Document:-
**A/CN.4/SR.2399**

**Summary record of the 2399th meeting**

Topic:
**International liability for injurious consequences arising out of acts not prohibited by international law**

Extract from the Yearbook of the International Law Commission:-
**1995, vol. I**

defined more and more frequently as the "operator". Yet at times the two coincided, and that was one of the problems with the subject-matter dealt with in his tenth report. In fact, the report outlined many cases in which treaties had reconciled the liability of the State and of the operator.

35. The points raised by Mr. Yankov were important. Environmental harm and the definition of the environment were evolving issues, and he hoped the Commission would bend its collective efforts towards resolving some aspects of those issues. He agreed that the human factor was important, but he truly did not think it entered into the definition of the environment. A human being could be affected by environmental harm, but was not actually part of the environment.

### Closure of the International Law Seminar

36. The CHAIRMAN said that, over the past three weeks, a new enthusiasm had marked the Commission's meetings as members had been able to share their concerns with the energetic participants in the International Law Seminar. The freshness of their outlook and the academic atmosphere that accompanied them had encouraged members of the Commission to look to the future and to recover the idealism of their youth. He commended the participants on the results of their work on subjects that the Commission itself had been grappling with. He wished them every success in their future endeavours and was sure international law would be safe in their hands.

37. Mr. SCHMIDT (Director of the Seminar) said that the participants had taken an avid interest in the Seminar and that the recommendations that had emerged from their study groups were remarkably detailed. He hoped the wealth of information they had consumed would not be difficult to digest. Trusting that they would leave Geneva with the sense that their time there had been well spent, he wished them success in their future posts—whether in teaching or in government service. Some day, perhaps, one or more of the participants would be seen again in the Commission's meeting room—in a different capacity.

38. Mr. TOMUSCHAT said that, as a former participant in the International Law Seminar, he was especially honoured to have headed the study group on consequences of international crimes. The results of the work done by that team, and by its fellow, the study group on unilateral acts under international law, were truly remarkable. The participants, he hoped, had gained a deeper insight into the issues facing the Commission, and the fact that they themselves had been unable to reach agreement on some points mirrored the Commission's own quandaries. The participants had worked hard and it was his hope that their memories of the past three weeks would always be agreeable.

39. Mr. PANNATIER said that he had the gratifying task of thanking the Commission on behalf of the participants in the International Law Seminar. In the past three weeks they had been able to delve into the world of the Commission and had enjoyed privileged access to its members. Those contacts had enriched each participant; one of the many gains of the Seminar was also the bonds of friendship that had been forged. All the members of the Commission had given freely of their time and the Director of the Seminar had made excellent arrangements for the organization of the programme. He wished to express thanks to the Governments which, in a time of growing budgetary constraints, had made contributions to facilitate the holding of the Seminar, and to extend to the Commission best wishes for success in its work from the participants in the Seminar, who would not forget what they had learned.

*The Chairman presented participants with certificates attesting to their participation in the thirty-first session of the International Law Seminar.*

### Other business (A/CN.4/L.518)

[Agenda item 11]

40. Mr. TOMUSCHAT, noting that a heated debate was going on in France over the pernicious effects on health of the asbestos used in building construction, asked whether any investigation had been made of whether that product was present in the structure of the Palais des Nations.

41. Ms. DAUCHY (Secretary to the Commission) said some offices had been renovated in 1991 and any asbestos present had been removed, but the secretariat would make further inquiries into the matter.

*The meeting rose at 12.10 p.m.*

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## 2399th MEETING

*Tuesday, 13 June 1995, at 10.05 a.m.*

*Chairman*: Mr. Pemmaraju Sreenivasa RAO

*Present*: Mr. Al-Khasawneh, Mr. Barboza, Mr. Bowett, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. He, Mr. Kabatsi, Mr. Lukashuk, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Tomuschat, Mr. Villagrán Kramer, Mr. Yankov.

