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Summary record of the 3247th meeting

Topic:
Protection of the atmosphere

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a draft guideline establishing that principles relating to the protection of the atmosphere took precedence over, for instance, the rules and principles of human rights law or the international law of the sea. He agreed with the “without prejudice” clause with respect to the legal status of airspace contained in subparagraph (c), although he would not have chosen the words “[n]othing ... is intended to”. He was not convinced of the relevance of subparagraph (a), inasmuch as it was not really about the scope of the guidelines, but rather about their ultimate purpose. Moreover, the guidelines did not directly “address” human activities, but should rather “concern” them. He therefore suggested that subparagraph (a) could become part of the preamble or of a draft guideline on the object and purpose of the guidelines.

19. As to draft guideline 3, he recalled that, during previous debates, he had expressed doubts about the wisdom of recognizing a principle of common concern of humankind, as he considered that the implications of such an approach should be established first. Although he was somewhat reassured by the Special Rapporteur’s second report, which clearly excluded the expansive interpretations of the concept proposed by certain academics, he was still not convinced that recognizing the protection of the atmosphere as a common concern of humankind should take the form of a principle, as proposed in draft guideline 3. The fact that States had been reluctant to use the phrase “common concern of humankind” was not a reason for the Commission not to use it. However, rather than being recognized as a principle, it could be mentioned in the preamble, as was the case in the United Nations Framework Convention on Climate Change, along with any explanation necessary to avoid the risk of too broad an interpretation.

20. Draft guideline 4, which formulated an important basic principle, was based on extensive research. One might disagree with the Special Rapporteur as to how far the principle had been established, but the reference in paragraph 50 of the second report to the ruling of the International Court of Justice in *Legality of the Threat or Use of Nuclear Weapons*, in which it had taken the view that the “existence of the general obligation of States* to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment” (para. 29 of the advisory opinion), was nonetheless particularly relevant, in that the Court had referred not to specific treaties, but to the corpus of international environmental law, the point being that the atmosphere was part of the environment. He was not, however, convinced that theoretical developments regarding the nature of obligations *erga omnes* were really helpful and even feared that they went too far. The commentary should instead emphasize that the obligation to protect the atmosphere was one of conduct, not one of result. It would also be important to clarify the relationship between the general obligation to protect the atmosphere and the more specific *sic utere tuo ut alienum non laedas* principle, which the Special Rapporteur intended to address in a separate guideline at a later stage. For the moment, it appeared that he might be engaged in “double counting”.

21. With regard to draft guideline 5, he proposed the amendment of the first sentence of subparagraph (b) and the deletion of the second sentence, so that the subparagraph would read: “States are encouraged to cooperate in further enhancing and exchanging scientific knowledge relating to the causes and impacts of atmospheric degradation.”

22. In conclusion, he said that the Special Rapporteur had adapted his approach to take into account previous debates and that the members of the Commission should take a fresh look at his second report, rather than assuming entrenched positions. Defining rules and principles of existing law that States must or should take into account, provided that such rules and principles did not contravene current treaty regimes, was not the same as disregarding the 2013 understanding. It seemed that there were two opposing views of international law in play: one viewed international law as a body of established rules agreed by States in treaties and had very little time for customary international law, at least as far as principles were concerned; the other saw international law as a body of rules and principles, which were all interlinked and supplemented the rules expressly agreed by States, ensuring their coherence without holding back their development, and which must be taken into account in any attempt at codification and progressive development. Lastly, he supported the referral of all the draft guidelines to the Drafting Committee and hoped that the Commission, in a spirit of seriousness, enlightenment and generosity, would not allow its discussions to get bogged down.

The meeting rose at 11.35 a.m.

3247th MEETING

Thursday, 7 May 2015, at 10.05 a.m.

Chairperson: Mr. Narinder SINGH

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Ms. Escobar Hernández, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Protection of the atmosphere (*continued*) (A/CN.4/678, Part II, sect. C, A/CN.4/681, A/CN.4/L.851)

[Agenda item 9]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the Commission to pursue its consideration of the second report of the Special Rapporteur on the topic “Protection of the atmosphere” (A/CN.4/681).

2. Sir Michael WOOD said that he continued to have serious reservations about the direction in which the Special Rapporteur was leading the Commission. He would like to know what connection the Special Rapporteur saw between the present topic and the adoption, under his Chairpersonship, of the Declaration of Legal Principles relating to Climate Change³³ by the International Law Association. Did the Special Rapporteur have the same ambitions for the Commission's final output as he had had for those legal principles, namely to give them the potential to shape and influence the evolution of the climate change regime?

