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Summary record of the 3246th meeting

Topic:
Protection of the atmosphere

Extract from the Yearbook of the International Law Commission:-
2015, vol. I

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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.

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

[Agenda item 9]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the members of the Commission to continue their consideration of the second report on the protection of the atmosphere (A/CN.4/681).

2. Mr. MURPHY said that the Special Rapporteur had opted for what he called a “liberal interpretation” of the 2013 understanding, which he portrayed, as Mr. Park had noted, as a reasonable, balanced, middle-of-the-road approach between actual adherence to that understanding and abandoning it. He begged leave to point out that the 2013 understanding had been agreed upon by the entire Commission, and could not be taken to reflect the extreme position taken by a few members, which the Special Rapporteur was free to water down as he wished so long as he did not “abandon” it. The 2013 understanding was itself the compromise referred to by the Special Rapporteur and, consequently, middle ground upon which all members of the Commission agreed and which should be followed in all reports. Altering that middle ground under the guise of a “liberal interpretation” would without question send the project in a very bad direction, for it betrayed the trust that had existed among the members of the Commission when reaching that understanding, which was what had allowed work on the topic to commence.

3. He fully agreed with the concerns expressed by Mr. Park, who had given various examples of the liberties that the Special Rapporteur had taken with the 2013 understanding. Although the Commission had agreed in 2013 not to deal with the precautionary principle, the Special Rapporteur planned to propose a draft guideline on it. Likewise, while it was envisaged that the work would not “deal with” the concept of “common but differentiated responsibilities”,²⁵ he had taken it upon himself to define precisely that concept. Far from being a “liberal interpretation” of the 2013 understanding, that was a flat-out and defiant ignoring of it. The understanding unambiguously provided that the outcome of the work on the topic would be a set of draft guidelines and would not seek to impose on current treaty regimes legal rules or legal principles not already contained therein. Yet the Special Rapporteur had decided to devote the second part of the draft guidelines to “general principles” that were “legal” in nature and “must be taken into account by decision makers”—in other words, once more completely rejecting the 2013 understanding, which excluded drafting “articles”, “principles” or “conclusions”. It was also clear from the “road map” proposed that the Special Rapporteur was intent on drafting a treaty. Strict adherence to the terms of the 2013 understanding mattered because it was only on that basis that members had agreed to proceed with the topic.

4. The Special Rapporteur proposed a declaration, in draft guideline 3, that “the degradation of atmospheric conditions is a common concern of humankind”. In his second report, he stated that the concept was “clearly

and fully established ... in State practice and the relevant literature”, which was not the case, as many members had noted at the previous session. It was important to be quite clear on that point: there was no treaty, whether universal, regional or bilateral, asserting that the degradation of atmospheric conditions was a common concern of humankind. Neither the International Court of Justice nor any other international tribunal had ever asserted such a proposition. It followed that the proposition set forth in draft guideline 3 was purely of the Special Rapporteur’s making.

5. The only support of any kind for the proposition was found in the preamble to the 1992 United Nations Framework Convention on Climate Change. However, nothing indicated that this provision had been advanced by States as a legal principle; it seemed, in fact, that it was a simple formula reflecting a gap in political positions. More importantly, no treaty concerning the atmosphere adopted since 1992 repeated the phrase “common concern of humankind”, which appeared neither in the 1997 Kyoto Protocol to the United Nations Framework Convention on Climate Change nor in the 2006 Amendment to Annex B to the Kyoto Protocol nor in the 2012 Amendment to the Kyoto Protocol pursuant to its Article 3, paragraph 9 (the Doha Amendment). See *texte* below. It was not mentioned in the 2011 Durban Platform for Enhanced Action²⁶ either, nor in the current context of global climate change negotiations. Finally, the phrase appeared nowhere in any of the treaties relating to ozone depletion concluded by States between 1985 and 1999. Despite that, the Special Rapporteur did not state anywhere in his second report that States had never operationalized the concept, nor did he mention once that it had never been repeated in the context of climate change negotiations in 20 years.

