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International Law Commission

Seventy-second session (second part)

Provisional summary record of the 3554th meeting

Held at the Palais des Nations, Geneva, on Thursday, 29 July 2021, at 3 p.m.

Contents

Present:

Chair:	Mr. Hmoud
Members:	Mr. Argüello Gómez
	Mr. Cissé
	Ms. Escobar Hernández
	Mr. Forteau
	Ms. Galvão Teles
	Mr. Gómez-Robledo
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Petrič
	Mr. Rajput
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Valencia-Ospina
	Mr. Vázquez-Bermúdez
	Sir Michael Wood

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 3.05 p.m.

Draft report of the Commission on the work of its seventy-second session (*continued*)

Chapter IV. Protection of the atmosphere (*continued*) (A/CN.4/L.944 and A/CN.4/L.944/Add.1)

The Chair invited the Commission to resume its consideration of chapter IV (E) (2) of the draft report, as contained in document A/CN.4/L.944/Add.1, beginning with paragraph (10) of the commentary to draft guideline 8 of the draft guidelines on the protection of the atmosphere, which had been left in abeyance at the previous meeting.

Commentary to draft guideline 8 (International cooperation) (continued)

Paragraph (10) (continued)

Mr. Murase (Special Rapporteur) said that, in the first sentence, neither the word "may" nor the word "also" should appear before the word "includes"; the words "and as appropriate," should be inserted after "*inter alia*"; and the definite article before "exchange" should be deleted. The first sentence would therefore read: "In this context, the obligation to cooperate includes, *inter alia* and as appropriate, exchange of information."

Paragraph (10), as amended, was adopted.

Commentary to draft guideline 9 (Interrelationship among relevant rules) (continued)

Paragraph (9)

Mr. Forteau said that, in the fourth sentence, which referred to the United Nations Convention on the Law of the Sea, the word "airborne" should be deleted from the phrase "airborne sources of marine pollution", both because the word was not used in the Convention and because it was too restrictive in the context at hand.

Paragraph (9), as amended, was adopted.

Paragraph (10)

Mr. Murase (Special Rapporteur) said that, in the second sentence, the words "acknowledged in the practice" should be amended to read "acknowledged in practice".

Paragraph (10), as amended, was adopted.

Paragraph (11)

Mr. Murase (Special Rapporteur) said that it would be preferable for paragraph (11) to include a direct quotation from the Paris Agreement instead of providing his interpretation of the Agreement. The second sentence and the remainder of the paragraph should be amended to read:

"The eleventh preambular paragraph of the Paris Agreement provides that:

[C]limate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity."

Mr. Forteau said that, in the first sentence, the words "'the right to life'" should be preceded by the words "in particular" [*notamment*] to take account of the existence of other rights such as the right to health, which was mentioned in the eleventh preambular paragraph of the Paris Agreement.

Mr. Grossman Guiloff said that there seemed to be a contradiction between the first sentence of the paragraph, which stated that there were three relevant human rights, and the quotation from the Paris Agreement, which set out other rights and contained an implicit

reference to the prohibition of discrimination. Such rights could not be excluded from the scope of "relevant human rights". Either the word "are" should be replaced with "include" in the first sentence or the first sentence and the portion of the second sentence preceding the quotation should be combined and amended to read: "In this regard, relevant human rights include, as stated in the eleventh preambular paragraph of the Paris Agreement, the following:".

Mr. Murase (Special Rapporteur) said that he supported Mr. Grossman Guiloff's proposal to replace the word "are" with the word "include" in the first sentence. However, he was reluctant to delete the references to the three rights in the first sentence because each was accompanied by a footnote that it was important to retain in the paragraph.

The Chair said that the beginning of the first sentence, incorporating both the Special Rapporteur's solution and Mr. Forteau's proposal, would read "In this regard, relevant human rights include, in particular, 'the right to life'".

Mr. Grossman Guiloff said that he could support the Special Rapporteur's solution. He could not, however, support the inclusion of the phrase "in particular" because other issues, such as the prohibition of discrimination and the protection of vulnerable groups, also deserved to have such emphasis placed on them.

