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Summary record of the 3245th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
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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.

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.

Statement by the Under-Secretary-General for Legal Affairs, United Nations Legal Counsel

1. The CHAIRPERSON welcomed Mr. Miguel de Serpa Soares, Under-Secretary-General for Legal Affairs, United Nations Legal Counsel, and invited him to provide the Commission with an update on legal developments in the United Nations.

2. Mr. de SERPA SOARES (Under-Secretary-General for Legal Affairs, United Nations Legal Counsel) said that, as part of the activities of the Office of Legal Affairs during the previous year, the Codification Division had provided substantive secretariat services and assistance to the Sixth Committee during the sixty-ninth session of the General Assembly. The Committee had considered some 20 agenda items dealing with subjects such as the promotion of justice and international law, drug control, crime prevention and combating international terrorism in all its forms and manifestations. The Sixth Committee had maintained its recent tradition of adopting all its resolutions and decisions without a vote.

3. Among those resolutions was one in which the United Nations Convention on Transparency in Treaty-based Investor–State Arbitration (also known as the “Mauritius Convention on Transparency”), was adopted. The Convention, which had been prepared by the United Nations Commission on International Trade Law (UNCITRAL), was intended to give those States that wished to make the new UNCITRAL Rules on Transparency applicable to their existing investment treaties an efficient mechanism to do so. The Convention had been opened for signature on 17 March 2015 and would enter into force six months after the date of deposit of the third instrument of ratification, acceptance, approval or accession.

4. In its resolution 69/118 of 10 December 2014, entitled “Report of the International Law Commission on the work of its sixty-sixth session”, the General Assembly had noted the completion of three of the Commission’s projects: the second reading of the draft articles on the expulsion of aliens,¹⁸ the first reading of the draft articles on the protection of persons in the event of disasters¹⁹ and the work on the topic “The obligation to extradite or prosecute (*aut dedere aut judicare*)”.²⁰ By its resolution 69/119 of 10 December 2014, entitled “Expulsion of aliens”, the General Assembly had decided to further consider that topic at its seventy-second session. Consideration had also been given to two other items arising from the work of the Commission, namely “Effects of armed conflicts on treaties” and “Responsibility of international organizations”; both subjects had been placed on the provisional agenda of the General Assembly’s seventy-second session.

5. Since the Sixth Committee’s Working Group on measures to eliminate international terrorism had been unable to achieve substantive progress on the outstanding issues concerning the draft comprehensive convention on international terrorism, the General Assembly had recommended the establishment, at its seventieth session, of a new working group with a view to finalizing the process.²¹

6. The Codification Division had continued to provide support for the United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law. However, as a result of a lack of funding, it had not been possible to organize the United Nations Regional Courses in International Law for Asia-Pacific and for Latin America and the Caribbean. At its sixty-ninth session, the General Assembly had concluded that voluntary contributions had not proven to be a sustainable method for funding the activities under the Programme of Assistance and had requested the Secretary-General to include additional resources for the Programme in the proposed programme budget for the biennium 2016–2017.²²

7. The Office of the Legal Counsel had had a very busy year. Among other things, it had prepared legal advice for the Secretariat on the legality of the use of armed force in two instances: the air strikes in the Syrian Arab Republic against the Islamic State in Iraq and the Levant (ISIL), or Daesh, carried out by a coalition led by the United States of America; and the air strikes against Houthi forces in Yemen by a coalition of Arab States. Despite apparent similarities in the two situations, very different legal rules were involved. The coalition conducting air strikes against ISIL had invoked the right of collective self-defence under Article 51 of the Charter of the United Nations. On the other hand, the coalition conducting the air strikes in Yemen had cited the right of the legitimate Government of Yemen under President Hadi to request military support in fighting an insurgency.

8. The Office was carefully reviewing the report of the Board of Inquiry into certain incidents that had occurred in the Gaza Strip between 8 July and 26 August 2014 with a view to identifying the claims that the Organization might make for reparation for the losses it had sustained in several of the incidents that fell within the Board’s remit, including some in which schools being used as emergency shelters had been shelled.

