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Summary record of the 3212th meeting

Topic:
Protection of the atmosphere

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3212th MEETING

Wednesday, 28 May 2014, at 10 a.m.

Chairperson: Mr. Kirill GEVORGIAN

Present: Mr. Cafilisch, Mr. Candiotti, 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. EL-MURTADI SULEIMAN GOUIDER said that although the inclusion of the topic in the long-term programme of work had been welcomed by many States, others had voiced concerns about its complex political and technical aspects. Nevertheless, the Special Rapporteur was to be commended for having fulfilled the basic objectives of a first report. It presented an in-depth and comprehensive study of the topic based on existing legislation, practice and principles and the understanding reached by the Commission at its sixty-fifth session, as set out in paragraph 5 of the first report. He hoped that the report would, as indicated in paragraph 8, “stimulate discussion within the Commission in order to provide the Special Rapporteur with the requisite guidance on the approach to be followed and the goal to be achieved”. Against that background and in light of comments made during the debate in plenary thus far, he had two general observations to make.

3. First, concerning the desired outcome of work on the topic, he agreed that it should take the form of draft guidelines, on the understanding that the General Assembly and Member States would decide as to the final form. The scope of the draft guidelines should encompass the deterioration of the environment caused by human activities, the protection of the natural environment and the human environment as well as the causes of atmospheric degradation. That was in keeping with the Commission’s previous practice, including its draft articles on the law of transboundary aquifers,¹²⁴ and with the provisions of

¹²⁴ See the draft articles on the law of transboundary aquifers adopted by the Commission at its sixtieth session and the commentaries thereto in *Yearbook ... 2008*, vol. II (Part Two), pp. 19 *et seq.*, paras. 53–54. See also General Assembly resolution 63/124 of 11 December 2008, annex.

relevant international treaties, such as the Convention on long-range transboundary air pollution and the United Nations Framework Convention on Climate Change.

4. Second, concerning the methodology to be followed, he expressed support for the framework described in paragraph 5 (a)–(c) of the report and the clarifications provided in the last footnote to that paragraph. The international community clearly attached great importance to the protection of the atmosphere. He therefore looked forward to further work on the topic, in line with the tentative plan of work outlined by the Special Rapporteur in paragraph 92 of the first report, work which should take into account comments and suggestions made during the debate in the Commission.

5. Mr. HMOUD recalled that the Commission had engaged in extensive debate on whether to tackle the issue of the legal protection of the atmosphere. That debate, which had culminated in the understanding set out in paragraph 5 of the first report, was crucial in ensuring that the Commission’s work would contribute to a mechanism for effective protection of the atmosphere that took into account existing legal regimes on air pollution, ozone depletion and climate change, but was without prejudice to relevant political negotiations. However, the Commission should be careful not to adopt a minimalist text devoid of any legal significance: the limitations of the understanding should not deprive the entire project of its legal substance. The Special Rapporteur should accordingly be allowed to discuss the status of the relevant existing legal principles and instruments and to propose draft guidelines, on which the international community would of course have the final say. There were other limitations, arising from the technical nature of the topic, as was true of any specialized matter requiring expert scientific input. The Commission should be able to seek the necessary technical advice when required.

6. He agreed that the Commission’s work should not duplicate, but instead complement, its previous work on the issue of transboundary harm, namely the 2001 draft articles on prevention of transboundary harm from hazardous activities¹²⁵ and the 2006 draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities.¹²⁶ The draft guidelines should reaffirm, and not contradict, the rules and principles under existing regimes relating to air pollution, ozone depletion and climate change. It was therefore necessary to clearly determine the nature of the general obligations and establish a hierarchy based on the *lex specialis* character of existing regimes. The goal identified in paragraph 13 of the first report, providing appropriate guidelines for harmonization and coordination among treaty regimes within and

¹²⁵ See the draft articles on prevention of transboundary harm from hazardous activities adopted by the Commission at its fifty-third session and the commentaries thereto in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 146 *et seq.*, paras. 97–98. The articles on prevention of transboundary harm from hazardous activities are reproduced in the annex to General Assembly resolution 62/68 of 6 December 2007.

