United Nations A/C.6/73/SR.25

General Assembly
Seventy-third session

Official Records

Distr.: General
19 November 2018

Original: English

Sixth Committee

Summary record of the 25th meeting
Held at Headquarters, New York, on Friday, 26 October 2018, at 10 a.m.

Chair: Ms. Ponce (Vice-Chair) . . . . . (Philippines)
later: Mr. Biang . . . . . (Gabon)

Contents

18-17950 (E)

In the absence of Mr. Biang (Gabon), Ms. Ponce (Philippines), Vice-Chair, took the Chair.

The meeting was called to order at 10.10 a.m.

Agenda item 82: Report of the International Law Commission on the work of its seventieth session (*continued*) (A/73/10)

1. **The Chair** invited the Committee to continue its consideration of chapters VI, VII and VIII of the report of the International Law Commission on the work of its seventieth session (A/73/10).

2. **Mr. Tichy** (Austria), referring to the topic "Protection of the atmosphere" and the draft guidelines adopted on first reading, said that paragraph 1 of draft guideline 12 stated the obvious, namely that disputes between States relating to the protection of the atmosphere from atmospheric pollution and atmospheric degradation were to be settled by peaceful means. The reference in paragraph 2 of the draft guideline, to the fact-intensive character of disputes was misleading, since all major disputes were likely to involve a huge quantity of facts that judges, and not technical and scientific experts, would have to consider. What made technical and scientific expertise necessary was not the quantity of facts in a dispute, but rather their special and complex nature.

3. The draft guidelines on the topic "Provisional application of treaties" adopted on first reading, would provide a valuable tool for States and international organizations in their treaty-making practice. However, their current formulation very closely resembled that of the text provisionally adopted at the sixty-ninth session of the Commission; suggestions made by members of the Sixth Committee had been taken up only cautiously, if at all.

4. Draft guideline 9 (Termination and suspension of provisional application) restated the provision of article 25 of both the 1969 Vienna Convention on the Law of Treaties and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations that provisional application could be terminated as a result of a treaty's entry into force or of notification by a State or an international organization that it no longer intended to become a party to the treaty. Although that approach was commendable, it would also have been useful for the draft guideline to include a provision regarding additional forms of termination and/or suspension. The Commission appeared to have considered addressing such cases, including unilateral termination of provisional application. Such situations could well arise: for instance, States and international organizations might have to terminate or suspend the provisional application of treaties as a result of internal democratic decision-making procedures or for other legal or political reasons, while leaving open the possibility of becoming a party in the future. It would have been useful to include some additional provisions to that effect in the draft guidelines.

5. His delegation noted with regret that there had not been sufficient time to discuss and formulate in detail the draft model clauses proposed by the Special Rapporteur. It hoped that the Commission would discuss them in detail in future.

6. Turning to the topic "Peremptory norms of general international law (*jus cogens*)" and the draft conclusions proposed by the Special Rapporteur in his third report (A/CN.4/714 and A/CN.4/714/Corr.1), he noted that draft conclusion 11 (Severability of treaty provisions in conflict with a peremptory norm of general international law (*jus cogens*)) stipulated that a treaty which, at its conclusion, was in conflict with *jus cogens* was invalid in whole. That provision was based on article 44, paragraph 5, of the 1969 Vienna Convention. Although such adherence to the non-separability regime for treaties that were contrary to *jus cogens* had a deterrent effect, his delegation wondered whether it was the optimal approach. It might be more useful to take a nuanced approach to sanction only provisions that violated *jus cogens*, but not invalidate the entire treaty. Such a solution would be consistent with the *favor contractus* principle.

7. The specific reference to Security Council resolutions contained in draft conclusion 17 (Consequences of peremptory norms of general international law (*jus cogens*) for binding resolutions of international organizations) had elicited debate and criticism within the Commission. His delegation believed that the phrase "binding resolutions of international organizations" referred to international organizations in general, and was thus sufficiently broad to apply to all international organizations and their organs, including the Security Council, without referring explicitly to any of them. As a strong supporter of the rule of law, including in the context of the United Nations, his delegation agreed with the underlying idea of the draft conclusion, because Security Council resolutions might in some cases lead to a conflict with *jus cogens*. In that context, he wished to draw attention to the conclusion in the final report of the Austrian Initiative 2004–2008 on the United Nations Security Council and the rule of law contained in document A/63/69-S/2008/270 that the Security Council did not operate free of legal constraint and that its powers were

exercised subject to the Charter of the United Nations and norms of *jus cogens*.

8. Draft conclusion 22, paragraph 1, rightly provided that States had a duty to exercise jurisdiction over offences prohibited by *jus cogens* where the offences were committed by their nationals or on their territory. Paragraph 2, however, might be misleading: it indicated that paragraph 1 did not preclude the establishment of jurisdiction on any other ground as permitted under the State's national law. It thus appeared to permit the exercise of universal jurisdiction to prosecute crimes prohibited by *jus cogens* solely on the basis of national law. However, any exercise of universal jurisdiction must take place within the framework of international law. It was essential for the draft conclusions to reflect that point. His delegation trusted that the Commission would address the issue more thoroughly when it examined the topic "Universal criminal jurisdiction".

9. Draft conclusion 23, paragraph 2, provided that immunity *ratione materiae* would not apply to any offence prohibited by *jus cogens*. His delegation would consider any such provision problematic, particularly because the issue was currently being examined by the Commission under the topic "Immunity of State officials from foreign criminal jurisdiction". In order to avoid inconsistency or duplication, discussion of the issue should be confined to the latter topic, so long as it was under consideration. Lastly, he hoped that the Special Rapporteur would endeavour to establish an illustrative list of *jus cogens* norms.

10. **Mr. Xu** Hong (China) said that an observer at the previous meeting of the Committee had made several references to the so-called award granted in the *South China Sea Arbitration* case. China strongly objected to such references. The so-called award had been issued *ultra vires* and was based on obvious errors of fact and law. It had no legal status whatsoever and constituted a reckless disruption of the rule of law at the international level. It was clearly highly inappropriate to cite such an unjust, unlawful and invalid award in the Committee.

11. The topic "Protection of the atmosphere" involved highly complex and sensitive political, legal and scientific issues. In examining the topic, the Commission must comply with the 2013 understanding, base itself on general international practice and existing law, and fully respect the efforts of the international community under existing mechanisms and outcomes of relevant political and legal negotiations.

12. The draft guidelines on the topic adopted on first reading rightly reaffirmed such basic principles as international cooperation and the peaceful settlement of disputes. However, some of their specific provisions were open to question. With regard to draft guideline 3 (Obligation to protect the atmosphere), explicit legal obligations on States to protect the atmosphere had yet to materialize, and the relevant practice and rules were still being developed. The aim of draft guideline 4 (Environmental impact assessment) was to have the rule cited in certain treaties and cases regarding environmental impact assessments being required for activities that could have a significant transboundary impact applied directly to protection of the atmosphere. However, the rule had a specific context and scope of application; it had not become a universally agreed principle of international law for the protection of the atmosphere. Draft guideline 9, paragraph 3, brought the concept of countries in special situations, as defined in the context of climate change, into the discourse regarding the protection of the atmosphere. His delegation could not see sufficient justification for doing so.