9. The Office of the Legal Counsel had also been active in efforts to establish accountability mechanisms in the Syrian Arab Republic, the Central African Republic and South Sudan. Despite the systematic and widespread nature of the atrocities committed in the Syrian Arab Republic, as detailed, for example, by the Independent International Commission of Inquiry on the Syrian Arab Republic, the calls for accountability remained unheeded at the international level due to a lack of political will or consensus among Member States.

10. In the Central African Republic, under a memorandum of understanding signed with the national

¹⁸ *Yearbook ... 2014*, vol. II (Part Two) and corrigendum, pp. 22 *et seq.*, paras. 44–45.

¹⁹ *Ibid.*, pp. 61 *et seq.*, paras. 55–56.

²⁰ *Ibid.*, pp. 92 *et seq.*, para. 65.

²¹ General Assembly resolution 69/127 of 10 December 2014, para. 24.

²² General Assembly resolution 69/117 of 10 December 2014, para. 7.

authorities in August 2014, the United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA) was to provide support to a special criminal court tasked with investigating and prosecuting serious crimes committed within the country. A recently adopted law establishing the special criminal court did not fully conform to the standards envisaged in the memorandum, particularly in that internationally recruited magistrates were not in the majority at all stages of the proceedings. Nevertheless, the United Nations had concluded that it was not precluded from providing appropriate support to the court. Above all, it was essential to ensure the exclusively international character of MINUSCA and, at the same time, to preserve the national ownership of the special criminal court and the independence of its personnel.

11. With respect to South Sudan, the Security Council had stressed the need to bring to justice the perpetrators of serious human rights violations and had taken note of the important role that international investigations and prosecutions could play in that regard. In February 2015, the two major parties to the conflict had agreed to the establishment of an independent hybrid judicial body to prosecute those with greatest responsibility for violations of international humanitarian law and South Sudanese law committed since December 2013. Building on that momentum, the Secretariat had been developing possible options for criminal accountability and transitional justice processes for South Sudan. For the United Nations, the International Criminal Court would in all likelihood remain a preferred option, even though the Court could only handle the prosecution of a very limited number of alleged perpetrators. It was unclear whether the political and security situation in South Sudan would permit the location of an independent hybrid judicial body there. Assuring sustainable funding for such a project would be an essential consideration. Ultimately, the adaptation of existing mechanisms might prove preferable to creating entirely new architectures.

12. The Division for Ocean Affairs and the Law of the Sea continued to meet the growing demand from States for technical services in implementing the United Nations Convention on the Law of the Sea, which had been providing stability in that area of the law for over 30 years. The Division had also continued to provide substantive servicing to the Commission on the Limits of the Continental Shelf, whose workload had been steadily growing.

13. On the subject of international administrative law, he said that the United Nations Dispute Tribunal and the United Nations Appeals Tribunal would soon mark the end of their sixth year of operation. As at 2 April 2015, the case law of the Dispute Tribunal comprised 1,101 judgments and that of the United Nations Appeals Tribunal, 495 judgments. Both Tribunals contributed on an ongoing basis to the development of international administrative law.

14. In the area of international trade law, the programme of work of UNCITRAL included such topics as commercial law on micro-, small- and medium-sized enterprises, arbitration and conciliation, online dispute resolution, electronic commerce, insolvency law and the law related to security interests. In March 2015, UNCITRAL had

organized its eleventh Multinational Judicial Colloquium on Insolvency, in conjunction with the World Bank and the International Federation of Insolvency Professionals. At its upcoming session in July 2015, UNCITRAL would be holding discussions on how to promote the uniform interpretation and application of its rules and standards, the incorporation of those rules and standards into the positive law of States, cooperation with relevant international organizations and the inclusion of the rule of law in the post-2015 development agenda.