¹²⁶ See the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities adopted by the Commission at its fifty-eighth session and the commentaries thereto in *Yearbook ... 2006*, vol. II (Part Two), pp. 58 *et seq.*, paras. 66–67. See also General Assembly resolution 61/36 of 4 December 2006, annex.

outside environmental law, was crucial to maximizing the legal protection of the atmosphere and assisting States in overcoming the problems arising from the multiplicity of obligations under the various regimes.

7. The first report drew on a wide variety of sources to identify the legal principles and rules applicable to the protection of the atmosphere, which had then to be placed in the right context in terms of the aspect of protection to which they applied. The sources revealed areas where cooperation, review and enforcement might be needed. Another key issue arising from the sources was whether and to what extent sustainable development should be considered. Paragraph 56 of the first report cited the Rio Declaration on Environment and Development,¹²⁷ which purported to balance environmental protection with economic interests and development goals. However, he considered that such matters did not fall within the scope of the topic.

8. The case law of courts and tribunals on transboundary harm was relevant for assessing the responsibilities of States, including the obligation not to cause harm, the prevention aspect and liability for damage. However, transboundary harm was much more limited in scope than the legal protection of the atmosphere. While significant harm was a standard in transboundary liability, the question was what the threshold for atmospheric damage would be and how it would be assessed, assuming that there was an emerging norm regarding the obligation not to cause atmospheric harm.

9. A key issue relevant to the Commission's project was the legal nature of the right to be free from nuclear atmospheric tests and the legal interests involved. The International Court of Justice had not shed much light on the relevant principles, except in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, where it mentioned "the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States" (para. 29 of the opinion).

10. Concerning draft guideline 1, he noted that the Special Rapporteur's approach to the definition of the atmosphere was to confine the spatial scope to the troposphere and the stratosphere, "within which the transport and dispersion of airborne substances occurs". However, the rationale for that definition was not explained. Although the core problems relating to atmospheric degradation did occur in the lower atmosphere, it must be ascertained that atmospheric problems did not have an effect on the upper layer or that human activities in the upper layer could not cause overall degradation before the upper layer was excluded from the definition. In addition, the scope of the definition should not be tied to the activity involved, namely the transport and dispersion of airborne substances, for that would confine the legal regime on protection to those specific substances. That did not seem to be the intention, as draft guideline 2 extended the scope to human activities that altered the composition of the atmosphere.

¹²⁷ *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992*, vol. I: *Resolutions adopted by the Conference* (United Nations publication, Sales No. E.93.I.8 and corrigenda), resolution I, annex I.

11. He agreed with the Special Rapporteur that the scope of the draft guidelines encompassed three main elements: human activities, the protection of the natural and human environments, and the causes of atmospheric degradation. Since long-range effects and causal elements were hard to establish scientifically, however, the nature of the causal link between human activities and damage should be determined. Furthermore, the expression "likely to have", before the words "significant adverse effects", should be clarified. The first report did not explain why the scope should encompass activities "likely" to have significant adverse effects or why the damage should not be linked to a transboundary element. Neither practice nor case law supported the proposition that the regime for protection of the atmosphere should, like the regimes for human rights, exclude an inter-State element. He shared the concerns expressed by other members in that connection.

12. While the objects of protection could plausibly include both the natural and the human environment, due to the intrinsic relationship between the two, the first report did not clearly delineate the human environment. He therefore welcomed the fact that draft guideline 2 confined the scope of human protection to human life and health.

13. Regarding the legal status of the atmosphere, he endorsed the Special Rapporteur's view that airspace was not an appropriate definition. Although strong arguments were made for defining the atmosphere as a natural resource, including because it was described as such by relevant bodies and in certain environmental instruments, there did not seem to be sufficient evidence in treaties or practice to characterize it as a shared or common natural resource. While he agreed that the basis of any effective protection regime must consist of both preservation and conservation aspects, the extent of the obligations associated with the two aspects was not necessarily the same.

