Provisional

For participants only

25 May 2021

Original: English

International Law Commission

Seventy-second session (first part)

Provisional summary record of the 3508th meeting
Held at the Palais des Nations, Geneva, on Monday, 26 April 2021, at 3 p.m.

Contents

Present:

Temporary Chair:	Mr. Šturma
Chair:	Mr. Hmoud
Members:	Mr. Aurescu
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Gómez-Robledo
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Nguyen
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Rajput
	Mr. Reinisch
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Tladi
	Mr. Valencia-Ospina
	Sir Michael Wood
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 3 p.m.

Opening of the session

The Temporary Chair, speaking via video link, declared open the seventy-second session of the International Law Commission.

Election of officers

Mr. Hmoud was elected Chair by acclamation.

Mr. Hmoud took the Chair.

The Chair thanked the members for the trust they had placed in him and said that it was a privilege to chair such an important body. He would make every effort to ensure that the current session was successful and productive.

Mr. Tladi was elected First Vice-Chair by acclamation.

Mr. Zagaynov was elected Second Vice-Chair by acclamation.

Ms. Galvão Teles was elected Chair of the Drafting Committee by acclamation.

Mr. Ruda Santolaria was elected Rapporteur by acclamation.

Introductory remarks by the Chair

The Chair said that he wished to welcome all participants to the session, whether they were physically present in Geneva or connecting via Zoom. Despite the unusual circumstances, he was certain that, thanks to its collegial spirit, the Commission would make the hybrid working model a success and would progress with its work.

Adoption of the agenda (A/CN.4/733/Rev.1)

The provisional agenda was adopted.

Programme, procedures and working methods of the Commission and its documentation (agenda item 9)

The Chair said that the Commission would follow its customary working methods as closely as possible. However, the hybrid working model, under which some members were participating remotely, made certain adjustments necessary to ensure that all members, spread as they were across numerous time zones, could take part in decision-making on an equal basis. Plenary meetings would take place from 11 a.m. to 1 p.m. Central European Summer Time (CEST) and, when needed, from 3 p.m. CEST for a short time for the purpose of making decisions. Given the shortened length of the meetings, members were encouraged to limit their statements to 20 minutes. The limit would not apply to the Special Rapporteurs or the Chair of the Drafting Committee. Mini-debates would be allowed only exceptionally, during afternoon plenaries. Members unable to participate “live” in a plenary debate would be permitted to upload a pre-recorded video or audio statement, which would be played during the meeting. In exceptional circumstances, such as in the event of technical difficulties, members could submit a written statement along with a request that it should be either read out by the Secretariat or circulated to all members in writing without being read out. In the latter case, the statement would not be translated or reflected in the summary records.

The Drafting Committee would meet from 3 p.m. to 5 p.m. CEST. Whenever there was a plenary at 3 p.m., the Committee would meet immediately after its adjournment. Only members physically present in Geneva and those participating over Zoom could take part in Drafting Committee meetings. Written statements could not be submitted in lieu of “live” participation.

The meetings of the Study Group on sea-level rise in relation to international law, the Planning Group, the Working Group on methods of work and the Working Group on the long-term programme of work would follow the same working methods as plenary meetings and would take place in the mornings during the first part of the session.

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

The Chair drew attention to the proposed programme of work for the first part of the Commission's current session, which would begin with the consideration of the sixth report of the Special Rapporteur on the topic "Protection of the atmosphere". Thereafter, the Commission would turn to the sixth report of the Special Rapporteur on the topic "Provisional application of treaties". Later, it would consider the eighth report of the Special Rapporteur on the topic "Immunity of State officials from foreign criminal jurisdiction".

On the topic of immunity of State officials from foreign criminal jurisdiction, the Drafting Committee would meet to conclude the work left over from the seventy-first session. Later in the session, it would reconvene to consider the draft articles proposed in the Special Rapporteur's eighth report. In between, there would be meetings of the Drafting Committee on the topics "Protection of the atmosphere" and "Provisional application of treaties".

The Planning Group, the Working Group on methods of work and the Working Group on the long-term programme of work would meet during the fifth week, while the Study Group on sea-level rise in relation to international law would hold several meetings during the sixth week. In line with the practice of the Commission, the proposed work programme would be applied with the necessary flexibility.

He took it that the Commission agreed to the proposed programme of work for the first part of the session.

It was so decided.

Ms. Galvão Teles (Chair of the Drafting Committee) said that, for the topic "Immunity of State officials from foreign criminal jurisdiction", the Drafting Committee was composed of Mr. Argüello Gómez, Mr. Gómez-Robledo, Mr. Grossman Guiloff, Mr. Hmoud, Mr. Jalloh, Ms. Lehto, Mr. Murphy, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Petrič, Mr. Rajput, Mr. Reinisch, Mr. Saboia, Mr. Tladi, Sir Michael Wood and Mr. Zagaynov, together with Ms. Escobar Hernández (Special Rapporteur) and Mr. Ruda Santolaria (Rapporteur), *ex officio*.