Sir Michael Wood, supported by **Mr. Jalloh**, said that the text of the paragraph preceding the quotation from the Paris Agreement should be amended to read: "In this regard, relevant human rights include 'the right to life', 'the right to private and family life' and 'the right to property', as well as the other rights listed in the eleventh preambular paragraph of the Paris Agreement:".

Mr. Murphy said that the language proposed by Sir Michael Wood would not be immediately followed by a list of rights, as the rights were mentioned later in the quotation. However, he did not oppose the formulation.

Paragraph (11), as amended by Sir Michael Wood, was adopted.

Paragraph (12)

Paragraph (12) was adopted.

Paragraph (13)

Mr. Murase (Special Rapporteur) said that, in the first sentence, the word "interrelationship" should be replaced with "relationship" and, in the penultimate sentence, the word "pronounced" should be replaced with "said".

Paragraph (13), as amended, was adopted.

Paragraph (14)

Mr. Forteau said that, in the fourth sentence, the clause "if and insofar as the relevant human rights norms are today recognized as either established or emergent rules of customary international law" was difficult to understand and the meaning of the word "relevant" was unclear. He wished to know which human rights were being referred to in the clause.

Mr. Murase (Special Rapporteur) said that he found the sentence clear. It first stated that, if and insofar as the relevant human rights norms were recognized, established or emergent, they could be considered to overlap with environmental norms for the protection of the atmosphere; examples were then provided. The human rights norms enumerated in the second half of the sentence might or might not be emergent or established; the Commission was not taking a position on that question.

Mr. Forteau said that it was still not clear to him which human rights, in particular, were being referred to. The corresponding footnote cited only general academic writings on human rights law. He was left wondering whether the sentence meant that human rights were not customary rights or that there were doubts on that score, or whether the sentence was concerned with only certain human rights norms. If the latter was the case, he wished to know what those human rights norms were.

Mr. Grossman Guiloff said that he agreed with Mr. Forteau. The phrase "as either established or emergent rules of customary international law" should be deleted. There was no reason to specify where the rights were recognized, whether in treaties, customary law or general principles of law.

Mr. Murphy said that, as he understood it, the paragraph – including the sentence being discussed – stated that, while human rights protections were conventionally understood to cover actions by Governments within their own territories and, therefore, arguably only applied to intra-country pollution, the non-discrimination rule could be interpreted to mean that Governments' human rights obligations also extended to transboundary pollution. The Commission was not taking a position; it was simply noting the existence of that view. He was concerned that the proposed deletions could reduce the scope of the human rights protections referred to in the text.

Mr. Jalloh said that he agreed with Mr. Forteau and supported Mr. Grossman Guiloff's proposal.

Mr. Grossman Guiloff said that, in his view, nothing would be lost if his proposal was accepted. If the phrase "as either established or emergent rules of customary international law" was deleted, the formulation "insofar as … recognized" would refer to human rights in their entirety. If no such deletion was made, the reader would be left wanting more information. Another possibility would be to replace the phrase "as either established or emergent rules of customary international law" with "in different sources of law".

Mr. Murase (Special Rapporteur) said that a great deal would be lost if the reference to customary international law was deleted. As he had explained in his fourth report (A/CN.4/705), the non-extraterritorial application of treaties – or their non-extra-jurisdictional application, to use the term that he had used in the report – could be overcome either through application of the non-discrimination principle, which was referred to at the beginning of paragraph (14), or through the recognition of human rights norms relevant to pollution as being part of customary international law.

Ms. Lehto said that she supported Mr. Grossman Guiloff's proposal, which could improve the passage.

Mr. Park said that he fully supported the Special Rapporteur's position and the reasoning behind it. He found paragraph (14) quite clear. The paragraph discussed the non-discrimination principle in cases of intra-boundary and transboundary pollution, where the application of the principle was well recognized in both domestic law and international conventions. It was unclear to him why the phrase "either established or emergent rules of customary international law" should be deleted.

Mr. Forteau said that whether a human right was customary and whether it could be applied extraterritorially were two completely different questions. The fact that a human right was customary did not mean that it had extraterritorial application. Mr. Murphy and Mr. Park had provided two different explanations, one based on extraterritoriality and the other on non-discrimination, and the Special Rapporteur had not specified what the "relevant human rights norms" were. He did not understand what the sentence meant and did not think that Mr. Grossman Guiloff's proposal would have any effect. Given the time constraints, he would not insist on that point, but it would be regrettable if the Commission adopted a paragraph whose meaning was so obscure.

Sir Michael Wood said that he shared Mr. Grossman Guiloff's concerns. Indeed, the first article cited in the footnote pertaining to the sentence suggested that human rights were more a matter of general principles of law than of customary international law. If the Special Rapporteur's intention was to indicate that there was overlap insofar as human rights norms had extraterritorial effect, the phrase "are today recognized as either established or emergent rules of customary international law" could be replaced with "have extraterritorial effect". The footnote would perhaps no longer be relevant.

Mr. Cissé said that he shared the views expressed by Mr. Forteau. His main concern was that, notwithstanding the Commission's adoption of paragraph (11) of the commentary to draft guideline 9, which also contained the phrase "relevant human rights", certain rights should not be highlighted as being more relevant than others. Furthermore, the word

"overlapping" seemed too generic a term when applied to norms that might be in conflict with each other.

Mr. Grossman Guiloff said that he agreed with the views expressed by Mr. Forteau and supported Sir Michael Wood's proposal.

Mr. Murase (Special Rapporteur) said that he could accept the amendment proposed by Sir Michael Wood, but wished to retain the relevant footnote as currently drafted.

The Chair, speaking as a member of the Commission, said that the idea behind draft guideline 9 was that the interrelationship among relevant rules should not give rise to conflict; indeed, as was stated at the end of paragraph (14), human rights norms and environmental norms for the protection of the atmosphere should be interpreted and applied "in a harmonious manner".

Mr. Jalloh said that the proposal by Sir Michael Wood had gone some way towards clarifying a cumbersome sentence. Thus, even though the focus was now on extraterritorial effects, the potential ambiguity of the word "overlapping" was no longer an issue.

Paragraph (14), as amended by Sir Michael Wood, was adopted.

Paragraph (15)

Paragraph (15) was adopted.

Paragraph (16)

Sir Michael Wood proposed that, in the penultimate sentence, the words "vulnerable groups" should be replaced with "vulnerable persons and groups", for the sake of consistency with the language used earlier in the same sentence.

Paragraph (16), as amended, was adopted.

Paragraph (17)

Paragraph (17) was adopted.

Paragraph (18)

Paragraph (18) was adopted with minor drafting changes.

Commentary to draft guideline 10 (Implementation)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

Mr. Murase (Special Rapporteur) said that, in the first sentence, the words "international agreements" should be changed to "international obligations".

Paragraph (3), as amended, was adopted.

Paragraphs (4) to (7)

Paragraphs (4) to (7) were adopted.

Commentary to draft guideline 11 (Compliance)

Paragraph (1)

Mr. Murase (Special Rapporteur) said that, in the first sentence, the words "at the level of international law" should be changed to "at the international level".

Mr. Grossman Guiloff said that he would like to know the reason for the proposed amendment, which appeared to change the meaning of the sentence.

Mr. Murase (Special Rapporteur) said that, in his fifth report (A/CN.4/711), he had stressed the importance of distinguishing between implementation, which referred to measures taken by States at the national level, and compliance, which referred to mechanisms or procedures at the international level. The phrases "at the international level" and "at the level of international law" were equivalent in meaning, but the first seemed clearer and more appropriate in the current context.

Mr. Jalloh, noting that paragraph (1) of the commentary to draft guideline 11 was a companion provision to paragraph (1) of the commentary to draft guideline 10, said that the language of the two paragraphs should be aligned. He did not object to the amendment proposed by the Special Rapporteur.

Sir Michael Wood said that he supported the Special Rapporteur's proposed amendment to the first sentence of paragraph (1) to align it with the language used in paragraph (1) of the commentary to draft guideline 10, which stated that "compliance at the international level is the subject of draft guideline 11". In addition, he proposed that, in the last sentence of the paragraph, the phrase "at the level of international law" should not be italicized.

Mr. Rajput said that he agreed with the views expressed by Mr. Jalloh and Sir Michael Wood and would support the removal of italics in the last sentence of the paragraph. He hoped that the references, in paragraph (2) of the commentary to draft guideline 11, to "obligations under international law" would help to allay Mr. Grossman Guiloff's concerns about the proposed amendment.

Mr. Murphy said that he shared Mr. Rajput's views and wished to propose that, in the first and last sentences of the paragraph, the phrase "at the level of international law" should be replaced with "at the international level". Given that, in the United States of America, international law was a part of national law, as declared by the Supreme Court in the *Paquete Habana* case, the phrase "at the level of international law" was not immediately clear to him; the phrase "at the international level" was less ambiguous.

The Chair said he took it that the Commission wished to remove the italics in the last sentence of the paragraph and to replace both instances of the phrase "at the level of international law" with "at the international level".

It was so decided.

Paragraph (1), as amended, was adopted.

Paragraph (2)

Mr. Murase (Special Rapporteur) said that, in the third sentence, the phrase "codify or lead to the crystallization of rules of international law, or give rise to a general practice that is accepted as law, thus generating a new rule of customary international law," should be inserted after the words "while others may", and the phrase "reflect or lead to the crystallization of rules of customary international law" should be deleted. In addition, a new footnote referring to conclusion 11 of the Commission's conclusions on identification of customary international law should be added, with the footnote marker appearing in the new text immediately after the words "accepted as law".

Sir Michael Wood said that he supported the proposed amendment, which was in line with the Commission's work on the topic "Identification of customary international law" and set out all three elements of conclusion 11 of the conclusions on identification of customary international law.

Mr. Jalloh said that, although he would not object to the amendment, it was, in his view, unnecessary to spell out the three elements of conclusion 11 in the current paragraph.

Sir Michael Wood said that, although it might be possible to shorten the proposed amendment, the issue with the sentence as it had originally been drafted was that it referred to only two of the elements of conclusion 11, and thus left out those cases where a treaty gave rise to a general practice that was accepted as law.

Paragraph (2), as amended and supplemented with a footnote, was adopted.

Paragraph (3)

Mr. Murase (Special Rapporteur) said that, in order to simplify the second sentence, the words "wording of the" should be inserted between the word "The" and "opening phrase", and the phrase "provides a purposive positive approach, with its wording aligned with" should be replaced with "is aligned with". In the penultimate sentence, the words "are to be considered" should be replaced with "may be considered", and in the last sentence, the two instances of the word "existing" should be deleted.

Paragraph (3), as amended, was adopted.

Paragraphs (4) to (6)

Paragraphs (4) to (6) were adopted.

Commentary to draft guideline 12 (Dispute settlement)

Paragraph (1)

Mr. Forteau proposed that, in footnote 183, a French-language source, *La Charte des Nations Unies: Commentaire article par article*, should be added.

Sir Michael Wood said that he supported the addition proposed by Mr. Forteau and that the reference contained in the footnote as originally drafted needed to be updated.

Paragraph (1) was adopted, with amendments to footnote 183.

Paragraph (2)

Mr. Forteau, noting that there was considerable literature in French on scientific evidence brought before international courts and tribunals, proposed that, in footnote 186, a French-language source should be added; he would provide the relevant reference to the secretariat.

On that understanding, paragraph (2) was adopted.

Paragraph (3)

Mr. Forteau said that many of the references given in footnote 187, including *Gabčíkovo-Nagymaros Project (Hungary/Slovakia) and Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, did not seem appropriate, as they did not relate to the protection of the atmosphere. In addition, the last sentence of that footnote implied that the International Court of Justice had appointed its own experts, in accordance with Article 50 of its Statute, in only one case. That was no longer true, given the recent developments in the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*. The entire footnote should thus be revised.

Mr. Murase (Special Rapporteur) said that, with the exception of the case concerning *Aerial Herbicide Spraying (Ecuador v. Colombia)*, which related directly to the atmosphere, the references in footnote 187 had been cited by analogy with protection of the atmosphere. Furthermore, although the case concerning *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* had focused on the environment surrounding a river, it had also touched on problems relating to the atmosphere that had been caused by the proposed project. He would therefore prefer to retain all the references cited in footnote 187. He agreed that a reference to *Armed Activities on the Territory of the Congo* should be added to the last sentence.