14. Similarly, in his first report, the Special Rapporteur did not provide a sufficient legal basis to conclude that the protection of the atmosphere was a "common concern of humankind". There was no customary rule or emerging norm to that effect, only some legal writings. Furthermore, both General Assembly resolution 43/53 of 6 December 1988 on the protection of global climate for present and future generations of mankind¹²⁸ and the United Nations Framework Convention on Climate Change¹²⁹ described climate change itself, not protection of the atmosphere from climate change, as the "common concern of humankind", and that description had produced no legal effects in terms of obligations regarding climate change. Describing the protection of the atmosphere as a common concern of humankind would entail obligations, the exact scope of which, and their relationship with those of other existing regimes, would need to be defined. In paragraph 89 of the first report, it was suggested that treating protection as the common concern of humankind entailed the creation of substantive legal obligations on the part of all States to protect the global atmosphere as enforceable *erga omnes*. But *erga omnes* obligations were by definition obligations owed to the

¹²⁸ See paragraph 1 of this resolution.

¹²⁹ See the first preambular paragraph.

international community as a whole, and which all States had an interest in protecting. That meant, under the draft articles on the responsibility of States for internationally wrongful acts,¹³⁰ that every State was entitled to seek reparations and impose measures against a State that violated the *erga omnes* obligation to protect the atmosphere. He would hesitate to treat atmospheric protection as a common concern of humankind until further substantiation for such treatment was provided, as it would have serious consequences in terms of the legal effects and the scope of legal protection.

15. In conclusion, he recommended the referral of the draft guidelines to the Drafting Committee, on the understanding that the adoption of draft guideline 3, relating to the nature of protection, would be deferred to a future session.

16. Mr. ŠTURMA commended the Special Rapporteur on his well-structured and well-documented first report but said he had serious doubts concerning the content of the report. The Commission's previous experience with a topic relating to the environment, namely transboundary harm, warranted a cautious approach to the new topic. Some aspects of the report seemed to be at odds with the commitments made in the very wise understanding reached the year before and quoted *in extenso* in paragraph 5 of the first report. For example, the reference in paragraph 18 to significant gaps and overlaps in existing conventions, and the suggestion that the Commission should ensure coordination among them, seemed to contradict the limitation in subparagraph (b) of the understanding, reproduced in paragraph 5, that the project would not seek to fill the gaps in the treaty regimes. Similarly, the reference in paragraph 26 to the adoption of precautionary approaches overstated the status of the precautionary principle in international law, which was far from clear, unlike that of the principle of prevention, which was *lex lata*.

17. Concerning draft guideline 1, he strongly disagreed with the Special Rapporteur's opinion that the Commission needed to define the atmosphere, not because of the content of the proposed definition, but in terms of the limits of law. The purpose of any legal regulation was to regulate human behaviour that might be in accordance with or in violation of a certain norm. Natural objects and processes could be described by natural sciences, but not regulated by law. The definition of the atmosphere was no more necessary than the definition of the sea. The situation was different, however, for the definition of the legal regimes related to natural resources like the territorial sea, the high seas, the seabed and now, airspace.

18. While he endorsed the thrust of draft guideline 2 (b), he had serious problems with the broad character of subparagraph (a). The reference to the introduction of deleterious substances or energy into the atmosphere was hardly compatible with the understanding detailed in

paragraph 5 of the first report. In addition, the Special Rapporteur's intention, stated in paragraph 76, to cover the issues of energy and radioactive or nuclear pollution was unacceptable, for two reasons. First, the peaceful use of nuclear energy and related problems were covered by special treaty regimes. Second, the topic should not in any way limit the right of any sovereign State to decide on its nuclear energy programme, in conformity with its international obligations.

19. Draft guideline 3, which aimed to define the legal status of the atmosphere, was the most important of the three. He accordingly expressed concern about the reference to the "common concern of humankind". If it was merely intended to convey a message about the importance of the protection of the atmosphere, it was acceptable. However, if the intention was to introduce a new legal concept, similar to the common heritage of humankind, that would pose a major problem. Unlike the international regimes to which the latter concept applied, the protection of the atmosphere occurred in the territory and under the jurisdiction of States. They must have the freedom to engage in activities, balanced by the responsibility (obligation) to ensure that any activities conducted under their jurisdiction and control did not cause damage to the environment of other States or areas beyond their national jurisdiction (principle 21 of the Stockholm Declaration¹³¹).