Protection of the atmosphere (agenda item 5) (A/CN.4/735 and A/CN.4/736)

Mr. Murase (Special Rapporteur), speaking via video link and introducing his sixth report on the protection of the atmosphere (A/CN.4/736), said that it was gratifying that the Commission had reached the final stage of consideration of the topic and was ready to proceed with the second reading of the draft guidelines and draft preamble. The exercise would be informed by the comments made by States and international organizations in relation to the text adopted on first reading in 2018. Based on those comments, which he analysed in detail in the report, he was proposing some changes to the text. A total of 41 States and the Permanent Court of Arbitration had made comments in the Sixth Committee in 2018, while written comments had been received from 14 States and 2 international organizations. The written comments were reproduced in document A/CN.4/735.

He wished to begin by referring to the 2013 understanding on the scope and outcome of the topic. The Nordic countries had commended the skill with which he and the Commission had conducted the work on what was a weighty and complex topic and had acknowledged the difficulty of working within a restricted mandate. They had recalled that the original intention, according to the syllabus annexed to the Commission's 2011 report on the work of its sixty-third session (A/66/10), had been to prepare draft articles to serve as a basis for a framework convention comparable to the United Nations Convention on the Law of the Sea. The Nordic countries had, from the outset, recognized the importance of the protection of the atmosphere as a topic and had expressed regret that the draft guidelines inevitably reflected the tight constraints imposed on him as Special Rapporteur.

Nonetheless, as noted by many States, he and the Commission had faithfully complied with the conditions of the understanding. There was therefore no need to reiterate its content in the text on second reading. Accordingly, he wished to recommend that references to the understanding in the draft preamble and in draft guideline 2 (2) and (3) should be deleted. Some States and international organizations had proposed, either orally or in writing, the insertion of references to questions such as the "precautionary principle", which was

prohibited by the understanding. However, such proposals were certainly legitimate, bearing in mind that the understanding had been imposed not by the Sixth Committee but by the Commission itself and was therefore not binding on States and international organizations.

He wished to recommend several amendments to the preamble. Portugal had proposed that, in the first preambular paragraph, the words "a limited natural resource" should be inserted after "the atmosphere is". He supported that proposal, given the importance of referring to that notion at the very beginning of the draft guidelines, as he had initially proposed.

The second preambular paragraph had originally been part of the definition of the term "atmosphere" contained in draft guideline 1 (a). Some States had expressed their unease with the inclusion of the functional aspect of the definition in the preamble. He therefore proposed that the second preambular paragraph should be deleted and moved back to draft guideline 1 (a), where it belonged.

In the fourth preambular paragraph, he recommended that the phrase "pressing concern of the international community as a whole" should be replaced with "common concern of humankind". While his initial proposal, made in his second report (A/CN.4/681), had been "common concern", the expression "pressing concern" had been adopted as a compromise, it having been suggested, when the second report had been discussed in May 2015, that the international community had "abandoned" the expression "common concern" after 1992. However, in December 2015, the Paris Agreement had been adopted with the term "common concern". All the States that had addressed the matter in their comments on the text adopted on first reading had indicated a preference for the phrase "common concern", with no State favouring "pressing concern". As noted in the specific comments submitted by Finland on behalf of the Nordic countries (A/CN.4/735), those countries took the view that "common concern of humankind" was a more established choice of expression in international environmental law and that using a term from a completely different context – that of the selection of topics for the Commission's long-term programme of work – had not been an obvious choice. The Nordic countries had thus proposed that a reference to the protection of the atmosphere as a "common concern of humankind" should be introduced in the preamble, in the light of the subject matter of the draft guidelines and the close connection between the protection of the atmosphere and climate change. Insofar as the omission of such a reference had been related to a lack of clarity as to the precise legal implications of the concept, the Nordic countries considered the draft commentaries a worthy opportunity for the Commission to contribute to its clarification.

He recommended the deletion of the eighth preambular paragraph, which referred to the 2013 understanding. The paragraph might have had some value at the outset of the work on the topic but had become meaningless, since the project had been completed in full compliance with the restrictions mentioned in the understanding. Most States that had commented on the paragraph had agreed that it should be deleted.

In line with a suggestion by Estonia, he also recommended that the third preambular paragraph should be placed after the fifth preambular paragraph. That would require a change in the opening words of the sixth preambular paragraph, from "*Aware also* … of" to "*Noting also*", and of the seventh preambular paragraph, from "*Noting*" to "*Recognizing*".

As he had previously mentioned, draft guideline 1 (a) should be amended to reincorporate the second preambular paragraph and should read: "'Atmosphere' means the envelope of gases surrounding the Earth, within which the transport and dispersion of the polluting and degrading substances occur."

In draft guideline 1 (b), he recommended that the words "or energy" should be added after "substances", as suggested by a number of States and in line with article 1 (a) of the Convention on Long-range Transboundary Air Pollution and article 1 (1) (4) of the United Nations Convention on the Law of the Sea.

The references to the 2013 understanding in draft guideline 2 (2) and (3) should be deleted. As pointed out by some States, paragraph 2 was unclear because it contained the "double negative" formula "do not deal with, but are without prejudice to".