3. Although climate change was a matter of widespread concern, the Commission had not been entrusted with the role of standard-bearer for causes, however worthy they might be. What was needed was for it to consider what, if anything, it could and should contribute. One thing was clear—the Commission must faithfully apply the understanding that had been reached in 2013, as recorded verbatim in the summary record³⁴ and as set out in paragraph 168 of the report on the work of its sixty-fifth session.³⁵ The agreement to include the topic in the programme of work was conditioned by that understanding, and delegates in the Sixth Committee continued to emphasize the importance they attached to it. There was genuine concern that the Commission's work might cut across ongoing political negotiations, including those on a new climate change agreement to be adopted later in 2015 and on the Montreal Protocol on Substances that Deplete the Ozone Layer that were still at a sensitive and crucial stage. Any interpretation of the principle of equity or of special circumstances and vulnerability might constitute unhelpful interference with the interpretation of those concepts in the specific context of the upcoming climate change negotiations. Similarly, in relation to the Montreal Protocol on Substances that Deplete the Ozone Layer, the Commission's work might create obstacles to matters being discussed by the parties to the Protocol, including financial support and responsibility, the legal basis for dealing with hydrofluorocarbons and the reduction of those that had a high global warming potential. Lastly, any attempt by the Commission to develop overarching principles on the protection of the atmosphere might confuse the role of the existing international agreements on specific aspects thereof and create inconsistency in the interpretation of the specific concepts they contained.

4. Against such a background, it was disconcerting to note that the Special Rapporteur referred in paragraph 3 of his second report to his “relatively liberal interpretation” of the Commission's understanding. What was needed was neither a liberal nor a restrictive interpretation of the understanding but rather a good faith application. He totally disagreed with Mr. Nolte's claim that the Special Rapporteur's second report was just such a faithful application. Mr. Nolte had argued that, in view of the fact that the Commission's understanding expressly excluded neither the definition of terms exclusively for the purposes of the draft guidelines nor references to existing customary law rules and established principles,

then the Special Rapporteur's work was within the scope of that understanding. That argument was simply untenable and Mr. Nolte's conclusion was plain wrong. The Commission's work often carried considerable weight, and any definition or associated commentary, even if it was applicable only for the purposes of the guidelines, could create confusion or risk influencing ongoing political negotiations and the implementation of existing treaty regimes. There was insufficient basis in existing law for the principles proposed by the Special Rapporteur, and his definitions of terms differed from those accepted in well-established treaty regimes. Terms such as “energy”, for example, were not understood in existing treaty regimes as they were by the Special Rapporteur.

5. In his second report, the Special Rapporteur painted a rather rosy picture of both the Commission's debate on the topic and the related debate in the Sixth Committee. Yet chapter VIII of the Commission's report on the work of its sixty-sixth session³⁶ provided considerable detail as to the concerns expressed by Commission members, and paragraph 30 of the topical summary of the discussion held in the Sixth Committee in 2014 (A/CN.4/678) enumerated a number of doubts expressed by delegations regarding the Commission's work on the topic.

6. Turning to the five draft guidelines proposed, he noted that draft guideline 1 (a) contained a new definition of the word “atmosphere”. He had been among those who, at the previous session, had not seen the need for a definition, at least not at the current stage, and he maintained that view. Neither the United Nations Framework Convention on Climate Change, nor the Kyoto Protocol thereto, defined the term “atmosphere”. In the definition proposed by the Special Rapporteur, it was unclear what the words “within which the transport and dispersion of degrading substances occurs” were intended to mean. Read literally, they meant that the guidelines addressed only a subset of the atmosphere—that part in which the transport and dispersion of degrading substances occurred. If those words were intended to be purely descriptive, then perhaps they should be omitted and the idea that underlay them should be dealt with in the commentary.

7. As to draft guideline 1 (b), he was surprised that the Commission was being asked to define the term “air pollution” rather than “pollution of the atmosphere”, particularly when the definition itself referred to the introduction of substances or energy “into the atmosphere”. It was his understanding that the Commission had made a deliberate choice to use the term “atmosphere” instead of “air”. He also questioned whether it was appropriate to refer to the introduction of energy into the atmosphere, when a very tight international regulatory regime governing the safe use of nuclear energy had already been established under the IAEA.

8. Regarding draft article 1 (c), it was unclear what purpose was served by including the term “climate change” in the definition of “atmospheric degradation”. It seemed to go against the very concept of climate change, which concerned the effects produced on the climate system, of which the atmosphere was only one element.

³³ International Law Association, *Report of the Seventy-sixth Conference, Washington D.C., August 2014*, London, 2014, Resolution 2/2014, annex, pp. 21–26.

³⁴ *Yearbook ... 2013*, vol. I, 3197th meeting, p. 162, para. 31.

³⁵ *Ibid.*, vol. II (Part Two), p. 78.