Mr. Murphy said that a more problematic issue in paragraph (3) was the fact that the assertion, in the first sentence, that there had been a recent noticeable change in the attitude of States and the International Court of Justice was not supported by the associated footnote. Some of the concerns expressed by Mr. Forteau might be addressed if, in the first sentence, footnote indicator 187 was placed immediately after the word "cases", so that the Commission would not appear to be claiming that the cases cited in the footnote related directly to the protection of the atmosphere. He was not convinced that a reference to *Armed Activities on the Territory of the Congo* was appropriate, not only because the case had not

yet been decided, but also because it did not necessarily reflect the change in attitude referred to in the first sentence of the paragraph.

Mr. Rajput said that he would not object to the amendment proposed by Mr. Murphy; an alternative would be to place the footnote indicator immediately after the term "international environmental law". He also proposed that the phrase "reflect, directly or indirectly, specific features of" should be replaced with "may have impact for".

Mr. Grossman Guiloff said that he supported Mr. Murphy's proposal regarding footnote 187. He would prefer to retain the references, but wished to propose that, on the basis of the Special Rapporteur's explanation, the footnote should also state that the cases in question were being cited "by analogy". After all, there had not been many cases that dealt directly with the protection of the atmosphere, but norms had been established in other contexts that related to that topic, and it was important to highlight the recent developments in relevant case law.

Sir Michael Wood said that the first sentence of paragraph (3) seemed to imply that the Commission sat in judgment of the proceedings being conducted by States and by the International Court of Justice. Instead, the Commission should simply draw attention to the fact that there had been a number of cases that revealed how States and the Court might deal with scientific matters. He therefore proposed that the first sentence should be redrafted to read: "Recent cases before the International Court of Justice involving the science-dependent issues of international environmental law illustrate, directly or indirectly, specific features of the settlement of disputes relating to the protection of the atmosphere."

Mr. Jalloh said that he shared the concerns expressed by Sir Michael Wood and supported his proposed amendment. The problematic tone of the first sentence of paragraph (3) was mirrored in the last sentence of footnote 187, where the word "finally" almost seemed to take an upbraiding tone *vis-à-vis* the International Court of Justice. The word "finally" should therefore be deleted. As for the placement of the footnote indicator, he supported, in principle, the proposal made by Mr. Rajput, but the phrase "although the latter was not *per se* an environmental law dispute" in the last sentence of footnote 187 might then need to be adjusted.

Mr. Murphy said that he agreed with the amendment proposed by Sir Michael Wood. He also agreed with Mr. Jalloh's proposal to delete the word "finally" from the last sentence of footnote 187. In the second sentence of that footnote, the words "by the Bench, as well as by commentators" should be deleted, as "the Bench", to him, suggested the entire Court. The word "thus" at the beginning of the third sentence could also be deleted.

Mr. Rajput said that, in using the formulation "met some criticisms by the Bench", the Special Rapporteur had had in mind the joint dissenting opinion of Judges Al-Khasawneh and Simma in the *Pulp Mills* case. That reference could perhaps be added, together with others in which the approach had been criticized.

Mr. Murphy said that, if the phrase in question was intended to refer to criticism from individual judges rather than the Court as a whole, it should be reformulated to say exactly that.

Mr. Murase (Special Rapporteur) said that he supported Sir Michael Wood's proposal concerning the opening sentence of paragraph (3) and Mr. Rajput's proposal to insert the marker for footnote 187 after "international environmental law". In the footnote, he agreed that the words "thus" and "finally" could be deleted. He was not convinced that it was necessary to be so explicit about the criticism on the part of the Court; he agreed that a full stop could be inserted after the word "criticisms" in the second sentence and the words "by the Bench, as well as by commentators" could be deleted.

Mr. Rajput said that, given the Special Rapporteur's wish to avoid overly strong language in the second sentence of footnote 187, a formulation along the lines of "a different view was expressed by…", followed by the views themselves, might be preferable. It was important for those views, especially the dissenting opinion, to be reflected.

The Chair said he took it that the Commission wished to adopt the text of paragraph (3), as amended, on the understanding that the Special Rapporteur would submit an amended version of the footnote to the secretariat.

Paragraph (3), as amended, was adopted on that understanding.

