Provisional

For participants only

22 May 2023

Original: English

International Law Commission

Seventy-fourth session (first part)

Provisional summary record of the 3613th meeting

Held at the Palais des Nations, Geneva, on Tuesday, 25 April 2023, at 3 p.m.

Contents

Present:

Temporary Chair:	Mr. Vázquez-Bermúdez
Chair:	Ms. Oral
Members:	Mr. Akande
	Mr. Argüello Gómez
	Mr. Asada
	Mr. Fathalla
	Mr. Fife
	Mr. Forteau
	Mr. Galindo
	Ms. Galvão Teles
	Mr. Grossman Guiloff
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Mr. Lee
	Ms. Mangklatanakul
	Mr. Mavroyiannis
	Mr. Mingashang
	Mr. Nesi
	Mr. Nguyen
	Ms. Okowa
	Mr. Ouazzani Chahdi
	Mr. Paparinskis
	Mr. Patel
	Mr. Reinisch
	Ms. Ridings
	Mr. Ruda Santolaria
	Mr. Sall
	Mr. Savadogo
	Mr. Tsend

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 3.15 p.m.

Opening of the session

The Temporary Chair declared open the seventy-fourth session of the International Law Commission.

Election of officers

The Temporary Chair, noting that, according to the system of rotation among regional groups, the Chair for the seventy-fourth session was to be a national from Western European and other States, said that both Ms. Oral and Ms. Galvão Teles had been nominated, with the proposal that Ms. Oral should serve as Chair during the first part of the session and Ms. Galvão Teles during the second part. The proposed arrangement was of an exceptional nature and was not intended to create a precedent or new practice. However, it reflected the United Nations Gender Parity Strategy, which promoted the leadership of women throughout the Organization. He took it that the Commission wished to elect Ms. Oral to chair the Commission during the first part of the session.

Ms. Oral was elected Chair by acclamation.

Ms. Oral took the Chair.

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

Mr. Vázquez-Bermúdez was elected First Vice-Chair by acclamation.

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

Mr. Paparinskis was elected Chair of the Drafting Committee by acclamation.

Mr. Nguyen was elected Rapporteur by acclamation.

Introductory remarks by the Chair

The Chair said that, after the disruption caused by the coronavirus disease (COVID-19) pandemic, she was pleased that the full Commission was once again able to meet in person. She extended a particularly warm welcome to the newly elected members and looked forward to working with them. She had no doubt that, with its usual spirit of collegiality, the Commission would make a success of the work before it.

Adoption of the agenda (A/CN.4/754)

The provisional agenda was adopted.

Programme, procedures and working methods of the Commission and its documentation (agenda item 8)

The Chair said that the public meetings of the Commission would be webcast via United Nations Web TV and would thus be recorded and publicly available. For closed meetings, including meetings of the Drafting Committee, the Study Group on sea-level rise in relation to international law, the Planning Group, the Working Group on methods of work and the Working Group on the long-term programme of work, video links would be made available for Commission members and secretariat staff who wished to follow the proceedings remotely. However, unlike during the pandemic, when meetings had been conducted in a hybrid format, those attending online would not be able to play an active part in meetings. It was proposed that the Commission should maintain the 20-minute time guideline for statements delivered in plenary meetings, a practice that had been introduced during the pandemic. That guideline would not apply to statements delivered by the Special Rapporteur for the topic in question or the Chair of the Drafting Committee. She took it that the Commission agreed to the proposed working methods.

It was so decided.

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

The Chair drew attention to the proposed programme of work for the first part of the Commission's current session, which would begin with the consideration of the topic "Settlement of international disputes to which international organizations are parties" by the plenary Commission. In addition, the topic "Sea-level rise in relation to international law" would continue to be considered by the corresponding Study Group and the Drafting Committee would finalize the draft conclusions under the topic "General principles of law" to enable the Commission to complete the first reading of the text. The Commission would then take up the new topics "Prevention and repression of piracy and armed robbery at sea" and "Subsidiary means for the determination of rules of international law". In line with the practice of the Commission, the proposed programme of work would be applied with the necessary flexibility. She took it that the Commission agreed to the proposed programme of work for the first part of the session.

It was so decided.

Settlement of international disputes to which international organizations are parties (agenda item 5) (A/CN.4/756)

Mr. Reinisch (Special Rapporteur), introducing his first report on the topic "Settlement of international disputes to which international organizations are parties" (A/CN.4/756), said that the topic had been placed on the Commission's long-term programme of work in 2016. The Commission had dealt with topics concerning international organizations on three previous occasions. It had embarked on the topic "Relations between States and international organizations" in the 1960s and had divided the topic into two parts, focusing first on the status, privileges and immunities of representatives of States to international organizations and then on the status, privileges and immunities of international organizations and their officials, experts and other persons engaged in their activities who were not representatives of States. Consideration of the second part of the topic had been discontinued in 1992, though the related topic "Jurisdictional immunity of international organizations" had been on the Commission's long-term programme of work since 2006.

The Commission had further addressed matters concerning international organizations in its draft articles on the law of treaties between States and international organizations or between international organizations, and the corresponding commentaries. Having been concluded in 1982, the work on that topic had ultimately led to the adoption of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. Lastly, the Commission had dealt extensively with international organizations in its articles on the responsibility of international organizations, adopted in 2011.

