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Held at the Palais des Nations, Geneva, on Tuesday, 7 June 2016, at 10 a.m.

Contents

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Present:

Chairman:	Mr. Comissário Afonso
Members:	Mr. Caflisch
	Mr. Candioti
	Mr. El-Murtadi
	Ms. Escobar Hernández
	Mr. Forteau
	Mr. Hassouna
	Mr. Hmoud
	Ms. Jacobsson
	Mr. Kamto
	Mr. Kittichaisaree
	Mr. Laraba
	Mr. McRae
	Mr. Murase
	Mr. Murphy
	Mr. Niehaus
	Mr. Nolte
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Saboia
	Mr. Singh
	Mr. Šturma
	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 (agenda item 8) (*continued*) (A/CN.4/692)

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

Mr. Niehaus said that he wished to thank the Special Rapporteur for his third report and for organizing the meeting with experts at the beginning of the session, which had helped to enlighten members on various aspects of a highly important subject, including the urgent need for effective international action to stop atmospheric pollution. Those who argued that the atmosphere had always existed and would always continue to exist were doubtless right, but the atmosphere had originally existed as a source of life, whereas now, as a result of human activity, it was on the way to becoming a reservoir of substances that would lead to the eradication of life on earth. Against such a background, the Special Rapporteur's efforts to find solutions that were acceptable to all and commensurate with the gravity of the situation took on particular importance. Mr. Murase had been working on the topic with skill, flexibility and humility for several years, in particular, since his appointment as Special Rapporteur in 2013.

Strong opposition from certain members of the Commission, for reasons difficult to fathom, had made it necessary to impose restrictions, set out in an "understanding", on how work on the topic would proceed, a situation which was very unusual. One of the main reasons for that opposition was the concern that the Commission's work should not interfere with ongoing political negotiations. However, it was difficult to understand how a set of clear, objective, non-binding legal guidelines could conflict with political initiatives in the same area and having the same objectives. On the contrary, it might be assumed that those guidelines would support such negotiations. As Chairman of the Commission at the time, he had been able to observe developments first-hand; he did not agree, therefore, with the statement that had been made the previous week to the effect that those who had supported the inclusion of the topic in the Commission's programme of work had somehow been "blackmailed" into accepting the conditions demanded. In fact, consensus had been achieved through a difficult but necessary process of negotiation. Obviously, the right course of action would have been to agree to include the topic without any limitations and to decide on its content and format in the usual manner, but that had not been possible owing to the uncompromising attitude of those who had been opposed to the topic's inclusion. That was the background to the understanding that had been accepted by the Special Rapporteur and approved by all the members of the Commission who had been present at the time. It was a formal agreement which must, of course, be honoured, and the Special Rapporteur's efforts to that end should be recognized. Nonetheless, the slightest comment in his reports that came even close to the limits agreed in 2013 was met with strong criticism and attacks. Such an attitude was unconstructive and detrimental to the work of the Commission. The Special Rapporteur's flexibility and understanding of differing opinions should serve as an example to those who did not share his ideas and lead to an acceptance on their part that, in some instances, it was simply impossible to comply absolutely with the restrictions imposed by the 2013 understanding. That did not mean that the understanding should be abandoned, but rather that members should show the flexibility and objectivity required in undertaking a scientific project. The third report might contain aspects that were unacceptable to some, but they could be highlighted without referring to the understanding.

Turning to the proposed texts, he said that the somewhat outdated term "developing countries", which appeared in the fourth draft preambular paragraph, should be replaced with the words "many countries". While the content of draft guideline 3 on the obligation of States to protect the atmosphere was excellent, he agreed with Mr. Forteau that the

overly broad formulation of its provisions made the guideline vague and deprived the obligation of its legal content. However, if it was the Special Rapporteur's intention to refer to the relevant obligations in subsequent provisions, he could accept the guideline as it stood. Draft guideline 4 on environmental impact assessments contained a very valuable analysis and a welcome reference to public participation. However, he considered the guideline's formulation to be excessively broad, for the same reason as that he had given regarding draft guideline 3. Draft guideline 5 on the sustainable utilization of the atmosphere addressed the crux of the problem, namely the finite nature of the atmosphere, something which was scientifically indisputable; the need to strike an appropriate balance between economic development and environmental protection, addressed in paragraph 2, was also a central issue. Draft guideline 6 on the equitable utilization of the atmosphere, which contained an important reference to future generations, should address specific legal aspects rather than matters of a philosophical nature. Regarding draft guideline 7 on geoengineering, he agreed that, although geoengineering provided a series of very interesting possibilities for the future, the Commission should be cautious in dealing with a very new area that was still in its infancy. If it were to address that issue, it would have to do so in very general terms, with an emphasis on promoting research rather than on legal aspects; it might therefore be more appropriate at the current stage not to refer to the matter at all. However, if the majority of members considered it appropriate to include a provision to the effect that geoengineering activities should be conducted with prudence and caution, he would not object.

In conclusion, he recommended referring all the draft guidelines to the Drafting Committee.

Mr. Hassouna said that he wished to commend the Special Rapporteur on his comprehensive, well-argued and well-researched report and his outreach efforts to promote and explain the project to Governments, organizations and academic institutions. In 2015, he had participated with the Special Rapporteur in the annual session of the Asian-African Legal Consultative Organization, at which the topic had aroused great interest and received much support. The recent dialogue with experts had enhanced members' understanding of the scientific and technical aspects of the topic, although the distinction between the scientific and legal approaches to the problem, which could sometimes result in misleading conclusions, must always be borne in mind.

Although a few States in the Sixth Committee continued to question the suitability of the topic and had even called for its withdrawal, he strongly believed that the Commission should continue its work on what was an important and timely subject, in line with the 2013 understanding, which had been agreed upon by the entire Commission. Much had been said at the current session about the terms of that understanding; those in favour of pursuing the topic and those who had doubts about its suitability had expressed differing views as to whether the understanding had been fully adhered to in the report. In his view, the Commission should continue to adopt a positive and balanced approach based on identifying the existing legal principles applicable to the protection of the atmosphere, while avoiding policy debates related to political negotiations on environmental issues. He was confident that the Commission could achieve that objective, as it had already succeeded at its previous session in reaching agreement on the draft guidelines contained in the second report.

Regarding the draft preamble, he was in favour of returning to the formulation "common concern of humankind" instead of "pressing concern of the international community as a whole", which did not carry the same connotation of a shared responsibility for the protection of the atmosphere. The concept of common concern of humankind had already been included in the United Nations Framework Convention on Climate Change, the Convention on Biological Diversity and, more recently, in the preamble to the 2015

Paris Agreement. While that Agreement addressed a different topic from the one the Commission was dealing with, it reinforced the proposition that the international community had accepted the notion of "common concern".

