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Summary record of the 3367th meeting

Topic:
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States that fulfilled requests for assistance in one context might submit such requests in another. As part of that practice, the ordinary costs of such cooperation were borne by the requested State. Cases involving exceptional situations would require agreement between the States concerned.

65. Mr. JALLOH said that, while Mr. Peter had raised a significant concern about developing countries, the Commission must also be aware of the usual State practice. In the commentary, it might be desirable to acknowledge the challenges faced by some States and to reiterate that paragraph 20 of the draft annex made allowance for alternative arrangements agreed upon between the States concerned.

66. Mr. GROSSMAN GUILLOFF said that he shared Mr. Peter's concern, and pointed out that the United Nations engaged in capacity-building in order to prepare developing countries to fulfil requests for legal assistance. He also recognized, however, that paragraph 20 of the draft annex reflected a practice that had not caused problems. It was important to acknowledge that "ordinary costs" might be politically difficult for some countries to meet and that those costs varied from one country to another, depending in part on the size and complexity of each country's legal system. However, the provision operated as part of the effort to ensure that countries had the will to undertake proceedings for the crimes addressed in the draft articles. As currently worded, paragraph 20 preserved countries' sovereignty to have an adjudicatory process that was not tainted by "foreign money", although requests of an extraordinary nature would require consultations on the question of costs.

67. The CHAIRPERSON said that the wording of the second sentence of paragraph 20 did not present a great risk, as it referred to "expenses of a substantial or extraordinary nature", which were defined by each State according to its own criteria. If a State considered such expenses to be substantial, it could opt to negotiate a different arrangement for meeting them.

The draft annex to the draft articles was adopted.

68. The CHAIRPERSON said he took it that the Commission wished to adopt, as a whole, the texts and titles of the draft preamble, the draft articles and the draft annex provisionally adopted by the Drafting Committee on first reading (A/CN.4/L.892).

It was so decided.

69. Mr. PETER asked whether the Commission's adoption of the draft would preclude any further changes to the draft articles or the draft annex.

70. Mr. MURPHY (Special Rapporteur) said that the Drafting Committee would resume its discussions on the issue during the second part of the sixty-ninth session. The main objective was to discuss the matter of immunity and official capacity, as the matter of amnesty had already been addressed. Members would have the opportunity to provide input on the commentary, and it was possible that the Drafting Committee would decide to include new text.

71. Mr. LLEWELLYN (Secretary to the Commission) said that when the Commission adopted draft texts in the absence of commentaries, the adoption was understood to be provisional. The draft articles in final form, incorporating any changes made during the second part of the session, and the commentary would be adopted definitively at the end of the second part of the session, when the Commission adopted its report to the General Assembly.

Programme, procedures and working methods of the Commission and its documentation (*continued*)^{*} (A/CN.4/703, Part II, sect. G)

[Agenda item 9]

72. Mr. HASSOUNA (Chairperson of the Working Group on methods of work) said that the Working Group on methods of work was composed of the following members: Mr. Cissé, Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Grossman Guiloff, Mr. Jalloh, Ms. Lehto, Mr. Murase, Mr. Murphy, Mr. Nguyen, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Šturma, Mr. Tladi, Mr. Vázquez-Bermúdez and Sir Michael Wood, together with Mr. Nolte and Mr. Valencia-Ospina as Chairperson and Vice-Chairperson, respectively, of the Commission.

The meeting rose at 12.45 p.m.

3367th MEETING

Friday, 2 June 2017, at 10.05 a.m.

Chairperson: Mr. Georg NOLTE

Present: Mr. Argüello Gómez, Mr. Cissé, Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Grossman Guiloff, Mr. Hassouna, Mr. Jalloh, Mr. Laraba, Ms. Lehto, Mr. Murase, Mr. Murphy, Mr. Nguyen, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Peter, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Saboia, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Sir Michael Wood.

