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Summary record of the 2787th meeting

Topic:
Adoption of the report

Extract from the Yearbook of the International Law Commission:-
2003, vol. I

2787th MEETING

Tuesday, 5 August 2003, at 3 p.m.

Chair: Mr. Enrique CANDIOTI

Present: Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kateka, Mr. Kolodkin, Mr. Mansfield, Mr. Matheson, Mr. Melescanu, Mr. Momtaz, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño.

Draft report of the Commission on the work of its fifty-fifth session (*continued*)

CHAPTER VI. ***International liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from transboundary harm arising out of hazardous activities)*** **(A/CN.4/L.638)**

1. The CHAIR invited members of the Commission to take up chapter VI of the draft report.

A. Introduction

Paragraphs 1 to 6

Paragraphs 1 to 6 were adopted.

Paragraph 7

2. In response to a comment by Mr. BROWNLIE, Mr. Sreenivasa RAO (Special Rapporteur) suggested that in the first sentence the word "again" should be deleted.

Paragraph 7, as amended, was adopted.

Paragraphs 8 to 10

Paragraphs 8 to 10 were adopted.

Paragraph 11

3. Mr. MOMTAZ queried the phrase "International liability in case of loss from transboundary harm arising out of hazardous activities", which was placed in parentheses in the first sentence.

4. Mr. MIKULKA (Secretary of the Commission) pointed out that it was part of the official title of the topic.

5. Mr. GAJA noted that in earlier paragraphs a different title was given, and that that might create some confusion. The transition should be made clearer.

6. Following a discussion in which Mr. MANSFIELD (Rapporteur) and Mr. KATEKA (Chair of the Drafting Committee) took part, the CHAIR suggested that the phrase in parentheses in the first sentence should be deleted and the last sentence revised to read: "The Commission adopted the report of the Working Group, decided that the topic would be entitled 'International liability in case of loss from transboundary harm arising out of hazardous activities' and appointed Mr. Pemmaraju Sreenivasa Rao Special Rapporteur for the topic."

Paragraph 11, as amended, was adopted.

Section A, as amended, was adopted.

B. Consideration of the topic at the present session

Paragraph 12

Paragraph 12 was adopted.

Paragraph 13

7. Ms. ESCARAMEIA said the paragraph raised a general question about how the proceedings of the working groups were reflected in the Commission's report. The practice seemed to be to say nothing about them, and that was the approach used in paragraph 13. On the other hand, the Commission's report to the General Assembly on the work of its fifty-fourth session contained an entire section on the activities of the Working Group on the present topic.[1] At the current session, the same Working Group had made a great deal of progress on a number of substantive questions, and it was difficult to see why such progress was not reflected in the report.

8. Mr. Sreenivasa RAO (Special Rapporteur) said that in 2002 the Working Group had reached agreement on fundamental issues relating to the approach to the topic. In 2003 a productive exchange of ideas had taken place, but no conclusions had been reached. During the preparation of the draft report, the idea of covering the Working Group's deliberations had been discussed, but after due consideration it had been decided not to. However, in deference to Ms. Escarameia's position and to give a sense of the very productive work that had been done, he could suggest the inclusion, at the end of the second sentence, of the phrase "and generally exchanged views on different aspects of the topic, particularly on the basis of the summary and submissions presented by the Special Rapporteur in his report".

9. The CHAIR said he thought there was no harm in providing a factual description of what the Working Group had done, even though the secretariat had informed him that that went against the general practice and might set an unfortunate precedent. In addition, the Working Group in question was not a Working Group of the Commission, but a body convened to assist the Special Rapporteur.

[1] *Yearbook … 2002*, vol. II (Part Two), chap. VII, sect. C, paras. 442–457.

10. Mr. BROWNLIE said that it would be a pity if precedents and past practice were the sole considerations governing reporting on the efforts of working groups. On the other hand, there were substantial reasons for not giving extensive coverage to what went on in those groups: their deliberations were therapeutic in character, problem-solving exercises that provided a foundation for future progress. He would be in favour of keeping the reporting at the present low level of coverage, without being entirely secretive about the proceedings in the Working Group.

11. Following a discussion in which Mr. MELESCANU, Mr. PELLET, Mr. MANSFIELD (Rapporteur) and Mr. CHEE took part, Mr. Sreenivasa RAO (Special Rapporteur) undertook to draft a text describing the Working Group's deliberations for insertion in the section entitled "Comments on the summation and submissions of the Special Rapporteur".

