30. He then drew attention to the additional sections of his report (A/CN.4/374 and Add.1–4) containing, respectively, the final draft articles of part II of the draft (arts. 24–30), the draft articles of part III (arts. 31–39) and those of part IV (arts. 40–42).

ARTICLES 24 to 30 (Exemptions accorded to the diplomatic courier and the diplomatic courier ad hoc, and status of the captain of a commercial aircraft or the master of a merchant ship entrusted with the transportation and delivery of a diplomatic bag)

31. Article 24, on exemption from personal examination, customs duties and inspection, and article 25, on exemption from dues and taxes, were modelled on the corresponding provisions of the four main diplomatic conventions.

32. Article 26 dealt with exemption from personal and public services. Although there might not be many occasions when a diplomatic courier was called upon to perform such services, it was probably advisable to provide for that possibility, because of the nature of his duties.

33. Article 27, on exemption from social security provisions, would probably also be of rather limited application. Articles 28 and 29 dealt with the duration of privileges and immunities, and waiver of immunity, respectively.

34. Article 30 dealt with the rights and obligations of the captain of a commercial aircraft or the master of a merchant ship entrusted with the delivery of a diplomatic bag. The reference to “an authorized member of the crew” had been included because it was often difficult to place additional responsibility on the captain or master of a highly complicated machine. No reference had been made to military aircraft or vessels, because the language of the draft article had been modelled on the corresponding provisions of the four main diplomatic conventions; but the Commission might wish to consider whether such a reference was needed.

ARTICLES 31 to 39 (Status of the diplomatic bag)

35. Article 31 related to indication of status and provided that the packages constituting the diplomatic bag must bear visible external marks of their official character.

36. Article 32 dealt with the content of the diplomatic bag, which was a key issue since it related to abuses of the bag. When examining State practice in the matter, he had come across several instances in which the sending State had imposed sanctions on persons involved in misuse of the diplomatic bag.

37. Articles 33–38 dealt, respectively, with the status of the diplomatic bag entrusted to the captain of a commercial aircraft, the master of a merchant ship or an authorized member of the crew; the status of the diplomatic bag dispatched by postal services or other means; general facilities accorded to the diplomatic bag; inviolability of the diplomatic bag; exemption from customs and other inspections; and exemption from customs duties and all dues and taxes.

38. Article 39, which was of a more general nature, provided for protective measures in circumstances preventing the delivery of the diplomatic bag. To take account of such rather rare cases, paragraph 1 of the article stipulated that “the receiving State or the transit State shall take the appropriate measures to ensure the integrity and safety of the diplomatic bag, and shall immediately notify the sending State . . .”; paragraph 2 dealt with the case of the unaccompanied bag.

ARTICLES 40 to 42 (Miscellaneous provisions)

39. The draft articles of part IV dealt only with issues of a general nature and therefore contained neither final clauses nor provisions on the settlement of disputes.

40. Article 40 set out the obligations of the transit State in case of force majeure or fortuitous event, in other words the obligations of a State which normally would not have been a transit State, but happened to become one. Article 41 dealt with situations in which a State or Government was not recognized or there were no diplomatic or consular relations, and was modelled on the corresponding provisions of the four main diplomatic conventions.

41. Article 42, which dealt with the relationship between the draft articles and other conventions, was very tentative. The Commission would note the proviso embodied in it.

42. He hoped to submit a further report which would take account of the comments made in the Sixth Committee of the General Assembly and of any considerations that might arise out of the work of the Drafting Committee. Articles 20–23 could be referred to the Drafting Committee either at once, or at the Commission’s next session; that was a matter for the Commission itself to decide.

43. After a procedural discussion in which the CHAIRMAN, Mr. DíAZ GONZÁLEZ, Mr. FtITAN, Mr. McCAFFREY, Mr. NJENGA and Sir Ian SINCLAIR took part, Mr. LACLETA MUNOZ (Chairman of the Drafting Committee) pointed out that the Drafting Committee would not have time to consider draft articles 20–23 at the current session. In the circumstances, it would be preferable to refer those articles to the Drafting Committee at the Commission’s next session.

It was so agreed.

The meeting rose at noon.