In the draft preamble, the Special Rapporteur proposed adding a paragraph on the need to take into account the special situation of developing countries, an idea which was closely related to the concept of common but differentiated responsibilities enshrined in the Rio Declaration on Environment and Development and the Framework Convention on Climate Change. The Paris Agreement expressly referred to the principle of common but differentiated responsibilities and stated that developed countries were to bear the brunt of the burden in reducing greenhouse gas emissions, while developing countries were encouraged to increase their reduction efforts. The rationale for applying that principle in environmental agreements was that the greatest impacts of climate change were mostly felt by developing countries, while the greatest per capita greenhouse gas emissions were concentrated in developed countries. Thus, under the Paris Agreement, a State's obligation to help solve the issue of climate change was directly linked to its contribution to the problem in the first place. However, under the current draft guidelines, the response to atmospheric issues did not relate directly to how much States had damaged the atmosphere, but rather focused on regulating their future collective use thereof, whether they were developed or developing States. The Commission should consider adopting the Paris Agreement as terms of reference for its work on the topic, since its principles had been endorsed by a very large number of States. Article 2 (2) of the Agreement provided that it was to be implemented in accordance with the principles of equity and "common but differentiated responsibilities and respective capabilities, in the light of different national circumstances", which reflected a more individualistic approach to that principle. Perhaps the draft guidelines could include a similar standard, based on States' individual capacity for implementation.

With regard to draft guideline 3, the Special Rapporteur had attempted to reflect a more narrow perspective of the general obligation of States to protect the atmosphere than that contained in the second report. It was not clear from subparagraph (a) whose "atmospheric pollution" States were expected to prevent — pollution emanating from their own territory or that produced by any State. The expression "appropriate measures" in both subparagraphs (a) and (b) should be elaborated upon in order to clarify the standard to be used. The "measures of due diligence" in subparagraph (a) could also be referred to in subparagraph (b). A sentence to read: "a State may be deemed to have failed in its duty of due diligence only if it knew or ought to have known that the particular activities would cause significant harm to other States" should be added, along with an explanatory commentary on when a State "ought to have known" of such harm. It should be mentioned in subparagraphs (a) and (b) that the requirements were to be applied in accordance with the draft guidelines, as well as the relevant rules of international law and conventions, respectively.

The obligation to assess environmental impact, as currently formulated in draft guideline 4, seemed overly broad. The obligation should not apply to all activities, but only to planned activities and those that caused significant harm to the environment. Mention could also be made of a threshold requirement for triggering the environmental impact assessment. A definition of "environmental impact assessment" should be provided either in draft guideline 1 on the use of terms or in the commentary to draft guideline 4. The commentaries could also explain which relevant actors were to be taken into account in the "broad public participation" process mentioned in draft guideline 4. Since multilateral financial institutions often provided for their own environmental impact assessment procedures, reference should be made in the commentaries that guideline 4 was without prejudice to additional requirements imposed by such institutions.

With regard to draft guideline 5 on the sustainable utilization of the atmosphere, the "finite" nature of the atmosphere should be explained, since it remained scientifically and legally somewhat controversial. The Special Rapporteur might add language from his report, namely that "the atmosphere is a limited resource with limited assimilation capacity". It should be clarified that "utilization" of the atmosphere referred to the "use of the atmosphere" or "activities conducted in the atmosphere". The term "sustainable" should be defined in the commentary to draft guideline 5; similar language to that of the World Commission on Environment and Development cited in paragraph 71 of the report could be used, namely "Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs".

Draft guideline 6 on the equitable utilization of the atmosphere was based on the principle of equity, which in the current context addressed both distributive justice in allocating resources and distributive justice in allocating burdens. The Commission had already referred to the principle in several of its projects and could therefore rely on the terminology of the Articles on the Law of Non-navigational Uses of International Watercourses of 1994 — "principle of equitable and reasonable utilization" — rather than simply "principle of equity". Since the principle of equity in draft guideline 6 was of a broad and undefined character, it should be carefully explained in the commentaries. In particular, mention should be made of how States were to balance the "needs of the present" and those of "future generations" and to find and apply an "equitable global balance". The factors to be taken into account in order to achieve an equitable balance of interests set forth in the 2001 draft articles on prevention of transboundary harm from hazardous activities should be included in the commentaries so as to provide clearer guidance to States.

With regard to draft guideline 7 on geoengineering, the term "existing international law" should be replaced with "applicable international law". However, since geoengineering was still a new concept in relation to which international norms and legal rules had not yet been developed, he agreed with others that, at the current stage, it would be inappropriate to address it within the scope of the draft guidelines. It might be sufficient to refer in the commentaries to the existence of such activities and potential scientific and legal developments.

Regarding the future programme of work, as the Special Rapporteur proposed dealing with the question of the interrelationship of the law of the atmosphere with other fields of international law, such as the law of the sea and international human rights law, perhaps informal meetings could be arranged between the Commission and experts in those fields in order to enhance members' knowledge and the quality of subsequent debates. He agreed with others that a dispute settlement clause would not be appropriate in the context of draft guidelines.

In conclusion, he recommended referring the draft guidelines, with the exception of draft guideline 7, to the Drafting Committee.

Mr. Nolte (Vice-Chairman) took the Chair.

Mr. McRae said that he wished to commend the Special Rapporteur on his third report, his creative attempts to provide a workable framework of guidelines and his dedication to educating himself and the Commission members on the scientific aspects of the topic.

On the issue of the "common concern of humankind", the Special Rapporteur had pointed out that, although the expression had been rejected by the Commission at the previous session, its use had been endorsed at the 2015 Conference of the Parties serving as the meeting of the Parties to the Paris Agreement. Some members had argued that the Commission should therefore reverse its decision, while others had drawn a distinction

between the climate change context of the Paris Agreement and the Commission's topic of protection of the atmosphere. It had further been pointed out that a number of States in the Sixth Committee had endorsed the Commission's decision not to use the expression. The divergence between what had been said in the Sixth Committee and what had been done at the Paris Conference probably showed nothing more than that the delegates in the two forums were not the same and did not share the same perspective. The fact that different parts of government might hold different views was not an unusual phenomenon; too much should not be read into it. The lesson he had drawn from the use of the term "common concern of humankind" in the Paris Agreement was that it had been a mistake for the Commission to allow its actions to be guided by what it believed Governments wanted. It had rejected the term because it had been argued that States no longer wished to use it, even though there had been no real evidence for that apart from the fact of non-use. The Commission had been prepared to second-guess States and adopt the conservative approach it believed they wanted, which had turned out to be wrong. States had been much more radical in Paris than the Commission had been prepared to be — a rather disturbing role reversal. If the Commission were now to reinsert the term "common concern of humankind", States might well decide, for whatever reason, not to use it at the next environmental conference. Where would that leave the Commission? The Paris Agreement had provided a lesson on how the Commission should act in the future, not guidance as to what it should do now. There might well be good reasons for reinserting the expression, but the Commission should not do so solely on the basis of its inclusion in the Paris Agreement. His concern about second-guessing Governments also applied to the way in which the views expressed in the Sixth Committee were used in the Commission's debates. There was a developing practice of citing what had been said in the Sixth Committee as if what Governments said should be decisive. Although an important ingredient in the Commission's consideration of a topic, the views expressed in the Sixth Committee did not generally give clear guidance; ultimately, it was for the Commission to decide on issues based on its independent expertise. After all, while it reported to the General Assembly, the Commission was not a subcommittee of the Sixth Committee.

