Document:-
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Summary record of the 3211th meeting

Topic:
Protection of the atmosphere

Extract from the Yearbook of the International Law Commission:-
2014, **vol. I**

20. He also had doubts about the expression "layer of gases", which would entail a discussion of what was meant by "layer" and "gases", and he preferred the term "gaseous envelope". The three core international issues of air pollution, ozone depletion and climate change should also be defined in the draft guidelines, although care must be taken not to encroach upon the relevant political negotiations.

21. Concerning draft guideline 2, on the scope of the guidelines, he said the nature of air pollution merited further discussion. It should be clarified, in terms of law, that the place of origin or causation of pollution was different from the place where its effects were felt. Movement in the atmosphere quickly transported pollutants all over the globe, far from their original sources, and their accumulation had deleterious effects on the atmosphere. However, it was often impossible to identify clearly the causes and original sources of atmospheric degradation. The protection of the atmosphere should therefore be formulated in terms of restriction of hazardous substances, as was done in the existing relevant conventions.

22. He had difficulty with the statement in paragraph 76 of the first report that the subject matter of the draft guidelines would include the introduction of energy into the atmosphere. That raised the issue of radioactive pollution and limits on radioactive emissions, something already covered by national laws, international documents and eight protocols to the 1979 Convention on long-range transboundary air pollution, which was cited in the last footnote to paragraph 76 of the first report.

23. Draft guideline 3 (Legal status of the atmosphere) was difficult to accept. In his view, the legal status of the atmosphere situated even temporarily over a State's territory or territorial sea was quite different to that of the atmosphere over the high seas, or over the Antarctic zone. The latter could, perhaps, be deemed a "common concern of humankind", but that was not true of the atmosphere over a State's territory, which was under the control of that State. To follow the legal regime of the law of the sea, for the purposes of its legal status, the atmosphere should be divided into the atmosphere in a State's airspace and the atmosphere outside that airspace. Moreover, it was unclear how international legal standards could be established with respect to a "common concern of humankind"; it would certainly amount to progressive development of international law.

24. While there was undoubtedly a need for a legal framework covering the entire range of environmental problems connected with the atmosphere in a systematic manner, protection of the atmosphere clearly raised many difficult technical and political issues.

Organization of the work of the session (*continued*)[*]

[Agenda item 1]

25. Mr. SABOIA (Chairperson of the Drafting Committee) said that the Drafting Committee on subsequent agreements and subsequent practice in relation to the interpretation of treaties was composed of Mr. Hmoud, Mr. Kamto, Mr. Kittichaisaree, Mr. Murphy, Mr. Park, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood, Mr. Nolte (Special Rapporteur) and Mr. Tladi *ex officio*.

The meeting rose at 10.45 a.m.

[*] Resumed from the 3200th meeting.

3211th MEETING

Tuesday, 27 May 2014, at 10.05 a.m.

Chairperson: Mr. Kirill GEVORGIAN

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, 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. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

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*)

1. The CHAIRPERSON invited the Commission to resume its consideration of the first report of the Special Rapporteur on the protection of the atmosphere (A/CN.4/667).

2. Mr. MURPHY said that the inclusion of the topic in the Commission's programme of work, far from having received strong, general support in the Sixth Committee, had met with mixed reactions. Certain States were resolutely opposed to its inclusion and many had stressed the importance of adhering to the conditions for considering the topic specified in the Commission's 2013 understanding. However, the first report of the Special Rapporteur seemed to depart from the letter and the spirit of that understanding, the crux of which was, not that the Commission should avoid interfering only in "*ongoing* treaty negotiations", but rather, that the analysis of certain questions was clearly precluded. Moreover, even though there was no express mention made of customary international law, the conditions set out in the understanding applied not only to treaty regimes but to all sources of international law.

3. Even though the project was *not* intended to "fill" the gaps in treaty regimes, in paragraphs 12, 13 and 15 of his first report, the Special Rapporteur tended to indicate that its goal was in fact to find and fill gaps in treaty regimes by identifying principles and rules of law.