12. The CHAIR suggested that the Commission should endorse that proposal and that the phrase "to exchange views on various items with a view to assisting the Special Rapporteur in the preparation of his next report" should be inserted at the end of the first sentence in paragraph 13.

It was so decided.

Paragraph 13, as amended, was adopted.

Paragraph 14

13. In response to a remark by Mr. PELLET, the CHAIR suggested that the word *dommages* in the French version should be replaced by *préjudice*.

It was so decided.

Paragraph 14, as amended, was adopted.

Paragraph 15

14. Mr. Sreenivasa RAO (Special Rapporteur) said that the words "once again" in the first sentence should be deleted and the word "urged" replaced by "recalled".

It was so decided.

15. Mr. BROWNLIE said he was unhappy with the substance of subparagraph (*b*) because it contradicted certain other propositions that appeared in the report, one of which was that the work on liability was without prejudice to the operation of the system of State responsibility. In real life, there was a great potential for overlap between the two systems. It would accordingly be preferable to modify the phrase "not involving State responsibility" to read "not necessarily involving State responsibility".

16. Mr. MELESCANU said the problem was that, if the Commission was simply endorsing the recommendations made by the Working Group in 2002, the wording of those recommendations could not be changed.

17. Mr. BROWNLIE said he accepted Mr. Melescanu's point, but adoption of subparagraph (*b*) as it stood would greatly narrow the scope of the topic, for the situations covered would shrink in number.

18. Mr. Sreenivasa RAO (Special Rapporteur) said that Mr. Brownlie's amendment should be incorporated; even if that meant slightly deviating from the wording of the Working Group's recommendations, it would give the Commission more room to deal with certain issues.

It was so decided.

Paragraph 15, as amended, was adopted.

Paragraph 16

19. Mr. PELLET queried the use of the term "innocent victim" in subparagraph (*c*), which seemed to imply that some victims were not innocent. The term had been extensively discussed the year before and he had been under the impression that it was to be avoided.

20. Mr. Sreenivasa RAO (Special Rapporteur) said the phrase had been used in the discussion of the topic from the very start. The meaning of "innocent victim" as a term of art had even been brought up in the General Assembly. It should be retained because it had entered into the vernacular as a means of referring to those who were not involved in the operation of a project as either administrators or managers yet were likely to be affected by the project.

21. Ms. ESCARAMEIA said that the expression "innocent victim" had been used in the Working Group. During discussions in plenary she had objected to the expression, but her objection differed from that of Mr. Pellet. She considered that the environment *per se* should be covered, yet the quality of innocence could not be attributed to the environment, and thus the adjective "innocent" was inappropriate. It was surprising that there was no mention of that discussion under subsection B.2 of the report, relating to the summary of the debate. When the Commission came to deal with that section, reference should be made to the fact that the expression "innocent victim" had been discussed and different views and concerns had been expressed.

22. Mr. Sreenivasa RAO (Special Rapporteur) said that when the Commission dealt with that section of the report it would consider inserting a few lines to satisfy Ms. Escarameia's concern and ensure that her views were properly reflected. The expression "innocent victim" was a term of art generally used to describe human beings—not the environment—who were innocent in the sense that they were not directly involved in the operation of hazardous activities. A distinction was drawn between those involved and those not involved because the former would normally be governed by factories acts or other relevant national legislation. A footnote could be added to the effect that an innocent victim generally referred to a person adversely affected by the damage resulting from a hazardous activity who was not a person employed to conduct or be in control of the activity.

23. Mr. GAJA wondered whether such a definition would not rule out some people the Commission was seeking to protect. For instance, in the case of a firm which employed people on both sides of a border, when harm was caused to those living on the other side of the border the fact that they were employed or somehow connected with hazard-

ous activities should not really be relevant. What of employees living within the border of the territory where the harm had originated? Should they not also be protected? Since it would clearly be difficult for the Commission to decide on a definition at that juncture, perhaps the matter should be deferred until the next report.

24. Mr. MANSFIELD (Rapporteur) said that the footnote suggested by Mr. Sreenivasa Rao could be shortened considerably by saying something along the lines of "generally referred to those not involved in or benefiting from the activity in question".