1800th MEETING

Monday, 11 July 1983, at 3.05 p.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Ftitan, Mr. Koroma, Mr. Lacleta
2. At its next session the Commission must decide what it could accomplish and form a view as to the scope and feasibility of the topic under consideration. If he considered that question from the point of view of the Commission, or as a Commission member, he would be concerned to have a sound answer to UNITAR’s question as to whether the Commission would be able to deal with topics having a larger policy content or a greater degree of novelty than hitherto. The Commission was no nearer than UNITAR to giving an affirmative answer.

3. In his fourth report (A/CN.4/373), he had endeavoured to update the development of an elusive topic. In the same period, the Secretariat had completed an excellent analysis of relevant materials and had requested (ibid., para. 58) that it should be made more widely available. The Secretariat material was not designed to support his report: on the contrary, covering as it did the whole field of the duty to avoid, minimize and repair harm, it would be useful also to those who would have preferred other ways of approaching the subject or that it should not be approached at all. Furthermore, as he had stated in his report (ibid., para. 64), he would like help from the Secretariat in addressing a questionnaire to selected international organizations whose work might satisfy many of the requirements set out in the schematic outline. In an age of international organization, it was unrealistic to consider a topic such as that for which he was Special Rapporteur without taking account of the impact of international organizations and the actions of States within them.

4. In introducing his report, he wished to revert to the excellent discussion on the topic at the Commission’s thirty-third session in 1981. In his second report, he had been concerned to develop the duty of care, which he had subsequently redefined in terms of “foreseeability”, since the original term had caused some difficulty (A/CN.4/360, paras. 19–23). During the discussion, Mr. Ushakov, who had earlier played a part in the decision to treat the topic as one which fell within primary rules, had explained that he had changed his view. He had asked what sort of obligation was involved in the duty of care, arguing that international law imposed no duty to avoid transboundary harm unless it fell within some recognized category. Sir Francis Vallat, on the other hand, had emphasized that the topic should not be approached from a doctrinaire viewpoint. He had considered that the duty of care was a reasonably conservative starting-point in enunciating the obligation to avoid and minimize harm, and that it was not necessary to make a distinction between wrongfulness and liability. However, by the time the topic had been discussed in the Sixth Committee of the General Assembly at its thirty-seventh session, the representative of the United Kingdom, Mr. Berman, had displayed a change in thinking similar to that of Mr. Ushakov. He had stated that there was no basis for the topic in codification and, if it appeared at all in international law, it was merely a matter of civil liability. While there was no reason for an identity of views between Sir Francis Vallat, expressing an independent opinion, and Mr. Berman, speaking as the representative of his country, it was surprising that the former could regard the duty of care as arising out of a standardized view of international obligation and the latter could regard it as having such novelty that it had no basis in international law. A similar evolution was observable in the case of France. Mr. Reuter was a recognized authority on the responsibility of States in matters of harm to neighbouring States and, in his writings cited in the second and

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fourth reports, had foreseen every possibility contemplated by the Special Rapporteur. However, in the Sixth Committee, Mr. Museux, as the representative of France, had taken the view that discussion of the topic was a waste of time since it was a matter for UNEP and not the Commission. 9

5. Four years previously, he had visited UNEP headquarters to ascertain the views of its senior officials on the topic. It appeared that, whenever the question of liability was raised in UNEP bodies, there were three reactions: that the subject should be avoided; that, if any work was to be done on it, it should be done by the Commission; or that, if the Commission was to embark on discussion of the topic, it would remain buried for 20 years. He did not himself intend to contribute to the burying process. It was his hope that the Commission would have the courage to make a firm decision either to take up the topic or to leave it to be developed in other forums. Officials at UNEP had also been most disconcerted by the fate of the draft principles on shared resources (see A/CN.4/L.353), which had been initiated by the Governments represented on UNEP's Governing Council, developed at considerable cost, endorsed by the Economic Committee representing the Economic and Social Council, and had then been merely "noted" in a General Assembly resolution proposed by the Second Committee. 10 The fact was that a Jekyll and Hyde element was involved. Up to a point, there was a desire and an attempt to make progress in the development of international law. But when that point was reached, delegations sought to conserve what they perceived as their country's or their region's immediate interests. It was for the Commission to decide whether it could surmount that hazard, and in so doing, it would provide the answer to the question posed by UNITAR.

