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# Summary record of the 3248th meeting

Topic:
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57. Although draft guidelines 3 and 4 both dealt with the protection of the atmosphere, they differed substantially in nature: while the former was a statement of general principle, the latter was the assertion of a general obligation. Accordingly, the last part of draft guideline 3 should be reformulated to read "and hence the protection of atmospheric conditions"—or "the protection of the atmosphere", if the Special Rapporteur preferred—"is a common concern of humankind".

58. Draft guidelines 4 and 5 affirmed two important obligations of States: the general obligation to protect the atmosphere and the general obligation to cooperate. As the Special Rapporteur had correctly pointed out in his second report, the first of those obligations was well accepted within the institutional context of the United Nations Convention on the Law of the Sea. As for the obligation to cooperate, the Commission was familiar with the concept from other legal instruments it had produced, including those on shared natural resources and the protection of persons in the event of disasters.

59. In conclusion, he wished to join with other members who had recommended that the entire set of five draft guidelines be sent to the Drafting Committee.

60. Mr. PETER commended the Special Rapporteur on his second report, which was well researched and carefully balanced to reflect the diversity of views within the Commission. He also wished to express strong support for the balanced and well-argued statement made by Mr. Nolte at the previous meeting.

61. It was disturbing to see that the so-called "2013 understanding", which he thought had been consigned to history, continued to occupy discussions among Commission members when time could be more usefully spent on the fundamentals of the topic. It seemed that the understanding would forever hang over the head of the Special Rapporteur—and over the Commission as a whole—like a sword of Damocles. To some members of the Commission, respect for the understanding appeared to prevail over putting forward well-argued views. It was almost as if the understanding had been purposely designed to bog down the work on the topic. It was even more disturbing to see that some delegations in the Sixth Committee had started to use the understanding as a yardstick by which to measure the Commission's work: while some delegations had correctly noted that it was constraining the Special Rapporteur, others had urged him to adhere strictly to the letter and spirit of the understanding. However, no delegation in the Sixth Committee had ever called into question the importance of the subject matter or the need for a strong legal framework to protect the environment. That in itself was proof that the Commission was on the right track.

62. On draft guideline 3, he had initially argued against the notion of "common concern of humankind" and in favour of the principle of "common heritage of mankind". However, in the second report the Special Rapporteur had made a very convincing case for adopting the principle of common concern of humankind, in particular by asserting that the concept did not create specific substantive obligations for States, but rather served as a supplement in the creation of two general obligations of States: to protect the atmosphere and to cooperate for its protection. Although he himself would have preferred a stronger legal regime, he could live with the Special Rapporteur's proposal, which was likely to garner more general support.

63. In paragraphs 42 to 51 of the second report, the Special Rapporteur addressed the question of whether the duty to protect the atmosphere was an obligation *erga omnes*. In line with the *obiter dictum* in the judgment of the International Court of Justice in the *Barcelona Traction* case, it followed that, once it had been agreed that the atmosphere was an area of common concern of mankind, there was an obligation on all States to protect it (para. 33 of the judgment). Furthermore, the very nature of the atmosphere, which was in constant movement around the Earth, militated in favour of such an obligation.

64. As to the other draft guidelines, they were, in his view, uncontroversial and not deserving of the criticism to which they had been subjected. It was important that the topic be considered in its totality and that each element be viewed as being connected with and complementary to all the others. Seen in that light, it was difficult to understand what objection there could be, for instance, to draft guideline 5 on international cooperation, which merely required States to cooperate with each other and with relevant international organizations in good faith.

65. In conclusion, he encouraged the Special Rapporteur to continue with the same high standard of scholarship and in the same spirit of compromise that he had demonstrated thus far. As to the five proposed draft guidelines, he found them to be reasonable and recommended their referral to the Drafting Committee.

66. Mr. HUANG expressed disappointment at the distinction Mr. Peter seemed to be making among members of the Commission on the basis of their support or otherwise for the 2013 understanding.

*The meeting rose at 1.05 p.m.*

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## 3248th MEETING

*Friday, 8 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.

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## Filling of casual vacancies in the Commission (A/CN.4/684 and Add.1)

[Agenda item 2]

1. The CHAIRPERSON said that the Commission would proceed to fill the seat that had become vacant owing to the resignation of Mr. Kirill Gevorgian. As was customary, the election would be held in a closed meeting.

*The meeting was suspended at 10.10 a.m. and resumed at 10.20 a.m.*

2. The CHAIRPERSON announced that Mr. Roman Anatolyevich Kolodkin had been elected to fill the casual vacancy resulting from the resignation of Mr. Kirill Gevorgian. On behalf of the Commission, he would inform the newly elected member and invite him to take his place in the Commission.