Similarly, while the draft guidelines should not "seek to impose on current treaty regimes legal rules or legal principles not already contained therein",[116] in paragraph 13 of his first report the Special Rapporteur envisaged providing "appropriate guidelines for harmonization and coordination among treaty regimes", which would be tantamount to imposing the rules and principles of one regime onto another. The precautionary principle and other questions relating to liability in particular, which were not to have been included in the project, were nevertheless addressed. Paragraph 39 of the report stated that the London adjustments[117] to the Montreal Protocol on Substances that Deplete the Ozone Layer had served to strengthen the principle of common but differentiated responsibilities, whereas the drafters of the instrument had scrupulously avoided any express mention of that principle. Similarly, in paragraph 40, the description of the commitments arising from the United Nations Framework Convention on Climate Change wrongly suggested that only developed countries had undertaken to reduce their greenhouse gas emissions, and that could lead the Commission to be perceived as taking sides on issues that were currently under negotiation.

4. As to the methodology followed in the first report, the draft guidelines and some parts of the report had no basis in treaty law, State practice or case law but instead relied on the views of NGOs or on doctrine, despite the fact that the Commission had traditionally been highly attuned to whether *States* had accepted a rule as law. For example, the recommendations made at the workshop held in Gothenburg (Sweden) in June 2013,[118] of which the States parties to the Convention on long-range transboundary air pollution had merely taken note,[119] could not in themselves justify the statement that the expectations of the international community towards the Commission with regard to the topic were particularly high, especially when 50 States and the European Union had challenged the notion. Similarly, it was important to carefully analyse the non-binding instruments that the first report cited as important sources for determining *opinio juris*, because if most of those instruments had been drafted in a non-binding form, it was because States did not believe them to reflect legal requirements and because those instruments, created to address particular issues, did not lay down general rules of international law.

5. As Mr. Kittichaisaree had pointed out, the definition of the atmosphere proposed in draft guideline 1 seemed to be incomplete, as it inexplicably excluded a number of atmospheric layers. Furthermore, the presence of "airborne substances" was not relevant to defining the atmosphere, as they were also present in outer space. The atmosphere was defined by the simple statement that it went no higher than the upper limit of the stratosphere, beyond which outer space began. However, outer space and its delimitation were expressly excluded from the project by the 2013 understanding. Moreover, it was impossible to disassociate the concepts of atmosphere and airspace, as the latter was by definition a space where there was "air", and if there was no "atmosphere", there was no "air", with the result that the proposed definition could be interpreted as implying that a State's airspace stopped 50 kilometres above the Earth's surface. In addition, the fact that treaties relating to atmospheric issues did not define the term begged the question of whether there was actually any need to define it; after all, the conventions on the law of the sea did not define the term "sea". Lastly, such a definition could have adverse effects if it was fed back into existing treaty regimes; its link with the concept of the planetary boundary layer contained in the Vienna Convention for the Protection of the Ozone Layer was far from clear.

6. At first sight, the scope of the guidelines, as proposed in draft guideline 2, seemed strikingly broad, as it referred to all human activities that altered the composition of the atmosphere, which included the simple act of breathing. However, as Mr. Park had noted, the relevant activities had to have a transboundary effect before they fell within the purview of international law. The scope of the project was subsequently restricted to activities affecting the Earth's *entire* atmospheric environment, which would imply that the guidelines addressed only "global atmospheric problems", namely ozone depletion and climate change. Moreover, draft guideline 2 (*b*) contravened the 2013 understanding, which favoured the development of guidelines in order to avoid identifying new legal principles. Lastly, a provision devoted to scope was not essential. However, if it was retained, it should reflect the preliminary scope of the project established in the 2013 understanding.

7. Draft guideline 3 contained elements which, at first glance, seemed to have little to do with the legal status of the atmosphere, aside from the controversial term "common concern of humankind". While the term appeared in the preamble to the United Nations Framework Convention on Climate Change, which addressed a single phenomenon, it did not refer to the "atmosphere" as such there, but rather to the concern caused by the adverse effects of a change in the Earth's climate. However, as Mr. Park had pointed out, the protection of a natural resource had never been considered to be a "common concern of humankind". The term did not appear in any of the treaties on the atmosphere or in any of the regimes developed since. In the report, the use of the term "common concern" in the context of the atmosphere as a whole was supported by a single academic work which actually suggested three interpretations of that phrase and emphasized the novelty of the concept in international law. Other academic works, upon which the Special Rapporteur also appeared to have drawn, injected conflicting content and effects into the use of the term. Those ranged from a legal responsibility to prevent damage to a natural resource (would States then have to prevent all types of emissions to protect the atmosphere?) to the rights and duties of States, and even of individuals, to guarantee the protection of the atmosphere though joint or separate action, including though legal channels, and even to a general obligation of international environmental solidarity between industrialized and developing States.