With regard to the 2013 understanding, there appeared to be widely divergent views about the circumstances of its adoption — although it had been adopted by the Commission under its normal practice of decision-making by consensus — and whether the Special Rapporteur's third report violated what had been agreed. The understanding was a decision of the Commission on the scope of the topic, not some kind of constitutional document and, as such, the Commission could choose whether it wished to modify it. The Commission in its new composition would have to decide whether to continue on the basis of the understanding or whether it wished to define the scope of the topic differently. How the understanding was interpreted and whether it had been complied with was ultimately a decision for the Commission. The Special Rapporteur did not speak on behalf of the Commission but merely provided the raw material on the basis of which the Commission decided what it wished to endorse. If members of the Commission disagreed for whatever reason with what the Special Rapporteur had proposed, there was an opportunity for them to do so in the plenary debate or in the Drafting Committee and during the final adoption of the draft articles or guidelines.

It was therefore not productive for members to engage in a debate on the consistency or inconsistency of the Special Rapporteur's reports with the 2013 understanding or, for that matter, to ask the Special Rapporteur to affirm that he was following that understanding. Specifically, it was unproductive to debate whether the reference to precaution in the report violated the 2013 understanding. As had been pointed out in the debate, it was difficult to cover prevention without mentioning precaution. In any event, the Special Rapporteur had not included the concept of precaution in either the proposed preambular paragraph or the draft guidelines and had in fact stated that the precautionary

principle was not recognized as customary international law. Regardless of the 2013 understanding, it was clear that the Commission had from the outset precluded the inclusion of the precautionary principle in its work on the topic and, unless it changed its mind, the Commission could not adopt a guideline that related to it. Ultimately, it was for the Commission to decide on the way that the 2013 understanding was to be applied. Castigating the Special Rapporteur for his reference to precaution on the basis of individual members' interpretations of the understanding ignored the real impact of that understanding and was not a profitable use of the Commission's time.

Recalling the recently revived debate over the difference between draft guidelines and draft articles, he said that the Commission did not have a consistent or coherent view of the consequences of a decision to prepare draft articles as opposed to draft guidelines, draft conclusions or draft principles. However, whatever the topic, the Commission's task remained the progressive development of international law and its codification and it should strive to accomplish said task by identifying the established international law on a given topic, the direction in which the law was developing and the principles or rules that were relevant to the particular issues within the scope of the Commission's work. In most of its work, the Commission did not, and realistically could not, establish clear-cut standards for broad application. In his report, the Special Rapporteur had set out to do precisely what the Commission expected of him — to identify the principles of international environmental law that applied to the atmosphere whether by way of treaty or customary international law — and where nothing directly applicable existed, he had reasoned by analogy. In many respects the protection of the atmosphere was a new topic, dealt with in part or collaterally in some agreements, but never directly or as a whole; it was also a complex topic, requiring some understanding of a phenomenon that was generally known but not necessarily in the sense that scientists understood it.

Turning to the individual proposals of the Special Rapporteur, he said that, while he understood the political value of the proposed preambular provision in a binding convention, he did not consider it as a matter that fell within the particular expertise of the Commission in recommending a series of guidelines. The provision did not result from the Commission's legal analysis, particularly as the Commission had decided not to deal with the question of common but differentiated treatment, and it had not analysed the legal implications of a provision on the special situation of developing countries for the protection of the atmosphere. Therefore, although the provision was in a sense impossible to disagree with, its inclusion was to some extent gratuitous. That said, he did not object to the principle *per se* and would not object to the inclusion of a reference thereto if that was the consensus.

It was difficult to disagree on principle with the ideas behind the draft guidelines. Yet, as many members had noted, the wording of the draft guidelines was often so general as to make their objective and the means for achieving it unclear. He proposed that the Special Rapporteur should improve the language to facilitate the work of the Drafting Committee. In draft guideline 3, the fact that States should act to protect the atmosphere was almost axiomatic and whether that should be done by means of the verb "should" or by a specific reference to an obligation seemed to be a matter of personal choice. However, there should be a more specific link between the chapeau and subparagraphs thereunder. He proposed reformulating the draft guideline as a single sentence, which would read: "States have an obligation to protect the atmosphere by taking appropriate measures of due diligence to prevent atmospheric pollution and by taking appropriate measures to minimize the risk of atmospheric degradation". The elaboration of the appropriate measures and the reference to relevant rules of international law and relevant conventions, which was somewhat unclear as set out in the guidelines, might be explained in the commentaries.

With regard to draft guideline 4, while there was no doubt that environmental impact assessments ought to be applied to activities that could cause harm to the atmosphere, the criteria for and timing of such an assessment were not clear. Draft guideline 7 stated that environmental impact assessments were required in the case of geoengineering activities; however, that was the only such reference within the draft guidelines. He did not support the wording "all necessary measures to ensure an appropriate environmental impact assessment", as it did not provide much guidance to States; instead, he proposed that the Drafting Committee should opt for language such as that used by the International Court of Justice in the cases concerning *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, in which it had referred to "significant adverse impact" and "significant harm". Indeed, "appropriate measures" might be the right term but "all necessary measures" seemed quite indeterminate and would depend on the explanations, if any, given in the commentary to the draft guideline.

In draft guidelines 5 and 6, the concept of utilization did not seem wholly appropriate in the context of the atmosphere. On the other hand, the broader point that activities that had a negative impact on the atmosphere must be conducted in a way as to ensure sustainability could not be controverted; draft guideline 5 should be revised to reflect it accordingly. With regard to draft guideline 6, while activities that had an impact on the atmosphere should take account of future generations — that was simply another aspect of sustainability — and must involve notions of fairness and equality between States, it was not clear that a reference to the term "equity" alone provided sufficient guidance. Noting the reference in the report to the development of the notion of equity in the context of maritime boundary delimitation, he said that reliance on the notion of equity in that area had led to considerable confusion, and the invocation of equity and transparency by courts and tribunals had often masked considerable subjectivity. Therefore, the Drafting Committee should search for a better way to express the ideas of fairness and equality than a simple reference to "equity".

With regard to draft guideline 7, he understood the concerns expressed by members to the effect that it was based on assumptions about science and technology that the Commission should not make and that it might inhibit future developments to prevent geoengineering activities because of a conclusion that such activities were in themselves harmful. He also understood the point made by Mr. Tladi that all the obligations set out in the draft guidelines should be applicable to geoengineering activities. There was, however, a broader issue: geoengineering was in a sense a surrogate for undertaking new activities that could have an impact on the atmosphere. It was not possible to ignore such future activities and he wondered whether the guideline might be generalized to cover all types of new activities, rather than just geoengineering, even if that one was currently the most prominent. The notion that caution and prudence should be exercised in respect of all new activities that could have a negative impact on the atmosphere should be maintained; a draft guideline that focused specifically on geoengineering was not useful in that regard. The commentaries could refer to geoengineering and other activities intended to modify atmospheric conditions as examples of a more general phenomenon, and the draft guideline could focus on any other new activities that might affect the atmosphere. The Drafting Committee would also need to consider the scope and nature of the obligations of disclosure and transparency in draft guideline 7 as it stood, and their relationship to the obligations contained in draft guidelines 3 and 4. The obligation to conduct a risk assessment would be better placed in draft guideline 4; moreover, it should be made clear that the relationship between any obligations set out in a revised draft guideline 7 should be read in accordance with draft guidelines 3 and 4.