## 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*)

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

4. Ms. JACOBSSON expressed her appreciation of the openness with which the Special Rapporteur had prepared the draft guidelines in the light of the Commission's debate on the topic at the previous session. With regard to draft guideline 1, although she considered that the terms "air pollution" and "atmospheric degradation" should be explored, even if it was later decided that the definitions need not be included in the draft guidelines, she believed that defining the term "atmosphere" was an excessively difficult exercise. Moreover, by describing the atmosphere as a natural resource, draft guideline 3 provided an additional element that might cause confusion.

5. It might be preferable to place draft guideline 2 (*a*), which was closely linked to the proposed definitions, before the definition of terms. While she was not opposed to the use of the term "principles" in draft guideline 2 (*b*) as such, given that addressing "principles" was part of the Commission's mandate, it was important to make clear whether the reference was to general principles of law in accordance with Article 38 of the Statute of the International Court of Justice, principles of international law or legal standards, such as the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities.[40] In any case, those principles needed to have at least some legal connotation.

6. In draft guideline 3, she did not take issue with the statement that the degradation of atmospheric conditions was a common concern of humankind in itself, provided that it was considered a general statement without any legal implication. However, there was a risk that the combination of the terms "common concern" and "humankind" in the draft guideline might be interpreted as having a legal implication. The only concept that included the words "common" and "mankind", and appeared to have a legal implication—which differed depending on whether it was referred to in the context of the law of the sea or space law—was the "common heritage of mankind". However, since the 1980s, attempts to label Antarctica as such had failed, as the parties to the Antarctic Treaty were concerned about the possible political and legal implications, insofar as the concept of the common heritage of mankind, as reflected in the United Nations Convention on the Law of the Sea, appeared to have given rise to a new subject of international law—mankind—with unclear legal standing. Nonetheless, the parties to the Antarctic Treaty had repeatedly acknowledged the interest of mankind in the region, both in the context of Antarctic Treaty Consultative Meetings and in the Convention on the conservation of Antarctic marine living resources, the Convention on the Regulation of Antarctic Mineral Resource Activities, the Protocol on Environmental Protection to the Antarctic Treaty and the 2009 Ministerial Declaration adopted on the fiftieth anniversary of the Antarctic Treaty.[41] In other words, it was not the use of the term "mankind", or the expressions "interest" or "concern" of mankind in themselves that was the problem, as they did not necessarily have legal implications, but rather the sometimes loose political or legal interpretations of those terms. The statement in draft guideline 3 might therefore be better placed in the introduction to the draft guidelines.

7. The wording of draft guideline 4 would also benefit from being more precise. Although the concept of obligations *erga omnes* had been further clarified since the *Barcelona Traction* case, there was still uncertainty when it came to its procedural implications, even in relation to article 192 of the United Nations Convention on the Law of the Sea and the obligations of the international community as a whole under the draft articles on the responsibility of States for internationally wrongful acts.[42] Lastly, in draft guideline 5, the Special Rapporteur had rightly emphasized the obligation to cooperate, but the type and content of such cooperation should be specified.

8. In conclusion, she welcomed the Special Rapporteur's future workplan, with the possible exception of draft guidelines 12 and 18, although he seemed to have treaty provisions rather than guidelines in mind. She supported the referral of draft guidelines 1 (*b*) and (*c*), 2, 4 and 5 to the Drafting Committee, but reminded the members of the Commission to respect the decision taken in 2013.

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

[41] Antarctic Treaty Consultative Meeting, *Final Report of the Thirty-second Antarctic Treaty Consultative Meeting, Baltimore, United States, 6–17 April 2009*, Secretariat of the Antarctic Treaty, Buenos Aires, 2009, Part I, appendix 1, Washington Ministerial Declaration on the Fiftieth Anniversary of the Antarctic Treaty, pp. 161–162, adopted on 6 April 2009 at Washington, D.C.

[42] 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.

9. Ms. ESCOBAR HERNÁNDEZ said that she welcomed the Special Rapporteur's efforts to take account of the opinions and concerns expressed by the Commission members at the previous session and particularly the rigour and clarity of his analysis, especially with regard to the principles addressed in chapters II, III, IV and V of the second report. However, she believed that the Special Rapporteur's plans for future work should be clarified, as some of the proposed topics, such as dispute settlement, were not compatible with the nature and object of the draft guidelines. In order for the Commission to make progress in its work, it might also be useful to organize further meetings with scientific experts. It was not necessary to reopen the question of whether the report was in line with the understanding agreed in 2013, as it was well known to the members and had been adopted collectively by the Commission.[43] The Commission should now focus on the substance of the report.