Paragraph (4)

Mr. Forteau said that he had difficulty making sense of paragraph (4). It stated that the principles of *jura novit curia* and *non ultra petita* "may be relevant", but his understanding was that those principles always applied to any dispute. The paragraph then stated that those principles concerned the relationship between law and fact, which was not how he understood the role of *jura novit curia*. Of greater relevance, to his mind, were the rules related to the law of evidence, of which there was no mention in paragraph (4). Footnote 190 also seemed very muddled, as it mixed considerations related to law and to fact. It was a pity that the draft commentary as a whole ended with such a paragraph, which lacked legal clarity. Given that the last sentence of paragraph (4) stated that the Commission had decided not to address those issues in the draft guideline, his proposal would be either to delete paragraph (4) or to redraft it entirely.

Mr. Murase (Special Rapporteur) said that those points had been discussed during the debate on his fifth report (A/CN.4/711). The statement by Judge Yusuf, the then President of the International Court of Justice, that was referred to at the end of footnote 190 was very important in that connection. The deletion of paragraph (4) would be a significant loss to the overall project; he therefore felt strongly that it should be retained. He had had to shorten the paragraph at the first-reading stage, but the books, articles and statements cited were sufficient to clarify the issues involved.

Mr. Rajput, recalling the long debate on the issue, said that he fully supported the Special Rapporteur's position. In order to address Mr. Forteau's concerns, perhaps the word "particularly" could be added before "relevant" in the first sentence of the paragraph. The Special Rapporteur might also consider adding the words "standard of proof" after "*jura novit curia* (the court knows the law)", as that was also quite important in environment-related disputes; the footnote could then be updated accordingly.

Sir Michael Wood said that, unfortunately, Mr. Forteau had not been present when the issue had been discussed at length at the seventieth session. He agreed that, as currently worded, paragraph (4) was very unclear. One solution might be to retain only the final sentence and expand it to read: "The Commission decided to maintain a simple formulation for this guideline and not to address other issues that may be relevant, such as *jura novit curia* (the court knows the law) and *non ultra petita* (not beyond the parties' request)." Footnote 190 could perhaps also be shortened, while retaining, in particular, the reference to Judge Yusuf's interesting statement.

Mr. Jalloh said that he supported the Special Rapporteur's position in wishing to retain the paragraph. He had been Chair of the Drafting Committee at the time the provision had been discussed; there had been broad agreement among the members that the principles of *jura novit curia* and *non ultra petita*, which the Special Rapporteur had originally wanted to address in a third paragraph of the draft guideline, would be more appropriately dealt with in the commentary. It would therefore be unfortunate to remove the paragraph at the current stage. In his view, Sir Michael Wood's proposed solution captured the factual situation and would resolve the concerns expressed. He wished to suggest that the reference to Judge Yusuf's statement should be moved to the beginning of the footnote.

Mr. Park said that the wording of paragraph (4) reflected the compromise reached at the seventieth session. He supported Sir Michael Wood's proposed formulation.

Ms. Oral said that she also supported Sir Michael Wood's proposal.

Mr. Grossman Guiloff said that it was only proper to include the issue in the commentary, given that the Commission had agreed to do so after an extensive debate. However, as the Special Rapporteur had been forced to shorten the text, it was now somewhat confusing. He therefore supported the amendment proposed by Sir Michael Wood.

Mr. Forteau said that, in the fifth sentence of footnote 190, the word “applicable” should be added before “law” so that the sentence would read: “Based on *jura novit curia*, the Court can in principle apply any applicable law to any fact …”. At the beginning of the sixth sentence, the words “and under *jura novit curia*” should be deleted because the sentence went on to say that the Court needed to sufficiently understand the facts in the case at hand, and that issue was related to the burden of proof and not to *jura novit curia*.

Mr. Murphy said that he would welcome clarification of the exact changes being proposed to the order of the references in the footnote, particularly as there were actually two references to Judge Yusuf. If the idea was to move the second reference, in the final sentence of the footnote, to the beginning, the reference should still be preceded by the two sentences that came before it, as they logically led into the reference. Thus, the last three sentences, starting with “Based on *jura novit curia* …”, should be moved to the beginning.