20. Lastly, he recommended that all the draft guidelines be referred to the Drafting Committee for detailed discussion.

21. Mr. PETER said that the first report conformed to what was to be expected of the Special Rapporteur—industry, excellence, an articulate discussion of the science of the law and practice, and an ability to explain complicated scientific concepts and relate them to international law and human life. In paragraphs 64 to 68 of his first report, he gave the reader a course on the physical characteristics of the atmosphere, drawing attention to the potentially deadly consequences of transboundary pollution, depletion of the ozone layer and the accumulation of greenhouse gas for both the human and the natural environment. In Europe alone during the past year, floods had occurred in several countries, most recently in the Balkans, where the attendant destruction had been compared to that caused 20 years earlier, during the war.

22. That point illustrated the importance of the topic and made it all the more disturbing that the Commission's treatment of it was to be constrained by the stringent conditions of an understanding set out in paragraph 5 of the first report. It was not surprising that the Special Rapporteur tried to interpret that understanding, in the last footnote to that paragraph, in an attempt to break free of the constraints it imposed. He should be afforded greater freedom to handle the topic, especially as the Sixth Committee had commended the Commission for choosing it and venturing into new areas of international law.

¹³⁰ General Assembly resolution 56/83 of 12 December 2001, annex, article 4. See the draft articles on responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session and the commentaries thereto in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77.

¹³¹ *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.

23. In addressing the legal status of the atmosphere, the Special Rapporteur brought up, but then dismissed, the concept of the common heritage of humankind. Reference to a common heritage had been made in the Convention for the Protection of Cultural Property in the Event of Armed Conflict,¹³² the Agreement governing the activities of States on the moon and other celestial bodies¹³³ and the United Nations Convention on the Law of the Sea.¹³⁴ In the latter two treaties, that notion had been mentioned in relation to the exploitation of resources, but the use of natural resources was not central. Heritage was the key aspect of the term, which normally referred to something inherited from the past that required protection. The atmosphere, which had not always been endangered, had been inherited as a pure space and was now threatened by the products of scientific and technological advances. More thought should therefore be given to the concept of a common heritage before simply dismissing it, particularly since the concept of a “common concern” was too weak.

24. It was premature to talk about setting up a large institution akin to the International Seabed Authority when all that might be needed was an effective watchdog to check on actual or potential abuse of the atmosphere. He would like to know why the Special Rapporteur had omitted any reference to the Basel Convention on the control of transboundary movements of hazardous wastes and their disposal and the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa.

25. Turning to the draft guidelines proposed by the Special Rapporteur, he said that, in draft guideline 1 (a), the definition of the term “atmosphere” was too complicated and overly scientific. On the other hand, the definition of “air pollution” contained in the footnote to the end of draft guideline 1 was very apt and should be incorporated as draft guideline 1 (b). He fully endorsed draft guideline 2. In draft guideline 3, it would be advisable to simplify the terminology. As he had already explained, the concept of a “common concern of humankind”, used in draft guideline 3 (a), was too weak for a subject as important as the atmosphere. Guideline 3 (b) was unnecessary and merely an attempt by the Special Rapporteur to show that he was strictly abiding by an “understanding” that was of dubious legitimacy and that was even being questioned by some of its former supporters. Notwithstanding his views on draft guidelines 1 and 3, he was in favour of referring all the draft guidelines to the Drafting Committee.

26. Mr. CANDIOTI said that Mr. Peter was right to question the validity of the so-called “understanding”: it was a disgrace, signifying a departure by the Commission from its traditional working methods and imposing a number of conditions that curbed the Special Rapporteur’s freedom to investigate a subject before he had even started work on it. He endorsed Mr. Peter’s suggestion that the Special Rapporteur be freed from any preconditions and allowed to explore all aspects of the topic within the limits of the Commission’s normal working methods.

27. Sir Michael WOOD said that the understanding had been adopted by the Commission, and it was on that basis that the Commission had embarked upon the topic. Absent the understanding, the topic was not on the Commission’s agenda.