Although questions of dispute settlement had not been addressed directly under those topics, they had played a certain role. For instance, the 1986 Vienna Convention provided for arbitration and conciliation as dispute settlement techniques in the case of disputes concerning the invalidity, termination, withdrawal from or suspension of a treaty; the draft articles on the representation of States in their relations with international organizations provided for conciliation in the case of disputes between a sending State, a host State and an international organization; and the work on the status, privileges and immunities of international organizations had specifically addressed questions of capacity to institute legal proceedings in domestic courts and invoke immunity before such courts.

In addition to those specific excursions into the field of dispute settlement, the conclusion of treaties by international organizations and the responsibility of international organizations had an even more important underlying connection to dispute settlement. Both were premised on the notion that international organizations had an existence that was separate from that of their members. That implied that international organizations could enter into treaties and incur responsibility for violating international legal obligations. The Commission's work on the status of international organizations had also concluded that such organizations could assume obligations under domestic law and incur liability for breaching such law. As the existence and extent of such obligations and, possibly, responsibility were often unclear, disputes could arise in that regard. Tackling the topic of settlement of

international disputes to which international organizations were parties therefore seemed to be a logical continuation of the Commission's previous work. At the same time, it was a novel topic that had not been sufficiently addressed in the past.

A review of the previous work of other bodies dealing with the progressive development and codification of international law led to similar findings. As detailed in his first report, the Institute of International Law, the International Law Association, the Committee of Legal Advisers on Public International Law of the Council of Europe and the Inter-American Juridical Committee, *inter alia*, had dealt with specific aspects of disputes involving international organizations, ranging from judicial review of resolutions or other acts of international organizations and disputes arising from contracts concluded by international organizations to procedures for assigning liability for damage caused by operational activities of international organizations. However, none of those studies had comprehensively dealt with disputes to which international organizations were parties. The Commission should therefore take the opportunity to embark on a broad legal analysis in that regard.

In respect of the scope of the topic, it was important to decide what kinds of disputes and forms of dispute settlement should be addressed and whether the topic should encompass any organization operating internationally, including non-governmental organizations and business entities, or should be confined to a more limited concept of international organizations.

The wording used by the Commission in 2022 when deciding to work on the topic referred to the settlement of international disputes to which international organizations were parties. When proposing the topic, Sir Michael Wood had suggested that the Commission could decide whether the scope should include certain disputes of a private law character, which might go beyond a narrow understanding of "international" disputes. The initial views expressed on that issue by States at the seventy-seventh session of the General Assembly had clearly shown that the prevailing view was to support the inclusion of disputes of a private law character. In deciding to include the topic on its programme of work, the Commission had clarified that "considering the importance of such disputes for the functioning of international organizations in practice, it was presumed that the Special Rapporteur and the Commission would take such disputes into account".

He was of the view that the scope should cover all forms of disputes, including those of a private law character, to which international organizations were parties. Disputes with member States and host States, but possibly also those with third States or other international organizations, would fall under the category of international disputes. Disputes with private parties would normally be considered disputes of a private law character, often in the form of contractual or delictual/tort disputes. However, they also raised important issues of international law, such as legal personality, jurisdictional immunity or the often treaty-based obligation to make provision for appropriate modes of settlement of disputes of a private law character. He thus suggested that disputes of a private law character should be included in the Commission's work on the topic.

As to the outcome of the work on the topic, since specific forms of dispute settlement were often regulated, sometimes very specifically, in constituent instruments, headquarters agreements, multilateral treaties or even contractual arrangements, a uniform outcome in the form of a draft treaty might not be appropriate. Given that the Commission's major contribution to the topic under discussion would lie in analysing the *status quo*, on the one hand, and making careful recommendations for the settlement of disputes of various types, on the other, he proposed that the most appropriate outcome would be a set of guidelines. He was, however, open to discussion on the matter and to the possibility of subsequently returning to the question of the final outcome, as had been done with a number of topics in the past.

Definitions, addressed in chapter III of the first report, were crucially linked to the scope of the topic. The Commission's deliberations on definitions of the core elements of the topic – international organizations, disputes and dispute settlement – would determine the scope of the work and the resulting definitions would form part of the suggested first set of guidelines.

International organizations had, to some extent, become almost ubiquitous, and their existence and relevance for over 100 years was such a self-evident fact that a definition might appear superfluous. However, since the colloquial use of the term "organization", when coupled with the adjective "international", could denote a number of entities, generally constituted under national law, that operated at an international level, such as non-governmental organizations or transnational corporations/multinational enterprises, and it was not intended that such entities should form part of the topic, it appeared necessary to define what was meant by international organizations. The Commission had attempted to do so in the past, and the resulting definitions had been refined over time. The topic thus presented a unique opportunity to continue that trend and to reconcile the rather pragmatic approach reflected in the Commission's previous definitions with the prevailing theoretical approaches of scholarship in the field.

As outlined in the report, there seemed to be broad convergence on the core features of international organizations, which were regarded as entities, usually consisting of States, and sometimes also international organizations, that had been established by instruments governed by international law, usually treaties, and had at least one organ able to express the organization's will in order to fulfil tasks entrusted to the organization by its members. In most cases, those typical characteristics would be present and it would be easy to identify entities as international organizations. In borderline cases, however, a definition of the term would be important for determining whether a specific entity should be regarded as an international organization covered by the topic.

In most of its previous work, the Commission had referred to "international organizations" as "intergovernmental organizations". Corresponding definitions were included in the two Vienna Conventions on the Law of Treaties, of 1969 and 1986, and were also found in the 1975 Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character, as well as in the 1978 Vienna Convention on Succession of States in respect of Treaties, all of which simply stated that "'international organization' means an intergovernmental organization". Although that definition seemed sufficient to exclude non-governmental organizations from its scope, as early as 1982, the Commission's report had noted that "the Commission has wondered whether the concept of international organization should not be defined by something other than the 'intergovernmental' nature of the organization".

