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Summary record of the 2090th meeting

Topic:
Other topics

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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*:

“One member pointed out that it was the consequences of a dangerous activity that could give rise to injury or harm. In other words, a reference to an activity involving risk meant not any type of risk, but, rather, an exceptional risk that could also cause injury or harm. Risk always existed, at one level or another. What had to be and could be prevented were the consequences of a lawful activity which was not prohibited by international law and involved exceptional risk. That member also stated that the obligation to be provided for in the draft was the obligation of the States concerned to co-operate in setting up the necessary machinery.”

11. Mr. BARBOZA (Special Rapporteur) said that he could accept those two amendments.

12. Mr. EIRIKSSON said that, in his view, the right place for Mr. Beesley's amendment would be in paragraph 28, which was drafted from the Special Rapporteur's point of view. That amendment was none the less a clever way of reconciling views that might seem to be diametrically opposed.

13. Mr. TOMUSCHAT said that the overall balance of the Commission's report might suffer if all the individual opinions expressed in plenary had to be reflected in it. The text proposed by Mr. Díaz González should also be shortened.

14. Prince AJIBOLA said that he shared Mr. Tomuschat's concern, particularly since the text proposed by Mr. Díaz González would make the logic of paragraph 26 more difficult to grasp.

15. The CHAIRMAN, speaking as a member of the Commission, pointed out that the Commission had already agreed to add entire paragraphs to its draft report in order to reflect the views of some of its members. His amendment was designed to give a fuller picture of the discussion by having the report reflect an opinion which was different from that of the majority. Either every member had to have the right to have his point of view reflected in the report or that right had to be denied to all.

16. Mr. PAWLAK and Mr. BEESLEY said that no one was being denied that right. The balance and concision of the report did, however, have to be borne in mind.

17. Prince AJIBOLA said his only fear was that, if the report contained too detailed an account of individual opinions, the reader might lose sight of the majority position in the Commission.

18. Mr. CALERO RODRIGUES suggested that, although the amendment by Mr. Díaz González was justified, he should agree with the Rapporteur on a way of shortening it.

It was so agreed.

Paragraph 26 was adopted.

Paragraph 27

19. Mr. BENNOUNA said that he would like the following text to be added at the end of paragraph 27: “One member observed that the risk to be taken into consideration was related to the potential appreciable

harm corresponding to it. There was therefore no need to qualify the risk.”

20. Mr. FRANCIS, noting that he had endorsed the same position as Mr. Bennouna, said he agreed with that amendment.

Mr. Bennouna's amendment was adopted.

Paragraph 27, as amended, was adopted.

Paragraph 28

21. Mr. EIRIKSSON said he thought that paragraph 28 should be divided into two paragraphs, the second of which would logically start with the fifth sentence, beginning “He admitted that the concept of risk . . .”. The word “While”, at the beginning of the third sentence, should be deleted and the following phrase should be added at the end of that sentence: “and that the articles should deal with all activities causing trans-boundary harm”.

22. Mr. BARBOZA (Special Rapporteur) said that he could accept the latter amendment, which related to a very important point that had divided the Commission.

23. Prince AJIBOLA said that paragraph 28 reflected two views that had been expressed during the discussion of the question whether or not the activities to be taken into account should be limited to those involving appreciable risk. It thus failed to mention the position of those members who considered that the concept of risk should not be taken into account at all and that the term itself should not be included in the draft.

24. Mr. BARBOZA (Special Rapporteur) said that paragraph 28 summed up only what he had said in reply to comments made by members of the Commission during the discussion. If Prince Ajibola wished to propose an amendment along the lines he had just indicated, the text of that amendment would have to be included in another paragraph.

25. Mr. BARSEGOV said that, since the Commission's report was supposed to reflect the views of all its members, it should also reflect the opinion of members who agreed with the Special Rapporteur that “The risk element constituted one of the most essential features of liability” (para. 40). Whenever the Commission discussed the question of risk, the opinion of those for whom risk was an inherent element of the concept that was being developed would, for the sake of impartiality, have to be recorded. It might, however, not be necessary to keep coming back to that question.

Mr. Eiriksson's amendments were adopted.

Paragraph 28, as amended, was adopted.

