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Held at the Palais des Nations, Geneva, on Tuesday, 31 May 2016, at 10 a.m.

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Present:

Chairman:	Mr. Comissário Afonso
Members:	Mr. Al-Marri
	Mr. Caflisch
	Mr. Candioti
	Mr. El-Murtadi
	Ms. Escobar Hernández
	Mr. Forteau
	Mr. Hassouna
	Mr. Hmoud
	Ms. Jacobsson
	Mr. Kamto
	Mr. Kittichaisaree
	Mr. Kolodkin
	Mr. Laraba
	Mr. McRae
	Mr. Murase
	Mr. Murphy
	Mr. Niehaus
	Mr. Nolte
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Saboia
	Mr. Singh
	Mr. Šturma
	Mr. Tladi
	Mr. Valencia-Ospina
	Mr. Vázquez-Bermúdez
	Mr. Wako
	Mr. Wisnumurti
	Sir Michael Wood

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 10 a.m.

Subsequent agreements and subsequent practice in relation to the interpretation of treaties (agenda item 4) (*continued*) (A/CN.4/694)

The Chairman invited the Commission to pursue its consideration of the fourth report of the Special Rapporteur on subsequent agreements and subsequent practice in relation to the interpretation of treaties (A/CN.4/694).

Mr. Niehaus said that in his fourth report the Special Rapporteur provided a thorough analysis of a topic that was of great importance for international law in general and treaty law in particular. In view of that importance and the intended role of the Commission's work on the topic, it would be more appropriate to describe the Special Rapporteur's draft proposals as "guidelines" rather than "conclusions". Furthermore, the term "guidelines" would differentiate those proposals from the official designation of the forms of action of expert bodies, which could more accurately described as "conclusions" or, better still, "pronouncements", the term used by the Special Rapporteur in his report. That said, he would, in order to avoid any confusion, use the term "draft conclusions" for the purposes of the debate.

New draft conclusion 1a, though somewhat brief, contained a clear reference to the topic of the interpretation of treaties, as contained in article 31 (3) (a) and (b) and article 32 of the Vienna Convention on the Law of Treaties. It might therefore be advisable to refer to the Convention explicitly in the draft conclusion. It would, of course, be for the Drafting Committee to make the relevant changes, as appropriate.

With regard to the proposed revision of draft conclusion 4 (3), some members of the Commission had indicated the need to clarify what was meant by the term "official conduct". The term was, however, perfectly comprehensible and acceptable, since it was clear from the report that all the activities of bodies established by a treaty and mandated to contribute to its application could constitute official conduct. It followed that members of international organizations qualified as officials, even when they were not acting on behalf of a State. Again, it would be a matter for the Drafting Committee to add any clarifications, taking into account members' comments and the Special Rapporteur's responses thereto.

As to draft conclusion 12, members had expressed divergent opinions regarding the role of the pronouncements of expert bodies. Some had argued that the latter had nothing to do with subsequent practice in relation to the interpretation of treaties, while others had defended the draft conclusion and had sought to equate such pronouncements with court decisions. In his opinion, it was important to bear in mind that, unlike court decisions, such pronouncements were not binding and merely contributed to the interpretation of a treaty. It was therefore correct to take the view that they were a form of practice in the application of a treaty. Likewise, as indicated in the draft conclusion, there was a need to distinguish between the pronouncements of expert bodies and the reactions of States. The influence of such pronouncements on the attitude of the parties to the treaty in question could not be disputed; they thus constituted practice within the meaning of article 31 (3) and article 32 of the Vienna Convention. The main problem that arose concerned the breadth of the term "expert body"; the draft conclusion should set out in greater detail the characteristics of those bodies.

As to draft conclusion 12 (4), he agreed with Mr. Hassouna that States could not always be expected to react to every pronouncement by an expert body and that a State's silence could not therefore be considered as, or automatically constitute, acceptance. Consequently, the paragraph in question should be reconsidered. In his view, the differences of opinion expressed regarding the content of draft conclusion 12, far from calling it into question, highlighted the need for it to be restructured.

Regarding draft conclusion 13, he fully endorsed the view that domestic courts, when applying a treaty, almost necessarily participated in its interpretation and, by extension, could contribute to a subsequent agreement or subsequent practice. Draft conclusion 13 (1) was logical and acceptable. The wording of draft conclusion 13 (2) was problematic in that it went further than mere recommendations. In the Spanish text, the use of the word "*deben*" — "should" in the English version — gave the impression that domestic courts were being instructed on how to deal with subsequent agreements and subsequent practice, rather than provided with guidance on how to do so. The task of coming up with the proper wording could be entrusted to the Drafting Committee.

He recommended that all the draft conclusions proposed by the Special Rapporteur should be referred to the Drafting Committee. The Commission was making steady progress towards adopting the entire set of draft conclusions on first reading at the current session. He agreed with the Special Rapporteur that a second reading could be envisaged for 2018.

Mr. Saboia said that he wished to congratulate the Special Rapporteur on his excellent fourth report, which was clear, well researched and carefully crafted. With the report, the topic was approaching its possible completion on first reading during the current session. At the current advanced stage of the debate on the topic, he would focus his comments on draft conclusion 12, entitled "Pronouncements of expert bodies", and concentrate in particular on human rights treaty monitoring bodies.

It was regrettable that the Special Rapporteur had decided to exclude from his consideration the outcome of the work of treaty bodies that, although technically organs of an international organization, were composed of independent experts and performed a similar role to other expert bodies. The Committee of Experts on the Application of Conventions and Recommendations of the International Labour Organization (ILO), for example, had itself recognized that its findings and conclusions could become authoritative in any binding sense only if independently established as such by a domestic court or by an international tribunal or instrument. National, international and supranational courts had been relying in their decisions on the Committee's pronouncements while referring to international labour standards to settle a dispute. The practice of the Inter-American Commission on Human Rights, which was an organ of the Organization of American States was also relevant, particularly with regard to individual complaints, which it could refer to the Inter-American Court of Human Rights or help settle through mediation.

The discussion on draft conclusion 12 had focused on whether the pronouncements of expert bodies established by a treaty and mandated to supervise its application qualified as subsequent practice or as supplementary means of interpretation under articles 31 and 32, respectively, of the Vienna Convention. No substantial doubts had been raised over the great weight carried by such pronouncements, as recognized, in respect of the Human Rights Committee, by the International Court of Justice in its judgment in the case concerning *Ahmadou Sadio Diallo* (*Republic of Guinea v. Democratic Republic of the Congo*, and by domestic courts, including the German Federal Administrative Court.

The "Final report on the impact of findings of the United Nations human rights treaty bodies", which had been adopted by the International Law Association, outlined two approaches to the question of whether the pronouncements of expert bodies under human rights treaties fitted "into traditional sources of international law, whether for the purposes of treaty interpretation or as a source relevant to the development of customary international law". According to the traditional approach, which had been followed by the Commission on the topic of reservations to treaties, "the findings of the committees themselves would not amount to State practice", but "the responses of individual States or of the States parties as a whole to the findings of the committees would constitute such practice". According to the second, alternative approach, the reference in article 31 of the

Vienna Convention to subsequent practice was written "as if no monitoring body had been established by a treaty, as if no third-party interests existed, and as if it were only for other States to monitor each other's compliance and to react to non-compliance". Given the particular nature of human rights treaties, which established obligations that were not reciprocal but consisted of common goals articulated and agreed among States parties, the International Law Association had stated that "it appears arguable that in interpreting these types of treaties … relevant subsequent practice might be broader than subsequent State practice and include the considered views of the treaty bodies adopted in the performance of the functions conferred on them by the States parties". That statement was particularly relevant, as it compared the work of expert monitoring bodies to the monitoring of obligations by States parties. In the field of human rights, the latter also existed and played a significant role, too, although on the issue of human rights violations organs such as the Human Rights Council tended to be more subject to political considerations and polarization.