**International liability for injurious consequences arising out of acts not prohibited by international law (*continued*) (A/CN.4/459,[1] A/CN.4/464/Add.2, sect. E, A/CN.4/468,[2] A/CN.4/471[3], A/CN.4/L.508, A/CN.4/L.510, A/CN.4/L.511 and Add.1, A/CN.4/L.519)**

[Agenda item 5]

TENTH AND ELEVENTH REPORTS OF THE SPECIAL RAPPORTEUR (*concluded*)

1. Mr. ROBINSON said that the question of international liability for injurious consequences arising out of acts not prohibited by international law presented particularly difficult issues for developing countries. Since developing countries did not have the technology to carry out such acts and were more likely to be affected by them, they would generally favour a regime of strict controls, but, as engaging in those acts was an imperative for development, they must perhaps agree to a somewhat less strict regime. Likewise in favour of a strict regime of controls were developing countries located near other countries, whether slightly developed, almost developed or fully developed, in which activities of that nature took place and which felt directly threatened by them, as well as island States whose economy was primarily dependent on tourism and for which the integrity of the natural environment was of the utmost importance.

2. As to the developed countries, it might seem obvious that, since they generally engaged in such activities, they would favour a liberal regime. But it must be borne in mind that some of those countries were less developed than others and therefore engaged in such activities to a lesser degree and might therefore prefer a stricter regime. It was thus clear that the dichotomy established between developed and developing countries for the purpose of discussing the topic under consideration was relevant only as a generalization and might be misleading. Ultimately, the Commission must find a solution on the basis of State practice, an examination of relevant international conventions and proposals which developed international law. The Special Rapporteur was to be commended for an approach which reflected a judicious combination of codification and progressive development of international law in the area.

3. Turning to the actual concept of the environment, his preference was for as broad a concept as would allow a reasonable assessment and quantification of harm to the environment. The Special Rapporteur pointed out in his eleventh report (A/CN.4/468) that the *Chorzów* rule of *restitutio in integrum* was strictly applicable to breaches of what were called primary rules and that it was not being as rigorously respected in this field as in that of wrongful acts.[4] He believed, however, that the *Chorzów* rule must serve as an indicator of the degree to which reparation must be made for damage to the environment. Subject to treaty obligations, reparation should seek as far as possible to restore the *status quo ante*.

4. With regard to the text proposed by the Special Rapporteur in his report, he was surprised to find references in subparagraph (*c*) (i), (ii) and (iii) to "cost" and "compensation" in the definition of harm to the environment, which were not so much components of harm as factors to be taken into consideration in assessing harm. It would be more sensible to introduce subparagraph (*c*) (i), (ii) and (iii) by a phrase such as: "in assessing reparation for harm to the environment, due account may be taken of". In order to stress the relevance of the *Chorzów* rule in that regard, he would make the text proposed in subparagraph (*c*) (i) even more explicit by adding the words "*the status quo ante*" after the word "restore". It was, moreover, not altogether clear whether the words "where reasonable" captured the circumstances in which the equivalent of resources not restored or replaced might be introduced into the environment. Concerning subparagraph (*c*) (ii), he understood "preventive measures" to include not only the *ex post*, but also the *ex ante*, measures referred to earlier in the report. Lastly, the text of subparagraph (*c*) (iii) was not stringent enough and he proposed that it should be replaced by the following wording:

> "reasonable compensation in cases where the measures indicated in subparagraph (*c*) (i) were impossible or insufficient to achieve a situation acceptably close to the *status quo ante*".

The instrument envisaged should not provide that such compensation should be used to improve the environment of the affected region. No doubt in most cases, the compensation would be so used, but that was a matter for the affected State to decide. Whereas the illustrative list in subparagraph (*c*) (i), (ii) and (iii) ought to be exhaustive, he supported the non-exhaustive listing of items constituting the environment and understood that the omission of a reference to "cultural heritage" in the list proceeded on the basis that damage to such property was covered by subparagraph (*b*) on damage to property.

5. Lastly, he noted that, according to the proposed text, the affected State or the bodies which it designates under its domestic law shall have the right of action for reparation of environmental damage. He wondered whether that meant that an individual whose interest had been damaged would not be able to institute proceedings, what would happen if neither the State nor the designated agency made a claim for reparation whereas individuals felt that there was a just claim, whether individuals had no *locus standi* to make a claim and whether harm to the environment was a matter in which there were only State or para-State interests.

6. Mr. de SARAM noted with interest that the eleventh report contained an excellent statement on the questions that might be raised by the definition of "harm". It would be useful if the various texts containing such a definition were made available to the working group so that their wording could be compared.

7. It seemed to him that the Commission should focus its attention on the definition of the word "harm" and avoid spending time on other questions that could be

[1] See *Yearbook... 1994*, vol. II (Part One).

[2] Reproduced in *Yearbook... 1995*, vol. II (Part One).

[3] Ibid.