Protection of the atmosphere (*concluded*)^{} (A/CN.4/703, Part II, sect. B, A/CN.4/705, A/CN.4/L.894)**

[Agenda item 5]

REPORT OF THE DRAFTING COMMITTEE

1. The CHAIRPERSON invited the Chairperson of the Drafting Committee to introduce the third report of the Drafting Committee, on the topic "Protection of the atmosphere", as contained in document A/CN.4/L.894.

^{*} Resumed from the 3354th meeting.

^{**} Resumed from the 3359th meeting.

2. Mr. RAJPUT (Chairperson of the Drafting Committee) said that the report contained three preambular paragraphs and one draft guideline. The Drafting Committee had devoted four meetings—on 18, 19, 22 and 29 May 2017—to its consideration of the draft guidelines referred to it by the Commission.

3. He wished to pay tribute to the Special Rapporteur, Mr. Murase, whose mastery of the subject, constructive spirit and cooperation had greatly facilitated the work of the Drafting Committee. Thanks were also due to the members of the Drafting Committee for their valuable contributions to a successful outcome and to the secretariat for its invaluable assistance.

4. At its 3359th meeting on 17 May 2017, the Commission had decided to refer draft guidelines 9, 10, 11 and 12, as contained in the Special Rapporteur's fourth report (A/CN.4/705), to the Drafting Committee, taking into account the debate in the Commission. The Special Rapporteur, when summing up the debate, had suggested reformulations of the proposed draft guidelines, taking into account the various comments made in the plenary, in particular to streamline the draft guidelines into a single guideline.

5. To that end, the Drafting Committee had before it a working paper containing the proposals made by the Special Rapporteur in his summing-up. After an initial round of comments concerning the structure of the draft guidelines, the Special Rapporteur had prepared a revised working paper, which had constituted the basis of discussions in the Drafting Committee. That proposal had sought to restructure the draft guidelines further, by presenting, in one paragraph, aspects of the interrelationship between the rules of international law relating to protection of the atmosphere and other relevant rules of international law, particularly the rules of international trade and investment law, the law of the sea and international human rights law. It had grounded the interrelationship in the 1969 Vienna Convention and in customary international law. The proposal had contained a separate paragraph relating to the interpretation and application of relevant rules of international human rights law with respect to persons belonging to vulnerable groups. Additionally, the proposal had reflected, in three separate preambular paragraphs, other elements concerning the close interaction between the atmosphere and the oceans, the situation of small island States and low-lying States, and the interests of future generations of humankind in the long-term conservation of the quality of the atmosphere.

6. Following discussions, the Drafting Committee had decided to split the first paragraph proposed by the Special Rapporteur in his revised working paper into two separate paragraphs, one dealing with existing rules and one dealing with the development of new rules. It had also revised the language of the second proposed paragraph, which had become the third paragraph of draft guideline 9.

7. Draft guideline 9 contained three paragraphs that sought to reflect the relationship between rules of international law concerning the atmosphere and other relevant rules of international law. Paragraphs 1 and 2 were general in nature, while paragraph 3 emphasized the protection of groups particularly vulnerable to atmospheric

pollution and atmospheric degradation. As the current topic dealt with atmospheric pollution and atmospheric degradation caused by humans, activities in other fields of the law had a bearing on the atmosphere and its protection. Draft guideline 9 highlighted the various techniques in international law for addressing tensions between legal rules and principles, whether they related to a matter of interpretation or a matter of conflict. In preparing the formulation, the Drafting Committee had drawn on the report of the Commission's Study Group on fragmentation of international law.²⁵²

8. Paragraph 1 of draft guideline 9 provided that “[t]he rules of international law relating to the protection of the atmosphere and other relevant rules of international law, including *inter alia* the rules of international trade and investment law, of the law of the sea, and of international human rights law, should, to the extent possible, be identified, interpreted and applied in order to give rise to a single set of compatible obligations, in line with the principles of harmonization and systemic integration, and with a view to avoiding conflicts”. The paragraph dealt with identification of the relevant rules as well as their interpretation and application. It was formulated in the passive voice in recognition of the fact that the process of identification, interpretation and application involved not only States but also international organizations, as appropriate.

