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International Law Commission

Seventy-second session (first part)

Provisional summary record of the 3510th meeting

Held at the Palais des Nations, Geneva, on Wednesday, 28 April 2021, at 11 a.m.

Contents

Present:

Chair:	Mr. Hmoud
Members:	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Gómez-Robledo
	Mr. Hassouna
	Mr. Jalloh
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Rajput
	Mr. Reinisch
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Sir Michael Wood
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 11 a.m.

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

Mr. Park, speaking via video link, said that he wished to thank the Special Rapporteur for introducing the sixth report on protection of the atmosphere (A/CN.4/736). He noted that the Special Rapporteur's recommended revisions of the draft guidelines were based on the comments and observations received from Governments and international organizations (A/CN.4/735), but written comments had been received from only 13 States as at 20 January 2020; that fact called for reflection on the part of the Commission on the reasons for the lack of a wider response.

He drew attention to the Special Rapporteur's proposal that references to the understanding that had been reached in 2013 should be removed from the draft guidelines, including the eighth preambular paragraph and draft guideline 2 (2) and (3), on the grounds that, since the project had been conducted in full compliance with the restrictions mentioned in the understanding, there was no need to include such references. That interpretation should be considered in the light of the information given in paragraph 19 of the report that some States and international organizations had proposed the inclusion in the draft guidelines of terms explicitly prohibited in the understanding, such as "precautionary principle", "common but differentiated responsibilities" and "dual-impact substances". He was of the view that explicit mention of the understanding would allow States to apprehend the scope of the project and would provide a rationale for the limited scope of the guidelines, although it would make no difference for those States that had expressed concern about the narrow focus of the project. Other States had stressed in their comments that the Commission should follow the understanding. Given the divergence of views, an explicit mention would be preferable to an implicit restriction in the content of the guidelines. However, if the majority of members of the Commission agreed with the Special Rapporteur that the understanding should not be mentioned in the draft guidelines, he would be in favour of including, at least, a reference to it at the beginning of the commentary, as a compromise solution.

In respect of draft guideline 9, he considered that, while the nature of the topic and the applicable laws were generally in alignment with those related to the response to climate change, not all the relevant rules concerning global climate change were *ipso facto* transferable to the topic at hand. As noted in paragraph 74 of the report, China had argued that there was not sufficient justification to transfer the "concept of countries in special situations" from the context of climate change to that of protection of the atmosphere.

Other factors, such as the natural leaking of methane gas in Siberia and the Arctic region, also merited attention. With the accelerated warming of that region in recent years, increasing amounts of methane were leaking from the estimated one trillion tons of organic carbon stored under the vast permafrost over Siberia and the seabed of the Arctic Ocean. The greenhouse effect of methane was between 23 and 100 times that of carbon dioxide and was thus further accelerating global warming. If current trends continued, greenhouse gases from the permafrost could become more important than the anthropogenic emissions on which the topic was focused, but the draft guidelines did not take them into account, as the issue *a priori* concerned climate change and was thus beyond their scope.

A further point of general concern was that the draft guidelines contained a mixture of content that was based on existing international treaties or customary international law and other content that did not come from either of those sources. The wording in paragraph 101 of the report indicating that the proposed draft guidelines served to reaffirm and to clarify the relevant rules of international law was thus not quite accurate. In particular, it should be noted that, when a draft guideline contained characteristics of *lex ferenda*, the use of imperative or prescriptive expressions should be avoided.

Turning to the draft preamble to the draft guidelines, he said that he did not oppose the addition of the words "a limited natural resource", as they came from the commentary to the preamble. However, regarding the proposal to move the second paragraph of the preamble to draft guideline 1 (a), he did not entirely agree with the resulting change to the working definition of "atmosphere": there was no need for the definition to include the functional aspect of the atmosphere in the transport and dispersion of polluting and degrading

substances. As noted in the report, the inclusion of the functional aspect in the definition of "atmosphere" could suggest that such transport and dispersion was something desirable, although the Special Rapporteur found that argument unconvincing; another possible interpretation could be that the atmosphere transported and spread pollutants at all times. Furthermore, as the occurrence of the transport and dispersion of polluting and degrading substances within the atmosphere was the reason for and the fundamental premise of the draft guidelines, the preamble would be an appropriate place in which to state that fact. If, however, other members agreed to the proposed change, he would propose that the word "may" should be added, so that the end of the paragraph would read "within which the transport and dispersion of the polluting and degrading substances may occur".