15. With regard to the activities of the Treaty Section, he said that the Secretary-General had recently become the depository for the United Nations Convention on Transparency in Treaty-based Investor–State Arbitration. Since April 2014, five multilateral treaties deposited with the Secretary-General had come into force. One such treaty was the Convention on the Law of the Non-Navigational Uses of International Watercourses, which had resulted from the work of the International Law Commission. The other four treaties were: the Optional Protocol to the Convention on the Rights of the Child on a communications procedure; the Amendment to the Convention on environmental impact assessment in a transboundary context; the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity; and the Arms Trade Treaty. Owing to the success of the 2014 Treaty Event, a 2015 Treaty Event would be organized at the forthcoming seventieth session of the General Assembly.

16. In April 2014, the State of Palestine had deposited instruments of accession for 14 treaties deposited with the Secretary-General, and in January 2015, it had deposited instruments of accession for 16 others, including the Rome Statute of the International Criminal Court. Some of those treaties were open to all States Members of the United Nations or of the specialized agencies (the “Vienna” formula) and others were open to all States (the “all States” formula). The instruments of accession of the State of Palestine to the treaties in the first category had been accepted because the State of Palestine was a Member State of the United Nations Educational, Scientific and Cultural Organization (UNESCO); the instruments of accession to treaties in the second category had been accepted because Palestine had been granted the status of non-Member observer State in the United Nations, pursuant to General Assembly resolution 67/19 of 29 November 2012.

17. The work of the International Law Commission, its cooperation with the Sixth Committee and its efforts to make its work more widely accessible were issues of great interest to Member States. As the Commission sought to discharge its mandate in a changing environment of greater financial constraints, his Office would do its utmost to provide it with the assistance it needed. It would ensure that the Codification Division continued to exercise its functions with the greatest professionalism, diligence and dedication.

18. The CHAIRPERSON thanked the United Nations Legal Counsel for his statement and invited the members of the Commission to make comments and put questions.

19. Mr. TLADI noted that the United Nations Legal Counsel had used the term “consensus” on two occasions. First, in a negative sense, to refer to the effects of consensus on decision-making in, for example, the Security Council’s failure to take decisions to promote accountability in some cases of atrocities. Second, in a positive sense, to refer to the tradition within the Sixth Committee of making decisions by consensus. In the light of the Sixth Committee’s failure to make progress on a number of issues, including the comprehensive convention on international terrorism and criminal accountability of United Nations officials, he asked whether the Office of the Legal Counsel had played any role in maintaining the confidentiality of the report on the alleged abuses in the Central African Republic or in suspending the whistleblower, who was a United Nations staff member.

20. Mr. de SERPA SOARES (Under-Secretary-General for Legal Affairs, United Nations Legal Counsel) said that the need for Member States in the Sixth Committee to take decisions by consensus was not the reason for slow progress. The problem was that Member States were not involved actively enough in the work of the Sixth Committee. Ideas for revitalizing its work were currently under discussion.

21. The Office of the United Nations High Commissioner for Human Rights had conducted the initial investigation into the alleged sexual abuse of children by French soldiers in the Central African Republic. Its report had then been turned over to the French judicial authorities. The involvement of his own Office had been limited to helping the French authorities to advance in their own investigation. He did not have any details concerning the situation of the whistle-blower; there were specialized bodies within the United Nations, such as the Ethics Office and the Office of Internal Oversight Services, that were in charge of dealing with such situations. The protocols for disclosing the type of information that had been reported had been established for a very important reason: to protect victims, witnesses and investigators. The United Nations strongly condemned incidents of sexual abuse or exploitation, especially when they involved children or other vulnerable groups, and its policy was to take decisive action against such criminal activity.

22. Mr. KITTICHAISAREE, referring to the advice provided by the Office of the Legal Counsel on the legality of the use of force, asked whether the right to collective self-defence under Article 51 of the Charter of the United Nations could henceforth be invoked to justify using armed force against non-State actors, as it had been in the case of the air strikes against ISIL. If so, that represented a groundbreaking rule, implying that the international community enjoyed the right to self-defence against terrorists through the use of armed force. Concerning the legality of air strikes against Houthi forces in Yemen, he asked whether international law would henceforth permit a State that was experiencing an internal armed conflict to request external military support in its efforts to suppress an insurgency. Given that there were only a few issues yet to be resolved in the process of finalizing the draft comprehensive convention on international terrorism, he asked whether the Secretary-General would consider using his good offices to promote the taking of a decision on those issues.

