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Held at the Palais des Nations, Geneva, on Wednesday, 1 June 2016, at 10 a.m.

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Present:

Chairman:	Mr. Comissário Afonso
Later:	Mr. Nolte
Members:	Mr. Al-Marri
	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. 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.

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

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

Mr. Park said that he wished to thank the Special Rapporteur for presenting his third report and for organizing a second meeting with scientists on 4 May 2016, which had enabled members to learn more about the protection of the atmosphere and to understand the scientific background. As an introductory remark, he noted that, in accordance with the workplan detailed in paragraph 79 of the second report, the third report was devoted to an analysis of the basic principles of international environmental law that were of relevance to the topic under consideration. The report also contained a modified version of the draft guideline on the obligation to cooperate — discussion of which had been deferred by the Commission at its sixty-seventh session — and a large number of references to international instruments and judicial decisions that made it possible to study the topic in greater depth.

As illustrated by, for example, the phenomenon affecting North-East Asia that consisted in yellow-dust storms that kicked up fine particles, transboundary atmospheric pollution and global atmospheric degradation were of fundamental importance to all human beings and States. The topic dealt with by the Special Rapporteur was thus a timely one for the international community, and the Commission should take care to formulate relevant and appropriate draft guidelines that met with the approval of as many States as possible. However, he still doubted whether the topic had special features that set it apart from other subjects linked to the protection of the environment. The purpose of the draft guidelines was to regulate human activities that could result in atmospheric pollution and degradation, not to protect the atmosphere *per se*. It should be borne in mind that not all principles of environmental law were applicable *mutatis mutandis* and that one could not ignore the differences between, on the one hand, the atmosphere, which was the envelope of gases surrounding the Earth, and, on the other, the marine environment, fresh water and other natural resources in liquid form and living or non-living ecosystems.

Turning to the draft guidelines annexed to the report, he recalled that the previous version of draft guideline 3, namely former draft guideline 4, had been a single sentence that had read: “States have the obligation to protect the atmosphere”. That proposal by the Special Rapporteur had been criticized by some members, including him, for being too abstract and because the obligation was characterized in the second report as being *erga omnes*. In the new version, the Special Rapporteur distinguished between transboundary atmospheric pollution and global atmospheric degradation, and proposed saying, in relation to the former, that States should take appropriate measures of due diligence to prevent transboundary atmospheric pollution in accordance with the relevant rules of international law and, in relation to the latter, that States should take appropriate measures to minimize the risk of global atmospheric degradation in accordance with relevant conventions. The wording implied that States had two different kinds of international obligation to protect the atmosphere: one based on customary international law and the other on relevant international instruments. Consequently, States had responsibilities towards not only neighbouring countries but also the international community.

The new language called for two observations. First, there was no significant difference between the draft under consideration and the previous version, as both established the overall obligation of the State to protect the atmosphere. Moreover, atmospheric pollution and atmospheric degradation were, in reality, closely linked, and, while he was aware that they were defined as distinct phenomena in draft guideline 1 as adopted by the Commission at its sixty-seventh session, he doubted whether it was possible, in practice, to distinguish clearly between the obligation to prevent transboundary atmospheric pollution and the obligation to prevent global atmospheric degradation, given that the atmosphere was mobile by nature and flowed like a gas. In fact, scientists considered that those closely related phenomena were nonetheless different, particularly in terms of the introduction into the atmosphere of substances produced by human activities, including molecules and particles, as underlined by one of the participants in the meeting

with scientists held at the beginning of the session. Some people believed that transboundary atmospheric pollution, far from being merely a local problem, was becoming a global issue, and that there was a link between atmospheric pollution and climate change. As a result, transboundary atmospheric pollution might lead or amount to global atmospheric degradation. It was thus difficult to distinguish clearly between human activities that caused atmospheric pollution and those that gave rise to atmospheric degradation.

Secondly, even if a distinction was drawn between atmospheric pollution and atmospheric degradation, doubt remained over whether the obligation to protect the atmosphere constituted an *erga omnes* obligation. In particular, he was not sure whether the principle of *sic utere tuo ut alienum non laedas* applied to global atmospheric degradation, which was, by nature, not simply a transboundary issue. In other words, one might wonder whether there was a specific legal obligation on a State not only to refrain from producing transboundary atmospheric pollution but also to prevent global atmospheric degradation, and whether that obligation could be imposed on all States, even though it was specified in subparagraph (b) that prevention measures should be taken in accordance with relevant conventions.

As explained in paragraphs 35 to 39 of the report, the "no harm rule" in the context of transboundary atmospheric pollution between neighbouring States had been recognized as a rule of customary international law. It was not sufficient, however, to indicate that the obligation was far-reaching and applied to all States, and the notion of precaution inevitably came into play when the geographical scope of the obligation was extended. As noted by the Special Rapporteur, however, the precautionary principle was too controversial to be recognized as a rule of customary international law and went beyond the 2013 understanding. During the consideration of the draft articles on the protection of persons in the event of disasters, similar legal points had been raised by some members of the Drafting Committee about draft article 9 on disaster risk reduction. He therefore thought that it might be better to follow the wording of principle 21 of the 1972 Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration) and of principle 2 of the 1992 Rio Declaration on Environment and Development, and to amend draft guideline 3 to read: "States ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."

Draft guideline 4 concerned the obligation to conduct a comprehensive environmental impact assessment. As pointed out in paragraph 42 of the report, the Stockholm Declaration did not expressly refer to such assessments, but principles 14 and 15 of the Declaration implied the rationale underlying them. Principle 17 of the Rio Declaration, meanwhile, provided that an assessment should be undertaken for activities that were likely to have a significant adverse impact on the environment and were subject to a decision of a competent national authority. The Special Rapporteur argued that international judicial precedents had confirmed the existence of an obligation to carry out an environmental impact assessment. However, in his draft, he did not specify under which conditions the obligation arose for a State and referred only to "proposed activities", a general term that did not pinpoint those cases in which a significant impact on the environment was likely to result. Moreover, bearing in mind that international instruments with an environmental impact assessment clause did not address transboundary pollution, one might question the appropriateness of mentioning global atmospheric degradation in the first sentence of the draft guideline, since doing so unduly extended the scope of the obligation set out there. One might also wonder whether the words "all such measures that are necessary to ensure" reflected the different capacities of States to perform an impact assessment. It seemed that, in Europe, the obligation to conduct an environmental impact assessment had become a regional rule of customary law and was well established in international practice, at least as far as projects with transboundary effects were concerned. In the light of the foregoing, he proposed the reformulation of draft guideline 4 to say that States should take the measures needed to ensure an appropriate environmental impact assessment. If necessary, detailed explanations could be given in the relevant commentary.