In conclusion, he recommended that draft conclusion 12 should be referred to the Drafting Committee, in the light of the debate in the plenary.

Mr. El-Murtadi said that he wished to thank the Special Rapporteur for his fourth report, in which, once again, he had dealt successfully with a very complex and controversial topic. The report addressed two key issues, namely the pronouncements of expert bodies and decisions of domestic courts. Differing views had been put forward with regard to the legal effect of such pronouncements, which, as stated in paragraph 15 of the report, depended, first and foremost, on the applicable treaty itself. The ordinary meaning of the term by which a treaty designated a particular form of pronouncement mostly indicated that such pronouncements were not legally binding. As noted in paragraph 120 of the report, however, pronouncements by expert bodies qualified as a supplementary means of interpretation, as envisaged in article 32 of the Vienna Convention.

An example of the complexity of the topic at hand was that, as indicated in paragraph 104 of the report, domestic courts often did not distinguish clearly between subsequent agreements and subsequent practice under article 31 (3) of the Vienna Convention, which required agreement between the parties regarding the interpretation of a treaty, and other subsequent practice under article 32 of the Vienna Convention, which did not require such agreement.

He recommended that the draft conclusions should be referred to the Drafting Committee, taking into account the comments made by members of the Commission during the debate.

Mr. Nolte (Special Rapporteur) said that, in his summing up of the debate, he wished to highlight the main points, address some criticism and explore possible ways forward.

He trusted that differences of opinion with regard to, for example, the status of the Working Group on Arbitrary Detention and the Committee on Economic, Social and Cultural Rights, could be clarified on a bilateral or, if necessary, technical basis. He did, however, wish to respond to a remark by Mr. Murphy that the report had "singled out" the United States of America by quoting only the reaction of that State to draft general comment No. 33 of the Human Rights Committee, and not that of other States. The reaction in question was the only easily accessible statement by a State and had been accepted by the Human Rights Committee. The report thus did not single out the United States. Rather, it quoted the United States as an example of a State whose reaction had given rise to a general agreement on a particular question.

Most speakers had considered draft conclusion 13 to be unnecessary, with some speakers expressing reservations about giving domestic courts "instructions". While it was

true that draft conclusion 13 was, strictly speaking, unnecessary, since it considered and applied to domestic courts draft conclusions that had already been provisionally adopted, without requiring any revision of those conclusions, he had included it because he had felt bound to do so. After all, in the original workplan for the topic, it had been stated that the practice of domestic courts would be considered, both for the sake of having a full analysis and in order to verify whether such practice was in conformity with the practice and sources at the international level.

It would not necessarily be inappropriate to formulate a draft conclusion that addressed domestic courts directly. Many domestic courts recognized a need to coordinate among themselves, or at least to inform themselves about relevant international case law, including that of other domestic courts. While it would not be appropriate to try to "instruct" domestic courts, it would be appropriate to offer domestic courts some respectfully worded guidance on their coordination efforts.

Nevertheless, he recognized that members of the Commission were reluctant to consider the adoption of draft conclusion 13 and he therefore withdrew his proposal in that regard. He did, however, wish to pursue the proposal by Mr. Forteau and Mr. Šturma to include a certain number of findings from the report in the commentaries to the draft conclusions. The research presented in the report contained useful elements that would nuance and improve the commentaries.

Given the current lively debate among international lawyers and politicians with regard to the legal relevance of the pronouncements of expert bodies, it was no surprise that draft conclusion 12 had elicited the most responses. Indeed, the debate had shown that the report, which concentrated on the most authoritative legal sources in an effort to treat opposing views in an unbiased manner, should have addressed certain questions in greater detail.

Mr. Murase, Mr. Forteau, Mr. Hmoud, Mr. Murphy, Mr. Park and Mr. Kolodkin, among others, had expressed the view that pronouncements of expert bodies were not a form of subsequent practice within the meaning of the present topic, while Mr. Hmoud and Mr. Forteau had even suggested that the report characterized such pronouncements as "subsequent practice" in order to fit them into the project. Mr. Kittichaisaree, on the other hand, had drawn attention to paragraph 109 of the advisory opinion of the International Court of Justice on the *Legal consequences of the Construction of a Wall in the Occupied Palestinian Territory*, in which the Court had referred to the "constant practice" of the Human Rights Committee as a means of interpreting certain provisions of the International Covenant on Civil and Political Rights. Mr. Tladi had also accepted that such pronouncements could be a form of practice.

That apparent divergence of views on the basic question of whether pronouncements of treaty bodies fell within the scope of the topic might result, at least in part, from a misunderstanding. Some members assumed that, since draft conclusion 5 limited the term "subsequent practice" to conduct by States parties, the project itself could deal only with conduct by States parties. In 2014, the Commission had, however, adopted draft conclusion 11 (3), which stated that "practice of an international organization in the application of its constituent instrument may contribute to the interpretation of that instrument when applying articles 31, paragraph 1, and 32".

That draft conclusion demonstrated that at least that form of non-State practice under a treaty was dealt with by the project. The issue of whether the practice of international organizations should be characterized as "subsequent practice" within the meaning of article 31 of the Vienna Convention, or whether it should simply be termed "practice" in order to distinguish it from the conduct of States parties was of lesser importance. As Mr. Murphy had suggested, what was important was that there were

different forms of practice that were recognized as a means of interpretation of a treaty, even if only in connection with the subsequent practice of the States parties to the treaty in question.

Most members did not exclude the possibility that pronouncements of expert bodies constituted a kind of "practice" which might be relevant for the interpretation of a treaty, even if it were not subsequent practice in a narrower technical sense. As Mr. Šturma and Mr. Niehaus had remarked, any doubts in that connection seemed to be prompted by a wide variety of substantive, rather than terminological, concerns.

Mr. Forteau and other members had held that the pronouncements of human rights treaty bodies, albeit a form of practice, were not practice within the meaning of the topic, because such pronouncements were more in the nature of international judicial decisions. Although the International Court of Justice had, in the *Diallo* case, spoken of the "jurisprudence" of the Human Rights Committee, that did not mean that the Court had considered those pronouncements to be forms of judicial decisions. Indeed, the Court had been careful to characterize the Committee not as a court but as an independent body which had been established specifically to supervise the application of the International Covenant on Civil and Political Rights. Nor had the Court characterized the Committee's decisions as "judicial". As Mr. Šturma had observed, it was widely accepted that pronouncements of expert bodies were not in the same category as judicial decisions. There was no apparent reason to assume that, in 2010, the Court, by using the term "jurisprudence" in the *Diallo* case had intended to change its own findings in the aforementioned advisory opinion that such pronouncements were a form of practice. One view did not exclude the other.

Mr. Murphy, on the other hand, had doubted whether expert bodies had any mandate to interpret their treaty, since the treaties at issue did not accord to those bodies an express power to do so. However, in the *Diallo* case, the Court had recognized that the International Covenant on Civil and Political Rights accorded the Human Rights Committee a power to interpret that treaty when it had spoken of the "interpretation adopted by this independent body". A further source in support of that view was a 2010 statement by the Government of the United States, in which it referred to the interpretations of the Human Rights Committee as one of the bases of its exhaustive review of whether the United States should continue to urge a strictly territorial reading of the Covenant.