With regard to the remaining draft guidelines, he had relatively minor changes to recommend. Concerning draft guideline 3, he recommended that the words “prevent, reduce or control” should be replaced with “prevent, reduce and control”, in line with article 194 of the United Nations Convention on the Law of the Sea. He had no changes to recommend for draft guidelines 4, 5 and 6. With regard to draft guideline 7, he recommended that the words “including those relating to environmental impact assessment” should be inserted at the end of the sentence.

The Nordic countries had questioned the decision to use the expression “prudence and caution” rather than “precautionary approach” in draft guideline 7. In the commentary, that decision had been explained with reference to several cases of the International Tribunal for the Law of the Sea, but the Nordic countries had suggested that a more relevant point of reference could perhaps be found in the Commission’s draft articles on the law of transboundary aquifers, where the expression “precautionary approach” was used in draft article 12. He was very grateful for that suggestion, and would propose the inclusion of a reference to the precautionary principle and the precautionary approach in the commentary. Although the two concepts had been discussed on first reading, the Commission had ultimately decided to use the expression “prudence and caution”.

With regard to draft guideline 8 (2), he recommended that the words “and technical” should be added after “scientific” in order to broaden the scope of the obligation to cooperate internationally. As for draft guideline 9, he had no changes to recommend, although he was sure that additions could be made to the commentary in due course.

Concerning draft guideline 10, he wished to propose the insertion of a new paragraph 2, to read: “Failure to implement the obligations amounting to breach thereof entails the responsibility of States under international law.” The Commission had rejected his original proposal to include a draft guideline on the responsibility of States. It was noted in the commentary that the articles on responsibility of States for internationally wrongful acts, adopted in 2001, were “equally applicable in relation to environmental obligations, including protection of the atmosphere from atmospheric pollution and atmospheric degradation”. Nevertheless, he believed that it would be useful to include an explicit statement of that position in the draft guideline itself. He had no recommendations to make regarding draft guidelines 11 and 12.

In a famous speech given at American University on 10 June 1963, President John F. Kennedy of the United States of America had emphasized the common interests of nations, noting that, “in the final analysis, our most basic common link is that we all inhabit this small planet. We all breathe the same air. We all cherish our children’s future.” It was in that spirit that the Commission’s work on the topic had been undertaken and would be completed.

Sir Michael Wood said that he wished to thank the Special Rapporteur for his concise, well-organized and readable sixth report. The comments and observations received from Governments and international organizations and the statements made over the years in the Sixth Committee provided an important basis for the Commission’s work on second reading. However, he did not believe that the Special Rapporteur had correctly assessed the comments received from Governments; indeed, the approach taken in that regard had been rather selective. It was regrettable that the Special Rapporteur had sought to reopen virtually all the compromises reached on first reading and had done so in the direction of the Special Rapporteur’s own proposals. That risked upsetting such balance as there had been in the text adopted on first reading, making it even less likely to prove useful for States.

Before turning to the detailed proposals in the report, he wished to make some general points.

The Special Rapporteur gave little indication as to what he had in mind for the commentaries. With only one or two exceptions, it was noted for each provision simply that the Commission might wish to refer, in the commentary, to some of the comments received from States and that proposals to that effect would be made in due course. He hoped that the commentaries eventually proposed would avoid straying into areas of controversy and areas beyond the Commission’s expertise.

In that regard, the commentaries adopted on first reading had been rather unsatisfactory. They contained a good deal of background material that, he hoped, could now be omitted. They also contained too much detail on scientific matters, on which the Commission was not qualified to comment, and too many references to writings of varying quality and authority; such references would in any case rapidly become out of date. He hoped that the commentaries adopted on second reading would be more concise and more carefully drafted.

The topic continued to be the subject of seriously critical comments and concerns in the Sixth Committee. In the sixth report, as in previous reports, the Special Rapporteur's description of the debate in the Sixth Committee was rather one-sided, as was his analysis of the written comments. Even when objections had been mentioned, for example the fact that several States doubted the utility of draft guidelines 10, 11 and 12, no explanation had been given for rejecting those views.

He continued to have real doubt about the utility of the topic. The subject matter was appropriate for political negotiations that would result in provisions agreed by States. It remained questionable whether draft guidelines from the Commission would be appropriate in that field and whether they would be of assistance to those negotiating texts on protection of the atmosphere. It was possible that the Special Rapporteur thought that the draft guidelines could somehow be used in legal strategies, whether before courts or tribunals or in other contexts.

Although the Commission had agreed to take up the topic on the basis of the 2013 understanding and had worked on that basis for the previous eight years, the Special Rapporteur was now seeking to remove all trace of the understanding from the draft guidelines. Some States already considered that the understanding was not adequately reflected in the text adopted on first reading. For example, one State had suggested that a reference to the understanding in a preambular paragraph was, of itself, not sufficient and that a possible solution would be to add a new paragraph to draft guideline 2 clarifying that the draft guidelines "do not extend to matters that are the subject of political negotiation, in particular political negotiations relating to climate change, ozone depletion or long-range transboundary air pollution". None of that was reflected in the sixth report.