Draft guidelines 5 and 6 could be examined together as they bore similarities. Some of the expressions that they contained, for example in the title of draft guideline 5, were not commonly employed. The term "sustainable utilization" did appear in article 5 (1) of the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses, but it was not very meaningful in the context of the topic under consideration as it was not clear how the atmosphere could be actually utilized. Similarly, the terms "finite nature of the atmosphere" and "proper balance" in subparagraphs 1 and 2, respectively, were too abstract. As for draft guideline 6, he was well aware that the concept of "equitable utilization" had already been referred to by the Commission in its previous work, including in article 4 of the draft articles on the law of transboundary aquifers adopted in 2008, but, to reiterate, one could not ignore the differences between the atmosphere and living or non-living ecosystems, or transpose all the principles of environmental law *mutatis mutandis* to the topic at hand. In his view, draft guidelines 5 and 6 should be deleted.

Concerning draft guideline 7, he considered that it was too early for the Commission to pursue the progressive development of international law in the area of intentional modification of the atmosphere, as proposed by the Special Rapporteur in paragraph 85 of his report. While the purpose of the draft guidelines was to determine well-established practice and principles, and to provide general guidance, geoengineering was a very specific and technical discipline that was still little known. In addition, as highlighted by the scientists at the meeting in early May, the concept of geoengineering and its use remained ambiguous. The issue also exceeded the scope outlined in draft guideline 2, in that it was directly related to climate change. Lastly, draft guideline 7 was essentially based on the Oxford Principles on Climate Geoengineering Governance, which had been published in 2013, and on several other documents concerning climate change, which meant that it covered most aspects of atmospheric degradation but did not deal with atmospheric pollution. It should therefore be deleted.

With regard to draft preambular paragraph 4, he recognized that the need for special consideration for developing countries was emphasized in several binding and non-binding international instruments, and was linked to the concept of "common but differentiated responsibilities", but noted that the normative quality of the concept was far from clear and remained in the grey area between international hard law and international soft law. Recalling that draft guideline 2 (2) established that the draft guidelines not only did not deal with several questions, including that of common but differentiated responsibilities, but were also "without prejudice" to them, he noted that, in paragraph 83 of the report, the Special Rapporteur interpreted the inclusion of the words "but is also without prejudice to" in draft guideline 2 (2) as a sign that the Commission intended to address the concept of common but differentiated responsibilities in the draft guidelines — an interpretation that he doubted was shared by all the members of the Commission.

To conclude, although the protection of the atmosphere was an important issue for the international community, the task was to draw up appropriate guidelines that could be accepted by most States. Concerning the workplan proposed in paragraph 92 of the report, the Special Rapporteur might wish to explain why he had suggested tackling the question of the interrelationship of the law of the atmosphere with other fields of international law and the issues of implementation, compliance and dispute settlement relevant to the protection of the atmosphere.

Mr. Forteau, after thanking the Special Rapporteur for the oral presentation of his report and for the very useful clarifications that he had provided, said that, before commenting on the proposed draft guidelines, he wished to point out that the French version of the report contained several errors, in particular because it did not reflect the wording that the Commission had deliberately chosen to use in the draft guidelines adopted at its sixty-seventh session. To cite just one example, in draft guideline 1, the term "atmospheric pollution", which the Commission had decided to render as "*pollution atmosphérique*", was translated in the report under consideration as "*pollution de l'air*" ("air pollution"), a markedly different concept. In the rest of his statement he would therefore refer to his own translation of the English version of the Special Rapporteur's proposals.

Regarding the new paragraph to be inserted in the preamble, he noted that the language was a compromise that made it possible to overcome the divergences between the members who wished to refer explicitly to common but differentiated responsibilities in the draft guidelines and those who did not deem that appropriate. The wording of the paragraph should, however, be reviewed to take into account the 2015 Paris Agreement, in which mention was made not only of the "special circumstances" of States but also of their "specific needs".

As to draft guideline 3, he thanked the Special Rapporteur for taking into consideration the criticisms expressed by several members at the sixty-seventh session. The proposed new wording was more precise and, as a result, seemed at first glance to be more operative from a legal standpoint. Nevertheless, it continued to pose a number of problems. The first of the three sentences in the draft guideline differed little from the previous version in that it was affirmed in absolute terms that States "have the obligation to protect the atmosphere from atmospheric pollution and atmospheric degradation". The Special Rapporteur indicated in his report that the draft guideline was based on the *sic utere* principle, but, in reality, the scope of the first sentence was considerably broader. Although specifying the nature of the adverse effects that States should prevent made it possible to limit the scope of the obligation in the light of the restrictive definition of atmospheric pollution and degradation adopted by the Commission at its sixty-seventh session, the obligation to protect was formulated in too general a manner, which precluded it from having actual legal significance. Indeed, it was not clear what exactly the obligation entailed: should it be taken that the State had a general obligation to protect the atmosphere, irrespective of the activity in question, of where it was carried out or of its nature or effects? In the same way that States could not be said to have an obligation to protect all of humanity from the effects of war, one could not assert that they had an obligation under international law to protect the atmosphere. Moreover, the fact that the first sentence was followed by two subparagraphs and that it was hard to tell whether they supplemented it or limited its scope was an additional source of confusion. Reading the draft guideline, it was not clear whether it contained three successive legal obligations or a single obligation composed of two elements. Also, the words "transboundary" and "global", which appeared in the draft guideline as set out in paragraph 40 of the report, should be removed as they were an integral part of the definitions adopted by the Commission at its sixty-seventh session, given that atmospheric pollution was necessarily transboundary, and atmospheric degradation, global.

With regard to the obligation to protect, the considerations advanced by the Special Rapporteur about the system of proof were only partly convincing. It was not the task of the Commission to decide on the matter, which was, rather, at the discretion of international courts. In addition, the Special Rapporteur's analysis of international case law was incomplete. When he cited, in paragraph 31 of his report, the judgment in the *Corfu Channel* case to support the idea that the International Court of Justice had agreed to a lessening of the standard of proof, he failed to mention that, immediately after the quoted passage, the Court also specified that, for State responsibility to be involved, there should be "no room for reasonable doubt". Consequently, it could not be said that the Court had relaxed the criteria applicable in that case.

