reworded so that the text proposed by Mr. Beesley would link up with it better. In addition, the words “threatened the rights of other States”, in the proposed text, did not seem appropriate, since the harm had already occurred. It would be better to say “infringed the rights of other States”.

6. Mr. KOROMA said that the example of the manufacture of chemical weapons referred to in the penultimate sentence was inappropriate and should be replaced or deleted.

7. Mr. Sreenivasa RAO, Mr. McCAFFREY and Mr. MAHIOU said that they shared that view.

It was so agreed.

8. Mr. EIRIKSSON, recalling that at the previous meeting, at his suggestion, paragraph 25 had been divided into two paragraphs (see 2089th meeting, para. 70), suggested that the text proposed by Mr. Beesley, as amended by Mr. McCaffrey, should be inserted at the end of the second paragraph before the new final sentence proposed by Mr. Ogisso (*ibid.*, para. 69).

It was so agreed.

Paragraph 25, as amended, was adopted.

Paragraph 26

9. Mr. BEESLEY asked whether the Special Rapporteur could add the following phrase at the end of the paragraph: “and a further chapter would be drafted to deal with the second category of activities”.

10. The CHAIRMAN, speaking as a member of the Commission and noting that paragraph 26 did not refer to the opinion he had expressed in plenary, proposed the addition of the following text, which might become paragraph 26 *bis*: