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Seventieth session (first part)

Provisional summary record of the 3412th meeting
Held at Headquarters, New York, on Friday, 25 May 2018, at 10 a.m.

Contents

18-08454 (E)

Present:

Chair:	Mr. Valencia-Ospina
Members:	Mr. Argüello Gómez
	Mr. Aurescu
	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Gómez-Robledo
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Huang
	Mr. Jalloh
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Mr. Nolte
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Rajput
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Vázquez-Bermúdez
	Mr. Wako
	Sir Michael Wood
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 10.10 a.m.

Identification of customary international law (agenda item 6) (*continued*) (A/CN.4/710, A/CN.4/716, A/CN.4/717 and (A/CN.4/L.908)

Report of the Drafting Committee

Mr. Jalloh (Chair of the Drafting Committee), presenting the third report of the Drafting Committee for the seventieth session of the Commission, on the topic "Identification of customary international law" (A/CN.4/L.908), said that the report, which had been issued on 17 May 2018, contained the texts and titles of the draft conclusions on identification of customary international law provisionally adopted by the Drafting Committee, and which the Committee was recommending for adoption by the Commission on second reading. The work of the Committee had been greatly facilitated by the Special Rapporteur, other members of the Committee and the Secretariat. The Committee had held five meetings from 14 to 16 May 2018, where it had examined the 16 draft conclusions that had been adopted on first reading and had been referred to it by the Commission at the conclusion of the plenary debate.

Turning to Part One (Introduction), he said that the Committee had adopted the sole draft conclusion contained therein, namely draft conclusion 1 (Scope), which contained an outline of what the draft conclusions covered and what matters fell outside their scope, with no changes to the text adopted on first reading. The Committee had considered that the general commentary could be used to clarify that the draft conclusions did not address any possible burden of proof of rules of customary international law, a question that had been raised by some members of the Commission. The Committee had also noted that it could be made clear in the commentary that no attempt had been made to explain in general terms the relationship between customary international law and other sources of international law; and that the question of hierarchy among rules of international law, including those concerning peremptory norms of general international law (jus cogens) and erga omnes obligations, had not been addressed in the consideration of the topic. The Committee had discussed the apparent discrepancy, in English, between the term "determination" used in draft conclusion 1 and the term "identification" used in the title of the topic, and had accepted the Special Rapporteur's explanation that the terms had been used interchangeably throughout the draft conclusions, with "determination" relating more to the identification of a particular rule, as opposed to customary international law more broadly, in the sense in which it was used in Article 38 (1)(d) of the Statute of the International Court of Justice.

The basic approach to the identification of rules of customary international law had been set out in Part Two (Basic approach) of the draft conclusions. The Committee had adopted draft conclusion 2 (Two constituent elements) with no changes to the text adopted on first reading. The draft conclusion set out a two-element approach to the identification of rules of customary international law, which required an inquiry into two distinct yet related questions: whether a general practice existed and whether it was accepted as law (*opinio juris*). Over the years during which the topic had been under consideration by the Commission, States had expressed strong support for that approach.

The Committee had considered the proposal made by some States to add the qualifier "of States" after the phrase "a general practice" in the draft conclusion. Having considered that the formulation "a general practice" was unqualified in the Statutes of the Permanent Court of International Justice and the International Court of Justice, and in view of the possible relevance of the practice of international organizations, the Committee had deemed it preferable to retain the text adopted on first reading. Furthermore, the Committee had considered that Part Three (A general practice) of the draft conclusions explained the meaning of "general practice", making a qualifier in draft conclusion 2 unnecessary.

The Committee had also considered whether a paragraph should be added to the draft conclusion to clarify that a rigorous and systematic approach ought to be employed in the identification of customary international law, but ultimately decided to highlight that need in the commentary instead. It had also agreed that it should be made clear in the commentary that deduction might be used as an occasional aid in the application of the two-element approach, but with great caution, and not as an alternative to the standard, inductive approach.

The Committee had adopted draft conclusion 3 (Assessment of evidence for the two constituent elements) with no changes to the text adopted on first reading. The purpose of the draft conclusion was to provide guidance for assessing evidence for the two constituent elements of customary international law. The draft conclusion set out clear yet flexible requirements, and the text had the general approval of both States and members of the Commission. According to paragraph 1 of the draft conclusion, the assessment of any available evidence must be careful and contextual — an overarching principle underpinning all

the draft conclusions. The Committee members had agreed that the existence of a general practice that was accepted as law must be carefully investigated in each case, in the light of all the relevant circumstances, and saw no need to amend the paragraph.

With regard to paragraph 2, according to which an assessment of evidence for each of the two constituent elements was required because they had to be ascertained separately, he said that the Committee had generally agreed with the comments of some States, in relation to the need for rigorous analysis, that such assessment should be careful, after considering the suggestion of adding a qualifier such as "rigorous", "careful" or "systematic" before the word "assessment". However, in order not to detract from the focus of the paragraph, which was to emphasize that the existence of one of the two constituent elements might not be deduced merely from the existence of the other, and that a separate inquiry needed to be carried out for each, the Committee had decided to leave the wording adopted on first reading unchanged, with the understanding that the need for the assessment of evidence to be rigorous and systematic would be clarified in the commentary.

Turning to Part Three (A general practice), in which more detailed guidance was provided on the first of the two constituent elements of customary international law, he said that the Committee had retained the title adopted on first reading.

The purpose of draft conclusion 4 (Requirement of practice) was to specify whose practice was to be taken into account when ascertaining the existence of a general practice for purposes of determining whether a rule of customary international law existed, as well as the role of such practice. The draft conclusion had been adopted with some stylistic changes to paragraph 1 and no changes to paragraphs 2 and 3 as adopted on first reading, with some clarifications to be made in the commentary. The Drafting Committee had considered that it was important to preserve the careful balance that had been reached on first reading between the three paragraphs, which referred, respectively, to States, to international organizations, and to actors other than States and international organizations, and recognized that only practice of States and international organizations could be creative, or expressive, of customary international law.

In all three paragraphs, further to a suggestion by the Special Rapporteur in light of the debate in the plenary, the formulation "formation, or expression, of rules of customary international law", had been retained, as it was understood to clearly indicate the two different aspects of the contribution of practice to the identification of customary international law.

Paragraph 1 of the draft conclusion indicated that it was primarily the practice of States that was to be examined to determine the existence and content of rules of customary international law. The Committee had made two stylistic changes after considering several options to make the text clearer: the phrase "of a general practice" had been repositioned immediately after "the requirement", and the word "refers" had been employed instead of "means that it is".

The Committee had also considered whether to delete the word "primarily" before "the practice of States", as the concern had been expressed that doing so could, instead of highlighting the primary role of the practice of States in the formation, or expression, of rules of customary international law, might be interpreted to imply the opposite. It had thus been decided to maintain the word "primarily" in light of its dual purpose. First, it reflected the primacy of States as subjects of international law possessing a general competence, and emphasized the preeminent role that their conduct played in the formation and identification of customary international law. Secondly, it indicated that State practice was not the only practice that could be relevant, thus linking paragraph 1 with paragraph 2, which addressed the practice of international organizations.

Paragraph 2 indicated that in certain cases, the practice of international organizations as such, not that of their member States acting within them, which was attributed to the States in question, also contributed to the identification of rules of customary international law. The paragraph had attracted much interest and elicited a range of opinions from States and members of the Commission as to how the relevance of the practice of international organizations should be captured. The Committee had discussed at length whether the word "may" should be added before "also contributes", and whether the word "rules" should be changed to "a rule". The intent behind those proposals had been to emphasize the need for caution when assessing the relevance of the practice of international organizations, and to indicate that such practice would not be relevant in all cases. Members of the Committee had been generally of the view that the text adopted on first reading had been sufficiently clear in that respect, and that the delicate balance achieved on first reading in the wording of paragraph 2 would be altered by the proposed changes. Some had viewed the addition of "may" as an additional qualifier and considered it excessive and unnecessary, in the light of the presence of the phrase "in certain cases" at the beginning of the

paragraph, while replacing "rules" with "a rule" had been deemed too restrictive.

