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**Summary record of the 3213th meeting**

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## 3213th MEETING

Friday, 30 May 2014, at 10.05 a.m.

*Chairperson:* Mr. Kirill GEVORGIAN

*Present:* Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

### Protection of persons in the event of disasters (concluded)\* (A/CN.4/666, Part II, sect. C, A/CN.4/668 and Add.1, A/CN.4/L.831)

[Agenda item 4]

#### REPORT OF THE DRAFTING COMMITTEE

1. Mr. SABOIA (Chairperson of the Drafting Committee) presented the text and titles of draft articles 1 to 21, which comprised the entire set of draft articles on the protection of persons in the event of disasters as provisionally adopted on first reading by the Drafting Committee. Since several draft articles which had already been provisionally adopted by the Commission had been moved and therefore renumbered, their previous number was shown in square brackets. The draft articles contained in document A/CN.4/L.831 read:

##### *Article 1 [1]. Scope*

The present draft articles apply to the protection of persons in the event of disasters.

##### *Article 2 [2]. Purpose*

The purpose of the present draft articles is to facilitate an adequate and effective response to disasters that meets the essential needs of the persons concerned, with full respect for their rights.

##### *Article 3 [3]. Definition of disaster*

“Disaster” means a calamitous event or series of events resulting in widespread loss of life, great human suffering and distress, or large-scale material or environmental damage, thereby seriously disrupting the functioning of society.

##### *Article 4. Use of terms*

For the purposes of the present draft articles:

(a) “affected State” means the State in the territory or otherwise under the jurisdiction or control of which persons, property or the environment are affected by a disaster;

(b) “assisting State” means a State providing assistance to an affected State at its request or with its consent;

(c) “other assisting actor” means a competent intergovernmental organization, or a relevant non-governmental organization or any other entity or individual external to the affected State, providing assistance to that State at its request or with its consent;

(d) “external assistance” means relief personnel, equipment and goods, and services provided to an affected State by assisting States or other assisting actors for disaster relief assistance or disaster risk reduction;

(e) “relief personnel” means civilian or military personnel sent by an assisting State or other assisting actor for the purpose of providing disaster relief assistance or disaster risk reduction;

(f) “equipment and goods” means supplies, tools, machines, specially trained animals, foodstuffs, drinking water, medical supplies, means of shelter, clothing, bedding, vehicles and other objects for disaster relief assistance or disaster risk reduction.

##### *Article 5 [7]. Human dignity*

In responding to disasters, States, competent intergovernmental organizations and relevant non-governmental organizations shall respect and protect the inherent dignity of the human person.

##### *Article 6 [8]. Human rights*

Persons affected by disasters are entitled to respect for their human rights.

##### *Article 7 [6]. Humanitarian principles*

Response to disasters shall take place in accordance with the principles of humanity, neutrality and impartiality, and on the basis of non-discrimination, while taking into account the needs of the particularly vulnerable.

##### *Article 8 [5]. Duty to cooperate*

In accordance with the present draft articles, States shall, as appropriate, cooperate among themselves, and with the United Nations and other competent intergovernmental organizations, the International Federation of Red Cross and Red Crescent Societies and the International Committee of the Red Cross, and with relevant non-governmental organizations.

##### *Article 9 [5 bis]. Forms of cooperation*

For the purposes of the present draft articles, cooperation includes humanitarian assistance, coordination of international relief actions and communications, and making available relief personnel, equipment and goods, and scientific, medical and technical resources.

##### *Article 10 [5 ter]. Cooperation for disaster risk reduction*

Cooperation shall extend to the taking of measures intended to reduce the risk of disasters.

##### *Article 11 [16]. Duty to reduce the risk of disasters*

1. Each State shall reduce the risk of disasters by taking the necessary and appropriate measures, including through legislation and regulations, to prevent, mitigate and prepare for disasters.

2. Disaster risk reduction measures include the conduct of risk assessments, the collection and dissemination of risk and past loss information, and the installation and operation of early warning systems.

##### *Article 12 [9]. Role of the affected State*

1. The affected State, by virtue of its sovereignty, has the duty to ensure the protection of persons and provision of disaster relief and assistance on its territory.