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[116] *Yearbook … 2013*, vol. II (Part Two), p. 78, para. 168 (*d*).

[117] United Nations, *Treaty Series*, vol. 1598, No. 26369, p. 469.

[118] P. Grennfelt, *et al.* (ed.), *Saltjöbaden V–Taking International Air Pollution Policies into the Future, Gothenburg, 24–26 June 2013*, Copenhagen, Nordic Council of Ministers, 2013, pp. 11 *et seq.*, available from: www.norden.org/en/publication/saltsjobaden-v-taking-international-air-pollution-policies-future.

[119] See ECE/EB.AIR/122, para. 18.

8. Although the Special Rapporteur noted in paragraph 89 of his first report that the concept of common concern could lead to the creation of obligations *erga omnes,* the *Trail Smelter* case showed that the pollution of the atmosphere did not necessarily violate obligations *erga omnes*, especially when it remained localized. Furthermore, as the Study Group on fragmentation of international law had pointed out, while certain obligations in international law were *erga omnes,* the bulk of international law emerged from bilateral relations between States.[120] It should also be noted that the obligations *erga omnes* referred to in the *obiter dictum* of the *Barcelona Traction* case concerned fundamental rights, aggression and genocide, to which the obligation not to pollute the atmosphere was in no way comparable. In his first report, the Special Rapporteur did not specify the consequences, under the articles on the responsibility of States for internationally wrongful acts, that could arise from that obligation if it were considered to be *erga omnes*. It would therefore be unwise for the Commission to adopt the term "common concern" which, as Mr. Kittichaisaree had said, was not settled in international law and could prove dangerous if the underlying notion was that of an *actio popularis* should the deadlines and targets set for work on climate change not be met.

9. At that stage, he was not in favour of referring draft guideline 3 to the Drafting Committee. He believed that the Commission should take a different approach to the draft guidelines, grounded in State practice, and gear the project towards policymakers grappling with problems relating to the atmosphere. One draft guideline could recall that existing State practice demonstrated that States were cooperating on those problems and that such cooperation should continue. Another draft guideline could state that a wide range of bilateral, regional and universal treaties and other instruments, which could be listed in the commentary, bore testament to that cooperation and helped to coordinate State activities. A third draft guideline could point to the different models for treaty regimes, including the model of a framework convention supplemented by protocols, and the commentary to that guideline could include an analysis of the techniques used. Those different types of "practice pointers" would allow States to understand the techniques used to design existing regimes so that they could apply them to new regimes. *A contrario,* a one-size-fits-all approach to the topic, which wrongly presupposed that all problems related to the atmosphere were of a similar nature and aimed to develop uniform legal rules to harmonize disparate regimes, was bound to be problematic. He suggested that a working group be convened at a later stage to assist the Special Rapporteur in developing those guidelines, and he agreed that a road map or a general plan could serve to guide the Commission's work on the topic.

10. Mr. NIEHAUS said that the Special Rapporteur had clearly demonstrated the importance of the protection of the atmosphere as a common concern of humankind, a problem that the Commission must address for the sake of future generations. The first report, attesting as it did to the Special Rapporteur's intention to broach the topic from a purely legal perspective, seemed likely to allay the fears expressed by certain States in the Sixth Committee.

11. Like the Special Rapporteur, he thought it would be useful to discuss the issues of transboundary air pollution, depletion of the ozone layer and climate change, insofar as they were not the subject of ongoing political negotiations. Moreover, in his first report, the Special Rapporteur rightly recalled that the aim was not so much to point to guilty parties or those responsible, but to identify possible mechanisms for international cooperation in dealing with common problems.