The Committee had discussed the concern raised by some members of the Commission that the wording of paragraph 2 did not make it sufficiently clear that the practice of international organizations should only be relevant when determining the "general practice" that was a constitutive element of customary international law. It had been proposed that the relationship between paragraph 2 and paragraph 1 should be made more explicit in that regard. The Committee had concluded, however, that the word "primarily" in paragraph 1, and the word "also" in paragraph 2, provided a sufficiently clear link between the two paragraphs. Paragraph 2 had therefore been retained unchanged from the text adopted on first reading, with the understanding that clarification would be provided in the commentary regarding the reference to the practice of international organizations, when and what kind of practice might be relevant and what considerations should guide an assessment of the weight given to it.

It was clear from paragraph 3 of draft conclusion 4 that the conduct of actors other than States and international organizations was neither creative nor expressive of customary international law and did not serve as primary evidence of the existence and content of rules of customary international law. According to the paragraph, however, such conduct might have a limited and indirect role in the identification of customary international law, by stimulating or recording practice and acceptance as law (*opinio juris*) by States and/or international organizations. Although some considered paragraph 3, as currently drafted, too restrictive in relation to the conduct of non-State actors, for example in relation to self-determination and non-international armed conflicts, the Committee had decided to retain the wording adopted on first reading, not least in view of its positive reception by States, on the understanding that the possible relevance of the conduct of actors other than States and international organizations would be clarified in the commentary.

Draft conclusion 5 (Conduct of the State as State practice), as adopted on first reading, reprised the formulation used in the articles on responsibility of States for internationally wrongful acts. The Committee had adopted the draft conclusion without making any changes to it.

Draft conclusion 6 (Forms of practice) comprised three paragraphs and had been adopted with no changes to the text adopted on first reading. The purpose of the draft conclusion was to clarify the types of conduct that were covered under the term "practice", providing examples thereof and stating that no type of practice had a priori primacy over another.

According to paragraph 1, practice could take a wide range of forms, including inaction. Committee members had engaged in an extensive debate on the Special Rapporteur's proposal to qualify "inaction" with the word "deliberate", in order to address the concern expressed by a number of States that clarification was needed of the circumstances, already recognized by the Commission in the draft commentary adopted as part of the first-reading text, under which inaction would amount to practice. However, in the view of some Committee members, the word "deliberate" could constitute too stringent a threshold for the identification of practice in relation to certain categories of rules, to the detriment of the flexibility necessary for the identification of customary international law. Instead, the Committee had considered that the phrase "may, under certain circumstances" could indicate sufficiently clearly that a State's inaction needed to be a conscious choice, as explained in the commentary adopted on first reading.

A non-exhaustive list of forms of practice that were commonly found useful for the identification of customary international law was provided in paragraph 2. The Committee had considered the absence of a reference to the practice of international organizations in the draft conclusion. In view of the commentary to draft conclusion 4, according to which a reference in the draft conclusions and commentaries to the practice of States should be read as including, where relevant, the practice of international organizations, the Committee had decided to retain the wording adopted on first reading, with the understanding that that general mutatis mutandis clause should be given more prominence in the commentaries.

The Committee had not considered any proposals to amend paragraph 3 of the draft conclusion, according to which there was no predetermined hierarchy among the various forms of practice, and had adopted it without change from the text adopted on first reading.

Draft conclusion 7 (Assessing a State's practice), which comprised two paragraphs, concerned the assessment of the practice of a particular State in order to determine the position of that State in assessing the existence of a general practice. The Committee had adopted without change paragraph 1, according to which account should be taken of all available practice of a particular State, which should be assessed as a whole, to determine its position on the matter in question. On paragraph 2, in which explicit reference was made to situations where there was or appeared to be

inconsistent practice of a particular State, the Committee had taken into consideration comments received from States, adding the phrase "depending on the circumstances", proposed by the Special Rapporteur, to convey more clearly the need for caution in such situations, given that not all cases of inconsistency would point to the same outcome. An explanation to that effect would be included in the commentary.

The Committee had adopted draft conclusion 8 (The practice must be general), which comprised two paragraphs, with no changes to the formulation adopted on first reading. The purpose of paragraph 1 was to clarify the notion of generality of practice, which had two requirements. First, the practice must be followed by a sufficiently large and representative number of States. Secondly, such instances of practice must be consistent. Regarding the first aspect, the Committee had agreed, following a debate on the matter, that the word "sufficiently" before the expression "widespread and representative" was necessary, as it implied and provided the necessary flexibility in the assessment of the generality of the practice, especially in circumstances where only a small number of States was involved in a given type of practice. As to the requirement of consistency, the Committee had considered the proposal by the Special Rapporteur that the word "consistent" should be replaced with "virtually uniform", which addressed a proposal made by some States in light of the terminology employed by the International Court of Justice in the *North Sea Continental Shelf* judgment. Committee members had been of the view that "virtually uniform" was only one of several expressions used in the case law to refer to a similar standard; that it could be understood as implying a stricter threshold of consistency and participation by States in the relevant practice; and that complete consistency was not required.

With regard to the question of "specially affected States", which had been raised by the Special Rapporteur and by a number of States and members of the Commission, the Committee had agreed with the suggestion made by the Special Rapporteur to include a discussion of the phrase in the commentary, along with an explanation that it did not refer to powerful States, but rather to those States whose interests might be particularly affected by a certain rule of customary international law.

The reference in paragraph 2 to the temporal element made clear that a relatively short period in which a general practice was followed was not, in and of itself, an obstacle to determining that a corresponding rule of customary international law existed. The Committee had adopted the paragraph without change from the text adopted on first reading, recognizing, however, that some time must elapse, since no such thing as "instant custom" existed.

Turning to Part Four (Accepted as law (*opinio juris*)), he said that it comprised two draft conclusions and offered more detailed guidance on the second of the two constituent elements of customary international law.

Draft conclusion 9 (Requirement of acceptance as law (*opinio juris*)) had been adopted by the Drafting Committee with no changes to the text adopted on first reading. The purpose of the draft conclusion, which comprised two paragraphs, was to encapsulate the nature and function of the second constituent element of customary international law: acceptance as law (*opinio juris*). In paragraph 1, it was made clear that acceptance as law (*opinio juris*), as a constituent element of customary international law, referred to the requirement that the relevant practice must be undertaken with a sense of legal right or obligation. In paragraph 2, a distinction was drawn between a general practice accepted as law, and mere usage or habit.

Draft conclusion 10 (Forms of evidence of acceptance as law (*opinio juris*)) comprised three paragraphs concerning the forms of evidence of the second constitutive element of rules of customary international law. The Drafting Committee had once again retained the wording adopted on first reading. Paragraph 1 contained the general proposition that acceptance as law (*opinio juris*) might take a wide range of forms.

Paragraph 2 contained a non-exhaustive list of forms of evidence of acceptance as law (*opinio juris*), including those most commonly resorted to for such purpose, which also explained why there were differences between that list and the one set out in draft conclusion 6, paragraph 2, as each contained references to the principal examples that were connected with each of the constituent elements. The Committee had debated whether the list in paragraph 2 should be expanded to include legislative acts and resolutions adopted by international organizations or at intergovernmental conferences as two additional potential forms of evidence. With regard to legislative acts, the Committee had decided that they would be addressed in the commentary, since it was only rarely specified in laws (as opposed perhaps to acts in connection with their adoption) that they were mandated under or gave effect to customary international law. With regard to resolutions, the Committee had decided that they were covered by the existing wording and had recalled that a particular draft conclusion had been dedicated to exploring their role. It had been noted also that the list

in paragraph 2 was not meant to be exhaustive. The Committee had also agreed that it would be stated in the commentary that the forms of practice listed in paragraph 2 could apply, mutatis mutandis, to international organizations.