25. The CHAIR observed that the views of the Special Rapporteur must be accurately reflected.

26. Mr. BROWNLIE said that, like some other members, he was in favour of retaining the expression "innocent victim", which seemed the most apt under the circumstances. There were all kinds of unresolved technical problems, such as the case of the innocent victim who owned shares in an offending enterprise in another State. However, the Commission did need a provisional term of art, which had some political advantages. Perhaps it could be made clear in the footnote that the definition was without prejudice to the various technical problems that would be explored in due course.

27. Mr. ECONOMIDES said that the notion of the innocent victim lay at the very heart of the draft and must therefore be referred to sooner rather than later. It should be mentioned in general terms by means of a footnote. For the time being, it did not seem necessary to provide a definition, since it was clear what it meant—the victim of a tragedy.

28. Mr. MOMTAZ said that the idea conveyed by the expression "innocent victim" was of a person who did not derive benefit from a hazardous activity. In that connection, he drew attention to the last sentence of paragraph 27, which stated that such activities were essential for the advancement of the welfare of the international community. The basic criterion was thus not a question of a person's involvement or non-involvement in such activities but whether they derived some benefit from them.

29. Ms. ESCARAMEIA said it would be useful to have a footnote, but instead of providing a definition of the "innocent victim" it should simply say that the expression generally signified a person who did not benefit from the activity in question. No mention should be made of the involvement aspect.

30. Mr. MATHESON said that members were losing sight of the purpose of the section of the report under consideration—to relate what the Special Rapporteur had said when introducing his first report. It should not reflect what members felt the Special Rapporteur should or could have said, but simply what he had said.

31. Mr. PELLET said that was all very well, but the Commission needed to understand what the Special Rapporteur meant. He wished to explain what bothered him about the expression "innocent victim". Some 10 years ago there had been an attack on a synagogue in Paris which had caused around 15 casualties. The Prime Minister at that time had had the bad taste to announce that there had been three Jewish victims and nine innocent victims. Surely the Jews were also innocent victims? He had been very upset by the incident and had mentioned it to the Commission the previous year. He was raising the matter again because at that time he had felt that the Special Rapporteur had grasped the problem and was ready to give him satisfaction. That no longer seemed to be the case. As far as the example of workers at a nuclear power station was concerned, perhaps they were not innocent in the sense the Special Rapporteur intended, but they were innocent in the usual sense. They might well be the innocent victims of a nuclear disaster—they were certainly not guilty. He was not asking for a different term to be used, but he did want to dispel the uneasiness surrounding the expression "innocent victim". He was certain the Special Rapporteur was not using the expression in a pejorative way, but his own understanding of innocence differed from the Special Rapporteur's. Those working in hazardous activities were as innocent as others who did not. He did not wish to reopen the discussion on the matter, particularly since they were dealing with the Special Rapporteur's report. He endorsed the idea of a footnote along the lines suggested by Mr. Momtaz—in other words, defining a specific concept. What the Special Rapporteur surely had in mind was not the innocence of Adam and Eve but the fact of not deriving greater benefit from an activity. The Commission would need to be careful about the implications of the words it chose.

32. Mr. GAJA disagreed. The idea of deriving benefit was not what the Commission was looking for. One might take the example of a dam built for agricultural purposes: there was an accident, the dam broke, and the farmland was flooded. Undoubtedly, the dam had been built for the benefit of the farmers, but would that mean that they were not victims? The Commission should not try to decide on a definition in such a short time, in view of the problems that remained to be resolved. If a footnote was to be added, it should be to the effect that the concept would be clarified in due course.

33. Mr. MELESCANU endorsed Mr. Gaja's remarks. He did not believe it really useful to define an innocent victim as someone who did not derive benefit from the activity in question. Mr. Momtaz and Mr. Pellet had given the example of workers in the nuclear power industry, but they did derive some benefit because they earned a salary. It was very difficult to determine what was meant by deriving benefit from an activity, and the more the matter was discussed, the more complicated it became. The only solution, therefore, was a footnote stating that the concept would be defined in due course.