Paragraphs 29 to 31

Paragraphs 29 to 31 were adopted.

Paragraphs 32 and 33

26. Mr. TOMUSCHAT said that, in paragraph 33, as well as in other paragraphs of the report, it would be helpful to underline the catchword, as had been done, for example, in paragraph 32.

It was so agreed.

27. Mr. EIRIKSSON said that, although the consequences of an activity had to be physical in order to come within the scope of the draft articles, that was not essential in the case of harm, which could, for example, be of an economic nature. He would, however, not propose any amendment to paragraphs 32 and 33.

Paragraphs 32 and 33 were adopted.

Paragraph 34

28. Mr. McCaffrey proposed that the fifth sentence should be amended to read: "This approach would allow the topic to deal effectively with activities having the potential to cause injuries outside the territory of a State." Moreover, since the concepts of "jurisdiction and control" were always mentioned together, it would be preferable to refer to them in the last sentence as an "expression" rather than as "terms".

29. Mr. CALERO RODRIGUES, referring to Mr. McCaffrey's proposed amendment to the fifth sentence, pointed out that paragraph 34 dealt not with "injuries outside the territory of a State", but with activities which were conducted outside that territory and were likely to cause injuries.

30. Mr. BARBOZA (Special Rapporteur) agreed with Mr. Calero Rodrigues and proposed that, in order to meet Mr. McCaffrey's concern, the fifth sentence should be amended to read: "This approach . . . with activities which are conducted outside the territory of a State and have the potential to cause injuries" or "This approach . . . with activities involving risk conducted outside the territory of a State".

The latter amendment was adopted.

Mr. McCaffrey's amendment to the last sentence was adopted.

31. Mr. AL-BAHARNA proposed that, in the last sentence, the words "and other instruments" should be deleted if those instruments were not to be specified and that the word "usage" should be replaced by "use".

32. Mr. BEESLEY, supported by Mr. YANKOV, suggested that, instead of deleting the words "and other instruments", the words "such as the 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter" should be inserted after them.

It was so agreed.

Mr. Al-Baharna's second amendment was adopted.

Paragraph 34, as amended, was adopted.

Paragraph 35

33. Mr. TOMUSCHAT said he did not recall that the controversial matter dealt with in the third sentence had been raised during the discussion. Since it was, moreover, quite unusual for States to claim and enforce extraterritorial jurisdiction *vis-à-vis* a foreign company, he proposed that that sentence should be deleted.

34. Mr. GRAEFRATH proposed that, in the first sentence, the words "while agreeing that 'territory' alone was too narrow" should be added after the word

"however". He confirmed that, during the discussion, he had referred to the matter dealt with in the third sentence, which Mr. Tomuschat had proposed deleting, and that he knew of several cases of that kind. He therefore proposed that the words "very often" in that sentence should be replaced by the word "sometimes".

35. Mr. MAHIU supported the amendment to the third sentence proposed by Mr. Graefrath.

Mr. Graefrath's amendments to the first and third sentences were adopted.

Paragraph 35, as amended, was adopted.

Paragraphs 36 and 37

Paragraphs 36 and 37 were adopted.

Paragraphs 38 and 39

36. Mr. McCaffrey noted that, while the summary of the discussion on the concepts of jurisdiction and control took up one page of the draft report, the summary of the Special Rapporteur's reply (paras. 38-39) occupied two and a half pages. Perhaps the Special Rapporteur and the Rapporteur could agree on a way of making that part of the text more balanced. He also suggested that the eleventh sentence of paragraph 38, beginning "The Special Rapporteur stated that the concept . . .", should be deleted, since it duplicated what was stated at the beginning of the paragraph.

37. Mr. BARBOZA (Special Rapporteur) said that, in summing up the discussion, he had dwelt at length on the concepts of jurisdiction and control. He would, however, have no objection if the sentence referred to by Mr. McCaffrey were deleted and if paragraphs 38 and 39 were shortened.

It was so agreed.

38. Mr. McCaffrey, supported by Mr. BEN-NOUNA, suggested that the Special Rapporteur should reconsider the wording of the twelfth sentence of paragraph 39, beginning "Accordingly, the control was the ouster of jurisdiction . . .".