Mr. Jalloh said that his proposal had also been to move the reference to Judge Yusuf’s statement to the beginning of the footnote, together with the related explanatory sentences. That would be followed by the reference to Judge Yusuf’s declaration in the *Pulp Mills* case and then by the academic references.

Sir Michael Wood, supported by **Mr. Forteau**, said that, as the proposed changes to the footnote were somewhat complicated, it might be best for the Special Rapporteur to draft a revised version for adoption at a later stage. The Commission should not rush a decision on how to reflect major questions of international law in a footnote.

The Chair said he took it that the Commission wished to adopt the text of paragraph (4), as amended, on the understanding that the Special Rapporteur would circulate a revised version of the footnote at a later stage.

Paragraph (4), as amended, was adopted on that understanding.

The Chair invited the Commission to resume its consideration of chapter IV (C) and (D) of the draft report, as contained in document A/CN.4/L.944.

C. Recommendation of the Commission

Paragraph 9

The Chair read out the proposed wording of paragraph 9, the text of which had been circulated to the members:

> “At its 3554th meeting, held on 29 July 2021, the Commission decided, in accordance with article 23 of its statute, to recommend that the General Assembly:
>
> (a) take note in a resolution of the draft preamble and guidelines on the protection of the atmosphere, annex the draft guidelines to the resolution and ensure their widest possible dissemination;
>
> (b) commend the draft preamble and guidelines, together with commentaries thereto, to the attention of States, international organizations and all who may be called upon to deal with the subject.
>
> The Commission has in recent years adopted a similar recommendation with respect to its conclusions on customary international law and subsequent agreements and subsequent practice in relation to the interpretation of treaties.”

Paragraph 9 was adopted.

D. Tribute to the Special Rapporteur

Paragraph 10

The Chair said that the proposed wording of paragraph 10 was that contained in the draft report (A/CN.4/L.944), with the addition of the missing elements at the beginning of the paragraph, which would read “At its 3554th meeting, held on 29 July 2021, the Commission …”.

Paragraph 10 was adopted.

Paragraphs 11 and 12

Paragraphs 11 and 12 were adopted.

Chapter IV of the draft report as a whole, as amended, was adopted.

Chapter V. Provisional application of treaties (A/CN.4/L.945, A/CN.4/L.945/Add.1, A/CN.4/L.945/Add.2 and A/CN.4/L.945/Add.4)

The Chair invited the Commission to consider chapter V (A) and (B) of its draft report, as contained in document A/CN.4/L.945.

A. Introduction

Paragraphs 1 and 2

Paragraphs 1 and 2 were adopted.

B. Consideration of the topic at the present session

Paragraphs 3 to 5

Paragraphs 3 to 5 were adopted.

Paragraph 6

Mr. Forteau asked whether it was still correct to refer to “draft guidelines” and “draft Guide” or whether the word “draft” could now be dropped in those two instances.

Mr. Murphy, supported by **Mr. Rajput**, said that it would make sense to retain the designation “draft” for the Guide and the annex, as well as for the guidelines.

Mr. Gómez-Robledo (Special Rapporteur) said that, in the text that had been adopted by the Commission, the titles of the Guide and the annex did not include the word “draft”, but the individual provisions were still termed “draft guidelines”. His understanding was that such wording was in line with the Commission’s practice and that the decision to eliminate the word “draft” from the term “draft guidelines” was to be taken not by the Commission but by the Sixth Committee. The same practice had been followed in the adoption of the Commission’s Guide to Practice on Reservations to Treaties.

The Chair said he took it that, from paragraph 6 onward, the Commission wished to use the formulations “Guide”, “annex” and “draft guidelines” in chapter V of the draft report.

It was so decided.

Paragraph 6, as amended, was adopted, subject to its completion by the secretariat.

Paragraph 7

Mr. Gómez-Robledo (Special Rapporteur) said that the words “including the narrative component of the draft model clauses” should be deleted.

Paragraph 7, as amended, was adopted, subject to its completion by the secretariat.

Paragraph 8

Mr. Gómez-Robledo (Special Rapporteur) said that the words “together with the draft model clauses” should be deleted.

Paragraph 8, as amended, was adopted.

The meeting rose at 5.30 p.m.