Addressing what might have been Mr. Murphy's main concern, he noted that most members, in particular Mr. Hmoud, Mr. Kamto and Mr. Tladi, had reached the conclusion, that, while expert bodies usually did have a mandate to interpret their respective treaties, since otherwise they could not fulfil their mandate under the treaty, their competence to interpret the treaty did not necessarily imply that their interpretation had any particular legal effect. Indeed, the pronouncements of expert bodies did not acquire a binding character by virtue of the competence of such bodies to interpret the treaty, as Mr. Tladi had emphasized.

Proposed draft conclusion 12 sought to convey the idea that the legal effect of the pronouncements of expert bodies, as practice and for the purpose of the present project, lay somewhere between being a legally irrelevant statement and a court judgment. In order to capture that middle position, draft conclusion 12 (3) recognized that pronouncements of expert bodies "may contribute to the interpretation of a treaty". That middle position was supported by the case law of the International Court of Justice and by most authorities, as Mr. Saboia had confirmed. The proposed draft conclusion did not attempt to resolve differences of view on whether, for the purposes of interpretation, the legal effect of pronouncements of expert bodies was closer to that of judicial decisions and thus quasi-judicial, as Mr. Šturma and Sir Michael Wood had suggested, or more akin to that of administrative practice, as Mr. Hassouna had suggested.

Proposed draft conclusion 12 left ample room for accommodating different viewpoints on the legal effect of the pronouncements of expert bodies, since, as Sir Michael Wood had said, it was difficult to generalize given the disparity in the competences and functions of different expert bodies under different treaties. It was clear that different treaties provided for specific terms and tasks for those different bodies, as Mr. Murphy had emphasized. He agreed with Mr. Murphy, Mr. Murase and Sir Michael Wood that caution was warranted regarding the powers of certain expert bodies, such as the Commission on the Limits of the Continental Shelf and the Compliance Committee under the Kyoto Protocol to the United Nations Framework Convention on Climate Change. The concern for leaving room for the diversity of treaties that established expert bodies was the reason for proposing draft conclusion 12 (5). Mr. Park had rightly observed that the report dealt more with human rights treaty bodies than with other expert bodies. The reason for that was that the debate about the legal weight of such pronouncements had mainly centred on the former. The references to other expert bodies were merely illustrative.

It might not be possible to persuade Mr. Murphy that pronouncements of expert bodies possessed a judicial quality, or to persuade Mr. Forteau that the interpretative value of such bodies was slight or non-existent. The point of the proposed draft conclusion was not, however, to make a comprehensive statement on the interpretative weight of such pronouncements, but to recognize, for the purpose of the present project, that they were a form of practice under a treaty which might be relevant for its interpretation, either in connection with State practice, or as such, and that such pronouncements might have additional legal effects possibly deriving from their more or less quasi-judicial character. The commentary could make clear that the reference to article 31 (1) of the Vienna Convention covered that possibility.

Mr. Hmoud had said that the references in draft conclusion 12 to articles 31 and 32 of the Vienna Convention were not sufficiently grounded in practice and that the draft conclusion therefore represented a deductive approach. He took it that Mr. Hmoud had meant that international and national courts had only rarely explained the relevance of the pronouncements of expert bodies in terms of the Vienna Convention. However, the Commission did not need such explanations in order to conclude that those pronouncements, whether or not together with the reactions of States, were a means of interpretation which fitted the rules of interpretation of the Vienna Convention, since, at the outset of its work on the topic, the Commission had already found that articles 31 and 32 were the framework for treaty interpretation. It was therefore within the *lex lata* for the Commission simply to state the role that pronouncements of expert bodies might play as a means of interpretation under the aforementioned articles 31 and 32, whether in conjunction with the reactions of States, as suggested by Mr. Šturma, or by themselves. Mr. Hmoud had also accepted that such pronouncements could constitute a supplementary means of interpretation under article 32. While it was true, as Mr. Hmoud and Mr. Murphy had said, that examples of such pronouncements from which an agreement of the parties had arisen were more difficult to find, the report quoted examples to show that they did exist. Another example was General Assembly resolution 65/221 of 21 December 2010, which, in paragraph 5, reaffirmed elements of general comment No. 29 of the Human Rights Committee concerning the interpretation of article 4 of the International Covenant on Civil and Political Rights.

The question of silence was relevant in that context. Mr. Murase had considered that draft conclusion 12 (4) was inconsistent with draft conclusion 9 (2). However, the intention of paragraph 4 was to specify the circumstances under which a reaction was called for. As Mr. Hassouna had proposed, the commentaries could provide further clarification in that respect.

Mr. Murase, Sir Michael Wood, Mr. Hassouna and Mr. Saboia had wondered why the report dealt only with expert bodies which were not organs of international organizations. The reason, a purely formal one, was that he did not consider that the topic should delve any further into the law of organizations than the 1969 Vienna Convention did. He tentatively agreed with Mr. Šturma and Sir Michael Wood that the pronouncements of expert bodies which were organs of international organizations and the reactions of States thereto would mostly have the same effect as the pronouncements of the bodies covered in the report.

Although he had defended the proposed draft conclusion 12 as contained in his fourth report, that did not mean that he was unreceptive to the various critical comments which had been made. In fact, as the project was a collective enterprise, he was quite prepared to reformulate certain elements of draft conclusion 12 to accommodate the concerns expressed by some members. It would be worthwhile confirming that the practice of States in relation to the pronouncements of an expert body, and the practice of that body, might play a role in the interpretation of a treaty, as that aspect had not been appropriately covered by the previous conclusions. The following points could be addressed in a reformulated proposal and considered by the Drafting Committee. First, in order to meet the concerns of Mr. Murphy and Sir Michael Wood, it could be stated explicitly at the beginning of the draft conclusion that it was first and foremost the treaty which determined the interpretative weight to be given to pronouncements of expert bodies, whether in connection with the reactions of States or as such. Secondly, it could be made clear that the draft conclusion did not claim to determine all aspects of the possible interpretative weight of pronouncements of expert bodies and the reactions of States thereto, but was confined to their weight as a form of "practice". That should meet the concerns of Mr. Forteau and others who wished to leave room for a quasi-judicial function of such pronouncements. It would also make it even clearer that the Commission recognized the position of the International Court of Justice in that regard. Thirdly, the commentaries could be kept to a minimum and omit any reference to article 38 of the Statute of the International Court of Justice, as Mr. Tladi and Mr. Murphy had requested. Fourthly, the draft conclusion, or the commentary thereto, could reaffirm that observations by States that disagreed with the interpretations contained in the pronouncements of expert bodies precluded any agreement under article 31 (3) (b). Fifthly, in order to allay Mr. Murase's concerns, it could be made plain that draft conclusion 12 (2) did not conflate reactions by States with the pronouncements of expert bodies themselves. Sixthly, he was prepared to replace the term "expert body" with "expert treaty body" and to replace the expression "individual capacity" with "personal capacity", as proposed by Mr. Murphy, Mr. Hassouna and Mr. Kamto. Seventhly, the drafting proposals of Mr. Park and Mr. Kamto could also be considered. He hoped that those proposals would enable the Drafting Committee to find enough common ground to arrive at a reformulated draft conclusion 12.