13. Referring to the topic "Provisional application of treaties", he said that the scope of legally binding obligations conferred on the parties by the provisional application of a treaty should be defined cautiously, with due respect for the genuine intentions of the parties. The agreed conditions and procedures for provisional application should be interpreted rigorously, in order to avoid unduly expanding the scope of obligations placed on the parties. That issue should be clarified in the commentaries to the draft guidelines on the topic adopted on first reading. It was questionable whether draft guideline 7 (Reservations) and draft guideline 9 (Termination and suspension of provisional application) had practical value; it seemed no State would ever need those provisions.

14. The Commission should be extremely cautious in its consideration of the topic "Peremptory norms of general international law (*jus cogens*)". *Jus cogens* was uniquely important and distinct from the norms of general international law. The determination of the elements, criteria and consequences of *jus cogens* must be based on the relevant provisions of the Vienna Convention on the Law of Treaties and supported by adequate State practice. The focus should be on codifying existing law (*lex lata*) rather than developing new laws (*lex ferenda*).

15. Referring to the draft conclusions on the topic proposed by the Special Rapporteur, he said that his delegation did not agree with draft conclusion 17, which stated that binding resolutions of the Security Council did not establish binding obligations if they conflicted with *jus cogens*. The Security Council was at the centre of the collective security system established after World War II. Its resolutions were adopted in accordance with

the provisions of Charter of the United Nations following strict procedural requirements, and must be consistent with the purposes and principles of the Charter. The content and scope of *jus cogens* were still far from clear. The invocation of that principle to challenge or avoid implementing a Security Council resolution would undermine the collective security system. His delegation proposed, therefore, that the issue not be included in the draft conclusions.

16. Draft conclusion 23, paragraph 2, stated that immunity *ratione materiae* should not apply to any offence prohibited by a norm of *jus cogens*. In the absence of clarity regarding the content and scope of *jus cogens* norms or the concept of an offence prohibited by *jus cogens*, that provision had proved highly controversial within the Commission. That had led the Special Rapporteur to propose that draft conclusions 22 and 23 be replaced with a single clause to read: "[t]he present draft conclusions are without prejudice to the consequences of specific/individual/particular peremptory norms of general international law (*jus cogens*)". His delegation supported the deletion of draft conclusion 23 and looked forward to further clarification regarding the specific meaning of the new clause. In its judgments, the International Court of Justice had repeatedly emphasized that immunities were a procedural matter. In *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, the Court had pointed out that *jus cogens* and jurisdiction were two separate issues. *Jus cogens* as a substantive rule therefore should not prejudice the rule regarding immunity of officials.

17. His delegation was concerned about the current procedure being followed by the Commission, whereby the draft conclusions would not be submitted to the plenary for review following their adoption by the Drafting Committee, or even included in the report of the Commission on its work, until the conclusion of the first reading of the entire set of draft conclusions and commentaries thereto before being submitted to the General Assembly. That course of action differed from the procedure the Commission followed for most of the other topics and would make it difficult for Member States to fully express their views on such an important topic. His delegation hoped that the Commission would find an appropriate solution to the problem.

18. With regard to the topic "Protection of the environment in relation to armed conflicts", his delegation's longstanding view was that international and non-international armed conflicts were different in nature, and that rules governing the former could not be applied automatically to the latter, unless warranted by State practice. However, the inclination to make such a leap remained in the draft principles and commentaries provisionally adopted by the Commission. He hoped that the Commission would consider the question in greater detail.

19. Turning to the topic "Succession of States in respect of State responsibility", he said that the second report of the Special Rapporteur and the discussions of the Commission had confirmed that there was a paucity of relevant State practice, and that what little practice existed was in specific, complex and varied political and historical contexts. It would therefore be difficult to codify a general rule in that field. The Commission might wish to consider whether it should continue working on the topic, or instead confine itself to formulating some essential draft guidelines.

20. When the topic "Immunity of State officials from foreign criminal jurisdiction" had been discussed at the previous session of the Committee, many delegates had objected to the provision on the non-applicability of immunity *ratione materiae* contained in draft article 7 provisionally adopted by the Commission at its sixty-ninth session. His delegation encouraged the Commission to take those views seriously and accordingly re-examine draft article 7 and the commentary thereto.

21. At its seventieth session, the Commission had held preliminary discussions on the sixth report of the Special Rapporteur (A/CN.4/722). On the question of when a forum State should begin to consider the immunity of foreign officials, the Special Rapporteur appeared to believe that if the forum State simply initiated an investigation without taking binding measures against a foreign official, imposing obligations on that person or impeding the proper performance of their functions, there would be no immunity implications and the issue of immunity would therefore not come into the equation at that stage. However, the immunity of State officials was not merely a requirement aimed at safeguarding the performance of their functions: it also arose from the basic principle of *par in parem non habet imperium* ("an equal has no power over an equal"). Accordingly, even if legal proceedings against a foreign official had no binding force, imposed no obligations and had no impact on the performance of his or her functions, they still had the potential to violate the immunity of the official and, by extension, to infringe the sovereignty of the State in question. The question of immunity ought therefore to be taken into consideration at that point.

22. With regard to the question of which authority in the forum State had the right to decide whether to grant or reject immunity, his delegation believed that once the judicial process had begun, courts did play an important

part in the final decision. However, given the diversity of political and legal systems and, in particular, the fact that immunity had implications for State-to-State relations and foreign affairs, the executive branches of States often had a considerable, even decisive say. More importantly, States' respect for immunity often reflected their approach to their international rights and obligations as a whole. The question of which State authority had the competence to make a final decision was an internal matter that belonged outside the purview of international law. His delegation therefore was not in favour of developing a set of uniform criteria to address that issue.

23. It was his understanding that the question of procedural safeguards in respect of immunity of officials would be addressed in the next report of the Special Rapporteur. His delegation believed that the term "procedural safeguards" should be taken to mean those safeguards that were directly linked with immunity and were intended to protect officials from abusive litigation. Procedural safeguards relating to criminal cases were not directly relevant to the topic. Moreover, no procedural safeguards could compensate for the flaw in the provision on exceptions to immunity *ratione materiae* contained in draft article 7. The only way to address that flaw was to re-examine draft article 7 and formulate an appropriate conclusion supported by general State practice and *opinio juris*.

24. **Mr. Tiriticco** (Italy) said that the risk posed by the long-range transboundary effects of polluting and degrading substances made it important for the Commission to work on the topic "Protection of the atmosphere". His delegation commended the Special Rapporteur and the Commission on the progress made. It appreciated the Special Rapporteur's attention to avoiding interference with ongoing political negotiations on environmental protection. The fact that the Commission was tackling such a fundamental problem was positive in itself.

25. Referring to the draft guidelines on the topic adopted on first reading, he said that draft guideline 10 (Implementation) was an essential completion of draft guideline 3, which established that States had the obligation to protect the atmosphere by preventing, reducing or controlling atmospheric pollution and atmospheric degradation, but did not specify the means to implement that obligation. His delegation took a favourable view of the discretionary approach to implementation: States were free to choose which protective actions to take in their own domestic legal orders. The Special Rapporteur's approach to dispute settlement was also positive. In accordance with the requirements of distributive justice, cooperative compliance mechanisms were preferable to punitive or enforcement-based ones. Scientific knowledge had an important part to play in the protection of the atmosphere, and there was indeed a need to consider the science-dependent and fact-intensive character of environmental disputes. Any initiatives to foster dialogue with scientific experts were therefore to be welcomed.