2. The affected State has the primary role in the direction, control, coordination and supervision of such relief and assistance.

##### *Article 13 [10]. Duty of the affected State to seek external assistance*

To the extent that a disaster exceeds its national response capacity, the affected State has the duty to seek assistance from among other States, the United Nations, other competent intergovernmental organizations and relevant non-governmental organizations, as appropriate.

\* Resumed from the 3201st meeting.

*Article 14 [11]. Consent of the affected State to external assistance*

1. The provision of external assistance requires the consent of the affected State.
2. Consent to external assistance shall not be withheld arbitrarily.
3. When an offer of assistance is extended in accordance with the present draft articles, the affected State shall, whenever possible, make its decision regarding the offer known.

*Article 15 [13]. Conditions on the provision of external assistance*

The affected State may place conditions on the provision of external assistance. Such conditions shall be in accordance with the present draft articles, applicable rules of international law, and the national law of the affected State. Conditions shall take into account the identified needs of the persons affected by disasters and the quality of the assistance. When formulating conditions, the affected State shall indicate the scope and type of assistance sought.

*Article 16 [12]. Offers of external assistance*

In responding to disasters, States, the United Nations and other competent intergovernmental organizations have the right to offer assistance to the affected State. Relevant non-governmental organizations may also offer assistance to the affected State.

*Article 17 [14]. Facilitation of external assistance*

1. The affected State shall take the necessary measures, within its national law, to facilitate the prompt and effective provision of external assistance regarding, in particular:

(a) civilian and military relief personnel, in fields such as privileges and immunities, visa and entry requirements, work permits, and freedom of movement; and

(b) equipment and goods, in fields such as customs requirements and tariffs, taxation, transport and disposal thereof.

2. The affected State shall ensure that its relevant legislation and regulations are readily accessible, to facilitate compliance with national law.

*Article 18. Protection of relief personnel, equipment and goods*

The affected State shall take the appropriate measures to ensure the protection of relief personnel, equipment and goods present in its territory for the purpose of providing external assistance.

*Article 19 [15]. Termination of external assistance*

The affected State and the assisting State, and as appropriate other assisting actors, shall consult with respect to the termination of external assistance and the modalities of termination. The affected State, the assisting State or other assisting actor wishing to terminate shall provide appropriate notification.

*Article 20. Relationship to special or other rules of international law*

The present draft articles are without prejudice to special or other rules of international law applicable in the event of disasters.

*Article 21 [4]. Relationship to international humanitarian law*

The present draft articles do not apply to situations to which the rules of international humanitarian law are applicable.

2. He would confine his comments to amendments made to the draft articles proposed by the Special Rapporteur at the current session, in other words draft articles 3 *bis*, 14 *bis*, 17 and 19, since the text of those already previously adopted by the Commission had been amended only very slightly.

3. Former draft article 3 *bis*, which had become draft article 4, had been recast in light of the numerous comments made on it during plenary sessions. The definitions of the terms “relevant non-governmental organization” and “risk of disasters” had been deemed unnecessary and had therefore been deleted, while that of “affected State”, in subparagraph (a), had been extended to cover disasters in a territory or area “otherwise under the jurisdiction or control” of a State. The Drafting Committee had been of the opinion that this wording did not contradict draft article 12 [9], although the latter mentioned only the territory of the affected State. In the exceptional case of a disaster striking two States, one whose territory was affected and one that exercised *de jure* jurisdiction or *de facto* control over the territory, the matter of knowing which of those States had to consent to outside assistance, if there was no specific agreement between them, was not settled by draft article 14 [11] as it stood, but the Drafting Committee considered it preferable to revisit that point on second reading. A reference to the environment had been inserted in the definition at several members’ request. Subparagraphs (b) and (c) had been amended mainly for the sake of consistency. The proposal not to state expressly that the other assisting actors were “external” to the affected State and to say only that they supplied “external assistance” had been rejected, since that wording might have given the impression that a domestic actor receiving assistance from abroad came within the purview of the draft articles, whereas it had been agreed that they did not apply to the activities of domestic actors. Some members of the Drafting Committee had been of the view that it would have been better to deal with that question in the definition of external assistance in subparagraph (d), which had been simplified, since the notion of “needs” had already been mentioned in draft article 2. The Drafting Committee had thought about deleting what appeared to be the relatively well-understood definition of “relief personnel”, from subparagraph (e) (formerly (g)), but had finally decided to retain it in order to make it clear that this personnel could be civilian or military. The adjective “specialized” had been deleted, but the commentary would explain that personnel sent to provide assistance generally had the requisite expertise. A similar explanation would be given with regard to “necessary equipment and goods”, the reference to which had been deleted from the definition, since it had been feared that it would prove too restrictive in practice. Lastly, the commentary would state that the expression “other objects” in the definition of “equipment and goods” in subparagraph (f) (formerly (e)) indicated that the list was not exhaustive. The proposal to include a separate definition of “necessary services” had not been retained, since that term did not appear in the draft articles.