The failure by States to react, within a reasonable time, to a practice as possible evidence of their *opinio juris* was addressed in paragraph 3. The Drafting Committee had considered that the reference to inaction in the draft conclusion served a different purpose from that found in draft conclusion 6, which justified the differences between the references to inaction in the two draft conclusions. The Committee had also considered a proposal to delete the words "over time", as they might suggest the necessity of a particular duration of a State's inaction, which might not always be required. Ultimately, the Committee had taken the view that the text adopted on first reading had captured well the fact that, where a State did not or could not have been expected to know of a certain practice or had not yet had a reasonable time to respond, inaction could not be attributed to an acknowledgment that such practice was mandated (or permitted) under customary international law.

Part Five (Significance of certain materials for the identification of customary international law) comprised four draft conclusions. The Drafting Committee had made no change to the text of draft conclusion 11 (Treaties) adopted on first reading. The purpose of the draft conclusion, which comprised two paragraphs, was to address the potential significance of treaties for the identification of customary international law.

In paragraph 1, three distinct circumstances were specified under which rules set forth in a treaty might be relevant to the identification of customary international law, distinguished by the time when the rule of customary international law was (or began to be) formed. Subparagraph (a) concerned the situation where it was established that a rule set forth in a treaty was declaratory of a pre-existing rule of customary international law; subparagraph (b) dealt with the case where it was established that a general practice that was accepted as law (accompanied by *opinio juris*) had crystalized around a treaty rule elaborated on the basis of only a limited amount of State practice; while subparagraph (c) concerned the case where it was established that a rule set forth in a treaty had generated a new rule of customary international law. Paragraph 1 reflected the terminology used by the International Court of Justice.

Paragraph 2 contained a reminder that the existence of similar provisions in a number of bilateral or other treaties, establishing similar rights and obligations for a broad array of States, did not necessarily indicate that a rule of customary international law was reflected in such provisions. Rather, it could suggest that no rule existed and thus there was a need for treaties. That question had been addressed by the International Court of Justice in the case concerning *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*.

Draft conclusion 12 (Resolutions of international organizations and intergovernmental conferences) comprised three paragraphs. The Drafting Committee had adopted paragraphs 1 and 3 without changes to the first-reading text and had amended paragraph 2. The purpose of the draft conclusion was to address the potential role that resolutions adopted by international organizations or at intergovernmental conferences could play in the identification of rules of customary international law and their content. The lack of parallelism between that draft conclusion and draft conclusion 11, on treaties, had been found to be justified, given the different guidance and clarifications that had been sought to be made between them.

Paragraph 1, in which it was clarified that a resolution adopted by an international organization or at an intergovernmental conference could not, of itself, create a rule of customary international law, also made clear that the adoption of a resolution did not create such law. The Committee had adopted the paragraph without changes to the formulation on first reading. The Committee had reformulated paragraph 2, to read as follows: "A resolution adopted by an international organization or at an intergovernmental conference may provide evidence for determining the existence and content of a rule of customary international law, or contribute to its development." In the light of the plenary debate, the Committee had decided not to add the words "in certain circumstances", as the Special Rapporteur had proposed, and to leave the word "may", which it believed was sufficient. For the sake of consistency with the other draft conclusions, the Committee had replaced the word "establishing" with the word "determining". In paragraph 3, it was clarified that a provision in a resolution adopted by an international organization or at an intergovernmental conference could reflect a rule of customary international law if it was established that the provision corresponded to a general practice that was accepted as law. The paragraph had been adopted with no change to the first-reading text.

The Drafting Committee had adopted draft conclusion 13 (Decisions of courts and tribunals), which comprised two paragraphs, without making any changes to the text adopted on first reading. The purpose of the

draft conclusion was to address the potential role of decisions of courts and tribunals, both international and national, as subsidiary means in the identification of rules of customary international law. In paragraph 1, the phrase "international courts and tribunals" referred to any international body exercising judicial powers that was called upon to consider rules of customary international law. An express reference to the International Court of Justice had been included in view of the significance of its case law for the identification of customary international law. Paragraph 2 concerned the decisions of national courts.

The Drafting Committee had considered a suggestion made by some members of the Commission to address together the decisions of national and international courts as subsidiary means for determining rules of customary international law. The Committee had considered that it was important to maintain the distinction between international and national courts and tribunals, in practical terms and also in view of the dual role played by the decisions of national courts, which could signal State practice or acceptance as law, as well as serve as a subsidiary means for the determination of rules of customary international law. The Committee had also decided that, in view of the positive reception of that draft conclusion by States, no change to the text adopted on first reading was warranted. It would be highlighted in the commentary that the value of the decisions of both national and international courts would primarily depend on the quality of reasoning and on how they had been received by States, and future case law.

The Drafting Committee had adopted draft conclusion 14 (Teachings) with no changes to the formulation adopted on first reading. The purpose of the draft conclusion was to address the role of teachings (in French, *doctrine*) as subsidiary means for the identification of customary international law. The draft conclusion followed closely the wording of Article 38(1)(d) of the Statute of the International Court of Justice, providing that teachings could constitute a subsidiary means for determining a rule of customary international law. The term "teachings" was to be understood in a broad sense, including for instance audiovisual materials. Furthermore, as indicated in the commentary adopted on first reading, the term "publicist" covered all those whose scholarly work might help to elucidate questions of international law. The importance of referencing, so far as possible, writings representative of the principal legal systems and regions of the world and in various languages, had been emphasized.

Part Six (Persistent objector) comprised only draft conclusion 15, also entitled "Persistent objector", which consisted of three paragraphs. Paragraph 1 read: "[w]here a State has objected to a rule of customary international law while that rule was in the process of formation, the rule is not opposable to the State concerned for so long as it maintains its objection." The timing of the objection was critical, as it must have been made while the rule in question was in the process of formation. If a State established itself as a persistent objector, the rule was not opposable to it as long as it maintained the objection. Further clarification of the stringent requirements for the application of the rule was provided in paragraph 2, including that the objection must be clearly expressed, made known to other States and maintained persistently. Although the members of the Commission had expressed different views as to where the draft conclusion should be placed within the set of draft conclusions, the Committee had decided to retain the text of the two paragraphs as adopted on first reading, also in view of the wide support expressed by States for the draft conclusion.

Further to a proposal made by the Special Rapporteur, the Drafting Committee had added paragraph 3, which read as follows: "The present conclusion is without prejudice to any question concerning peremptory norms of general international law (jus cogens)." Although it would be clarified in the general commentary that all the draft conclusions were without prejudice to questions of hierarchy among rules of international law, including those concerning peremptory norms of general international law (jus cogens), the Committee had agreed to clarify that point in the particular context of draft conclusion 15. It would also be stated in the commentary that the "without prejudice" clause applied to the other conclusions as well.

The Committee had considered whether the text of paragraph 3 should more explicitly reflect the view that persistent objection was not permissible in relation to peremptory norms of general international law (jus cogens) as well as, possibly, *ergo omnes* obligations. The Committee had considered that those issues had not been studied under the topic, and were currently being examined by the Commission under a different topic. The intention behind the new paragraph 3 was thus to clarify that the Commission was not prejudging any such questions.

Part Seven (Particular customary international law) consisted of draft conclusion 16 (Particular customary international law), which comprised two paragraphs. The purpose of the draft conclusion was to address the particular situation of rules of customary

international law applying only among a limited number of States. Paragraph 1 contained the definition of a rule of particular customary international law as a rule applying only among a limited number of States that should be distinguished from general customary international law, which in principle applied to all States. Importantly, a rule of particular customary international law as such created neither obligations nor rights for third States.