28. Mr. WISNUMURTI said that an understanding of the nature of the atmosphere as a limited natural resource beneficial to humankind was enhanced by the Special Rapporteur’s thorough research on the evolution of the relevant international law and the sources of the law. While there was no denying that the topic presented a number of challenges, necessitating the understanding referred to in paragraph 5 of the first report, it was incumbent upon the Commission to make its best effort to complete its work in a constructive spirit. Debate on how the understanding was to be implemented was counterproductive.

29. He agreed with the fourfold goal set out in paragraph 13 of the first report and with the Special Rapporteur’s suggestions, in paragraphs 73 and 88, respectively, that the modalities of utilizing the atmosphere should be considered in depth and that the concept of a common concern of humankind should be applied to all issues related to the atmosphere. No State could claim national jurisdiction over any segment of the atmosphere, but that should not prevent the Commission from preparing draft guidelines on the obligations of States to protect the atmosphere from activities by States or natural or juridical persons that released deleterious substances or energy into the atmosphere. Given the unique physical characteristics of the atmosphere, efforts to protect it should be pursued through international cooperation, the modalities and mechanisms for which should be elaborated in the draft guidelines to be submitted in the next report.

30. The definition of “atmosphere” proposed by the Special Rapporteur in draft guideline 1 (a) disregarded the complicated process of atmospheric circulation, which should be made into a component of the definition. While he agreed with draft guideline 2 (a), which captured the essential scope of the guidelines and recognized the intrinsic relationship between the human and the natural environment, he had some reservations about subparagraph (b): the meaning of the phrase “as well as to their interrelationship” was unclear. Although there would have to be a draft guideline that contained and clarified the concept of a “common concern of humankind”, draft guideline 3 (a) suggested that the Commission was concerned with the protection of the atmosphere, rather than with its protection against degradation. That subparagraph should therefore be rephrased in a manner that was consistent with paragraphs 12 and 88 of the report. He agreed with the formulation of paragraph 3 (b) and was in favour of sending all three draft guidelines to the Drafting Committee.

31. Mr. CAFLISCH, referring to the understanding reached at the previous session that the work on the topic should not interfere with relevant political negotiations, said that it was not clear how the Commission could know in advance the content of any future negotiations on the broad range of issues that were relevant to the topic. The

¹³² See the second preambular paragraph.

¹³³ See article 11, paragraph 1.

¹³⁴ See, *inter alia*, the sixth preambular paragraph.

same could be said about the stipulation that the topic should not deal with specific substances that were the subject of inter-State negotiations. The exclusion of outer space from the topic was problematic, inasmuch as the boundaries between the various layers of the atmosphere and outer space were not clearly defined. Lastly, the precondition that the project should not seek to fill the gaps in current treaty regimes raised questions as to the scope of the Commission's mandate.

32. He endorsed Mr. Park's request for a road map of the topic and his suggestion that work should focus on acts or omissions of States liable to have a serious impact on the atmosphere, rather than on the atmosphere as such.

33. As Mr. Kittichaisaree had pointed out, the Special Rapporteur's emphasis on the principle of *sic utere* clashed with the "common concern" approach developed elsewhere in the first report. The *sic utere* principle was rooted in the law applicable to relations between neighbouring States. It covered only significant harm caused by or in a State to the atmosphere of a nearby State, and as such, it could not provide a basis for general rules for the protection of the atmosphere.

34. If, on the other hand, the intention was to elaborate a comprehensive protection regime, and not one restricted to relations between neighbours, then it would be necessary to engage in progressive development. While it might seem desirable to seek to protect the atmosphere from all significant harm, regardless of its source, the existing legal standards did not provide a solid foundation for doing so.

35. Given the current uncertainty regarding the plan of work, it might be prudent to defer a decision on the draft guidelines until the Commission's next session. However, should the draft guidelines be referred to the Drafting Committee at the current session, he had a number of suggestions to make. With regard to draft guideline 1, he had no objection to limiting the atmosphere, for the purposes of the project, to the troposphere and the stratosphere, provided that the upper boundary of the latter could be established accurately and, if possible, on the basis of legal elements. Noting that the text of draft guideline 2 was a modified version of article 1, paragraph 4, of the United Nations Convention on the Law of the Sea, he said that he was undecided as to whether its incorporation was appropriate. As to draft guideline 3, he wondered whether it might be preferable to postpone defining the nature of the atmosphere until the Commission had a clearer idea of the regime that it wished to apply.