39. Mr. BARBOZA (Special Rapporteur) said that he would do his best to meet the concerns of Mr. McCaffrey and Mr. Bennouna.

40. Mr. SHI (Rapporteur) said that the text of paragraphs 38 and 39 to be redrafted with the Special Rapporteur's co-operation would be distributed to the members of the Commission before the end of the session.

Paragraph 38, as amended, and paragraph 39 were adopted on the understanding that they would be recast by the Special Rapporteur and the Rapporteur.

Paragraph 40

41. Mr. OGISO said that, in his opinion, paragraph 40 was very important because it reflected what the Special Rapporteur meant by the concept of risk. Although he himself had some doubts about the idea of making risk the basis for liability, he understood that that was one of the main concepts on which the Special Rapporteur had relied. The seventh sentence, reading "Sub-paragraph (a) limited the risk to 'appreciable risk',

meaning that it had to be greater than a normal risk", was thus quite significant. The Special Rapporteur had also used the expression "appreciable harm", as Mr. McCaffrey had done in the chapter of the draft report on the law of the non-navigational uses of international watercourses. Mr. McCaffrey, however, had given a detailed definition of that term: for him, it meant harm that was significant, but less than substantial. If the Special Rapporteur shared that view, should he not say so?

42. He did not recall that that question had been raised during the discussion on the present topic and he could therefore understand that the Special Rapporteur had not referred to it. He nevertheless noted that, in his definition of "appreciable risk" (draft article 2 (a) (ii)), the Special Rapporteur had given the idea of appreciability a different connotation from that implied in the expression "appreciable harm". That point should be clarified.

43. Mr. GRAEFRATH, supported by Mr. BARSEGOV, said that it would be useful to add a footnote at the end of paragraph 40 referring back to paragraphs 21 to 28, which already dealt in detail with the question of "risk" and "appreciable risk".

It was so agreed.

44. Moreover, it was rather strange that, after dealing at length with that question in the above-mentioned paragraphs, in which he had explained that he had adopted a different position, the Special Rapporteur should later revert to his original position.

45. Prince AJIBOLA suggested that the words "Occult risk", in the ninth sentence of paragraph 40, should be replaced by "Hidden risk".

It was so agreed.

46. Mr. BARBOZA (Special Rapporteur) said that he had not dealt at any greater length with the term "appreciable" because it was a term of art that was well known in environmental law. He had discussed it in detail in his fourth report (A/CN.4/413), in which he had, moreover, used it in the same sense as in the context of the law of the non-navigational uses of international watercourses. Mr. Ogiso's concern was, however, commendable and it might be met by adding a short paragraph to the part of chapter II of the report dealing with transboundary harm, to indicate that the concept of appreciable harm was similar to that used in the context of the law of the non-navigational uses of international watercourses.

Paragraph 40, as amended, was adopted.

Paragraph 41

47. Mr. PAWLAK and Mr. Sreenivasa RAO said that, in the second sentence, it would be better to refer to "jurisdictional limits" than to "jurisdictional boundaries".

It was so agreed.

48. Mr. TOMUSCHAT said that the words "a best translation", in the fourth sentence, did not mean

anything. They should be replaced by "the best translation" or "an adequate translation".

It was so agreed.

Paragraph 41, as amended, was adopted.

Paragraph 42

Paragraph 42 was adopted.

Paragraph 43

49. Mr. McCAFFREY proposed that the following sentence should be inserted between the second and third sentences: "It was also said that the term 'risk' should encompass activities whose operation entailed a low probability of causing harm, but in relation to which, if harm ensued, it could be catastrophic."

50. Mr. BARBOZA (Special Rapporteur) said that that point of view had already been expressed in paragraph 25 and that it had even been indicated in paragraph 28 that he intended to take it into account in amending draft article 2.

51. Mr. McCAFFREY said that the discussion summed up in paragraph 25 related to draft article 1 and that the present context was different. He was, however, prepared to withdraw his amendment, provided that paragraph 25 was amended slightly to reflect his point of view more clearly.

It was so agreed.

Paragraph 43 was adopted.

Paragraphs 44 to 46

Paragraphs 44 to 46 were adopted.