Turning to draft conclusion 4 (3), he said that he had taken note of the reservations expressed by Mr. Murphy, Mr. Murase, Sir Michael Wood, Mr. Hmoud, Mr. Kamto, Mr. Kolodkin and Mr. Park about his proposal to replace the phrase "conduct by one or more parties" with "official conduct". The intention behind that proposal was to make clear that the practice of an international organization, pronouncements of expert bodies or other forms of conduct mandated by the treaty as elements of its application were not to be placed on the same footing as the private conduct of non-State actors, but that they might contribute to the interpretation of a treaty when combined with the practice of the parties to the treaties themselves. Although the report might not have sufficiently explained why the expression "official conduct" had been chosen, he remained convinced that it was an apt means of characterizing the practice of international organizations and the pronouncements of expert bodies as distinct from the private conduct of non-State actors. Nevertheless, he recognized that a majority of members were reluctant to place such practice on the same

level as State conduct, in the same way as they had questioned the status of the practice of international organizations for the purpose of the formation and identification of customary international law. In that context, the Commission was about to give the practice of international organizations a sort of intermediate status that neither equated it with State practice nor put it on the same level as the conduct of private actors. Moreover, as Mr. Kamto had said, States had wanted the treaty-mandated conduct of international organizations and expert bodies to be characterized as forms of practice for the purpose of interpretation.

In a sense, draft conclusion 11 (3) recognized that intermediary status by indicating that the practice of an international organization might contribute to the interpretation of a treaty under articles 31 (1) and (2) of the 1969 Vienna Convention. If the same idea were to be expressed in a reformulated draft conclusion 12, it would then be unnecessary to explain the status of such pronouncements for the purpose of interpretation in more general terms. That task could be left until the second reading of the draft conclusions. On that basis, he would be prepared to withdraw his proposed revision of draft conclusion 4 (3), thereby obviating any need to discuss the revision of draft conclusion 5, a possibility raised by Mr. Kolodkin.

In light of the statements made during the debate, he withdrew the proposal to adopt draft conclusion 13 and, for the time being, the proposal to revise draft conclusion 4 (3). However, it was still his wish that the Commission should adopt draft conclusions 1a and 12, as well as the general structure of the set of draft conclusions proposed in paragraph 113 of the report. The question of whether the draft conclusions should be renamed "guidelines", as Mr. Murase had proposed, should be addressed on second reading and take account of the views of States.

Mr. Kamto said that he would like to thank the Special Rapporteur for the flexibility displayed in his summing up of the debate, which would probably enable the Commission to follow his recommendation to refer two draft conclusions to the Drafting Committee. However, one point in draft conclusion 12 required clarification, namely whether the Commission should give some clear guidance to the Drafting Committee regarding that draft conclusion. He was concerned that draft conclusion 12 with the amendments proposed by the Special Rapporteur still referred to articles 31 (3) and 32 of the Vienna Convention. He was unconvinced that article 31 (3) could be applied in the context of pronouncements of expert bodies, because in order for there to be subsequent agreement within the meaning of article 31 (3) (a), or subsequent practice within the meaning of (3) (b) thereof, there had first to be an agreement. He had difficulty in accepting that the Commission could consider pronouncements of expert bodies to be subsequent practice within the meaning of article 31 (3) (b). He had therefore suggested that draft conclusion 12 should be based on article 32 of the Vienna Convention. If reference were made to article 31 (3) in that context, it would be necessary to include a reference to the reaction of States. However, that reaction in itself would not suffice, unless it was held that an agreement had been reached between States; but, if the view were taken that the subsequent practice had not given rise to an agreement between States parties, what would be needed would be a reaction from one or more States to the pronouncement of the expert body. Even if only the agreement of one State to an interpretation under article 31 (3) (b) were required, it would be necessary to reintroduce the notion of a reaction from States to that agreement. It would therefore be better if the Commission were to confine itself to a reference to article 32 in connection with pronouncements of expert bodies; however, even that solution would be unsatisfactory, because it would be tantamount to excluding the possibility that an expert body could use its own pronouncement for the purpose of interpretation.

Mr. Nolte (Special Rapporteur), replying to Mr. Kamto, said that it would be necessary to make absolutely clear that a pronouncement of an expert body as such could not constitute an agreement within the meaning of article 31 (3). The question was whether it could reflect or act as a catalyst for a subsequent agreement or subsequent practice between States. That was the notion underlying draft conclusion 11. He was open to considering the omission of any reference to articles 31 and 32 if another adequate solution could be found in draft conclusion 12. The fact that he had said that he was prepared to be flexible on certain points did not mean that he was inflexible on others. He would, however, be reluctant to exclude from the outset any reference to article 31 of the Vienna Convention, since it was the Convention's most important provision on the interpretation of treaties.

Mr. Hmoud said that he was in favour of referring the draft conclusions to the Drafting Committee so long as the latter had the mandate to change their substance. He still thought that it was innovative to regard article 31of the Vienna Convention as applicable to pronouncements of expert treaty bodies. He would have something to say about practice under article 32 of the Vienna Convention in the Drafting Committee.

Mr. Murphy said that the Special Rapporteur's proposal to withdraw some draft conclusions and to send others to the Drafting Committee was a sensible path forward. While it was not the Commission's practice to engage in a substantive debate at the current juncture, in light of the statements by Mr. Kamto and Mr. Hmoud, he wished to raise one point on which the Special Rapporteur might wish to reflect when reformulating draft conclusion 12. Although he could to a certain extent see that the reaction of States to an expert treaty body's pronouncement, as reflected in a General Assembly resolution, might constitute a subsequent agreement of States on interpretation, he still had great difficulty in regarding an expert treaty body's pronouncement as itself reflecting or embodying the agreement of States. The Special Rapporteur's response to his comments about singling out the reaction of the United States to general comment No. 33 of the Human Rights Committee highlighted the fact that the difficulty of finding statements by Governments made it very hard to know for sure whether Governments were in agreement with a treaty body's pronouncement and whether the latter reflected the views of States.

The Chairman said that he had taken note of the fact that revised draft conclusion 4 (3) and draft conclusion 13 had been withdrawn. He had also taken note of the fact that the Special Rapporteur wished to pursue in the commentaries the proposals made by Mr. Forteau and Mr. Šturma in respect of draft conclusion 13.

He took it that the Commission wished to refer draft conclusions 1a and 12 to the Drafting Committee.

It was so decided.

Protection of the atmosphere (agenda item 8) (*continued*) (A/CN.4/692)

The Chairman invited the members of the Commission to resume their consideration of the third report on the protection of the atmosphere (A/CN.4/692).

Mr. Murase (Special Rapporteur), referring to discrepancies between the draft guidelines contained in the body of his third report and those in the annex thereto, said that the previous version of the draft guidelines had been mistakenly incorporated into the annex. He had requested that a corrected version of the report should be issued. In the meantime, members should ignore the draft guidelines as contained in the annex.

Mr. Hmoud said that the discussions in the Sixth Committee indicated that States had generally reacted positively to the Commission's dealing with the topic on the basis of the 2013 understanding. Notwithstanding the continuing scepticism of a few States, he thought that the Commission's approach in striking a balance between the interest of the

international community in the protection of the atmosphere and the need not to prejudice political negotiations or existing treaty regimes was the right one.

As to the Special Rapporteur's proposal to consider reintroducing the concept of "common concern of humankind", he did not see either the debate in the Sixth Committee or the inclusion of those words in the preamble to the 2015 Paris Agreement under the United Nations Framework Convention on Climate Change as warranting any amendment to the preamble adopted by the Drafting Committee at the previous session. Most delegations in the Sixth Committee had agreed with the proposal to change the term "common concern of humankind" to "pressing concern of the international community as a whole". It was natural that the expression "common concern of humankind" had been used in the Paris Agreement, given that it reflected the language of the preamble to the Framework Convention itself. The fact that the scope of the Commission's topic — protection of the atmosphere — was wider than that of the Paris Agreement — climate change — also made the comparison inappropriate. The relation of the concept of "common concern of humankind" to atmospheric protection had no basis in general international law and its inclusion would have significant legal consequences, including potentially triggering obligations *erga omnes*. He also had reservations concerning the Special Rapporteur's intention to tackle the issues of implementation and compliance in future reports, since it suggested that the legal nature of atmospheric protection might be considered *erga omnes*. The inclusion of those issues and dispute settlement in the scope of the topic would be inconsistent with the 2013 understanding.