6. The 1979 Convention on long-range transboundary air pollution also made no reference to a “common concern of humankind”, nor did any of its eight protocols adopted or amended between 1985 and 2012. There had been nothing to prevent States parties from characterizing long-range transboundary air pollution as a “common concern of humankind” if they had believed that this was the case, but they had opted not to do so. The Special Rapporteur had again chosen to ignore that fact. Finding no support for the phrase in any treaties on atmospheric pollution, he had referred to the preamble to the 1992 Convention on biological diversity, which, however, had nothing to do with the atmosphere. The fact remained that, even if treaties not directly relating to the atmosphere were deemed relevant to the topic, none of them—neither the Convention on environmental impact assessment in a transboundary context, nor the 1991 Protocol on Environmental Protection to the Antarctic Treaty. See *texte* below, nor the 1994 Convention to combat desertification in those countries experiencing serious drought and/or desertification, particularly in Africa, nor the 2001 Stockholm Convention on Persistent Organic Pollutants, nor the 2013 Minamata Convention on Mercury—made any mention of the concept of “common concern of humankind”. The

²⁵ *Yearbook ... 2013*, vol. II (Part Two), p. 78, para. 168 (a).

²⁶ Framework Convention on Climate Change, Report of the Conference of the Parties on its seventeenth session, held in Durban from 28 November to 11 December 2011, Addendum, Part Two: Action taken by the Conference of the Parties at its seventeenth session, decision 1/CP.17 of 11 December 2011.

phrase did not appear in any of the high seas fishing conventions passed in recent years either. There was no need to continue the list to make it clear that States did not find the concept helpful when developing treaty regimes. The Special Rapporteur seemed to think that the presence of the simple word “concern” in some of those instruments was sufficient to support the concept of common concern of humankind, but that logic was both untenable and unpersuasive. The reality was that States were perfectly well aware of the concept and had pointedly and repeatedly chosen not to use it.

7. In his second report, the Special Rapporteur also claimed that “non-binding instruments” were one of the major sources of international law, which of course they were not. It was notable, however, that none of the key non-binding instruments—such as the 1972 Declaration of the United Nations Conference on the Human Environment (“Stockholm Declaration”)²⁷ or the 1992 Rio Declaration on Environment and Development—mentioned the common concern of humankind. Given the lack of any real support for his position in treaty law, State practice or international case law, the Special Rapporteur suddenly announced, in paragraph 34 of his second report, that the concept was a “developing notion”, which in his view justified a “deductive approach”, whatever that might mean. The obvious question was why States had abandoned the phrase, not just in treaties relating to the atmosphere but also in other treaties relating to the environment—and the answer was that the phrase in question had given rise to all sorts of meanings in academic literature that extended well beyond anything that had been intended when the phrase had appeared in the United Nations Framework Convention on Climate Change. The Special Rapporteur had in fact noted in his second report that the concept could be interpreted broadly or narrowly.

8. Although they were interesting, such interpretations were nevertheless based on extravagant and unanchored claims, which was precisely why States no longer wanted to use the phrase “common concern of humankind” in contemporary instruments—and it was also what should prompt the Commission not to use it in its guidelines. The Special Rapporteur seemed to think that his own preferred interpretation of “common concern” was the correct one and that all others were wrong, but he said nothing about that interpretation. At the end of the debate in 2014, he had said that applying the phrase “created substantive obligations of environmental protection”. In his second report, however, he said that it was “difficult to conceive how the concept itself [could] lead to the creation of specific substantive obligations for States”. Similarly, having stated that “there was a close link between *erga omnes* obligations, and their enforcement, and the notion of ‘common concern’”,²⁸ he now found an interpretation of common concern that had the legal effect of giving “all States a legal interest, or standing, in the enforcement of rules concerning protection of the atmosphere” to be unsustainable. It was all very confusing, and certainly not the “full analysis and implications, from a legal perspective, of

the concept”²⁹ that was expected. In any event, there was nothing in draft guideline 3 that reflected the Special Rapporteur’s personal interpretation of the concept.