The Special Rapporteur seemed to have reasoned that references to the understanding would no longer be needed once the Commission's work on the topic had been completed. At the same time, however, he was proposing that, at the final stage, issues that had been expressly excluded by the understanding should be added both to the draft guidelines and to the commentaries. For example, the proposed new paragraph 2 of draft guideline 10 would be contrary to the understanding, under which the topic was not to cover State liability.

With regard to the proposed deletions from the draft preamble, the Special Rapporteur seemed to be agreeing with a suggestion made by Japan, namely that it might not be necessary to repeat the content of the understanding in the draft guidelines and that the concluding paragraph of the draft preamble and paragraphs 2 and 3 of draft guideline 2 should thus be revisited and possibly deleted. However, when the Special Rapporteur asserted that he and the Commission had "faithfully complied with the conditions of the 2013 understanding", he seemed to have been thinking only of the draft guidelines and not of the commentaries. Although it was not yet clear what the Special Rapporteur had in mind for the commentaries, it appeared, from paragraphs 51 and 68 of the report, that the Special Rapporteur wished to address precautionary matters. That would be directly contrary to the understanding. The commentaries would form part of the Commission's output on the topic and were governed by the understanding to the same extent as the guidelines themselves. The Special Rapporteur had not given any reasons why the three paragraphs should now be omitted. If they had been necessary on first reading, they were equally necessary on second reading.

One reason that could have been given was that, while the paragraphs in question provided explanations of what the Commission had done, they did not qualify it in any legally relevant way. They were therefore superfluous and as such should not be included in the draft guidelines themselves. However, the Special Rapporteur had not taken that argument to its logical conclusion. If deletions were to be considered, there was no reason not to consider

the deletion of the draft preamble as a whole; a preamble was hardly appropriate for such draft guidelines.

In fact, however, the concluding preambular paragraph served an important purpose. It set out clearly and prominently the fact that the Commission had indeed faithfully complied with the conditions of the understanding. It stated that the draft guidelines were not to interfere with relevant political negotiations, fill gaps or seek to add new rules to existing treaty regimes. He therefore strongly opposed its deletion.

The Special Rapporteur noted that the Commission had scrupulously adhered to the understanding but then proposed that it should depart from the understanding by referring to "some of the principles and substances in the relevant preambular paragraphs and draft guidelines". That seemed incoherent. The Special Rapporteur seemed to be saying that the Commission did not need to refer to the understanding because it had complied with it, but also that the Commission should do precisely what it had said that it would not do in the understanding.

One of the Special Rapporteur's other proposed changes to the draft preamble deserved comment. After a long debate, the Commission had settled on the expression "a pressing concern of the international community as a whole", which had been taken from the Commission's criteria for the selection of new topics. Although the Special Rapporteur acknowledged that the expression had been a compromise, he was now seeking to reopen the discussion, for no convincing reason. The expression "a common concern of humankind" had been rejected not because it had not been used by States since 1992, as the Special Rapporteur now maintained, but to avoid unintended legal consequences, given its uncertain implications. A group of legal experts convened by the United Nations Environment Programme in 1990 and 1991 to examine the concept of "common concern" had concluded that it still had "no legal consequences in terms of rights and duties". Others, however, sometimes appeared to take a different view, as shown by some recent academic initiatives. If such words were included, the commentary would need to state very clearly that they did not carry legal implications and that they were in fact no more than another way of saying that atmospheric degradation was a pressing concern of the international community as a whole.

With regard to draft guideline 1, the Special Rapporteur once again seemed to want to upset the compromises reached on first reading. Following much debate, the word "energy" had not been used in the definition of the term "atmospheric pollution". It had been agreed that, although that word appeared in the United Nations Convention on the Law of the Sea and the Convention on Long-range Transboundary Air Pollution, it should not be included in the draft guidelines. He did not agree with the Special Rapporteur's recommended change in that regard.

He also disagreed, for the reasons that he had already given, with the Special Rapporteur's proposal to delete paragraphs 2 and 3 from draft guideline 2. If that deletion was made, the matter would need to be explained very clearly in the commentary. For example, it would be necessary to include the Special Rapporteur's explanation that the draft guidelines on the topic did not touch on the principles enumerated in paragraph 2.

With regard to draft guideline 3, it would not be right to adopt the language of article 194 of the United Nations Convention on the Law of the Sea, as the Special Rapporteur proposed. Under that article the meaning of the obligation "to prevent, reduce and control" pollution was immediately and clearly qualified by the words "consistent with this Convention". Draft guideline 3, by contrast, contained a much less specific reference to international law.

He did not support the Special Rapporteur's proposal to add a new paragraph 2 to draft guideline 10, which would be inconsistent with the understanding. The draft guidelines were not an appropriate place for dealing with questions of State responsibility. The proposed text would add nothing to the 2001 articles on State responsibility. Moreover, the inclusion of such a provision in the draft guidelines would raise the question of why something similar could not be found in many of the Commission's other final outputs, past and future.