26. His delegation agreed with the position set out in draft guideline 11 (Compliance) and, in particular, the wording of paragraph 2, which was similar to that set out in other provisions regarding compliance and implementation review mechanisms. In paragraph 2, the Commission had, albeit indirectly, addressed the disparities among States by calling for facilitative procedures to assist States that were willing but unable to comply with their international obligations. His delegation also noted the reference to common but differentiated responsibilities, which was found in several international environmental instruments. It also stressed that the enforcement procedures referred to in paragraph 2 (b) should be distinguished from any invocation of international responsibility of States. Accordingly, his delegation welcomed paragraph (5) of the commentary to the draft guideline.

27. It would be preferable for a provision to be added to draft guideline 12, paragraph 1, stating that there should be no interference with existing dispute resolution provisions in treaty regimes. His delegation agreed with the content of paragraph 2: the role of technical and scientific expertise should be duly considered in settling disputes involving the atmosphere. Given the often fact-intensive and science-dependent nature of most international disputes regarding atmospheric pollution, technical and scientific expertise had a valuable role to play.

28. In addressing the topic "Peremptory norms of general international law (*jus cogens*)", the Special Rapporteur and the Commission had admirably sought to strike a balance between theoretical intricacy and practicality. Some of the draft conclusions proposed by the Special Rapporteur appeared not to have been deemed entirely persuasive but had been provisionally adopted by the Drafting Committee in an apparent effort to move the topic forward. The work done thus far, and the approach adopted by the Special Rapporteur might, in the future, allow the Commission to work toward delivering a product that would constitute a reference point. Nonetheless, given the theoretical dimension of the topic, it would be difficult to develop fruitful draft conclusions at the current stage. The Commission might wish to consider conducting a broader study on the topic, which would admittedly have a less practical

character. Alternatively, it could opt for a narrower approach and, through a step-by-step drafting process to be appropriately discussed with Member States, consider specific aspects of the possible application of the notion of *jus cogens* to treaty law. In any event, the work carried out thus far, in a relatively short time, was remarkable and commendable.

29. In her sixth report, the Special Rapporteur for the topic "Immunity of State officials from foreign criminal jurisdiction" took a balanced approach to the questions addressed thus far, namely the timing of the consideration of immunity, the acts of the authorities of the forum State that might be affected by immunity, and the identification of the organ that was competent to decide whether immunity applied. With regard to the issues to be addressed in the seventh report, his delegation would be particularly interested in the analysis of cooperation between States and international criminal courts and the possible impact of that cooperation on immunity from foreign criminal jurisdiction.

30. His delegation supported the text of draft article 7 provisionally adopted by the Commission at its sixty-ninth session, which provided that immunity *ratione materiae* did not apply in respect of only certain specific crimes under international law. The so-called territorial tort exception, which the Special Rapporteur had originally proposed, was not sufficiently established in State practice.

31. **Ms. Hioureas** (Cyprus), addressing the topic "Peremptory norms of general international law (*jus cogens*)", in relation to the law of treaties, said that treaties should be interpreted in a manner consistent with peremptory norms. Indeed, many States including Cyprus had invoked *jus cogens* even before the adoption of the Commission's draft articles on the law of treaties or the 1969 Vienna Convention on the Law of Treaties. In the light of articles 53 and 64 of the Convention, which addressed the invalidating effect of *jus cogens*, it would be useful, for the purposes of current work on the topic, to explore further the question of who determined whether a treaty conflicted with that norm and the possible legal consequences of such conflict. As a general point, her delegation fully agreed that the Commission should avoid any outcome that could result in, or be interpreted as, a deviation from the Convention.

32. It should also be recognized, however, that the scope of the topic extended beyond the law of treaties and included such areas of international law as the responsibility of States for internationally wrongful acts. As was made clear in articles 40 and 41 of the articles on responsibility of States for internationally wrongful acts, a breach of a peremptory norm, such as the prohibition of the threat or use of force, was deemed serious and entailed State responsibility. Consequently, States had an obligation to cooperate in order to bring to an immediate end any serious violation. They also had an obligation not to recognize the results stemming from such unlawful conduct and to refrain from aiding or assisting the State engaged in wrongdoing. Moreover, under articles 30 and 31 of the articles on responsibility of States for internationally wrongful acts, the State responsible for the internationally wrongful act was under an obligation to cease that act, offer appropriate assurances of non-repetition, and make full reparation for the injury caused by its behaviour.

33. Her delegation supported the suggestion that the Commission should draft an illustrative list of norms that had already acquired the status of *jus cogens*. The proposal was feasible, as the number of *jus cogens* norms to consider was relatively limited. Such a list would be useful given that, according to article 53 of the Vienna Convention, peremptory norms existed only if they were accepted and recognized by the international community of States.

34. **Mr. Elshenawy** (Egypt), referring to the topic "Peremptory norms of general international law (*jus cogens*)" and the draft conclusions proposed by the Special Rapporteur in his third report (A/CN.4/714 and A/CN.4/714/Corr.1), said that the phrase "as far as possible" should be removed from paragraph 3 of draft conclusion 10 (Invalidity of a treaty in conflict with a peremptory norm of general international law (*jus cogens*)). That change would avoid opening the door for exceptions in the event that a treaty was to be interpreted in a manner inconsistent with or contrary to *jus cogens*. In that regard, it was important to respect the rules of interpretation set forth in the 1969 Vienna Convention on the Law of Treaties and customary international law.

35. To his delegation, draft conclusion 11, paragraph 1, must mean only one thing: a treaty was invalid if, at its conclusion, it was in conflict with a peremptory norm of general international law (*jus cogens*), and no part of the treaty could be severed or separated. Paragraphs 1 and 2 should be re-drafted in order to clarify that there should be no exception to that rule. Treaties were drafted in a balanced manner and their provisions were generally interconnected. When a new *jus cogens* norm emerged that was in conflict with a provision of a treaty, it would be preferable for the treaty to be reviewed as a whole. In paragraphs 2 (b) and (c), two conditions had been introduced in order for the exception to apply, namely that the provisions that were in conflict with a peremptory norm of *jus cogens* should not constitute an essential basis of the consent to the treaty, and that

continued performance of the remainder of the treaty would not be unjust. However, it was not clear when those conditions would apply, or who would have the power to make that assessment. In any event, those provisions would open the door for exceptions to *jus cogens* norms, something that would not be acceptable to his delegation.

36. The phrase "to the extent possible" should be removed from paragraph 2 of draft conclusion 17 (Consequences of peremptory norms of general international law (*jus cogens*) for binding resolutions of international organizations), as it opened the door for the possibility that resolutions of international organizations, particularly those of the Security Council, could be interpreted in a manner inconsistent with or contrary to *jus cogens* norms. Paragraph 2 should state that resolutions that conflicted with a *jus cogens* norm were not merely non-binding; they were void, and none of their legal effects could be recognized.

37. In paragraph 2 of draft conclusion 20 (Duty to cooperate), it should be explained how a serious breach of *jus cogens* differed from other breaches, and how that distinction added value to the consideration of such a sensitive issue. However, his delegation believed that the threshold for the application of the duty to cooperate should be low: that duty should extend to any breach, and not only to serious ones.

38. Draft conclusion 23 (Irrelevance of official position and non-applicability of immunity *ratione materiae*) conflicted with the established rules regarding the immunities granted to States, Governments, ministers for foreign affairs and senior officials under international law and custom. It also confused the issue of prohibition with that of prosecution. His delegation therefore believed that the draft conclusion should be removed in its entirety.