Subject to those remarks, he believed that subparagraph (a) of draft guideline 3, as currently worded, reflected customary international law, at least when it came to atmospheric pollution; in other words, to transboundary harm affecting two clearly identifiable States. He doubted, however, that the *sic utere* principle could simply be transposed from a bilateral to a global context and also be taken as a reference in the case of atmospheric degradation, as indicated in subparagraph (b). In that respect, paragraphs 35 *et seq*. of the report were based on a certain confusion: while it was true that the *sic utere* principle applied to areas beyond national control, it could not be deduced that its scope could also be global. The *sic utere* principle could be applied when a given State polluted a common area, such as the high seas. It was harder to see how it could apply to atmospheric degradation, which resulted from cumulative, interconnected actions by various actors whose legal liability was difficult to gauge, as acknowledged by the Special Rapporteur in paragraph 37 of his report. Even if principle 21 of the Stockholm Declaration expanded the scope of application of the *sic utere* principle to areas beyond national jurisdiction, the

principle still followed the logic of transboundary harm, which was different to that of global atmospheric degradation. The experts who had met with the Commission at the start of the session had in fact confirmed that, although it was possible to prove scientifically that atmospheric degradation was due to human activity, it was impossible to assign responsibility for that degradation to a particular actor. The responsibility was thus global and could not be fragmented to the level of individual legal responsibility.

It should be emphasized that the negotiators of the Paris Agreement had decided not to address the issue of loss and damage from the point of view of legal responsibility. In fact, paragraph 52 of the decision adopted by the Conference of the Parties to the United Nations Framework Convention on Climate Change with a view to giving effect to the Paris Agreement expressly provided that "Article 8 of the Agreement does not involve or provide a basis for any liability or compensation". The Special Rapporteur should therefore clarify the scope of the obligation to protect the atmosphere that he planned to place on States with respect to global atmospheric degradation and specify, in particular, whether harming the atmosphere in absolute terms, outside the transboundary context, would or would not give rise to State responsibility under international law. Knowing how difficult it was to determine the cause of any given damage, one might also question whether it would be possible, if necessary, to establish that harm had occurred.

The Special Rapporteur seemed to be aware of the problem because, in subparagraph (b) of the draft guideline, he used merely a watered-down version of the *sic utere* principle. However, he did not explain on what basis he was imposing on States the obligation to take appropriate measures to minimize the risk of atmospheric degradation. The nature and scope of such an obligation, if there was any, should be specified. It should be made clear, in particular, whether the obligation entailed undertaking commitments to reduce pollutant emissions. Thus, while subparagraph (a) of draft guideline 3 appeared to be in accordance with existing laws, the same could not be said for the first sentence of subparagraph (b).

Regarding draft guideline 4, in principle, he agreed with the Special Rapporteur that there was a requirement under contemporary international law to perform environmental impact assessments. It should be borne in mind, however, that the obligation applied not in a vacuum, but in relation to specific projects, plans and programmes. That was reflected in the judgment handed down in the case concerning *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, in which the International Court of Justice found that a State had to ascertain if there was a risk of significant harm "before embarking on an activity having the potential adversely to affect the environment of another State", and in principle 17 of the Rio Declaration on Environment and Development, which stipulated that impact assessments should be undertaken "for proposed activities". In addition, the Special Rapporteur, who cited other instruments in paragraphs 42 and 43 of his report, should clarify whether the numerous conventions mentioned in paragraphs 44 and 45, and the non-binding instruments referred to in paragraph 51, concerned only transboundary harm, like the Espoo Convention, or were of general applicability. In the case concerning *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, the International Court of Justice had held that the obligation to undertake an assessment applied only where there was a risk that a given industrial activity might have an adverse impact in a transboundary context, and the International Tribunal for the Law of the Sea had stated that the obligation applied to areas beyond national jurisdiction but only when there was a risk of those areas being damaged by particular activities.

The text proposed by the Special Rapporteur seemed to widen the scope of that customary law obligation considerably. As well as relating to both atmospheric pollution and atmospheric degradation, thus extending the obligation beyond the transboundary context, draft guideline 4 covered, in a very general manner, "proposed activities". It followed that the obligation applied not only to activities that created a risk of transboundary pollution but also to all activities that might contribute to atmospheric degradation. In fact, in its current wording, the draft guideline established an obligation to carry out an impact assessment for almost all human activities, and particularly all industrial activities. The obligation was overly broad and hardly seemed compatible with the very nature of atmospheric degradation, which had not one source, but many, in that it

resulted from multiple pollution factors that were problematic by the very fact of their accumulation. Consequently, the obligation to conduct an impact assessment could not be interpreted in the same way or arise from the same rules of law in the context of atmospheric pollution and in that of atmospheric degradation. Furthermore, it was hard to imagine providing for "broad public participation", to quote the language of the draft guideline, if the obligation to perform an impact assessment was so widely applicable.

Draft guideline 5 dealt with the "sustainable utilization of the atmosphere", but one might question the appropriateness of that expression. In the same way that one could not say that a pollutant emission utilized the atmosphere, one could not reasonably cite the "sustainable utilization" of the atmosphere as grounds for imposing an obligation to limit sources of pollution. Moreover, although it had a worthy aim, the first subparagraph of the draft guideline seemed to be devoid of real normative value. It was also drafted, in the French text, in the conditional tense, which was not very consistent with the second subparagraph, which set out an obligation under international law. Given that the Special Rapporteur considered sustainable development to be only an emerging principle of international law, he was not sure that it was appropriate to try at all costs to define it in subparagraph 2. It would probably be wiser to convert draft guideline 5 into a preambular paragraph and to reformulate it in line with article 3 (4) of the Framework Convention on Climate Change, while recalling that, for all States, sustainable development was a right and an objective to be promoted.

The current wording of draft guideline 6 also left something to be desired. While he subscribed fully to the spirit of the text, he considered that the rule expressed therein pertained more to philosophical thought than to a norm of law. He did not know what was meant, in law, by the concept of the utilization of the atmosphere on the basis of the principle of equity, or what the concrete legal effects of such a principle would be. In existing instruments related to the atmosphere, equity was not considered to be a principle *per se*, but a notion that should guide the implementation of legal commitments. Such was the case in article 2 of the Paris Agreement and in article 3 of the United Nations Framework Convention on Climate Change, in which it was mentioned as a principle that should be followed when discharging the obligations laid down in the Convention and that was associated not with the utilization of the atmosphere, but with the protection of the climate system.

Besides, even though the concept of equitable utilization appeared in instruments related to the sea and watercourses, the contexts were not necessarily comparable. Indeed, while it was conceivable to speak of the utilization of a watercourse, it was less conceivable to speak of the utilization of the atmosphere, which was not a resource whose benefits had to be shared equitably. The need to protect the atmosphere stemmed, above all, from a pollution and degradation problem whose scale should be reduced. The analogy with the sea and watercourses was thus not justified. The place accorded to equity in the jurisprudence of the International Court of Justice, particularly with regard to maritime delimitation, to which the Special Rapporteur devoted several passages of his report, was not relevant to the matter at hand. It would therefore be better to rephrase draft guideline 6 and to turn it into a preambular paragraph. Also, if equity was to be mentioned in the draft guidelines under consideration, it should be in the context of the principle of common but differentiated responsibilities and respective national capabilities, as was the case in all the relevant instruments.