Paragraph 2, which addressed the substantive requirements for identifying a rule of particular customary international law, read as follows: "To determine the existence and content of a rule of particular customary international law, it is necessary to ascertain whether there is a general practice among the States concerned that is accepted by them as law (*opinio juris*) among themselves." The Committee had inserted the words "among themselves" at the end of the paragraph, as suggested by the Special Rapporteur, to clarify that, in order to determine whether a rule of particular customary international law existed, it was necessary to conduct a search for a general practice prevailing among the States concerned that was accepted by them as law governing their relations, and to underline that the two-element approach was stricter in the case of rules of particular customary international law.

As to the final form of the provisions, the Drafting Committee had decided to retain the term "conclusions", since the objective of the topic was to offer some reasonably authoritative guidance to those called upon to identify the existence and content of rules of customary international law. The decision was consistent with the decisions taken by the Commission for other related topics, without prejudice to the substantive consideration of the final forms of other topics currently under discussion.

The Committee recommended that the Commission should adopt the draft conclusions on identification of customary international law on second reading.

The Chair invited the Commission to adopt the text of the draft conclusions as adopted by the Drafting Committee on second reading, as contained in document A/CN.4/L.908.

Draft conclusions 1 to 14

Draft conclusion 1 to 14 were adopted.

Draft conclusion 15

Mr. Park, supported by **Mr. Argüello Gómez**, said that he would not block the adoption of the draft conclusion but wished his concerns to be reflected in the record of the meeting. While the changes that had been made to draft conclusion 15 (Persistent objector) since the adoption of the draft conclusion on first reading might have reduced the possibility of the abuse of the provision, he still considered the persistent objector rule or doctrine to be controversial both in the theory of international law and in State practice. Furthermore, he was not convinced that the text would clearly convey the intended meaning to practitioners and State officials who were not particularly familiar with the theory of international law.

Draft conclusion 15 was adopted.

Draft conclusion 16

Draft conclusion 16 was adopted.

The Chair said he took it that the Commission wished to adopt the text of the draft conclusions as adopted by the Drafting Committee on second reading, as a whole, as contained in document A/CN.4/L.908.

It was so decided.

Sir Michael Wood (Special Rapporteur) thanked the Commission for the adoption of the text, and the Chair of the Drafting Committee for his excellent leadership. He invited members of the Committee to submit suggestions for the commentaries to the draft conclusions by 14 June 2018. He hoped that during the second part of the session the Committee would carry out work on the basis of the memorandum prepared by the Secretariat on ways and means for making the evidence of customary international law more readily available (A/CN.4/710). He also invited members to suggest works for inclusion in the bibliography, which he hoped to expand with items in many other languages.

Protection of the atmosphere (*continued*) (A/CN.4/711)

The Chair invited the Commission to resume its consideration of the fifth report on the protection of the atmosphere (A/CN.4/711).

Sir Michael Wood thanked the Special Rapporteur for his report and oral introduction. Like its predecessors, the current report had stimulated a lively debate. He agreed with everything that previous speakers had said, particularly Ms. Galvão Teles, Mr. Murphy, Ms. Oral, Mr. Park and Mr. Reinisch.

He reiterated the view that there was no separate branch of international law known as the "law on the protection of the atmosphere". That point had been made in the Sixth Committee, as noted in footnote 18 of

the Special Rapporteur's report, and yet the Special Rapporteur continued to use that term.

Furthermore, the topic "Protection of the atmosphere" itself continued to be the subject of highly critical comments and concerns in the Sixth Committee. The Special Rapporteur's characterization of the debates in his fifth report, as in his earlier reports, was somewhat optimistic. Similarly, in his oral introduction, the Special Rapporteur had invoked support for the topic from quarters where it did not seem to exist. Over the years, and as recently as 2017, he and other members of the Commission and representatives in the Sixth Committee had expressed serious doubts about the usefulness of the Commission's continuing work on the topic. It was not clear whether any guidelines produced by the Commission would help or hinder States in their negotiations on matters relating to the protection of the atmosphere. If a first reading were completed during the current session, it would be appropriate to take stock of the situation before moving forward any further.

With regard to draft guideline 10 (Implementation), he did not think that the Commission should concern itself with the "implementation" of the guidelines at the national level. The Special Rapporteur acknowledged in paragraph 12 of his report that all the forms of implementation "are regulated by the national constitutional and legal system of each State; all the draft guidelines can do is address the obligation that States have to implement the relevant international law in good faith". The extensive case law cited in the footnotes did not seem to be relevant.

As Ms. Oral had noted, three types of obligations that were not reflected in other international instruments or academic sources were referred to in paragraph 14 of the report: "obligation of measures", "obligation of methods" and "obligation of maintenance". He did not understand the point being made by the statement that such classifications were "illustrative and the minimum to protect the atmosphere" and, as others had suggested, the proposed wording for draft guideline 10 did not shed any light on the matter. With regard to paragraph 4 of the draft guideline, he concurred with the various members who had stated that the Commission should not address the matter of the extraterritorial application of national law.

In connection with draft guideline 11 (Compliance), he said that the distinction made in the report between breach and non-compliance did not make sense. Any distinction to be made was surely between the different types of procedures that might be laid down in individual conventions, not between different forms of breach.

He agreed with Mr. Park and Mr. Reinisch that draft guideline 12 (Dispute settlement), with its rather extensive justification in the report, was hardly appropriate. He reiterated his doubts about whether suggestions concerning evidence and procedures to be brought before international tribunals, which were contained in the draft guideline, should form part of the Commission's work on the topic. Furthermore, the Special Rapporteur indicated in paragraph 2 of the draft guideline that "due consideration should be given to the rules and procedures concerning, inter alia, the use of experts", and referred to the possibility of their appointment and cross-examination. That seemed harmless but was not necessary, as it concerned a matter that was entirely for the parties in a dispute and for the adjudicators to decide on in the context of a specific case. He agreed with colleagues that the theoretical discussion in the report on the concepts of *non ultra petita* and on whether *jura novit curia* might apply to facts was not particularly illuminating and had no real connection with the topic of protection of the atmosphere. In short, he did not see the need for a guideline on dispute settlement.

For those reasons, and others, he was not in favour of referring draft guidelines 10, 11 and 12 to the Drafting Committee. If, nevertheless, any of them were referred to the Drafting Committee, they would have to undergo substantial changes. He would therefore encourage the Special Rapporteur to submit to the Drafting Committee new texts in the light of the plenary debate, as he had helpfully done in the past.

Ms. Escobar Hernández said that she wished to begin by making some general comments before addressing the draft guidelines proposed by the Special Rapporteur. First, on the distinction drawn between the terms "implementation" (*aplicación*) and "compliance" (*cumplimiento*) in paragraph 11 of the report, at least in the Spanish version, the terms, while not being exactly identical, referred to the same reality and could be used synonymously in some contexts, so it would create confusion to assign them different meanings in the draft guidelines. The definition of "compliance" given in paragraph 11 seemed to relate more to monitoring and evaluation of the activities undertaken by States to comply with their treaty obligations. It was true that both terms were employed in certain international instruments concerning the environment, including the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú Agreement) adopted on 4 March 2018. However, she had provided support to the Economic Commission for Latin America and the Caribbean and the negotiating States during the

negotiations on the Escazú Agreement and could state with certainty that the terms were used in that text in the context of assessing compliance. Moreover, the originally proposed wording had been different; those terms had been settled upon following a lengthy debate, in an attempt to overcome difficulties with the English and Spanish language versions and to avoid the use of formulations of a punitive character. Furthermore, they were used in the context of the relationship between implementation and the monitoring of implementation; there had been no intention to make any sort of pronouncement on the issue of responsibility.