³⁶ *Yearbook ... 2014*, vol. II (Part Two) and corrigendum, pp. 135 *et seq.*

9. He still had doubts about the wording of draft guideline 2 (a), on the scope of the guidelines. Of the three possible types of harm to the atmosphere—global harm, transboundary harm and purely local harm—international law had, to date, addressed only the first two. In so doing, it had relied on different rules that were not easily harmonized, and it was probably better if they were not.

10. In draft guideline 2 (b), the reference to “basic principles” seemed inconsistent with the Commission’s 2013 understanding,³⁷ which made it clear that the topic was to result in “guidelines”, not “principles”. He sought clarification from the Special Rapporteur as to whether any of the many meanings proposed for the word “principle” in paragraph 24 of his report were actually used in international law. He supported Mr. Park’s proposal to replace the entire text of draft guideline 2 with the four paragraphs of the Commission’s 2013 understanding.

11. With regard to draft guideline 3, he found it discouraging that, despite the serious doubt and objections expressed the previous year within the Commission and in the Sixth Committee, the Special Rapporteur continued to insist on using the vague and controversial term “common concern of humankind”, having even substituted it for the previous title of the draft guideline, “Legal status of the atmosphere”.³⁸ An explanation for that fundamental change would be appreciated. Although there was general agreement that the degradation of atmospheric conditions was a matter of concern, the more pertinent question was what it meant, as a matter of law, to say that it was a common concern of humankind. What did the word “common” mean in that context and what legal consequences, if any, flowed from its use?

12. While the expression “a common concern of humankind” appeared in 1992 in the preambular paragraphs of both the United Nations Framework Convention on Climate Change and the Convention on biological diversity, it was significant that it had not been included in the Montreal Protocol on Substances that Deplete the Ozone Layer, which had achieved universal participation and was recognized as one of the most effective multilateral environmental agreements ever adopted. Although the expression had resurfaced in draft article 2 of the International Law Association’s 2014 Declaration of Legal Principles relating to Climate Change, the commentary to that draft article elided the notion of “common concern” with that of “common responsibility”.

13. In his second report, the Special Rapporteur invoked a series of treaty provisions that he believed contained language equivalent to the expression “common concern of humankind”, while noting that the concept might still be regarded in part as a developing one. He concluded that the concept could certainly serve as a supplement in the creation of two general obligations of States, namely to protect the atmosphere and to cooperate for the protection of the atmosphere. If the foregoing amounted to another manifestation of the responsibility to protect, it was quite unhelpful in the current context. Ultimately, neither the Special Rapporteur nor Commission members knew

what the legal implications were of the expression, and they should therefore not use it.

14. The text of draft guideline 4 had apparently been inspired by article 192 of the United Nations Convention on the Law of the Sea, which was not to be read in isolation—yet that was what the Special Rapporteur was proposing. Moreover, it had been asserted in the Sixth Committee debate that the atmosphere could not be given the same legal treatment as the high seas, which differed in essence and nature. He failed to see how affirming that “States have the obligation to protect the atmosphere” could be seen as a guideline, and not as imposing new wide-ranging duties. To include such a bold statement as that one would either be virtually meaningless or would promise too much.

15. The titles of some of the draft guidelines that formed part of the future workplan were inconsistent with the Commission’s 2013 understanding. Although the latter stated that the Commission’s work would not deal with common but differentiated responsibilities, the workplan called for the Commission to consider “special circumstances and vulnerability”. The workplan called for guidelines on “compliance and implementation” and “dispute settlement”, which were very specific technical issues, and in fact, the Montreal Protocol on Substances that Deplete the Ozone Layer, the Kyoto Protocol to the United Nations Framework Convention on Climate Change and the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, among others, already had individual compliance and implementation regimes, each of which was tailored to the specific needs of the instrument concerned.

16. In conclusion, he was not in favour of sending all of the draft guidelines to the Drafting Committee. Draft guidelines 3 and 4, in particular, were not ripe for consideration, as they raised central issues of principle on which there was no agreement. The Special Rapporteur and the members of the Commission needed to consider carefully the points made in the debate and then decide how to proceed.

17. Mr. HASSOUNA said that the Commission should continue to make progress in its consideration of the current topic in keeping with the 2013 understanding. It should adopt a positive and balanced approach, one that identified the existing legal principles applicable to the protection of the atmosphere but avoided policy debates related to political negotiations on environmental issues.

18. He commended the Special Rapporteur for the revised set of draft guidelines in the second report, which took into account all the suggestions made by members during the consideration of the first report.³⁹ Generally speaking, he agreed with the proposition that general guidelines could embody legal principles. Concerning draft guideline 1, he endorsed the Special Rapporteur’s view that a working definition of the atmosphere was a practical necessity. He welcomed the deletion of the specific references to the troposphere and the stratosphere

³⁷ *Yearbook ... 2013*, vol. II (Part Two), p. 78, para. 168.