10. If the aim was to define the principles of contemporary international law applicable to the protection of the atmosphere with a view to providing States with legal guidance that they could take into account, if they so wished, in negotiations that directly or indirectly concerned the atmosphere, the Commission should keep two things in mind, namely that it was not a question of proposing new principles or new rules, and that the principles in question must be specifically analysed from the perspective of protection of the atmosphere, and not in an abstract manner. It followed that the guidelines should be formulated in such a way that they could not, under any circumstances, be mistaken for normative provisions from which a new legal obligation for States could be derived. However, some of the proposed guidelines did not meet that criterion, and they would have to be amended by the Drafting Committee. The non-prescriptive nature of the draft guidelines should not, however, be taken to mean that they were without legal value because, as indicated by the Special Rapporteur in paragraph 24 of the second report, principles had a certain legal significance and could even give rise to obligations. It was for that very reason that, in the context of protection of the atmosphere, the concept of "common concern of humankind" could not be considered a principle in the general sense used in international law. Rather, it was a factual element that produced a "common concern" for the preservation and protection of the atmosphere and thereby justified the analysis of existing principles of international law that could be useful in protecting the atmosphere. It was vital that the serious misunderstandings that seemed to surround the issue should be dispelled.

11. The way in which the Special Rapporteur almost automatically drew a parallel between the concepts of "protection of the environment" and "protection of the atmosphere" led him to extrapolate from the latter the international norms, principles, practice and jurisprudence applicable to the former, when, although there was undoubtedly a link between the environment and the atmosphere, it might be preferable to take into consideration the particular characteristics of the atmosphere in order to select only the elements that were really relevant to its protection. With regard to the structure of the draft guidelines, which consisted of two parts—"General guidelines" and "General principles"—it would be more logical to deal with the "Scope of the guidelines" (draft guideline 2) before the "Use of terms" (draft guideline 1) in the first part, and to move draft guideline 3 from the second part to the first.

12. With regard to draft guideline 1, she still had doubts as to whether it was necessary to provide a definition of the "atmosphere", but said that the definition proposed in draft guideline 1 (*a*) could be a useful starting point. In her view, the distinction between "air pollution" and "atmospheric pollution" had been sufficiently substantiated and she supported the reference to "energy" in the definition of "air pollution". As to draft guideline 2, its title did not match its contents, which dealt more with the object of the draft guidelines than their scope. Insofar as it could not be considered a principle, the "common concern of humankind", dealt with in draft guideline 3, should not be addressed in a separate guideline but should instead be mentioned, subject to the necessary drafting changes, in draft guideline 2 or in a preamble or general introductory note to be added to the draft guidelines once they had been adopted by the Commission.

13. As far as draft guideline 4 was concerned, the categorical statement that there was a general obligation to protect the atmosphere was not substantiated by contemporary international law, nor was it possible to conclude from the Special Rapporteur's analysis of the practice that such an obligation existed, much less to recognize it as an obligation *erga omnes*. It would therefore be preferable to opt for a more cautious wording, such as "States must endeavour to protect the atmosphere" or, more prescriptively, "States must take measures to protect the atmosphere". In any case, that issue required further discussion. Regarding draft guideline 5, it would be helpful to specify the fields in which States could cooperate with each other and the means they could use to do so.

14. Mr. VALENCIA-OSPINA said that while taking due account of the terms of the 2013 understanding, the Special Rapporteur should endeavour to develop the topic as much as possible to enable the Commission to make a real contribution to the development of international law. Although the second report appeared to fall within the scope of the understanding, the same could not be said of the principles of precaution and equity—in the intragenerational dimension embodied in the principle of common but differentiated responsibilities—contained in the future workplan. Furthermore, the outcome of the Commission's work should be a set of guidelines rather than conclusions; the Commission should draft guidance rather than impose legal obligations that were already contained in existing treaty regimes or not envisaged by them, as was the case with draft guideline 4. The 2013 understanding did not exclude the possibility of dealing with obligations based on customary international law, however.

15. With regard to draft guideline 1, the proposed definition of air pollution, as currently worded, could give rise to a restrictive interpretation. In order not to appear to require that substances or energy introduced into the atmosphere actually had deleterious effects,

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

he suggested adding the words "or likely to result in" before "deleterious effects", in line with the United Nations Convention on the Law of the Sea. Furthermore, he suggested replacing the conjunction "and" with "or" at the end of the sentence, to avoid giving the impression that the deleterious effects in question must apply cumulatively to human life and health and the Earth's natural environment, and adding "living resources" as one of the possible addressees of air pollution. The definition would then read: " 'Air pollution' means the introduction by human activities, directly or indirectly, of substances or energy into the atmosphere resulting or likely to result in deleterious effects on human life and health, living resources or the Earth's natural environment." The same amendments could be applied to the definition of atmospheric degradation if it was to be retained, in which case the order of the two definitions should be inverted, as the latter was wider in scope. Although the reference to ozone depletion and climate change as contained in the second report did not appear, *prima facie*, to interfere with political negotiations, future guidelines should be drafted with caution so as to avoid indirectly including those concepts via the definition of atmospheric degradation. Moreover, according to WMO, the climate was, in a broader sense, a system that comprised not only the atmosphere but also the hydrosphere, the cryosphere, the surface lithosphere and the biosphere; it was therefore doubtful whether climate change in itself could be considered atmospheric degradation. Given that climate change was the consequence of the enhanced concentration of natural greenhouse gases, it would perhaps be more appropriate to refer to the concentration of greenhouse gases in the atmosphere at a level that produced anthropogenic interference with the climate system.