6. He personally was of the opinion that there was a way for the Commission to go forward without undue risk. The real cleavage of opinion did not lie between East and West, North and South, or between practitioners of civil law and common law, but between what might be termed the old world and the new. He had been interested to see, in Tentative Draft No. 4 of the Restatement of the Foreign Relations Law of the United States, a separate part dealing with the law of the environment, which was of striking relevance to the topic under consideration. A responsible group of United States lawyers appeared to think that the draft was an unadventurous statement of existing international law. They referred to the duty to take such measures as might be practical under the circumstances to ensure that activities conducted in the territory of one State did not cause harm elsewhere. As in the schematic outline presented in his report (A/CN.4/L.373, annex), the text referred to the importance of the activity, its economic viability, technological considerations and foreseeable harm. The obligations extended to both public and private activities in respect of loss or injury either to a particular country or to the environment in general—obligations erga omnes. The text emphasized primarily prevention and dealt with reparation virtually as a facet of that aspect. States incurred special responsibility in respect of harm arising from ultra-hazardous activities. The phrase "strict liability" was not mentioned, but all liability was related to the wrongfulness of allowing unrequited harm to occur. The breadth of scope was remarkable, since it included coastal States and flag-States of ships on the high seas. There was a reference to access to local remedies and non-discrimination before local courts.

7. It was impossible to consider the present topic without starting from State responsibility for wrongfulness. The view of the United States made it clear that no question of attribution stood between the State and responsibility for activities which occurred in its territory or within its control. Accordingly, strict liability did not constitute a great step forward, but rather something of a relaxation. However, if a State held the view that there was no liability except for specific types of harm defined in conventional régimes, or if it drew a distinction between private and public acts, strict liability might seem an unacceptable step forward. Such was the threat of divergence on the question of liability.

8. States might, however, have more in common than would appear from the text he had just analysed. For example, the North American doctrine on the wrongfulness of harm was weak when some element of sharing entered into the equation. In respect of watercourses, the position of the United States of America with regard to responsibility for water crossing boundaries had not always been consistent. In such contexts, rules could not be stated absolutely. Mr. Evensen's approach to the question of the non-navigational uses of international watercourses (A/CN.4/L.367) was valuable for the topic under consideration. His draft articles 6 and 9 11 covered both the principle of sharing and the principle of not causing harm, and the latter principle had won a general degree of immediate acceptance by the Commission. But if it had been simply a matter of establishing a rule of prohibition, the subsequent articles would not have been necessary. Those articles set out a procedure for avoiding wrongfulness by reference to the criterion of "appreciable harm". Yet what might well prove harmful in a heavily populated boundary area might prove negligible in a desert area. There was no way of setting a minimum limit, and the parties concerned must be prepared to consult within the framework of fact-finding machinery. Usually, the matter could be amicably settled at that level. Similarly, in his own schematic outline, sections 2 and 3

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9 Ibid., 38th meeting, para. 17.
10 General Assembly resolution 34/186 of 18 December 1979.
11 See 1785th meeting, para. 5.
should usually be sufficient to deal with any problem of
damage or possible damage. Section 4 constituted the
machinery of last resort, when the damage had either not
been foreseen or, if foreseen, had not been provided for.

9. Another aspect of the draft articles on the non-
navigational uses of international watercourses was the
duty to co-operate. That was a substantial legal duty
which was not easy to define. Sir Ian Sinclair (1791st
meeting) had distinguished the duty of co-operation from
*bon voisinage*. It could perhaps be related to the distinc-
tion between rights and interests recognized by the
arbitral tribunal in the *Lake Lanoux* case. There was,
for instance, the proverb “good fences make good neigh-
bours”, which expressed the minimum content of the duty
of co-operation. But it was even better if the parties could
make joint arrangements, in respect of irrigation for
example, so that costs were shared rather than dupli-
cated. A bilateral convention relating to boundaries
was not practicable to define in customary law either the
duties of the respective interests, especially in matters
where third-party settlements were quite exceptional. It would
perhaps progress never would be made, if the issue was
considered solely in terms of prohibitions. The present
topic would set a precedent for an alternative approach.