In respect of the Special Rapporteur's recommendation that the phrase "pressing concern of the international community as a whole" in the fourth preambular paragraph should be replaced with "common concern of humankind", he noted that, while many States and Commission members preferred the latter expression, he agreed with Sir Michael Wood that there was a lack of clarity as to its precise legal implications and possible unintended legal consequences.

Concerning the Special Rapporteur's recommendation in respect of draft guideline 10, to the effect that a new paragraph 2 should be inserted, which would read "Failure to implement the obligations amounting to breach thereof entails the responsibility of States under international law", he continued to support the Commission's decision not to include a specific draft guideline on State responsibility. He had emphasized in 2018 that there was not yet sufficient clarity to allow the Commission to express an opinion on whether the protection of the atmosphere concerned liability or responsibility in international law. It should therefore be asked whether the issue of responsibility in connection with protection of the atmosphere was ripe for discussion. Moreover, as noted in paragraph 81 of the report, only two countries were insisting on the inclusion of a reference to State responsibility; that would seem to indicate that most States were satisfied with the current draft guidelines, in which it was not addressed. Its inclusion might even create further problems or provoke opposition. Furthermore, there was no clear indication whether the obligations mentioned in the new paragraph 2 of draft guideline 10 were intended to be the same as those referred to in paragraph 1. If responsibility arose from obligations mentioned in the draft guideline, that would obscure the applicability of the rules *per se*. He therefore believed it would not be appropriate to include the proposed new paragraph 2 or any explicit reference to State responsibility in the draft guideline.

He had no specific comments on suggestions such as the inclusion of "and" in draft guideline 3, the addition of a reference to environmental impact assessment in draft guideline 7 or the addition of the words "and technical" to draft guideline 8 (2). He was, however, concerned about the Special Rapporteur's suggestion that the commentary to draft guideline 7 should explain that the expression "prudence and caution" came from the discussion of "precautionary principle" and "precautionary approach", as that might alter the Commission's decision to use the former expression. In conclusion, he commended the Special Rapporteur's outstanding work and looked forward to completing the second reading of the text.

Mr. Murphy, in a pre-recorded video statement, said that, while the sixth report provided a useful survey of the statements made in the Sixth Committee in 2018, during the seventy-third session of the General Assembly, its content was quite selective and lacking in balance when compared with the views that had been expressed by Member States over the lifetime of the project. If proposals that had been rejected on first reading were to be put forward again, it would also be necessary to return to the statements made by Governments prior to the first reading that had been the basis for the Commission's rejection of the proposals at that stage.

For example, the Special Rapporteur was seeking to reintroduce the concept "common concern of humankind" into the preamble, on the basis of views expressed by some States in the Sixth Committee in 2018. That proposal did not, however, take account of the statements made in the same forum in 2014, criticizing the Special Rapporteur's original proposal to use that concept. Among the views expressed were that the proposal to rank protection of the atmosphere as one of the common concerns of humankind was not supported by the state of

positive law and that the concept was controversial, had no basis in State practice or case law and lacked clarity as to its legal content, interpretations and implications. Those views had been behind the Commission's choice not to use the concept when it had adopted the relevant preambular clause in August 2015. At the subsequent session of the Sixth Committee in 2015, during the seventieth session of the General Assembly, many Governments had said that they supported the Commission's use of "pressing concern of the international community as a whole" rather than "common concern of humankind", considering it more relevant, objective and clear. However, none of those views were reflected in the Special Rapporteur's sixth report.

In addition to being mindful of what Governments had said during the course of the project, the Commission should remember that the approach it typically adopted at the second-reading stage was to maintain decisions reached on first reading unless there was a strong and compelling reason, driven by the views of Governments, to make a change. It appeared that, in the sixth report, an attempt was being made to advance ideas that the Special Rapporteur had originally proposed, but that the Commission had not accepted, on first reading and to resurrect those ideas through a very selective use of limited government reactions.