Concerning draft guideline 7, it was clear from what the scientists had said at the meeting in early May that geoengineering was a concept of great technical complexity. Since it was also a discipline with regard to which, by the Special Rapporteur's own admission, the law was still in its infancy, it did not seem opportune for the Commission to venture to examine it, especially given the fact that, under the 2013 understanding, the project should not seek to fill gaps in existing law. Although geoengineering ostensibly covered activities for which environmental impact assessments seemed particularly necessary, care should nevertheless be taken to ensure that the draft guideline could not be interpreted *a contrario* as justifying those activities, as the current text did by regulating but not prohibiting them. In that connection, it should be recalled that the 2015 Paris Agreement contained no mention of geoengineering in terms of the measures to be taken.

Regarding the Oxford Principles, some people believed that they had been established by supporters of testing and developing geoengineering and that they should thus be approached with caution.

Some authorities, such as the French National Research Agency, had adopted a more neutral standpoint. Following intensive work, the Agency had adopted a report in which it recalled that geoengineering should be viewed without any preconceived ideas and noted that international law would have great difficulty in taking into account all the questions raised by the issue of the governance of geoengineering research. Under those circumstances, it was perhaps premature for the Commission to take a stance on the matter.

Mr. El-Murtadi said that the report under consideration usefully complemented the work already completed, which had resulted, at the previous session, in the adoption of five draft guidelines. Those guidelines had been well received by States in the Sixth Committee of the General Assembly, even though some concerns had been voiced, largely regarding political and technical aspects of the topic.

The report under consideration and the discussions within the Commission prompted two remarks. First, the Special Rapporteur had fully respected the conditions under which the Commission had agreed to include the topic in its programme of work in 2013. The scope of the draft guidelines was sufficiently broad to encompass atmospheric degradation caused by both human activities and natural events. Pursuant to the aforementioned conditions, the report excluded questions related to outer space, including its delimitation, and the question of dual-impact substances. As for the other conditions, it should be stressed, as many members of the Commission had done, that the fact that the work should not interfere with political negotiations regarding certain issues and that it was not intended to fill gaps in existing treaty regimes did not preclude the Commission from highlighting those gaps or from examining any other matter addressed in the context of negotiating a treaty. Moreover, the fact that the Commission had undertaken to leave aside certain questions, such as the liability of States and their nationals, did not prevent it from referring to them.

The protection of the atmosphere was of vital importance to the international community, and, in its work on the topic, it would be hard for the Commission not to take account of well-established principles such as the principle of good neighbourliness, the principle of prevention, the precautionary principle and the principle of sustainable development, or of some international obligations in force, like the obligation to utilize the atmosphere for peaceful purposes.

His second remark was more directly linked to the report under consideration, in which the Special Rapporteur dealt with two important issues. The first concerned the obligation of States to protect the atmosphere, establishing a clear distinction between the obligation to prevent transboundary atmospheric pollution and the obligation to mitigate the risk of global atmospheric degradation, and the second concerned the sustainable and equitable utilization of the atmosphere and the legal limits on certain activities aimed at intentional modification of the atmosphere.

The dialogue with scientists had made it possible to gain a better understanding of the complex physical phenomena involved, but, as emphasized by one delegation in the Sixth Committee, it might also give rise to misleading conclusions, especially when many important elements were defined by physics and not by the law. The Special Rapporteur also gave an account of developments over the previous year, including the adoption of the post-2015 development agenda and of the Paris Agreement at the twenty-first session of the Conference of the Parties to the United Nations Framework Convention on Climate Change. It would be helpful if, in future reports, the Special Rapporteur took into account those developments for the purposes of the topic.

In addition, while, at its previous session, the Commission had requested States to provide information on their legislation and on the judicial decisions of their domestic courts concerning the protection of the atmosphere, only one State had done so, and it would be a good idea for the Commission to reiterate the request in its report on the current session.

In conclusion, he considered that the draft guidelines should be referred to the Drafting Committee.

Mr. Al-Marri said that the protection of the atmosphere affected the very existence of humanity. The Commission had been able to capitalize on the experience of specialists in the matter during the dialogue with scientists, particularly regarding the impact of geoengineering. Like the Special Rapporteur, he considered that, in order to avoid any negative consequences, the protection of the atmosphere had to be managed on an international level.

Concerning draft guideline 4 and the need for transparency and for broad public participation in environmental management, governments did have a responsibility in that regard and he supported the draft guideline, and draft guideline 6. Draft guideline 7 was linked to the notion of common but differentiated responsibilities, which was a complex issue, but one that was backed by case law.

To conclude, he considered that the Commission should be able to carry out its work on the topic successfully and that the progress achieved as a result would contribute to international development.

Mr. Kittichaisaree said that he wished to thank the Special Rapporteur for preparing such a meticulous and well-documented report, especially as the Commission's work on the topic of the protection of the atmosphere could have a real impact on the future of humanity and, above all, on that of small island developing States.

It should be noted, however, that the analysis of the burden of proof and standard of proof on pages 13 to 16 of the report was circular, ambiguous and inconclusive: ultimately, it did not provide an accurate picture of the issue with regard to the protection of the atmosphere. The Special Rapporteur should have referred to the judgment in the case concerning *Oil Platforms* (*Islamic Republic of Iran v. United States of America*), in which the International Court of Justice spoke of "direct evidence", drawing a distinction between evidence that was "highly suggestive" and that which was "conclusive", and made clear that the burden of proof lay with the claimant State.

In paragraph 31 of his report, the Special Rapporteur cited the Court's judgment in the *Corfu Channel* case. He should have noted that the Court used the terms "conclusive evidence" and "degree of certainty" and said that "[t]he proof may be drawn from inferences of fact, provided that they leave *no room* for reasonable doubt". In the same vein, in the case concerning *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*), the Court held that it had to "attain the […] certainty" that the facts on which the claim was based were "supported by convincing evidence", and that the evidence should be "clear". In the case concerning *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v. Uganda*), it alluded to the need to establish the evidence on the basis of facts that it regarded "as having been convincingly established" and to "weighty and convincing" evidence, and, in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v. Serbia and Montenegro*), it reaffirmed that claims had to be proved by evidence that was "fully conclusive".

The Special Rapporteur should have examined whether or not the criteria used by the Court were applicable in the context of environmental protection and in the light of the other cases that he had mentioned; the Commission might wish to do that in the commentaries to the draft guidelines in question. Having said that, he was in favour of referring the proposed draft guidelines to the Drafting Committee, provided that they fell within the parameters of the 2013 understanding.