23. Sir Michael WOOD said that he valued the excellent studies carried out by the Codification Division in various areas of international law, including the provisional application of treaties, customary international law, *aut dedere aut judicare* and diplomatic asylum. Other useful aspects of its work were its publications, such as the *Reports of International Arbitral Awards*, the Regional Courses in International Law and the Audiovisual Library of International Law. All those aspects of the Codification Division’s work should be continued and expanded. The legal section of the library at the United Nations Office at Geneva was an excellent resource; he hoped that the library would continue to be funded adequately.

24. Mr. HASSOUNA asked whether, in a situation of civil strife in which no Government was in control, the United Nations had the right to provide assistance to a State without the consent of a legitimate authority. It would be interesting to hear whether the failure of the mediation provided by the United Nations in various Middle East conflicts, particularly in Yemen and the Syrian Arab Republic, was due to the complexity of the crises concerned, the lack of effective mechanisms for finding solutions or the lack of Security Council backing for the mediation, due to divisions among Member States.

25. Mr. de SERPA SOARES (Under-Secretary-General for Legal Affairs, United Nations Legal Counsel) said that his Office had determined that the air strikes carried out against ISIL in the territory of the Syrian Arab Republic fell into the category of collective self-defence under Article 51 of the Charter of the United Nations. The air strikes carried out against insurgents in Yemen had been deemed to be associated with the right of the legitimate Government of Yemen under President Hadi to request military support in fighting the insurgency. It was not for his Office to elaborate on the views it had issued in response to requests. Although there remained only a few issues to resolve before finalizing the draft comprehensive convention on international terrorism, among them was the crucial issue of the definition of terrorism, to which a few Member States had raised serious objections. The Codification Division would endeavour to engage them in debate and seek ways to unblock the impasse.

26. The Codification Division was currently working on two substantive studies on issues of international public law: immunities of Heads of State and issues of humanitarian assistance. The Codification Division’s publications and the Audiovisual Library of International Law would continue to operate with their usual level of resources. It was likely that the Regional Courses in International Law would be financed from the regular budget of the United Nations, but that arrangement would have to be confirmed by the General Assembly at its forthcoming session.

27. He had taken the view—regarded by some in the international legal community as too conservative—that, given the current state of development of international law, the United Nations did not have the right to provide humanitarian assistance without the consent of the affected State or a Security Council resolution. He could not explain why mediation had failed in the cases of the Syrian Arab Republic and Yemen. His Office would continue, undeterred, to seek solutions to disputes using

mediation or any of the other means for the pacific settlement of disputes described in Chapter VI of the Charter of the United Nations.

28. Mr. KAMTO said that the situation in Yemen was similar to an earlier one in the Libyan Arab Jamahiriya, where a national insurgency against a Government of questionable legitimacy had developed into an armed conflict. In the Libyan Arab Jamahiriya, the Security Council had authorized an intervention by a coalition of Member States on the grounds of the responsibility to protect a population at risk. In Yemen, however, no intervention had been authorized, even though the Government had lost control and the President had fled the country. Could the United Nations Legal Counsel comment on that discrepancy? Of course, those were sensitive issues bordering on the political, but since legal advice had been sought on them, some information would be appreciated.

29. Did the United Nations Legal Counsel consider that the international community and the United Nations had provided sufficient assistance to South Sudan when it became an independent State, without the necessary institutions in place and with leaders who, for the most part, had been former members of the military?

30. Mr. GÓMEZ ROBLEDO said that he endorsed Sir Michael's comments regarding the quality of the assistance provided by the Codification Division to members of the Commission, from which he had benefited in his capacity as Special Rapporteur on the provisional application of treaties. He expressed the hope that the United Nations Legal Counsel would be able to persuade the financial authorities of the United Nations of the need for more sustainable financing for the Regional Courses in International Law, now that it had become clear that voluntary contributions alone would not suffice.