In conclusion, he recommended referring all the draft guidelines to the Drafting Committee and at the same time encouraged the Special Rapporteur to consider making some revisions in the light of the Commission's debate on the topic for consideration by the Drafting Committee.

Mr. Hmoud said that he agreed that the Commission should revisit the 2013 understanding, if necessary. Until such time, however, it was important to abide by the principles adopted. The Commission should therefore take a careful approach to issues such as the non-interference with relevant political negotiations and the scope of the topic, including the precautionary principle. That was especially important with regard to draft guideline 2. Similarly, the question of revisiting the language regarding the concept of the "common concern of humankind" adopted at the Commission's sixty-seventh session required serious consideration, given the potential political repercussions.

The Chairman said that he agreed that the Commission should observe its 2013 understanding until such time as it decided to change it. In any case, the Commission's debate on the protection of the atmosphere reflected members' different interpretations of the understanding, including with respect to the Paris Agreement. He was confident that the Special Rapporteur would comment on such matters in his summing up of the debate and would not draw any undue conclusions.

Mr. Vázquez-Bermúdez expressed appreciation for the Special Rapporteur's excellent third report, which contained an in-depth analysis of the material relevant to the topic as well as for his organization of a second dialogue with scientists, which had contributed usefully to the Commission's work. He noted that the Sixth Committee had responded favourably overall to the Commission's work on the topic thus far. He said that the Special Rapporteur's task was far from easy, given not only the complexities inherent in the topic, but also the need to hew to the Commission's 2013 understanding. That was clearly not the Commission's standard practice; its guidance to any given Special Rapporteur was not typically given in advance, but rather on the basis of the Special Rapporteur's proposals in his or her reports. Nevertheless, the Commission had adopted an understanding for the current topic and the Special Rapporteur must endeavour to heed it. So far he had succeeded in doing so, even to the extent of incorporating the elements of the understanding in the draft preamble and draft guidelines on the topic. Once the draft guidelines had been adopted on second reading, the draft preamble would need to be revised, since it would no longer make sense, for instance, to include a reference to the requirement of the Commission's work to proceed in a manner so as not to interfere with relevant political negotiations, as set out in the 2013 understanding. That said, the decision not to include in the draft guidelines references to, for instance, the concept of "common but differentiated responsibilities" and the precautionary principle, had been taken not on the grounds that they had not attained the status of a principle of international law, or that they were irrelevant to the topic, but because the Commission had decided not to deal with them in the context of the topic, in line with the 2013 understanding. He supported the proposed fourth draft preambular paragraph, which simply recognized a *de facto* situation that was relevant to the topic at hand. He likewise supported adding a reference to the special needs of developing countries. It was important for the Commission to seriously examine the Special Rapporteur's suggestion that the Commission might wish to consider anew the inclusion of the expression "common concern of humankind" in the draft preamble. That concept, contained in instruments such as the United Nations Framework Convention on Climate Change and the Convention on Biological Diversity and, more recently, in the Paris Agreement, transcended individual States' interests and concerns and related to critical situations requiring urgent attention and therefore concerted collective action. In any event, while the legal implications of such a notion were far from clear, it would appear useful to include a reference to situations that affected the international community as a whole.

The Special Rapporteur's decision at the Commission's sixty-seventh session not to request the referral of the previous draft guideline 4 to the Drafting Committee had been a wise one, as it had allowed him to provide a more in-depth analysis of the support for and scope of such obligations. His decision in the current report to differentiate in draft guideline 3 between two dimensions of the protection of the atmosphere was also judicious and consistent with the terminology adopted by the Commission on atmospheric pollution and degradation. The Special Rapporteur provided adequate support for the obligation to prevent transboundary atmospheric pollution on the basis of the maxim *sic utere tuo ut alienum non laedas*, which had been affirmed in international instruments and international case law. As a result, the application of that principle was no longer limited to the obligation to prevent transboundary atmospheric pollution in the context of adjacent States sharing a common territorial border, meaning a strictly transboundary context, but now extended to include the environment of other States in general and areas beyond the limits of their national jurisdiction. The International Court of Justice had confirmed the wider scope of the principle in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, as well as in its judgments in the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* and *Pulp Mills* cases. In the draft preamble, as adopted by the Commission, it had been recognized that the atmosphere was essential for sustaining life on Earth, human health and welfare, and aquatic and terrestrial ecosystems. The atmosphere was an important part of the global environment, whose protection and preservation was in the interest of States and humankind as a whole, precisely because it was necessary in order to sustain life on Earth.

In the context of the atmosphere, as demonstrated by the Special Rapporteur, the *sic utere tuo* principle implied the obligation of States to protect the atmosphere from transboundary atmospheric pollution and atmospheric degradation. That obligation was of a general nature and required the adoption of preventive measures on the basis of due diligence, namely the obligation to make best possible efforts in accordance with the capabilities of the State controlling the activities, prior to starting such activities and throughout the time that they were carried out, so as to avoid harmful effects. As the Commission had indicated in its articles on the responsibility of States for internationally wrongful acts, obligations of prevention were usually construed as best efforts obligations, requiring States to take all reasonable or necessary measures to prevent a given event from occurring, but without warranting that the event would not occur. Referring to the *Trail Smelter* arbitration, the Special Rapporteur asserted that the tribunal in question had set a higher standard of proof for transboundary atmospheric pollution, but rightly added that the special context and circumstances of that case should not be overlooked. Since that arbitration in 1941, there had been increasingly less tolerance for environmental harm, and consequently a lowering of the threshold of the extent of environmental harm before it was considered as such. He supported the referral of draft guideline 3 to the Drafting Committee, without prejudice to any formal changes the Committee might wish to make. For instance, it was unnecessary and even inconvenient for the chapeau to include the word "transboundary" to describe atmospheric pollution, as "atmospheric pollution" was already defined in draft guideline 1 (b) for the purposes of the draft guidelines as a whole. Furthermore, atmospheric pollution and atmospheric degradation were two sides of the same coin, involving actions and consequences. In that sense, it did not seem appropriate to refer specifically to international law in draft guideline 3 (a) and specifically to relevant conventions in draft guideline 3 (b). It did not seem useful to set out the obligation to adopt appropriate measures to minimize the risk of atmospheric degradation only in accordance with relevant conventions, without taking into account international law already in existence or yet to be developed.

With regard to draft guideline 4, environmental impact assessments were an indispensable means for States to obtain scientifically reliable information on the potential

environmental effects of their activities or of the activities they authorized within their jurisdictions. Referring to paragraphs 41, 55 and 56 of the report, he said that it was clear, on the basis of decisions taken by the International Court of Justice and other international authorities, that States were expected to comply with the obligation to carry out environmental impact assessments, where appropriate, under international treaty law and customary international law. The report contained much information on the incorporation of environmental impact assessments into the legislation of most States and on their widespread adoption in various binding and non-binding international agreements, as well as case law. The Special Rapporteur's analysis supported the notion that such an obligation should be considered in a transboundary context, on the basis of customary international law — a context that included both atmospheric pollution and atmospheric degradation. Furthermore, the obligation to carry out an environmental impact assessment was tied to the risk that a given planned activity might have considerable adverse effects.