Secondly, she did not think that the distinction between the terms "breach" and "non-compliance" could be maintained, as both terms were synonymous. Moreover, any breach of an international obligation by a State entailed its international responsibility, regardless of the types of mechanisms that might have been established in the relevant international instrument to deal with breaches. She understood the reasoning behind the Special Rapporteur's emphasis on non-punitive measures as the best way of promoting compliance with obligations relating to protection of the environment and considered that, in certain circumstances, they probably did promote compliance. In that connection, she agreed with the Special Rapporteur that international cooperation was essential. The approach taken under the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) provided a good example in that regard. However, the desire to favour measures that were not punitive or coercive must not lead to the modification of well-established concepts, such as the breach of international obligations and the State responsibility that ensued from such breach.

Thirdly, while the extraterritorial application of certain rules of national law undeniably took place, and was supported by international law, it was a stretch to affirm, as the Special Rapporteur did in paragraph 19 of his report, that "[n]ation States are increasingly asserting jurisdiction and control over activities that occur extraterritorially." Although the Special Rapporteur did later nuance that statement and note that legitimate legal grounds were required, the statement was confusing and would be best avoided.

Turning to draft guideline 10, she agreed with the underlying principle that there was an obligation to comply with international obligations in good faith, including by adopting the necessary measures at the national level. However, that principle was not adequately reflected in the draft guideline. In that connection, the phrase "obligations affirmed by the present draft guidelines" in paragraph 1 did not take into account the nature of the draft guidelines. She suggested that the paragraph should be amended and combined with paragraph 3, which referred to "recommendations", which seemed more appropriate than "obligations". She shared the concerns that had been expressed by other members of the Commission about the controversial reference in paragraph 2 to "damage or risk" as a necessary condition for establishing State responsibility in connection with non-compliance with or breach of an international obligation. Furthermore, paragraph 4 contained statements about extraterritoriality that were difficult to justify. The use of expressions such as "comity among the States" should be carefully considered. The contradiction between the first and last sentences of paragraph 4 must also be resolved.

She had fewer reservations about draft guideline 11. However, to ensure that it was properly understood, it should include a reference to international responsibility resulting from non-compliance with or breach of an international obligation. She had no objection to the use of the phrase "effectively comply", as it made it clear that the necessary measures must be adopted to ensure compliance with the obligation in question. However, the last sentence of paragraph 4 should be deleted, as it contained a purposive element that was difficult to justify both in theory and in practice.

Concerning draft guideline 12, she considered paragraph 1 too drastic, in that it contained a list of means of dispute settlement which, as another member had noted, would risk excluding other permissible means. In her view, a simple reference to Article 33 (1) of the Charter of the United Nations would be sufficient because, as she understood it, the aim of the draft guideline was to draw attention to the principle of peaceful settlement of disputes and its application in the context of the protection of the atmosphere. With regard to paragraph 2, she shared the Special Rapporteur's view that it would be appropriate to draw attention to the possibility of using experts in the settlement of disputes through judicial procedures or arbitration, given that that was an important issue that had created problems in practice. However, she had serious concerns about the references in paragraph 3 to *jura novit curia*, an established legal principle whose meaning was never in doubt. The statement that *jura novit curia* applied not only to law but also to facts should therefore be removed, as it did not correspond to the well-established understanding of the principle.

She had no objection to draft guidelines 10, 11 and 12 being referred to the Drafting Committee, as the concerns expressed by her and other members of the

Committee could be best addressed in that forum. She concluded by thanking the Special Rapporteur for his dedication and the significant effort he had made to move forward with a topic that was of great importance to the international community.

Mr. Petrič said that the Special Rapporteur had shown commendable persistence in his work on a topic on which there had been diverging views from the beginning. He did not think that the work should be terminated or suspended, in particular given the importance of the topic to humanity. It would be preferable to adopt the draft guidelines on first reading and then seek the views of States on whether or not the work should continue. It was likely that similarly unusual topics would be taken up in the future, and the Commission should not shy away from them, but it must adopt a careful approach. In that connection, it should avoid giving the impression that it wished to impose obligations on States through the draft guidelines on the protection of the atmosphere. The Commission's role was not to impose obligations; rather, it was to examine the state of the law and perhaps appeal to States to comply with their existing obligations. He therefore considered that the Special Rapporteur had gone too far in affirming in paragraph 105 of the report that the Commission had "provisionally adopted draft guidelines containing certain obligations, as well as recommendations, relating to the protection of the atmosphere." He urged the Special Rapporteur to rid the draft guidelines of any wording that could lead to a misunderstanding concerning obligations. Member States would most likely put a stop to the Commission's work on the topic if they were given the impression that the Commission was attempting to impose obligations that did not currently exist under international law. That would be unfortunate, given the importance of the topic.

He supported the Special Rapporteur's general view that in matters of the environment, international courts should seriously consider scientific and technical evidence. He also agreed that the interests of future generations should be taken into account. He had been pleased to read in paragraph 9 that the delegations of some Pacific island States had proposed that the Commission should take on a topic related to sea-level rise as a separate new topic. He supported that proposal and urged the Commission to give serious consideration to any topics suggested by Member States for the programme of work.

He had reservations about the emphasis placed on the implementation of the Singaporean Transboundary Haze Pollution Act as a basis for draft guideline 10, since the implementation of the Act had given rise to a dispute and thus did not necessarily lead to the conclusions that seemed to have been drawn by the Special Rapporteur. He also had a number of concerns about the draft guideline itself. The affirmation in paragraph 1 that States were "required to implement in their national law the obligations affirmed by the present draft guidelines" was far-reaching and would be better avoided. Moreover, the phrasing seemed to imply that States were not required to fulfil obligations that were not affirmed in the draft guidelines. In the same paragraph, the phrase "national implementation takes the forms of legislative, administrative and judicial actions" seemed to rule out other possible forms of implementation at the national level. He was not sure that the explanation of State responsibility in paragraph 2 was necessary, but he would not object to its being retained. He supported the use of the word "should" in paragraph 3. However, he was strongly opposed to paragraph 4. The Commission might examine the topic of extraterritorial application of national law in the future, but at current juncture there was no basis for the inclusion of paragraph 4. The subject of extraterritorial application was very complex, and it was insufficient to simply state that it "should be exercised with care, taking into account comity among the States concerned." Furthermore, the statement that "the extraterritorial enforcement of national law by a State should not be exercised in any circumstance" was problematic, as it implied that in some other circumstances it was permissible to use force for the extraterritorial enforcement of national law.

Turning to draft guideline 11, he said there was no difference between non-compliance and breach. If an act of a State was not in compliance with international law it must necessarily be a breach; it was not possible for an act to be simultaneously in accordance and not in accordance with international law. Furthermore, the phrase "effectively comply" in paragraph 1 was problematic, as it created an obligation of result. The guidelines could require compliance, but not "effective" compliance. He also considered that the Special Rapporteur should have devoted more attention to the mechanisms available under international law to enable States in difficult situations to comply with environmental treaties. For example, they could be given additional time to implement the necessary measures, or could be required to achieve only a certain percentage of a target. If such options were not available, some States might make reservations to treaties, decline to ratify them or delay their ratification.

With regard to draft guideline 12, he was not convinced that it was necessary to set out a general principle of the peaceful settlement of disputes, as was the case in paragraph 1, given that the principle was

contained in the Charter of the United Nations and was therefore jus cogens. With regard to paragraph 2, he agreed with the Special Rapporteur that scientific evidence should be brought before international courts in environmental cases. That, however, had little to do with *non ultra petitia* and *jura novit curia*. First, in accordance with the rule of *non ultra petita*, the court must deal with the case within the limits set by the parties. In practice, courts often failed to respect that rule not by overreaching, but by failing to address every issue within the established limits.

In many cases that ended up at the European Court of Human Rights, national courts had been found wanting, not because they had violated the *non ultra petita* rule, but because they had failed to adequately address all the issues raised by the parties. In each of those cases, the court's role had been to address all the facts. That should also be its role in environmental cases. Similarly, the *jura novit curia* principle allowed the court to find the law that applied to established facts, using all the necessary factual knowledge to reach a well-founded decision. There was no limitation to how far it could go in search of that knowledge. Thus, while he supported the Special Rapporteur's efforts to urge the courts to pay attention to scientific evidence, he did not think that it was necessary to invoke the principles to *non ultra petita* and *jura novit curia* in order to do so. He therefore suggested that the draft guideline should be reformulated accordingly.