39. His delegation supported the remainder of the draft conclusions.

40. **Ms. Schmitz** (Brazil) said that the Special Rapporteur for the topic "Peremptory norms of general international law (*jus cogens*)" was to be commended for the quality of his research and for proposing draft conclusions that reflected State practice in a manner consistent with the Vienna Convention on the Law of Treaties. It was, however, critically important to retain in the text of draft conclusion 17 an explicit reference to decisions of the Security Council. In view of the hierarchy of international obligations established in Article 103 of the Charter of the United Nations, the Commission should not shy away from recognizing that the Security Council was also bound by *jus cogens* norms. In draft conclusion 20, the scope of the duty to cooperate was limited to serious breaches of peremptory norms; but such a provision went against the very notion of *jus cogens*. While the Commission had clearly sought inspiration from the commentaries to the articles on the responsibility of States for internationally wrongful acts, it should be stressed that every breach of *jus cogens* was, by definition, serious.

41. Her delegation noted that draft conclusion 22 (Duty to exercise domestic jurisdiction over crimes prohibited by peremptory norms of general international law (*jus cogens*)) and draft conclusion 23 (Irrelevance of official position and non-applicability of immunity *ratione materiae*) had been referred to the Drafting Committee on the understanding that they would be dealt with by means of a "without prejudice" clause. Her delegation supported the Special Rapporteur's initial proposal but understood his flexibility in view of the need to maintain consistency in the work of the Commission across topics. It would be useful to find a creative way of elaborating an illustrative list of *jus cogens* norms while respecting the understanding that the Commission should be discussing process and method, as opposed to the content of the peremptory norms.

42. In the draft guidelines on the topic "Provisional application of treaties" adopted on first reading, the Commission frequently referred to agreements between States relating to the provisional application of a treaty. That approach was commendable, as the intention of States with regard to provisional application could not be inferred or assumed. States needed to agree formally, explicitly and in writing that a treaty would apply provisionally. The word "may" in draft guideline 3 (General rule) was apt, because it reinforced the idea that the concerned States' agreement was completely voluntary.

43. Draft guideline 4 (Form of agreement) and the commentary thereto did not clarify the number of parties that needed to agree to the provisional application of a treaty through a resolution adopted by an international organization or by an intergovernmental conference. It was unclear whether a decision of an international organization or intergovernmental conference allowing the provisional application of a treaty would be binding on all States parties, even if that decision had not been unanimous.

44. In some places, there appeared to be a tension between the draft guidelines and the Vienna Convention on the Law of Treaties. According to paragraph (5) of the commentary to draft guideline 6, the formulation that provisional application produced a legally binding obligation to apply the treaty or part thereof as if the

treaty were in force did not imply that provisional application had the same legal effect as entry into force. Although in the draft guidelines the Commission attempted to apply several aspects of the law of treaties to the idea of provisional application, that provision showed clearly that the draft guidelines also addressed areas that were not covered by the Vienna Convention. For instance, the term "mutatis mutandis" had been used in paragraph 1 of draft guideline 7 (Reservations) and in paragraph 3 of draft guideline 9 (Termination and suspension of provisional application) in order to separate the provisional application regime from the general rationale of the Vienna Convention. That approach was risky: it encouraged legal uncertainty, because it failed to establish the extent to which the rules set out in the Vienna Convention would apply to various aspects of the provisional application of treaties.

45. In paragraph (2) of the commentary to draft guideline 7, it was recognized that there was a relative lack of practice in relation to provisional application of treaties. Moreover, as was correctly stated in paragraph (3) of the commentary to draft guideline 3, bilateral treaties constituted the vast majority of treaties that historically had been provisionally applied. Since it was acknowledged in the 2011 Guide to Practice on Reservations to Treaties that, strictly speaking, there were no reservations to bilateral treaties, a specific guideline on reservations in relation to the provisional application of treaties could cause confusion and legal uncertainty.

46. Lastly, in order to maintain consistency across the work of the Commission, draft guideline 8 (Responsibility for breach) should reflect, as far as possible, the concepts set out in the articles on responsibility of States for internationally wrongful acts, particularly articles 1 and 2.

47. *Mr. Biang (Gabon) took the Chair*.

48. **Mr. Mik** (Poland), addressing the topic of protection of the atmosphere, said that his delegation took note of the adoption by the Commission on first reading of 12 draft guidelines and commentaries thereto, including the three new draft guidelines 10, 11 and 12, on implementation, compliance and dispute settlement, respectively.

49. Draft guideline 10 did not sufficiently articulate the view that, under international law, States had broad discretion as to the means of fulfilling their international obligations, in accordance with their preferences. Draft guideline 11 raised significant concerns, as there was some inconsistency between the text and its title. It was clear from the first paragraph and the commentary that the principle referred to was that of the fulfilment of obligations in good faith, irrespective of their source in international law. However, in paragraphs 1 and 2, the term "compliance" was used only in respect of treaty obligations and thus limited the scope of the draft guideline more than was intended. Furthermore, it was surprising that the words "abide with" were used rather than "fulfil", which was the word used in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.

50. On the topic "Provisional application of treaties" and in reference to the draft guidelines adopted on first reading, he said that some reasonable period of notice as to when termination of provisional application would take effect needed to be introduced in draft guideline 9, paragraph 2, for the sake of the stability and predictability of treaty relations. Draft guideline 6 was also in need of a provision equivalent to article 70 of the Vienna Convention, to the effect that provisional application did not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.

51. Turning to the topic "Peremptory norms of general international law (*jus cogens*)" and the draft conclusions proposed by the Special Rapporteur, he said that, in draft conclusion 8, the forms of evidence of acceptance of a norm of general international law as a peremptory norm and the forms of *opinio juris* required for the emergence of customary norms were treated as being equal; that was potentially misleading. Given that the Commission was seeking to specify the contours, content and effects of *jus cogens*, it was questionable whether that provision was necessary. There was, in any case, no need for draft conclusion 14, on dispute settlement, since, as recently confirmed by the International Court of Justice in *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, States were free to choose the appropriate procedure for the resolution of their disputes.

52. Lastly, if the Commission accepted the inclusion of the reference to Security Council resolutions in the draft conclusions, a separate individual provision should be devoted to them. It was noteworthy, however, that the sanction proposed by the Special Rapporteur in cases where the binding resolutions of international organizations conflicted with *jus cogens* was different from that provided in the Vienna Convention, in respect of treaties.

53. **Mr. Yee** (Singapore) said that his delegation continued to support the Commission's work on the topic "Protection of the atmosphere" and recognized the

importance of international cooperation in that area, as reflected in the draft guidelines adopted on first reading, which it would be studying and commenting on in due course. It also continued to support the Commission's work on the provisional application of treaties, which was a tool of immense practical value in modern international life. More detailed comments on the draft guidelines adopted on first reading could be found in his delegation's statement available on the PaperSmart portal. The model clauses proposed by the Special Rapporteur to be included as an annex to the draft guidelines contained few examples involving Asian States; more could be done to represent the full diversity of State practice in that regard. For instance, the memorandum by the Secretariat reviewing State practice in respect of treaties (bilateral and multilateral), deposited or registered in the last 20 years with the Secretary-General, that provide for provisional application, including treaty actions related thereto (A/CN.4/707) referred to article 20.5 of the Trans-Pacific Strategic Economic Partnership Agreement as an example of provisional application of part of a treaty that applied to only one party to the Agreement. The Commission might wish to consider similar examples at its seventy-first session.