34. Mr. Sreenivasa RAO (Special Rapporteur) said he agreed with Mr. Gaja. It was very difficult to define the concept of benefit as it was such a broad term. All consumers, persons supported by social welfare, traders and dealers were beneficiaries. If the term were extended to cover those kinds of situations, it would be impossible to draw a distinction between innocent victims, who were entitled to compensation, and those who were not. From the outset, the Commission had worked on the assumption that a large class of persons not directly involved in an operation should be given the benefit of compensation. In the case of the operation of motor vehicles it was easy to draw the distinction. One person drove the vehicle and

the others were passengers; if the latter were hurt they would be classified as innocent victims. However, if one attempted to extend the concept of operation to workers in the chemical or nuclear industries where different people were involved in the various operating stages—safety, monitoring, maintenance—the matter was not so straightforward. Mr. Pellet had said that the Commission had one year to resolve the problem. However, it was not a question of time. The Commission would not be able to solve the problem even if it had 10 years at its disposal, at least not without dissenting opinions. His suggestion had not been made without reflection. He had been an adviser in his country at the time of the drafting of a liability act for an atomic energy plant. The answer had been that persons working on and in the plant were covered by the Factories Act, whereas general liability provisions covered the remainder of the workers. That was the kind of idea he was trying to introduce, but it might not be acceptable to the Commission.

35. Ms. Escarameia had introduced a completely different dimension, which might well be envisaged. There was no reason why different elements could not be added to the concept over time. Also, the sentimental aspect referred to by Mr. Pellet should be borne in mind so as to ensure that the Commission did not commit a similar gaffe. The expression "innocent victim", was a term of art used since the beginning of the consideration of the topic, and the question of who was covered for the purposes of liability and for compensation required careful study. His understanding of the expression was that it meant persons not directly involved in the relevant operation. He would make no reference to those responsible for accidents, since the Commission did not want to make it a culpability issue. Therefore, a footnote should be added stating that "innocent victim" was a term of art generally understood to mean persons not directly involved in the operation, without prejudice to other technical issues, which, as Mr. Brownlie had suggested, would leave scope for further debate.

36. Mr. CHEE said he failed to understand the need to debate the definition of an innocent victim. In his view, it simply meant a person innocent of causing the accident. It could be used in tort law and a variety of other situations. In paragraph 16 it was being used in the context of harm caused in a situation over which the victim had no control; he was in favour of retaining it.

37. The CHAIR said that the debate had been long and interesting. However, if he heard no objection, he would take it that the Commission endorsed the Special Rapporteur's proposal to add a footnote explaining what was meant by "innocent victim".

It was so decided.

Paragraph 16, as amended, was adopted.

Paragraph 17

Paragraph 17 was adopted.

Paragraph 18

38. Mr. BROWNLIE said that the second sentence was rather clumsy. It would be easier to read if it were turned around. It should be reworded to read: "Factors which militated against the achievement of full and complete compensation included the following: problems with the definition of damage; difficulties of proof of loss; problems of the applicable law; limitations on the operator's liability; and limitations within which contributory and supplementary funding mechanisms operated."

Paragraph 18, as amended, was adopted.

Paragraph 19

Paragraph 19 was adopted with a minor drafting change.

Paragraph 20

39. Mr. PELLET, referring to the end of the second sentence, said that the word "(liability)" would need to be inserted in the French version after the word *responsabilité.* He also questioned the use of the term "option"; perhaps the word "aspect" would be more appropriate.

40. Mr. Sreenivasa RAO (Special Rapporteur) suggested the addition of a phrase at the end of the last sentence which would read: "as it might force the Commission to enter a different field of study altogether".

41. The CHAIR suggested that the word "force" should be replaced by "lead".

Paragraph 20, as amended, was adopted.

Paragraph 21 (*a*)

42. Mr. MOMTAZ asked for clarification regarding the phrase at the end of the second sentence: "still less one based on any particular set of elements".

43. Mr. MANSFIELD (Rapporteur) said the problem stemmed from the phrase in the first part of the sentence "that duty would be best discharged by negotiating a liability convention". He suggested it should be reworded: "that the best approach would be the negotiation of a liability convention". Similarly, the phrase in the third sentence "the duty could be equally discharged, if considered appropriate" should be replaced by "another possibility would be".

44. Mr. Sreenivasa RAO (Special Rapporteur) said that the phrase queried by Mr. Momtaz would be clearer if the start of the sentence were reworded: "While the schemes of liability reviewed had common elements" and the words "of compensation" were inserted after "duty" in the second sentence. In his review of various liability regimes, he had listed the different factors involved. It was difficult to negotiate a particular liability convention precisely because of the wide variety of factors.