With regard to draft guideline 5, the fact that sustainable development was referred to as a principle in the United Nations Framework Convention on Climate Change and as an objective in the Marrakesh Agreement Establishing the World Trade Organization did not make it any less normative in character, despite the suggestion to the contrary in paragraph 64 of the report. The International Court of Justice, in its judgment in the *Gabčíkovo-Nagymaros* case, had stated that the "need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development". It could be argued that the Court had implicitly demonstrated the normative character of sustainable development in that case, since as a result of its decision, the parties together would need to look afresh at the effects on the environment of the Gabčíkovo power plant. Sustainable development could be seen as a principle that guided States' decision; its definition could be based on principles 3 and 4 of the Rio Declaration on Environment and Development. Furthermore, the concept of sustainable development had given rise to principles such as the sustainable use of natural resources and the sustainable use of components of biological diversity, as contained in articles 2 and 10 of the Convention on Biological Diversity. Sustainable utilization must be used in the context of the environment in order to have normative value. In that sense, the draft guideline was satisfactory in that it prescribed that the utilization of the atmosphere should be undertaken in a sustainable manner. However, the word "should" should be replaced with the word "shall". Clearly, the sustainable utilization in the current context should not be understood in the traditional sense of the term, as it might be in relation to mineral or other natural resources, but rather, whatever the activity concerned, it should be understood as not contributing to atmospheric pollution or degradation, as defined in draft guideline 1. The fact that the atmosphere had a limited capacity for absorbing pollution, and therefore for maintaining a certain level of quality, meant that atmospheric pollution and degradation had significant adverse effects that ultimately endangered human life and health and the Earth's natural environment. It was because of the atmosphere's limited capacity that it was necessary to ensure its sustainable utilization. He supported paragraph 2 of the draft guideline, which largely reflected the judgment of the International Court of Justice in the *Gabčíkovo-Nagymaros* case.

With regard to draft guideline 6, equity, as a corollary of sustainable development, was another major principle in international environmental law and had both intra- and intergenerational dimensions. The first dimension was related to the need to take into account the economic and technological differences between States in the conservation and management of global resources, and their equitable exploitation; the second referred mainly to the need to ensure the protection of the atmosphere for the benefit of future generations. In several cases, the International Court of Justice had referred to both those dimensions. He supported the application of the principle of equity in terms of utilization of the atmosphere as a substantial component of the global environment.

With regard to draft guideline 7, he shared the other members' concern that the current draft might appear to legitimize States' use of geoengineering, whose environmental consequences were potentially negative or even catastrophic. However, such activities seemed to be a reality and therefore should be carried out in compliance with strict parameters to avoid any adverse effects on the environment, especially if they proved to be irreversible. Draft guideline 7 referred to important aspects such as the need for prudence and caution; the obligation to conduct such activities in a fully disclosed, transparent manner and in accordance with existing international law; and the requirement for environmental impact assessments. He proposed that the draft guideline should not refer specifically to geoengineering, but instead to all activities designed to intentionally modify the atmosphere. Given the possible effects worldwide of such activities — which could in turn result in atmospheric degradation — the word "should" in the draft guideline should be replaced with the word "shall".

He supported the proposed programme of work, but suggested that, should the first reading be completed in 2018, the second reading should take place in 2020, in keeping with the Committee's general practice, in order to provide States with sufficient time to review the draft guidelines.

Ms. Jacobsson said that she wished to thank the Special Rapporteur for his well-researched report and for organizing another valuable meeting with scientists at the beginning of the Commission's session. Cooperation with technical and scientific experts had been endorsed by the Sixth Committee and was particularly welcome when addressing topics such as the protection of the atmosphere.

Regarding the Special Rapporteur's suggestion that the Commission might wish to consider reintroducing the concept of the "common concern of humankind" in the light of its inclusion in the 2015 Paris Agreement, she recalled that, at the Commission's previous session, she had stated that she had no problem with the affirmation in the then draft guideline 3 that the degradation of the atmosphere was a common concern of humankind, provided that the Commission took it to be a general statement, devoid of legal effects. However, bearing in mind the — highly unlikely — legal consequences that might arise from the combination of the words "common concern" and "humankind", she had underlined that the Commission needed to tread carefully. During subsequent discussions within the Drafting Committee, it had been decided that the expression "common concern of mankind" should be replaced with "pressing concern of the international community as a whole", to appear in a preamble to the draft guidelines, rather than in the draft guidelines themselves. She was of the view that the Commission should retain that formulation.

She welcomed the Special Rapporteur's decision to differentiate, in draft guideline 3, between two dimensions of the obligation of States to protect the atmosphere, namely to prevent transboundary atmospheric pollution, on the one hand, and to minimize the risk of global atmospheric degradation, on the other.

In general terms, she supported draft guideline 4 on environmental impact assessments. As had been pointed out in the literature, environmental impact assessment was a procedure to be undertaken; it did not impose substantive environmental standards or indicate what results were to be achieved. Nevertheless, the obligation to conduct such assessments had become a part of both national and international law, notably in the Convention on Environmental Impact Assessment in a Transboundary Context. There was still disagreement among lawyers as to whether an obligation to undertake environmental impact assessments with respect to possible risks to the atmosphere already existed. However, the International Court of Justice had widened the scope of the obligation to undertake environmental impact assessments when, in the joined cases concerning *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*,

it had ruled that environmental impact assessments had to be carried out in connection with all potentially harmful activities, not only in the context of industrial activities, to which reference had been made by the Court in the *Pulp Mills* case. Given that the Commission was developing guidelines, rather than legally binding rules, and that environmental impact assessments were procedures, not substantive obligations, it was appropriate that reference should be made to such assessments in draft guideline 4. That said, consideration could be given to making the wording of the guideline more concise and to emphasizing the procedural nature of environmental impact assessments.

Regarding draft guideline 5, she shared the view of the Special Rapporteur that there seemed to be a definite trend toward recognizing the character of sustainable development as an emerging principle, assuming that he meant a legal and not a political principle. She recalled that she had addressed the nature of the concept of sustainable development in her preliminary report on the protection of the environment in relation to armed conflicts (A/CN.4/674) and had concluded that, although there was a trend in that direction, sustainable development had not yet been recognized as a legal principle. She noted that the Special Rapporteur did not refer to the concept of "sustainable development" in the draft guideline, but used the words "sustainable utilization". With respect to the wording of draft guideline 5, she was not convinced that it was possible to refer to the "finite nature" of the atmosphere or that the expression "utilization of the atmosphere" was the right expression. She therefore had doubts as to whether the draft guideline served a practical purpose. However, since it was important to interpret the proposed guidelines in relation to each other, it would be premature to decide not to send it to the Drafting Committee.