9. The reference to “including *inter alia* the rules of international trade and investment law, of the law of the sea, and of international human rights law” reflected the concern within the Drafting Committee to capture, on the one hand, the practical importance of those three areas to the atmosphere, and, on the other, the risk of overlooking other fields of law, which might be equally relevant. The phrase “including *inter alia*” represented the agreement in the Drafting Committee reflecting that “without prejudice” categorization and indicated that the list of relevant fields of law was not exhaustive.

10. The phrase “should, to the extent possible, be identified, interpreted and applied in order to give rise to a single set of compatible obligations” drew upon the conclusions of the Study Group on fragmentation of international law.²⁵³ The paragraph applied to rules arising from treaty obligations and other sources of international law. That was indicated by the term “identified”, even though some members of the Drafting Committee had questioned the need for such a specification.

11. The first sentence of paragraph 1 also made specific reference to principles of “harmonization and systemic integration”, which had been accorded particular attention in the Commission's conclusions in the fragmentation study. As noted in the conclusions, “harmonization” entailed that when several norms bore on a single issue they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations. Moreover, systemic integration denoted that, whatever their subject matter, treaties were a creation of the international legal system and should be interpreted against the background of other international rules and principles.

²⁵² *Yearbook ... 2006*, vol. II (Part One) (Addendum 2), document A/CN.4/L.682 and Add.1.

²⁵³ *Ibid.*, vol. II (Part Two), pp. 177–184, para. 251.

12. The phrase “and with a view to avoiding conflicts” signalled that avoiding conflicts was among the principal purposes of the paragraph. While some members had suggested placing that phrase at the beginning, the Drafting Committee had decided to retain it at the end of the sentence, as that better reflected the nuance that the guidelines had more than one purpose.

13. The second sentence of paragraph 1 sought to locate the paragraph within the relevant rules set forth in the 1969 Vienna Convention, including article 30 and article 31, paragraph 3 (c), and the principles and rules of customary international law. The phrase “principles and rules of customary international law” covered such principles and rules of customary international law as were relevant to the identification, interpretation and application of relevant rules.

14. In contrast to paragraph 1, paragraph 2 dealt with the situation where States wished to develop new rules. It provided that “States should, to the extent possible, when developing new rules of international law relating to the protection of the atmosphere and other relevant rules of international law, endeavour to do so in a harmonious manner”. The paragraph signalled a general desire to encourage States, when engaged in negotiations for the creation of new rules, to take into account the systemic relationships that existed between rules of international law relating to the atmosphere and rules in other legal fields.

15. Paragraph 3 highlighted the plight of those who found themselves in vulnerable situations because of atmospheric pollution and atmospheric degradation. It had been reformulated to make direct reference to atmospheric pollution and atmospheric degradation. It provided that “[w]hen applying paragraphs 1 and 2, special consideration should be given to persons and groups particularly vulnerable to atmospheric pollution and atmospheric degradation. Such groups may include, *inter alia*, indigenous people, people of the least developed countries and people of small island and low-lying States affected by sea-level rise”.

16. The reference to paragraphs 1 and 2 captured both the aspects of identification, interpretation and application, on the one hand, and development, on the other. At the end of the first sentence, the phrase “special consideration should be given to persons and groups particularly vulnerable to atmospheric pollution and atmospheric degradation” underlined the broad scope of the consideration to be given to the situation of vulnerable groups, covering both aspects of the topic, namely atmospheric pollution and atmospheric degradation. It had been considered appropriate to omit a reference in the text to “human rights” or even to “rights” or “legally protected interest”. The second sentence of paragraph 3 gave examples of groups that might be in vulnerable situations, although the phrase “may include, *inter alia*” indicated that those examples were not necessarily exhaustive. The commentary would develop the examples mentioned in the sentence, as well as others, including local communities, migrants, women, children, persons with disabilities, as inspired by the preamble to the Paris Agreement under the United Nations Framework Convention on Climate Change, and also older persons.