Mr. Grossman Guiloff, speaking via video link, said that he wished to thank the Special Rapporteur for his continued leadership. In his oral introduction, the Special Rapporteur had set the right tone for the final stage of the Commission's work on the topic. Quoting President John F. Kennedy, he had said "We all breathe the same air." It was clear from many of the comments received from States and international organizations that the project was seen by the international community as a contribution to a legal regime developed with that conception in mind.

In his view, although the draft guidelines represented an important step in the right direction, they did not go far enough. As Chile had noted in the Sixth Committee, the draft guidelines required "more development and precision", as they did not introduce "innovative legal elements to solve the problems posed by the diversity of legal regimes that refer to the protection of the atmosphere … or to effectively face the challenges concerning the observance by States of international obligations regarding the protection of the atmosphere". In that connection, while he supported the draft guidelines proposed by the Special Rapporteur, he wished to make some additional proposals with a view to strengthening them further.

As he had mentioned in previous statements, the Commission needed to ensure that the interface between human rights and protection of the atmosphere played a more prominent role in its work on the topic. The relationship between those two bodies of international law had been mentioned in several of the most recent comments received from States.

Environmental human rights had both a general normative value and a clear practical impact. It was widely recognized that the atmosphere directly and indirectly affected a range of internationally recognized human rights, including the rights to life, self-determination, development, food, water and sanitation, health, and housing. The right to live in a healthy environment had been recognized as early as 1988 in the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) and had consistently been accepted by States in subsequent agreements. As had recently been noted by the United Nations Environment Assembly of the United Nations Environment Programme, that right had been "enshrined in international agreements for many decades" (UNEP/EA.4/2, para. 64). The Human Rights Committee had recognized that the International Covenant on Civil and Political Rights provided for an obligation to protect individuals from environmental degradation (CCPR/C/126/D/2751/2016). In addition, the jurisprudence of the Inter-American Court of Human Rights had established that the degradation of environmental conditions might violate a number of specific human rights, including the right to life, the right to health and the right to food. As the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment had noted, 124 States were parties to legally binding international treaties that explicitly included the right to a healthy environment (A/HRC/40/55, para. 11). That right was also enshrined in over 100 constitutions. The Commission itself had dealt with the impact of environmental degradation on human rights in the context of armed conflicts. Based on those considerations, he believed that human rights should be addressed more prominently, both in the draft guidelines and in the commentaries.

He wished to make a number of specific comments regarding the draft preamble and guidelines and the Special Rapporteur's recommended changes. With regard to the fourth paragraph of the preamble as adopted on first reading, he supported the Special Rapporteur's approach, which reflected the current view of the international community that the atmosphere was a "common concern of humankind". That language had been endorsed by States in their comments and was used in the Paris Agreement. It would be inconsistent to consider that climate change was a "common concern of humankind" but that protection of the atmosphere was not, since climate change, atmospheric pollution and atmospheric degradation were inextricably linked.

He supported the Special Rapporteur's proposed additional preambular paragraph on the interaction between the atmosphere and the oceans. However, that paragraph should be expanded to encompass the interaction between forests and the atmosphere, with a specific focus on the special relationship between forests and indigenous populations. There were

various international treaties that dealt with forests and the interrelationship between forests, the atmosphere and oceans.

Atmospheric pollution and atmospheric degradation had major implications for human rights and thus influenced the obligations of States under international law. In that connection, the rights of indigenous peoples were exceptionally relevant, as forests were the living habitat for many such peoples. Obligations towards indigenous peoples and members of traditional communities were explicitly mentioned in the framework principles on human rights and the environment. In the commentary, reference should be made to relevant decisions of international courts and tribunals, including the recent decision of the Inter-American Court of Human Rights in the *Indigenous communities of the Lhaka Honhat Association (Our Land) v. Argentina* case. He proposed that the paragraph should be revised to read: "*Noting* the close interaction between the atmosphere, oceans and forests." He also proposed that, in the commentary, reference should be made to the relationship between the atmosphere, forests and indigenous populations.

He agreed with the Special Rapporteur that the Commission should not dedicate a paragraph of the draft preamble or guidelines to the 2013 understanding. The aim of avoiding interference with ongoing political negotiations on environmental protection had already been served. That said, it would be necessary to refer to the understanding in a footnote, in order to avoid confusion.

He wished to propose three additional preambular paragraphs in order to take advantage of the opportunity available to the Commission to contribute to an effective legal regime on the protection of the atmosphere. The language that he was proposing was preliminary, and he invited other members of the Commission to consider his proposals and engage in productive and solution-oriented discussions.

The first additional preambular paragraph would read: "*Aware* of the urgent threat posed by atmospheric pollution and atmospheric degradation." Although that threat had long been recognized, it had yet to be stated explicitly in the draft preamble or guidelines. As a major factor in the stability of the global climate system, a functioning atmosphere was essential for the very existence of humanity on the planet. In the commentaries, the "essential importance of the atmosphere for sustaining life on Earth" and the fact that the atmosphere was one of the Earth's most important resources and was "essential for human, plant and animal survival" had already been recognized. It was also noted in the commentaries that the General Assembly had continued to emphasize "the urgency of addressing the effects of atmospheric degradation", which threatened "the survival of many societies" and would impact "all populations".