10. States perhaps required reassurance that other
States in a different position from themselves really had
similar interests. The developing countries, for example,
were reluctant to accept inflexible standards which
developed countries had learned to adopt. That was
paralleled by the fear of developed countries that their
freedom to use technology and employ options might be
impaired by rules about not causing harm to their
neighbours. That was the reason for dealing with the
matter within a flexible framework which did not rely on
wrongfulness, but emphasized the possibility of co-
operation and the need to accommodate varying
interests. In that connection, he would refer to the
description of the law of the sea as a progression from
customary law to legal powers, which he had quoted in his
report (A/CN.4/373, para. 74). That was indeed the
major theme of the topic under consideration.

11. There was also a real parallel with the law in respect
of the treatment of aliens. If States had a duty in respect of
the way they allowed foreigners to be treated in their
territory, it was reasonable to assert that they also had a
duty in respect of the way they allowed activities to be
conducted in their territory which caused harm to people in
other States. At the same time, there were no precise
rules as to how aliens should be treated, since local
standards varied, but the accepted rule was one of non-
discrimination. The question was whether the topic under
consideration could provide a useful counterpoint to
obligations arising from acts of omission or commission
engaging State responsibility. The notion of “different
shades of prohibition” laid emphasis on co-operation,
encouraging accommodation of the respective interests
and the foreseeing of problems which might arise from the
conduct of particular activities.

12. There were perhaps three positions to take into
consideration, namely that of Mr. Ushakov that no new
principle of international law could be admitted; that of
the United States of America that the scope should not be
extended beyond physical transboundary harm; and,
thirdly, that of some developing countries which wanted
the principle of strict liability to extend to economic
matters as well as to physical transboundary harm.
International law envisaged two systems of obligation, namely
wrongfulness involving State responsibility and strict
liability. There were also two areas involving trans-
boundary effects, namely physical activities and the
conduct of economic affairs. If strict liability were applied
in the first area but excluded in relation to economic
matters, that would be damaging to the interests of people on
their way forward to the new international economic
order. That was, however, too complicated a subject to be
regulated by simple prohibition.

13. A solution was offered in the schematic outline. It
was not practicable to define in customary law either the
principle of strict liability or the principle of wrongfulness
as such. There were wide differences of views on wrong-
fulness and on strict liability. But there was a considerable
amount of State practice dealing with transboundary
issues. The aim should therefore be not to construct a
rigid rule, but to develop a set of obligations which
allowed as much latitude to States as the old rule
governing the treatment of aliens. The object should be to
postpone as long as possible the point at which wrongful-
ness intervened and to provide chance after chance for the
source State to act, so that, if damage did occur, it had an
opportunity to make it good, taking into account a variety
of factors. Within that framework, the scope should be
limited to physical transboundary harm, on which there
was a considerable body of State practice. In contrast,
there was comparatively little in respect of economic
affairs, where not much progress had been made towards
the development of legal norms around which rules could evolve.

14. It might be inquired why there was a need to draft
rules with a considerable procedural content. The answer
was the same as in the case of the draft articles on non-
navigational uses of international watercourses. It was
difficult to apply general rules to specific cases. It was
therefore desirable to articulate a procedure to permit the
accommodation of interests, especially in matters where
third-party settlements were quite exceptional. It would
be useless to codify international law on the fictitious
basis that decisions would be taken by third parties.
Allowing them the opportunity to articulate detailed rules
increased the likelihood of achieving a judicial settlement
in the case of a dispute between the parties concerned.

15. It was too early to discuss the form to be taken by
any possible draft articles. Their outcome must be the
ultimate obligation to make reparation for damage
incurred, involving the sanction of wrongfulness if not
fulfilled. That outcome should, however, be postponed as

long as possible in order to give States the maximum opportunity of regulating their affairs on a more flexible basis. In his view, the topic could be considered as a useful supplement to that of State responsibility.

16. Mr. Riphagen congratulated the Special Rapporteur on his excellent report (A/CN.4/373), which clearly showed the difficulties of the topic, especially those of a doctrinal character. The Special Rapporteur had chosen to present his report in the form of a general review and had endeavoured to place the topic in the general structure of international law, inviting members to make general comments. His own remarks, at any rate, would be of a general and somewhat theoretical character. A well-known writer had called the topic of public policy (ordre public) "the unfinished part of private international law" and he himself would describe the present topic as "the unfinished part of public international law".