31. The allegations of sexual abuse by French soldiers in the Central African Republic highlighted the need to resume consideration of the draft convention on the criminal accountability of United Nations officials and experts on mission. He was pleased to note that the Sixth Committee planned to do so at the seventieth session of the General Assembly. It was the right moment, as the current United Nations High Commissioner for Human Rights, while in a previous position in the United Nations, had developed a strategy to eliminate sexual exploitation and abuse during peacekeeping operations.

32. Like Mr. Tladi, he hoped that the emphasis on consensus would not hinder the Sixth Committee from making progress on a number of issues. While decision-making by consensus was ideal, it was sometimes necessary to resort to a vote. The only occasion on which he recalled the Sixth Committee having done so had been in 2004, when considering the reproductive cloning of human beings, and that vote had proved to be divisive and damaging. On the other hand, a good example of consensus-building on a contentious issue had been the negotiations on conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction.

33. Mr. COMISSÁRIO AFONSO said that he, too, would welcome further clarification from the

United Nations Legal Counsel on the similarities in legal terms between the situations in the Syrian Arab Republic and in Yemen, which seemed to be subject to different interpretations in different quarters.

34. Turning to the situation in South Sudan, he said that during a recent visit to the country in his capacity as Chairperson of the Executive Committee of the Office of the United Nations High Commissioner for Refugees, various problems had been brought to his attention, including the protection of civilians near Juba. It was causing friction between the Government and the United Nations Mission in South Sudan and there seemed to be a legal vacuum between the two institutions. More importantly, however, there was a fundamental problem of State-building: the legal and political bases of the State were not yet solid. He would be interested to hear the United Nations Legal Counsel's comments on what type of assistance the United Nations might be able to give to Governments like that of South Sudan.

35. Mr. HMOUD said that the United Nations Legal Counsel had referred to efforts to establish accountability mechanisms for international crimes in the Syrian Arab Republic, the Central African Republic and South Sudan, but the scope of accountability at the international level was still very limited. The International Criminal Court usually investigated leadership crimes (not lower-level acts) due to the lack of resources to prosecute "all" violations. He also wondered what role the United Nations could play in ensuring accountability for international crimes in situations where the International Criminal Court had no jurisdiction, given that the Security Council did not seem ready to establish new mechanisms.

36. Since the African Union Peace and Security Council was responsible for issuing decisions on international peace and security and, in certain cases, its mandate overlapped with that of the Security Council, he asked what could be done to harmonize the work of the two institutions. Lastly, he invited the United Nations Legal Counsel to comment on the issue of sovereignty and possible exceptions thereto, in view of the growing number of States that were invoking the right to self-defence in situations involving non-State actors, such as ISIL, and of the increase in internal armed conflicts.

37. Mr. NOLTE, referring to the legal advice sought from the Office of the Legal Counsel on the legality of the use of force in the Syrian Arab Republic and in Yemen, said that he understood that there might well be reasons why the Office's opinions had not been made public. Nonetheless, it would be interesting to know whether they departed from the position of the International Court of Justice in its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* case and its judgment in the *Armed Activities on the Territory of the Congo* case.

38. Ms. ESCOBAR HERNÁNDEZ said that the United Nations Legal Counsel had indicated that the Special Criminal Court in the Central African Republic was an ordinary court within the national judicial system, yet he had mentioned several aspects that would seem to

suggest that the Court had an international dimension, namely the presence of internationally recruited judges, its cooperation with MINUSCA and the related memorandum of understanding, which constituted an international agreement. In view of the long-standing debate on the legal definition of hybrid courts, she requested information regarding the work of the Office of Legal Affairs on that issue, and in particular, on what the law establishing the Special Criminal Court had to say about the distinction between hybrid and domestic courts.

39. The United Nations Legal Counsel had mentioned various options for ensuring criminal accountability in South Sudan, but it seemed that the United Nations was leaning towards the involvement of the International Criminal Court. Were any studies being conducted into the relationship between international criminal tribunals and domestic tribunals? They would be useful for many areas of international law, not least the topic of immunity of State officials from foreign criminal jurisdiction.