17. Some members had registered reservations not only with respect to the various guidelines initially proposed by the Special Rapporteur, but also regarding the reduction of the issues into a single guideline. Some members had expressed concern regarding the scope of the draft guideline, in particular the absence of any reference to purpose, for example protecting the atmosphere or achieving sustainable development.

18. The title of the draft guideline was “Interrelationship among relevant rules” to indicate the relationship between rules of international law relating to the atmosphere, on the one hand, and various other rules of international law, on the other.

19. Turning to the three preambular paragraphs, he said that preambular paragraph 3 *bis* would be placed after the third preambular paragraph of the text of the preamble already provisionally adopted by the Commission.²⁵⁴ It acknowledged the physical relationship that existed between the atmosphere and the oceans. The Drafting Committee had not made any changes to the text proposed by the Special Rapporteur. Given that the relationship between the atmosphere and the oceans was cyclical and varied, the preambular paragraph simply noted as a factual matter the close interaction between the atmosphere and the oceans.

20. Preambular paragraph 4 *bis* would be placed after the fourth preambular paragraph of the text of the preamble already provisionally adopted by the Commission. It read: “*Also aware*, in particular, of the special situation of low-lying coastal areas and small island developing States due to sea-level rise”. That preambular paragraph was linked to the persons and groups in vulnerable situations referred to in draft guideline 9, paragraph 3. The words “in particular” were intended to acknowledge specific areas without necessarily foreclosing the list of potentially affected areas. The original proposal by the Special Rapporteur had included references to delimitation, potential loss of statehood and environmental migration. The Drafting Committee had decided to offer a shorter and more streamlined text with the phrase “due to sea-level rise”. Such an approach had been considered appropriate, since the draft guidelines did not provide any guidance on how those three complex questions should be addressed in relation to the topic in a preambular paragraph.

21. The sixth preambular paragraph would be placed after the fifth preambular paragraph of the text of the preamble already provisionally adopted by the Commission. It read: “*Noting* that the interests of future generations of humankind in the long-term conservation of the quality of the atmosphere should be fully taken into account”. The Drafting Committee had not made any changes to the text proposed by the Special Rapporteur. It would be recalled that the Commission had addressed considerations of intra- and inter-generational equity in draft guideline 6 on equitable and reasonable utilization of the atmosphere.²⁵⁵

22. In conclusion, he expressed the hope that the Commission would be in a position to provisionally adopt the

²⁵⁴ See *Yearbook ... 2016*, vol. II (Part Two), p. 173 (draft preamble).

²⁵⁵ *Ibid.*, p. 177 (draft guideline 6).

three preambular paragraphs and draft guideline 9, as presented.

23. The CHAIRPERSON invited the Commission to adopt the three preambular paragraphs and draft guideline 9, as provisionally adopted by the Drafting Committee.

Preambular paragraphs

The preambular paragraphs were adopted.

Draft guideline 9

Paragraphs 1 and 2

Paragraphs 1 and 2 were adopted.

Paragraph 3

24. Mr. VÁZQUEZ-BERMÚDEZ said that, in the English version, the reference should be to “indigenous peoples” rather than “indigenous people”, in line with the United Nations Declaration on the Rights of Indigenous Peoples,²⁵⁶ among other documents.

25. Mr. PARK said that, although he had no objection to adopting paragraph 3, it seemed that the Drafting Committee, of which he had been a member, had missed an inconsistency between draft guideline 9, paragraph 3, and preambular paragraph 4 *bis*. The former referred to “people of small island and low-lying States affected by sea-level rise” whereas the latter mentioned “low-lying coastal areas and small island developing States”, which was quite different. The issue was both a formal and a substantive one. During the discussions in the Drafting Committee, the choice of terminology for preambular paragraph 4 *bis* had been considered at length, based on a proposal by Ms. Oral, but less attention had been paid to draft guideline 9, paragraph 3. Perhaps it would be possible to resolve the issue during *toilettage* or in the plenary.