9. At the end of paragraph 37 of the second report, it was stated that the concept could “certainly serve as a supplement in the creation of two general obligations of States”, which were the obligations set forth in draft guidelines 4 and 5. For his part, he did not see any such “certainty”, nor why it was appropriate for the Commission to be creating obligations. However, if the vague phrase “common concern” was just a “supplement” to draft guidelines 4 and 5, then perhaps the Commission could abandon draft guideline 3 and focus solely on draft guidelines 4 and 5. The Special Rapporteur was certainly entitled to his own preferred interpretation; however, while he and the Commission had agreed in 2013 that they would not seek to impose on current treaty regimes legal rules or principles not already contained therein, he was asking the Commission to reach a definitive conclusion as to what was meant, and what was not meant, by the preamble to the 1992 United Nations Framework Convention on Climate Change. If that was not interfering with ongoing political negotiations, one might well ask what was. On that basis alone, draft guideline 3 and its associated commentary transgressed the 2013 understanding. Of the 10 States that had, in autumn 2014, commented on the concept of “common concern of humankind” as it had appeared in the Special Rapporteur’s first report, 8 had expressed serious concerns about using the phrase. The most common objection had been the undefined character of the concept and the uncertainty as to what legal obligations flowed from it. He therefore considered that using the concept of “common concern” in the face of rather extensive contrary State practice would be unjustified and inappropriate, and hence a poor decision. As such, he did not think that draft guideline 3 should be sent to the Drafting Committee.

10. Draft guideline 4 also had no basis in any treaty practice, nor in any State practice, nor in case law, and like the phrase “common concern of humankind”, the assertion that States had the obligation to protect the atmosphere could not be supported with reference to any of the standard sources of law. The Special Rapporteur had based the draft guideline on the concepts of obligations *erga omnes* and *sic utere tuo ut alienum non laedas*, within an analysis that seemed, to use yet another Latin term, to be a non sequitur. It was true that obligations *erga omnes* had been established by the International Court of Justice and were generated, for States parties, by certain multilateral treaties, such as the Convention against torture and other cruel, inhuman or degrading treatment or punishment, but the Special Rapporteur had apparently leapt to the conclusion that there was a non-treaty-based obligation *erga omnes* to protect the atmosphere, without providing any support for that proposition. The International Court of Justice had not mentioned the fact that environmental protection created obligations *erga omnes* in either the *Barcelona Traction* case, the *East Timor* case or in the case of the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, and had in fact rejected the argument made by Australia to

²⁷ 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.

²⁸ Yearbook ... 2014, vol. II (Part Two) and corrigendum, p. 141, para. 121.

²⁹ *Ibid.*, p. 139, para. 107.

that effect in the *Nuclear Tests* cases. It would be good for the Special Rapporteur to explain exactly what he meant in paragraph 51 of his second report when he asserted that “protection of the atmosphere relating to global issues is clearly under the general obligation of States”. Did he mean that every State owed all other States an obligation with respect to climate change, ozone depletion, and transboundary air pollution, regardless of their adherence to the relevant treaty regimes? If so, then what was the content of that obligation? Should it be understood that States that were not parties to climate change treaties were nonetheless obliged to conform to those treaties, or that the obligation *erga omnes* triggered the ability of other States to demand reparation from a State that polluted the atmosphere, whether or not they were directly affected by emissions? In his view, such a claim had considerable implications that could not help but interfere with existing negotiations. The Special Rapporteur, oddly, seemed to think that its breadth could somehow be softened by his position that there was no corresponding procedural law to give effect to the obligation, but, in reality, all sorts of procedural laws could give effect to it. During the debate in the Sixth Committee, several States, including Austria, China, France and Spain, had expressly refuted its existence, and scholars had also hesitated to advance a claim with such significant consequences, especially political. The *sic utere* concept was also invoked to support the sweeping obligation to protect the atmosphere. Yet, by its terms, that obligation was focused on a State not using its territory in a manner that injured the territory of another State, and not on the much more abstract idea that no State should harm the environment. Even if one extended the original concept so as to provide that States must not use their territory to harm areas beyond their national jurisdiction, it was a non sequitur to say that this supported the proposition that States had a general obligation to protect the atmosphere. Rather, States had been extremely careful to express their legal obligations in terms of transboundary pollution that endangered human health and the environment, as had international courts and tribunals, such as in the *Trail Smelter* case. In view of the foregoing, he was opposed to sending draft guideline 4 to the Drafting Committee.