Paragraph 47

52. Mr. Sreenivasa RAO proposed that the following text should be added at the end of paragraph 47:

"In this connection, a view was also expressed that the Commission should focus on the liability of a multinational corporation without attempting to view it through the prism of State jurisdiction. It was further suggested that such a concept of liability should be proportional to the effective control of the State or other entities operating within each jurisdiction and, more importantly, to the means at their disposal to prevent, minimize or redress harm."

It was so agreed.

Paragraph 47, as amended, was adopted.

Paragraphs 48 to 52

Paragraphs 48 to 52 were adopted.

Paragraph 53

53. Mr. TOMUSCHAT and Mr. RAZAFINDRALAMBO pointed out that, in the first sentence, the word "interest" should be in the plural.

It was so agreed.

Paragraph 53, as amended, was adopted.

Paragraphs 54 to 57

Paragraphs 54 to 57 were adopted with some drafting changes.

Paragraph 58

Paragraph 58 was adopted.

Paragraph 59

54. Mr. KOROMA said that paragraph 59 dealt with an important issue which would determine the entire structure of the draft articles. He proposed that the paragraph should reproduce the principles stated by the Special Rapporteur in paragraphs 85 and 86 of his fourth report (A/CN.4/413).

55. Mr. BEESLEY supported that proposal, since paragraph 59 was in fact too vague. At least the second set of principles stated in paragraph 86 of the Special Rapporteur's fourth report should be reproduced, since the first set (para. 85 of the fourth report) had been reproduced in the Commission's report on its thirty-ninth session. He therefore suggested that the word "namely" should be added at the end of the first sentence of paragraph 59 and that the principles contained in paragraph 86 of the fourth report should then be listed.

56. Mr. TOMUSCHAT proposed that, in the second sentence, the words "specific rules for their application" should be replaced by "specific rules of implementation".

57. The CHAIRMAN, speaking as a member of the Commission, said that it would be helpful to make it clear in the first sentence that the principles identified by the Special Rapporteur had been considered relevant to the topic.

58. Mr. BARBOZA (Special Rapporteur) said that, as agreed at the 2088th meeting (para. 28), he would reproduce the principles stated in paragraph 86 of his fourth report (A/CN.4/413) in the part of the Commission's report now under consideration.

59. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt paragraph 59 with the amendment agreed to by the Special Rapporteur and the amendment proposed by Mr. Tomuschat.

It was so agreed.

Paragraph 59, as amended, was adopted.

Paragraphs 60 to 63

Paragraphs 60 to 63 were adopted.

Paragraph 64

60. Mr. CALERO RODRIGUES proposed that, in order to bring all language versions into line with one another, the word "free" in the last sentence should be replaced by the words "free of charge".

61. Mr. BENNOUNA said that the word *gratuite* in the French text was not any clearer than the word "free". If the reference was to a financial contribution, that should be clearly stated.

62. Mr. TOMUSCHAT said that he also did not see what the last sentence meant.

63. Mr. BARBOZA (Special Rapporteur) said he had meant that, although co-operation was compulsory, assistance to a State might not always be provided free of charge.

64. Mr. TOMUSCHAT proposed that the last sentence should be amended to read: "Nor did the Special Rapporteur wish to imply that assistance provided under the rules on co-operation should be free of charge in all cases."

It was so agreed.

Paragraph 64, as amended, was adopted.

Paragraph 65

65. Mr. BARSEGOV proposed that, in order to reflect the discussion more completely, a passage along the following lines should be added:

"According to a view expressed during the debate, it was essential, as the Special Rapporteur had indicated in his fourth report, to take account of the rights and interests of the State of origin, for that was of crucial importance from the point of view of prevention. According to that view, taking account of the rights and interests of the State of origin was an integral part of the whole concept of liability in the event of transboundary harm caused by a lawful activity."

It was so agreed.

Paragraph 65, as amended, was adopted with a further drafting change.

Paragraph 66

66. Mr. BENNOUNA proposed that the following sentence should be added after the first sentence: "Through these procedures, it would be possible to identify activities involving risk and to adopt by agreement the necessary preventive measures."

It was so agreed.

Paragraph 66, as amended, was adopted.