[4] See 2397th meeting, footnote 19.

considered at a later stage, including the necessity that the harm for which a particular claim for compensation was made should not be a remote, but a reasonably direct, consequence of the activity in the State of origin; the standards to be utilized in determining the amount of compensation payable in particular cases; and who would be entitled to submit claims. The prospects of catastrophic harm and thus of high claims also gave rise to great difficulties and it would probably be necessary in certain cases to conclude special arrangements. However, the Commission should, at least in principle, stick to the basic idea that the primary purpose of compensation was to restore the situation that had existed prior to the harm. For that reason, he did not quite agree with the point made by the Special Rapporteur in his report that there was a distinction to be drawn between reparation in the case of a breach of a primary international obligation and compensation pursuant to a primary international obligation.

8. The definition of harm must be reasonably comprehensive without being overburdened with detail. In a preliminary stage, it ought to cover the following elements: loss of life, personal injury or other impairment of health within the affected State, loss of or damage to property within the affected State, impairment of the natural resources of the affected State and impairment of the natural, human or cultural environment of the affected State.

9. There was another matter which, although not of direct relevance to the question of the definition of harm, was of general importance to the current topic: what the current basis was for the obligation to compensate where an activity not prohibited by international law in one State caused physical harm in another State and, regardless of the current state of the law on the matter, what ought to be the basis for the obligation to compensate in such cases. Where the obligation to compensate was set out clearly in a treaty, there should be no legal difficulty in determining the basis for the obligation. Difficulties arose where there was no such treaty, particularly as there was a paucity of guidance in the form of authoritative judicial or arbitral decisions. In such cases, it was difficult to determine which law was applicable. But from the point of view of the progressive development of the law that was needed if only for humanitarian considerations, he was of the view that it should not be impossible to find a basis for an obligation to compensate, at least in cases of very hazardous activities, a field in which, at any rate in many national systems of law, the obligation to compensate no longer entailed the requirement for the claimant who had been harmed to prove that there had been a failure to take all precautions at the source to prevent the harm from taking place. There was the view that, in many cases, the solution might be claims for compensation at the level of private international law, but he doubted whether that was possible if the countries concerned were both geographically distant and had different national legal systems. Logistical difficulties were also inevitable in litigating abroad.

10. Consequently, there was a need to consider elaborating rules applicable between States under public international law, but individual claimants should not, of course, be deprived of the opportunity to institute proceedings under private international law if they so desired. It would be a good idea to consider the question further at a later date, perhaps initially in the working group.

11. Mr. YANKOV drew the Commission's attention to two points. The first had to do with the place of the human being in the constituent elements of the concept of environment. Notwithstanding the explanations given in the eleventh report, particularly those which raised the question of human health, he continued to think that the definition of the concept of environment must contain a reference to human beings. He noted in that regard that article 2, paragraph 1 (*b*), of the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment spoke of the significant risk for man that those activities posed and he suggested that the Special Rapporteur should pursue his consideration of that aspect of the question in the light of the debate and review the restrictive approach reflected in the report.

12. His second point concerned the use in English of the terms "damage" and "harm". He noted that, in most conventions on the environment, the word "damage" was used, but that the draft articles on the law of the non-navigational uses of international watercourses employed the term "harm". Although he had no particular preference for one term or the other, he thought that the Commission should also discuss that question.

13. Mr. VILLAGRÁN KRAMER said he thought that using the definition of harm to the environment proposed by the Special Rapporteur in his eleventh report would be convenient. The question still remained whether the definition should appear in article 2 or be placed at the beginning of a chapter entitled "Harm". It would be up to the Drafting Committee to take that decision. In his view, it was also very important that the Commission should reach agreement on the criteria to be applied in order to exclude certain acts or omissions from the concept of harm to the environment. Some interesting suggestions in that respect were made by the Special Rapporteur in the report.

14. He recalled, however, that the highly developed and less developed countries held widely differing views on the concept of the environment, as had become very clear at the United Nations Conference on Environment and Development. The standards advocated by both sides were equally valid. The developing countries said that the developed countries had made ample use of their resources in order to achieve their development and that they now wanted to prevent other countries from following their example. Yet certain activities were absolutely essential to a country's development and it was therefore necessary to take account of certain economic factors and to establish reference indices which would make it possible to exclude from the concept of harm certain elements connected with the various stages of a country's development. He personally was in favour of establishing strict standards, but he thought it useful to recall that point, not to the Special Rapporteur, who himself came from a developing country, but to the other members of the Commission.