12. With regard to draft guideline 1, he said that he endorsed the definition proposed by the Special Rapporteur, who had decided to limit it to the lower layers of the atmosphere, namely the troposphere and the stratosphere. Certain members were of the opinion that the mesosphere and the thermosphere should also be included but, aside from the fact that air was non-existent in those upper layers, they were part of outer space, which was excluded from the topic. In the case mentioned by Mr. Kittichaisaree, where the mesosphere might be affected by climate change, it would inevitably be of natural origin and not caused by human activities. It seemed impossible to speak of jurisdiction or sovereignty over the atmosphere, as it was a moving substance, differing in that respect from airspace, which was a spatial delimitation.

13. Draft guideline 2 indicated that only damage caused by human activities fell within the scope of the draft guidelines. Subparagraph (*b*) referred to the fact that the basic principles relating to the protection of the atmosphere were interrelated. If by that was meant the links between the law of the atmosphere and the other fields of international law mentioned in paragraph 77 of the first report, the provision should be formulated more clearly. Draft guideline 3 set out the legal status of the atmosphere, which the Special Rapporteur had chosen to delineate with reference to the concept of the "common concern of humankind" as used in the 1992 United Nations Framework Convention on Climate Change. As the Special Rapporteur rightly recalled, the rules relating to the legal status of airspace remained applicable.

14. Lastly, he said that he was in favour of sending the three draft guidelines to the Drafting Committee. He drew members' attention to two recent studies conducted by the Organisation for Economic Co-operation and Development and WHO, which reaffirmed the importance of the topic under consideration by demonstrating the human and material costs of air pollution.

15. Mr. TLADI said that, after having read the first report, he wondered whether there was any treaty practice to be examined outside the limits established for the consideration of the topic in 2013. The main instruments analysed in the report concerned the very areas that were not supposed to be dealt with by the Commission, such as long-range transboundary air pollution, the ozone layer and climate change. Matters such as the precautionary principle and common but differentiated responsibilities, which were ubiquitous in environmental treaty law, were

[120] See the report of the Study Group of the Commission on fragmentation of international law, document A/CN.4/L.682 [and Corr.1] and Add.1, mimeographed; available from the Commission's website, documents of the fifty-eighth session (2006). The final text will appear as an addendum to *Yearbook … 2006*, vol. II (Part One).

also excluded from the topic. Moreover, as mentioned by Mr. Park, the simple fact of defining a concept so intrinsic to the protection of the environment as the depletion of the ozone layer would be a breach of the preconditions placed on the Commission's work, hence the clear need to adopt a more flexible approach to those preconditions.

16. One of the aims outlined by the Special Rapporteur in paragraph 13 of the first report was that of exploring the introduction of cooperation mechanisms to solve problems of common concern—a welcome objective, provided that the existing legal obligations were likewise discussed. As to the identification of sources of law, in paragraph 15, the Special Rapporteur said that it was necessary to distinguish arguments based on existing law from the "preferences" of *lex ferenda*, which, in the field of international environmental law, were sometimes "smuggled" into the interpretation of *lex lata*. While that exclusively legalistic approach might seem the correct one, it subjected interpretation, an essential element in identifying the law, to undue criticism. As the Special Rapporteur himself had said, the first step was to clarify the meaning and function of existing legal principles, something which involved a certain degree of interpretation, and even to envisage "reinterpreting" them if necessary. In paragraph 46, he cited the *Gabčikovo-Nagymaros Project* case to illustrate the irrelevance of arguments based on "preferences" or priorities and not on positive law. In fact, however, it was on the basis of the applicable law that the International Court of Justice had rejected the arguments made by Hungary. On the other hand, in paragraph 88 of his first report, the Special Rapporteur said that the application of the concept of common concern to all atmospheric problems seemed appropriate, something that he himself did not contest, even though the argument was based on preferences and priorities and had no firm legal basis. The Special Rapporteur provided a very useful summary of international jurisprudence on international environmental law. The *Pulp Mills on the River Uruguay* case was particularly noteworthy in that the International Court of Justice had recognized for the first time that there was a general obligation, independent of the treaty, to perform environmental impact assessments. However, it had not addressed all aspects of the requirement, and that afforded the Commission the possibility of clarifying the obligation without overstepping the limits imposed for the consideration of the topic. The analysis of the principal non-binding instruments was also useful and, in that respect, he did not agree with the limited approach advocated by Mr. Murphy. For example, the precautionary principle was relevant as a legal principle because it was present not only in treaties but also in a large number of non-binding instruments and in bilateral agreements. In that connection, equity principles, such as Principles 9 and 11 of the Declaration of the United Nations Conference on the Human Environment[121] (the Stockholm Declaration), warranted greater attention.

