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Summary record of the 3244th meeting

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INTERNATIONAL LAW COMMISSION

SUMMARY RECORDS OF THE FIRST PART OF THE SIXTY-SEVENTH SESSION

Held at Geneva from 4 May to 5 June 2015

3244th MEETING

Monday, 4 May 2015, at 3 p.m.

Acting Chairperson: Mr. Shinya MURASE

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. 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.

Opening of the session

1. The ACTING CHAIRPERSON declared open the sixty-seventh session of the International Law Commission.

Statement by the Acting Chairperson in the absence of the Outgoing Chairperson

2. The ACTING CHAIRPERSON said that the Chairperson of the sixty-sixth session of the Commission, Mr. Gevorgian, had resigned from the Commission following his election to the International Court of Justice in November 2014. On behalf of all the members of the Commission, he wished Mr. Gevorgian well in his new position. Briefly outlining the debates of the Sixth Committee on the Commission's report on its sixty-sixth session, a topical summary of which was contained in document A/CN.4/678, he said that the General Assembly had adopted two resolutions concerning the Commission's work. In resolution 69/119 of 10 December 2014, the General Assembly had welcomed the conclusion of the Commission's work on the expulsion of aliens and the adoption of the draft articles and a detailed commentary on the subject,¹ and had expressed its appreciation to the Commission for

¹ *Yearbook ... 2014*, vol. II (Part Two) and corrigendum, pp. 22 *et seq.*, paras. 44–45.

its contribution to the codification and progressive development of international law. The General Assembly had also taken note of the recommendation made by the Commission with respect to the draft articles² and decided to continue its consideration of the recommendation at its seventy-second session. In resolution 69/118 of 10 December 2014, the General Assembly had welcomed the work accomplished by the Commission at its sixty-sixth session, in particular the completion of the second reading of the draft articles on the expulsion of aliens,³ the first reading of the draft articles on the protection of persons in the event of disasters,⁴ the completion of the work on the obligation to extradite or prosecute (*aut dedere aut judicare*) and the adoption of the final report on the topic,⁵ of which it encouraged the widest possible dissemination. The General Assembly had recommended that the Commission should continue its work on the topics in its current programme, taking into account the comments and observations of Governments made in writing or orally in the Sixth Committee, and noted that the Commission had included the topics "Crimes against humanity"⁶ and "*Jus cogens*" in its programme of work and long-term programme of work.⁷ In paragraph 5 of the resolution, the General Assembly had drawn the attention of Governments to the importance of the Commission receiving their views on the various topics on its agenda by 31 January 2015, particularly on the specific issues identified in chapter III of its report. In paragraph 6, the General Assembly had drawn the attention of Governments to the importance of the Commission receiving their comments and observations on the draft articles on the topic "Protection of persons in the event of disasters" by 1 January 2016.⁸

Election of officers

Mr. Singh was elected Chairperson by acclamation.

Mr. Singh took the Chair.

² *Ibid.*, p. 21, para. 42.

³ *Ibid.*, pp. 22 *et seq.*, paras. 44–45.

⁴ *Ibid.*, pp. 61 *et seq.*, paras. 55–56.

⁵ *Ibid.*, pp. 92 *et seq.*, para. 65.

⁶ *Ibid.*, p. 164, para. 266.

⁷ *Ibid.*, p. 18, para. 23.

⁸ *Ibid.*, pp. 61 *et seq.*, para. 55.

3. The CHAIRPERSON thanked the members of the Commission for the trust they had placed in him and paid tribute to Mr. Gevorgian, the Chairperson of the sixty-sixth session, and the other officers of that session for their outstanding contribution.

Mr. Wako was elected First Vice-Chairperson by acclamation.

Mr. Šturma was elected Second Vice-Chairperson by acclamation.

Mr. Forteau was elected Chairperson of the Drafting Committee by acclamation.

Mr. Vázquez-Bermúdez was elected Rapporteur by acclamation.

Adoption of the agenda (A/CN.4/677)

4. The CHAIRPERSON said that, as the provisional agenda had been issued before the secretariat had been notified of Mr. Gevorgian's resignation, a new item entitled "Filling of casual vacancies in the Commission" would have to be added.

The agenda, as amended, was adopted.

*The meeting was suspended at 3.35 p.m.
and resumed at 4.15 p.m.*

Organization of the work of the session

[Agenda item 1]

5. The CHAIRPERSON drew the members' attention to the programme of work for the first two weeks of the session and said that, if he saw no objection, he would take it that the Commission wished to adopt the programme.