54. His delegation also appreciated the efforts made by the Commission to clarify the intrinsically complex topic of peremptory norms of international law (*jus cogens*), but felt that it was difficult to consider the draft conclusions proposed by the Special Rapporteur meaningfully in the absence of commentaries thereto. It welcomed draft conclusions 10 to 13, which duly reflected and were consistent with the Vienna Convention. Draft conclusion 14, however, was perhaps unnecessary, as it overlapped significantly with the procedures already established under that Convention. Moreover, the inclusion of a "without prejudice" clause served to confuse rather than clarify matters, since it introduced a procedure that was different from those set out in the Convention. It was not appropriate in a set of draft conclusions, given that the provision concerned a recommended procedure and was not a reflection of the state of international law. His delegation nevertheless appreciated the work as a whole and looked forward to further reflecting on the draft conclusions.

55. **Mr. Arrocha Olabuenaga** (Mexico), addressing the topic "Protection of the atmosphere" and the draft guidelines adopted on first reading, said that the draft guideline on national implementation of obligations relating thereto was in line with the mechanisms generally used by States to discharge their obligations under international law. The Special Rapporteur had rightly highlighted the existence of various compliance systems under a number of international instruments to which Mexico was a party. The draft guideline on peaceful settlement of disputes must be interpreted in accordance with Article 33, paragraph 1, of the Charter. His delegation agreed that the use of technical and scientific experts would be helpful and desirable in view of the highly specific nature of evidentiary requirements under such mechanisms, but that such use should be considered on a case-by-case basis.

56. Turning to the topic "Provisional application of treaties", he said that the 12 draft guidelines adopted on first reading embodied a pragmatic approach and that they would lend themselves, through their specific content, to easy use and consultation by the legal experts of States and international organizations. His delegation welcomed the addition of a draft guideline on reservations and of a third paragraph in draft guideline 9 to cover the possibility of termination and suspension of provisional application through breach of an obligation. Those additions served to ensure that the relationship of article 25 of the Vienna Convention to the other provisions of the draft guidelines was comprehensively addressed. It was also noteworthy that the adjustments made to the commentaries, particularly the commentary to draft guideline 6, resolved some of the questions raised by a number of delegations regarding the difference between the scope of obligations under a provisionally applied treaty and that of obligations under a treaty in force. His delegation remained in favour of a set of model clauses on provisional application and supported their inclusion in an annex to the draft guidelines, in which it hoped that they would be incorporated on second reading; they would be useful to States in negotiating international treaties.

57. On the topic of peremptory norms of general international law (*jus cogens*), his delegation welcomed the fact that most of the draft conclusions proposed by the Special Rapporteur were based on provisions of instruments adopted by the Commission, in particular the Vienna Convention, the articles on State responsibility for internationally wrongful acts and the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations. It supported the inclusion of a draft conclusion on the consequences of *jus cogens* norms for the general principles of law, so as to embrace all sources of international law; it was also in favour of addressing the topic of countermeasures, understood as precluding responsibility, and their relationship to *jus cogens* norms, in accordance with article 41 of the articles on State responsibility for internationally wrongful acts. His delegation would be attentive to how that topic would be linked to the topic of general principles of law.

58. His delegation welcomed the clarification that draft conclusion 10 did not render ineffective the rules of interpretation codified in the Vienna Convention. In draft conclusion 13, it needed to be made clear that the mere fact that a treaty reflected a *jus cogens* norm did not mean that any reservation to the treaty would be null and void. In draft conclusion 14, his delegation supported the recommendation that possible conflicts between a treaty and a *jus cogens* norm be submitted to the International Court of Justice. In draft conclusion 16, it would be advisable to use the term "unilateral declaration", rather than "unilateral act", to reflect the wording of the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations. Lastly, noting the suggestion to compile an illustrative list of *jus cogens* norms, he said that such a list would be very useful but should serve only to provide examples and not be exhaustive.

59. **Mr. Válek** (Czechia), addressing the topic "Protection of the atmosphere", said that the usefulness of adopting draft guidelines containing provisions frequently found in various treaties relating to the topic was questionable. Such provisions did not have any normative value of their own outside those treaties, nor did they have an autonomous life in international law. They were a corollary of substantive provisions of those instruments and could not operate in the absence of such provisions. Unlike the treaty instruments that served as their inspiration, the draft guidelines proposed by the Special Rapporteur rightly lacked substantive provisions, since the Commission did not possess the technical or scientific expertise needed to address the substantive problems of atmospheric degradation. The limits of the Commission's work on the topic were reflected in draft guideline 2, paragraphs 2 and 3.

60. It was stated in paragraph 1 of draft guideline 10 that national implementation of an international obligation might take the form of legislative, administrative, judicial or other action. Since that was simply a statement of a known fact, there was no reason to include that paragraph. Similarly, the statement in draft guideline 11, paragraph 1, that States were required to fulfil obligations under international law relating to the protection of the atmosphere in good faith was merely a repetition of what was already universally accepted for all international legal obligations. Paragraph 2 of that same draft guideline, in referring to facilitative and enforcement procedures available under relevant agreements, was again stating the obvious, namely, that such procedures could be used in accordance with those agreements. As for draft guideline 12, it seemed inappropriate to include a provision on dispute settlement in such draft guidelines. While technical or scientific experts had a role to play in certain situations, there was no need for them if the dispute concerned such issues as the validity of a treaty or the effects of a reservation.

61. Turning to the topic "Provisional application of treaties", he said that it was doubtful whether draft guideline 7 needed to be included in the draft guidelines adopted on first reading, since it might raise doubts about the integrity of the legal regime of reservations. As had been stressed at the time of elaborating the Guide to Practice on Reservations to Treaties, the regime of reservations was a single uniform regime applicable to all reservations, irrespective of the material content of a treaty provision in respect of which the reservation was formulated and irrespective also of whether such provision would or would not be provisionally applied. Inclusion of the words "mutatis mutandis" in paragraph 1 implied that the relevant provisions of the Vienna Convention were not directly applicable to reservations to treaty provisions that might be provisionally applied.

62. His delegation could not agree with such an assumption, since the reservation could be formulated before the action triggering provisional application was taken, in which case the standard provisions concerning reservations would apply directly, not mutatis mutandis, to such reservation. The real issue was not the moment when the reservation was formulated, as suggested by both paragraphs 1 and 2 of the draft guideline, but rather, the span of the reservation, namely, the limitation of the duration of the reservation to the duration of the provisional application of the treaty. The question was thus whether some treaty provisions were excluded from provisional application or whether their content was modified during their provisional application. Draft guideline 7, by focusing on the moment of formulation of a reservation to a provision to be provisionally applied, did not properly capture that issue. Lastly, his delegation welcomed the introduction, in draft guideline 9, of a new paragraph 1 and agreed both with its content and with its prominent place, as it addressed the most common scenario of termination of provisional application.