She welcomed the inclusion of draft guideline 7, on geoengineering, and found the argument that the Commission should refrain from addressing the issue owing to a lack of expertise unpersuasive for two reasons. First, the guideline was formulated in general terms only; and secondly, international lawyers had always been required to address factual developments and could not shy away from an issue because of a lack of knowledge. The scientific experts who had attended meetings with the Commission had alerted it to the pros and cons of geoengineering. She failed to see why a cautiously formulated guideline on the issue could not be included in the topic. The Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, for example, contained sweeping formulations about environmental modification techniques, despite the fact that those who negotiated it could hardly have claimed to be experts on the matter.

In conclusion, she recommended that all the draft guidelines should be referred to the Drafting Committee.

Mr. Laraba said that he wished to thank the Special Rapporteur for his concise report, in which he sought to strike a balance between scientific and legal matters, and for organizing another informative meeting with scientists. He recommended that draft guidelines 3, 4, 5 and 6 and the fourth draft preambular paragraph should be referred to the Drafting Committee, taking into account the remarks he would make.

Regarding draft guideline 3, the Special Rapporteur had stated in paragraph 35 of the report that the *sic utere tuo* principle had two distinct dimensions, one in a transboundary context and the other in the global context, and had cited in that regard the judgment of the International Court of Justice in the *Pulp Mills* case, which had distinguished two different forms of obligations flowing from the principle. At the same time, the Special Rapporteur had referred readers to paragraph 12 of the report. It was not clear, however, why he had done so, since paragraph 12 contained no mention of the *Pulp Mills* case. Consequently, it was difficult to understand on what basis the distinction in draft guideline 3 between transboundary atmospheric pollution and global atmospheric degradation had been made.

Also in paragraph 35, the Special Rapporteur had stated that, in its judgment in the *Pulp Mills* case, the Court had interpreted the *sic utere tuo* principle in a broader sense than that given to it in the *Trail Smelter* arbitration, citing paragraph 193 of the judgment in support of his claim. However, it would have been helpful if the Special Rapporteur had further developed his analysis of paragraph 193 — including by taking into account paragraph 194 of the same judgment — particularly in respect of his assertion that the scope of the *sic utere tuo* principle had been expanded to encompass a broader geographical context.

The overall logic and coherence of draft guideline 3 was questionable. Strictly speaking, its title, "Obligation of States to protect the atmosphere", covered only the first sentence of the guideline and, moreover, it was identical to the title of section II of the report, which dealt with both draft guideline 3 and draft guideline 4. In sections II.A and II.B, the Special Rapporteur had done little to substantiate the proposition contained in the first sentence of draft guideline 3, perhaps because he considered that the issue had already been dealt with in paragraphs 52 to 57 of his second report on the protection of the atmosphere (A/CN.4/681). If that were the case, it would have been better to say so more explicitly, particularly as the wording of the first sentence of draft guideline 3 was not exactly the same as that of draft guideline 4 as proposed in the second report. As had been pointed out by other members of the Commission, there was no link between the obligation to protect the atmosphere set out in the first sentence of draft guideline 3 and subparagraphs (a) and (b), which might give the impression that the three propositions contained in those provisions were independent of one another. It would be helpful if the Special Rapporteur could explain the relationship between those provisions. While paragraphs 35 to 38 of the report did not provide a compelling justification for the prescriptive character of subparagraph (b), the Special Rapporteur had justified the prescriptive nature of subparagraph (a), despite the fact that his arguments relating to knowledge or foreseeability, burden of proof and standard of proof, and jurisdiction and control were not entirely conclusive and were not reflected at all in the text of the subparagraph.

Regarding draft guideline 4, he agreed with the Special Rapporteur about the need to address the question, considered in paragraph 60 of the report, of whether the requirement to conduct an environmental impact assessment applied to projects intended to have significant effects on the global atmosphere, such as geoengineering activities, in the same way as it did in transboundary contexts. The Special Rapporteur's reasoning for making the leap from a transboundary context to a global one was condensed into one sentence, in which he submitted that geoengineering activities, for example, were likely to carry a more extensive risk of widespread, long-term and severe damage than projects causing transboundary harm and that, therefore, the same rules should *a fortiori* be applied to them. The Special Rapporteur's decision to use the word "should" in relation to the application of the rules in a global context was prudent; such prudence was called for, given that the issue of geoengineering activities was the subject of debate within the Commission. Draft guideline 4, in which more prescriptive language was used, would benefit from being redrafted with the same degree of prudence.

As to draft guidelines 5 and 6, which were drafted cautiously, it could be left to the Drafting Committee to address such issues as the appropriateness of transposing the rules and principles relating to the notion of sustainability and that of equity in international law to the protection of the atmosphere, the relationship between subparagraphs (1) and (2) of draft guideline 5 and the applicability of the judicial decisions relating to maritime delimitation mentioned in paragraph 77 of the report to the equitable utilization of the atmosphere.

He had misgivings regarding the fourth draft preambular paragraph, not from a substantive point of view, but rather in connection with the Commission's 2013

understanding, in particular concerning the exclusion from the scope of the topic of the notion of "common but differentiated responsibilities". While the content of the understanding was not as clear as it might seem, what was clear was that the understanding should be respected. However, his reservations regarding the fourth draft preambular paragraph did not prevent him from recommending its referral to the Drafting Committee.

Mr. Candioti said that he wished to thank the Special Rapporteur for his report and for establishing a dialogue with the scientific community, whose input was crucial in ensuring that the Commission's draft guidelines were solidly based on scientific evidence. He supported all the draft guidelines proposed by the Special Rapporteur and the proposal to mention the special situations of developing countries in the preamble. He noted that the preamble was still in its embryonic stages and its content would require further modification in due course. He also agreed with the inclusion, in the revised third draft preambular paragraph circulated in the meeting room, of the phrase "common concern of humankind", which was in more widespread use than the expression "pressing concern of the international community as a whole".

In his view, the draft guidelines proposed by the Special Rapporteur should be formulated as guiding principles and, consequently, the word "should" was to be avoided in favour of a more normative formulation. The wording of draft guideline 3 could be simplified, while a definition of geoengineering, which was the subject of draft guideline 7, could usefully be added to draft guideline 1, on the use of terms. In draft guideline 6, it would be helpful to elaborate on the principle of "equity", perhaps by providing an illustrative list of factors for States to bear in mind with a view to preserving the atmosphere.

Lastly, the 2013 understanding concerning the scope of the topic was not set in stone and could be altered or abandoned, as appropriate. It would be for the Commission in its new composition to consider afresh the absurd conditions imposed on the Special Rapporteur.

Mr. Murase (Special Rapporteur), summing up the discussion on his third report, said that he wished to thank all those who had taken part in the debate for their helpful comments, suggestions and constructive criticisms, which he would certainly take into account in the preparation of the fourth report, were he to be re-elected to the Commission. As members had found the informal meeting with scientists and experts extremely useful, it would be worthwhile, in view of the planned focus of the fourth report on the interrelationship between the protection of the atmosphere and the law of the sea, to hold a similar meeting the following year on the linkages between the atmosphere and the oceans.