15. With regard to prevention, the arguments advanced by the Special Rapporteur on the subject of *ex ante* pre-

vention and *ex post* measures assumed particular importance in the case of harm to the environment and the Commission should give favourable consideration to the latter type of measures as far as the environment was concerned. As for reparation, it was clear that, in the event of harm to the environment, *restitutio in integrum* was extremely difficult and complicated. The "Green Paper on Remedying Environmental Damage"[5] said some interesting things in that connection, but, there again, it was a matter of countries that were very highly developed and he was not sure that the standards advocated could be accepted by developing countries. That did not mean that it was necessary to provide two types of rules, one set applicable to the industrialized countries and the other to developing ones, but what certainly needed doing was to study the developing countries' suggestions in order to arrive at a reasonable common denominator.

16. Mr. ROBINSON, taking up the point raised by Mr. Yankov, said that, in his view, the concept of harm should include injury to human health. The inclusion of human beings or human health in the concept of the environment would help to provide that concept with an anchorage and a concrete basis which would otherwise be lacking, for human beings were really at the centre of the environment.

17. If he had understood correctly, the Special Rapporteur thought that the point was covered by subparagraph (*a*) of the definition of "harm" which he gave in the proposed text contained in his eleventh report. According to that paragraph, "harm" could, in particular, mean "loss of life, personal injury or impairment of the health or physical integrity of persons".

18. The problem arose, however, whether the inclusion of human beings or human health in the concept of the environment would not open the way to, as it were, a double claim for reparation. The Commission could easily circumvent that difficulty by including a provision in the text expressly precluding such a possibility. That approach should, in his opinion, be given further consideration.

19. Mr. KABATSI requested the Special Rapporteur to clarify the position under the envisaged arrangement of a State whose environment was adversely affected by a legitimate change in the use of the national resources of a neighbouring State, warranted, for example, by economic considerations. In the case of a riparian watercourse State that might decide to utilize land in the vicinity of the watercourse for agricultural purposes, which might have adverse effects on the rainfall situation in the neighbouring State and thus damage its forests or make lands in that State unsuitable for growing crops or keeping animals, he wondered what the rights of the injured State would be.

20. The CHAIRMAN, speaking as a member of the Commission, said that the information supplied by the Special Rapporteur and his judiciously formulated proposals had helped the Commission to see its way a little more clearly in one of the most interesting, but also most elusive areas it was called on to study.

21. Nevertheless, the issues to be resolved remained exceptionally complex and abstract because international liability for injurious consequences arising out of acts not prohibited by international law could be envisaged at several levels. In the simplest case, where an activity, through a causal link, led to harm, which the Commission had agreed to describe as "significant" because of the need to establish a threshold, the problem of liability was reasonably easy to solve because there already existed a set of generally accepted principles applicable in that area.

22. A change of level occurred, however, when the activities in question were ultra-hazardous. That type of activity had been at the centre of concern in recent years and a number of legal principles and rules had already been formulated in that respect since such activities could be of fundamental importance to the development of a particular community or of the international community as a whole and they were now accessible to practically all States. As such activities were recognized as being socially beneficial, steps had to be taken to absorb the loss if any damage were to result.

23. It was to those developments that had brought into being the system of "civil liability", for example in the nuclear energy sphere, where the operator's liability had been instituted, within certain limits determined by the availability of insurance. Drawing inspiration from that approach, the Special Rapporteur had gone so far as to envisage, in his tenth report (A/CN.4/459), an insurance system funded by the State that would by virtue of subsidiary State liability, be additional to the reparation offered by the operator by way of his own civil liability. Thus far, the problem was still reasonably simple because the standards in question were more or less universally accepted by all societies engaged in "ultra-hazardous" activities that could, despite the best care, cause harm.

24. By their very nature, however, ultra-hazardous activities could entail extraordinary harm which could never be made good. In that context, the concepts of *restitutio in integrum* or of return to the *status quo ante* lost all meaning inasmuch as the harm could be irreversible. The calculated risk people accepted when they engaged in an activity which, under normal circumstances, produced a tolerable level of pollution could over a period of time assume an unacceptable or significant level of harm, because of the accumulated impact of the pollution involved. Moreover, that type of harm was not always rapidly assessable or traceable to a specific source or entity. In the case, for example, of deforestation or of effluent discharges into an ecosystem, which could at some point assume dimensions of significant harm, it was difficult to determine who was responsible and what type of liability would apply.