The programme of work for the first two weeks of the session was adopted.

Protection of the atmosphere⁹ (A/CN.4/678, Part II, sect. C,¹⁰ A/CN.4/681,¹¹ A/CN.4/L.851¹²)

[Agenda item 9]

SECOND REPORT OF THE SPECIAL RAPPORTEUR

6. The CHAIRPERSON invited Mr. Murase, the Special Rapporteur on the topic "Protection of the atmosphere", to introduce his second report.

⁹ At its sixty-fifth session (2013), the Commission decided to include the topic in its programme of work and to name Mr. Shinya Murase as Special Rapporteur for the topic (*Yearbook ... 2013*, vol. II (Part Two), p. 78, para. 168). At its sixty-sixth session (2014), the Commission examined the first report of the Special Rapporteur in which he presented three draft guidelines (*Yearbook ... 2014*, vol. II (Part One), document A/CN.4/667).

¹⁰ Mimeographed; available from the Commission's website, documents of the sixty-seventh session.

¹¹ Reproduced in *Yearbook ... 2015*, vol. II (Part One).

¹² Mimeographed; available from the Commission's website, documents of the sixty-seventh session.

7. Mr. MURASE (Special Rapporteur) said that he had made a few minor changes to draft guidelines 1 and 2 and a major change to draft guideline 3 based on the comments made by the members of the Commission during the previous session and by States in the Sixth Committee.¹³ With regard to draft guideline 1, he had simplified the substantive definition of the atmosphere by deleting the reference to the "troposphere and stratosphere", as they were covered by the expression "envelope of gases surrounding the Earth". Unlike certain members of the Commission, he was not in favour of including the mesosphere and the thermosphere in the definition of the term "atmosphere", as it was clear from consultations with legal and scientific experts that the Commission's project did not extend to those upper spheres, which were not yet covered by international law. In his view, it was also important to define the functional aspect of the atmosphere, since transcontinental transport of polluting substances was recognized by the United Nations Environment Programme (UNEP), the World Meteorological Organization (WMO), the United Nations Economic Commission for Europe (UNECE) and the Arctic Council as one of the major problems of the present-day atmospheric environment.

8. Two paragraphs defining the terms "air pollution" and "atmospheric degradation" had been added to draft guideline 1. The definition of air pollution given in subparagraph (b) focused on the introduction of substances into the atmosphere and was in line with article 1 of the Convention on long-range transboundary air pollution, which was widely referenced in legal writings. Although in some cases the term "air pollution" was defined broadly, encompassing other forms of atmospheric degradation, he was in favour of a narrow definition of the concept in international law. At the previous session, some members had questioned the use of the word "energy" in draft guideline 2, as it appeared in the first report. It was important, however, to use that word in the definition of air pollution as the Commission should not ignore the serious problem of radioactive emissions or the introduction of heat and light into the atmosphere. Taking into account the narrow definition of air pollution, he proposed that a broader definition of "atmospheric degradation", defined in subparagraph (c), be employed to cover other alterations of atmospheric conditions such as climate change and ozone depletion.

9. With regard to draft guideline 2 on the scope of the project, subparagraph (a) made it clear that the topic addressed "human activities", excluding the harm caused by natural phenomena such as volcanic eruptions and desert sands. In subparagraph (b), which described the content of the set of draft guidelines, he had added the words "with other relevant fields of international law" after the word "interrelationship". He had added a subparagraph (c), which was the saving clause on the legal status of airspace under applicable international law that had appeared in the previous version of draft guideline 3.

10. The concept of "common concern of humankind" was well established in treaty practice and was contained in several universally accepted conventions. One of the

¹³ For draft guidelines 1, 2 and 3 proposed in the first report of the Special Rapporteur, see *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/667.