The limited usefulness of "intergovernmental" as a defining criterion was also referred to in the commentaries to the Commission's articles on the responsibility of international organizations, adopted in 2011, which stated that "the term 'intergovernmental' is in any case inappropriate to a certain extent, because several important international organizations have been established with the participation also of State organs other than Governments … an increasing number of international organizations include among their members entities other than States". The definition in those articles further noted that such organizations might "include as members, in addition to States, other entities". It also emphasized the specific nature of the constituent documents of international organizations by referring to treaties or other instruments governed by international law.

Although the 2011 articles did not explicitly include the requirement that organizations should possess at least one organ – a requirement, arguably, inherent in the notion of an organization – they contained a definition of an "organ of an international organization", thus suggesting that organs were a constituent feature of international organizations. Lastly, although the 2011 definition of an international organization stressed possession of its own international legal personality, the commentary revealed that such possession might not necessarily mean that international legal personality should be considered a prerequisite or defining element of an international organization, but could, rather, be regarded as a consequence of an international organization's ability to express a will that was distinct from that of its members and was usually expressed by its organs.

He therefore suggested that the Commission should build on its previous definitions of international organizations and integrate the elements that were generally accepted as constituent for international organizations: first, a membership consisting mostly of States and sometimes also other entities, such as, most often, international organizations; second, establishment by a treaty or other instrument governed by international law; and third,

possession of organs capable of expressing a will of the organization that was distinct from that of its members.

The proposed definition corresponded largely to the 2011 definition in the articles on the responsibility of international organizations, integrating all the constituent elements into one sentence. It gave States and other entities – the members of organizations – a more prominent place by clarifying that they could establish organizations, and explicitly integrated the constituent requirement for organizations to possess at least one organ, thereby avoiding the partly circular definition of "international organizations" as "organizations". It further added language indicating that organs must be capable of expressing an organization's distinct will, replacing the reference to an organization's possession of international legal personality. The Commission seemed to have accepted the idea that international legal personality might be less a prerequisite or defining element than a consequence of an international organization's ability to express its own will, and that idea was thus formulated more prominently in the proposed definition.

A definition of "dispute" was also needed. As explained in paragraph 65 of the report, the notion of a "legal dispute" was understood in the case law of the International Court of Justice as being "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons". While the majority of disputes relevant in the context under consideration would be such legal disputes, it seemed advisable not to exclude at the outset disputes concerning policy decisions or more political disputes. It was thus suggested that a broad notion of disputes should be adopted. The proposed definition built on the Court's notion of "legal disputes" and widened it to include disputes other than purely legal ones, which might often be subject to alternative forms of dispute settlement.

Concerning the definition of "dispute settlement", it was generally considered that the methods of dispute settlement mentioned in Article 33 of the Charter of the United Nations – negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, and other peaceful means of solving disputes – reflected the available methods of peaceful dispute settlement. They were considered to be available not only to States, but also to international organizations, and not only for disputes that were likely to endanger international peace and security. In view of the limited availability of arbitration or judicial settlement of disputes involving international organizations, other alternative forms of dispute resolution might be particularly important. It would therefore be useful to define dispute settlement on the basis of those generally accepted forms mentioned in the Charter. The resultant proposed definition closely followed the text of Article 33 of the Charter. It was broad enough to refer to any disputes and was sufficiently flexible, as it also referred to other peaceful dispute settlement methods. While it was expected that the Commission's consideration of the topic would mostly scrutinize judicial and quasi-judicial dispute settlement methods, the proposed definition was wide enough to cover more political forms of dispute settlement.

Thus, the proposed definitions of the three core elements, together with a proposed text on the scope of the topic, were presented in paragraph 83 of the report as proposed guidelines, with "guidelines" itself a proposal open to discussion. He would welcome comments, reactions and suggestions in respect of the report.

Mr. Forteau, welcoming the new members of the Commission, with whom he would have the pleasure of working over the new quinquennium, said that he was particularly pleased to note that the vast majority of the members were able to work in French, a fact that he hoped would revitalize multilingualism in the Commission's work, particularly in the Drafting Committee, where multilingualism had been declining in recent years. Multilingualism was vital for ensuring the richness and legitimacy of the Commission's work. In that regard, it was regrettable that the documents for the current session had been made available in languages other than the original (English or French) either only a few days before the beginning of the session, or not at all. While he was aware that the Codification Division was doing its best to overcome that situation, he regretted that source of inequality between the working languages and between Commission members.

Turning to the Special Rapporteur's first report, he praised its quality and its clear and methodical approach. The broad range of doctrinal references – to Brazilian, English, French, German or Spanish sources – reflected a wide variety of legal languages and traditions. He

had included, in the written version of his own statement, footnotes containing additional references in French that might be of interest in the further development of the work, such as the 1998 thesis by Pierre Klein, whose conclusions remained relevant, and a 2011 book by Stéphanie Bellier on recourse to arbitration by international organizations. As to examples and precedents that should be carefully considered, the original example of the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea, which had jurisdiction over disputes, including contractual disputes, with respect to activities in the international seabed area, could serve as a source of inspiration.

The Special Rapporteur's first report was mainly of an exploratory and preliminary nature; so, too, were the current observations on the report. With regard to scope and purpose, whose delimitation was essential for drafting the first guideline and identifying the compass that should guide the work on the topic, care must first be taken to delineate the area covered by the topic at hand from that covered by the law of responsibility. Some aspects, such as the question of *jus standi* or that of the admissibility of claims, which was addressed in detail in the 2016 syllabus, related to both subjects. He was of the view that the Commission's work should be limited to the question of dispute settlement alone. He also considered that it should be based on the Commission's previous work on the law of international responsibility, without calling into question what the Commission had already established on the subject.