³⁸ *Yearbook ... 2014*, vol. II (Part Two) and corrigendum, p. 136, footnote 790.

³⁹ *Ibid.*, vol. II (Part One), document A/CN.4/667.

that the original draft guideline had included and preferred the term “envelope” to “layer”, which was too restrictive. However, the definition of the atmosphere should make it clear that within such an envelope, the transport and dispersion of both degrading and non-degrading substances occurred. The reference to energy in the definition of “air pollution” should be explained; the definition of “atmospheric degradation” was so broad that separate definitions for the various elements it covered would seem to be required.

19. Concerning draft guideline 2, the Special Rapporteur had reassured the Commission that the scope of the draft guidelines would be limited to transboundary atmospheric damage and would not cover domestic and local pollution. However, the requirement in subparagraph (a) that the human activities addressed by the draft guidelines had to have “significant” adverse effects on human life and health was questionable. Since the atmosphere was a limited resource, and its protection was a common concern of humankind, the requirement that any adverse effects on the environment must be significant was too restrictive. Moreover, the assessment of the “significance” of such effects was likely to be challenged or disputed. Furthermore, the expression “basic principles” warranted further explanation as to the criteria for describing any given principles as “basic”.

20. During the sixty-sixth session, he had stressed the need for the inclusion in draft guideline 3 of a reference to the legal implications of the statement that the protection of the atmosphere was a common concern of mankind, and the Special Rapporteur had attempted to respond to that concern. While reference to the “common concern of humankind” had a certain authority, since it was used in the preambles to the United Nations Framework Convention on Climate Change and the Convention on biological diversity, there did not seem to be sufficient State practice to make it part of customary international law. Since the expression was relevant to the topic, however, he suggested that it should figure somewhere in the text, possibly in a preamble.

21. With regard to draft guideline 4, it was difficult to see the general obligation of States to protect the atmosphere as an obligation *erga omnes* towards the international community as a whole. If the aim of the text was to lead States to cooperate for the sake of protecting the atmosphere, then that should be clearly reflected in the draft guideline. On draft guideline 5, he said that the sharing of scientific knowledge, covered in subparagraph (b), should not be subject to less stringent standards than international cooperation for the protection of the atmosphere, referred to in subparagraph (a).

22. He found the Special Rapporteur’s long-term workplan for the topic to be overambitious. It suggested the study of other subjects which, although relevant to the topic, would significantly expand its scope. It indicated that the precautionary principle would be addressed, which was not in keeping with the Commission’s 2013 understanding. The proposed date of 2020 for the completion of the topic might need to be revised in the light of scientific and technical developments that might impinge on certain aspects of the study.

23. In closing, he recommended the referral of all the draft guidelines to the Drafting Committee.

24. Mr. KITTICHAISAREE said that draft guidelines 4 and 5 concerned the general obligation of States to protect the atmosphere and the obligation of international co-operation, respectively. However, it was not clear whether they were obligations of conduct or obligations of result. The International Court of Justice had drawn a distinction between obligations of conduct and obligations of result in its 1996 advisory opinion concerning *Legality of the Threat or Use of Nuclear Weapons* and in its 2007 judgment in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*. In the latter case, the Court had held that the obligation to prevent the commission of genocide was an obligation of conduct, not an obligation of result. The distinction was significant, as it also concerned the standard of action required of States in relation to the protection of the atmosphere. For instance, in relation to the general obligation under draft guideline 4, would it be sufficient for States to establish a national framework for pollution control, or should they also ensure that no atmospheric degradation was caused?

25. In paragraph 55 of the report, the Special Rapporteur alluded to due diligence as the genesis of the principle of prevention. Did that mean that all the draft guidelines aimed merely at setting due diligence standards for States with respect to the protection of the atmosphere?

26. He welcomed the fact that the Special Rapporteur had revised the initial three draft guidelines, giving them greater clarity in content and structure, and had taken on board the suggestion not to confine the definition of the term “atmosphere” to the troposphere and stratosphere.

27. Draft guideline 3 had been placed under a new Part that dealt with one of the main aims of the project: to use existing case law to identify basic principles relating to the protection of the atmosphere. Draft guideline 2 (b) elucidated the scope of the guidelines, which extended to the basic principles relating to the protection of the atmosphere as well as to their interrelationship with other relevant fields of international law. However, it was not clear whether those principles were the same as “the general principles of law recognized by civilized nations” referred to in Article 38, paragraph 1 (c), of the Statute of the International Court of Justice.

28. In paragraph 89 of the first report, the Special Rapporteur had asserted that the concept of common concern would “certainly lead to the creation of substantive legal obligations on the part of all States to protect the global atmosphere as enforceable *erga omnes*”.