That said, he agreed that the draft guidelines should have at their core a general obligation on States to protect the atmosphere and, in that regard, he welcomed the reformulation of what was now draft guideline 3. During the previous year's debate he had expressed the view that it was important to determine the legal content of any aspects of that obligation that went beyond the customary law principle of *sic utere tuo*. He was therefore pleased to note that the Special Rapporteur had explained the legal consequences arising from an obligation to protect the atmosphere in terms of transboundary air pollution and atmospheric degradation.

He agreed that, under international law, the obligation to protect the atmosphere comprised a duty to prevent transboundary atmospheric pollution, as evidenced by the case law, starting with the *Trail Smelter* arbitration, and the inclusion of the principle in treaties and other instruments, such as the Stockholm Declaration on the Human Environment and the Rio Declaration on Environment and Development. A State had to do everything reasonable and necessary within its capabilities to prevent the possibility of transboundary pollution, based on knowledge of the potential risk of the activities in question to cause harm. If it failed to conduct the necessary environmental impact assessment and damage occurred, it would be responsible for violating the obligation of due diligence. The report did not explain whether there were minimum international standards to be employed in the measures of due diligence to prevent transboundary harm; it seemed reasonable to conclude that the degree of care was based on the best practicable means available to the State.

The report noted a trend to reduce the standard of proof from the high standard of the *Trail Smelter* arbitration of "clear and convincing evidence" to a lower standard of "balance of probabilities". While there might indeed be a case to be made for lowering that standard, the arguments advanced in the report in that regard were not convincing. The issue of the burden of proof in a court or tribunal in the context of a dispute arising from transboundary harm was a totally different matter. What was relevant for the duty of due diligence was whether the State had been aware of the prospect of significant transboundary harm and whether the proof had been available to it to act in order to prevent the damage from occurring. Such proof was necessary to trigger its obligation; it was therefore not a procedural matter relating to judicial or arbitral proceedings.

The report provided examples of case law relating to *de jure* and *de facto* jurisdiction by a State over a territory or area as an element in determining the State's obligation to take preventive measures. However, the atmosphere was not an area as such. Therefore, even if the State had an obligation to prevent transboundary air pollution beyond its territorial jurisdiction, there did not seem to be any obligation under general international law to take preventive measures in areas outside its territory or in territories or areas under its jurisdiction or control. Nonetheless, in view of the goal of enhancing atmospheric protection, the idea that all activities under the control or jurisdiction of the State should be subject to preventive measures could be advanced as *lex ferenda*.

With regard to draft guideline 3 (a), he remained of the view that the relevant obligation under international law was to take measures of due diligence to prevent transboundary air pollution; pollution that was localized in the State's territory should therefore fall outside the scope of the topic.

Concerning the second aspect of the obligation to protect, namely the duty to minimize the risk of global atmospheric degradation, he was of the view that, to the extent that the obligation was related to the environment, and bearing in mind that the air was part of the environment, there was sufficient basis to assume that the *sic utere tuo* principle might apply to atmospheric degradation, at least in relation to climate change and ozone depletion. The case law, including the case concerning *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, the relevant principles in the Stockholm and Rio declarations, and recent treaty developments supported the proposition that the duty not to cause atmospheric degradation was becoming part of general international law. The Commission should not base the application of the *sic utere tuo* principle regarding atmospheric degradation on an unsubstantiated proposition that it somehow entailed *erga omnes* effects or *actio popularis*. Instead, it needed to determine the content of the State's obligations in terms of the protection of the atmosphere from degradation, in light of the existing rules of international law. Paragraph 39 of the report referred to precautionary measures as obligations incorporated in the relevant conventions, but provided no examples of the kind of measures that could be taken to minimize the risk of atmospheric degradation. The matter should be considered further by the Special Rapporteur before being included in draft guideline 3. As the precautionary principle was excluded from the scope of the topic, draft guideline 3 should be formulated carefully in that regard.

The duty to assess environmental impact, addressed in draft guideline 4, was a procedural duty rather than a substantive one and, in relation to transboundary environmental harm, seemed to exist under general international law, as could be deduced from the pronouncements of the International Court of Justice in the *Pulp Mills* case and the case concerning the *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, as well as from State practice, relevant sectoral and regional treaty regimes and instruments of soft law, such as the Rio Declaration. Nonetheless, while it was established that such a duty existed in relation to transboundary environmental harm when the activity was likely to have a significant impact, the same could not be said of atmospheric degradation as such. Furthermore, it was not clear from the report why the obligation provided for in draft guideline 4 was to take measures to ensure an appropriate environmental impact assessment to prevent, mitigate and control the causes and impacts. If such elements were derived from the precautionary principle, they should be avoided. While he supported the principle of draft guideline 4, he believed that the duty should be tied to the prospect or possibility that the activity would cause significant environmental harm.

With regard to draft guideline 5, he agreed with the Special Rapporteur that the atmosphere was a limited resource with limited assimilation capacity. Properly balancing economic development with atmospheric protection could be advanced as a policy

objective, but it was not a requirement under existing international law. While he agreed that sustainable utilization of the atmosphere should be provided for in a progressive, non-binding manner, the commentary would have to elaborate on the content of such a goal if the guideline were adopted. As to draft guideline 5 (2), ensuring a balance between economic development and environmental protection should not be a requirement under international law, since the concept of sustainable utilization was itself progressive in nature.

Concerning draft guideline 6, although the report discussed in detail the principle of equity in international law, including references to treaties and judicial decisions, it did not indicate any symmetry that could be applied to deduce the content of the concept of the equitable utilization of the atmosphere. Under the Framework Convention, equity was associated with protection and the principle of common but differentiated responsibilities — not rights — while in judicial decisions it was usually employed to settle border disputes. The provisions on equitable utilization contained in the draft articles on the law of transboundary aquifers and the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses concerned the rights of aquifer States and river States, respectively. He looked forward to further explanations from the Special Rapporteur on how the content of draft guideline 6 could be deduced.

With regard to draft guideline 7 on geoengineering, it was clear from the report and the recent discussion with scientific experts that there was significant uncertainty regarding the implications of modifications to the atmosphere. He would therefore be in favour of tackling the matter from a policy perspective and having the draft guideline suggest a course of action rather than a legal principle, as the latter would fall within the context of the precautionary principle.

In conclusion, he recommended referring draft guidelines 3, 4, 5 and 7, as well as the preambular paragraph, to the Drafting Committee.

Mr. Tladi said that, by and large, he agreed with the content of the proposed draft guidelines and that they should be sent to the Drafting Committee. Although all the guidelines required drafting changes, he would not make any specific proposals in that regard at the current stage.

At the outset, he wished to say that he was somewhat at a loss with respect to draft guideline 7. He did not object to it being sent to the Drafting Committee, but feared that the Commission was venturing into areas that it was ill-equipped to address. Although the report was generally satisfactory, he was very unhappy with the treatment of the precautionary principle and the principle of common but differentiated responsibilities. With regard to the concept of the "common concern of humankind", the fact that it was mentioned in the preamble to the Paris Agreement clearly suggested that States had not abandoned the concept. He therefore supported the Special Rapporteur's suggestion that the Commission might wish to reconsider adopting it in place of the rather cumbersome phrase "pressing concern of the international community as a whole". The substitution could be made at the current session. On the point made by Mr. Hmoud, it did not follow that, because the expression "common concern of humankind" had been included in the Framework Convention, it would automatically be included in the Paris Agreement; after all, it had not been mentioned in the Kyoto Protocol, and, precisely because there had been no reference to the concept since 1992, the Commission had decided on the alternative formulation.