4. In former draft article 14 *bis*, which had become draft article 18, the expression “all necessary measures” (in other words, the measures that had to be taken to protect relief personnel, equipment and goods) had been replaced with “the appropriate measures” in order to avoid placing too heavy a burden on the affected State. The commentary would make it plain that this obligation was one of conduct and not of result. Although the measures that had to be adopted were described as “necessary” in draft articles 17 [14] and 11 [16], the actions referred to therein could be regarded as falling more within the competence of the State than those that were expected under draft

article 18. The proposal to deal with the duty to protect in two separate paragraphs depending on whether it applied to State or non-State actors, had not been retained, but the commentary would make it clear that the term “appropriate measures” enabled the affected State to establish different levels of obligations according to the object of protection and would explain how the provision applied to the various categories of relief personnel. Similarly, although it had been suggested that draft articles 18 and 17 [14] be merged, because the protection referred to in the former was included in the general obligation to facilitate external assistance mentioned in the latter, that proposal had been regarded as rather inadvisable for, as stated previously, the duties in question in the two provisions were different in nature.

5. The contents of former draft articles 17 and 18 proposed by the Special Rapporteur had quite simply been encapsulated in a standard “without prejudice” clause in new draft article 20 concerning the draft articles’ relationship with special or other rules of international law. The term “special rules” meant the other, mainly treaty-based, rules applicable “in the event of disasters”, to echo the wording of the first draft article, but also the rules of customary international law. The expression “other rules” referred to the rules of international law that might apply, even if they did not directly concern disasters. The draft articles were therefore without prejudice to those various rules, but conversely they applied in the absence of those rules. Pursuant to draft article 21 [4] they would likewise apply, for example, when a disaster occurred in an area of armed conflict, to the extent that this area was not covered by international humanitarian law. That point would be elaborated in the commentary. The Drafting Committee had not retained former draft article 19 on the draft articles’ relationship to the Charter of the United Nations, as it had been unable to reach consensus on its adoption.

6. The CHAIRPERSON invited the members of the Commission to adopt, draft article by draft article, the document published under the symbol A/CN.4/L.831, which contained all the draft articles on the protection of persons in the event of disasters that the Drafting Committee had provisionally adopted on first reading.

Draft article 1. Scope

*Draft article 1 was adopted.*

Draft article 2. Purpose

*Draft article 2 was adopted.*

Draft article 3. Definition of disaster

*Draft article 3 was adopted.*

Draft article 4. Use of terms

7. Mr. PARK, noting that, in the French version, subparagraph (a) defined the term *État touché*, said that it should be brought into line with the terminology used in all the draft articles, namely *État affecté*.