ways of articulating that concept in relation to the atmosphere was to state the principle proactively, like in the Convention on biological diversity, while the other was to more passively recognize deteriorating atmospheric conditions, in line with the United Nations Framework Convention on Climate Change. As he believed that the latter approach might be more readily acceptable for the draft guidelines, he had changed draft guideline 3 accordingly. At the previous session, a few members of the Commission had suggested that the notion of “common concern” might be too weak to provide an effective legal regime for such an important problem as the protection of the atmosphere, and that the more well-established “common heritage of mankind” framework should be used instead. However, while it was true that the 1979 Agreement governing the activities of States on the moon and other celestial bodies classified the moon and its natural resources as “common heritage of mankind”, that regime had never taken full effect. The concept of “common heritage” had seemingly acquired new meaning in the course of negotiations on the United Nations Convention on the Law of the Sea in the 1970s. The initial conceptualization of plant genetic resources as common heritage had been almost immediately retracted, and similar arguments for considering climate change and biodiversity as common heritage had not been taken up in the final drafts of the United Nations Framework Convention on Climate Change and the Convention on biological diversity. While it was stated in the preamble to the 1972 Convention for the protection of the world cultural and natural heritage that “parts of the cultural or natural heritage are of outstanding interest and therefore need to be preserved as part of the world heritage of mankind as a whole”, the tone and consequence of the text suggested more “common concern” than “common heritage”, as understood in the institutional context of the United Nations Convention on the Law of the Sea. He therefore believed that “common concern” should be the preferred language for the protection of the atmosphere, as it had been for the 1992 United Nations Framework Convention on Climate Change and the Convention on biological diversity. Although the principle did not create substantive obligations for States to protect the atmosphere, it certainly supplemented the creation of two general obligations for States: protection of the atmosphere and cooperation with each other for that purpose.

11. Draft guideline 4, which set out the general obligation of States to protect the atmosphere, was in line with article 192 of the United Nations Convention on the Law of the Sea, under which States had the obligation to “protect and preserve the marine environment”. In his view, the same general obligation was applicable to the protection of the atmosphere and it could be characterized as an obligation *erga omnes*. In the famous *obiter dictum* of the judgment of the *Barcelona Traction* case, the International Court of Justice had introduced the notion of obligations *erga omnes*, described as “obligations of a State towards the international community as a whole”, in other words, obligations which “by their very nature ... are the concern of all States” (para. 33 of the judgment). The Court had since played a significant role in developing that concept, referring to it in several opinions and judgments, most recently, in 2015, in the judgment on the case concerning *the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*.

The Commission had recognized the existence of obligations *erga omnes* in article 48, paragraph 1, of its 2001 draft articles on the responsibility of States for internationally wrongful acts.¹⁴ It could thus fairly be said that the concept of obligations *erga omnes* was well established in substantive law for some of the important rules of applicable international law, but, apparently, there was no corresponding procedural law to give effect to that obligation. Therefore, it could not be said that obligations *erga omnes* granted any State standing before the Court or the right to invoke the responsibility of the wrongdoing State. Only an obligation *erga omnes partes*—the obligation owed to a group of States under a multilateral convention—gave standing to any party to that convention. In the absence of any multilateral convention on the protection of the atmosphere, draft guideline 4 merely recognized the existence of the obligation *erga omnes* in substantive law without intending to give standing to any State in procedural law. It was important to recognize, albeit in an abstract fashion, the general obligation of every State to protect the atmosphere. In its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the Court had recognized that “the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn” (para. 29 of the advisory opinion). It had considered that “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” (*ibid.*). In that spirit, it was his hope that draft guideline 4 would be supported by the Commission and the Sixth Committee.

12. Draft guideline 5 referred to the principle of international cooperation, which also flowed from the concept of the common concern of humankind. That principle was at the core of the project, as the purpose of the Commission’s work was to establish a cooperative framework for the protection of the atmosphere, without seeking to assign blame under a liability regime. International cooperation was now recognized as a legal obligation and not merely a moral duty, and rather than the “aggregate” of bilateral cooperation relations in the traditional “international society”, it was now to a large extent built on the notion of “common interests” of the international community as a whole (A/CN.4/681, para. 60). The review of jurisprudence showed that the principle of good faith was at the heart of the international law of cooperation.

13. Thus, in addition to the revised draft guidelines on the definition and scope of the project, the second report contained three additional draft guidelines on the basic principles for the protection of the atmosphere, which formed a trinity and were fundamentally interconnected, namely the common concern of humankind, the general obligation of States, and international cooperation. Details of his future plan of work beyond the current quinquennium, as requested by the Commission members, were contained in the conclusion of the report, and work on the topic was expected to be completed in 2020.

¹⁴ The draft articles adopted by the Commission and commentaries thereto are reproduced in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77. See also General Assembly resolution 56/83 of 12 December 2001, annex.

14. The CHAIRPERSON thanked the Special Rapporteur for his presentation and invited the members of the Commission to make comments.