Paragraph 67

Paragraph 67 was adopted.

Paragraph 68

Paragraph 68 was adopted with a drafting change.

Paragraphs 69 to 72

Paragraphs 69 to 72 were adopted.

Paragraph 73

67. After a brief discussion in which Mr. THIAM, Mr. BENNOUNA and Mr. BARBOZA (Special Rapporteur) took part, the CHAIRMAN said that the first sentence of the French text should read: *Le Rapporteur spécial a expliqué que le principe de la réparation prévaudrait en cas d'absence d'un régime établi d'un commun accord entre l'Etat d'origine et l'Etat affecté.*

Paragraph 73, as amended in the French text, was adopted.

Paragraph 74

68. Mr. BARSEGOV, referring to the penultimate sentence, said that it was States, not the Commission, that would be called upon to transform the obligation in question into a legal obligation.

69. Mr. CALERO RODRIGUES proposed that the sentence should be amended to read: "It was that obligation that had to be transformed into a legal obligation."

It was so agreed.

70. In reply to a request by Mr. BENNOUNA for clarifications concerning the last sentence, Mr. BARBOZA (Special Rapporteur) said that, during the discussion, some members had stated that it had to be specified in what cases and in which circumstances the obligation to make reparation existed when it was not linked to risk.

71. Mr. BARSEGOV proposed that the words "In the opinion of these members" should therefore be added at the beginning of the last sentence.

It was so agreed.

Paragraph 74, as amended, was adopted.

Paragraphs 75 and 76

Paragraphs 75 and 76 were adopted with some drafting changes.

Paragraph 77

Paragraph 77 was adopted.

Paragraph 78

72. Mr. AL-BAHARNA proposed that the words "of the Commission" should be added after "the members".

It was so agreed.

Paragraph 78, as amended, was adopted.

Paragraph 79

73. Mr. McCAFFREY said that, as was customary, paragraph 79 should form the subject of a separate section, which would be entitled: "C. Points on which comments are invited".

74. For the sake of uniformity, the paragraph should also be brought into line with the corresponding text (para. 87) of chapter III of the report (see 2088th meeting, para. 19), and it should be specified that the Commission would welcome the views of Governments in particular on the question raised. The question itself should be stated more straightforwardly, since the Commission wished to know whether the basis of liability should be risk or harm. Paragraph 79 as it now stood was too abstract.

The meeting rose at 1.05 p.m.

2091st MEETING

Wednesday, 27 July 1988, at 3 p.m.

Chairman: Mr. Bernhard GRAEFRATH

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. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, 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 (concluded) (A/CN.4/L.424 and Corr.1)

Paragraph 79 (concluded)

1. The CHAIRMAN said that, following consultations with the Special Rapporteur and to obviate the need for further discussion, he would suggest that paragraph 79 should be amended to read: "The Commission would welcome the views of Governments in particular on the role risk should play in the topic (see paragraphs 21 to 28 above)."

2. Mr. BEESLEY said that that formulation was one possibility, but was so condensed that the Commission was unlikely to receive useful answers. He proposed instead that the last part of the paragraph should read: "... on the question whether the concept of appreciable risk or the concept of appreciable harm should be the basis of liability". He was, however, prepared to accept any clear form of wording that would have the necessary effect.

3. Mr. RAZAFINDRALAMBO pointed out that, in order to bring the French text of paragraph 79 into line with the English, the words *à la fois* should be added before *à la prévention*. Also, the word *applicabilité* should be replaced by *application*.

4. Mr. BARSEGOV said that the Commission now seemed to want to change the basis on which it had been working. If the neutral wording suggested by the Chairman was not acceptable, the question the Commission should put to the General Assembly was whether the concept of liability for lawful acts should be based, as before, on risk, or whether the basis should be changed to harm, or again, if it was deemed preferable, to appreciable harm, the word "appreciable" being placed between square brackets so as to indicate that there were two schools of thought on the matter.

5. Prince AJIBOLA said that the text proposed by the Chairman would be acceptable provided the reference to paragraphs 21 to 28 was deleted.

6. Mr. FRANCIS said that the Commission should ask the General Assembly whether the scope of the draft articles should be limited to activities involving risk, as