45. Mr. MOMTAZ requested confirmation that the Special Rapporteur's aim was not to draft a convention that would consolidate the elements of various regimes but simply to identify the general principles that would apply to all activities.

46. Mr. Sreenivasa RAO (Special Rapporteur) said that the way forward was not yet clear. There were no elements common to all regimes, so it seemed impossible to draft a comprehensive convention. On the other hand, in the absence of a model convention, he wondered whether various elements could be used in an *ad hoc* manner, although such a course of action was more difficult because it provided less guidance. However, for the time being, the aim was just to report to the General Assembly. Finer points of detail could be thrashed out within the Commission at the next session.

47. Mr. MOMTAZ said that the second sentence remained misleading. He wondered whether the Special Rapporteur's argument would be impaired if the phrase "still less one based on any particular set of elements" was deleted.

48. Mr. Sreenivasa RAO (Special Rapporteur) said any fears Mr. Momtaz might harbour that the Commission would be unable to draft a convention were misplaced, although it was not yet clear what form such a convention would take. There were strong views on both sides, but the phrase to which Mr. Momtaz had referred would not vitiate any future convention exercise.

49. Mr. MANSFIELD (Rapporteur) suggested that the Special Rapporteur's views would be more accurately reflected if the second sentence was reworded along the following lines: "Certainly the review did not suggest that the duty to compensate would best be discharged by negotiating a particular form of liability convention."

Paragraph 21 (a), as amended, was adopted.

Paragraph 21 (*b*)

Paragraph 21 (b) was adopted.

Paragraph 21 (*c*)

50. Mr. BROWNLIE said that, as it stood, the wording of subparagraph (5) was too elliptical: wording should be found to make it clear that State liability was the exclusive basis of liability in the case of outer space activities.

51. Mr. Sreenivasa RAO (Special Rapporteur) suggested the wording "Except in the case of outer space activities, State liability was not used exclusively as a basis of liability."

52. Ms. ESCARAMEIA pointed out that State liability existed as a subsidiary rather than a primary form in several conventions. Subparagraph (5) did not fully convey that. Therefore, the phrase "in the sense of exclusive liability" should be inserted after the word "exception".

53. Mr. GAJA recalled that some space activities, such as damage by one spaceship to another, were subject to fault liability rather than absolute liability. State liability was, in short, a very vague term and included liability based on fault.

54. Mr. GALICKI said that such exclusive State liability was not without exceptions, such as the combined liability of States and international organizations. The text should therefore take account of the possible variations.

55. Mr. Sreenivasa RAO (Special Rapporteur) said that he feared that tinkering with the paragraph would only make it worse. The points in paragraph 21 (*c*) were, after all, merely his recommendations; and the Commission understood what he had meant to convey in subparagraph (5).

56. Mr. BROWNLIE drew attention to two editorial changes that should be made in subparagraph (14).

Paragraph 21 (c), as amended by Mr. Brownlie, was adopted.

Paragraph 21 as a whole, as amended, was adopted.

Paragraph 22

57. Mr. Sreenivasa RAO (Special Rapporteur) said it was not clear that the last sentence related to a recommendation made by him rather than by the Commission. The wording ", he suggested," should be inserted after "possibility".

Paragraph 22, as amended, was adopted.

Paragraph 23

58. Ms. ESCARAMEIA regretted that the negative tone of the paragraph might give the impression that the debate had focused exclusively on the viability of the topic and its conceptual and structural difficulties in relation to other areas of international law. In order to reflect the positive attitude of some members, the words "difficulties in relation to" should be replaced by "affinities with".

Paragraph 23, as amended, was adopted.

Paragraph 24

59. Ms. ESCARAMEIA said that not only the Sixth Committee had been favourably disposed towards consideration of the topic: strong support had also been expressed within the Commission. She therefore suggested that the following sentence should be added at the end of the paragraph: "Since General Assembly resolution 56/82 requested in its paragraph 3 that the Commission review the consideration of the liability aspects of the topic and article 18, paragraph 3, of the Commission's statute requires that priority be given to requests of the General Assembly, a discussion on the viability of the project was misplaced."

Paragraph 24, as amended, was adopted.

Paragraphs 25 and 26

60. Mr. BROWNLIE said that the word "pragmatic" in the penultimate sentence of paragraph 25 was redundant and should be deleted.