Sir Michael Wood said that he wished to thank the Special Rapporteur for his report and for his introduction of it. He was grateful to him for having organized another meeting with scientists, which he hoped would become a tradition, given how useful it had proved to be.

The adoption of the Paris Agreement, to which the Special Rapporteur rightly drew attention, was a major achievement. It served as a reminder that States continued to strive to reach political agreements that could make a real difference to the situation. The success of

the Conference of the Parties to the United Nations Framework Convention on Climate Change demonstrated that the Commission had been right to decide to carry out its work on the protection of the atmosphere in a manner that did not interfere with political negotiations, including on climate change, ozone depletion and long-range transboundary air pollution. In that respect, as highlighted by Mr. Hmoud, the fact that the authors of the Paris Agreement had chosen to use the expression "common concern of humankind" was irrelevant to the topic at hand.

He remained unconvinced about the appropriateness of examining the topic of the protection of the atmosphere. First, many multilateral agreements were already devoted to the main risks to the environment; secondly, the Commission's work had the potential to touch upon subjects that were being dealt with in sensitive ongoing negotiations among States, including those related to the Montreal Protocol, or even to negotiated texts that were in the process of being ratified and implemented, such as the Paris Agreement. In any event, and as the Sixth Committee had again recalled in 2015, the International Law Commission should apply faithfully the understanding on which it had made its consideration of the topic conditional when it had decided to include the topic in its programme of work in 2013. Indeed, the Special Rapporteur acknowledged the understanding in his report, though his reading of it was, in places, surprising. Similarly, in various places, he used the term "law of the atmosphere", as though it were his ambition to establish a new branch of international law. Yet, while it was indeed what he had initially proposed to do, that proposal had not been accepted.

Turning to the new draft guidelines, he shared many of the views expressed by other members of the Commission. It should be noted, in particular, that the Commission had agreed in 2013 that the concept of common but differentiated responsibilities would not fall within the scope of the draft guidelines on the protection of the atmosphere, yet the Special Rapporteur considered it in depth before instead deciding to refer, in the draft preamble, to the special situation of developing countries. That phrase seemed to be somewhat rooted in the past, as did the placement of "developing countries" in a category of their own and the mention of a North-South divide, terminological choices that were reminiscent of old debates over a new global economic order. Since it covered outdated notions, the draft preamble, at least in its current wording, should not appear in the draft guidelines.

The opening sentence of draft guideline 3 began with the same language as draft guideline 4 as proposed at the previous session, which had been criticized for establishing an absolute and overly broad obligation, and which had thus not been referred to the Drafting Committee. The addition, at the end of the sentence, of the words "from transboundary atmospheric pollution and global atmospheric degradation" did not change the fact that the obligation placed on States was excessively broad. The new draft guideline also contained two subparagraphs. Subparagraph (a) stipulated that States should take appropriate measures in accordance with the relevant rules of international law, which presumably meant the rules applicable to the State concerned. Subparagraph (b) provided that the measures taken should be in accordance with relevant conventions. Again, that probably meant the conventions in force for the State concerned. However, as other members of the Commission had pointed out, there was no clear logical connection between the opening sentence and the subparagraphs. If the Special Rapporteur's intention was for States to fulfil the obligation imposed on them in the first sentence by the means described in subparagraphs (a) and (b), he should say so more clearly. The lack of logic in the draft guideline was further exacerbated by the fact that the adjectives "transboundary" and "global", which were used, in the opening sentence, to qualify atmospheric pollution and atmospheric degradation, respectively, did not appear in the text of the subparagraphs.

Draft guideline 4, which laid down a general obligation to take the necessary measures to "ensure an appropriate environmental impact assessment", was problematic in several respects. First, the Special Rapporteur submitted that there was "so far" no comprehensive global convention governing impact assessments, despite then listing some of the numerous instruments that contained provisions to that effect. Seemingly, his approach was aimed at filling gaps in the treaty regimes, which went beyond the Commission's self-imposed mandate. Secondly, as acknowledged by the Special Rapporteur, impact assessment regimes varied from region to region and from resource to

resource. A draft guideline purporting to establish a common framework for all regions and resources was thus scarcely compatible with the fact that the Commission should not seek to impose on current treaty regimes legal rules or legal principles not already contained therein. Thirdly, as mentioned by other members of the Commission, there was no definition in the text of the threshold of pollution or degradation above which the provisions of the draft guideline became applicable. In that respect, the Special Rapporteur referred merely to the Espoo Convention and to the need to conduct an impact assessment when consideration was being given to a major project that was likely to have a significant adverse environmental impact across boundaries. The draft guideline could therefore be interpreted as imposing on States an obligation to undertake an impact assessment even for small-scale activities, which would be not only disproportionate but also contrary to existing treaties and to State practice and case law. If the Special Rapporteur wished simply to restate the rule of customary international law that placed that obligation on States, he should draw upon the jurisprudence of the International Court of Justice, in particular the judgment in the case concerning *Certain Activities Carried Out by Nicaragua in the Border Area* (*Costa Rica v. Nicaragua*).

As Mr. Forteau had noted, draft guideline 5 raised several questions. For example, it was not clear how one should interpret the adjective "finite" in the context of the provision, or whether it was appropriate to speak of "utilization" in relation to the atmosphere. Furthermore, the Special Rapporteur contradicted himself, observing that "the atmosphere is not exploitable in the traditional sense of the word (such as in the context of mineral or oil and gas resources)", before adding that "any polluter in fact exploits the atmosphere". The arguments put forward to explain that paradox were not convincing, especially as they related primarily to the origin and use of the term "sustainable development", which was not used in the draft guideline. The Drafting Committee might wish to consider the issue.

Concerning draft guideline 6, it was worth recalling that, while the expression "for the benefit of present and future generations of humankind" was borrowed from the United Nations Framework Convention on Climate Change, it was approached from a different perspective. In the Convention, the benefit of present and future generations was invoked to impose on States an obligation to protect the climate system, whereas, in the report, it was mentioned in the much broader context of the "utilization" of the atmosphere. The draft guideline could thus be read as requiring States to carry out certain activities in the atmosphere for the economic benefit of future generations, which would raise issues that went far beyond the topic under consideration. There was nothing in the report to indicate on what basis the Special Rapporteur had given the draft guideline such a wide scope, or why he had separated the provision from draft guideline 5, which also addressed the sustainable utilization of the atmosphere. Lastly, as pointed out by other members of the Commission, the principle of equity was not a genuine principle of international law and could not, therefore, provide guidance to States.