17. The Special Rapporteur had relied heavily on what he called the "continuum of prevention and reparation" (ibid., paras. 40 et seq.). "Continuum" was a dangerous word for lawyers, and indeed for all scholars of the Cartesian-Newtonian school of thought; but the Special Rapporteur had said that he made "no great claim to orthodoxy" (ibid., para. 54). He (Mr. Riphagen) would be the last to blame him for that, considering all that the heretics of the past had contributed to mankind. Moreover, the Special Rapporteur had disarmed him by using the expression "different shades of prohibition", which he himself had used as Special Rapporteur on the topic of State responsibility.

18. The Special Rapporteur had nevertheless stated somewhat categorically that "it is not the policy of the law to perpetuate ambivalent situations, but rather to break them down into elements of right and wrong" (ibid., para. 21). That remark appeared to rule out the "continuum" concept, and the Special Rapporteur had attempted to resolve the contradiction by having recourse to an "administrative law perspective" and quoting Professor Allot's appeal in its favour (ibid., para. 74). Although it was uncongenial to his common law colleagues, he himself found the concept of administrative law rather attractive; but he could not resist quoting an outstanding European lawyer, Professor Prosper Weil, who had begun his treatise on administrative law with the words: "L'existence même d'un droit administratif relève, en quelque sorte, du miracle" (The very existence of administrative law is something of a miracle). 13

19. Miracles did sometimes happen, however, and it had in fact been possible in many national legal systems to control public authorities effectively without impairing the performance of their public functions. But even on the national plane, a delicate balance had to be struck between the various interests at stake. On the international plane, the transition from what Professor Allot called "legal freedom", presumably meaning sovereign,

eighty, to legal power, implying "the absence of unfettered discretion", would be even more difficult. The dominant feature of administrative law, however, was the "marginal" test applied to the conduct of public authorities, and that test could also be applied in international relations.

20. In section A of his report, the Special Rapporteur discussed "the duty to avoid, minimize and repair transboundary harm". But in linear logic, if there was a duty to avoid, the question of minimizing harm would not arise; again, if action had been taken in conformity with the duty to minimize, the question of reparation would not arise. He would suggest that the only way to resolve those contradictions was to adopt a "systems" approach instead of a "linear" approach.

21. In dealing with the topic under consideration, it was necessary to work on the assumption that there were neither obligations nor rights, but only rules of conduct. In that connection, he referred to the phenomenon of "circumstances precluding wrongfulness" in the topic of State responsibility. In the present topic, there would be the parallel phenomenon of "circumstances precluding rightfulness", namely the rightfulness of the exercise of territorial sovereignty.

22. He commended the Special Rapporteur for limiting the scope of the topic to physical activities which caused physical transboundary harm. The question of scope was relevant not only to the outer limits, but also to the inner limits of the topic, in other words the factors to be taken into account in the procedures described by the rules of conduct. As to the outer limits, the rules of conduct would have no meaning if compliance or non-compliance with them had no legal consequences. If those rules were completely ignored, and a physical activity within a State caused physical harm in another State, State responsibility would arise.

23. In considering the rules of conduct, a distinction could be drawn between procedural rules and substantive rules, and many factors had to be taken into account in connection with the former. The first rule of procedure related to the duty of prior information; the second concerned the duty of consultation; and the third the duty to resort to impartial, expert fact-finding in case of disagreement on the facts. All those duties were reciprocal and included the time factor, since no party could be allowed to delay a solution indefinitely.

24. In regard to the factors to be taken into consideration in striking a balance between the interests at stake, there were certain general rules. The first was a negative rule: there must be no discrimination between factors inside and factors outside the territory, on both sides. There was also the positive rule on cost-benefit sharing. Lastly, there was the encouragement of alternatives on both sides, including assistance in avoiding injurious consequences, such as depollution measures.

25. As to the inner limits of the scope of the topic, the only relevant factors were those relating to physical acts and physical harm. That excluded consideration of the anticipation of acts and also of trade-offs of advantages in other fields. In the suggested system, which took into

account both circumstances precluding wrongfulness and circumstances precluding rightfulness, there would be ample room for States to choose other "rules of the game" by treaty, possibly taking other fields of interest into account.