61. Mr. PELLET said that the last sentence of paragraph 26 appeared to be inconsistent with the body of the paragraph.

62. Mr. BROWNLIE said that paragraph 26 needed restructuring altogether. He also suggested that the phrase

"incidence of cases highly probable" in the second sentence should be replaced by the phrase "a greater incidence of cases probable".

63. Mr. MANSFIELD (Rapporteur) said the problem lay in the fact that the middle section comprised a summary of the statement by Mr. Koskenniemi, in which he had identified all the various criticisms that had been made and rebutted them point by point. The paragraph, however, listed only the criticisms and not the rebuttals; that was the reason for the apparent inconsistency noted by Mr. Pellet.

64. Ms. ESCARAMEIA said that what was in effect a double negative in the first sentence was misleading. The sentence should be rephrased to the effect that "some members considered that the topic, particularly as it concerned the allocation of loss, was not appropriate for codification and progressive development". She also suggested the addition of a final sentence that would sum up Mr. Koskenniemi's conclusions.

The meeting was suspended at 4.35 p.m. and resumed at 4.45 p.m.

65. Mr. Sreenivasa RAO (Special Rapporteur) said that, following informal consultations, paragraph 26 would be recast, taking account of the suggestions that had been made and incorporating the sentence at the end suggested by Ms. Escarameia. The middle section of the paragraph, enumerating the criticisms of the topic—(*a*) to (*e*)—would be transposed to paragraph 25, to follow the penultimate sentence. It would be preceded by the phrase "In addition, the following difficulties were noted:… ". The revised paragraph 26 would read:

> "On the other hand, some members considered that the topic, particularly as it concerned the allocation of loss, was not appropriate for codification and progressive development. They expressed the view that the subject was important theoretically and in practice, with a greater incidence of highly probable cases in the future. They also noted that some of the various criticisms against the topic needed to be taken into account in the Commission's work, but they did not debar the Commission from achieving a realizable objective. The Commission could draft general rules of a residual character that would apply to all situations of transboundary harm that occurred despite best-practice prevention measures."

Paragraphs 25 and 26, as amended, were adopted.

Paragraphs 27 and 28

Paragraphs 27 and 28 were adopted.

Paragraph 29

66. Mr. BROWNLIE said that the text would read better if the word "which" was inserted before "caused", in the second sentence.

67. Mr. PELLET suggested that, in view of the Commission's previous discussion, the expression "innocent parties" should be replaced by "innocent victims".

68. Mr. Sreenivasa RAO (Special Rapporteur) agreed to the proposal. He also proposed that the second half of the last sentence should be recast along the following lines: "and, second, to deal with the different social costs, which, from an analysis of the various regimes, varied from sector to sector".

Paragraph 29, as amended, was adopted.

Paragraph 30

69. Mr. Sreenivasa RAO (Special Rapporteur) said that the words "were not prejudiced", in the first sentence, should be replaced by "should not be prejudiced".

70. Mr. BROWNLIE said that, if the Commission was taking the *Corfu Channel* case as the basis for its argument, as it should, precisely because the principle it enshrined was important, the fifth sentence of the paragraph should refer not only to a State's knowledge of acts contrary to the rights of other States but also to the means of knowledge: Albania had been held liable not on the basis of the proof of its knowledge but because it had the means of knowing that a mine had been laid. He therefore suggested that the phrase "of which it had knowledge or means of knowledge" should be inserted after the word "acts". He also suggested that the phrase following the words "other States" should be recast as a separate sentence, to read: "Such obligation would apply to the environment as well." He would add that the distinction was nonetheless somewhat artificial, because the Corfu Channel was also part of the environment.

71. Mr. MOMTAZ said that he detected a contradiction between the last sentence, which appeared to sum up the paragraph, and the content of the paragraph itself. On the one hand, it was said that State responsibility largely dealt with the subject matter of the topic, yet surely that was not compatible with the aim of avoiding an overlap.

72. Mr. BROWNLIE said that, in his opinion, a system of options existed and the option of State responsibility still applied where appropriate. The snag had always been that earlier Special Rapporteurs had used as examples of what they deemed to be liability cases which were in fact classic instances of State responsibility. The problem was not one of conflict, but of the relationship between separate, coexisting options. That was why every draft contained a proposition that the State liability project was without prejudice to the law relating to State responsibility. If that were not so, it would be necessary to reconsider the 40 years' work on State responsibility, and a splendid mess would then ensue.