Referring to paragraph 9 of the report, he pointed out that the Sustainable Development Goals were intended to build on the Millennium Development Goals, not replace the latter, as suggested in that paragraph. The objectives of the Millennium Development Goals therefore remained relevant, even under the new regime.

Noting that, in response to the concerns of some members, the Special Rapporteur proposed to differentiate between two dimensions of the protection of the atmosphere — transboundary atmospheric pollution and global atmospheric degradation — he wondered whether that distinction had been accurately captured. According to draft guideline 1 (b), atmospheric pollution referred to the release of substances "extending beyond the State of origin", while guideline 1 (c) defined atmospheric degradation as the alteration of "atmospheric conditions". According to the statement made by the Chairman of the Drafting Committee at the previous session, atmospheric degradation referred to a global phenomenon, not a transboundary one. Similarly, paragraph 6 of the commentary to draft guideline 1 stated that atmospheric pollution referred to transboundary air pollution, while atmospheric degradation referred to global atmospheric problems. That was not clear from the text itself, but, in any case, the distinction was largely inconsequential.

The *sic utere tuo* principle was an apt illustration of the futility of the distinction. It would seem that one of the consequences of the distinction would be a recognition that the principle applied only to neighbouring States. Indeed, according to paragraph 14 of the report, "the *sic utere tuo ut alienum non laedas* principle has been recognized as customary international law as applied to the relationship with an 'adjacent State' sharing a common territorial border", but its scope had been "broadened to the relationship with long-range transboundary causes and effects between the State of origin and the affected States". In short, as he understood it, the principle did not apply to "commons" or areas beyond national jurisdiction, or to the global degradation of the environment. Yet, there was nothing in the *Trail Smelter* decision, or any of the sources cited, that suggested such a limitation. Indeed, the Rio Declaration expressly provided for the application of the principle beyond national jurisdiction. Analogously, article 117 of the Convention on the Law of the Sea imposed a duty on States to take measures to ensure that their nationals conserved the living resources of the high seas. What was particularly strange with respect to the treatment of *sic utere tuo* was that paragraph 38 of the report confirmed that the principle applied equally in a global context.

Further illustrating the futility of the distinction, draft guideline 3 (a) applied to atmospheric pollution, while draft guideline 3 (b) applied to atmospheric degradation; the primary duty, in the chapeau, applied to both equally. However, for atmospheric pollution there was a duty of due diligence, while the same did not appear to apply to atmospheric degradation. Moreover, measures to prevent atmospheric pollution were to be "under international law", while measures relating to atmospheric degradation were to be "in accordance with relevant conventions". Nothing in the report alluded to the distinction made in respect of due diligence, either expressly or by necessary implications. According to paragraph 17, the principle of prevention in environmental law was based on the concept of due diligence; since a duty of prevention applied to both degradation and pollution, surely measures of due diligence should be adopted in both instances. The distinction between "international law" and "relevant conventions" was even more puzzling, as it almost seemed to suggest that conventions were not international law. If the Special Rapporteur meant that the duty to adopt measures with respect to atmospheric pollution applied as a matter of customary international law, while the duty to adopt measures with respect to atmospheric degradation applied only as a matter of treaty law, there was nothing in the report to justify that conclusion. Presumably, it was based on the conclusion reached previously concerning the limited application of *sic utere tuo*; but there was nothing in the report to justify such a narrow interpretation. The International Court of Justice had recognized the broader version of the principle in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*. In any event, the phrase "under international law" would capture the idea.

He also had doubts about the dichotomy presented in paragraph 15, namely that the principle of prevention consisted of two different obligations: the obligation to prevent

before actual pollution or degradation occurred and the duty to eliminate, mitigate and compensate after they had occurred. It was not clear that the second obligation was a part of the primary obligation; rather it seemed to be a secondary duty flowing from the failure to comply with the primary duty to prevent. That was certainly the case for the compensation aspect. Although the Commission might well conceive of a duty to mitigate potential pollution or degradation, there was no reason for it to apply after they had already occurred. In other words, he did not see the duty to mitigate as being similar to the duty to restore.

The only authority cited in the report for the dual nature of the duty to prevent was the 1997 Watercourses Convention; however, even there, it was clear that the duty to mitigate, eliminate and possibly compensate was a secondary duty flowing from the first and not a distinct independent duty. Presumably, the duty to compensate did not arise, absent a breach of the primary obligation.

The duty to mitigate was closely connected to rules relating to impact assessments and foreseeability, the best examples of which were the World Bank operational policies. Under those policies, where an environmental impact assessment revealed the potential for significant damage, there was a duty to mitigate the risk by, for example, making adjustments to the proposed plan. That, however, remained a primary obligation applicable before any harm occurred. The post-degradation or pollution duty seemed to be of a secondary nature flowing from failure to comply with the primary duty to prevent.

He also had concerns about the treatment of the due diligence obligation in the report, which was described variously as the obligation to "make best possible efforts in accordance with the capabilities of the State", to "take all appropriate measures to control, limit, reduce or prevent human activities", and as requiring "the best available efforts not to cause adverse effects". The report did not clarify whether those were equivalent standards or why draft guideline 3 used the expression "appropriate measures", a standard that seemed different from all of the others.

It was not clear why the report contained a detailed discussion on the burden of proof, since — quite rightly in his view — none of the draft guidelines appeared to relate to that concept. In paragraph 28 of the report, it was suggested that the precautionary principle might result in a reversal of the burden of proof. However, as the International Court of Justice had stated, the precautionary principle was not about reversing the burden of proof. It was important to understand that the case law cited in the report concerned factual disputes and that the Court had simply been applying its own approach to the establishment of facts. The Court's reasoning in those cases had not been intended to contribute to rules, principles or guidelines on issues related to the environment or the atmosphere.

While the analysis of the precautionary principle contained in the report was useful, he did not share the conclusion that it would be inappropriate to refer to the precautionary principle in the draft guidelines because it had not been recognized as customary international law by the Court. That should not be the standard used by the Commission in determining whether a given element should be included in its texts. Since the Special Rapporteur had not engaged in a qualitative analysis of practice, including, for example, the advisory opinion of the International Tribunal for the Law of the Sea referred to in paragraph 25 of the report, or the countless resolutions, treaties and acts related to those treaties and resolutions that could have been considered to support a conclusive determination about the status of precaution, it was inappropriate to suggest that no reference was made to the principle in the draft guidelines because of a lack of normative or doctrinal support. That said, he did not wish to suggest that the Commission should include a guideline on precaution. Clearly, it was precluded from doing so by the 2013 understanding. However, he objected to the unsubstantiated conclusion reached in the report that customary international law did not recognize the precautionary principle. He recalled that the understanding specifically stated that it was without prejudice to questions

such as the precautionary principle. Regrettably, the Special Rapporteur's treatment of the principle in the report was the definition of prejudice, and he wished to register his very strong disapproval.

He was largely in agreement with the Special Rapporteur's analysis, even if it was somewhat conservative, of the obligation to carry out an environmental impact assessment. The International Court of Justice had indeed found, in its judgment in the *Pulp Mills* case, that there was a duty under customary international law to conduct an impact assessment where an activity had the potential to have transboundary effects; incidentally, there was no reason why such duty should not also apply in the context of potential global effects. However, the Court had not accepted the argument put forward by Argentina concerning the quality and consequences of such an assessment. In other words, the Court had not accepted that international law prescribed the elements to be contained in an environmental impact assessment, nor had it accepted that international law prescribed such an assessment's consequences. That was in contrast to the policies of the World Bank on environmental impact assessments, which identified both elements and consequences, including a potential reorientation of the proposed activity.