17. Turning to draft guideline 1, he said that he was not convinced that it was appropriate to provide a definition of the atmosphere, at least at that early stage of the Commission's work. As to the scope of the guidelines, which was defined in draft guideline 2, the Commission should clearly state that the exclusion of certain principles and concepts, in keeping with the preconditions governing its consideration of the topic, was without prejudice to the standing of those principles and concepts in international law. With regard to draft guideline 3, the Special Rapporteur should explain why he had chosen to make the protection of the atmosphere a "common concern of humankind", and not to use the idea of a "common heritage of humankind". The fact that the latter concept entailed the exploitation of resources, which would require a "far-reaching institutional apparatus" similar to the International Seabed Authority, was insufficient reason, especially as the emphasis would be on preserving the atmosphere and not exploiting it.

18. Lastly, as Mr. Park had pointed out, the United Nations Convention on the Law of the Sea could provide a useful analogy, in particular with regard to the obligation to assess environmental risks, which that instrument addressed, and concerning the question of territorial sovereignty. Although the atmosphere flowed freely through national boundaries, the same could be said of oceans, the delimitation of which had merely served to complicate their governance.

19. Mr. HASSOUNA said that, in his approach, the Special Rapporteur had scrupulously adhered to the restrictions imposed by the Commission for considering the topic in question, which had made his task all the more difficult, as the protection of the atmosphere was closely linked to climate change and to other areas that had been excluded. In the absence of legal norms on the subject, the Special Rapporteur had suggested "reinterpreting" existing legal concepts, principles and rules. In doing so, however, he should bear in mind that the Commission had undertaken to not "fill the gaps" in existing treaty regimes.

20. The definition of the atmosphere proposed in draft guideline 1 was too specific and precluded the possibility that scientific knowledge might evolve. The definition should focus on the functional aspect of the atmosphere, namely its role in the transport and dispersion of airborne substances, rather than on its physical aspects or its delimitation. In draft guideline 2, several terms might unnecessarily restrict the scope of the Commission's work. The human activities addressed were those that introduced deleterious substances or energy into the atmosphere or altered the composition of the atmosphere and that had significant adverse effects on human life and health and the Earth's natural environment. However, those two cumulative conditions set a very high threshold, which would exclude, for example, the activities intended to alter atmospheric conditions mentioned in paragraph 74 of the first report, since they were intended to produce desirable changes. The term "deleterious" was also problematic, as the same substance could be deleterious or innocuous depending on its location in the atmosphere. Similarly, the adjective "significant" was open to numerous interpretations and, in any case, given the importance of the atmosphere, was too restrictive to characterize only those adverse effects on the environment that could be covered by international regulations.

[121] *Report of the United Nations Conference on the Human Environment, Stockholm, 5–16 June 1972* (United Nations publication, Sales No. E.73.II.A.14), Part One, chap. I, p. 3.

It would be more appropriate to define the scope of the draft guidelines in broader terms so as to encompass all human activities affecting the atmosphere. The concept of protection should also be defined in the draft guidelines. In draft guideline 2 (*b*), the adjective "basic", used to describe the principles relating to the protection of the atmosphere, should either be clarified or omitted. The last part of the sentence was also unclear, especially as the Special Rapporteur explained in his first report that the law of the atmosphere was intrinsically linked to other fields of international law.

21. The saving clause in draft guideline 3 (*b*) was justified in light of the differences between the notions of airspace and atmosphere, which were explained in detail in the first report. However, subparagraph (*a*) did not provide a satisfactory definition of the legal status of the atmosphere. For example, did the fact that the protection of the atmosphere was "a common concern of humankind" give rise to legal obligations or did it merely serve to justify international law-making because the issue no longer belonged to the domain reserved for national law? The Special Rapporteur assumed that the concept of common concern would lead to the creation of *erga omnes* obligations to protect the atmosphere, yet he had stated that it was too early to interpret the concept as giving States an interest or standing to act in that regard. A more in-depth analysis of whether such rights and obligations existed in international law was necessary, not only to justify the inclusion of that provision but also to clarify its meaning and to improve the understanding thereof. To that end, draft guideline 3 should be referred to the Drafting Committee, along with draft guidelines 1 and 2.