The second additional preambular paragraph would read: "*Recognizing* that steps taken to address atmospheric protection are environmentally, socially and economically most effective if they are based on the best available science and continually re-evaluated in the light of new scientific findings." The international community had recognized the role of science in various conventions and declarations, including various provisions of the Convention on Long-range Transboundary Air Pollution. Reference was made to the importance of science in draft guidelines 8 (2) and 12 (2). As noted in the commentaries, the Commission's view was that the legal definition of the term "atmosphere" should be "consistent with the approach of scientists" and that the focus on transboundary pollution and global atmospheric degradation caused by human activity reflected the current realities, which were "supported by the science".

The third additional preambular paragraph would read: "*Aware* of the transboundary impact of atmospheric pollution and atmospheric degradation on human rights." Such a paragraph would serve to capture the inextricable link between protection of the atmosphere and the promotion and protection of human rights and to recognize that, in some circumstances, human rights applied diagonally between one State and the nationals of another. The extraterritorial application of human rights had been recognized in the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights and was indispensable in the context of protection of the atmosphere, since harm that was done to the atmosphere in one State could have a direct impact on individuals in other States.

The paragraph that he was proposing would bridge the horizontal application of international environmental law, between different States, and its vertical application, between individuals and States. The extraterritorial application of human rights was also supported by jurisprudence. For example, in its 2017 advisory opinion on environment and human rights, the Inter-American Court of Human Rights had determined that the obligations of States under the American Convention on Human Rights extended to harms caused to individuals outside their borders. The finding of the European Court of Human Rights in the *Ilaşcu and others v. Moldova and Russia* case was also relevant in that regard. It would therefore be prudent to acknowledge that dimension of international law in the context of protection of the atmosphere.

Turning to the draft guidelines, he said that the phrase "extending beyond the State of origin" should be deleted from draft guideline 1 (b). As polluting substances and energy present in the atmosphere were not confined by national boundaries, their deleterious effects would eventually extend beyond the State of origin.

He supported the Special Rapporteur's proposal that draft guideline 2 (2) should be deleted. As many States had noted, there was no proof that the understanding reflected in that paragraph represented what the international community would have wanted. However, it was important for readers of the draft guidelines to know that, because of the restrictions imposed by the understanding, the draft guidelines were incomplete and more work needed to be done to arrive at an international legal framework for the effective protection of the atmosphere. Therefore, a footnote should be added to paragraph 1 stating that the draft guidelines had been drafted on the basis of an understanding imposed on the Special Rapporteur by the Commission in 2013 and that, as a result, they did not deal with, but were without prejudice to, questions concerning the polluter pays principle, the precautionary principle, common but differentiated responsibilities, the liability of States and their nationals, and the transfer of funds and technology to developing countries, including intellectual property rights. The Special Rapporteur should clearly state in the commentary that the Commission's silence on those principles in no way implied that they were legally irrelevant.

He fully supported the Special Rapporteur's characterization of the obligation to protect the atmosphere as an *erga omnes* one in draft guideline 3. The reference to the Paris Agreement and its articulation of that *erga omnes* obligation was important and deserved its place in the commentary. The *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)* cases should have a prominent role in the commentary, instead of merely being mentioned in a footnote, and the Rio Declaration on Environment and Development and the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration) should be further highlighted. While the due diligence standard mentioned in the draft guideline was generally supported by international case law and treaty practice, more stringent standards could be developed in the future in specific areas of international law, such as human rights and environmental law. The due diligence standard should therefore be seen as a floor rather than a ceiling, and the commentary should state that the draft guideline's reference to due diligence was without prejudice to stricter standards of protection.

He supported the Special Rapporteur's approach to draft guideline 4 but had two suggestions. First, the words "are likely to" should be replaced with the word "may" to better reflect the current obligation under customary international law to conduct environmental impact assessments, since "may" more accurately captured the spirit of due diligence, and had been used in existing case law, as noted in the commentary. Although the word "likely" had been used in the Rio Declaration and in the Convention on Environmental Impact Assessment in a Transboundary Context, it did not reflect the urgency of the issue, of which countries were now more aware. "May" implied a minimum level of knowledge of the potential effects of activities on the atmosphere and thus did not mean "any", which would be too broad.

Second, a reference to procedural rights, such as those enshrined in principle 10 of the Rio Declaration, should be included in the draft guideline. It was his understanding that, under international law, the substantive obligation to prevent transboundary harm was to be considered together with the procedural rights of the public. He therefore disagreed with the stance taken in the commentary that it was unimportant to mention procedural rights in the

draft guidelines and suggested that a new sentence should be added to draft guideline 4: “The rights of every person of access to information, participation in decision-making, and effective remedies in environmental matters should be respected.” At a minimum, the draft guideline should have a “without prejudice” provision in that respect.

He supported the reference to the obligation to utilize the atmosphere sustainably in draft guideline 5, as that issue had an impact on various human rights. Since an environment capable of sustaining life was a prerequisite for the enjoyment of rights related to social and economic development, the commentary should reflect the importance of the human dimension of sustainable development.