*It was so decided.*

*Draft article 4 was adopted.*

Draft article 5. Human dignity

*Draft article 5 was adopted.*

Draft article 6. Human rights

*Draft article 6 was adopted.*

Draft article 7. Humanitarian principles

*Draft article 7 was adopted.*

Draft article 8. Duty to cooperate

*Draft article 8 was adopted.*

Draft article 9. Forms of cooperation

*Draft article 9 was adopted.*

Draft article 10. Cooperation for disaster risk reduction

*Draft article 10 was adopted.*

Draft article 11. Duty to reduce the risk of disasters

*Draft article 11 was adopted.*

Draft article 12. Role of the affected State

*Draft article 12 was adopted.*

Draft article 13. Duty of the affected State to seek external assistance

*Draft article 13 was adopted.*

Draft article 14. Consent of the affected State to external assistance

*Draft article 14 was adopted subject to a minor editorial amendment to the English version.*

Draft article 15. Conditions on the provision of external assistance

*Draft article 15 was adopted.*

Draft article 16. Offers of external assistance

*Draft article 16 was adopted.*

Draft article 17. Facilitation of external assistance

*Draft article 17 was adopted.*

Draft article 18. Protection of relief personnel, equipment and goods

8. Mr. NOLTE proposed that the commentary make clear that the expression “present in its territory” also included personnel, equipment and goods “under the jurisdiction or control” of the affected State, in accordance with the definition provided in draft article 4 (a).

*The proposal was adopted.*

*Draft article 18 was adopted.*

Draft article 19. Termination of external assistance

*Draft article 19 was adopted.*

Draft article 20. Relationship to special or other rules of international law

*Draft article 20 was adopted.*

Draft article 21. Relationship to international humanitarian law

*Draft article 21 was adopted.*

*The draft articles contained in document A/CN.4/L.831, as a whole, as amended, were adopted.*

**Protection of the atmosphere (*continued*)**  
(A/CN.4/666, Part II, sect. I, A/CN.4/667)

[Agenda item 11]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

9. The CHAIRPERSON invited the members of the Commission to resume their consideration of the Special Rapporteur's first report on the protection of the atmosphere (A/CN.4/667).

10. Mr. NOLTE said that the scope of the topic of the protection of the atmosphere was circumscribed by the basic understanding underpinning the Commission's decision to include that topic in its programme of work. That understanding had to be taken seriously, regardless of whether one approved of its contents. He had always been in favour of including the topic in the Commission's programme of work. He did not think that those members who had had reservations in that respect, but who had demonstrated their readiness to compromise by accepting the understanding, had intended to limit the topic's scope unreasonably by requiring that any study of it be subject to the conditions established in the understanding.

11. Everyone agreed that the protection of the atmosphere was extremely important for humankind. It was equally undeniable that dramatic forms of climate change were taking place. He was deeply convinced that everyone should work together to preserve the vital basis of human existence on Earth. The Commission's primary task was not, however, to say what it thought needed to be done to protect the atmosphere, but rather to ask what role it should play in the overall common endeavour to protect the atmosphere and what its contribution might properly be in that connection. When asking that initial question, the Commission members must be honest and modest and they should recognize that the Commission could not save the atmosphere simply by virtue of its legal authority and the collective wisdom of its members. The most important decisions with regard to the protection of the atmosphere must be taken at the political level; the Commission could neither prescribe specific decisions or measures on the matter, nor compensate for the lack thereof. That was the basic reason why the members of the Commission had set some limitations on the study of the topic when the understanding had been formulated. It was also necessary to bear in mind the fact that the Commission would jeopardize its own authority if it overstepped its role in that area. It took a long time to establish authority, but often very little to lose it.

12. Some members regarded the understanding as a strait-jacket that placed the Special Rapporteur in an impossible situation of not being able really to address the important issues raised by the topic. That was not the case, since the understanding left a margin of manoeuvre sufficient to identify the general principles of international environmental

law and to say that they applied to the protection of the atmosphere. The identification of existing law could not be seen as exerting pressure on treaty negotiations, or as "filling gaps" between treaty regimes. What already existed between treaty regimes could not be considered to be a form of "filling in". The identification of general principles of international environmental law, irrespective of whether they were based on customary law or on a general principle of law, was a regular and legitimate function of the Commission and there was nothing in the understanding to prevent that. The Commission might not go very far in that task, but that modest goal was worth pursuing.