22. Lastly, he said that, while the protection of the atmosphere was undoubtedly a challenging topic, the Commission should treat it as *sui generis* and not adhere too closely to existing regimes or the way in which other natural resources were treated, thereby leaving the door open for future scientific developments.

23. Mr. PETRIČ said that he had supported the inclusion in the Commission's programme of work of the topic of the protection of the atmosphere because it was a matter of urgency and such protection was far from being guaranteed in general international law. Before turning to the draft guidelines themselves, he wished to make two preliminary remarks. First, it should always be borne in mind that the Commission had included the topic in its programme of work on the condition that the outcome of its work would take the form of non-binding draft guidelines,[122] a goal which States in the Sixth Committee had generally approved. Second, the Special Rapporteur had been fairly audacious in stating that the concept of "common concern of humankind", while well-established in international environmental law, was also applicable to the protection of the atmosphere. In fact, there was no practice to suggest that States were willing to accept that concept, especially as it was used in instruments on climate or biodiversity that had nothing to do with the legal status of the atmosphere. Taking into account the lack of State practice and the close relationship between the concepts of airspace and atmosphere, which were virtually indistinguishable, the conclusions drawn by the Special Rapporteur in paragraphs 88 and 89 of the first report were not acceptable.

24. Instead of defining the legal status of the atmosphere by applying the concept of common concern of humankind, which was important but imprecise and could prove controversial, the Commission should focus on preventing the pollution of the atmosphere by applying the regulations that already existed in customary international law, in the Charter of the United Nations and in other texts. The principle of cooperation was firmly established in international law, as the Commission had recently confirmed in its work on the protection of persons in the event of disasters. One could find examples in practice to show that States, which were already bound to cooperate to prevent climate change and to preserve biodiversity, were also bound to cooperate to protect the atmosphere, whatever its legal status. In addition to that obligation, when establishing the legal basis for the protection of the atmosphere, the Commission should also take into account the rules of good-neighbourliness, which formed a general principle of law and, as such, were a formal source of international law.

25. Concerning draft guideline 1, he agreed with the Special Rapporteur's proposal to establish contacts with representatives of interested intergovernmental organizations. He also agreed on the need to define the atmosphere and the term "air pollution", but only for the purposes of the guidelines. As to draft guideline 2, which warranted further examination, he pointed to a contradiction between paragraph 80 of the first report, which stated that the notion of "airspace" differed significantly from that of the "atmosphere", and paragraph 73, which stated that the atmosphere had been used in several ways, most notably in the form of "aerial navigation". That contradiction clearly illustrated the close relationship between airspace and the atmosphere in terms of their legal status. In any event, there was nothing in the draft guideline, including in subparagraph (*b*), to suggest that the definition of the legal status of the atmosphere fell within the scope of the Commission's project.

26. Draft guideline 3 was acceptable, with the exception of its title, which characterized the protection of the atmosphere, and not the atmosphere itself, as a common concern of humankind. Lastly, he said that he was awaiting clarification from the Special Rapporteur before taking a position on whether the draft guidelines should be referred to the Drafting Committee.

27. Mr. FORTEAU noted with satisfaction that the Special Rapporteur had taken very seriously the doubts expressed by certain members and certain States over whether it was advisable to consider the topic, thus demonstrating his willingness to address the concerns of all parties. As a preliminary remark, he noted that the technical nature of the matters at hand called for the creation of a glossary. More should have been done at the outset to map out the Commission's future course and to show exactly how the Commission could make a useful contribution. It was all the more necessary to clearly define that future course and to devise a workplan given that the Commission had included the topic in its programme of

[122] *Yearbook … 2013*, vol. II (Part Two), p. 78, para. 168 (*d*).

work subject to certain conditions. According to paragraphs 13 and 15 and the last footnote to paragraph 17 of the first report, new rules were to be created and gaps filled by the proposed draft guidelines—yet that ran counter to both the Commission's mandate and the decisions it had taken at its previous session.