Secondly, and more importantly, it would be necessary to determine how the topic related to the law of immunities. The fact that an international organization enjoyed jurisdictional immunities had consequences for the settlement of disputes in which it was involved. While the question of immunities was raised several times in the report, the Special Rapporteur did not address its relationship to the current topic directly, and the 2016 syllabus was equivocal on that point. The most difficult question appeared to be to what extent an international organization could continue to rely on its jurisdictional immunity when it had not itself established appropriate means of dispute settlement. For example, in January 2005 the French Court of Cassation had rejected the immunity of an international organization on the grounds that it had not provided any means of settling disputes with its staff. There appeared to be a similar trend in inter-American practice, according to paragraph 9 of the report. That aspect of the subject merited a detailed examination and would presumably constitute the most difficult issue: the Commission would need to strike a satisfactory balance between maintaining immunity where it was legitimate and avoiding the denial of justice.

According to paragraph 17 of the report, only limited use was made of procedures for the third-party settlement of disputes to which international organizations were parties. The question facing the Commission was whether it simply wished to take note of that situation or whether it wished to propose solutions that would encourage recourse to binding modes of dispute settlement, at least when the dispute concerned a private person. He was personally inclined towards the latter course of action. The advisory opinion of the International Court of Justice of 1 February 2012, concerning an appeal against an international organization, was important in that respect. In it, the Court noted "the development of the principle of equality of access to courts and tribunals since 1946" and observed that, according to the Human Rights Committee, "that right to equality guarantee[d] equal access and equality of arms". The Court further stated that "the present-day principle of equality of access to courts and tribunals" flowed from the principle of equality between the parties and that "that principle must now be understood as including access on an equal basis to available appellate or similar remedies unless an exception [could] be justified on objective and reasonable grounds". Of course, that principle must be reconciled with the need to protect international organizations from actions that could undermine their independence and mission. But it also meant that some way must be found to better reconcile jurisdictional immunity and access to justice when an international organization was a party to an international dispute with a private person. The lack of a truly effective remedy in the case of the cholera outbreak in Haiti in 2010 or, years earlier, in the case concerning the United Nations Interim Administration Mission in Kosovo (UNMIK) was not compatible with the principles of the rule of law that the United Nations regularly proclaimed.

Thirdly, it was important for the Commission to agree on what the word "international" meant in the title of the topic. He was surprised to see that the proposed draft guideline 1 referred to "disputes" in general, not only to the "international" disputes referred to in the

title. The Special Rapporteur seemed to consider, in paragraph 30 of the report, that a dispute would necessarily be international as long as it involved an international organization, regardless of whether the dispute was one of domestic or international law. Similarly, paragraph 24 seemed to suggest that all private law disputes should be included in the topic, whereas the 2016 syllabus was more cautious: it only questioned "whether certain disputes of a private law character" might be covered under the topic – "certain" disputes, not all. That was why the title of the topic referred to "international" disputes.

It should be recalled that an international organization could act as both a subject of international law and a subject of domestic law. The topic could be limited to disputes that involved the international organization acting as a subject of public international law, whether with respect to States, other international organizations or private persons, as in the case of a dispute over damage caused to third parties by a peacekeeping operation or, to take a concrete example, the case of complaints filed by private persons against the European Border and Coast Guard Agency (Frontex) in matters of migration. On the other hand, disputes that were subject only to domestic law, such as a dispute over a contract for the purchase of pens or a contract for the lease of a building, could be excluded from the topic.

A more difficult question was whether to include international civil service litigation and jurisdictional remedies specific to regional integration organizations. He had no definitive position on that question. He did, however, wonder whether the Commission should not limit itself to private law disputes that involved issues of public international law, including respect for human rights. In that case, instead of using the expression "dispute of a private law character", which was too broad and a potential source of misunderstanding, it should perhaps specify that only "international law disputes with private persons" [*différends de droit international avec des personnes privées*] would be covered in the guidelines. In any case, it was imperative to clarify draft guideline 1 in order to better delimit the scope of the Commission's work.

At the heart of the discussion was the choice to be made between two very different approaches. The 2016 syllabus focused on disputes between States and international organizations or between international organizations and emphasized the disadvantaged position of international organizations that did not have access to the International Court of Justice or whose claims could face admissibility issues. That aspect of the topic did not pose any great difficulties. It would essentially be a matter of proposing methods of dispute resolution, along the lines of the relevant arbitration rules of the Permanent Court of Arbitration. If, on the other hand, disputes with private persons were also included, the main problem would be the weak position of private persons *vis-à-vis* international organizations. When deciding on the scope of the topic, the Commission would need to be aware of the implications of its decision. Personally, he was in favour of including at least some disputes with private persons – those involving international law – and, consequently, of including in the topic the question of the relationship between immunity and the denial of justice in such disputes.

Another question that would have to be addressed regarding the scope of the topic – and one that posed particular problems for the European Union – was to determine in which cases it was the international organization that was the defendant and in which it was the organization's member States. The complexity of that issue could be seen in the negotiations on the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), as well as in article 7 of annex IX to the United Nations Convention on the Law of the Sea.