Mr. Šturma said that, having supported the inclusion of the important topic of protection of the atmosphere in the Commission's programme five years earlier, he commended the Special Rapporteur for his patience and efforts in dealing with it and for completing the entire set of draft guidelines for the first reading. However, like Ms. Oral, Mr. Park, Mr. Murphy and others, he was not convinced that they contributed much to the development of rules on the protection of the atmosphere. The report was rather unbalanced; some parts, such as that dealing with the Singaporean Transboundary Haze Pollution Act 2014, were disproportionately long. The content of the draft guidelines did not always result from the analysis in the report. Furthermore, like Mr. Aurescu, he failed to see the relevance to the topic of the distinction made in paragraph 14 between the three types of obligations. If such a distinction was needed for the purpose of conclusions on implementation in national law, then the distinction of obligations of conduct and obligations of result might perhaps serve better to that end. In the case of obligations of result, States could take any measures, including legislative measures, or could take no measures, provided that they were otherwise in compliance with their international obligations.

With regard to individual draft guidelines, draft guideline 10 should be shortened and partly modified: the obligations provided for in paragraph 1 were too strict, given the nature of the draft guidelines. In the first sentence, the qualification "where appropriate" might usefully be introduced; the second sentence would be better if it included the wording "national implementation may take the forms, etc.". The wording of paragraph 2 was unclear: there was no need to state that any breach attributable to a State of an obligation binding on that State entailed its responsibility under international law. If the obligation was not binding, then failure to comply with it did not entail responsibility. It was not clear whether the inclusion in that paragraph of the concepts of damage and risk was intended to weaken the obligation, in the sense that not every failure to comply would entail responsibility, but possibly only if it triggered the non-compliance mechanisms, or to introduce the concept of international liability for damage or even for risk, albeit through the back door. If such was indeed the intention, it was not acceptable; in any case, he preferred to delete the reference to risk. In paragraph 3, he supported the drafting changes proposed by Mr. Reinisch. Paragraph 4 introduced complex and controversial issues that were not generally relevant to the topic; he therefore proposed its deletion.

Draft guideline 11 (Compliance), although more appropriate than the provision on responsibility, needed to be amended: in paragraph 1, the word "effectively" could be deleted; in paragraph 2, after the words "as appropriate", he proposed the addition of "in accordance with the relevant environmental agreements"; paragraphs 3 and 4 should be deleted: their content could be explained in commentaries.

The provisions on dispute settlement contained in draft guideline 12 would seem more suitable for treaties than for draft guidelines. Paragraph 1 was not necessary, as it merely repeated what was already stipulated in the Charter of the United Nations; if the reference was maintained, it should be clearly indicated that disputes between States should be settled by one or more peaceful means freely chosen by the States concerned or provided for in the relevant agreement. Paragraph 2 should be deleted, as the problem of evidence might more appropriately be left to the rules of procedure of the competent international courts or tribunals. Paragraph 3 was potentially misleading and should likewise be deleted: he did not see how the principle of *jura novit curia* applied to facts and he could not support the inclusion of the rule of *non ultra petita*, for the reasons explained by Mr. Reinisch. Notwithstanding his

comments, which in no way called into question the academic quality of the report, he was not opposed to the referral of the draft guidelines to the Drafting Committee, if such was the wish of the majority of the members. He thanked the Special Rapporteur for his extensive work and interesting report.

Mr. Grossman Guiloff said that the Special Rapporteur's commitment to the work on protection of the atmosphere was exemplary. The Commission's work on the topic showed its own commitment to such topics of current relevance, having regard in particular to the comments of the Sixth Committee representative of Belize during the commemoration of the Commission's seventieth anniversary, encouraging the Commission to pursue topics of interest to a wider variety of States, and specifically smaller States. The work on protection of the atmosphere was valuable and an appropriate addition to its work of the current session. He accordingly supported the referral of the three new draft guidelines to the Drafting Committee, with due regard for his concerns. He agreed with the Special Rapporteur that draft guidelines on implementation, compliance and dispute settlement were a logical way to address the recommendations provisionally adopted by the Commission on the topic. The draft guidelines reflected the importance of establishing principles and approaches that States might apply for the implementation of, and compliance with, those recommendations as well as their other international obligations. As had been noted by Mr. Rajput and others, the adoption of a cooperative approach to help ensure compliance by non-compliant States and the emphasis on peaceful dispute settlement came well within the scope of the work proposed on the topic by the Commission.

He agreed with the substance of draft guideline 10 but, like Ms. Galvão Teles, Mr. Cissé and others, he thought that it should be streamlined. Paragraphs 1 to 3 should better reflect the flexibility provided for by international law for States to fulfil their obligations under international law, with as much latitude and as that they saw fit, unless they had agreed otherwise. He concurred with Mr. Reinisch and Mr. Rajput that the mandatory tenor of the wording of the draft guideline seemed inconsistent with what had been suggested in paragraph 14 of the report, and indeed with the recommendatory nature of the draft instrument, having regard to the variety of ways available to States for complying with their international obligations. He agreed with Mr. Reinisch that the draft guideline should be revised to make it compatible with the articles on responsibility of States for internationally wrongful acts. In particular, it appeared to him that paragraph 2 of the draft guideline was inconsistent with article 2 of the articles on State responsibility which, as Mr. Reinisch had noted, did not require proof of damage or risk, or a clear and convincing standard of proof to determine State responsibility. In addition, the standard of proof set by the Special Rapporteur of "clear and convincing" evidence was not properly defined in the report and would need to be clarified. It was therefore inappropriate at the current stage to refer to those additional elements in the text. He suggested that the Drafting Committee should strive to align paragraph 2 of draft guideline 10 with article 2 of the articles on State responsibility.

In paragraph 3, he recommended the inclusion of a reference to the need to take into consideration, in complying with international obligations, the situations of the most vulnerable people affected, as stated by the Special Rapporteur in paragraph 15 of his report. Draft guideline 9, regarding the interrelationship of relevant rules, provided a model in that regard. He agreed with the view expressed by Mexico in the Sixth Committee at the seventy-second session of the General Assembly, in reference to paragraph 3 of draft guideline 9, that "the concern with regard to vulnerable groups should not be restricted to the interpretation of rules, but should permeate the entire instrument …". That point was particularly relevant to draft guideline 10 and the actions taken by States to comply with their international obligations concerning the protection of the atmosphere. He therefore suggested the following revised wording for paragraph 3 of draft guideline 10: "States should give serious consideration to the agreed recommendations contained in the present guidelines, with special consideration to persons and groups particularly vulnerable to atmospheric pollution and atmospheric degradation".

Regarding paragraph 4, he agreed with Ms. Oral and Mr. Rajput that the issue of extraterritorial application of domestic law should be dealt with in the commentary. He generally agreed with Ms. Oral that the extraterritorial application of domestic law might be possible under exceptional circumstances. In the advisory opinion of the Inter-American Court of Human Rights referred to by Ms. Oral, the Court had interpreted the word "jurisdiction" in article 1 (1) of the American Convention on Human Rights as extending to activities within a State causing extraterritorial environmental damage or impairment of rights under the Convention of people outside its territory. That Court had been the first human rights court to recognize an extraterritorial jurisdictional link based on control over domestic activities with extraterritorial effect. That was a new area of development for States, which might therefore

be more appropriately addressed through commentaries. In addition, the affirmative language used in the last sentence of that paragraph might require serious debate. Mr. Huang had rightly raised the question of what standard was to be applied to determine the existence of a "well-founded grounding in international law". He therefore suggested that paragraph 4 should be deleted and that the issue of extraterritorial application and enforcement of domestic law should be addressed in the commentary.