63. On the topic of "Peremptory norms of general international law (*jus cogens*)", given that the Special Rapporteur's approach was based primarily on references to doctrine rather than to international practice, a deeper analysis of relevant international and national case law and State practice would be appreciated, particularly in respect of the methodology used to identify peremptory norms. Furthermore, since *jus cogens* was a dynamic concept, the focus should be not on which norms had already acquired a peremptory character but rather on the processes through which the

peremptory character of the specific rule of international law could be ascertained. In conclusion, as some of the draft conclusions proposed by the Special Rapporteur overlapped with other topics that were being or had been considered by the Commission, the Commission should strive for a coherent and consistent approach in its work on all related topics.

Statement by the President of the International Court of Justice

64. **Mr. Yusuf** (President of the International Court of Justice), noting that, over the years, the Court had submitted numerous reports on its judicial activities to the General Assembly, said that those reports showed two emerging trends. The first was the substantial increase in the number of decisions rendered by the Court on the merits and on incidental proceedings. In the first ten months of 2018 alone, the Court had delivered two decisions on the merits, one judgment on compensation, one judgment on preliminary objections and two orders indicating provisional measures. The second trend was the growing diversity of the subject matter of the cases submitted to the Court. Besides traditional matters, such as territorial sovereignty and maritime delimitation disputes, the Court was increasingly seized of disputes pertaining to various other topics, such as human rights, diplomatic relations and environmental protection. As the only international court with general jurisdiction, the Court was competent to decide on all matters of international law, subject to the consent of the parties to the dispute. Over the previous century, the areas governed by international law had increased significantly. At the same time, the legal techniques used to regulate those areas had become more and more diverse, while scientific knowledge had continued to grow. States and international organizations relied on technological and scientific parameters to define the scope of their legal obligations, with the result that matters touching on complex scientific issues were increasingly falling within the jurisdiction of the Court *ratione materiae*. Two sets of examples illustrated that point.

65. In *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, the Court had had to decide whether the whaling programme conducted by Japan had been for "scientific purposes" under article VIII, paragraph 1, of the International Convention for the Regulation of Whaling, which allowed whales to be killed for such purposes. Other international conventions used scientific terms to define a legal concept, often giving a particular meaning to those terms. For example, article 76 of the 1982 United Nations Convention on the Law of the Sea set out the definition of the continental shelf beyond 200 nautical miles using scientific parameters.

66. The second set of examples concerned situations in which the facts of the dispute brought before the Court must be established in accordance with scientific principles and methodologies. In *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, the Court had had to determine whether the discharge of certain substances into the River Uruguay would pollute that body of water, in contravention of the obligations of Uruguay under the Statute of the River Uruguay. *Aerial Herbicide Spraying (Ecuador v. Colombia)* had raised similar issues.

67. In academic circles, such cases often raised the question whether the Court was well equipped to tackle disputes involving scientific or fact-intensive evidence. The legitimacy of that question rested on the very composition of the Court. Article 2 of its Statute, which set out the qualities required of members of the Court, did not require them to have recognized competence in scientific matters. However, under Article 50 thereof, the Court was empowered to appoint experts to allow it to take cognizance of scientific issues in cases before it. The use of such Court-appointed experts was an added value, as it allowed the Court to fully appreciate the scientific issues raised in some of the cases brought before it, without prejudice to the procedural rights of the parties.

68. In general, the disputing parties were the main providers of evidence in the cases brought before the Court. In *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, the Court had explained that, in accordance with the well-established principle of *onus probandi incumbit actori*, it was the duty of the party to establish the existence of any facts it asserted. To that end, parties had frequently relied on experts to address or elucidate controversial scientific issues. While party-appointed experts offered valuable assistance to the Court, the Court might still need to appoint its own experts under Article 50 of its Statute for two main reasons.

69. First, the practice of disputing parties not to call experts as witnesses, but rather to include them as counsel in their respective delegations had certain legal consequences under Article 42, paragraph 2, of that Statute. When experts appeared before the Court as counsel, they were not subject to cross-examination by the other party. Moreover, members of the Court could not directly cross-examine them either. As a result, the veracity of the statements made by such experts or their bearing on the decision of the Court remained untested. Since 2010, the Court had sought to encourage parties to call their experts as witnesses, rather than using them as counsel. In an *obiter dictum* in the *Pulp Mills* case,

the Court had explained that it would have found it more useful if experts had been presented by the parties as expert witnesses under articles 57 and 64 of the Rules of Court, instead of being included as counsel in their respective delegations during the oral hearings. According to the Court, those persons who provided evidence before the Court based on their scientific or technical knowledge and on their personal experience should testify before the Court as experts, witnesses or in some cases in both capacities, rather than counsel. Thus, they could be submitted to questioning by the other party as well as by the Court. Since that case, the Court had begun to issue letters, before the opening of hearings, requesting the parties to call as witnesses the experts cited in their written pleadings. That approach had been followed, for example, in *Whaling in the Antarctic*, and in the joined cases *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)* and *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*. The practice of experts appearing as counsel before the Court thus appeared to have come to an end.

70. Second, in their submissions before the Court, party-appointed experts tended to be more favourably disposed to the interests of the party that had appointed them. As should be expected, it would be strategically ill-advised for a State to call as a witness an expert who could undermine its case. While, however, the Court treated with caution evidentiary material specifically prepared for the purposes of a case, such as that presented by expert witnesses, it gave particular attention to reliable evidence acknowledging facts or conduct unfavourable to the State represented by the person presenting such evidence. Cross-examination could assist the Court in understanding the diverging views of party-appointed experts and was also useful for understanding the methodological differences underlying those views.

71. Notwithstanding the assistance of the parties, the Court might still need to draw its own conclusions on the scientific issues before it and rely on its own experts in such situations. In academic literature, scholars often claimed that the Court did not appoint experts under Article 50 because it relied on “ghost experts”, who were so called because their identity was not disclosed to the parties and their input in the decision-making process of the Court was not made available to the parties for comment. That criticism and the solution proposed to address it were based on a lack of familiarity with the work of the Court. Those persons were neither “ghosts” nor “experts” within the meaning of the Statute of the Court. They were in fact temporary Registry officials, appointed under Article 21, paragraph 2, of the Statute. The Registry of the Court played an important role in supporting the functioning of the Court, but its staff members did not submit reports, such that the question of submitting reports to the parties for comment did not arise. Like other Registry officials, they merely helped the Court to materialize and concretize its decisions and provided information to individual judges upon request.

72. It would be impossible to list *in abstracto* every circumstance under which the Court might need to appoint its own experts. It had exercised its power under Article 50 only on four occasions: in the *Corfu Channel (United Kingdom v. Albania)* case, during both the merits and compensation phases; in *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/ United States of America)* and, most recently, in *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)*.

73. The fact that the Court had not exercised that power for more than 40 years had given rise to allegations that it was reluctant to appoint experts. Those criticisms had been not only external; they had also come from the Bench itself, in the form of separate or dissenting opinions. He himself, for instance, had stated in the *Pulp Mills* case that the Court should have had recourse to expert assistance to help it gain a more profound insight into the scientific and technical intricacies of the evidence submitted by the parties, particularly with regard to the possible impact of the effluent discharges of the Orion (Botnia) mill on the living resources, quality of the water and the ecological balance of the River Uruguay. Other judges had drawn attention to the need to appoint experts much earlier. For example, Judge Wellington Koo had done so in *Temple of Preah Vihear (Cambodia v. Thailand)* in 1960.

74. The Court should be guided by two elements when determining whether or not to appoint experts under Article 50 of its Statute: Article 38 of the Statute, which set out the function of the Court, and fundamental principles of international procedure.