29. As he himself had stated during the sixty-sixth session, he was not sure that there was a clear link between the concept of common concern and obligations *erga omnes* in international law. In its 1970 judgment in the *Barcelona Traction* case, the International Court of Justice had mentioned obligations *erga omnes* only in *obiter dicta*, and in any event, the case had not concerned environmental protection. In his view, the issue of common concern and

obligations *erga omnes* had not been resolved in international law, and he questioned whether any substantive obligations to protect the atmosphere existed in hard law.

30. He disagreed with the contention in paragraph 29 of the second report that the concept of the common heritage of mankind had failed to find traction beyond the quite limited success in the regime of the deep seabed under the United Nations Convention on the Law of the Sea. As defined in Part XI of the Convention, the common heritage of mankind would be fully realized when market conditions were right for deep seabed mining. Moreover, the concept was being emulated in relation to the conservation and sustainable use of marine biodiversity beyond areas of national jurisdiction.

31. Draft guideline 4 imposed the substantive obligation on States to protect the atmosphere, which the Special Rapporteur argued was an obligation *erga omnes* on the basis of article 192 of the 1982 United Nations Convention on the Law of the Sea. In his own view, the latter obligation was *erga omnes partes*, similar to the obligation to prosecute or extradite perpetrators of the crime of torture under the Convention against torture and other cruel, inhuman or degrading treatment or punishment, as explained by the International Court of Justice in its 2012 judgment in *Questions relating to the Obligation to Prosecute or Extradite*. It should be noted that the International Tribunal for the Law of the Sea, in its advisory opinion in Case No. 21 of 2 April 2015 on the *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, had merely held that article 192 of the United Nations Convention on the Law of the Sea was a general obligation binding on States parties to that Convention and was applicable to the maritime areas under the jurisdiction of the parties to that case. In paragraph 47 of his second report, the Special Rapporteur seemed to have implicitly recognized the *erga omnes partes* nature of such obligations, although he confined it to the *locus standi* to bring a claim before international courts and tribunals.

32. The Special Rapporteur's discussion of the principle of *sic utere tuo ut alienum non laedas*, like his discussion of obligations *erga omnes*, relied heavily on dissenting opinions in the case law of the International Court of Justice, as well as on "soft law" documents. It was still not clear what the relationship was between the general obligation set out in draft guideline 4 and the principle of *sic utere tuo ut alienum non laedas* that governed transboundary air pollution. Perhaps, as Mr. Nolte had suggested, it was a matter of "double counting" the obligation?

33. Regarding draft guideline 5, he welcomed the Special Rapporteur's detailed explanation of the foundation for the principle of international cooperation. While he had no argument with the principle of good faith, he stressed the importance of establishing the scope and content of the obligation of States to cooperate before requiring that they cooperated in good faith. Once again, the issue at stake was whether the obligation was one of conduct or one of result.

34. The second report provided a clearer picture of how the Special Rapporteur proposed approaching this

very complex topic. Although all of the draft guidelines required further elaboration, he recommended their referral to the Drafting Committee, if that was the general consensus of the Commission.

35. Mr. ŠTURMA said that the second report was well structured and documented by numerous treaties, soft law and case law. However, he had certain doubts concerning the content of the second report and the long-term work-plan. The 2013 understanding had made it possible to start work on the topic and he agreed with other members that it must be respected. Although the understanding could be interpreted in different ways, the Commission should not waste time discussing whether a liberal or strict interpretation was appropriate. What was important was that it should be interpreted in good faith, and the Special Rapporteur had tried his best to do that. However, in some respects, it seemed that the report did not entirely reflect that effort and did not adhere to the understanding. If that was indeed the case, the Commission should help the Special Rapporteur to find better solutions.

36. He agreed with Mr. Nolte that the agreement reached on the form of the outcome of the work, namely draft guidelines, was not incompatible with the inclusion of some basic or general principles. What mattered was what kind of principles were included. It was important to distinguish carefully between principles of international environmental law *de lege lata*, which were well established in many multilateral treaties and in general international law, and other principles, which formed either *lex ferenda* or emerging principles. For example, the principle of *sic utere tuo ut alienum non laedas* could be listed among principles *de lege lata*, but it warranted some clarification, as it included both a sovereignty aspect and a responsibility aspect. The principles of cooperation, prevention and due diligence also belonged among principles *de lege lata*.

37. On the other hand, the status of the precautionary principle was far from clear and raised some issues under international law. The judgment of the International Court of Justice in the case concerning the *Gabčíkovo–Nagymaros Project* called for a cautious approach to the principle, although that did not preclude speaking of an "emerging principle". However, in accordance with the 2013 understanding, the precautionary principle and the concept of common but differentiated responsibilities were not to be dealt with under the present topic.