26. Lastly, he drew attention to a matter which was not covered in the report, namely the possibility of a third State being involved. The third State could be either a participant in the act or an injured party.

27. Mr. EL RASHEED MOHAMED AHMED commended the Special Rapporteur for his learned report (A/CN.4/373) on a difficult topic and expressed particular appreciation of the very clear introductory statement it contained. He would confine his remarks largely to section 2 of the schematic outline, in response to the Special Rapporteur's request (ibid., para. 75). His observations would be of a general and preliminary character.

28. The Special Rapporteur had warned that: "The rules contained in the schematic outline are not a substitute for specific conventional or customary rules that engage the responsibility of the State." (Ibid., para. 19.) In an effort to delimit the uncertain boundaries of the topic, he had added that: "The topic concerns activities which are 'on the way to being ... prohibited' or, alternatively, are being saved from prohibition because adequate guarantees have been provided as to the avoidance of adverse transboundary effects ..." (Ibid., para. 20). The Special Rapporteur had drawn attention to certain areas, such as pollution, in which there was a growing body of conventional rules that would give rise to international responsibility, but he had not suggested any rule, and still less any prohibition. He had placed the emphasis on procedure in sections 2-4 of his schematic outline, which proposed: (a) a duty to provide information in respect of activities that could give rise to loss or injury and the kinds and degrees of foreseeable loss or injury; (b) the establishment of fact-finding machinery; (c) negotiations in good faith upon the report of the fact-finding body; (d) determination of the rights and obligations of the acting and affected States by agreement.

29. Clearly, the Special Rapporteur was sailing a dangerous course in not very hospitable waters. The situation warranted the question as to whether he was moving forward or perpetuating ambivalent situations. One of the objects of the present study was to encourage regimes that delimited the respective rights and obligations with some degree of certainty. Failing that, the object was to assert the duty to avoid and repair transboundary loss or injury, without a prior finding of the acting State's responsibility for a wrongful act or omission.

30. Yet there could be no duty without a correlative right; whence a dilemma for the Special Rapporteur, since the negative duty to avoid transboundary injury or loss should have a corresponding right. That right, however, arose from a wrongful activity or omission on the part of the acting State. But the responsibility for the wrongful act or omission was glossed over.

31. The extremely pragmatic and cautious approach of the Special Rapporteur showed his reluctance to enter the realm of State sovereignty. He would appear to wish to leave it to States to find for themselves the answers to the questions which arose in each specific dispute, but in accordance with a set of rules of procedure. It was very doubtful whether that approach would satisfy the affected States, which in most cases were developing or poor States, whereas in cases of pollution, for example, the sources were invariably industrialized countries. Even when those countries were not the sources of pollution, they were the only ones possessing the means of cleansing its effects. The Persian Gulf States were paying millions of dollars to developed countries to stop oil flows and clean up the waters of the Gulf. In that part of the world, water was now more expensive than petrol.

32. The Special Rapporteur was prepared to see developing countries bring about a change in the trend of international relations. That change would not be dictated by the weight of the developing countries, but by the need to balance the mutual interests of developed and developing countries. In those situations, the law should not lean against the more vulnerable party; it should maintain a delicate balance between the strong and the weak. Nevertheless, the Special Rapporteur appeared to be more concerned with the protection of source States from unreasonable demands than with ensuring reparation for affected States (ibid., para. 51).

33. That situation called for one more step forward, perhaps rather further than the Special Rapporteur was prepared to go. He would venture to suggest that a general thesis should be predicated on the notion of the duty not to cause harm or injury. If harm or injury was caused and could be traced to the source State, a duty to make reparation could be inferred, provided all the relevant factors were taken into consideration. The Special Rapporteur himself had supported that idea when he had written:

"There is, incidentally, no reason why the right to reparation, and the principles and factors safeguarding it, should not be stated as strongly as the Commission considers prudent and warranted by developing State practice. (Ibid., para. 54.)"

34. He proposed to speak at a later stage on the subject of strict liability. At first sight, however, there could be no dissent from the Special Rapporteur's assertion, in his opening statement, that the introduction of that concept would be unacceptable.