Concerning the proposed changes to the preamble, the Commission could obviate the need to address them simply by omitting the preamble; he saw no merit in its inclusion. If the preamble was nevertheless retained, the proposed changes did not seem to improve the text or to respond to any wishes expressed by Governments. The Special Rapporteur's assertion that the reason for not using the phrase "common concern of humankind" in the text adopted on first reading was that it had been abandoned after 1992 or that the Paris Agreement had not yet been adopted was incorrect. The Commission had rejected it, as had many Governments, because its meaning in the context of the project under discussion was entirely unclear. Given that the Special Rapporteur had not indicated, in either the sixth report or his introduction to it, what the concept meant, it would be helpful to hear his interpretation of it and whether he considered it to have a different meaning from "pressing concern of the international community as a whole". If it had any normative content, placing it in the preamble had the potential to significantly influence the meaning of the entire project, possibly involving rights and obligations. Academics cited by the Special Rapporteur had described the concept as creating rights for individuals and future generations, as implying that industrialized countries accepted a duty to provide financial assistance to poorer nations for their implementation of environmental policies, and as establishing the right of developing countries to request such assistance.

The argument that the phrase "common concern of humankind" appeared in some treaties was uniquely unconvincing, as no instrument of any kind in international law described the degradation of the atmosphere as a common concern of humankind. Even the Paris Agreement did not use the term "common concern of humankind" to describe degradation of the atmosphere, but rather to describe climate change, which was a particular consequence that flowed from certain human activities. The use of the term in the Paris Agreement thus had no bearing on its use in the project before the Commission, as the two contexts were not comparable.

Another proposal made in respect of the preamble was that the final preambular paragraph should be deleted. However, that paragraph expressed a view that had been a fundamental premise on which the project had proceeded; its purpose was to make clear to States that the Commission's guidelines were not intended, and should not be used, to interfere with political negotiations, to fill gaps in treaties or to impose new rules on existing treaties. He believed that it was crucial for a statement of that kind to be retained and did not understand the argument that such guidance for Governments was no longer pertinent.

In draft guideline 1 (a), the Special Rapporteur was proposing the addition of a clause that had been proposed in his second report (A/CN.4/681) but had been rejected by the Commission on first reading. Since no Government had requested the reinstatement of that clause, he saw no reason for its inclusion. In draft guideline 1 (b), the Special Rapporteur proposed that the words "or energy" should be added after the word "substances". Since that addition had likewise been proposed in the second report and rejected by the Commission on

first reading, and only a few Governments had requested that a reference to energy should be included, he again saw no compelling basis for making the change.

If a change was to be made in draft guideline 1 (b), it was more important, in his view, to add the word "significant" before the word "deleterious", as that addition would reflect the manner in which the relevant treaties and customary international law operated. The Special Rapporteur argued that the definitions set out in the Convention on Long-range Transboundary Air Pollution did not include the word "significant", yet key operative provisions of that Convention did include it. The draft guidelines, however, did not; for example, article 5 of the Convention, on consultations, and article 8 (b), on the exchange of information, referred to a "significant" contribution and "significant" changes to air pollution, respectively, whereas draft guideline 8 (1) established an obligation to cooperate to protect the atmosphere from any atmospheric pollution, not just significant atmospheric pollution. In the United Nations Convention on the Law of the Sea, the word "significant" was also used in references to pollution, including, for example, in articles 196, 206 and 220.

The Special Rapporteur was proposing that two entire paragraphs should be deleted from draft guideline 2, but those paragraphs provided important guidance for Governments, which was precisely the purpose of guidelines. The Special Rapporteur argued that such guidance was no longer needed because the project was drawing to a close. In fact, the project was not nearing completion, not least because the Special Rapporteur had indicated in his opening statement that he intended to propose, for inclusion in the commentary, language on matters that the Commission had previously agreed to exclude. Moreover, and perhaps more importantly, the Special Rapporteur's argument was misplaced; the objective of the draft guidelines was not to guide the Commission, but to guide Governments and other actors.