38. Turning to draft guideline 1, he said that it was unnecessary for the Commission to define the atmosphere, since it was not a legal concept. Like Mr. Murphy, he was doubtful whether any mention should be made of energy in subparagraph (b). Like Mr. Nolte, he was also uncertain whether the very broad concept of climate change should be included in the definition of "atmospheric degradation". While he was in favour of draft guideline 2 (b), the reference in subparagraph (a) to the introduction of deleterious substances or energy was hardly compatible with the 2013 understanding.

39. Draft guideline 3 was the most problematic of all. Although it stated that the atmosphere was essential for life on Earth, which was certainly true, it also introduced

the concept of a “common concern of humankind”, which had no specific normative content. In contrast to the concept of the “common heritage of mankind”, which applied to international legal regimes, the protection of the atmosphere took place in the territory and under the jurisdiction of States. Moreover, the concept of a common concern of humankind was not a principle *de lege lata*, but rather a general underlying idea that served to interpret other principles with a normative content. The draft guideline should therefore be turned into a preamble, in line with the approach adopted in several multilateral conventions.

40. Draft guideline 4 had potentially enormous consequences. The reference to an unqualified obligation *erga omnes* to protect the atmosphere seemed to go too far, since it might mean different things in relation to different activities that might have adverse effects in various parts of the atmosphere. On the other hand, he fully supported the inclusion of the obligation to cooperate contained in draft guideline 5.

41. He recommended the referral of draft guidelines 1 (b) and (c), 2, 4 and 5 to the Drafting Committee for more detailed debate.

42. Mr. HMOUD said that the Commission’s task was to identify the law on the protection of the atmosphere. Just as it had done in the past with the topic of reservations to treaties, it could then formulate a set of guidelines that would have authoritative legal value and be of use to organizations and practitioners. The principles addressed in the Special Rapporteur’s second report were consistent with the understanding reached in 2013, although questions excluded by the understanding, such as the precautionary principle and common but differentiated responsibilities, should not be dealt with, nor should compliance and dispute settlement, which essentially related to the drafting of treaties.

43. A definition of the atmosphere might be useful in order to determine the applicability of the principles contained in the guidelines, but it was not absolutely necessary. The functional aspect of the atmosphere as a medium to transport and disperse degrading substances need not enter into the definition, as it related more to the process of atmospheric degradation than to the substance thereof. The definition of air pollution should be wide enough to cover the introduction by all human activities of substances and energy resulting in deleterious effects. The reference in draft guideline 2 to the introduction of deleterious substances was not consonant with the definition of air pollution, since the latter was essentially a matter of effect, irrespective of whether the activity or substance itself was harmful. The existence of *lex specialis* on energy use would restrict the application of the principles in the draft guidelines and therefore limit their impact.

44. In order to identify the specific obligations pertaining to protection, it was essential to determine the scope of the activities or conditions covered by the topic—air pollution, ozone depletion and climate change—which the Special Rapporteur had decided to subsume under the term atmospheric degradation. Since the contents of draft

guidelines 1 and 2 overlapped but were also inconsistent, the Drafting Committee would have to deal with those discrepancies. Beforehand, however, the Commission had to decide whether alterations to atmospheric conditions other than ozone depletion or climate change were to be included in the scope of the topic. Draft guideline 2 spoke of alterations to the composition of the atmosphere and draft guideline 1 talked about alterations of atmospheric conditions. Similarly, while draft guideline 2 (a) referred to human activities that were “likely” to cause significant deleterious effects, draft guideline 1 (b) mentioned activities that did result in deleterious effects. Both those discrepancies needed to be addressed. It was appropriate to limit the scope of the draft guidelines to effects of a significantly adverse nature, but draft guideline 2 did not specify that such harmful effects had to be transboundary, although that element was essential if protection were to be multilateral.

45. There was no basis in treaty law, customary international law or case law for asserting that the protection or the degradation of the atmosphere was a common concern of humankind. The second report offered no support for the proposition that it was a notion that fell within the realm of progressive development. If the aim was to create certain legal obligations, including the duty to cooperate, then that could be achieved by simply stating the obligations related to protection. “Common concern” was a concept, not a legal principle, but it could trigger a variety of legal consequences which the international community was not prepared to accept. Despite the Special Rapporteur’s assurances that the concept had no procedural legal implications, it was obvious from his insistence on creating a connection with obligations *erga omnes* and from his plan for a draft guideline 17 on compliance and implementation that it was intended to do so. The references in the second report to a collective response went beyond the notions of cooperation and collaboration, and created uncertainty as to who was entitled to receive protection and who could take action in that regard. As for draft guideline 3, there seemed to be no need for an additional description of the atmosphere, as it served no legal purpose.