Like previous speakers, he questioned the relevance of draft guideline 7. The provision dealt with "geo-engineering activities", but contained no definition of the term, which did not appear to have any particular meaning in international law. If the Commission decided to use the term, it would thus need to explain what the activities in question were, or even define them, at least for the purposes of the draft under consideration. According to the Special Rapporteur, geoengineering was understood as the "intentional large-scale manipulation of the global environment". That definition seemed to be too broad and, in any case, did not explain the purpose of the draft guideline. In the second sentence, it was stated simply that environmental impact assessments were required for "geo-engineering activities". Once again, in addition to failing to define an action threshold, the Special Rapporteur had the apparent intention of filling a gap in existing treaty regimes.

As for the Commission's future workplan, it was not clear why the time frame between the first and second readings of a draft text should differ depending on whether it contained draft articles or draft guidelines. The period of time between the two readings was not regulated and certainly did not depend on the name given to the text produced by the Commission. The practice was for the period to be two years, and there must be good reason for any proposed change.

He wished to thank the Special Rapporteur for taking account of some of the concerns expressed at the previous session with regard to the future work of the Commission, but noted nonetheless that the concerns that he had voiced about the references to compliance and dispute settlement — issues that were, in his view, too technical to be included in general guidelines — had not been taken into consideration.

To conclude, with the possible exception of draft guideline 7, he did not object to referring the draft preamble and the draft guidelines to the Drafting Committee, provided, however, that the Committee was ready to re-examine all the issues raised during the debate on those provisions. The Commission should not refer a draft text to the Drafting Committee unless it considered that all its provisions should appear in the final document.

Mr. Nolte, First Vice-Chairman, took the Chair.

Mr. Peter said that the third report was not only concise but also highly focused on the topic assigned to the Special Rapporteur. The introduction, which was almost in the form of a summary, helped the reader to evaluate the content of the report itself. The report, which included proposals for five new draft guidelines and for some adjustments to the preamble and to the wording of draft guidelines 5 and 8, was easy to read and likely to be of interest to the many people across the world who supported the protection of the environment in general.

Concerning the importance of working with scientists, although it was a very technical subject, the Special Rapporteur's innovative idea of inviting scientists to address the members had been of enormous benefit to the topic and to the interests of the Commission. The involvement of scientists in the work of the Commission had been appreciated during the debates held in the Sixth Committee of the General Assembly in November 2015. Finland, on behalf of the Nordic States, Singapore and Belarus had mentioned the relationship with the scientific community, while Austria had welcomed "the dialogue which the Commission had had with scientists, thereby promoting a better understanding of the complex physical phenomena involved". There was therefore no doubt that, if the Commission truly wished to produce a high-quality document that was scientifically irreproachable and based on the most recent data, it would succeed in doing so.

Regarding the distinction between draft articles and draft guidelines, he observed that, while the former could give rise to a convention whose provisions would be binding on the parties, the latter were aimed only at helping States to behave in a particular manner: they were a form of gentlemen's agreement that did not have serious consequences, save for honour. Consequently, it made little sense to approach the topic as though it were a matter of life and death. Clearly, the Commission was not drafting a criminal code providing for sanctions and liabilities, and it would be better, given the nature of the document under consideration, to exercise restraint during the debate.

As to the preamble, he noted that members had so far recommended inserting in it everything that they deemed controversial. However, everyone was aware of the nature and value of the preamble to a legal document: according to case law, for example in *Jacobson v. Massachusetts* (1905, 197 U.S. 11), the preamble was not part of the document and thus could not give rise to a dispute. A preamble was, in the strict sense of the term, merely a form of guidance as to the content of a document that was in keeping with its spirit. It was thus regrettable that, owing to the legal nature of the preamble, members should wish to consign to it everything that could not be agreed upon or that was subject to reservations, at the risk of it becoming a compilation of ideas that was devoid of any scientific rigour.

It was regrettable that, instead of moving forward, addressing fundamental issues and presenting sound arguments, the Commission was hiding behind the so-called 2013 understanding. As he had already said several times, the so-called understanding undermined the reputation of the Commission as a whole, since it was unfair and ran counter to freedom of expression. He largely agreed with the content and structure of the report and would limit himself to two general comments.

First, the way in which the topic of the protection of the atmosphere was perceived by the Sixth Committee of the General Assembly was the subject of debate within the Commission. Futile though it might be, that debate should be based on hard facts and not

on beliefs. It emerged from footnotes 3 and 4 of the report that 31 States parties had welcomed the consideration of the topic of the protection of the atmosphere and that only 5 States had expressed scepticism. However, some people spoke about those five States as though they were the most numerous, while the majority opinion was treated as negligible and not commented on.

Secondly, as for whether the atmosphere would endure indefinitely, it appeared that some people were trying to downplay the significance of destroying the atmosphere by saying, with regard to draft guideline 5, that "the atmosphere is still what it has always been — an envelope of gases surrounding the Earth and of roughly the same size". Unless the Commission had misunderstood the scientists' message or decided to heed their opinions selectively, it was clear that, owing to the rate of destruction that it was suffering, the atmosphere would never be the same again. It was the quality of the atmosphere, rather than its very existence, that was the bone of contention. Would it be credible, for example, to sanction the poaching of elephants while affirming that they had always been there and would never die out?

The beauty of the draft guidelines proposed by the Special Rapporteur was their brevity and precision, which removed any risk of speculating as to their interpretation.

Draft guideline 3, on the obligation of States to protect the atmosphere, was very well conceived. Any prudent State exercised due diligence in relation to all activities that might affect the environment, especially industrial activities. It was legitimate to extend that sovereign duty to the prevention of atmospheric pollution: no new obligation was being imposed on States; they were merely being given guidance.

Draft guideline 4 was also well thought out and useful — States usually undertook environmental impact assessments before giving their approval to any large-scale industrial activity. The draft text introduced two new elements, namely: transparency in the performance of environmental impact assessments; and the involvement of the public in that exercise, which was logical, because any damage to the environment affected the community. Once the draft guideline had been adopted, environmental impact assessments would cease to be a bureaucratic exercise and would be viewed from a social perspective.

The message contained in draft guideline 5, on the sustainable utilization of the atmosphere, was simple: one should live in the knowledge that no one would outlive the Earth. The Earth's resources should be utilized with due consideration for future generations, who had the right to live in a clean environment and atmosphere, which could not, therefore, be destroyed before those generations had been born. The draft guideline was thus guided simply by logic.

Leaving aside semantic considerations, the notion of equity was not complicated. It was not even to do with ideology; it was about fairness. Therefore, in accordance with draft guideline 6, it should govern the utilization of the atmosphere. He did not see what was wrong with that and considered that the draft guideline was very useful for States.