75. Article 38 of the Statute, which provided that the Court’s function was to decide in accordance with international law such disputes as were submitted to it, had two consequences for the appointment of experts by the Court. First, it was for the members of the Court, not the experts, to settle the disputes submitted to it. The appointment of experts by the Court must not result in an outsourcing of its judicial function to those experts. Thus, the Court had explained in the *Pulp Mills* case that: “Despite the volume and complexity of the factual information submitted to it, it is the responsibility of the

Court, after having given careful consideration to all the evidence placed before it by the Parties, to determine which facts must be considered relevant, to assess their probative value, and to draw conclusions from them as appropriate. Thus, in keeping with its practice, the Court will make its own determination of the facts, on the basis of the evidence presented to it, and then it will apply the relevant rules of international law to those facts which it has found to have existed." The second consequence was that the Court would appoint experts only when they were necessary for its decision on the case. Referring to Article 50 of the Statute, the Court had explained in the case concerning the *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) (Tunisia v. Libyan Arab Jamahiriya)* that that provision must be read in relation to the terms in which jurisdiction was conferred upon the Court in a specific case; the purpose of the expert opinion must be to assist the Court in giving judgment upon the issues submitted to it for decision.

76. To illustrate the point, he said that in situations in which the Court might need to appoint its own experts under Article 50 of its Statute, States could generally bring two types of claims before the Court: "violation claims" and "legal situation claims". In the former, one State argued that another State had breached its international obligations and asked the Court to determine that State's international responsibility. In the latter, the Court was asked to declare the existence or extent of the rights of the parties, such as in territorial and maritime disputes.

77. To establish the responsibility of a State for a breach of international law for the purposes of "violation claims", the Court must first ascertain the existence of a breach of international law; the attribution of that breach to a State; and the non-existence of any relevant circumstances precluding the wrongfulness of that breach. It must then determine the consequences arising from the internationally wrongful act, especially the payment of compensation. The Court might need to appoint an expert to establish each of those four hypotheses, which corresponded to four key elements under the law of State responsibility.

78. To illustrate the first hypothesis, in which scientific expertise was required to ascertain a fact which, if proven, would establish the breach of a State's obligations under international law, he referred to recent environmental cases in which the Court had had to determine which kinds of substances discharged into a river, and in what amount, would entail the breach of treaty obligations. In one such case, *Construction of a Road in Costa Rica along the San Juan River*, the Court had had to decide whether sediments deposited in the San Juan River could be characterized as causing environmental damage. Since judges did not necessarily have the requisite skills to determine whether and when such substances might cause environmental damage, or in what amount, the role of an expert could be crucial.

79. An illustrative example of the second hypothesis, in which scientific expertise was needed to establish a fact which, if proven, would establish the attribution of an international wrongful act to a State, was the *Corfu Channel* case, which had arisen from the destruction of British naval vessels owing to mines laid in the Corfu Channel. In that case, the Court had appointed a committee of three experts, tasked with examining, among other things, the available information regarding "the means employed for laying the minefield discovered on November 13th, 1946, and ... the possibility of mooring those mines with those means without the Albanian authorities being aware of it, having regard to the extent of the measures of vigilance existing in the Saranda region". The committee had found that the mines could not have been laid without Albania being aware, and the Court had held Albania responsible for breach of its duty of due diligence. In that hypothesis too, the role of an expert could be instrumental.

80. The third hypothesis concerned the appointment of experts to determine the existence of a circumstance precluding international wrongfulness. In *Gabčikovo-Nagymaros Project (Hungary/Slovakia)*, Hungary had invoked a "state of ecological necessity" to justify the non-compliance with its obligations under the 1977 treaty concerning the construction and operation of the Gabčikovo-Nagymaros System of Locks. Despite the impressive amount of scientific material submitted by the parties, the Court had not found it necessary to determine whether such a state of ecological necessity effectively existed. For the Court, Hungary had not, at any rate, satisfied the conditions for invoking a state of necessity as a circumstance precluding wrongfulness in international law under the law of State responsibility. For the Court, Hungary would not have been permitted to rely upon that state of necessity to justify its failure to comply with its treaty obligations, as it had helped, by act or omission, to bring it about. Under those circumstances, the Court had not considered it necessary to have recourse to the services of experts.

81. The fourth and final hypothesis related to the obligation to pay compensation and the assessment of the appropriate amount of compensation. The assessment of the extent of the damage, as well as that of the contribution of various factors to such damage,

was not an easy exercise. Notably, when the Court had appointed experts to assess damages in the *Corfu Channel* case, it had observed that the estimates and figures submitted by the Government of the United Kingdom had raised questions of a technical nature calling for the application of Article 50 of the Statute.

82. Turning to the second type of claims, namely "legal situation claims", he said that, in such cases, the use of Court-appointed experts might be important for assessing facts that could create legal situations and respective entitlements. For example, States might disagree as to whether a given maritime feature was an island or a low-tide elevation under the 1982 United Nations Convention on the Law of the Sea and might rely on different measurements and techniques to determine whether that maritime feature was above the water level at high tide. In *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, the dissenting judge ad hoc, Torres Bernárdez, had expressed regret that the Court had not appointed its own experts to determine whether or not Qit'at Jaradah was an island or a low-tide elevation.

83. A second example concerned the Court's 2018 decision in the case concerning *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)*, in which the Court had exercised its power under Article 50 of the Statute. In its 2015 judgment, the Court had interpreted the 1858 Treaty of Limits between Costa Rica and Nicaragua as providing that the territory under the sovereignty of Costa Rica extended to the right bank of the Lower San Juan River as far as its mouth in the Caribbean Sea. However, in the absence of detailed information provided by the parties, the Court had left the geographical situation of the area in question somewhat unclear with regard to the configuration of the coast of Isla Portillos. To reach its decision on the merits in 2018, the Court had appointed two experts under Article 50 of the Statute. In the light of the findings of those Court-appointed experts, the Court had determined that Costa Rica had sovereignty over the whole of Isla Portillos up to where the river reached the Caribbean Sea. As a consequence, it had found that the starting-point of the land boundary between Costa Rica and Nicaragua was the point at which the right bank of the San Juan River reached the low-water mark of the coast of the Caribbean Sea. The Court had identified that point as currently located at the end of the sandspit constituting the right bank of the San Juan River at its mouth.

84. In addition to Article 38 of the Court's Statute, there were two general principles of procedure that might influence the Court's decision to appoint experts: the principle *iura novit curia* and the principle of equality of arms. The principle that "the Court knows the law", *iura novit curia*, limited the situations in which the Court might need to appoint experts. In its 1974 judgment in the *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)* case, the Court had described the significance of that principle in the following terms: "The Court, however, as an international judicial organ, is deemed to take judicial notice of international law and is therefore required in a case falling under Article 53 of the Statute, as in any other case, to consider on its own initiative all rules of international law which may be relevant to the settlement of the dispute. It being the duty of the Court itself to ascertain and apply the relevant law in the given circumstances of the case, the burden of establishing or proving rules of international law cannot be imposed upon any of the Parties, for the law lies within the judicial knowledge of the Court." It was therefore for the Court to interpret treaties in the cases submitted to it. Since the Court knew the law, it could not outsource its judicial function to experts. That applied even in situations where treaties expressed the parties' legal obligations using scientific parameters.