11. The second report was characterized by a continuing conceptual confusion in terms of the scope of the project, as the Special Rapporteur sometimes seemed to think that it was concerned with any harm to the atmosphere—whence his draft guideline 4—and at other times seemed to recognize that it was concerned only with emissions that harmed the global atmosphere or with transboundary emissions that endangered human health or the environment—whence the various formulations of text used in draft guidelines 1 and 2—but a choice must be made between the two and the draft guidelines crafted accordingly. Moreover, given that the second report stated that the guidelines would be limited to transboundary atmospheric damage and that the Special Rapporteur had asserted that draft guideline 2 (a) was in line with the draft articles on prevention of transboundary harm from hazardous activities,³⁰ it was at the very least regrettable

that the term “transboundary” did not appear in the first two draft guidelines, where it was needed most. The argument that it was doubtful whether it was possible to distinguish between “transboundary atmospheric damage” and “domestic and local pollution” was undermined by the practice of Governments, which had focused their treaty relationships exclusively on certain types of pollutants the physical origin of which was situated wholly or in part within the area of the national jurisdiction of one State and which had adverse effects in the area under the jurisdiction of another State. Bearing those comments in mind, it would perhaps be best to set aside draft guideline 2 until a latter stage of the project. In any case, any definition of the scope of the guidelines should reflect the understanding reached in 2013.

12. With regard to draft guideline 1, it did not seem necessary to include a definition of “atmosphere”, which States had seen no need for in the United Nations Framework Convention on Climate Change or other treaties containing important obligations with respect to the atmosphere, such as the 1963 Treaty banning nuclear weapon tests in the atmosphere, in outer space and under water or the 1996 Comprehensive Nuclear-Test-Ban Treaty. With regard to the definition of “air pollution”, it was worrying to note that it differed significantly from that set forth in article 1 (a) of the Convention on long-range transboundary air pollution, even though the latter was the cornerstone of an extremely important treaty regime to which more than 50 States were party. At the same time, the Special Rapporteur was providing an interpretation of the term “energy” that differed from its meaning in that article, which did not cover radioactive, nuclear or light pollution—not to mention the fact that if it did come under the scope of air pollution, the introduction of artificial light into the environment would not be commonly termed “light” pollution. The definition of “atmospheric degradation” was poorly drafted and problematic, partly because it classified climate change as a form of atmospheric degradation, which was incompatible with article 1, paragraph 2, of the United Nations Framework Convention on Climate Change. Climate change in fact encompassed other phenomena than just a warming of the atmosphere and, in the many forms it took, was the result of atmospheric degradation. Furthermore, the definition proposed was not limited to atmospheric degradation caused by human activities, but appeared to sweep within it events such as volcanic eruptions or forest fires, which the Commission was not trying to address. Moreover, if one applied the definition of “air pollution” contained in subparagraph (b) to the definition of “atmospheric degradation”, of which air pollution was one form, the activities concerned would have to be somehow doubly harmful in order to satisfy the surprising set of redundant criteria thereby established.

13. In conclusion, he did not support sending draft guidelines 2, 3 and 4 to the Drafting Committee, given that the last two, in particular, were neither supported by existing international law nor desirable as draft international legal provisions. He was very willing to engage in discussions with other members of the Commission about how best to focus the work of the project in a useful direction, with a view to developing true “guidelines” that would include practical considerations for States to take

³⁰ 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.

into account. It would make more sense for the guidelines to identify uncontested facts and highlight them for States so as to encourage them not to overlook those facts. For example, a guideline could be drafted pointing out that State practice demonstrated that States were cooperating in important ways to address issues relating to atmospheric degradation (which was a fact) and encouraging them to pursue such cooperation in the future.