The second part of draft guideline 6 was especially valuable from a human rights perspective, but stronger language was needed in order to sufficiently reflect the international obligation to protect the interests of future generations. The words “taking into account” should be replaced with “safeguarding” or, alternatively, “with due regard to” or “taking fully into account”. A duty to pay “due regard” to certain interests could be found in different legal regimes and various international instruments dealing with natural resources. However, he preferred “safeguarding”, a word that had already been used by the international community in relation to future generations. In addition, the words “benefits and rights” should be added immediately after “interests”. The attempt made in the commentary to explain why “interests” had been chosen over “benefits” did not address why “benefits” had been excluded. The two notions were neither contradictory nor mutually exclusive. The word “benefits” was regularly used in international treaties. Furthermore, there was precedent for referring to the “rights” of future generations, and such rights had been recognized by domestic and regional courts. The fair and equitable sharing of benefits should be further explored in the commentary to draft guideline 6, in line with, *inter alia*, principle 15 of the Stockholm Declaration and article 1 of the Convention on Biological Diversity.

With respect to draft guideline 7, since large-scale modification of the atmosphere could considerably alter the environment, there was a need to prevent any widespread, long-lasting or severe effects of such modification. The phrase “should be conducted with prudence and caution” should therefore be replaced with “should only be conducted with the highest degree of prudence and caution”. Such wording was in line with the precautionary principle and would sufficiently protect the atmosphere from imprudent modifications that could potentially have adverse effects on everyone on the planet.

Draft guideline 8 would better reflect the degree of State cooperation currently expected if it incorporated the language used in the United Nations Framework Convention on Climate Change: “the widest possible cooperation by all countries and their participation in an effective and appropriate international response”. In closing, he wished to again express his deepest appreciation for the Special Rapporteur’s work on the topic.

Mr. Jalloh said that the Commission’s commitment to its mandate had been demonstrated by the sacrifices that Commission members had made in order to participate in the current session, whether in person or remotely. Although he would have preferred for the Commission to be finalizing draft articles for a framework convention on the protection of the atmosphere, as proposed in 2011 in the syllabus for the topic, the fact that it would be offering some legal guidance to States in the form of guidelines was of great significance. The very positive reception of the draft guidelines among States and observers, nearly all of whom had underscored the relevance of the guidelines and the importance of protecting the atmosphere, had been encouraging. However, some States were concerned that, without critical amendments, the draft guidelines risked being only moderately useful. He agreed with those States that had found the Commission’s work to be too narrowly circumscribed by the understanding reached in 2013. Some States had mentioned the omission of such key principles as common but differentiated responsibilities, the precautionary principle and the polluter pays principle. The understanding – which was a type of self-inflicted wound – imposed restrictions on the Commission at a time when it needed flexibility in order to address one of the more pressing concerns of the international community.

He agreed with the Special Rapporteur that the limitations imposed by the 2013 understanding were not binding on States. Proposals made by States that could be construed as being incompatible with the understanding should therefore be taken on board. He

supported the Special Rapporteur's proposal, made in paragraph 19 of the report, to delete parts of the draft preamble and draft guidelines that had been copied and pasted from the now superseded 2013 understanding. He also agreed with Mr. Grossman Guiloff that the draft guidelines or commentary should nonetheless contain a reference to the understanding so that future readers would be aware of why key principles of international environmental law were not fully reflected in them.

With regard to the draft preamble, he wished to recall that, in 2018, members of the Drafting Committee had suggested that the Special Rapporteur should rework the entire preamble at the second-reading stage. That, in his view, was what the Special Rapporteur had done. He therefore fully endorsed the suggestions made in paragraphs 29 to 33 of the report. In particular, the legal notion of "common concern" was well established in international environmental law. The deviation from that standard in paragraph (9) of the commentary to the draft preamble should not be interpreted as meaning that the Commission was casting doubt on the established notion of "common concern of humankind". He supported the Nordic countries' suggestion that the Commission should elaborate on the precise legal implications of "common concern" in the context of atmospheric protection. He shared the concerns expressed by Antigua and Barbuda on the sixth preambular paragraph and suggested that the paragraph should be reworded to indicate that account should be taken of the specific needs and special circumstances of developing countries, especially those that were particularly vulnerable to the adverse effects of climate change. Such rewording would bring the paragraph into line with the United Nations Framework Convention on Climate Change, the Paris Agreement and the Stockholm Convention on Persistent Organic Pollutants.

Turning to the draft guidelines, he said that he supported the Special Rapporteur's recommendation that a reference to "energy" should be included in the definition of "atmospheric pollution" in draft guideline 1 (b). He fully supported the views expressed by Sri Lanka and the Special Rapporteur on draft guideline 2 (2) and (3) and agreed that the use of a double negative in those paragraphs was awkward and should be avoided. In the light of the concern expressed by Belgium that exclusion of the substances listed in paragraph 3 would constitute a very significant restriction, he supported the deletion of that paragraph. Those substances had initially been excluded on the grounds that they were the subject of negotiations among States, but key environmental negotiations, such as the talks leading to the Paris Agreement, had been concluded as much as five years earlier.