Regarding the form that the outcome of the Commission's consideration of the topic should take, he supported the Special Rapporteur's proposal in paragraph 27 of the report, that the Commission should produce guidelines. However, he noted a certain ambiguity in that paragraph: the Special Rapporteur referred to both "guidelines" and "recommendations", which were not the same thing. Guidelines were mainly used to find practical answers, while recommendations were aimed at developing the law. Perhaps the Commission should consider proposing standard or model clauses, in particular compromissory clauses, that could be inserted in international treaties or contracts and that could serve as recommended practice to improve and strengthen the existing means of dispute settlement.

Regarding the definition of the term "international organization" – discussed at length by the Special Rapporteur – he strongly disagreed with the suggested definition, and considered that the Commission should stand by the definition it had adopted in the 2011 articles on the responsibility of international organizations. Attempting to change that definition would create unnecessary complications and detract from the unity and coherence of the Commission's work.

Unlike the Special Rapporteur, he did not consider it necessary to amend that definition to specify that the entity must possess at least one organ capable of expressing a will distinct from that of its members. For one thing, that point was already covered in the 2011 definition, in that it indicated that an international organization possessed its own international legal personality. For another, seeking to amend the 2011 definition would risk generating sterile theoretical debates. The Special Rapporteur himself pointed out that such debates were long-standing and complex and hardly conducive to producing a definition.

Furthermore, he was not convinced by the Special Rapporteur's assertion that the establishment of organs appeared to be "a crucial defining element of international organizations, distinguishing them from other forms of treaty-based cooperation". Purely cooperative conferences of States parties could have organs without having an independent personality. In any case, what the Special Rapporteur was proposing would involve defining what was meant by "organ" and distinguishing between organs that had an independent personality and those that did not, thus highlighting the only criterion that counted – autonomy of legal personality – which seemed to be an infinitely clearer concept.

Moreover, the "will" criterion put forward by the Special Rapporteur was too simplistic. In many disputes, what was at issue was not the will of the international organization, but the wrongful *act,* the harmful *fact,* attributable to it. The concept of international legal personality, which was at the heart of the 2011 definition, encompassed those elements. On the other hand, the Special Rapporteur's proposal seemed to require, for the purposes of the draft guidelines, that an organ of an organization should be capable of expressing a will. However, in the case of, for example, damage caused by a United Nations peacekeeping operation, what was important for the purposes of the draft was not whether an organ of the entity in question could express a will, but whether the entity was a subject of international law to which the act in dispute could be attributed and which could be held accountable through an appropriate dispute settlement mechanism, regardless of whether the damage had been caused voluntarily or involuntarily. He noted, moreover, that, when the International Court of Justice had held in 1949 that the United Nations had the capacity to bring a claim against a State, it had made no reference to the criterion of "will".

Regarding the definition of the term "dispute", he believed that the Commission should follow the widely accepted definition in the *Mavrommatis Palestine Concessions* judgment of the Permanent Court of International Justice. He was reluctant to extend the definition, as proposed by the Special Rapporteur, to non-legal disputes. It was one thing to deal with legal disputes that were also political in nature; it was quite another to deal with disputes that were not legal disputes at all. Should the Commission's work on the topic, for example, deal with purely political differences between two regional organizations, or between the Security Council and an association opposed to the existence of veto power in the Council? Such purely political differences of opinion were outside the scope of the topic and the Commission's expertise. On the other hand, of course, as soon as a legal dispute was involved, the Commission must deal with all methods of dispute settlement, whether they were of a political, judicial or arbitral nature.

Furthermore, he did not believe that it was necessary to specify, in the definition of a dispute, that a dispute arose when "a claim or assertion" of one party was met with denial by another. That formulation suggested that there would always be a plaintiff and a defendant, a claimant and a victim. However, there were situations in which two parties might be in doubt as to the interpretation or application of a treaty and both were anxious to have the dispute resolved. In that case, there existed not only one claim, but mutual claims, as had been the case in the 2003 arbitration between France and the United Nations Educational, Scientific and Cultural Organization (UNESCO). If a clarification was really necessary, a more appropriate formulation would be the one used by the International Court of Justice in the 2016 case of *Alleged Violations of Sovereign Rights and Maritime Spaces in the*

Caribbean Sea (Nicaragua v. Colombia), cited in footnote 247 of the report, which indicated that what mattered was that the two sides held clearly opposite views concerning the question of the performance or non-performance of certain international obligations. That being said, if there really was a need to improve the *Mavrommatis* definition, why should the Commission not be exhaustive? Why, for instance, not include also the fundamental stipulation that the existence of the dispute should be established objectively? Or why not specify also that a dispute could concern either the interpretation or the application of the law? His view was that it was not the role of a definition to contain such specifications and he saw no need to refine the *Mavrommatis* definition or to encroach on the role of the dispute settlement bodies whose task it was to provide the necessary clarifications of the definition. In fact, he was not sure if a definition of the term "dispute" was even necessary. No such definition had been included in the arbitration rules of the Permanent Court of Arbitration. In addition, human rights courts or treaty bodies were competent with respect to claims or individual applications rather than with regard to "disputes" within the meaning of the case law of the International Court of Justice.

He did, however, agree with the definition of dispute settlement methods proposed by the Special Rapporteur in draft guideline 2 (c).

Mr. Jalloh, after congratulating the Chair on her well-deserved election and welcoming the new members of the Commission, said that the Special Rapporteur had produced an excellent and well-written first report. The Special Rapporteur's collegial approach, combined with his well-known expertise in the law of international organizations, should help to positively shape the direction, the outcome and, ultimately, the utility of the Commission's work on the topic of the settlement of international disputes to which international organizations were parties.