25. That was the field in which efforts should be made to undertake more global action by trying to draw up universally acceptable standards, to disseminate the relevant information widely and to help States regulate, legislate and otherwise provide the necessary mecha-

[5] Ibid., footnote 22.

nisms for monitoring the application of standards once they had been adopted and incorporated in their laws.

26. At another general level, the old quarrel which saw the developed countries favouring a "liberal" liability regime, while the developing countries wanted a stricter one, seemed to him outdated. Concern with environmental protection was today common to all countries, whatever the differences between them or stages of their economic growth.

27. The question was, rather, one of knowing what to do and what not to do in the case of a particular activity and what types of rules could be established and then to bring the message home, providing assistance to countries, if necessary, so as to give them the material means of implementing the principles adopted. Once certain standards and parameters had been defined, it would be possible to consider ways and means of promoting their adoption by all States. The Commission was well placed to help in formulating such principles and eventually connecting them up to a liability system, even if it might not be in a position to do so very quickly given the time available to it and the level of consensus reached so far.

28. The Special Rapporteur could play an extremely useful role in that regard by summing up what had been achieved over the past two years and specifying what principles could already be identified and what problems would have to be reviewed or what imponderables must still be reckoned with. For such imponderables did exist: in order to be convinced of that, it was enough to read draft articles 13 and 14 provisionally adopted by the Commission at the forty-sixth session.[6] What, for example, was the scope of the obligation of "due diligence" imposed on the State? And when the Commission stated that "pending authorization [which would or would not be granted to the operator in respect of an activity involving a risk of significant transboundary harm], the State may permit the continuation of the activity in question "at its own risk", what was the real scope of that provision?. Those were concepts that needed to be carefully analysed and weighed further before further progress could be made.

29. Mr. BARBOZA (Special Rapporteur) said that, at the conclusion of the preliminary debate on his tenth and eleventh reports, he would simply sketch out a few replies to comments by previous speakers.

30. To Mr. Yankov and Mr. Robinson, who had by implication reproached him with having, as it were, overlooked the human dimension in his analysis of the topic, he would recall that, when introducing his eleventh report (2397th meeting), he had spoken out against any tendency to dissociate the human being from the environment. He had also duly made it clear in the report itself that harm to the environment was always harm to someone and he would not wish to give the impression of ignoring humanist concerns, which, on the contrary, he believed to be fundamental.

31. The human environment and the human being were nevertheless two different subjects. Since the human being was already in itself protected by law, the protection of the environment was the heart of the matter in the present context and that was why he had developed that aspect in particular.

32. He had also listened with interest to the comments made by Mr. Kabatsi and Mr. Sreenivasa Rao, but the former had given a complicated example that he would need to have in front of him in order to make valid comments on it.

33. In conclusion, he said that the draft which he was proposing and which, at the present stage, dealt essentially with matters of prevention and liability was a modest one that did not in any way set out to remedy all of mankind's ills.

*The meeting rose at 11.15 a.m.*

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## 2400th MEETING

*Wednesday, 14 June 1995, at 10.15 a.m.*

*Chairman*: Mr. Pemmaraju Sreenivasa RAO

*Present*: Mr. Al-Khasawneh, Mr. Barboza, Mr. Bowett, Mr. de Saram, Mr. Fomba, Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Lukashuk, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Tomuschat, Mr. Villagrán Kramer.

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### The law and practice relating to reservations to treaties (A/CN.4/464/Add.2, sect. F, A/CN.4/470,[1] A/CN.4/L.516)

[Agenda item 6]

FIRST REPORT OF THE SPECIAL RAPPORTEUR

1. The CHAIRMAN invited Mr. Pellet, the Special Rapporteur, to introduce his first report on the topic of the law and practice relating to reservations to treaties (A/CN.4/470).

2. Mr. PELLET (Special Rapporteur) said that the question of reservations to treaties was not *terra incognita* for the Commission, which had already studied it on four occasions, first at its third session in 1951 in connection with the topic of the law of treaties and, later, within the framework of the work which had led to the adoption of the Vienna Convention on the Law of Treaties (hereinafter referred to as the "1969 Vienna Con-

[6] For the text, see *Yearbook . . . 1994*, vol. II (Part Two), para. 380.

[1] Reproduced in *Yearbook . . . 1995*, vol. II (Part One).