35. With regard to definitions, the Special Rapporteur had raised the question of whether the word "activity" also included absence of activity. He would not venture an answer, but suggested that the word "omission" should be added to the word "activity" in section 1, paragraph 2, of the schematic outline, to cover the question of lack of activity to remove a danger that could give rise to loss or injury.

36. Mr. USHAKOV said that, despite the explanations the Special Rapporteur had given in his introductory statement, the situation was still not very clear. As noted in the report (A/CN.4/373, para. 11), the debate in the Commission at its previous session had shown that
Some members had taken the view that the topic should not be further discussed for want of any basis in general international law or because of existing difficulties.

He himself continued to hold that view and still believed that there were no rules of international law establishing the liability of States for injurious consequences arising out of acts not prohibited by international law.

37. In the case of certain specific activities, such as hazardous activities that could be expected to have harmful consequences, States concluded special agreements of universal, regional or bilateral character, such as the agreement establishing State responsibility for lawful activities conducted in outer space which were likely to have consequences on Earth.14

38. On the other hand, it was impossible to stipulate an obligation to make reparation for the injurious consequences of any lawful activity necessary for the development of industry or agriculture or to combat some natural scourge. Moreover, the acting State was usually the first to suffer the injurious consequences of its own action; but even in such a case, there was no certainty that it would be prepared to pay damage to neighbouring States which had also suffered the consequences of that action. He also had some doubts about the usefulness of the term “transboundary harm”, for if the question was being studied by the Commission, the “harm” was obviously international.

39. Either a treaty prohibited a certain activity and a State party which ignored the prohibition incurred international liability, or there was no obligation on the State, in which case, as things stood at present, the State was in no way bound to make reparation to a neighbouring State which suffered the injurious consequences of its activities.

40. Mr. KOROMA congratulated the Special Rapporteur on his very useful report (A/CN.4/373), which provided further proof of his command of the topic. In the earlier discussions he had thought that the dichotomy in the Commission and in the Sixth Committee of the General Assembly was conceptual, because the Special Rapporteur had taken as his earlier point of departure the “duty of care” towards other States. Later, however, the Special Rapporteur had been persuaded that such a general duty did not exist, or at least that the concept was not common to all legal systems. He had therefore adopted instead (A/CN.4/360, paras. 19-23) the “criterion of foreseeability”: if the harm or injury to a neighbouring State could be foreseen, a duty existed for the acting State. For the time being, that proposition should have sufficed.

41. Listening now to the Special Rapporteur and to Mr. Ushakov, however, he realized that the differences within the Commission were essentially a matter of policy and were not merely conceptual. Mr. Ushakov had maintained that no general liability arose for States under public international law in respect of transboundary harm caused by activities not prohibited by international law. He, for one, could accept that thesis, but he drew attention to a discrepancy between the French and English versions of the title of the topic. The English title spoke of “acts not prohibited by international law”, whereas the French version used the term activités. As pointed out by Mr. Ushakov, “activities” that were not forbidden by international law could not give rise to liability. The position was not the same for “acts”. To take the example of activities in outer space, which were of course lawful, it was only when a particular act caused harm that the State would be held liable. He urged that the terminology used, particularly in the title of the topic, should be carefully reviewed in the light of those comments.

42. It could not be denied that there was a wealth of State practice and an impressive body of international legislation on acts which caused harm to other States, on the resulting duty of care and on the obligation to make reparation and, where appropriate, take steps to prevent the recurrence of such acts. Those ideas should constitute the point of departure for the study of the topic.

43. The Special Rapporteur had endeavoured to elaborate on the content of the duty not to cause harm to another State. That duty could be cast in preventive form, or in the form of reparation or compensation. He agreed with the Special Rapporteur that the topic should be confined to physical injury and should not extend to economic injury for the time being. In a great many cases, however, physical injury would have economic consequences; for instance, pollution of a river by an upper riparian State would lead to economic losses for farmers in a lower riparian State.

The meeting rose at 6.10 p.m.

1801st MEETING

Tuesday, 12 July 1983, at 10 a.m.

Chairman: Mr. Laurel B. Francis

Present: Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Koroma, Mr. Lacletà Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Quentin-Baxter, Mr. Tazafindralambo, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov.

International liability for injurious consequences arising out of acts not prohibited by international law (continued)