It would be useful for the draft guidelines, as a whole, if draft guideline 4 were to include a reference to the principle invoked in the *Pulp Mills* case as a rule of customary international law and then, in more practical terms, if it were to include the elements of an effective environmental impact assessment and its consequences or the response measures to be carried out. The latter aspect would have to be carefully drafted to avoid any impression that such elements themselves constituted customary international law. Adopting such an approach would clearly distinguish between those elements of the guidelines that were representative of customary law and those that were not. For instance, he approved of the reference, in draft guideline 4, to transparency and public participation regarding environmental impact assessments, but the report did not justify them as legal requirements. Yet it would be useful to introduce into the draft guidelines ways in which States might give effect to the customary international law principle on the duty to conduct an environmental impact assessment, including rules on public participation and transparency.

Regarding the sustainable utilization of the atmosphere, he would hesitate to equate maximum sustainable yield with sustainable development; it was noteworthy, in that connection, that the drafters of the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks had abandoned that concept in favour of precaution. Moreover, even in the annual General Assembly resolution on oceans and the law of the sea, which focused on the Convention on the Law of the Sea, the concept of maximum sustainable yield was largely marginalized.

He welcomed the references in the report to the principles of inter- and intragenerational equality. It was regrettable that the same treatment had not been given to the principle of common but differentiated responsibilities. While he understood that, just as with the precautionary principle, the principle of common but differentiated responsibilities had not been included in the draft guidelines on the basis of the 2013 understanding, he strongly objected to the impression created in paragraph 83 of the report that it had not been included because it was not part of the body of international law. It was simply not true that the "without prejudice" clause was ambiguous. Any suggestion, moreover, that the principle of common but differentiated responsibilities was not part of the body of international law was without basis and no effort was made in the report to support it. Virtually every modern international law instrument adopted since the United Nations Conference on Environment and Development, held in 1992, in Rio de Janeiro, Brazil, reflected in some way the principle of common but differentiated responsibilities —

whether by express mention, through the creation of differentiated responsibilities, or through the linking of the performance of obligations on developing States to technology and financial transfer.

He was particularly baffled by the assertion in paragraph 81 of the report that there was no longer any reference — presumably in the 2015 Paris Agreement — to the concept of common but differentiated responsibilities. However, article 2 (2) of the Agreement made it clear that that concept — or, more appropriately, principle — was part of United Nations law on combating climate change. Similarly, and perhaps more importantly in terms of giving effect to the principle, article 4 (3) of the Agreement referred to the common but differentiated responsibilities of States parties. If the Special Rapporteur, in asserting that there had been a regression in the application of the concept, meant that all States had commitments under the Paris Agreement, whereas in the Kyoto Protocol developing States did not have quantified emissions and reductions commitments, that was only because the Paris Agreement itself was a regression. After all, the Paris Agreement did not set any binding commitments on any State; it was States themselves that must set commitments. Differentiation in that respect was therefore not possible.

It was not clear that geoengineering should be addressed in the draft guidelines, not least because the Commission lacked expertise in that area. The Commission's work on the topic should instead seek to lay down broad principles, supported by practical guidelines on the ways in which States could give effect to those principles. The principles should reflect rules of law, while the guidelines need not do so, and specific issues, such as geoengineering, should be addressed through the application of the draft guidelines. In other words, any geoengineering activity would presumably also be subject to the requirement of environmental impact assessments — and the guidelines to be developed thereunder — and to the duty to ensure that that activity did not cause atmospheric pollution or degradation under draft guideline 4. In that respect, a separate provision dealing specifically with geoengineering was unnecessary, and might even be dangerous.

He supported referring to the Drafting Committee the fourth draft preambular paragraph and draft guidelines 3 to 6; he was also in favour of the proposal whereby draft guideline 5, as provisionally adopted by the Commission at its sixty-seventh session, would become draft guideline 8, and the guidelines as a whole would be renumbered accordingly. Although he would not stand in the way of consensus, he did not support referring draft guideline 7 to the Drafting Committee.

Mr. Murphy, noting the serious concerns expressed by Member States during their debate on the topic in the Sixth Committee, said that the Commission had sought to avoid such issues from the outset by adopting its 2013 understanding and incorporating elements thereof into both the preamble and draft guideline 2. Given the support subsequently expressed by Member States in favour of the understanding, it was unfortunate that the report on the topic once again departed from it. Despite the statement in the understanding that the topic would not deal with the precautionary principle, paragraphs 28 and 39 of the report dealt expressly with that principle. Moreover, the Special Rapporteur asserted, in footnote 119 of the report, that it had been agreed that the "precautionary approach" could be addressed in the draft guidelines, yet no such agreement had been reached and no such agreement was reflected in the 2013 understanding. Moreover, no "precautionary" formulation was implicit in draft guideline 3, and any suggestion that it was in the commentary to the draft guidelines would be in disregard of the understanding.

Similarly, despite the statement in the 2013 understanding that the topic would not deal with common but differentiated responsibilities, paragraphs 71, 72, 79 and 81 to 83 of the report dealt expressly with that concept. Moreover, references to it were not casual; the Special Rapporteur was purporting to interpret the meaning of the concept in some depth, precisely for the purpose of injecting references to it into the draft guidelines, specifically in

the preamble and with respect to the principle of equity. It was particularly troubling that, in paragraph 83 of the report, the Special Rapporteur claimed that the phrase "but is also without prejudice to" had been inserted in the 2013 understanding so as to allow the concept of common but differentiated responsibilities to be included in the draft guidelines; that statement was a misrepresentation of the understanding and should be corrected. Otherwise, he feared that future reports might include matters that had been excluded by the understanding.

Also according to the 2013 understanding, the topic was not to interfere with relevant political negotiations, including on climate change; yet, in paragraph 82 of the report, the outcome of the recent Paris Agreement was characterized as regressive in its imposition of the obligation on all States, rather than just developed States, to develop nationally determined contributions. Such statements were precisely what the Commission had sought to avoid by adopting the 2013 understanding; indeed, it was not helpful to cast aspersions on the outcome of the careful and, in some respects, fragile balancing of interests captured in the Paris Agreement, especially at a time when States were deciding whether or not to ratify it.

He did not support referring the fourth draft preambular paragraph to the Drafting Committee and he hoped that the Special Rapporteur would not insist on including the language contained therein. Furthermore, language emphasizing "the need to take into account the special situation of developing countries" was out of step with contemporary efforts to deal with atmospheric degradation. All States were now seen as being part of the solution to such complex problems as climate change. If the draft preambular paragraph was to be sent to the Drafting Committee, the focus should be not on "the special situation of developing countries", but on a more neutral and less category-driven acknowledgement of "the national circumstances and economic capabilities of States". He did not support the recent suggestion by the Special Rapporteur that the Commission might wish to revisit the language regarding the concept of the "common concern of humankind" adopted at its sixty-seventh session. The Paris Agreement did not support the idea that protection of the atmosphere — the context of the draft preambular paragraph currently under consideration — was a common concern of humankind. As pointed out by Mr. Hmoud, the United Nations Framework Convention on Climate Change and the Paris Agreement focused solely on climate change.