Before turning to the report itself, he wished to make two big-picture observations. First, there was no doubt that the topic dealt with an issue of topical interest to the international community. International organizations were a key part of the fabric of modern international law. By one estimate, depending on how they were defined, at least 400 such organizations had been created by States. Their prevalence, whether at the universal, regional or subregional level, meant that international organizations touched on virtually all aspects of contemporary international life, from issues of trade and economics to politics, health, science and technology, law and, of course, peace and security.

Even though, by their nature – as emphasized by the International Court of Justice in its 1996 advisory opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* – international organizations, unlike States, did not possess "a general competence", no one could credibly deny that international organizations had positively impacted, and continued to positively impact, international law and international relations. The dramatic increase in the number and types of such organizations, especially since the Second World War, could partly be explained by the increasing need for greater coordination and cooperation among sovereign States in an increasingly interdependent and globalized world. Moreover, international organizations had proven to be functionally convenient vehicles to advance the individual and broader common interests of all States. Still, as the International Court of Justice had rightly noted in its advisory opinion on the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt:* "International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law."

His second general observation related to the first, and in fact was a consequence of it. While there had been an exponential increase in the number of international organizations with diverse mandates and characteristics, fundamental questions had arisen about the rights and responsibilities of such organizations towards States and other subjects of international law, including natural and legal persons. Thus, it was unsurprising that the Commission had sought to contribute to the codification and progressive development of various aspects of the law of international organizations. The key outcomes of those efforts included the draft articles that formed the basis for two separate multilateral treaties, the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character, adopted in 1975, and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations,

adopted in 1986. In 2011, exactly a decade after adopting its seminal 2001 articles on responsibility of States for internationally wrongful acts, the Commission had completed its articles on the responsibility of international organizations. Such outcomes demonstrated the importance that the Commission rightly attached to the law of international organizations.

Against that wider backdrop, the current topic, although narrower in scope given its focus on the specific issue of settlement of disputes involving international organizations, seemed to be an important step forward in the Commission's efforts to contribute to the law of international organizations. However, the Commission should remain mindful that its previous excursion into the law of international organizations had not been without significant challenges, not only within the Commission, but also in relation to States and, indeed, international organizations themselves. For instance, the generally poor reception of the 1975 and 1986 Vienna Conventions should stand as a cautionary tale. Similarly, in the face of the generally critical comments of States and international organizations, it seemed unlikely that the United Nations General Assembly would take the 2011 articles on the responsibility of international organizations forward as a binding international instrument, at least in the current state of international affairs.

He fully agreed with the statement in paragraph 15 of the report that the topic now under consideration complemented and continued the previous work of the Commission on legal issues involving international organizations. However, in the light of the Commission's not entirely positive experience in that previous work, if it was to be more successful with the current project, it would need to carefully build on that prior work even as it cautiously assessed the implications of the choices it made. Caution and principled practicality should inform the approach, the scope and the outcome of its work on such an important topic.

He appreciated the Special Rapporteur's summary of the history of the topic within the Commission and the excellent questionnaire on the subject, which was intended for onward transmission to both States and international organizations. If the response rate to the questionnaire from States and international organizations across all regions was high, it should furnish the Commission with information that could help to enrich the quality and relevance of its future work on the topic. The experiences of States hosting international organizations, whether of a universal or a regional character, could be particularly illuminating.

It was not clear from the report whether international organizations and States had been informed that the existence of the questionnaire did not preclude them from sharing any additional information on their practice that might be relevant to the Commission's work. He understood, nonetheless, that an open-ended request for information might be more difficult to answer and hoped that the questionnaire, being more targeted, would be less burdensome, especially for smaller or developing country delegations with limited capacity. He assumed that the questionnaire was already accessible on the website of the Sixth Committee and wondered whether it could also be included in the analytical guide for the topic on the Commission's website.

He was concerned that the Special Rapporteur might have missed an opportunity to consider the views of States more holistically, on both the substance and the practical relevance of the topic. The report, in fact, focused on the October 2022 General Assembly debate, but there had also been pertinent input during the Sixth Committee debate held in 2016, when the topic had been added to the long-term programme of work. That input – most importantly on the proper delimitation of the scope of the topic, including whether to address private disputes – had come notably from Romania, Austria, the Sudan, Greece, Ireland, Singapore, Japan, Slovakia and the Kingdom of the Netherlands, as well as from the Council of Europe.

With reference to the Special Rapporteur's enumeration of relevant actors in paragraph 16 of the report, it might be possible to structure the topic or the guidelines so as to consider, first, disputes between international organizations and their member States; then disputes between international organizations and non-member States; then disputes between international organizations; and, lastly, disputes between international organizations and private parties. Each of those pairings had different sources of law and different power

dynamics between the parties, and a systematic structure that was aligned with the key literature might assist in the practical application of the guidelines.

He wondered whether the exploratory nature of the report was the reason that the standard section on methodology, typical in first reports, had been omitted. As the Commission embarked upon such a study, clarification of the methodology was important, as it would help to ensure agreement, not only among members of the Commission but also between the Commission and States and international organizations. In fact, the methodology section helped States and other interested parties to learn about the overarching approach that would guide the Commission's work on a given topic. He hoped that the Special Rapporteur would consider addressing methodological issues in his next report.

In its commentaries on the articles on the responsibility of international organizations, the Commission had noted that one of the biggest barriers to discussions about such responsibility was the "limited availability of pertinent practice". It was therefore unsurprising that other bodies had recommended an increased use of judicial settlement, arbitration and other third-party mechanisms, particularly when private rights and interests were at issue. However, despite such invitations from various authorities, international organizations appeared to have been unreceptive. Attempts to clarify the applicable legal standards had been further complicated by a general practice of confidentiality in dispute settlements with international organizations and of invocation of immunity, as opposed to waiver of immunity, by the organizations concerned.