However, not everyone believed in fairness, as was clearly demonstrated by the behaviour of some States during the debates that had led to the adoption of the 1982 Convention on the Law of the Sea. With regard, more particularly, to part XI of the Convention, which was entitled "The Area", some States had objected to the exploitation and coordination of mining sites on the deep seabed by the Authority and by its economic arm, the Enterprise, and had invoked the concept of the common heritage of mankind put forward by the Ambassador of Malta, Mr. Pardo, on the grounds that it was a problem concerning third States. It had then taken 12 years, until 1994, to achieve a very watered-down consensus in the field of the law of the sea, and it would no doubt be necessary to raise awareness for a long time in order for the public to appreciate fully the notion of the equitable utilization of the atmosphere.

Draft guideline 7, on geoengineering, addressed activities that, to some extent, affected the environment. It called for such activities to be carried out with prudence and caution, and for transparency and the performance of environmental impact assessments prior to the granting of a general licence or permit. It was an important guideline, and he agreed with Mr. Al-Marri that the issue of geoengineering should be looked at in depth.

In conclusion, in future reports, he would like the Special Rapporteur to reproduce the draft texts examined at previous sessions, including the preambular paragraphs, as that would enable the reader to obtain information on the status of the draft guidelines more easily and with no risk of error. He warmly congratulated the Special Rapporteur on the outstanding quality of his work and invited him not to be discouraged by negative comments. The approach of inviting scientists was commendable, and hopefully that collaboration, which was as useful as it was instructive, would continue. As for the future work of the Commission, the programme proposed by the Special Rapporteur was perfect, especially as it prevented the treatment of the topic from dragging on.

Lastly, he recommended that all the draft guidelines should be referred to the Drafting Committee.

Mr. Tladi said that Mr. Peter's statement prompted two remarks. First, the Commission should not be any less rigorous simply because it was producing draft guidelines rather than draft articles. The fact that they were guidelines did not in any way diminish their value.

Secondly, he had never been in favour of the conditions under which the Commission had agreed to include the topic in its programme of work in 2013, but they had been adopted by the Commission as a whole without any objections from the members, so it was unacceptable to contest them at the present juncture.

Mr. Petrič said that, in his plea for the protection of the atmosphere, Mr. Peter had raised the issue — just mentioned by Mr. Tladi — of the difference between draft guidelines and draft articles. While it was true that the Commission should not be any less rigorous when drawing up guidelines, it should not formulate them in the same way as it would formulate draft articles. In his opinion, expressions such as "States have the obligation", which suggested that the Commission was establishing legal obligations, had no place in a set of guidelines. His fears were further confirmed by the fact that the Special Rapporteur planned to deal with dispute settlement, since he did not see how guidelines could give rise to disputes. Similarly, he was not convinced of the need for a preamble in guidelines. He therefore requested that the Special Rapporteur and the members of the Drafting Committee strive to develop draft guidelines that were, of course, precise and clear, but that were not, in reality, legally binding provisions, which might not garner the support of States.

Mr. Saboia said that, like Mr. Tladi and Mr. Petrič, he did not think that, just because the Commission was formulating draft guidelines, it should be less precise and rigorous in drafting them. As Mr. Petrič had said, the guidelines should not be expressed as legal obligations, either. In addition, provisions on implementation and dispute settlement had no place in a set of draft guidelines.

However, some comments had been made during the debate about issues that should be addressed. For example, it had been said that referring to the special situation of developing countries in the preamble was tantamount to going back in time 30 years, to the debate over a new global economic order. He did not share that view because, when it came to the environment and, in particular, to climate change, the special situation and needs of developing countries were worth mentioning, since some of them, like small island States, bore the brunt of the effects of that change, which could cause damage that was sometimes irreversible.

Some of the criticisms of the proposed draft guidelines were perhaps justified, but the issues that they raised could be resolved by the Drafting Committee.

Mr. Kamto said that the members who had spoken before him had raised points that should be clarified. In its practice, the Commission always put the same level of care into drafting its texts, regardless of the form that it intended to give to the final outcome of its work — guidelines, draft articles or conclusions, or even, as with its study of the fragmentation of international law, a doctrinal report. What could sometimes pose a problem was that the Commission was not always very clear about how it would like States to regard that final outcome. It seemed to him that, when Mr. Peter had contrasted "draft guidelines" with "draft articles", he had meant to say not that the Commission should be lax

in its work but that, in a set of guidelines, it could allow itself to focus more on the progressive development of law than on its codification. It was up to the Commission to tell States, in the general commentary or in an introductory one, that some of its conclusions were not sufficiently based on established practice for it to result in codification.

As to the remark by Mr. Petrič that guidelines should not be drafted in the same way as draft articles, he noted that there was at least one precedent, involving the Guide to Practice on Reservations to Treaties, whose guidelines established genuine obligations. In the case at hand, the problem stemmed from the fact that the draft guidelines on the protection of the atmosphere were not very different, in their form, to draft articles. It was, however, a general problem that could not be overcome there and then, and perhaps the new Commission would have to reflect on whether, when drawing up guidelines, it wished to break with previous practice or maintain it, while indicating in the commentary that the guidelines were in no way binding on States.

Mr. Kittichaisaree said that the issue should be put in its proper perspective. The Commission had included the topic of the protection of the atmosphere in its long-term programme of work in 2011, and, since 2011 had been another year in which the General Assembly had elected members of the Commission, he had spoken to delegations in the Sixth Committee and in the General Assembly and had noted that a very large number of States had been extremely interested in the topic. When the new Commission had met in 2012 and had begun to discuss the topic, most members had still doubted the usefulness of studying it; in 2013, the Commission had agreed to include it in its programme of work subject to certain conditions. Although he had not opposed those conditions, he had said at the time that he feared they might deprive the Commission's work on the topic of all substance, and he continued to believe that the Commission's room for manoeuvre in that regard was very limited. To those members who considered that work on the topic should be suspended or abandoned, he wished to say that the Commission was not a political body and that, having adopted the 2013 understanding, it should continue its work in line with that understanding and avoid politicizing the debate; the members of the Commission were legal experts and their credibility was at stake.

Mr. Peter said that, the last time that he had expressed similar views, two members of the Commission had directed some very harsh words at him, but he had not deemed it worthwhile to reply. In the current discussion, however, fundamental issues had been raised and called for a response.

Regarding the question of "draft articles" versus "draft guidelines", Mr. Kamto had given a very clear explanation. Guidelines provided guidance and lent themselves more readily to progressive development than draft articles, but at no point had he personally said that, because the Commission was developing guidelines, it should not be as serious and professional as it would be in the case of draft articles. Lastly, he recalled that he had never been in favour of the 2013 understanding, but had not formally opposed its adoption because he had felt confronted by a form of blackmail: either the work was made subject to that understanding or the topic would not be included in the Commission's programme of work.