26. Mr. MURASE (Special Rapporteur) said that, as preambular paragraph 4 *bis* referred to questions related to sea-level rise and draft guideline 9, paragraph 3, referred to human rights, albeit not explicitly, the context in each case was different. Considerable time had been spent in the Drafting Committee discussing which terms to use in preambular paragraph 4 *bis*, and in the end it had been decided to opt for constructive ambiguity in the form of “low-lying coastal areas”. He was not in favour of reopening the debate on the matter at the current stage; he could, of course, reflect the points raised in the Drafting Committee in the commentaries that he would be drafting before the second part of the session.

27. Mr. NGUYEN said that he shared the concern raised by Mr. Park about the difference between the terms “low-lying coastal areas” and “low-lying States”, and was not convinced by the Special Rapporteur’s reasoning in relation to the different contexts. Small-island States, low-lying States and low-lying coastal areas of coastal States were facing the same consequences of migration, food

shortage and land loss caused by sea-level rise. Those were human rights issues. He therefore proposed that draft guideline 9, paragraph 3, be amended to refer to “low-lying coastal areas”, which covered both low-lying States and low-lying coastal areas of States.

28. Ms. ORAL said that she agreed with Mr. Park about the inconsistent use of terminology. The terminology in draft guideline 9, paragraph 3, did not reflect the standard language used, including that of the Paris Agreement under the United Nations Framework Convention on Climate Change itself, on which the Drafting Committee had drawn. As currently drafted, draft guideline 9, paragraph 3, could be somewhat confusing, and should perhaps be amended during *toilettage* to ensure consistency.

29. Mr. TLADI said that the points raised by Mr. Nguyen, Ms. Oral and Mr. Park, with which he tended to agree, could not simply be resolved during the *toiletage* process.

30. Mr. RAJPUT (Chairperson of the Drafting Committee) said that, before turning its attention to the preambular paragraphs, the Drafting Committee had not had the occasion to consider draft guideline 9, paragraph 3, at length, and had not revisited it at a later stage. He agreed that the matter went beyond mere *toilettage*. The term “low-lying coastal areas” had been introduced deliberately in the preamble by consensus of the Drafting Committee because it was quite broad. The Special Rapporteur might therefore consider reproducing the language used in the preamble in draft guideline 9, paragraph 3. The end of the last sentence of paragraph 3 would then read: “indigenous peoples, people of the least developed countries and people of low-lying coastal areas and small-island developing States affected by sea-level rise”.

31. Mr. MURASE (Special Rapporteur) said that he supported the proposal made by Mr. Rajput.

32. The CHAIRPERSON, noting that the phrase “due to sea-level rise” was used in preambular paragraph 4 *bis*, while “affected by sea-level rise” was used in draft guideline 9, paragraph 3, asked whether the terminology should perhaps be harmonized and, if so, which expression should be used.

33. Mr. TLADI said that there was a difference in context, inasmuch as preambular paragraph 4 *bis* referred to the special situation of States themselves, while draft guideline 9, paragraph 3, concerned the impact of sea-level rise on people. He therefore saw no need to change the language in question.

Paragraph 3, as amended, was adopted.

Draft guideline 9 was adopted.

34. The CHAIRPERSON said he took it that the Commission wished to adopt the report of the Drafting Committee on the protection of the atmosphere, as a whole, as contained in document A/CN.4/L.894.

It was so decided.

²⁵⁶ General Assembly resolution 61/295 of 13 September 2007, annex.

35. The CHAIRPERSON said that it was his understanding that the Special Rapporteur would prepare the commentaries, for inclusion in the Commission's report on its sixty-ninth session.

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

[Agenda item 1]

36. The CHAIRPERSON drew attention to the proposed programme of work for the first two weeks of the second part of the Commission's sixty-ninth session, to be held

from 3 July to 4 August 2017. If he heard no objection, he would take it that the Commission wished to adopt the programme, as proposed.

It was so decided.

37. After the usual exchange of courtesies, the CHAIRPERSON declared the first part of the sixty-ninth session closed.

The meeting rose at 10.55 a.m.

* Resumed from the 3365th meeting.