For such reasons, although the focus of the current topic was narrower than responsibility in a broad sense, the Commission might nonetheless be confronted with the same challenge of locating relevant practice. If such practice was lacking or was not readily accessible, consideration of the topic might tilt more towards the progressive development end of the Commission's mandate to codify and progressively develop international law. Codification and progressive development were, of course, equally important parts of the mandate and were indivisible, interdependent and interrelated. Nonetheless, if progressive development became the dominant basis for the work on the current topic, the Commission should state as much transparently and anticipate the methodological implications. In particular, such an approach could affect the form of output selected for the topic and potentially impact on its acceptability to States and international organizations.

He wished to commend the Special Rapporteur for providing a useful overview of pertinent work by other expert bodies, which should offer useful material for the Commission as it addressed the topic. In particular, the pathbreaking 2004 study by the International Law Association (ILA) on the accountability of international organizations recommended many rules and practices for disputes of different types, including those of a private character. In addition, the Special Rapporteur rightly drew attention to the work of State-created regional and national bodies in all regions, including the Committee of Legal Advisers on Public International Law of the Council of Europe and the Inter-American Juridical Committee. Much was to be gained from the full consideration of prior work by expert bodies in international law and, to the extent that such work coincided with the Commission's independent analysis, there could be immense value in consistency. It was fundamental nonetheless to consider how States and international organizations had received the work – and in particular the recommendations – of expert bodies.

He agreed with the Special Rapporteur that the Commission should limit the scope of the topic to "international organizations", which in its previous work were described as intergovernmental organizations, and that it should exclude non-governmental organizations and transnational corporations. In fact, although such entities could colloquially be said to be "organizations", they were created under domestic law and were not typically subjects of international law in the same way as "international organizations" in the classic sense. He also agreed with the Special Rapporteur on the need to define "disputes" and "dispute settlement", which were key terms that would also help to delimit the scope of the topic.

In 2022, he had expressed strong support for the inclusion of disputes of a private law character in the consideration of the topic. Having examined the report and reviewed an extensive body of relevant literature, he was now even more firmly convinced of the correctness of that position. Disputes of a private law character often raised questions

regarding conflicting obligations under international law, particularly *vis-à-vis* the interaction of the immunities of international organizations with the human rights obligations of States to provide access to justice and effective remedies. Not only were private disputes the most pressing and the most relevant, both for victims and for international organizations; they also tended to be the most challenging. That was consistent with the findings of the 2004 ILA study, which pointed out the inadequacy of alternative forums and alternative remedies for private parties and highlighted the fundamental procedural obstacles that private claimants faced when trying to discharge the burden of proof and evidence against international organizations.

In addition, the Commission needed to remain mindful of the fact that there was typically a huge power imbalance between the two disputing sides, as had been made manifest in the case of the victims of the Haiti cholera epidemic before the courts of the United States of America and the cases brought by the mothers of victims of the Srebrenica massacre in the national courts of the Kingdom of the Netherlands. Those private disputes with an international organization, the United Nations, had not been substantively resolved in any national court due to privileges and immunities. At the same time, a key challenge that the Commission was likely to face when considering the topic was how to strike a balance between the need to maintain the independence and functional role of international organizations and the need to ensure the right of access to a judicial or administrative venue for private actors seeking a contractual or tortious remedy from an international organization.

The topic, then, would surely involve the regime of privileges and immunities that international organizations currently enjoyed, something the Commission had previously considered with the intention of producing draft articles for a convention. When the privileges topic had been removed from the programme of work in 1992, one of the reasons given had been that the issue was “covered, to a large extent, by existing agreements”. He looked forward to hearing the Special Rapporteur’s views as to whether and how that situation had changed since 1992.

Like the Special Rapporteur, he believed that the Commission should be mindful of pre-existing agreements, primarily the constituent agreements of international organizations and headquarters agreements, and the dispute settlement mechanisms for which they provided. In order to give practical guidance to States and international organizations, the Commission should strive to ensure that its work was compatible with those agreements and with ongoing efforts in other forums, and should bear in mind the diverse national legal contexts that involved contractual, tortious and even criminal law issues.

He agreed with the Special Rapporteur that the Commission should take legal disputes as its starting point, but not limit itself to such disputes. In that regard, assuming the Commission was able to reach agreement on expanding the scope of the nature of the disputes to be covered, it might wish to revisit the title of the topic to make it more reflective of that scope, which should include private disputes as well as legal and non-legal disputes. It might then be appropriate to delete the term “international” so that the title would read “Settlement of disputes to which international organizations are parties”.

He concurred that the outcome of the Commission’s work on the topic should take the form of draft guidelines. He had independently reached a similar conclusion in his own report on subsidiary means for the determination of rules of international law. Since its establishment in 1947, the Commission had always taken a broad view of the variety of outputs it could produce and recommend to States, and it would not be doing anything new by adopting the form of draft guidelines, which seemed to suit the specific needs of the current topic. In fact, as the Special Rapporteur indicated in the report, the immense number and variety of international organizations and their distinctive legal natures and relationships to States, individuals and other private actors meant that they were unlikely to be amenable to draft articles intended as a basis for a binding legal instrument. In order to make the guidelines more useful, and considering the treaty-based nature of international organizations and their relations with States, the production of model clauses for key provisions of constituent agreements and headquarters agreements could be of practical use for shaping dispute settlement into the future. A useful precedent for that approach lay in the fact that the Commission had expressly contemplated the development of model clauses under the topic “Provisional application of treaties”.