16. Draft guideline 2 (*a*), which repeated the elements contained in the definitions of air pollution and atmospheric degradation without really defining the scope of the project, could be deleted. If it were retained, the same drafting changes as proposed earlier could be made. Draft guideline 2 (*b*) could also be slightly amended to read: "The present draft guidelines refer to the basic principles relating to the protection of the atmosphere with other relevant rules and principles of international law."

17. In his view, the title of the second part of the draft guidelines should be changed, as there was no consensus in international law as to whether the concept of "common concern of humankind" constituted a legal principle as such, and also, draft guidelines 4 and 5 were drafted as rules and not as legal principles (according to Ronald Dworkin's distinction[44]). The more passive formulation of draft guideline 3 was also inappropriate, as the protection of the atmosphere and the prevention of air pollution were pressing concerns for the international community as a whole. The solution adopted in the context of the United Nations Framework Convention on Climate Change was due to the fact that this instrument focused on a specific problem—climate change—whereas the Commission's work dealt with protection of the atmosphere in more general terms. Furthermore, provided that the common concern of humankind was not understood as a legal principle, a proactive formulation would, on the one hand, implicitly cover the concept of atmospheric degradation and, on the other hand, be more consistent with the drafting of the other guidelines and the acknowledgement of the atmosphere as an essential natural resource to sustain life on Earth. There also seemed to be a contradiction between paragraphs 37 and 41 of the second report: in paragraph 37, it was stated that since there were no *actio popularis* procedures established in international law, the broad interpretation of common concern which would give all States a legal interest, or standing, could not be sustained, which seemed to indicate that the concept could not give rise to obligations *erga omnes*, as the concept of common concern supplemented the general obligation to protect the atmosphere; yet that was characterized as an obligation *erga omnes* in paragraph 41. However, the absence of *actio popularis* had not stopped the International Court of Justice and legal scholars from recognizing potential obligations *erga omnes* from a substantive point of view. In fact, the Commission's draft articles on the responsibility of States for internationally wrongful acts endorsed the idea of collective interest standing, but recognized conditions and limitations on remedies and countermeasures available to an injured State. Some scholars had suggested that the concept of common concern had the potential to widen the range of environmental protection obligations owed to the international community as a whole, although all the constraints of the law of State responsibility would still apply, unless a treaty converted the obligation *erga omnes* into an obligation *erga omnes partes*. He therefore suggested that the title of draft guideline 3 be changed, the first sentence be incorporated into the definition of the atmosphere in draft guideline 1 (*a*), and the sentence be amended to read: "The protection of the atmosphere is a common concern of humankind."

18. With regard to draft guideline 5, in the light of the order in *The MOX Plant Case*, in which the International Tribunal for the Law of the Sea had recognized that the duty to cooperate was a fundamental principle in the prevention of pollution of the marine environment under general international law (para. 82 of the order), the Commission was justified in considering the duty to cooperate a fundamental principle in the prevention of pollution of the atmosphere, as proposed by the Special Rapporteur. Further examples of cooperation could be added to draft guideline 5 (*b*) based on State practice in agreements concerning air pollution or protection of the atmosphere.

19. As to the future workplan, he proposed that the title of Part II of the project be amended to read "Concepts and principles of international environmental law applicable to the protection of the atmosphere", given that the principles and concepts in question were not specific to the protection of the atmosphere and that it would clarify the use of the term "principles". Part II would cover the concepts of common concern and sustainable development—whose legal nature was still unclear and should perhaps be replaced with the expression "sustainable use", which was a more established principle—as well as the principles of prevention, due diligence and environmental impact assessment in a transboundary context—the latter principle having been recognized as a customary obligation by the International Court of Justice in the case concerning *Pulp Mills on the River Uruguay* and by the

[44] R. Dworkin, *Taking Rights Seriously*, London, Duckworth, 1977.