Mr. Nolte said that the Special Rapporteur had once again demonstrated his mastery of the subject matter and had provided the Commission with a document that would serve as an excellent basis for its future work on the topic. He would concentrate on certain substantive issues and, to a lesser extent, on points of detail. First, he supported the proposal for the Commission to revise the provisionally adopted preamble by replacing the words "pressing concern of the international community as a whole" with "common concern of humanity". Like Mr. Tladi, he thought that the main reason why the Commission had not chosen the term "common concern of humanity" in the first place was that States had stopped using it after the United Nations Framework Convention on Climate Change. Now that the concept had been reaffirmed in the Paris Agreement, that argument was no longer valid. Moreover, he was not persuaded by the argument that the Paris Agreement contained no reference to, or did not address, the atmosphere as such, but that it dealt instead with climate change, since those concepts were inseparable, even if the word "atmosphere" had broader implications than "climate change".

As noted by Mr. Tladi and Mr. Murphy, the report went beyond the scope of the topic as defined in the 2013 understanding, in that it dealt with the precautionary principle and with common but differentiated responsibilities. The understanding could be criticized for excluding such important aspects of the topic, but, if the Commission wanted to be able, in the future, to adopt decisions regarding its work that took into account the views of different members, such understandings needed to be respected.

He did not share Mr. Peter's view that the understanding had given rise to a form of blackmail, since its purpose had been simply to determine the scope of the topic. He agreed with Mr. Tladi that, by not dealing with certain issues, the understanding excluded all substantive considerations that might lead to the conclusion that a particular principle was recognized as a rule of customary international law. He did not think that the understanding was being respected if one established a primarily terminological distinction between the precautionary principle and a precautionary approach, or if one used criteria that did not make it possible to establish a distinction, such as burden of proof. On the other hand, it should be recognized that there might be some overlap between the principle of prevention, which had been included, and the precautionary principle, which had not, and between the principle of the individual responsibility of States, which had been included, and that of common but differentiated responsibilities, which had not. The Special Rapporteur could perhaps come to useful conclusions on that basis, even if such conclusions would not cover every aspect of the topic as he and others saw it. Draft guideline 3 should therefore be formulated more cautiously, and any commentary should not address the precautionary principle.

He understood the point made by Mr. Kamto and Mr. Peter that producing draft guidelines gave the Special Rapporteur and the Commission more leeway. That being said, the reasoning behind a particular guideline was of great importance, and the Commission should be transparent by indicating whether it reflected existing law or political considerations.

With regard to the reasoning that underpinned draft guideline 3, he tended to share the view expressed by Mr. Tladi, but also agreed with certain reservations voiced by Mr. Murphy, Mr. Forteau and Sir Michael Wood about the drafting. Unlike Mr. Forteau, however, he believed that it might be justified, in some cases, to formulate and recognize legal principles that were not specific enough to establish clear rules of conduct. Such principles could provide general guidance and served an important purpose in many legal systems. As had been mentioned, that was particularly true in international law, for example in the Declaration on Principles of Friendly Relations and Co-operation among States, which were not always very precisely defined. That did not exclude, of course, that general principles should be formulated prudently so as not to produce unintended effects or overburden a law with expectations that it could not fulfil.

Concerning draft guideline 4, he was impressed by the analysis provided in the report, but was not sure that it supported the broad formulation of the proposed draft guideline. After all, an environmental impact assessment made sense only for projects whose potential impact on the atmosphere as a whole could be measured. In that respect, he tended to agree with Mr. Forteau that draft guideline 4 was formulated too broadly.

With regard to draft guideline 5, he had no objection in principle to its underlying idea. While it might be true, in a formal sense, that the atmosphere was technically not finite, as Mr. Murphy had stated, he thought that it was finite in terms of its essential function for humankind and all States, as noted by Mr. Peter. That point could be clarified in the commentaries. On the other hand, he doubted that the expression "emerging principle of customary international law" was appropriate to describe the draft guideline. Like Mr. Tladi, he thought that the Commission should distinguish as clearly as possible between *lex lata* and *lex ferenda*, and not try to establish a legal definition of an emerging principle. It would therefore seem preferable to replace the expression "is required under international law" in subparagraph 2 with a more cautious formulation, like the one used in subparagraph 1 of draft guideline 5.

Lastly, like other members, he was not sure that the Commission should explicitly address geoengineering in a guideline, and he supported the comments made by Mr.

Murphy, who had cautioned against what the draft guideline implicitly permitted. Should the Commission wish to retain draft guideline 7, he would propose the deletion of the term "geo-engineering", since the essence of the text would remain. In substance, however, he thought that the scope of the draft guideline should be restricted to "activities intended to modify atmospheric conditions" that "could affect the atmosphere as a whole". That could be the "threshold" that Sir Michael Wood had identified as lacking.

To conclude, he supported the referral of draft guidelines 3, 4, 5 and 7, and draft preambular paragraph 4, to the Drafting Committee, subject to the comments that he had made about their substance and to their compatibility with the 2013 understanding.

Mr. Kamto said he was concerned that the issue of the conditions under which the Commission had agreed to study the topic in 2013 would arise every time that the Commission examined a report by the Special Rapporteur, who thus found himself somewhat trapped. He considered that the best solution to the issue was the one advocated by Mr. Forteau in his statement at the current meeting, which he fully endorsed. Indeed, it was in terms of their compliance with international law, and not with the 2013 understanding, that one should assess the legal validity of the draft guidelines proposed by the Special Rapporteur. If the draft guidelines were grounded in international law and sufficiently established in practice or, if necessary, by international custom, there was no reason to reject them and not to refer them to the Drafting Committee.

The Chairman, speaking as a member of the Commission, said that the 2013 understanding had been adopted by consensus by all the members of the Commission, even though the relevant *travaux préparatoires* had been carried out by only a group of them. In addition, he had always considered that the adoption of the understanding had simply been a way for the Commission to define the scope of the topic, in the same way as it defined the scope of other topics.

Mr. Hmoud said that, according to the 2013 understanding, the topic should not deal with the precautionary principle, but it seemed to him to be debatable whether one could disregard the principle, which underpinned three or four of the proposed draft guidelines, when addressing the protection of the atmosphere.

Mr. Kittichaisaree said that, to end the debate over the 2013 understanding, the Commission could perhaps give the Special Rapporteur the benefit of the doubt and believe that the draft guidelines that he proposed complied with the understanding, with the proviso that the Drafting Committee should change them as appropriate if it considered that they did not.

The meeting rose at 1 p.m.