He agreed that the obligation contained in draft guideline 3 was one of due diligence. It was an obligation of conduct, not of result. Such an obligation could be found in many treaties and international cases dealing with transboundary atmospheric pollution; by including it in draft guideline 3, the Commission would be confirming that it also applied in the context of significant atmospheric degradation. In order for the obligation to be meaningful, it had to be of an *erga omnes* character. In countries such as Cuba and Kenya, the duty of care to protect the environment, for the sake of current and future generations, was recognized in the constitution. On the other hand, noting the doubts expressed by China, he took the view that the Commission was on safe ground with regard to draft guideline 3. While that draft guideline might not represent a codification of international law, it promoted the progressive development thereof, which was squarely within the Commission's mandate. He concurred with the proposals set out in paragraphs 50 to 52 of the report.

His position on draft guideline 4 diverged from that of the Special Rapporteur and was partly in line with that of Antigua and Barbuda. Under current international law, States were obligated to conduct environmental impact assessments only when environmental impacts were significant. However, since States were urging the Commission to strengthen the guidelines, he suggested that the obligation should be triggered *prima facie* when emissions causing "atmospheric degradation" were produced and that the requirement of "adverse effects" should be removed, as it was already addressed in the definition of "atmospheric degradation" in draft guideline 1. He disagreed with the Special Rapporteur on the relevance of procedural rights in relation to draft guideline 4. As States were likely to have differing views as to when carrying out an environmental impact assessment in one State would help avoid significant atmospheric pollution leading to atmospheric degradation for all States, it was important to provide additional procedural clarity.

He supported the Special Rapporteur's position on draft guideline 5 but asked the Commission to seriously consider the wording proposed by Belarus for paragraph 2. He also strongly supported the view that the special circumstances of developing countries, including small island developing States, should be reflected in both the draft guideline and the commentary, as that could be done without undermining the essence of the guideline. Given the concerns expressed by some States, he called on the Special Rapporteur to explain in the commentary that, in paragraph 2, the Commission was not casting doubt on the status of the principle of sustainable development; rather, it considered sustainable development to be applicable also to the protection of the atmosphere.

He wondered whether the Special Rapporteur could clarify the indication in the report that wording expressing an obligation might not be appropriate in draft guideline 6. Draft guideline 3 set out an obligation, and draft guideline 6 should likewise be formulated as an obligation. He found great merit in the suggestion made by Estonia that the phrase "taking into account the interests of present and future generations" should be added to the end of the guideline. That would not only be in line with the seventh preambular paragraph but also reflect the determination made by the International Court of Justice, in its 1996 advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, that "the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn". Intergenerational equity was a matter of increasing concern for States.

With respect to draft guideline 7, he supported the Special Rapporteur's proposal to explicitly mention environmental impact assessment. He agreed that the phrase "prudence and caution", which some States had found ambiguous, should be replaced with a reference to the precautionary principle, since many States and other authorities now considered the precautionary principle to be a customary rule of international environmental law. Alternatively, he would reluctantly consider the use of the phrase "precautionary approach", which the Commission had used in article 12 of its draft articles on the law of transboundary aquifers. He supported the proposed addition of the words "and technical" after "scientific" in draft guideline 8 (2), as that would slightly but appropriately broaden the scope of the guideline.

He endorsed the Special Rapporteur's observations on draft guideline 9, but also supported the position of Antigua and Barbuda. Belgium had made an interesting suggestion: the guideline should include a reference to vulnerable people not just in developing countries but also in developed ones. The disproportionate impact on vulnerable people, even in developed countries, had been amply demonstrated over the preceding year in a different context: that of the coronavirus disease (COVID-19) pandemic.

Although he doubted that paragraph 1 added much value to draft guideline 10, he had no doubt that paragraph 2 did so. He was in favour of recognizing the principle of common but differentiated responsibilities in paragraph 2. He respectfully disagreed with the Special Rapporteur's stance on State responsibility, as it remained unclear to him which aspects of the draft guidelines constituted binding obligations under international law and which were recommendations.

He agreed with the Special Rapporteur's approach to draft guideline 11 and agreed that the comments made by some States could be accommodated in the commentary. He also supported the Special Rapporteur's overall approach to draft guideline 12. While there had been disagreement among States as to whether paragraph 1 was necessary, in his view, the language of the paragraph served to reaffirm a foundational principle of the post-war legal order in the context of atmospheric protection. He suggested that the commentary should refer to Article 2, paragraph 3, in addition to Article 33, of the Charter of the United Nations, as the former set out the general principle and the latter set out the specific one that would be triggered only by a finding of a climate-related threat to international peace and security. Given reports by scientists that climate-related issues were likely to arise more frequently, leading to more such threats, it was prudent to include that reference. Lastly, while he basically supported the Special Rapporteur's proposal regarding the recommendation to the General Assembly, he would prefer to align the wording with language previously adopted by the Assembly, *inter alia* by adding the phrase "To encourage all States that have not yet

done so to sign, ratify or accede and implement key multilateral environmental agreements, in particular those that may enhance the protection of the atmosphere”.

The meeting rose at 5.10 p.m.