He did not think the Special Rapporteur's proposal that the "or" in draft guideline 3 should be replaced with "and", so that the phrase would read "to prevent, reduce and control", was a good idea. The substantive reasoning for that view was that the obligation to protect the atmosphere could not be expressed in a way that required States, in all circumstances, to "prevent" atmospheric harm. The formulation used in article 194 (1) of the United Nations Convention on the Law of the Sea appeared in the context of a very detailed set of provisions on what was meant by prevention of pollution of the marine environment, but the draft guidelines did not contain such detail in respect of atmospheric degradation. Furthermore, there were many other treaties pertaining to atmospheric degradation that used "or" rather than "and" precisely in order to avoid the implication that all such degradation must be prevented.

Concerning draft guideline 10, in which the Special Rapporteur proposed the addition of a new paragraph 2 on the responsibility of States, he wished to note that, once again, the proposed addition was essentially a previous proposal, put forward in the Special Rapporteur's fifth report (A/CN.4/711), that had been rejected by the Commission on first reading. Two States had since indicated an interest in including such a provision, and the Special Rapporteur was taking their interest as a sufficient basis for reintroducing his original idea. However, the paragraph should not be adopted, for the same reasons that had led the Commission to reject it previously and because there was no clamour among States to resurrect the idea.

In conclusion, although he had doubts about, and was in some cases opposed to, certain changes proposed in the sixth report, he was content for the entire set of draft guidelines and the associated proposals to be referred to the Drafting Committee for its consideration, having regard to the Commission's current debate.

Mr. Petrič said that he wished to thank the Special Rapporteur for his excellent report and, more generally, for the perseverance he had shown throughout his work on the topic. It was important to recall that, although the 2013 understanding had greatly constrained the Special Rapporteur's work, it had also enabled the Commission to begin consideration of the topic. For that reason, removing all mention of the understanding from the draft guidelines would be inappropriate. Although the draft guidelines did not constitute a legal instrument, they would influence the practice of States and international organizations and could represent an important step towards future regulation of protection of the atmosphere. Until then, however, the draft guidelines should be treated as just that – guidelines. The

Commission should avoid any statements that would suggest the establishment of legal rights and obligations for States, as that would extend beyond the scope of the Commission's mandate for the current topic and would be counterproductive for the guidelines' approval by States. The draft guidelines would have a useful impact on State practice only if they reflected reality and took States' views into account. He would therefore prefer to retain a reference to the 2013 understanding in the draft guidelines.

At the second-reading stage, the Commission should exercise caution when considering any changes to the compromises reached previously. Indeed, the Commission's task was now simply to respond to the comments of States: if a particular issue had elicited reservations on the part of States, the Commission should consider those reservations seriously; on the other hand, if an issue had not given rise to any objections, the Commission should avoid introducing any changes on its own initiative. In a legal instrument, commentaries served to explain legal provisions; in draft guidelines, commentaries played a different role and could instead raise additional issues and point to possible future developments. In a treaty, the preamble provided a framework for the interpretation of legal provisions; in the draft guidelines, which in themselves were not the basis for a legal instrument, the preamble could and should be more programmatic than explanatory.

It was generally agreed that the protection of the atmosphere was important to everyone. Thus, international cooperation was all the more crucial, as individual States could have only limited impact on the atmosphere. While he would not object strongly to the addition, in draft guideline 8, of the words "and technical" after the word "scientific", he urged the Commission to exercise caution in making such changes, which might spark controversy. Indeed, "technical knowledge" had a specific meaning and included a commercial aspect, which might raise issues of industrial property, among others.

There was no doubt that the protection of the atmosphere was and should be a "common concern of humankind". Nonetheless, at the current stage, it would be unwise to reintroduce such a phrase, which might be interpreted as giving rise to rights and obligations for States. The Commission should bear in mind that it was not drafting a legal instrument. From the outset, States had indicated what they wished the Commission to do, and the Commission should remain within those bounds, in the interest of ensuring that the guidelines were fully accepted, supported and ultimately used and cited in State practice. It had been mentioned already that the protection of the atmosphere was relevant to all aspects of life; it was also probably relevant to most, if not all, spheres of international law. However, it might be worthwhile to highlight its particular interrelationship with the status of airspace under international law and the basic principle of State sovereignty in that context, given the direct impact of protection of the atmosphere on those issues and *vice versa*. The commentaries seemed to be the most appropriate place in which to do so.