40. Mr. de SERPA SOARES (Under-Secretary-General for Legal Affairs, United Nations Legal Counsel) said that he did not wish to elaborate on questions relating to the legal advice provided by his Office on the use of force against ISIL in the Syrian Arab Republic and in Yemen, except to say that no formal written opinions had been or would be issued. The Office provided advice to the Secretary-General and, quite frequently, to Member States, on an informal basis. He had mentioned the legal advice simply because, in both cases, the media reports of the legal facts had been inaccurate.

41. The situation in South Sudan raised many complex issues, some of a diplomatic nature. He was not in a position to assess whether the United Nations and the international community had done everything possible in terms of State-building there. As far as criminal accountability was concerned, he would like to see the strongest possible engagement of the authorities in South Sudan and of the African Union. The Office of Legal Affairs was working on various options for criminal accountability and would probably be invited to brief the Security Council in the near future. The International Criminal Court was the centrepiece of the international criminal justice system. Under the principle of complementarity, it should focus on the most serious international crimes, while cooperating with national accountability mechanisms.

42. He confirmed that the Special Criminal Court in the Central African Republic was an entirely national institution, supported by MINUSCA. The fact that the salaries of the judges and staff at the Special Criminal Court would not be paid by the United Nations showed that it was not an international court.

43. He agreed that the Sixth Committee should resume its consideration of the draft convention on the criminal accountability of United Nations officials and experts on mission. Clearly, however, it would not be applicable to the situation in the Central African Republic, which had involved only French soldiers and had pre-dated the establishment of international peacekeeping operations. Member States must become involved in the discussion, with a view to strengthening accountability and efforts to

combat sexual abuse and exploitation by United Nations staff. The current United Nations High Commissioner for Human Rights had indeed made an important contribution on the subject.

44. The CHAIRPERSON thanked the United Nations Legal Counsel for his comprehensive statement and detailed replies to members' questions.

45. Mr. HMOUD, pointing out that some of the questions he had asked the United Nations Legal Counsel in Arabic had been incorrectly interpreted into English, said that he and other Arabic-speaking members of the Commission were being forced to resort to speaking other languages. He asked the Secretariat to take steps to ensure that the quality of the Arabic interpretation was improved.

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

[Agenda item 9]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

46. Mr. TLADI said that the Special Rapporteur's interpretation of the understanding reached at the Commission's sixty-fifth session was more than "relatively liberal" as he called it: he intended to devote some guidelines to precisely those questions with which the Commission, as part of the understanding, had decided not to deal.

47. Draft guideline 1, contained in the Special Rapporteur's second report (A/CN.4/681), proposed definitions of "atmosphere", "air pollution" and "atmospheric degradation". The definition of "atmosphere" relied on scientific works rather than on the practice of States, and as such, seemed inconsistent with the proposed methodology outlined in the first report on the topic,²³ namely to limit the exercise to a study of State practice.

48. Although the definition of "air pollution" was good and supported by practice, it omitted an important element, namely the danger or risk to human health posed by such pollution, which was included in the treaties on which the definition was based. He failed to follow the logic behind the definition of "atmospheric degradation" and was uncertain whether the distinction drawn between it and air pollution was meaningful. The methodology for arriving at the definition was questionable in that it rested on only two cases heard by courts in the United States, which could hardly be described as widespread practice.

49. The Commission might well wish to engage in progressive development when producing draft articles that laid down hard rules of law and could be transformed into conventions incorporating any amendments deemed necessary by States. That possibility was more remote when the Commission adopted draft guidelines, however, and greater caution was therefore needed there. He had reservations about the definitions of "atmosphere" and "atmospheric degradation", but he supported that of "air pollution", with some minor amendments. On

²³ *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/667.

the other hand, he had no hesitation in recommending the referral of draft guideline 2 to the Drafting Committee, although in order to abide by the spirit of the aforementioned understanding, certain rules and/or principles, such as that of common but differentiated responsibilities, should be referred to in a “without prejudice” clause, unless the Commission intended to proceed unencumbered by the understanding.