International Tribunal on the Law of the Sea in its first advisory opinion.[45] A draft guideline stating that the draft guidelines were "without prejudice to the polluter-pays principle, the precautionary principle and the principle of common but differentiated responsibilities" could also be added. Finally, Part V of the draft guidelines should deal not only with the interrelationship between concepts and principles for the protection of the atmosphere and other relevant fields of international law—without necessarily being restricted to the three areas mentioned—but also to the interrelationship among them. He would not oppose a decision to refer draft guidelines 1 to 3 and 5 to the Drafting Committee.

20. Mr. McRAE said that, having been absent for two years and thus not having participated in the debates prior to the inclusion of the topic in the Commission's programme of work or the consideration of the Special Rapporteur's first report,[46] he hoped that his colleagues would forgive any remarks that betrayed an ignorance of things of which he was unaware. The discussion about whether to interpret the "understanding" adopted in 2013 liberally or restrictively lacked substance. The understanding should be read in accordance with the usual rules of interpretation. Accordingly, the prohibition on interfering with political negotiations mentioned in the first sentence of subparagraph (*a*) of the 2013 understanding was not open-ended, as the second sentence contained a list of the issues that could not be taken up by the Commission. That meant that the issues indeed could be mentioned in the report or incidentally during the Commission's discussions, but could not be dealt with in conclusions or guidelines—a requirement that the Special Rapporteur had fully observed in his second report.

21. The other important limitation on the Commission's work, namely that the outcome should be in the form of draft guidelines which did not impose new legal rules or principles on current treaty regimes, was of little relevance in that, regardless of their content, the guidelines could not simply introduce new rules or principles into existing treaty regimes. However, although highly unlikely, it might be problematic to rephrase the rules of other treaty regimes in different legal terms and suggest that it was the correct interpretation of them. In his view, the Commission was free to choose its own definitions for the purpose of the guidelines, regardless of whether they had been endorsed by customary international law or not, and to reflect or not rules of customary international law, legal principles or proposed conduct by States. As had been pointed out by Mr. Hmoud, the Commission's guidelines on reservations to treaties reflected treaty rules, rules of customary international law and provisions on which practice had not been clear or had been divided, thus expressing both what was accepted as law and progressive development. Furthermore, as the protection of the atmosphere was an area in which the law had not yet been well developed, the Commission's role, through the drafting of guidelines, was to explain what at least some elements of a future legal framework or regime would and should look like. The acceptability of the guidelines in the long term would depend not on whether the Commission had accurately defined them on the basis of customary international law, but on the extent to which States adopted them either in their practice or treaties, which would be the case regardless of whether the outcome of the Commission's work was in the form of draft guidelines or draft articles.

22. With regard to draft guideline 1, he said that it was difficult to comment conclusively on the definitions contained therein without knowing how they would be used, and that it would therefore be premature to adopt them at that stage. Referring to the definition of the "atmosphere", he proposed the deletion of the words "within which the transport and dispersion of degrading substances occurs", which did not add anything and, in fact, might restrict the scope of the definition, which was not the desired effect. In the English version, the definition of "air pollution" as "the introduction … of substances or energy into the atmosphere" was confusing, as it appeared to equate atmosphere and air. Given the subject matter of the draft guidelines, perhaps the reference should be to "atmospheric pollution". In the definition of "atmospheric degradation", it was not clear why the Special Rapporteur had specifically mentioned air pollution, ozone depletion and climate change; apart from the fact that the phenomena were not comparable in nature, it did not seem necessary to list them, as the general expression "alterations of atmospheric conditions resulting in significant adverse effects to human life and health and the Earth's natural environment" covered them all. He would suggest the deletion of the list of words in question; unless the Special Rapporteur considered that it would alter the definition, in which case he would be interested to hear the reasons why.

23. With regard to draft guideline 2, he was not convinced that the guidelines addressed human activities, as was stated in subparagraph (*a*), particularly as draft guidelines 4 and 5 were addressed to States. The phrase could be reworded: "address the protection of the atmosphere, in particular from human activities". Subparagraph (*b*) should be deleted, as principles might be only one of the elements addressed in the guidelines, and the interrelationship of the guidelines with other fields of international law was not necessarily limited to principles. The idea conveyed in subparagraph (*b*) could perhaps be better expressed in the commentary. He did not support the proposal to insert in draft guideline 2 the words of the 2013 understanding, as mentioning what was not in the scope of the project did not help explain what the guidelines actually addressed.

24. With regard to draft guideline 3 and the controversial use of the term "common concern of humankind", he was of the view that, from a purely descriptive point of view, there could be no doubt that the protection of the atmosphere was a matter of common concern for humankind and that, if the parties to the United Nations Framework Convention on Climate Change could state that "change in the Earth's climate and its adverse effects are a common concern of humankind",[47] it seemed unobjectionable to say that degradation of atmospheric conditions was a common concern

[45] *Responsibilities and obligations of States with respect to activities in the Area.*

[46] *Yearbook … 2014*, vol. II (Part One), document A/CN.4/667.