36. Mr. VÁZQUEZ-BERMÚDEZ said that the Special Rapporteur had taken due account in his first report of the understanding reached at the previous session in order to accommodate the opposition to the inclusion of the item of some members, of whom he himself was not one. However, it was clearly not possible to research the topic without considering the various sources of relevant international law or without referring to specific issues. The understanding should therefore be seen as providing guidance to the Special Rapporteur, and not as a straitjacket.

37. He agreed with the Special Rapporteur concerning the need to adhere exclusively to a legal approach to the topic. The draft guidelines should be normative principles providing helpful guidance to States and promoting the progressive development and codification of international law on the protection of the atmosphere. The Commission should approach the topic in a comprehensive and systematic way and not confine its focus to one or more special regimes.

38. As to the sources relevant to the protection of the atmosphere, he said that the Commission's draft articles on prevention of transboundary harm¹³⁵ and its principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities¹³⁶ were listed in the report as non-binding instruments, but they should be classified differently, as relevant previous work. Since the domestic legislation of States had been identified as important by the Special Rapporteur insofar as it addressed issues of transboundary harm to and global protection of the atmosphere, he noted that in Ecuador, the obligation of the State to protect the environment was enshrined in the Constitution.¹³⁷

39. Turning to draft guideline 1, he said that the definition of the atmosphere should make no express reference to the troposphere and the stratosphere, so as to align it more closely with the scientific definition. A separate paragraph could be included, indicating that the transport and dispersion of airborne substances occurred in those layers. Alternatively, that clarification could be made in the commentary to the guideline.

40. As indicated in paragraph 72 of the first report, the scope of the draft guidelines should extend only to damage caused by human activities, and as stated in paragraph 75, the objects to be protected must be the natural environment, meaning the composition and quality of the atmosphere, and the human environment, meaning human health and materials useful to humankind, such as natural vegetation and crops. Linkages with other areas of international law must be taken into account, as appropriate. He thought it would be useful to include a savings clause saying that nothing in the draft guidelines affected the legal status of airspace under other conventions.

41. Regarding draft guideline 3, he said that the Special Rapporteur's characterization of the protection of the atmosphere as a "common concern of humankind" was a move in the right direction. As Mr. Petrič had observed,

¹³⁵ See the draft articles on prevention of transboundary harm from hazardous activities adopted by the Commission at its fifty-third session and the commentaries thereto in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 146 *et seq.*, paras. 97–98. The articles on prevention of transboundary harm from hazardous activities are reproduced in the annex to General Assembly resolution 62/68 of 6 December 2007.

¹³⁶ See the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities adopted by the Commission at its fifty-eighth session and the commentaries thereto in *Yearbook ... 2006*, vol. II (Part Two), pp. 58 *et seq.*, paras. 66–67. See also General Assembly resolution 61/36 of 4 December 2006, annex.

¹³⁷ Constitution of Ecuador, article 391. An English version is available from <http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html>.

the focus should be on the duty to cooperate to protect the atmosphere and on the recognition that international cooperation for that purpose was required. The notion of the “common concern of humankind”, which could be found in, for example, the United Nations Framework Convention on Climate Change, was a developing concept, and the Commission could play a significant role in its elucidation and concrete expression.

42. In conclusion, he expressed his support for the referral of the three draft guidelines to the Drafting Committee.

43. Sir Michael WOOD recalled that there had been strong objections to the inclusion in the agenda of the topic on the protection of the atmosphere, as originally proposed by Mr. Murase in 2011.¹³⁸ It was only after extended consultation and negotiation that, on the final day of its previous session, the Commission had decided in favour of its inclusion, and only on the basis of a far-reaching understanding recorded verbatim in the summary record of its 3197th meeting¹³⁹ and set out in paragraph 168 of the Commission’s report to the General Assembly on the work of its sixty-fifth session.¹⁴⁰ Considering that the understanding had been proposed by the Special Rapporteur himself, it was disturbing that in his first report and his introduction, he appeared to downplay its importance and even perhaps to seek to evade its terms. Sir Michael cautioned strongly against any kind of resetting or even setting aside of the understanding.