A wide range of opinions had been expressed regarding the 2013 understanding; for his part, he could only say that he had complied with, and remained faithful to, the understanding. The "without prejudice" clause had been inserted into the understanding to allow the Commission to deal with common but differentiated responsibilities; consequently, he had considered it his duty to refer to that concept in his report. As he had stressed during the drafting of the understanding, the precautionary principle, as a legal principle, had a meaning and status in international law distinct from that of precautionary measures or approaches. In any event, as he had dealt with neither common but differentiated responsibilities nor precaution in the draft guidelines, the issue of compatibility with the understanding did not arise.

In respect of the annex, he had originally prepared a single text with the new proposed guidelines underlined but that format had been rejected by the editors. He would in any future report produce one annex with the draft guidelines that had already been adopted and a second containing the new proposed guidelines. His intention in including "settlement of disputes" in the future workplan had been not to draft a set of dispute

settlement clauses, but to highlight some unique features of environmental disputes relating to the atmosphere, which tended to be fact-intensive and science-heavy. The issue of burden of proof would be addressed in the fifth report in 2018. He agreed with Sir Michael Wood that there would have to be a good reason for the Commission not to wait for a year before proceeding to the second reading of the draft guidelines.

Many members had expressed support for draft guideline 3, with some considering it an improvement on the previous year's proposal. It had been suggested that the relationship between the chapeau and the subparagraphs, as well as that between subparagraphs (a) and (b), should be clarified. His intention had been that the chapeau should set out the general principle, while subparagraphs (a) and (b) should specify the meaning of the principle in the contexts of transboundary atmospheric pollution and global atmospheric degradation, respectively. As to the relationship between the subparagraphs, subparagraph (a) was concerned with the obligation to protect the atmosphere under customary international law and treaty law, while subparagraph (b) dealt with the obligation under the relevant conventions. That said, he agreed with Mr. McRae that it would be a good idea to combine the three sentences into a revised draft guideline 3. He therefore wished to propose that draft guideline 3 should be amended to read: "States have the obligation to protect the atmosphere by taking appropriate measures of due diligence in accordance with international law to prevent transboundary atmospheric pollution and to minimize the risk of global atmospheric degradation." Although some members had noted that the language of the draft guideline, as proposed in the report, was vague, he agreed with Mr. Nolte that it might sometimes be appropriate to avoid specific language when providing for general principles. Clarification of the meaning of the draft guideline would be given in the commentary.

Regarding draft guideline 4, most members had agreed that States had the obligation to undertake appropriate environmental impact assessments in relation to transboundary atmospheric pollution. He welcomed Mr. Tladi's suggestion that practical guidance should be provided to States on how to conduct such assessments, along the lines of that offered in the World Bank Operational Manual. Several members had suggested that the draft guideline should clarify the circumstances in which States' obligation to carry out an environmental impact assessment was triggered. In the light of that suggestion, he would like to propose that the guideline should be revised to read: "States have the obligation to undertake an appropriate environmental impact assessment on proposed activities which may cause significant adverse impact on the atmosphere. It should be conducted in a transparent manner with broad public participation." Mr. Murphy and Mr. Forteau had expressed concern that the inclusion of a reference to broad public participation in the draft guideline could be read to require that a State must allow participation by other States and nationals of other States in its environmental impact assessments that did not have a transnational dimension. However, only those activities with a transnational dimension fell within the scope of the draft guideline; in any event, the guideline simply recommended that States should allow broad public participation and did not create a legal obligation to do so.

There had been general support for the inclusion of the concept of sustainable utilization of the atmosphere in draft guideline 5. As had been recommended by some members, the concept would be further clarified and elaborated upon in the commentary. As to the question that had been raised about the appropriateness of the reference in the draft guideline to the finite nature of the atmosphere, he said that the atmosphere was a limited resource because, as he had pointed out in his second and third reports, its quality and its capacity to assimilate pollutants could be reduced by its exploitation. That point had been reflected in a commentary to the preamble, adopted the previous year, which stated that "it must be borne in mind that the atmosphere is a limited resource with limited assimilation capacity".

As to draft guideline 6, while Mr. Park had expressed doubt concerning the relevance to the topic of the concept of equitable utilization of the atmosphere, many other members had welcomed its inclusion. Mr. Hmoud, Mr. Murphy and Sir Michael Wood had expressed concern that the meaning of equity in the draft guideline was not sufficiently clear. Their concern could be addressed by refining the text of the guideline and clarifying its meaning in the commentary. In that regard, he welcomed Mr. Murphy's suggestion that the phrase "on the basis of the principle of equity" might be replaced with "in a reasonable and equitable manner". He therefore proposed amending draft guideline 6 to read: "States should utilize the atmosphere in a reasonable and equitable manner and for the benefit of present and future generations of humankind." Although Mr. Forteau had suggested that the content of draft guidelines 5 and 6 should be dealt with in the preamble rather than the draft guidelines themselves, it was perhaps preferable not to place everything controversial in the preamble.

Some members had considered draft guideline 7, which called for prudence and caution in geoengineering activities, to be important, while others had expressed reservations about making a separate guideline on the issue in the light of the uncertainties surrounding such activities. It was, however, because of those very uncertainties that the guideline cautioned against conducting such activities without a careful prior assessment of their potential impact on the environment. The guideline should also reflect the emerging rules of international law in that field. While, as some members had noted, geoengineering was a highly technical issue, the Commission was primarily concerned with assessing its legal aspects in the light of applicable international law. Furthermore, the draft guideline sought to lay out basic principles, without creating any legal obligations regarding geoengineering activities. Some concern had been expressed that the term was not sufficiently clear and should be either dropped or given a legal definition. He therefore proposed moving draft guideline 7 to paragraph 3 of draft guideline 5 on sustainable utilization of the atmosphere, without referring to geoengineering as such. Draft guideline 5 would then read: "Any activities intended to modify conditions of the atmosphere should be conducted with prudence and caution in a fully disclosed, transparent manner and in accordance with existing international law. Environmental impact assessments are required for such activities."

The phrase "the special situation of developing countries" in the fourth draft preambular paragraph had been taken from the preamble to the 2008 draft articles on the law of transboundary aquifers. While some members had considered that such language was not in line with the current approach to atmospheric pollution and atmospheric degradation, others had argued persuasively that there was a continuing need to take into account the special situation of developing countries. In that regard, he welcomed the proposal made by Mr. Forteau and Mr. Murphy to mention the circumstances of each country, thus echoing the Paris Agreement. With that in mind, he proposed revising the wording of the fourth draft preambular paragraph to read: "Emphasizing the need to take into account the special situation of developing countries in the light of different national circumstances."

A large number of members had supported his suggestion that the Commission should reconsider its decision adopted the previous year to use the term "pressing concern of the international community as a whole" rather than "common concern of humanity". The fact that the Paris Agreement referred to the "common concern of humankind" clearly suggested that States had not abandoned the concept. While some members had considered that the context of the Paris Agreement was different from that of the present project, the atmosphere and climate change were inseparable, as Mr. Nolte had pointed out; reconsideration of the decision was therefore warranted. He proposed that the third draft preambular paragraph should be amended to read: "Recognizing therefore that the

protection of the atmosphere from atmospheric pollution and atmospheric degradation is a common concern of humankind, …".