[47] United Nations Framework Convention on Climate Change, first preambular paragraph.

of humankind. Unlike Mr. Murphy, he did not believe that the fact that States had used the term in only one convention was sufficient basis to conclude that they had rejected the concept and to prevent the Commission from using it. Nevertheless, given the concerns in relation to the lack of clarity of the normative scope of the concept, it would be necessary to make its content clear if the Commission were to decide to use it. The proposal to move the concept to the preamble therefore warranted further consideration.

25. As far as draft guideline 4 was concerned, declaring that States had an obligation to protect the atmosphere implied that there was sufficiently clear evidence of such an obligation in customary international law, even more so if it was claimed that it was an obligation *erga omnes*. He was not convinced that the *erga omnes* nature of the obligation, which implied that it had legal consequences for all States, had been proven, given that under the present state of the law, no legal consequences could be identified in situations in which States failed to protect the atmosphere, even though almost all States contributed to atmospheric pollution. Could the Commission nonetheless state in a draft guideline that there was an obligation to protect the atmosphere without treating it as an obligation *erga omnes*? The *sic utere tuo ut alienum laedas* principle seemed to point in that direction, although it was difficult to apply to consequences that occurred a long distance from the polluting act, particularly when it came to establishing causation, as was explained in paragraph 57 of the second report. The Commission should perhaps decide to posit such an obligation while recognizing that there was an element of progressive development in so doing. The Drafting Committee would then have two options: either to retain the current wording of the obligation while recognizing in the commentary that progressive development was involved, or rewording the obligation by replacing "have the obligation to" with "should", and indicating in the commentary that "should" was expressed in stronger than hortatory terms.

26. As to draft guideline 5, like other members, he considered that, as currently worded, subparagraph (*b*) seemed to undercut the obligation expressed in subparagraph (*a*) and downplayed the critical role of information gathering and monitoring in protecting the atmosphere. In conclusion, he would support sending all of the draft guidelines to the Drafting Committee, provided that it had a broad enough mandate to make the proposed changes, such as moving the contents of draft guideline 3 to a preamble.

27. Mr. CANDIOTI said that he endorsed the contents of the five draft guidelines and was in favour of their referral to the Drafting Committee. With regard to draft guideline 1, it was important to ensure that the definitions were in line with the current scientific knowledge and thus to continue to consult experts with a view to supplementing the existing definitions or adding new ones, if necessary. In the English version of draft guideline 2 (*b*), it would be a good idea to use a stronger verb than "refer to", which had been translated aptly as "*définissent*" in the French version and was thus more in line with the main objective of the guidelines, namely to set out the basic principles relating to the protection of the atmosphere. With regard to draft guideline 3, he held the view that in the present context the "common concern of humankind" was not actually a principle but rather the reason why it was necessary to define the general principles applicable to the protection of the atmosphere and, as such, it could be mentioned in the preamble to the guidelines, as had been proposed by several members. He considered draft guideline 4 to be essential, although he was not convinced that the argument concerning the *erga omnes* nature of the obligation to protect the atmosphere was necessary. He expressed support for draft guideline 5, which established the obligation of States to cooperate, and invited the Special Rapporteur to define more clearly the scope of that obligation in his future reports, stressing, in particular, the need for States to share scientific knowledge.

28. Mr. NIEHAUS said that far from being definitive, the 2013 understanding merely provided guidance on how the Commission should proceed with its work. The understanding had been clearly and correctly interpreted by the Special Rapporteur, who had not gone beyond what was required of a comprehensive consideration of the issues at stake in his second report and had duly taken into account the concerns expressed by Commission members at the previous session. In any case, even if the draft guidelines departed from the initial understanding, which was certainly not yet the case, the Drafting Committee could always make the necessary adjustments. He did not understand why certain members continued to consider the topic to be devoid of legal substance even though atmospheric degradation was a threat to humankind as a whole and ignoring the issue would simply be contrary to the "right to life", expressly protected under article 3 of the Universal Declaration of Human Rights.[48] He was convinced that, if the Commission used the Special Rapporteur's excellent second report as the basis for its deliberations and complied with the 2013 understanding, the outcome of the work would not interfere with international efforts at the bilateral or multilateral levels to find solutions to environmental problems but, on the contrary, would support them.