The Commission should bear in mind that guidelines – like "conclusions" and "principles" – were not forms of output with which States in the Sixth Committee were very familiar and would, in all probability, give rise to questions. That likelihood was confirmed by the Commission's experience with recently completed work under other topics submitted to the General Assembly. In order to avoid or at least limit potential confusion, the Commission should consider explaining at the outset what it meant by "guidelines", at least for the specific purposes of the dispute settlement topic. He was therefore grateful to the Special Rapporteur for proposing that the term "guidelines" should be characterized as it had been in the 2011 Guide to Practice on Reservations to Treaties. That approach was a helpful starting point because it situated the topic in the wider context of the Commission's practice with that type of output and offered one possible meaning that could be given to the term.

The Commission could safely assume that States in the Sixth Committee would request an explanation of the normative value of the guidelines and, in particular, whether they constituted codification, progressive development or a mix of both. Some States would probably seek an indication as to which guidelines constituted one or the other. The methodological difficulties of signposting specific guidelines as codification and others as progressive development should be transparently explained, also in the light of the Commission's long-standing practice going back to the 1940s, in the general commentary to the guidelines or under the first guideline addressing the scope of the topic.

Since the form of output chosen for the topic would seriously affect the drafting process, the Commission needed to make that choice at the outset. In the previous quinquennium, lack of clarity on the form of output had given rise to controversies relating to several topics, including "Protection of the atmosphere" and "Succession of States in respect of State responsibility". Moreover, the drafting process would be much easier if the Commission agreed on the form of output beforehand, especially if there were substantive disagreements on the topic; that did not mean that the Commission could not, exceptionally, reconsider the issue at a later stage if the need arose.

He agreed with the Special Rapporteur's proposed draft guideline 1, which limited the scope of the draft guidelines to the settlement of disputes to which international organizations were parties. With reference to draft guideline 2 (a), he was broadly in agreement with the definition of "international organization" as an "entity established by States and/or other entities" because it did not exclude the possibility that an international organization could be created entirely by other international organizations; such organizations had been intentionally excluded from the scope of the articles on the responsibility of international organizations. It was clear in practice, moreover, that international organizations could be created by a State and another international organization; examples included the Special Court for Sierra Leone and the Special Tribunal for Lebanon.

The wise omission of an explicit reference to the requirement of international legal personality in favour of a reference to possession of at least one organ capable of expressing the organization's distinct will could serve to bypass the academic debate on how an international organization acquired international legal personality. He was intrigued by the Special Rapporteur's conclusion that international legal personality could be read as the "consequence" of, rather than a "prerequisite" for, the creation of an entity as an international organization, but he would listen to the debate before deciding whether to support that conclusion. Nonetheless, he would be in favour of including, in draft guideline 2 (a), the language "and thus possessing its own international legal personality" for the sake of continuity between the proposed definition and the definition in the articles on the responsibility of international organizations. He would also consider the inclusion of the articles' definition of "organ" to account for the wide range of practice among international organizations in terms of how such organs were structured.

In draft guideline 2 (b), he was in favour of a broad definition of "dispute" to encompass all kinds of disputes to which international organizations could be parties. As the Special Rapporteur rightly noted, that built on the classic definition of "dispute" as adopted by the Permanent Court of International Justice in the *Mavrommatis Palestine Concessions* case and reaffirmed by the International Court of Justice in numerous other cases, and as subsequently developed to encompass other types of common disputes that were not strictly "legal" disputes.

He supported the Special Rapporteur's proposed language in draft guideline 2 (c), since the logic of the definition of "dispute settlement" was rooted in Article 33 of the Charter of the United Nations, relevant jurisprudence of the International Court of Justice and General Assembly resolutions. Perhaps, though, the Commission could slightly adjust the definition by first describing the end result of "settlement" before enumerating the wide range of forms that such settlement could take. If the Commission chose to take up that proposal, "dispute settlement" could be defined as "the consideration of the claims or assertions comprising the subject matter of a disagreement concerning a point of law, fact or policy with a view to identifying an appropriate remedy".

"Consideration" should be understood to require the earnest evaluation of all claims or assertions in a dispute and the identification of an appropriate remedy. Needless to say, a dispute that was simply ignored until it went away was not properly "considered", silence in the face of a dispute was not an "appropriate" remedy, and a remedy that the parties were incapable of implementing could not be considered "appropriate". The proposed definition of dispute settlement did not impose any form of remedy, as remedies could take a wide range of forms, nor did it favour any particular type of settlement mechanism. If his proposed definition was incorporated, he suggested that the existing guideline 2 (c) should become guideline 2 (d), with the wording: "Disputes may be settled by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement and other peaceful means of solving disputes." That would underline the recognition that the principle of free choice of means, envisaged in Article 33 of the Charter of the United Nations, was applicable both generally and in relation to international organizations specifically, as the International Court of Justice had held in its advisory opinion on *Reparation for Injuries Suffered in the Service of the United Nations*.

In conclusion, he wished to express his support for the Special Rapporteur's proposals on the future programme of work on the topic. In that regard, the proposal that the next report should focus on international disputes between States and international organizations seemed appropriate. He hoped that the Special Rapporteur would include a comprehensive analysis of the possibility that international organizations could appear as parties in contentious cases at the international level, in forums such as the International Court of Justice, the International Tribunal for the Law of the Sea and the World Trade Organization. He was in favour of referring the proposed draft guidelines to the Drafting Committee.

The meeting rose at 5.55 p.m.