85. The Court had followed that approach in *Whaling in the Antarctic*, where it had been requested to decide whether the whaling programme conducted by Japan had been for the purposes of scientific research, as set forth in the International Convention for the Regulation of Whaling. The Court had considered the issue to be one of treaty interpretation. It had held that as a matter of scientific opinion, the experts called by the parties had agreed that lethal methods could have a place in scientific research, without necessarily agreeing on the conditions for their use. The Court had nevertheless insisted that their conclusions as scientists must be distinguished from the interpretation of the Convention, which was the task of the Court. Since the Court had construed the question at stake as a matter of legal interpretation, it had not deemed it necessary to appoint experts to decide whether or not the programme conducted by Japan had in fact been for the purposes of scientific research. That decision had been controversial. Some members of the Court had felt that the terms of article VIII, paragraph 1, of the International Convention referred either to another field of knowledge or to pure questions of fact. For those judges, the Court needed to appoint its own experts to determine whether or not the research programme had been conducted for scientific purposes. However, a decision of the Court must be respected by all members of the Court.

86. The second principle of procedure that might influence the Court's decision to exercise the power to appoint experts was the principle of equality of arms,

since the exercise by the Court of that power interfered with the allocation of the burden of proof between the parties. That was particularly so with regard to the maxim *onus probandi incumbit actori*, which stemmed from the principle of equality of arms. Thus, the Court had to ensure that the presence of Court-appointed experts did not tilt the balance in favour of one party or the other.

87. Four scenarios were possible in that regard, depending on the conduct of the parties to the dispute. In the first, the parties did not disagree on the scientific evidence or their disagreement was not material. In such circumstances, the Court might not need to appoint experts under Article 50. According to Judge Keith, who had voted with the majority in the *Pulp Mills* case, those factors had weighed in the Court's decision not to appoint experts in that case. The question remained, however, whether the absence of a material disagreement between the disputing parties to the case would always be dispositive. Perhaps the Court should not be dissuaded from appointing its own experts when the case concerned global commons, such as the environment. In such cases, rules of international law not only protected the interests of the parties, but also those of their populations, and, in the case of certain ecosystems, those of humanity as a whole. In general, there was no reason why the Court should not do so, especially if it secured sufficient funding from the General Assembly for that purpose.

88. In the second scenario, the parties had a material disagreement on the scientific evidence and the Court needed to make a finding on that point in order to decide the case. In such an event, appointing experts under Article 50 would be useful to allow those experts to engage with the information provided by the experts appointed by the parties. It would also be useful to obtain the parties' reactions to any reports on scientific evidence produced by the Court-appointed experts. The procedure set forth in articles 67 and 68 of the Rules of Court had been designed to ensure respect for the principle *audi alteram partem*, but also to allow the Court to obtain the information needed to make its decision.

89. The third scenario arose when one of the parties to the dispute decided not to appear before the Court. While that had a negative effect on the sound administration of justice, it did not end the proceedings before the Court. Article 53 of the Statute provided that, in such cases, the other party could call upon the Court to decide in favour of its claim. It further provided that, before doing so, the Court must satisfy itself, not only that it had jurisdiction in accordance with Articles 36 and 37, but also that the claim was well founded in fact and law.

90. As far as the law was concerned, the Court had explained in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* that the principle *iura novit curia* signified that the Court was not solely dependent on the argument of the parties before it with respect to the applicable law. Consequently, the absence of one party had less impact in that regard. However, non-appearance raised problems relating to the production of evidence and its examination, both of which tasks fell on the parties under the maxim *onus probandi incumbit actori*. In such cases, Article 53 of the Statute obliged the Court to employ whatever means and resources might enable it to satisfy itself whether the submissions of the applicant State were well founded in fact and law, and simultaneously to safeguard the essential principles of the sound administration of justice. As part of its inquiries, the Court might therefore decide to appoint experts under Article 50. In the *Corfu Channel* case, the Court had emphasized the non-appearance of Albania in the last phase of the case and the technical character of the determination of the damages to be paid. Both those factors had been important in justifying its decision to appoint experts to quantify the damage to be paid for the destruction of the British warships.

91. The fourth scenario concerned situations in which the parties jointly requested the Court to appoint experts. That had happened in the *Gulf of Maine* case, heard by a Chamber of the Court under article II of the Special Agreement between Canada and the United States. In that case, the Court had appointed Commander Peter Bryan Beazley, who had been jointly nominated by the parties, relying for that purpose on its power under Article 50 of the Statute. It was important to note, however, that, under Article 50, the appointment of experts was a power of the Court, and not of the parties. The expert had not been appointed to establish some scientific fact or its scientific meaning; rather, he had been tasked with assisting the Chamber in describing the geographical coordinates of the boundary and in depicting that boundary on charts. The Court would normally rely on the Registry to perform such a task. However, nothing prevented the parties from making available to the Court persons familiar with the peculiarities of their request. Even in such cases, it was still for the Court itself to determine whether such experts would be useful in its decision-making process.

92. In view of the great scientific progress made over the past century, which had revolutionized the way that issues were addressed both in international relations and in everyday life, it was not surprising that science had

had an impact on international law and affected the work of the International Court of Justice. However, the Court was not the arbiter of scientific issues. Within the scope of its contentious jurisdiction, the Court was charged with deciding disputes brought to it on the basis of law. It was only when scientific evidence was relevant to the decision-making process and that evidence had not been adequately provided by the parties that the Court might exercise its power to appoint its own experts.

93. The practice of the Court over the years clearly showed that it had not been reluctant to deal with scientific evidence. Rather, it had tried to exercise its function within the bounds of its Statute, while respecting the fundamental principles of international adjudication. Nevertheless, the law was not an island unto itself: it affected, and was in turn affected by, other disciplines. Its application was undoubtedly influenced increasingly by scientific and technological changes. The Court could not remain oblivious to those realities and must continue to assess the extent to which its work might benefit from the introduction of outside experts, bearing in mind the various factors involved. He concluded by commending the drafters of the Statute of the Court for their foresight in providing for that possibility, under its Article 50.

94. Looking ahead, he said that the annual visit of the President of the International Court of Justice should become an occasion for an effective dialogue and exchange of ideas with members of the Sixth Committee. In future, an effort could be made to inform the members in advance of the theme of the President's presentation, to enable them to prepare for such a dialogue. The presentation could also be made more relevant to the discussions on the report of the International Law Commission by bringing to bear the views, experience and case law of the Court on one or two of the topics covered in the report. He hoped that those new lines of approach would be followed as from 2019.

95. **Mr. Horna** (Peru) said that his delegation had greatly appreciated the presentation by the President and welcomed the new practice introduced in the Court concerning the participation of its members in arbitration cases between States. His delegation also welcomed the proposals regarding future presentations by the President to the Committee.

96. **Ms. Jacobsson** (Sweden) concurred and said that her delegation particularly appreciated the generosity shown by the President in proposing a new method for future presentations to the Committee. The issues raised were of such importance that it would be extremely useful to be able to ponder them in advance. Moreover, as a former member of the International Law Commission, she was sure that members of both the Commission and the Sixth Committee welcomed the proposal to link the presentation more closely to the Commission's work.

97. **The Chair**, speaking on behalf of the Committee, thanked the President for his presentation, which had comprehensively addressed a number of important issues, and welcomed the proposal to communicate the theme of the presentation to members in advance.

The meeting rose at 1 p.m.