15. Mr. PARK said that he was uncertain as to whether the approach taken by the Special Rapporteur corresponded to the Commission's "understanding" of the conditions under which the topic had been included in the programme of work in 2013.¹⁵ The Special Rapporteur, who intended to apply a liberal interpretation while remaining within the structure of the understanding, seemed, however, to have strayed from that structure in paragraphs 10 and 12 of his second report and subparagraph (c) of draft guideline 1, which specifically mentioned ozone depletion and climate change as examples of atmospheric degradation despite the fact they were among the topics of the political negotiations excluded from the scope of the project under the Commission's 2013 understanding. Before continuing the discussion on that paragraph, the members of the Commission should reach a clear consensus on the matter.

16. With regard to draft guideline 1, it was necessary to clarify the meaning of the term "energy" used in the definition of air pollution. The Special Rapporteur considered it important to refer to the question of "energy" pollution, in the broad sense, in the light of the Fukushima nuclear disaster in particular. However, that example was not relevant because the release of energy into the atmosphere as a result of human activities had not been intentional, but had been due to an exceptional natural disaster, which concerned "international liability for injurious consequences arising out of acts not prohibited by international law".¹⁶ Furthermore, nuclear power installations around the world were duly regulated by national and international legal and scientific safety mechanisms and, according to the International Atomic Energy Agency (IAEA), several States had decided to continue and develop their nuclear energy policies to reduce carbon emissions even after that accident. The Commission should therefore be very careful in dealing with the issue of nuclear energy. Notwithstanding his reservations in relation to subparagraph (c), he agreed with the Special Rapporteur about the need to distinguish between the concepts of atmospheric degradation and air pollution, as the latter focused on the introduction of deleterious substances, while the former also included an alteration of the composition of the atmosphere due to the introduction of substances that were not deleterious *per se*.

17. With regard to draft guideline 2, it would be difficult, realistically and practically, to draw a distinction between "transboundary atmospheric damage" and "domestic and local pollution" in order to exclude the latter from the scope of the topic, as suggested by the Special Rapporteur in paragraph 18 of the report. Bearing in mind the fluidity of the atmosphere, deleterious substances that entered a State's airspace inevitably moved to the airspace of another State, with the atmosphere itself becoming the medium delivering such substances. Indeed, perhaps based on a similar understanding, the Special Rapporteur stated, in paragraph 33 of the report, that regional environmental

issues could also be a common concern for humankind, which raised the question of whether that statement was inconsistent with the limitation of the scope of the topic as suggested. He therefore proposed replacing the current text of draft guideline 2 with paragraphs (a), (b), (c) and (d) of the 2013 understanding.

18. With regard to draft guideline 3, he supported the Special Rapporteur's proposal to adopt a more "passive" recognition of the concept of common concern, which clarified that it was deteriorating atmospheric conditions that were a matter of concern, and not protection of the atmosphere. The concept of "common concern" would trigger a collective response and supplement the general obligation of States to cooperate with each other for the protection of the atmosphere. However, the treaty practice cited by the Special Rapporteur to support the existence of a link between transboundary air pollution and climate change, particularly the reference to black carbon and tropospheric ozone, appeared to go beyond the Commission's 2013 understanding, which specifically excluded those two substances from the scope of the topic.

19. Regarding draft guideline 4, he considered it necessary to clarify to what exactly the general obligation of States to protect the atmosphere applied, which was not indicated in the draft guideline. He questioned the use in the current context of an expression based on article 192 of the United Nations Convention on the Law of the Sea concerning the obligation to protect the marine environment, which could be concretely defined. Furthermore, if the aim was to broadly frame the obligation on States in general, the wording should be toned down. He therefore proposed the wording: "States should not deteriorate intentionally the quality of the atmosphere" or "States should not cause atmospheric degradation".

20. Concerning draft guideline 5, for the sake of consistency with the work of the Commission on similar subjects, he said that it would be preferable to follow its previous work and to draw on article 4 of the 2001 draft articles on prevention of transboundary harm from hazardous activities.¹⁷ With regard to the future workplan, in accordance with the 2013 understanding, he suggested that the precautionary principle be omitted, and the Special Rapporteur explain what he intended to include in Part V.

The meeting rose at 5.25 p.m.

3245th MEETING

Tuesday, 5 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,

¹⁵ *Yearbook ... 2013*, vol. II (Part Two), p. 78, para. 168.

¹⁶ See the last footnote to paragraph 69 of the second report of the Special Rapporteur (A/CN.4/681).

¹⁷ General Assembly resolution 62/68 of 6 December 2007, annex. The draft articles adopted by the Commission and commentaries thereto are reproduced in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 146 *et seq.*, paras. 97–98.