28. Concerning draft guideline 1 (the term "draft guideline" should be translated into French as *ligne directrice*), he said that he did not possess the scientific knowledge necessary to adopt a position on the best way to define the atmosphere. It seemed to him, however, that in order to determine whether the atmosphere should be limited to the troposphere and the stratosphere, one must be sure that no environmental degradation took place or was likely to take place in the other layers. In addition to those scientific difficulties, the draft guideline also posed legal problems. If, as indicated in paragraph 69 of the first report, most international treaties and documents did not define the "atmosphere", then two possibilities emerged: either there were some treaties that defined the atmosphere and they should be taken into account, or it had never been deemed necessary to define the atmosphere—which seemed to be the case—and so the Commission should also refrain from doing so.

29. As to draft guideline 2, before deciding on its wording, the Commission should agree on the exact scope of the project. There were three levels of air pollution: pollution emitted in the territory of a State and which did not cross its borders; transboundary pollution affecting only one State; and lastly, global pollution. Paragraph 76 stated that the Commission's work would address both the transboundary and global aspects of atmospheric degradation, which seemed reasonable. However, the broader scope of the draft guideline also seemed to cover purely domestic pollution and, for that reason, needed clarification. The Special Rapporteur had provided no justification for the use of the adjective "significant", which made it impossible to decide on its merits.

30. As to draft guideline 3, the idea that the protection of the atmosphere was a common concern of humankind had no basis in current practice. The precedents cited to support that statement were not opposite. To say that the evolution of the climate and climate change and its harmful effects were a common concern of humankind was one thing, but to say that the *protection* of the atmosphere was such a concern was quite another. In other words, to say that a fire which ravaged a neighbour's house was a common concern of the inhabitants of a village was not the same as saying that protecting that house against fire was a concern of all those inhabitants.

31. The Special Rapporteur had rightly indicated in paragraph 89 of his first report that the concept would certainly lead to the creation of obligations *erga omnes* on the part of all States to protect the global atmosphere, but he had immediately softened that statement by saying that it was too early to interpret the concept of common concern as giving all States a legal interest, or standing, in the enforcement of rules concerning the protection of the global atmosphere. Several observations should be made in that regard: first, if it was premature to recognize obligations *erga omnes*, it was highly unlikely that the Commission would be able to adopt the proposed draft guideline; second, if the Commission retained the idea that the protection of the atmosphere was a common concern of humankind, it would almost certainly give rise to that type of obligation; third, instead of putting the cart before the horse, the Special Rapporteur should have first endeavoured to determine the precise nature of the obligations with which States had to comply, and then proposed a legal definition; and fourth, the concept of a common interest in protecting the atmosphere might well prove hard to apply. While it could be said that all States had a legal interest in another State's not committing torture or genocide, it was more difficult to contend that all States had a legal interest in another State's enforcing the obligation to protect the atmosphere when, in reality, all States contributed to its degradation, to differing degrees.

32. That very particular and global type of responsibility, which was also very new, raised eminently complex questions of causation that made it difficult to think in terms of obligations *erga omnes* or a common interest in protecting the atmosphere. Such obligations implied identifying a responsible party whom everyone could hold accountable. In reality, there was a very complex system of overlapping responsibilities in which the responsible parties were also the victims, albeit to differing degrees. Certain authors spoke of multiparty causation, while highlighting the legal difficulties created by damage to which all States contributed on different scales and to different degrees. The difficulty of reasoning in terms of liability in the present case had been referred to in the preamble to Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage.[123]

33. In *EPA* v. *EME Homer City Generation*, the Supreme Court of the United States had ruled on the difficult question of allocation of liability when it was shared in differing degrees. It had found the questions of causation in that case to be extremely complex and that, for that reason, had felt the need to rely more heavily on administrative and political decisions than on legal mechanisms to find appropriate solutions. Caution was therefore of the essence, militating against the Commission's adoption from the outset of its work of a definition that elevated the protection of the atmosphere to a common concern of humankind. By doing so, it would be generating a new regime of liability whose consequences and legal implications would go well beyond the Commission's project. Draft guideline 3 raised the more general question of the place that questions of liability should occupy in the Commission's work on the protection of the atmosphere. It would be useful to know whether such questions fell within the scope of the topic or whether the Commission needed only to establish primary obligations—and if so, which ones.

The meeting rose at 1 p.m.

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[123] *Official Journal of the European Union*, No L 143 of 30 April 2004, p. 56.