29. As to the draft guidelines proper, he expressed support for draft guideline 1, as the definition of the three key concepts, namely "atmosphere", "air pollution" and "atmospheric degradation", was helpful in understanding the topic. In that regard, he agreed with the expert who, during the informal meeting the Commission had held with scientists, had said that it would be problematic not to define the term "atmosphere" for the purposes of the draft guidelines. Since air pollution was a consequence of atmospheric degradation, perhaps the two concepts could be defined in a single paragraph or, for the sake of consistency, the second term could be defined before the first, as proposed by Mr. Candioti. By including in the definition contained in subparagraph (*b*) the word "energy", taken from the definitions of pollution contained in the 1979 Convention on long-range transboundary air pollution and in the United Nations Convention on the Law of the Sea, the Special Rapporteur had simply recognized the importance of that issue, without exaggerating its importance, and had concluded that, as energy—particularly nuclear emissions—was likely to contribute to air pollution, it should be taken into account for the purposes of the draft guidelines.

[48] General Assembly resolution 217 (III) A of 10 December 1948.

30. With regard to draft guideline 3, some members had expressed the view that the concept of "common concern of humankind" had been poorly defined and could be controversial. However, with all due respect, he believed, quite simply, that insofar as the very existence of humankind depended directly on the protection of the atmosphere, which was a fundamental legal principle in relation to the "right to life", atmospheric degradation entailed the obligation for all States to help protect the atmosphere, as set out in draft guideline 4, and the duty to cooperate towards that end, as set out in draft guideline 5, both of which were logical and useful. In conclusion, he was in favour of referring all the draft guidelines to the Drafting Committee.

31. Mr. VÁZQUEZ-BERMÚDEZ thanked the Special Rapporteur for his second report, which was of excellent quality, well structured, and based on an in-depth analysis of the legal issues at stake. He commended him on having taken due account of the comments made by the Commission members and by States in the Sixth Committee. The report was a step in the right direction and it was to be hoped that the disagreements concerning the scope of the draft guidelines would be resolved without difficulty. The understanding adopted by the Commission in 2013, particularly the choice of guidelines, by no means prevented the Commission from referring to relevant principles or legal rules, and had been duly observed, as noted by Mr. Nolte and Mr. McRae. He also agreed with Mr. Hmoud, who had helpfully recalled that the Commission could include legal principles in draft guidelines, as it had done in the Guide to Practice on Reservations to Treaties,[49] by referring to the practice of States and international organizations and to case law.

32. The topic of the protection of the atmosphere invited reflection on the development of international law, which the Special Rapporteur had touched upon in the report. International law had effectively moved from the "law of coexistence" to the "law of cooperation", and from the protection of the individual rights and interests of States to a system that increasingly protected the interests of the international community, based on the belief that global problems, which could not be resolved through individual measures or responses, called for concerted action by States and other subjects of international law. That development was evident in some fields of international law, such as international criminal law and also international environmental law, where international cooperation was vital.

33. For the purposes of the draft guidelines, he considered it appropriate to include a definition of the atmosphere in draft guideline 1 (*a*). As the topic at hand was the protection of the atmosphere, it was certainly helpful to clarify the purpose of the project. While he had no objection to the material aspect of the proposed definition, the same could not be said of the functional aspect of the definition in the second clause. The Drafting Committee would have to discuss whether to retain the second clause in view of the consequences of so doing. In that connection, it would have to consider whether it was necessary to add the word "degrading" before "substances". With regard to draft guideline 1 (*b*), he supported the definition of "air pollution", taken from article 1 of the Convention on long-range transboundary air pollution, as it restricted the concept to the introduction into the atmosphere by human activities, directly or indirectly, of substances or energy that had a deleterious effect on human life and health and on the Earth's natural environment. He was also in favour of the use of the word "energy", without which the definition of air pollution would be incomplete. Since the term *contaminación atmosférica* was used in the Spanish version of the Convention on long-range transboundary air pollution, it would perhaps be wise to use it in the Spanish version of the draft guidelines, and to use "atmospheric pollution" rather than "air pollution" in the English version. In his view, the definition of the concept of "atmospheric degradation" in draft guideline 1 (*c*) was also useful for the purposes of the draft guidelines. It was important to adopt a broad approach so as to ensure that there was no legal void and, consequently, not to limit the scope to air pollution *per se*, but to expand it to degradation of atmospheric conditions, which not only encompassed air pollution but also its consequences.

34. As far as draft guideline 2 was concerned, the Drafting Committee would have to decide whether the word "deleterious" should be retained in subparagraph (*a*), as its use could give rise to problems of interpretation in relation to the definitions, which referred only to "substances". In subparagraph (*b*), the clause "as well as to their interrelationship with other relevant fields of international law" could be deleted, as the study of the interrelationship between the basic principles of the protection of the atmosphere and other fields of international law would involve a great deal of work and would stretch the scope of the draft guidelines too far. However, there was no reason why reference could not be made to certain relevant aspects or principles of international law in order to illustrate or clarify the substance of the topic. He supported the "without prejudice" clause in subparagraph (*c*).