There was a structural ambiguity in draft guideline 3: it was not clear whether the very broad obligation set out in the chapeau exceeded the obligations set forth in subparagraphs (a) and (b), or whether those subparagraphs captured the totality of the overall obligation. If the former was intended, an explanation of the full scope of the obligation contained in the chapeau should be provided; if the latter was intended, the chapeau should conclude with a phrase such as "as follows:", to connect the chapeau directly with the subparagraphs. More importantly, though, the Commission should consider its intentions for the guidelines. Recalling that the Commission's Guide to Practice on Reservations to Treaties, which the Special Rapporteur had recently invoked as a model for the present topic, did not contain guidance in the form of obligations, but rather a series of propositions designed to aid States' understanding, he said that the draft guidelines on the protection of the atmosphere had been drafted as diktats to States and therefore presented an altogether different tone. Therefore, if draft guideline 3 were to be referred to the Drafting Committee, it should be reformulated; for instance, one subparagraph might read, "Customary international law provides that appropriate measures of due diligence shall be taken by States to prevent atmospheric pollution", and the other, "In accordance with relevant conventions, States have agreed to appropriate measures for minimizing the risk of atmospheric degradation". The Commission's goal in providing such guidelines should be to encourage States to adopt certain behaviours, not to dictate orders to them,

especially orders that could not be found in any treaty, principle or rule of law relating to the atmosphere.

Draft guideline 4 had the same general problem of tone and approach as that mentioned in relation to draft guideline 3. In addition, it departed from the standard language on environmental impact assessment that appeared in leading cases on the subject. Further, much of the language proposed in draft guideline 4 was unclear. For example, the second sentence on transparency could be read to require that a State must allow participation by other States and nationals of other States in its environmental impact assessment activities that did not have a transnational dimension, a proposition that clearly had no basis in international law. If such a draft guideline was deemed necessary, it should be crafted so as to follow the language of well-established precedents. For example, taking inspiration from the language of the *Pulp Mills* case, draft guideline 4 might be better drafted to read "Customary international law provides that a State shall undertake an environmental impact assessment where there is a risk that an activity by that State may have a significant adverse impact in a transboundary context resulting in atmospheric pollution or atmospheric degradation".

The tone and style of draft guidelines 5 and 6 were an improvement on that of draft guidelines 3 and 4, in particular, in that they used the hortatory word "should" rather than phrases such as "have the obligation to". He nevertheless had some reservations about the substance of the guidelines. For instance, there was no analysis in the report to support the reference in guideline 5 to the atmosphere's "finite nature". Although the atmosphere was currently more polluted than previously and contained more greenhouse gases, the atmosphere remained what it had always been — an envelope of gases surrounding the Earth and of roughly the same size as the Earth. As such, the atmosphere could be understood as a renewable resource, similar to water, wind and solar energy. If what was meant in draft guideline 5 was that excessive pollution of the atmosphere would change the composition of its gases, that was true, but it did not mean that the atmosphere itself was finite. If instead what was meant was that the absorption of an excessive quantity of greenhouse gases into the atmosphere would lead to catastrophic climate change, that too was true, but again it did not imply that the atmosphere was finite.

The unusual concept of sustainable utilization referred to in draft guideline 5 was not supported by treaties, jurisprudence or general practice. It appeared to be inspired by the concept of sustainable development, but, in the present context, seemed almost to commodify the atmosphere. Indeed, the use of the term "sustainable utilization" seemed to represent the atmosphere as a sort of gas or oil reserve that the Commission expected or even encouraged States to exploit, even though in the present context that would mean polluting or degrading the atmosphere. Given that the Commission did not wish States to engage in polluting activities, he had serious reservations about the use of the novel concept of sustainable utilization.

Noting that draft guideline 6 referred to utilization of the atmosphere on the basis of an undefined "principle of equity", he said that the term "equity" had radically different meanings for different actors, especially in the context of protection of the atmosphere. The reasons for including a reference to such a principle in the Commission's work on the topic remained unclear. With regard to the three categories of equity in international law — equity *infra legem*, equity *praetor legem* and equity *contra legem* — he said that, notwithstanding the Special Rapporteur's suggestion that equity *contra legem* should be set aside as inappropriate, he had not found any such caveat in draft guideline 6. Furthermore, the exact meaning of "equity", for the purposes of the draft guidelines, and its connection to the concepts of distributive justice and common but differentiated responsibilities, was not clear. Did the reference to "equity" mean, for instance, that wealthy States must allocate resources to less wealthy States when they utilized the atmosphere? Did it mean that less

wealthy States should allocate burdens to wealthy States? Given the lack of clarity, it would be unwise to advance such a principle without explaining its exact meaning. It would also be useful to determine how the principle related to the recent Paris Agreement, which had been widely acclaimed precisely because it sought to impose burdens on all States. In the operative paragraphs of the Agreement, the drafters had consciously avoided any open-ended references to a principle of equity in favour of more concrete formulations tailored to the particular issues at hand. Indeed, in none of the treaty instruments identified by the Special Rapporteur, in paragraphs 72 to 74 of the report, was there a reference to a "principle of equity". The closest analogy to such a principle was found in those treaties that referred to "reasonable and equitable utilization" of a shared resource, as appeared in the Commission's 1994 articles on the law of the non-navigational uses of international watercourses, which had resulted in the eponymous Convention. Perhaps, then, the phrase "on the basis of the principle of equity" in guideline 6 might be replaced with an expression such as "in a reasonable and equitable manner".

The fact that draft guideline 7, on geoengineering activities, seemed not to be directed at States, but at anyone carrying out such activities, raised certain structural issues. Moreover, the guideline did not define geoengineering activities. Recalling that some members had argued strongly in favour of a definition for the term "atmosphere", he said that the need for a definition of "geoengineering activities" seemed all the more warranted. Even if a narrow definition were found to suit the Commission's purposes, he wondered whether it would be appropriate for the Commission to declare broad support for such activities. As was noted in the report, geoengineering science was advancing rapidly and there were calls by States, scientists and environmental groups to ban geoengineering activities completely, for two reasons: first, the concern that large-scale manipulation of the planetary environment might be extremely risky; and secondly, the concern that promoting geoengineering might undercut efforts to decrease greenhouse gas emissions, based on the theory that States would focus on novel methods of carbon sequestration rather than on elimination of carbon emissions. Therefore, he agreed with Mr. Tladi that draft guideline 7 should not be referred to the Drafting Committee.

With regard to the Commission's future work on the topic, he would suggest that, if a first reading was contemplated in 2018, then the second reading should occur in 2020, in keeping with the Committee's general practice, to provide States with ample time to react to draft guidelines.

Mr. Kittichaisaree suggested that the Special Rapporteur should be allowed to comment on the statements made by Commission members before the end of the Commission's debate on the topic.

Mr. Tladi said that each member had the right to make a statement on the topic and it would not be appropriate to pre-empt the Commission's debate.

He supported Mr. Murphy's point that the Commission ought not to create the impression that previously adopted instruments, such as the United Nations Framework Convention on Climate Change, did not impose obligations on a certain category of States. Indeed, such instruments did create some obligations for the latter, but they were obligations of a different nature. Similarly, in the Paris Agreement, it was the nature of the obligations between States that were different: the concept of common but differentiated responsibilities was taken into account when States set their nationally determined contributions.

The Chairman said that the Commission took decisions on the basis of consensus. Therefore, he could not force the direction of the Commission's discussion one way or another, nor could he pre-empt individual members' contributions thereto.

Organization of the work of the session (agenda item 1) (*continued*)

Mr. Šturma (Chairman of the Drafting Committee) said that the Drafting Committee on the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties was composed of Mr. Kamto, Mr. Kittichaisaree, Mr. Kolodkin, Mr. McRae, Mr. Murphy, Mr. Vázquez-Bermúdez and Sir Michael Wood, together with Mr. Nolte (Special Rapporteur) and Mr. Park (Rapporteur), *ex officio*.

The meeting rose at 1.05 p.m.