46. There were sufficient grounds for introducing a general duty to protect the atmosphere as a development of international law, namely the judgments of the International Court of Justice on environmental protection and the customary environmental law principle *sic utere tuo ut alienum non laedas*. It was, however, important to determine the content and extent of any other aspects of the general obligation that went beyond *sic utere tuo*. There was no evidence in customary international law, environmental treaties or case law to suggest that protection of the environment was an obligation *erga omnes*, and no such obligation could be created by virtue of progressive development.

47. The duty of cooperation was not a stand-alone duty in international law; it was a customary duty in some fields and treaty-based in others. Its content differed from one field to another, hence it was vital to establish sound grounds for determining the content of that duty for the purpose of atmospheric protection. It could be inferred from instruments relating to environmental protection,

air pollution, ozone depletion and climate change that such cooperation essentially comprised three elements: exchange of information and of scientific and technical data and research findings; good faith; and compliance with the principle of sovereignty.

48. Draft guidelines 1, 2, 4 and 5 should be referred to the Drafting Committee.

49. Mr. KAMTO said that the Commission's position should not be interpreted as licence to impair the atmosphere or as implying that the protection of the atmosphere was of no concern. It should be made plain that, even if international law did not offer a basis for formulating a positive law rule or a rule crystallizing a customary rule, and even if current legal trends did not permit any progressive development, States could and should adopt laws to protect the atmosphere.

50. Mr. PETRIČ said that, while the topic under consideration was of particular importance to States that felt endangered by the consequences of climate change, other States had serious reservations, owing to the complexity of the topic. For that reason, the Commission should proceed with caution and deal with the topic in a thorough manner. It was also necessary to abide by the understanding reached in 2013.

51. At the current stage of its work, the Commission needed working definitions of the atmosphere, air pollution and atmospheric degradation that matched the scientific definitions thereof. The definitions proposed in the second report were not legal definitions. He shared the reservations of other members of the Commission about the references to the introduction of energy into the atmosphere and the use of nuclear energy. The definition of atmospheric degradation was not based on any relevant State practice, but even so, draft guideline 1 should be referred to the Drafting Committee, as should draft guideline 2, despite the fact that the relationship of the proposed guidelines with the basic principles on the protection of the atmosphere and with other relevant fields of international law was unclear. What was the legal value of the guidelines? Were political and moral principles of relevance, or were only legal principles drawn from international law pertinent? The principles identified in paragraph 25 of the second report were certainly of relevance, but their functional relationship with the topic needed to be explained. While States indubitably did have an obligation to protect the atmosphere, as was affirmed in draft guideline 4, it was necessary to spell out the scope of that obligation and the specific duties that it entailed. The obligation to cooperate was well established in international law *de lege lata*, but it was necessary to clarify how it applied in practice to the protection of the atmosphere. The statement in draft guideline 5 (b) that States were encouraged to cooperate in further enhancing scientific knowledge and that cooperation could include exchange of information and joint monitoring was inadequate in substance and, from a legal standpoint, it watered down the obligation to cooperate.

52. With regard to draft guideline 3, he remained unpersuaded that the concept of the "common concern

of humankind" was a well-established legal principle in State practice. While the degradation of atmospheric conditions was undoubtedly the concern of all States, it was unclear what legal obligations derived from the principle of the common concern of humankind or on whom any such obligations might fall. What was meant, in a legal sense, by "common concern of humankind"? He agreed with Mr. Nolte that it might be better to express such a general concern in a preamble to the draft guidelines.

53. Turning to the future workplan set out in paragraph 79 of the second report, he said that the principles on which it was based—prevention, due diligence and precaution—should be brought into a direct functional relationship with the protection of the atmosphere. Consideration should also be given to the inclusion of the principles of solidarity and sovereignty. While he agreed that States had no claim to the moving air—the atmosphere—in their sovereign airspace, there was a special relationship between the principle of sovereignty and the protection of the atmosphere that should not be neglected in the current project. In fact, a parallel could be drawn between the moving air in a State's airspace and the moving waters in the sovereign territorial waters of a coastal State.

54. In conclusion, he supported the referral of draft guidelines 1 and 2 to the Drafting Committee. The referral of draft guideline 3 should be deferred until the Commission had considered a preamble to the guidelines. As to draft guidelines 4 and 5, further efforts should be made to resolve outstanding issues of concern before referring them to the Drafting Committee. On a final point and in order to avoid any misunderstanding, he wished to express his continuing support for the project, which was one of the most challenging that the Commission had ever had before it. The Commission should proceed with its consideration of the subject in a tolerant and thoughtful manner.

55. Mr. COMISSÁRIO AFONSO commended the Special Rapporteur on the clear and comprehensive manner in which he had dealt with a highly technical subject. A case in point was the concepts and definitions contained in draft guidelines 1 and 2, which legal science alone might not suffice to finalize—hence the utility of the consultation of scientific experts.