35. With regard to draft guideline 3, for some legal scholars, the concept of "common concern of humankind" essentially referred to aspects that went beyond the individual interests or concerns of States and addressed serious and urgent situations that affected humankind as a whole. In that sense, common concern was not a legal principle, but rather a concept that did not give rise to any obligation *erga omnes*. It could be mentioned in the draft guidelines or, as proposed by Mr. Nolte, in the preamble.

36. Draft guideline 4 set out an important principle, the obligation to protect the atmosphere, which was supported by State practice and the case law of the International Court of Justice. As Mr. Nolte had recalled, the Court had mentioned, in its order of 22 September 1995 on the *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case*, the "obligations of States to respect and protect the natural environment" (para. 64 of the order), of which the atmosphere was an integral part. In his view, the principle should guide the Commission's work on the topic, although, as had been noted by Ms. Escobar Hernández, the principles of the protection of the atmosphere

[49] General Assembly resolution 68/111 of 16 December 2013, annex. The guidelines constituting the Guide to Practice on Reservations to Treaties adopted by the Commission and commentaries thereto are reproduced in *Yearbook … 2011*, vol. II (Part Three) and corrigenda 1–2, pp. 23 *et seq*.

should be identified on the basis of its specific characteristics and not by simply extrapolating the principles applicable to the environment in general. Mr. McRae's proposal to frame the obligation to protect the atmosphere in the context of the progressive development of international law should be supported, particularly as the Special Rapporteur had put forward sound arguments to that effect.

37. He considered that the obligation to cooperate mentioned in draft guideline 5 should be expanded upon, by referring to the prevention or mitigation of air pollution, and he agreed with Mr. Hassouna and Mr. McRae that subparagraph (*b*) should be reworded, as it diluted the obligation set out in subparagraph (*a*). In conclusion, he proposed the referral of the five draft guidelines to the Drafting Committee.

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

[Agenda item 1]

38. Mr. McRAE (Chairperson of the Working Group on the long-term programme of work) said that the Working Group on the long-term programme of work would be composed of the following members: Mr. Caflisch, Ms. Escobar Hernández, Mr. Forteau, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Petrič, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood and Mr. Vázquez-Bermúdez (*ex officio*).

39. Mr. WAKO (Chairperson of the Planning Group) said that the members of the Planning Group were: Mr. Caflisch, Mr. Comissário Afonso, Ms. Escobar Hernández, Mr. Forteau, 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. Petrič, Mr. Šturma, Mr. Tladi, Mr. Wisnumurti, Sir Michael Wood and Mr. Vázquez-Bermúdez (*ex officio*).

*The meeting rose at 1.05 p.m.*

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## 3249th MEETING

*Tuesday, 12 May 2015, at 10 a.m.*

*Chairperson*: Mr. Narinder SINGH

*Present*: Mr. Al-Marri, Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Ms. Escobar Hernández, Mr. Forteau, 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. Saboia, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

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**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 (*concluded*)

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

2. Mr. HUANG said that the protection of the atmosphere was a far more complex topic than the Commission had initially imagined. He was therefore surprised that it had not adopted a more cautious approach: it was attempting to establish legal definitions for scientific concepts that even scientists found difficult to define, something which did not seem to be in keeping with its usual rigorous working methods.

3. During the debate, a range of views had been well argued and well expressed. Regrettably, however, the discussions had taken a political and emotional turn, with some members conflating opposition to the Special Rapporteur's views with not caring about the planet, while others had approached the topic strictly in terms of the divide between the developed and developing world. Such an approach was counterproductive. There was no need for the Commission to become an environmental protection forum or a non-governmental organization (NGO). Its members needed to do less propaganda and more legal analysis, to work in harmony in the interests of protecting the environment, a goal that would not be achieved by empty rhetoric or unrealistic legal "guidelines".

4. Various concerns had been raised in the Sixth Committee about the Commission's choice of topic. The views had been voiced that: an overarching legal framework on protection of the atmosphere was unnecessary, since long-standing instruments already provided sufficient guidance to States; the attempt to extract legal rules from existing treaties and to assert that they were applicable in areas beyond their original scope was potentially harmful; the Commission's pursuit of the topic would severely complicate sensitive ongoing negotiations; and the Commission might not have the expertise to handle the highly technical nature of the topic. The difficult situation the Commission now faced would seem to bear out those concerns.

5. The Commission faced a dilemma. On the one hand, the understanding reached in 2013[50] as a result of arduous negotiations was no longer open to debate; on the other hand, the understanding had itself become controversial. The Special Rapporteur had attempted to bypass it by applying a "relatively liberal interpretation". His wish for some leeway was understandable, but his "liberal interpretation" was in fact a total disregard for the 2013 understanding. He admired the Special Rapporteur's ambitious work for the International Law Association, culminating in the adoption in 2014 of the Declaration of Legal Principles relating to

[*] Resumed from the 3245th meeting.

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