14. Mr. NOLTE thanked Mr. Murase for his excellent report, which, as well as being very well researched, took proper account of the debates held in 2014. Although he agreed with Mr. Tladi that the understanding reached in 2013 must be respected, he did not share the doubts expressed by Mr. Park, who thought that the second report and draft guidelines exceeded the scope of the understanding. On the contrary, they seemed to him to remain fully within its scope, even without their liberal interpretation. In fact, nothing in the understanding excluded defining basic concepts such as “atmosphere”, “air pollution” or “atmospheric degradation”, if it was done “for the purpose of the draft guidelines”, as proposed, and did not “interfere with ... political negotiations”.³¹ Neither did the understanding exclude defining the scope of application of the guidelines as covering activities that might have significant adverse effects on the atmosphere, as referring to “basic principles relating to the protection of the atmosphere” or as excluding any effect on the legal status of airspace. No more did it exclude addressing the question of whether the protection of the atmosphere was in some legal sense a “common concern of humankind”, or exclude attempting to identify existing principles of international law and the obligations arising from them. Moreover, a simple reminder of the existence of certain basic principles relating to the protection of the atmosphere could not reasonably be interpreted as the Commission interfering in political negotiations, including on climate change, ozone depletion and long-range transboundary air pollution. Similarly, it could not be considered that the report dealt with “specific substances” merely because it occasionally mentioned them as generally recognized relevant factors, without taking a position on how they should be dealt with specifically. The report did not address “outer space” but made clear that the topic did not affect the status of airspace in any way. Finally, it did not seek to “fill” the gaps in the treaty regimes”, nor to “impose on ... treaty regimes ... rules ... not already contained therein”,³² as it restricted itself to identifying existing rules of customary international law.

15. He also considered that the second report and the draft guidelines it contained were consistent with the object and purpose of the 2013 understanding, which, in his view, were principally intended to ensure that the work of the Commission did not “interfere in relevant political negotiations”. That condition was essential in that it served as a reminder to the Commission that it had only a limited role to play in the important issue of the protection of the atmosphere. Nonetheless, the Commission did have the function of reminding States of existing principles that should be taken into account when addressing questions of the protection of the atmosphere in political negotiations.

He therefore welcomed the approach taken by the Special Rapporteur, which consisted of identifying not specific rules but general principles that, by their nature, left States the necessary political room to manoeuvre.

16. There was no problem with articulating basic principles of international law in the form of “guidelines”, as long as they provided general guidance without imposing a specific result, which was true in the present case because States were being given orientation on which general considerations they should take into account when addressing issues relating to the protection of the atmosphere in relevant forums. In any case, a guideline need not necessarily be devoid of legal content and non-binding. Notwithstanding the foregoing, he reserved his judgment with respect to whether the future workplan proposed by the Special Rapporteur remained within the bounds of the 2013 understanding. He also wondered what would be covered in draft guideline 12 on the precautionary principle, as the 2013 understanding expressly excluded that principle from the Commission’s work on protection of the atmosphere. He also feared that Part V (Interrelationship with other relevant fields of international law) and Part VI (Compliance and dispute settlement) might stray beyond the bounds of the topic and be overambitious, unless the Rapporteur pursued a general approach. However, the Commission need not decide on such matters immediately.

17. With regard to the substance of the second report, he approved of the proposed definition of the term “atmosphere” contained in draft guideline 1, which had the advantage of not entering into scientific questions but remaining purely functional, and also the proposed definition of “air pollution”, which was inspired by widely ratified treaties that also included the word “energy”. Nevertheless, he had doubts about whether the definition of the term “atmospheric degradation” should be based primarily on domestic legislation and court decisions. Clarification was needed as to whether the phrase “climate change and any other alterations of atmospheric conditions” was limited to alterations caused by “human activities” or whether it comprised any form of climate change, even that which was not caused by human activities. He was inclined to think that any form of climate change that had deleterious effects on human life and health should be recognized as a common concern of humankind giving rise to certain duties for States to cooperate.

18. With regard to draft guideline 2, he underlined the importance of limiting the scope of the guidelines, in subparagraph (b), to “basic principles relating to the protection of the atmosphere”, which would exclude the creation of detailed rules that could interfere in relevant political negotiations. He had nothing against defining basic principles, provided that it was clear whether they were existing law (*lex lata*) or what the Special Rapporteur referred to as “emerging law” (*lex ferenda*). However, he did not support the formulation “as well as to their interrelationship with other relevant fields of international law”, because he doubted whether principles could have relationships with “fields” and whether, in any event, it would be too ambitious an undertaking to attempt to define such relationships. In that regard, he wished to know whether the Special Rapporteur was contemplating

³¹ *Yearbook ... 2013*, vol. II (Part Two), p. 78, para. 168 (a).

³² *Ibid.*, para. 168 (b) and (d).

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

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

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

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

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

The meeting rose at 11.35 a.m.

3247th MEETING

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

Chairperson: Mr. Narinder SINGH

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

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

[Agenda item 9]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

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