There had been general support for referring all the draft guidelines and the fourth draft preambular paragraph to the Drafting Committee. He had taken note of the preference expressed by Mr. Tladi, Mr. Murphy and Sir Michael Wood not to send draft guideline 7 to the Committee. However, as he had indicated earlier, he was of the view that their concerns in that regard could be addressed by the Committee within the context of draft guideline 5. While Mr. Murphy had not been in favour of sending the fourth draft preambular paragraph to the Drafting Committee, the changes he had proposed could be used to improve its wording. He therefore requested that all the draft guidelines and the new paragraphs of the draft preamble, as proposed in his third report and as revised in his new proposal, should be referred to the Drafting Committee.

Mr. Forteau asked whether the Special Rapporteur was proposing that the third draft preambular paragraph, which had been adopted, together with a commentary, at the previous session, should also be sent to the Drafting Committee and whether, if the paragraph were amended, a new commentary to the preamble as a whole would have to be adopted. He raised the matter, since it was his understanding that the Commission had settled the question the previous year, given that, when deciding on the formulation to be used, it had already taken into account the fact that the 1992 United Nations Framework Convention on Climate Change stated that climate change was a common concern of humankind. He would therefore be grateful if the Special Rapporteur could clarify whether he was proposing that the Commission should modify the approach that it had adopted at the previous session and adopt a new draft preamble along with a new commentary thereto. In his view, it would be particularly unfortunate if the Commission were to proceed in that manner, since it would be sending out, from one year to the next, conflicting messages to States.

Mr. Murase (Special Rapporteur) said that he was proposing that the third draft preambular paragraph should be sent to the Drafting Committee and that the phrase "pressing concern of the international community as a whole" should be replaced with "common concern of humankind". He was proposing that change in wording in the light of the adoption of the Paris Agreement; the change to the wording would entail an amendment of the commentaries.

Mr. Murphy said that it was his understanding that it was the Commission's usual practice to refer to the Drafting Committee draft texts that had been proposed in a report and debated by the Commission. While he had no problem with referring to the Committee the proposals contained in the Special Rapporteur's report, he was concerned that it was being asked at the current juncture to approve texts that it had not debated and that might or might not reflect the views of the plenary. He would prefer that only the proposals contained in the Special Rapporteur's report should be referred to the Drafting Committee, which could subsequently take into account any recommendations that the Special Rapporteur might have. Regarding the proposed change to the wording of the third draft preambular paragraph, the Commission had decided the previous year not to include the term "common concern of humankind" because of concerns about the highly contested nature of the term and the fact that its precise meaning would be difficult to explain. Those concerns had not changed.

Mr. Murase said that he had followed the previous year's practice in circulating his proposed amendments; he had no problem, however, with the original proposals being referred to the Drafting Committee.

Mr. Hmoud said that he was against sending the proposed revised version of the third draft preambular paragraph to the Drafting Committee for the reasons that he had

given during the plenary debate. At its previous session, the Commission had decided against the inclusion of a reference to "common concern of humankind" because of the legal implications that would arise therefrom, in particular in respect of obligations *erga omnes*. During discussions on the issue in the Sixth Committee in November 2015, at the time the Paris Agreement was being negotiated, most States had opposed any such reference.

Sir Michael Wood said that the procedural position was quite simple: the Commission should agree to refer all the draft guidelines and the preambular paragraph, as proposed in the report, to the Drafting Committee. The Special Rapporteur could then raise his proposed amendments in that context.

Mr. Candioti said that it was not usual practice to draft a preamble before completing the operative part of a project. The Commission had stated in paragraph 53 of the report on its work at its sixty-seventh session (A/70/10) that some other paragraphs might be added to the preamble and that the order of the paragraphs might be coordinated at a later stage. It had further stated in footnote 19 of the report that the terminology and location of the fourth preambular paragraph would be revisited at a later stage in the Commission's work on the topic. In order to avoid repeated discussion on fragmented parts of the text, the Drafting Committee and the Special Rapporteur should delay consideration of the preamble until the Commission had a clearer idea of the draft guidelines as a whole.

Mr. Petrič said that he fully supported Mr. Candioti's suggestion. Although there might well be good reasons for changing the preamble, he did not consider that it was necessary to do so at the present juncture.

The Chairman said that the Commission was master of its own procedure and, as such, could refer matters to the Drafting Committee even if they had not been formally proposed by the Special Rapporteur in the report under discussion. However, an extraordinary procedure of that kind should be undertaken very carefully and without undue haste. His sense was that the Commission should not send the revised third draft preambular paragraph to the Drafting Committee, but that it should authorize the Committee to reflect on the matter; once the Committee had completed its work, the plenary could take a decision on what the Commission's report on its work at the current session should say in that regard.

Sir Michael Wood said that he would be in favour of the referral of all the draft guidelines and the draft preambular paragraph, as set out in the report, to the Drafting Committee.

Mr. Hmoud said that he supported the referral to the Drafting Committee of the draft texts, as proposed in the Special Rapporteur's report; he was not in favour of referring to the Committee the proposed revised version of the third draft preambular paragraph.

Mr. McRae said that he had no problem with the suggestions made by Sir Michael Wood and Mr. Hmoud, provided that it was understood that the issue of the third draft preambular paragraph remained open and that it could be discussed again when the preamble as a whole was considered in plenary.

Sir Michael Wood said that nothing was final until a text was adopted on second reading. The third preambular paragraph had been discussed at great length the previous year and adopted with commentaries. While it could be discussed again in the Drafting Committee, the plenary should refer to the Committee only those texts proposed in the report.

Mr. Forteau said that he agreed with Mr. Hmoud and was opposed to undoing something that had been completed the previous year. There would be ample opportunity

during the first reading to review any draft text and consider any necessary adaptations, in the light of any developments that had occurred since taking up the topic.

Mr. Candioti said that he agreed with Sir Michael Wood's proposal. The Drafting Committee had stated the previous year that some parts of the preamble were provisional; the Commission should continue to move forward on that basis.

Mr. Murase (Special Rapporteur) said that he endorsed Sir Michael Wood's suggestion.

The Chairman, speaking in his personal capacity, said that he welcomed the emerging consensus with respect to the proposal that the Commission should refer the draft guidelines, as proposed in the report, to the Drafting Committee, on the understanding that other matters might be raised in the Drafting Committee; there was no need to make a general practice statement.

Mr. Hmoud said that the proposals contained in the report should be forwarded to the Drafting Committee without any qualification or understanding.

The Chairman said that he took it that the Commission wished to refer draft guidelines 3, 4, 5, 6 and 7, together with the fourth draft preambular paragraph, as proposed in the report, to the Drafting Committee.

It was so decided.

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 protection of the atmosphere was composed of Mr. Forteau, Mr. Hmoud, Mr. Kittichaisaree, Mr. McRae, Mr. Murphy, Mr. Niehaus, Mr. Saboia, Mr. Vázquez-Bermudez, Sir Michael Wood, together with Mr. Murase (Special Rapporteur) and Mr. Park (Rapporteur), *ex officio*.

The meeting rose at 1.15 pm.