Turning to draft guideline 11, he said that the inclusion of facilitative approaches to non-compliance seemed to imply a treaty or a system having the institutional capability to organize such approaches. While that might indeed be the primary way of addressing non-compliance in environmental treaties, that seemed somewhat irrelevant to the purpose of the draft guidelines, which, as he understood it, was to codify customary norms rather than to assess compliance with a future convention. Either the draft guidelines and commentaries needed to be expanded to deal at greater length with remedies for any breach of the international obligations identified in the guidelines, or a process or approach needed to be developed to differentiate between cases where stricter enforcement was required and cases where facilitation would be in order. He concurred with Mr. Murphy, Mr. Huang and others, however, that such an option was probably impossible politically. An alternative would be to remain silent about specific methods of addressing enforcement and non-compliance. He therefore agreed with Ms. Galvão Teles that the discussion of such specific measures, currently addressed in paragraphs 3 and 4, should more appropriately be reserved for the commentary, thereby offering States greater flexibility in the fulfilment of their obligations towards protection of the atmosphere, as he had also said in his comments on draft guideline 10.

He agreed with the substance of draft guideline 12 but, like Mr. Murphy, considered the reference in paragraph 1 to Article 33, paragraph 1, of the Charter of the United Nations to be improper; it should be replaced with a reference to Article 2, paragraph 3, which stated that: "[a]ll Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered", and thus better captured the nature of the topic and would allay some of the concerns raised by members. He likewise agreed with the Special Rapporteur about the importance of the role of scientific experts in disputes relating to the protection of the atmosphere, which were usually fact-intensive and science-dependent; the issue would, however, be better addressed in the commentary. He therefore recommended that paragraphs 2 and 3 should be deleted and the important issue of scientific evidence should be dealt with in the commentary.

It should also be highlighted that, as part of the progressive development of international environmental law with the inclusion of a more science-based approach, permanent and specific bodies had been established under important international treaties that provided scientific and technical guidance for their implementation. Examples included the Subsidiary Body on Scientific, Technical and technological Advice, under the Convention on Biological Adversity and the Intergovernmental Panel on Climate Change, under the United Nations Framework Convention on Climate Change. The Special Rapporteur had noted the prudent shift towards the incorporation of more technical and scientific issues in the legal analysis of environmental dispute settlement cases and the participation of scientific experts in related court proceedings, especially in the International Court of Justice. The scientific perspective on environmental law was indeed important, but it would be better handled through the commentaries.

Mr. Ruda Santolaria said that he supported the Commission's work on the topic of protection of the atmosphere and the Special Rapporteur's efforts to address it appropriately and in a manner comprehensible to all its members, including through a meeting with a select group of scientists, held in Geneva in 2017. The progress so far achieved in studying the topic and developing draft guidelines had benefited from his tenacity and steadfastness. While some States had voiced doubts or concerns about the topic, others, including his own, Peru, had supported it. Analysis and discussion of the topic, which was of such significance and relevance for the Commission, should certainly be continued with a view to completing its first reading of the related proposals.

One element to be considered in terms of the link between the topic and international human rights law, noted by the Special Rapporteur in his fourth report (A/CN.4/705) and reflected in draft guideline 9, was the advisory opinion of 15 November 2017 of the Inter-American Court on Human Rights concerning the environment and human rights. It was notable that the Court had recognized the right to a healthy environment as a right in itself and had stressed that the enjoyment of some rights, such as the rights to life, personal integrity, health or property, could be particularly affected by environmental degradation.

With regard to the current report and the three new draft guidelines proposed by the Special Rapporteur, he appreciated the interesting references made by the Special Rapporteur to some State laws, particular international instruments and cases brought before national courts, as well as before the International Court of Justice, the International Tribunal for the Law of the Sea and the World Trade Organization dispute settlement system. He disagreed, however, with some of the Special Rapporteur's reasoning and conclusions and with the form and some of the content of the new draft guidelines. A core cross-cutting concern in the three new draft guidelines was the excessively prescriptive or mandatory character of their content which, like previous speakers, he too found not to be in keeping with the nature of the topic. The difference between draft guidelines and draft articles for a future convention must be kept in mind. The wording of the draft guidelines and the effects that they sought to achieve were more like those of a binding international instrument.

With regard to draft guideline 10, he therefore suggested the following reformulation of paragraph 1: "National implementation by States of the obligations contained in the present draft guidelines may take the form of the adoption of legislative, administrative and judicial measures." [*La aplicación nacional por los Estados de las obligaciones contenidas en el presente proyecto de directrices puede hacerse a través de la adopción de medidas legislativas, administrativas y judiciales*]. Paragraph 2, however, should be deleted, as references to the responsibility of States under international law had no place in the draft guidelines. In paragraph 3, he recommended the following adjustments to make the wording more like that of a guideline: "States should consider in good faith the recommendations contained in the present draft guidelines" [*Los Estados han de considerar de buena fe las recomendaciones contenidas en el presente proyecto de directrices*]. As for paragraph 4, he disagreed with its content and joined previous speakers in expressing a preference for its deletion, in view of the exceptional and restrictive character of any possible extraterritorial application of national law by a State. The issue was a highly controversial one that would be bound to give legitimate concern to States.

He recalled in that connection that, in its aforementioned advisory opinion of 15 November 2017, the Inter-American Court of Human Rights, referring to the American Convention on Human Rights, had made the point that compliance with human rights or environmental obligations did not justify non-compliance with other norms of international law, including the principle of non-interference. It had held that the Convention was to be interpreted in accordance with other principles of international law, since the obligations to respect and protect human rights did not allow States to act in violation of the Charter of the United Nations or of general international law; that, although international law did not exclude the extraterritorial exercise of a State's jurisdiction, the bases for such jurisdiction were generally defined and limited by the sovereign territorial rights of the other relevant States; and that, consequently, territorial sovereignty set limits on the scope of the duty of States to contribute to the global observance of human rights.

Turning to draft guideline 11, he said that he would recommend leaving only the first paragraph and moving the others to the commentaries. He would, however, rephrase that first paragraph, taking into account the views expressed by other members of the Commission that, in addition to multilateral agreements, other relevant bilateral agreements could be mentioned, and that the word "rules" would also include the "procedures" set out in the said instruments. It would thus read: "States should comply in good faith with the international law relating to the protection of the atmosphere in accordance with the rules of the relevant environmental agreements to which they are parties" [*Los Estados han de cumplir de buena fe las disposiciones del derecho internacional relativas a la protección de la atmósfera de conformidad con las normas de los acuerdos sobre el medio ambiente pertinentes de los que sean Partes*].

With regard to draft guideline 12, he would suggest that some of the details should be spelled out and that paragraph 1 should be reworded to read: "Disputes relating to the protection of the atmosphere from atmospheric pollution and atmospheric degradation that may arise between States should be settled by peaceful means, as established in Article 33 (1) of the Charter of the United Nations" [*Las controversias relativas a la protección de la atmósfera y la degradación atmosférica que puedan surgir entre los Estados han de revolverse por medios pacíficos de conformidad con lo establecido en el artículo 33, párrafo 1, de la Carta de las Naciones Unidas*]. In paragraph 2, and again in agreement with other members of the Commission, he would suggest deleting the last two sentences concerning the appointment of experts, which would be more suitably included in the commentaries. Lastly, he did not share the Special Rapporteur's approach regarding the principle of *jura novit curia* and would prefer to delete paragraph 3 altogether. He supported the referral of the draft guidelines to the Drafting Committee.

Mr. Jalloh said that he appreciated the Special Rapporteur's hard work on the topic of protection of the atmosphere and his deep commitment to it. The Special Rapporteur's collegial approach and generous spirit greatly facilitated the Commission's work and his latest report provided a strong basis for the successful completion of the first reading at the current session. That report had been seriously criticized, sometimes unfairly, given that it dealt with such a highly complicated issue where the Commission was attempting to marry international law to atmospheric science.