13. The understanding did leave the Commission enough room to set forth some general principles and to establish their applicability to the protection of the atmosphere. He therefore supported draft guideline 2 (*b*) which said just that. The Special Rapporteur and the Commission should seek to achieve the programme inherent in that draft guideline. In pursuing that goal, it might be wise, for example, to emphasize States' duty to cooperate in protecting the environment, as Mr. Petrič and other members had suggested.

14. His views on the other draft guidelines stemmed from the basic position that he had just outlined. He agreed with other members, such as Mr. Forteau, that the Special Rapporteur had put the cart before the horse. More importantly, it was premature to propose a draft guideline which already proclaimed that the atmosphere, by virtue of its legal status, was a "common concern of humankind". Of course, the protection of the atmosphere was a "common concern" in the colloquial sense of the term, but everyone knew how important it was for the meaning and implications of a term to be reasonably clear once it was supposed to describe something with "legal status". Perhaps the Special Rapporteur should hold draft guideline 3 in abeyance and, in his next report, begin to elaborate on the above-mentioned general principles of international environmental law. The notion of a "common concern" should not be debated again until those principles, as they applied to the protection of the atmosphere, had been articulated, at which point it might become a suitably-sized horse to draw the cart.

15. He agreed with the members who considered draft guideline 1 (*a*) on the definition of the atmosphere to be unnecessary and draft guideline 2 (*a*) to be misleading. As it stood, the draft guideline concerned not only scope, as its title indicated, but also referred to some substantive concepts, such as "deleterious substances" or "significant adverse effects", which should be considered in connection with substantive obligations. Why should the definition of scope be burdened with such notions, which it would be better to discuss at the same time as the general principles related to their role?

16. The protection of the atmosphere was a very important topic where the Commission had to play a crucial, albeit limited, role, which consisted of reminding States that the protection of the atmosphere was not a field governed solely by the law of a few treaties. He therefore proposed that the Special Rapporteur and the Commission consider the first report and the first debate in plenary session to be a valuable introduction to the topic, but they

should not seek the provisional adoption of any draft guideline at that stage, apart from draft guideline 2 (a). Proceeding in that manner would promote the sustainability and development of the topic. He made this suggestion as a friend of the topic, in a friendly spirit towards the Special Rapporteur, and as a Commission member who was concerned about the Commission's role and authority and about the protection of the atmosphere.

17. Mr. VALENCIA-OSPINA said that he wished to make three general comments. First, the Special Rapporteur, by reinterpreting existing legal concepts, principles and rules, might unintentionally and indirectly attempt to fill gaps in the existing regime for the protection of the atmosphere. Second, by singling out, for the purposes of the draft guidelines, only those principles and rules that pertained exclusively to the protection of the atmosphere, he was forgetting that most of the principles of international environmental law, such as the principle of prevention, the "polluter pays" principle and the precautionary principle, also applied if the atmosphere were considered to be an inseparable part of the environment. Third, the approach adopted by the Special Rapporteur in paragraph 75 of the first report appeared to confuse the direct object of protection, namely the atmosphere, with the indirect object, namely the natural and human environment.

18. The definition of the atmosphere set forth in the draft guideline 1 was a useful starting point, but it would be preferable to extend it to the mesosphere and thermosphere because, on the one hand, the atmosphere had no upper limit and therefore no precise boundary with outer space and, on the other hand, technological progress might one day lead to devices capable of flying above the stratosphere and they must be covered.

19. As far as draft guideline 2 was concerned, he agreed with Mr. Hassouna that it unnecessarily restricted the scope of the draft guidelines. By stating that the human activities in question were those that had significant adverse effects on human life and health and the Earth's natural environment, it excluded activities which, although they released deleterious substances or energy into the atmosphere, or altered its composition, did not have significant adverse effects on human life and health or the Earth's natural environment, as well as activities whose effects were still unknown. For that reason, contrary to the Special Rapporteur's intentions, activities that might alter atmospheric conditions with highly unpredictable secondary effects might not be covered. That situation could be avoided by adding the word "intentionally" before "alter" in subparagraph (a). Furthermore, there might be a contradiction between the purpose of the draft guidelines, which was to protect the natural environment, including the composition and quality of the atmosphere, and subparagraph (a), which excluded from the scope of the draft guidelines human activities that altered the atmosphere but which did not have any major adverse effects on human life and health or on the Earth's natural environment. It would be better to include those activities in the scope of the draft guidelines and to protect the atmosphere *per se* rather than to restrict the scope to activities that might have adverse effects on the human or natural environment. For that reason, the phrase "and that have or

are likely to have significant adverse effects on human life and health and the [E]arth's natural environment" could be deleted.