The Commission should be cautious in considering the issue of procedural rights, which were essential in any legal instrument, but not necessarily in draft guidelines. He had similar reservations about how far the Commission should go in providing guidance on dispute settlement: introducing a reference to Article 33 of the Charter of the United Nations seemed unnecessary in the draft guidelines, which did not constitute a legal instrument and were in any event not likely to provoke disputes that would endanger international peace. As disputes relating to the protection of the atmosphere would necessarily involve scientific and technical issues, a mere reference to Article 33 of the Charter would, in any case, be insufficient. Once again, the commentaries seemed to be the appropriate place for such considerations.

Mr. Saboia, speaking via video link, said that he wished to thank the Special Rapporteur for the sixth report, which provided the Commission with the necessary elements to successfully conclude its second reading of the draft guidelines, and for the close attention paid to the many comments and suggestions submitted by States and international organizations, which had shown marked interest in the text adopted on first reading.

He shared the Special Rapporteur's view that it was no longer appropriate or necessary to replicate the terms of the 2013 understanding in the text of the draft preamble or draft guidelines. Developments in the international consideration of environmental agreements had superseded the concerns reflected in that understanding, as had been recognized in the

comments of several States which had argued in favour of using expressions such as "common concern of humankind", "precautionary principle" and "common but differentiated responsibilities". The revised draft preamble reproduced in the annex to the report reflected those comments, and the Special Rapporteur's proposals added relevance and coherence to the text as a whole.

The statements made in the Commission earlier that week had raised a number of issues that merited consideration; Mr. Grossman Guiloff, for example, had shared extensive observations about the draft preamble at the opening meeting of the session (A/CN.4/SR.3508). He supported Mr. Grossman Guiloff's comments and proposals in respect of the fourth preambular paragraph in particular, especially the proposal that the paragraph should cover the interaction of the atmosphere with forests as well as its interaction with oceans. He also agreed that emphasis should be placed on the human rights dimension of that relationship, especially bearing in mind that the cultural and existential survival of indigenous peoples and traditional inhabitants of forests was dependent on the integrity of their natural environment.

With regard to draft guideline 1, he was in favour of adding the words "or energy", as proposed in paragraph 39 of the report. As explained in that paragraph, and as several States had pointed out in their observations, "energy" had a specific scientific meaning, distinct from that of "substances", and was used in international instruments such as the United Nations Convention on the Law of the Sea and the Convention on Long-range Transboundary Air Pollution. Draft guideline 3 (Obligation to protect the atmosphere) had a central role in the normative structure of the draft guidelines, as several members had already pointed out; Mr. Grossman Guiloff, among others, had underlined the *erga omnes* character of that obligation, which was rightly emphasized in the commentary. With regard to draft guideline 4, Mr. Grossman Guiloff had reflected on the use of the phrase "likely to cause significant adverse impact" and the possible replacement of "likely to" with "may", and had proposed an additional sentence referring to the procedural rights of access to information, participation in decision-making and effective remedies. Although the new text proposed by Mr. Grossman Guiloff was in his view too broad, the idea merited consideration nonetheless. Draft guideline 6 was acceptable in its current form, but Mr. Grossman Guiloff had made several proposals aimed at strengthening the language regarding the protection of the interests of future generations that might, in his view, improve the text.

The issue addressed in draft guideline 7 (Intentional large-scale modification of the atmosphere) remained controversial, as was evidenced by the extensive conditions, referred to in paragraph 65 of the Special Rapporteur's report, to which the European Union proposed to subject any such experiment. Although he supported the Special Rapporteur's suggestion that a reference to the obligation to conduct an environmental impact assessment should be added, he doubted that the inclusion of such a reference would in itself be considered an adequate response to the concerns raised; the European Union had proposed an alternative text that referred to the precautionary principle as one of the conditions that should prevail in the consideration of such activities.

He had reservations regarding draft guidelines 10, 11 and 12, in view of the legal status of the guidelines. Lastly, he supported the Special Rapporteur's proposed recommendation to the General Assembly and was in favour of referring the draft preamble and draft guidelines to the Drafting Committee.

The meeting rose at 12.25 p.m.