44. A reading of the topical summary (A/CN.4/666) of the discussion held in the Sixth Committee in 2013—a discussion largely ignored by the Special Rapporteur in his first report—revealed that some delegations had welcomed the limitations on the scope of the topic, while others had continued to express doubts about the appropriateness of its inclusion in the Commission’s programme of work, notwithstanding—or because of—those limitations. As Mr. Forteau, Mr. Park and Mr. Cafilisch had noted, what was missing from the first report was a road map. In fact, the report failed to deliver on the promise contained in paragraph 8 to provide “the basis for a common understanding of the basic concepts, objectives and scope of the project”.

45. Turning to the draft guideline 1, he agreed with those speakers who considered that there was no need for a definition of the atmosphere at the present stage.

46. As to draft guideline 2, he also agreed with those who questioned the formulation of the first paragraph. Mr. Forteau had identified three types of possible harm to the atmosphere: global harm, such as climate change and ozone depletion; transboundary harm; and purely local harm that crossed no boundary.¹⁴¹ To date, international law had only addressed the first two types of harm, and in doing so, it had used a variety of rules that were not easily harmonized, and probably should not be harmonized. As to draft guideline 2 (b), it was not so

much about scope as about the nature of the exercise. According to the Special Rapporteur, the draft guidelines referred to “the basic principles relating to the protection of the atmosphere as well as to their interrelationship”, but it was not clear what the Special Rapporteur meant by “basic principles”.

47. As to draft guideline 3, he shared the almost universal concern expressed so far about the introduction of the vague concept of the “common concern of humankind”. As currently drafted, the implications of the guideline were very far-reaching, since it appeared to define what constituted a “common concern of humankind” in general. The phrase “[t]he atmosphere is a natural resource essential for sustaining life on [E]arth ... hence, its protection is a common concern of humankind” seemed to open the door to analogous arguments in relation to many other natural resources that could be deemed “essential for sustaining life on [E]arth”.

48. Given all those circumstances, he, like others, was doubtful whether the time was right to refer the draft guidelines to the Drafting Committee. The need for the introductory draft guidelines 1 and 2 had been questioned, and draft guideline 3 was not ripe for the Drafting Committee, since its central element—“common concern”—had been strongly questioned and would clearly not be generally acceptable, at least not without further specification of its potential implications.

49. Mr. KAMTO, referring to the general approach to the topic, said that the Commission should avoid giving the impression of being divided on the issue. Members’ statements should be viewed as having been made with the aim of helping the Special Rapporteur to define the topic and facilitating a sound and useful result.

50. Given the topic’s highly technical nature, the Commission needed to benefit from the insights of experts. The organization of a seminar on the atmosphere and the threats to it might assist it in better determining both the relevance and the scope of any guidelines it might formulate.

51. For his part, he was currently unable to take a position on the definition of the atmosphere contained in draft guideline 1. Since it seemed to be based mainly on just one glossary, perhaps several other sources should be consulted. It was for scientists, not jurists, to validate the Commission’s definition of the atmosphere. The same could be said, at least in part, of draft guideline 2 (a). As to the notion of the “common concern of humankind” referred to in draft guideline 3, it should not be disregarded. That notion included the concept of “common heritage” that had guided the United Nations Conference on the Law of the Sea. The Special Rapporteur should carry out further research into the matter, and in his second report, he should provide a more comprehensive picture of the general direction in which he intended the work of the Commission to go.

¹³⁸ *Yearbook ... 2011*, vol. II (Part Two), p. 189 *et seq.*, annex II.

¹³⁹ *Yearbook ... 2013*, vol. I, 3197th meeting, p. 162, para. 31.

¹⁴⁰ *Ibid.*, vol. II (Part Two), p. 78.

¹⁴¹ See the 3211th meeting above, p. 57, para. 29.