He recalled the comments made in the debate on the topic in the Sixth Committee by the representative of South Africa that the atmosphere was a common resource of global concern and the effects of human interference in the atmosphere had an impact beyond national borders; and by the representative of Senegal that developing countries, many of which were in Africa, were, alongside small island and low-lying coastal areas, particularly vulnerable to the adverse effects of atmospheric pollution, atmospheric degradation, climate change and environmental degradation, and that the primary victims were the most vulnerable people, especially women and children. The Commission must not forget the many vulnerable people who could be helped by international law if it could successfully convince States to take up its recommendations, especially in regard to the topic under consideration.

While supporting the inclusion of the three new draft guidelines, which had grown logically out of the recommendations adopted as part of the first nine draft guidelines provisionally adopted by the Commission, and while he did not wish to reopen old debates, he continued to regret that paragraph 2 of draft guideline 2 had established what South Africa had aptly described as a "blanket exclusion" of many rules and principles which, in its view, were integral to the emerging law concerning the protection of the atmosphere. By cordoning off fundamental principles of environmental law, such as the polluter pays principle, the precautionary principle and the principle of common but differentiated responsibilities, which were particularly important to developing countries, and by excluding from within the scope of the topic specific substances such as black carbon, the Commission assumed the risk that it might end up with guidelines that would not offer States the sort of substantial additional legal certainty it might otherwise have been able to offer in that important area of international law. He hoped nevertheless that, working in its usual collegial way, the Commission would complete its first reading within the limited time allocated for the topic at the current session.

He supported the inclusion of a draft guideline on implementation, while agreeing with previous speakers that draft guideline 10 could be improved. He agreed with the comments by Ms. Oral, Mr. Park and Mr. Nguyen concerning paragraph 1, which essentially required States to implement in their national law the obligations affirmed in the draft guidelines. If the mention of legislative, administrative and judicial actions was to be retained, despite suggestions to delete it or to discuss those forms of implementation in the commentary, "executive" actions might also be added, together with a residual category of "other forms" of action.

He continued to have doubts about the analysis concerning State responsibility, including the concepts of attribution and causation addressed in paragraph 2, and about how the treatment of failure to comply with obligations concerning global atmospheric degradation contrasted with the treatment of such failure with respect to trans-boundary atmospheric pollution. While it might be possible to identify the causes and authors of the alleged damage in the case of transboundary atmospheric pollution, that could be much harder in the case of global atmospheric degradation, which might well be collective. He wondered, bearing in mind the situation of African States, whether and, if so, how the principle of common but differentiated responsibilities and the precautionary principle would apply and what the implications that would have for the reception of the draft guidelines by both developed and developing States in that regard. Like the Special Rapporteur, he considered that international cooperation was central to the action to be encouraged. However, and despite the existence of draft guideline 8, further analysis of such forms of cooperation would have been appreciated, given the differing needs and capabilities of different countries and regions; that would have been preferable to importing the fault-based discussion and regime of the articles on responsibility of States for internationally wrongful acts.

As for paragraph 3, the content of which he generally supported, he took it that the words "the present draft guidelines" referred back to draft guidelines 3 to 7, rather than to the entire set of draft guidelines to be adopted on first reading. If so, it might be better to be more explicit and to mention those specific guidelines. Like other speakers, he wondered whether the paragraph should include a reference not only to "recommendations" but also to other relevant rules of international law relating to the protection of the atmosphere, especially in view of draft guideline 9, which referred to the identification, interpretation and application of such rules "in order to give rise to a single set of compatible obligations". He supported the

proposal by Mexico to revise the paragraph to include a reference to vulnerable populations.

On the controversial issue of extraterritorial application of national law addressed in paragraph 4, which Mr. Peter had aptly described as a "landmine", its inclusion might do more harm than good, since more comprehensive analysis would be required to substantiate the permissibility of such application of law when there was a well-founded grounding in international law. He therefore endorsed the suggestion of several colleagues that the Special Rapporteur should consider omitting the paragraph in its entirety; if it were retained, the broader formulation proposed by Mr. Park would perhaps be more appropriate.

With regard to draft guideline 11, he said that the Special Rapporteur's discussion of the two main approaches to compliance in environmental law was stimulating. The examples drawn from the Montreal Protocol, the Kyoto Protocol and the Paris Agreement, as well as the decisions taken by States on enforcement provided useful models that could be used for reasoning by analogy when addressing issues relating to compliance with emerging norms concerning the protection of the atmosphere. However, like other colleagues, he still had concerns about the draft guideline as currently framed. He was clearly not opposed to the inclusion of such a draft guideline, or to a discussion of its implications in the commentary, as some colleagues would prefer. If, however, the intention of the draft guidelines was to suggest that States were required to abide by specific non-compliance mechanisms under relevant international agreements, he would urge the Special Rapporteur to give careful thought to the alternative formulations suggested during the current session.

Turning to draft guideline 12, which aimed to encourage the peaceful settlement of atmosphere-related disputes, he said that he had been surprised by the controversy that had arisen during the mini-debate on the topic. The peaceful means suggested by the Special Rapporteur seemed to be firmly rooted in Article 33 (1) of the Charter and the addition suggested by the Special Rapporteur in his oral presentation of "other peaceful means of their own choice" had his support, as it would give maximum flexibility to States, which was also the aim of the Charter, so long as States were engaging in the mandatory peaceful settlement of disputes. The mention in that Article of "any dispute" clearly signified that the disputes to be resolved by States through peaceful means were not restricted to any particular type of dispute. He had, however, noted the concern of one colleague who wondered whether it was appropriate to imply that disputes concerning atmospheric pollution and degradation might endanger peace and security, especially since the words "any dispute" in that Article were followed by "the continuation of which is likely to endanger the maintenance of international peace and security". For him, that was not really an issue, as he had no knowledge either of the International Court of Justice or of any other international or national tribunal excluding a dispute between States because it related to environmental or atmospheric matters or of any decision purporting to remove the prospect of judicial settlement as an option for States on the ground that the dispute was unlikely to endanger international peace and security. Indeed, since at least 1945, the ambition had been to encourage States to subject even more of their differences to judicial dispute settlement.

Furthermore, the aforementioned Article of the Charter reflected the raison d'être of the United Nations, as expressed in its Article 1 (1), which included among the means of maintaining international peace and security the "adjustment or settlement of international disputes or situations which might lead to a breach of the peace" in conformity with the principles of justice and international law. Accordingly, and in pursuance of Articles 93 to 95 of the Charter, Member States were required to accept the decisions of the International Court of Justice in cases to which they were parties, without however being prevented from entrusting the solution of their differences to other tribunals by virtue of agreements already in existence or that might be concluded in the future. Moreover, the General Assembly in several of its resolutions and the Security Council in its presidential statements had recognized that the adverse effects of global climate change could aggravate existing threats to international peace and security; that would presumably include threats to the atmosphere on which human survival might well depend. Lastly, the draft guideline rested firmly on Principle 26 of the Rio Declaration on Environment and Development, by which States undertook to resolve all their environmental disputes peacefully and by appropriate means in accordance with the Charter of the United Nations.

He endorsed the first sentence of paragraph 2 of draft guideline 12, since the relevant case law of the International Court of Justice cited in the report, showed a need for clearer guidelines in relation to the use of scientific experts in environment-related litigation. He supported the two-step approach suggested by Mr. Peter, entailing a redrafting of the paragraph whereby the parties would nominate members to a standing body from which experts would be appointed by a given court. The experts would thus act more like friends of the court than as partisans and would be subject to

routine cross-examination by the parties as well as questioning from the bench. In view of his preceding suggestions, he did not think that paragraph 3 should be retained. Such issues as it addressed might be included more appropriately in the commentary. He was in favour of transmitting all the draft guidelines to the Drafting Committee and looked forward to the successful completion of the first reading during the current session.

The meeting rose at 1.05 p.m.