20. Draft guideline 2 (b) did not fully reflect the Special Rapporteur's aim, because it referred to the basic principles relating to the protection of the atmosphere without saying anything about their relationship with other rules and principles of international environmental law, other specialized areas of international law or general international law. With reference to draft guideline 3, it should first be noted that it could not be inferred from subparagraph (b) that activities in airspace, irrespective of whether they fell under the jurisdiction of a State, were not covered by the draft guidelines and, second, with regard to activities conducted in areas outside the jurisdiction of States, for example on the high seas or in Antarctica, that issues of extraterritorial jurisdiction might arise. He recommended that a more in-depth examination be made of the relationship between customary principles of international environmental law, such as the principle of prevention, the principle of co-operation and the duty to conduct environmental impact assessments of transboundary projects, and regulations regarding the atmosphere. He drew particular attention to the difference between the principle *sic utere tuo ut alienum non laedas* and the principle of prevention, which must not be muddled. In conclusion, it would be wiser to look more closely at the issues raised by the topic before referring the draft guidelines to the Drafting Committee. That was especially true of draft guideline 1. He invited the Special Rapporteur to draw up a road map showing how he intended to address the topic.

21. Ms. ESCOBAR HERNÁNDEZ said that, while she believed that she understood the Special Rapporteur's concern when he stated, in paragraph 15 of the first report, that the Commission would adhere exclusively to a legal approach, that statement was unnecessary in view of the Commission's terms of reference, even though it was impossible to draw a clear-cut distinction between the legal and political aspects of the topic. The information regarding the way forward, provided in paragraphs 91 and 92, was insufficient. The Special Rapporteur should list what he deemed to be the priority issues in a road map and should say how he intended to address them. While it would be useful to have a dialogue with the representatives of relevant intergovernmental organizations, given the scientific and technical dimension of the topic, it would also be helpful to have a glossary of the terminology used, which could be annexed to the draft guidelines. The first report did, however, contain copious information about treaty practice in relation to the protection of the atmosphere which appeared to be of little relevance to the topic. For example, although the Council of the European Union directives,<sup>142</sup> to which reference was made in paragraph 30, were predicated on the Treaty on European Union and the Treaty on the Functioning of the European Union, they could not be regarded under any circumstances as binding treaty-based standards. Similarly, it was unclear why

<sup>142</sup> See J. H. Jans and H. H. B. Vedder, *European Environmental Law: After Lisbon*, 4th ed., Groningen, Europa Law Publishing, 2012, pp. 419–430.

the Commission's previous work directly or indirectly related to the protection of the atmosphere was mentioned in a section of the first report on non-binding instruments.

22. As far as draft guideline 1 was concerned, while it was helpful to define the notion of "atmosphere" for the purposes of the draft directives, it might be unwise to do so in a separate draft text, if the Commission wished to cleave to purely scientific and technical considerations, especially as it was doubtful whether it was necessary for the definition to encompass all four layers of the atmosphere. In draft guideline 2, she had no objection to using the notion of "scope", although it was generally employed by the Commission in draft articles, not draft guidelines. That being so, the elements in subparagraph (a) were insufficient to constitute what was generally understood by the term "scope". In draft guideline 3, both the meaning and legal scope of the notion "common concern of humankind" were problematic. The explanations provided in the first report suggested that the expression referred more to a worry of the international community than to a genuine legal principle which had the effect of placing States under an obligation *erga omnes* to protect the atmosphere. While the emergence of such an obligation was certainly desirable, there was no basis for concluding that it existed. In view of the foregoing, it would be premature to refer the draft guidelines to the Drafting Committee.