50. He mostly agreed with the distinction drawn between principles and rules in chapter II of the second report. Sustainable development was certainly a principle, but contrary to what was asserted in paragraph 24 of the report, that conclusion could not be based on the case concerning the *Gabčíkovo–Nagymaros Project*. The judgment by the International Court of Justice in that case referred to certain norms and standards that had to be given due weight, but it was unclear from the judgment whether those were legal principles or just moral and political norms, and whether sustainable development was one such norm.

51. He would be interested to know how the Special Rapporteur had identified the principles which, he claimed, were relevant to the protection of the atmosphere. He personally agreed with all the principles identified and with the reasons advanced, but thought the Special Rapporteur should have better explained the reasons for excluding the principle of common but differentiated responsibilities. Although discussions related to that principle did tend to be controversial, what divided States was not so much the principle itself as the rationale behind it. Countries from the North believed that the principle was predicated on the capability to bear a greater burden of responsibility, whereas those from the South emphasized the historical contribution to environmental degradation. Those were issues the Commission did not have to address. The principle was reflected in almost every modern environmental instrument, including those relevant to the protection of the atmosphere, such as the United Nations Framework Convention on Climate Change and the Rio Declaration on Environment and Development.²⁴ Every provision on financial and technology transfer—ubiquitous in international environmental agreements and legal instruments—was an expression of that principle. Furthermore, common but differentiated responsibilities was a principle of equity, which itself was part of sustainable development, as was the precautionary principle. That brought into sharp focus the fact that, going forward, the demarcations and interconnections between the various principles which the Special Rapporteur intended to consider in the future would have to be clearly spelled out.

52. Turning to the question of methodology, he said that if the draft guidelines had been draft articles, the title would not be misplaced, as the text stated obligations, rather than offering States options for achieving principles or obligations that were reflected in practice, as would be expected of guidelines. While he personally

would have preferred to see the drafting of articles on the protection of the atmosphere, the Commission had opted for guidelines. It might thus be better to redraft the text in the form of guidelines. In that case, then, rather than stating in draft guideline 4 that “States have the obligation to protect the atmosphere”, the Commission should identify the means, based on practice, by which States could take meaningful action to prevent pollution of the atmosphere. He would actually be quite comfortable if the Commission decided in future to change the title of the text to “principles” rather than “guidelines”. Referring to the future workplan set out in paragraph 79 of the second report, he said that “vulnerability” was listed as a principle, which it was not, and the work scheduled for 2017 needed to be more focused.

53. To sum up, he said that the interpretation of the understanding was likely to be an issue in the future; the Special Rapporteur’s report was well researched and for the most part well substantiated; the definition of “atmospheric pollution” should be revised by the Drafting Committee; other definitions required further consideration before they were discussed in the Drafting Committee; the provisions on scope could be examined in the Drafting Committee; common but differentiated responsibilities should be among the principles considered in the future; and the Drafting Committee should be mindful of the fact that the Commission was producing draft guidelines and not draft articles.

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

[Agenda item 1]

54. In the absence of Mr. Forteau (Chairperson of the Drafting Committee), Mr. Tladi said that the Drafting Committee on the identification of customary international law would comprise, in addition to the Chairperson, Ms. Escobar Hernández, Mr. Gómez Robledo, Mr. Hmoud, Mr. Kittichaisaree, Mr. Murase, Mr. Murphy, Mr. Nolte, Mr. Park, Mr. Petrič, Sir Michael Wood (Special Rapporteur) and Mr. Vázquez-Bermúdez, *ex officio*.

The meeting rose at 12.50 p.m.

3246th MEETING

Wednesday, 6 May 2015, at 10.05 a.m.

Chairperson: Mr. Narinder SINGH

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

²⁴ *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992* (United Nations publication, Sales No. E.93.I.8 and corrigenda), vol. I: *Resolutions adopted by the Conference*, resolution 1, annex I.