73. Mr. Sreenivasa RAO (Special Rapporteur) said that he would defer to Mr. Brownlie on that question.

74. Mr. MANSFIELD (Rapporteur) said he agreed with Mr. Brownlie and that there was no disagreement on the main issue. The crux was that, in order for State responsibility to be incurred, there had to be a wrongful act, whereas the situations covered in chapter VI of the report were primarily those in which loss had arisen in circumstances where no wrongful act had occurred and where fault-prevention action had been taken.

75. Mr. BROWNLIE said that, in the paragraph under consideration, the Special Rapporteur had faithfully reflected the debate on the issue. He personally wished to make it clear that in his own previous comment he had not added anything new, but had merely elucidated the precedents set by the *Corfu Channel* case.

76. Mr. MOMTAZ said that readers would be perplexed, because the whole paragraph alluded to the interaction between the two regimes and yet the last sentence asserted that it was within the competence of the Commission to avoid any overlap.

77. The CHAIR said that the sentence in question reflected an individual opinion expressed during the debate and Mr. Brownlie appeared to be satisfied that his standpoint had been correctly reported. Although he therefore believed that the sentence should be retained, he asked Mr. Brownlie if he insisted on keeping the sentence.

78. Mr. BROWNLIE said that he had not, in fact, drawn that conclusion. His position was that there was a whole series of options, which included all the existing schemes of multilateral treaties dealing with that kind of issue. The Commission was wisely designing a new option. A benign competition took place between those options. They did not collide with one another. Hence there was an overlap, but it was not something negative. What alternative was there to acknowledging that coexistence? Was the Commission supposed to consolidate everything into a single scheme of liability that would subsume State responsibility and all the other treaty regimes? To his knowledge, no member had expressed that view.

79. The CHAIR suggested that the last sentence should be deleted.

Paragraph 30, as amended, was adopted.

Paragraphs 31 and 32

Paragraphs 31 and 32 were adopted.

Paragraph 33

80. Ms. ESCARAMEIA said that, further to the discussion centering on the term "innocent victim", it might be advisable, at the end of the paragraph, to add the following sentence: "Some members commented also on the appropriateness of the expression 'innocent victim', as in the case of damage to the environment."

81. Mr. PELLET said that if that sentence were included in the report another sentence would have to be added in order to indicate that some members disagreed with that notion. Furthermore, he wished to know what was meant by "replacement language for a draft convention". Did that phrase embrace the possibility of a draft convention?

82. Mr. Sreenivasa RAO (Special Rapporteur) said that the terms "models" and "legal regimes" had been selected so as not to imply that the definite aim was the drafting of a convention.

83. Mr. PELLET said his impression was that the idea to be conveyed was that the terms "models" and "legal regimes" did not necessarily exclude the possibility of a draft convention but, on the contrary, covered the whole range of potential outcomes. If that was the case, the expression "replacement language" was inapt.

84. Following a discussion in which Mr. ECONOMIDES, Mr. PELLET, Ms. ESCARAMEIA and the CHAIR took part, Mr. Sreenivasa RAO (Special Rapporteur) suggested that the paragraph should end with a formulation reading: "Some members also commented on the appropriateness of the expression 'innocent victim', particularly in relation to damage to the environment. Another view objected in principle to the use of the expression 'innocent victim'."

Paragraph 33, as amended, was adopted.

Paragraphs 34 and 35

Paragraphs 34 and 35 were adopted with minor drafting changes.

Paragraph 36

85. Mr. PELLET said that the structure of the paragraph was illogical, as it referred to "general support" in one sentence and "some members" in the next. For that reason, it would be better to say that there had been wide support for maintaining the same threshold.

Paragraph 36, as amended, was adopted.

Paragraph 37

Paragraph 37 was adopted.

Paragraph 38

86. Mr. Sreenivasa RAO (Special Rapporteur) said that the traditional liability approach should not serve as a pretext for skirting the topic of damage to the environment. He suggested that, in order to make the meaning of the second sentence plainer, it should read, "It was stressed that any emphasis on traditional civil liability approaches should not be considered as an excuse for not dealing with questions concerning damage to the environment."

Paragraph 38, as amended, was adopted.

Paragraph 39

87. Mr. Sreenivasa RAO (Special Rapporteur) said that the footnote should refer to the final printed version of the Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters.

Paragraph 39 was adopted with minor drafting changes.

The meeting rose at 6 p.m.