56. With regard to draft guideline 3, it was his view that the expression "common heritage" was the most appropriate, as had been argued extensively at the previous session. The Special Rapporteur had nonetheless decided to retain the concept of "common concern", but the arguments that he had advanced to justify his decision did not appear to be substantially stronger than those he had put forward to reject the concept of "common heritage of humankind". He would appreciate an explanation of why, in paragraph 26 of the report, the Special Rapporteur stated that "the protection of the atmosphere [was] a 'common concern of humankind'", whereas in draft guideline 3, the terminology changed to "the degradation of atmospheric conditions". The guideline should be couched in a more positive way by emphasizing the protection side rather than the degradation aspect.

57. Although draft guidelines 3 and 4 both dealt with the protection of the atmosphere, they differed substantially in nature: while the former was a statement of general principle, the latter was the assertion of a general obligation. Accordingly, the last part of draft guideline 3 should be reformulated to read “and hence the protection of atmospheric conditions”—or “the protection of the atmosphere”, if the Special Rapporteur preferred—“is a common concern of humankind”.

58. Draft guidelines 4 and 5 affirmed two important obligations of States: the general obligation to protect the atmosphere and the general obligation to cooperate. As the Special Rapporteur had correctly pointed out in his second report, the first of those obligations was well accepted within the institutional context of the United Nations Convention on the Law of the Sea. As for the obligation to cooperate, the Commission was familiar with the concept from other legal instruments it had produced, including those on shared natural resources and the protection of persons in the event of disasters.

59. In conclusion, he wished to join with other members who had recommended that the entire set of five draft guidelines be sent to the Drafting Committee.

60. Mr. PETER commended the Special Rapporteur on his second report, which was well researched and carefully balanced to reflect the diversity of views within the Commission. He also wished to express strong support for the balanced and well-argued statement made by Mr. Nolte at the previous meeting.

61. It was disturbing to see that the so-called “2013 understanding”, which he thought had been consigned to history, continued to occupy discussions among Commission members when time could be more usefully spent on the fundamentals of the topic. It seemed that the understanding would forever hang over the head of the Special Rapporteur—and over the Commission as a whole—like a sword of Damocles. To some members of the Commission, respect for the understanding appeared to prevail over putting forward well-argued views. It was almost as if the understanding had been purposely designed to bog down the work on the topic. It was even more disturbing to see that some delegations in the Sixth Committee had started to use the understanding as a yardstick by which to measure the Commission’s work: while some delegations had correctly noted that it was constraining the Special Rapporteur, others had urged him to adhere strictly to the letter and spirit of the understanding. However, no delegation in the Sixth Committee had ever called into question the importance of the subject matter or the need for a strong legal framework to protect the environment. That in itself was proof that the Commission was on the right track.

62. On draft guideline 3, he had initially argued against the notion of “common concern of humankind” and in favour of the principle of “common heritage of mankind”. However, in the second report the Special Rapporteur had made a very convincing case for adopting the principle of common concern of humankind, in particular by asserting that the concept did not create

specific substantive obligations for States, but rather served as a supplement in the creation of two general obligations of States: to protect the atmosphere and to cooperate for its protection. Although he himself would have preferred a stronger legal regime, he could live with the Special Rapporteur’s proposal, which was likely to garner more general support.

63. In paragraphs 42 to 51 of the second report, the Special Rapporteur addressed the question of whether the duty to protect the atmosphere was an obligation *erga omnes*. In line with the *obiter dictum* in the judgment of the International Court of Justice in the *Barcelona Traction* case, it followed that, once it had been agreed that the atmosphere was an area of common concern of mankind, there was an obligation on all States to protect it (para. 33 of the judgment). Furthermore, the very nature of the atmosphere, which was in constant movement around the Earth, militated in favour of such an obligation.

64. As to the other draft guidelines, they were, in his view, uncontroversial and not deserving of the criticism to which they had been subjected. It was important that the topic be considered in its totality and that each element be viewed as being connected with and complementary to all the others. Seen in that light, it was difficult to understand what objection there could be, for instance, to draft guideline 5 on international cooperation, which merely required States to cooperate with each other and with relevant international organizations in good faith.

65. In conclusion, he encouraged the Special Rapporteur to continue with the same high standard of scholarship and in the same spirit of compromise that he had demonstrated thus far. As to the five proposed draft guidelines, he found them to be reasonable and recommended their referral to the Drafting Committee.

66. Mr. HUANG expressed disappointment at the distinction Mr. Peter seemed to be making among members of the Commission on the basis of their support or otherwise for the 2013 understanding.

The meeting rose at 1.05 p.m.

3248th MEETING

Friday, 8 May 2015, at 10.05 a.m.

Chairperson: Mr. Narinder SINGH

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Ms. Escobar Hernández, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.