23. Mr. CANDIOTI said that, since it was well established that it was essential to protect the atmosphere, in other words breathable air, as a vital resource for humankind, it was to be hoped that the Commission's work would result in the clarification and systematization of the principles of international environmental law which had to be respected, fleshed out and applied to that end. When the General Assembly, of which the Commission was a subsidiary organ, had taken note of the inclusion of that new topic in the Commission's programme of work,<sup>143</sup> it had not mentioned the informal understanding of 2013. It would certainly have made express reference to it, if it had considered it advisable to make the treatment of the topic subject to certain conditions. Moreover, as several members had commented, it was not the practice of the Commission, which worked in a spirit of harmony and tolerance, to encase its special rapporteurs in a straitjacket or to impose strictures on them in advance.

24. The goals of the draft guidelines, as set by the Special Rapporteur, while respecting the need not to interfere in political matters, something which the Commission always endeavoured to avoid, seemed fit for a subject that was of immediate interest on account of the worsening effects of natural disasters linked to atmospheric degradation caused by human activities, as described earlier. Coherent, exhaustive systematization, in the form of normative guidelines, of the general principles governing the subject matter might help to advance and consolidate that new dimension of international law. While the focus had to be on the purely legal implications of issues related

to the atmosphere, the Special Rapporteur had rightly emphasized the need to cover their technical aspects as well. The suggestion put forward by a number of members that a meeting with scientists be organized at the next session was therefore welcome.

25. The definition proposed in draft guideline 2 seemed to be well founded, as only the troposphere and stratosphere were composed of air and affected by degradation resulting from human activities. Some members had, however, rightly considered that it might be unwise for the Commission to confine its consideration of the topic to those lower levels in view of technological progress and the growing impact of human activities.

26. He shared the reservations expressed earlier with regard to the notion of the "common concern of humankind" and the content of draft guideline 3 (a), which was less an attempt to define the legal status of the atmosphere, which would require more in-depth consideration, and more a restatement that the protection of the atmosphere, as an essential natural resource, formed the subject of a common concern of humankind. The notion of "common heritage of humankind" proposed by one Commission member as a description of the atmosphere might be an interesting starting point, provided that it was remembered that the Antarctic legal regime was special in that it did not exclude classic sovereign rights.

27. He would leave it to the Special Rapporteur to decide whether to refer the draft guidelines to the Drafting Committee. The various proposals made during debates that the Commission's work in the future should tend either towards the drawing up of general principles or towards the development of the principle of international cooperation were interesting.

28. Mr. SINGH said that, given the diverging views expressed with regard to the criteria set by the 2013 understanding, it was crucial that the Commission proceed with its work constructively and give it enough substance to make a meaningful contribution to the codification and development of that important subject. As Mr. Wisnumurti had said, it would be advisable for the Special Rapporteur to propose a more precise road map or programme of work and to give priority to formulating draft guidelines related to the basic principles of protecting the atmosphere, in other words States' general obligations in that respect, as part of the goals set out in paragraph 13 of the first report.

29. It was regrettable that the definition proposed in draft guideline 1 disregarded the higher levels of the atmosphere and, although the criterion of a "layer of gases" might make for a better understanding of the subject at the scientific level, it was out of place in that definition which, for the reasons stated earlier, might be unnecessary. The scope of the draft guidelines, as defined in draft guideline 2, seemed apposite. On the other hand, the notions "common concern of humankind" and "common heritage" required clarification in order to ascertain whether they applied to the protection and preservation of the atmosphere, as opposed to its exploitation. The statement that the notion of a common concern would certainly lead to the creation of obligations *erga omnes*

<sup>143</sup> See paragraph 6 of General Assembly resolution 68/112 of 16 December 2013.

also needed further examination. With those reservations, he was in favour of referring the draft guidelines to the Drafting Committee.

30. Mr. WAKO said that the Special Rapporteur, guided by his enthusiasm for the subject, had managed in his first report to make headway along the rocky path mapped out by the 2013 understanding. The Special Rapporteur had taken due account of the concerns expressed by some States in the Sixth Committee about the technical nature of the subject matter and those of the members who deemed the Commission's scientific and technical knowledge to be inadequate, and he had proposed that the Commission should consult some experts as it had done in the past. Those consultations should be held at an early stage, otherwise it would be impossible to adopt a position on the proposed definition of the atmosphere. It would be undesirable to forgo a definition of the atmosphere that would, however, have to be scientific. Although the reasons for restricting that definition to the two lower layers of the atmosphere appeared to be justified, the exclusion of the other two layers might complicate work in other bodies, such as the United Nations Committee on the Peaceful Uses of Outer Space.

31. The member States of the Asian–African Legal Consultative Organization (AALCO) had emphasized the importance of including the topic of the protection of the atmosphere in the Commission's programme of work, since that protection was rendered all the more urgent by the fact that in many respects humanity depended on the conservation of the atmosphere's quality. The understanding from 2013 had made it possible to break the deadlock, and several States that had previously had substantial reservations about the topic had revised their position, after what they considered to be a "wise precaution" had been taken. It was to be hoped that it would no longer be necessary to have recourse to that unusual procedure in the future. The Commission would currently have to make the best of it and not interpret the understanding so restrictively that constant questioning of the Special Rapporteur's faithfulness to its terms killed off the project. The flexible interpretation proposed by the Special Rapporteur was therefore appropriate.

32. Paragraphs 13 and 92 of the first report set out a programme of work on which the Special Rapporteur could base himself in the future. While Mr. Wako personally shared the reservations expressed by a number of members concerning the approach chosen, the clarity and the wording of the draft guidelines, the Special Rapporteur would undoubtedly dispel those reservations in his subsequent reports. He was therefore in favour of referring the draft guidelines to the Drafting Committee, on the understanding that draft guideline 1 might be altered in light of the opinions of the experts who would be consulted, and that the notions of a common concern or common heritage of humankind would be subject to more in-depth consideration. He would support whatever decision was taken by the Special Rapporteur on the referral of each of the draft guidelines to the Drafting Committee.

*The meeting rose at 1.05 p.m.*

## 3214th MEETING

*Tuesday, 3 June 2014, at 10 a.m.*

*Chairperson:* Ms. Concepción ESCOBAR HERNÁNDEZ  
(Vice-Chairperson)

*Present:* Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Wako, Mr. Wisnumurti.

### Expression of sympathy in connection with the disappearance of Malaysia Airlines flight MH370

1. Mr. HUANG said that the loss of Malaysia Airlines flight MH370 had been an incident of virtually unprecedented gravity: 330 passengers and crew members, citizens of 13 different countries, had been on board. The Governments of China and Malaysia reiterated their will to continue the search for the aircraft and to investigate the causes for its loss. They acknowledged their responsibility to all the passengers and flight attendants and to the international community as a whole.

2. The CHAIRPERSON requested Mr. Huang, in his capacity as Chinese Ambassador to Malaysia, to convey the Commission's condolences to the Chinese authorities, the Chinese people and, in particular, to the families of the passengers and crew of the aircraft. She hoped that the investigations would soon shed light on the fate of Malaysia Airlines flight MH370.

### Protection of the atmosphere (*concluded*) (A/CN.4/666, Part II, sect. I, A/CN.4/667)

[Agenda item 11]

#### FIRST REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

3. Mr. HUANG said that the three draft guidelines proposed in the Special Rapporteur's first report (A/CN.4/667) touched on some fundamental issues, including the definition and legal status of the atmosphere. However, those matters required more thorough study before any guidelines could be properly formulated. Depletion of the ozone layer, long-range air pollution and protection of the atmosphere were all processes that were still imperfectly understood. He hoped that the Special Rapporteur would conduct more in-depth research and that his second report would address the concerns expressed during the current debate. For those reasons, he believed it was too early to establish a Drafting Committee to discuss the draft guidelines.

4. Mr. MURASE (Special Rapporteur), summing up the debate, said that the detailed comments made by 24 speakers—nearly the entire membership of the Commission—attested to the importance of the topic. Two