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International Law Commission

Seventy-fourth session (first part)

Provisional summary record of the 3614th meeting

Held at the Palais des Nations, Geneva, on Wednesday, 26 April 2023, at 10 a.m.

Contents

***Present*:**

Chair:	Ms. Oral
Members:	Mr. Akande
	Mr. Argüello Gómez
	Mr. Asada
	Mr. Aurescu
	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
	Mr. Ruda Santolaria
	Mr. Sall
	Mr. Savadogo
	Mr. Tsend
	Mr. Vázquez-Bermúdez

Secretariat:

Mr. Llewellyn	Secretary to the Commission

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

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

Mr. Fathalla said that the Special Rapporteur was to be commended for his first report on the topic "Settlement of international disputes to which international organizations are parties", which provided a solid basis for the Commission's work. He fully agreed with the proposed scope of the draft guidelines, as set out in draft guideline 1, and would therefore focus in his statement on the definitions proposed in draft guideline 2.

With regard to the proposed definition of the term "international organization", his preference would be to delete the words "and/or other entities" from the text in order to clarify that non-governmental organizations (NGOs) and business entities were not international organizations, thereby ruling out any future debate on the matter. The legal basis for the exclusion of NGOs and business entities was the fact that they were not established by an instrument governed by international law. In addition, the definition should reflect the fact that, as shown by the examples cited in the report, an international organization could contribute to the establishment of another international organization. Moreover, it should be noted in the text that, as explained in paragraphs 35 to 37 of the report, the membership of an international organization could include entities other than States. A clear distinction would then be created between the entities that established the international organization itself and its members. Although NGOs could be observers at international organizations, and sometimes even members, they could not establish them. The possession by an international organization of at least one organ capable of expressing a will distinct from that of its members was what gave rise to its separate legal personality. It was therefore the legal personality of the organization that was to be invoked in the event of a dispute rather than the legal personalities of its members. In his view, there was no need to specify in the definition that the organization had to be established on a permanent basis with a view to achieving a specific objective by specific means. It was self-evident that such characteristics were what differentiated international organizations from international bodies such as conferences or *ad hoc* working groups.

He agreed with the proposed definition of the term "dispute", which did not limit the concept to legal disputes but also included disputes over points of fact or policy. For the sake of clarity, it would be useful to specify that disputes of a private law character were also included within the scope of the definition. Such disputes were recurrent and widespread. In that connection, it might be fruitful to consider Mr. Jalloh's proposal that the title of the topic should be amended to "Settlement of disputes to which international organizations are parties".

The proposed definition of the term "dispute settlement" was based on the methods of dispute settlement set out in Article 33 of the Charter of the United Nations. His preference would be to prioritize judicial and quasi-judicial methods. Although judicial methods were binding, experience within the United Nations system had demonstrated the need for mechanisms to implement binding decisions. A reference to the importance of such mechanisms should therefore be added to the definition. The question of how to deal with the immunity of international organizations involved in disputes with private parties should also be addressed. In that connection, he agreed with the arguments made by Mr. Forteau. Moreover, it should be clarified in the text that the States members of an organization could not under any circumstances be held liable concurrently or subsidiarily for its obligations, since it had a separate legal personality.

He fully understood the Special Rapporteur's rationale for selecting draft guidelines as the most appropriate form of output. As explained in paragraph 27 of the report, it would be difficult to "aim at any form of uniform treaty language". The Commission should reach agreement on the intended form of the output before it began working on issues of substance, since the legal terminology to be employed would be different in each case. As noted in paragraph 27 of the report, for example, guidelines were not binding. The Commission's consideration of the topic offered an opportunity to discuss the usefulness of elaborating non-binding legal instruments in general.

Mr. Akande said that he wished to thank the Special Rapporteur for his excellent first report on the topic "Settlement of international disputes to which international organizations are parties". By virtue of its "explorative" character, the report provided a useful basis for the Commission's future work on the topic. The Special Rapporteur was to be commended for his willingness to raise questions that touched on fundamental issues of relevance to the future direction of travel.

The inclusion of such an important topic in the Commission's programme of work was a positive step. One of the distinctive features of modern international affairs was the large number of international organizations through which States and other entities achieved international cooperation on a wide range of matters. Those organizations were key players in many areas of international relations. It could even be said that a number of them exercised significant public powers.

The range of methods by which disputes involving States could be resolved was well known, and there had been increased resort to those methods in recent decades. Regrettably, the rise of international organizations in international affairs had not been accompanied by a corresponding expansion of mechanisms for resolving disputes to which they were parties. As shown in chapter I of the Special Rapporteur's report, although much work had been done on the substantive law applicable to international organizations and the principles relating to their responsibility, including by the Commission itself, less had been done on the institutional dimension of the mechanisms for resolving disputes relating to the rights and obligations of international organizations.

The topic was important for two major reasons. First, it raised a rule-of-law issue. As international organizations were bound by the law and bore responsibility for violations of the law, it seemed unacceptable that there should be no mechanisms for establishing such responsibility. Second, when coupled with the immunity that international organizations typically enjoyed before domestic courts, the lack of such mechanisms could cause injustice for private parties. The potential for such injustice had the predictable effect of putting pressure on domestic courts to reduce the scope of the immunity of international organizations. That development was in itself problematic, as it meant that organizations established by a group of States could be made subject to the law, and thus the unilateral will, of a single State.

The settlement of international disputes to which international organizations were parties and the immunity of international organizations were two distinct topics. In the context of the first of those topics, it should not be the Commission's aim to address the question of whether and when international organizations were immune from the jurisdiction of national courts. That said, the two topics were related. On the one hand, if the Commission managed to enhance the processes by which disputes involving international organizations were settled, domestic courts would feel less pressure to circumvent immunity. It had been argued in the literature that the granting of immunity by domestic courts should be conditional on the existence of alternative methods for resolving disputes involving international organizations. Indeed, in some cases, it had been held that the States members of an organization could be in breach of their obligation to provide access to a court if they created and granted immunity to an organization that did not establish such alternative methods. On the other hand, in examining whether international organizations had obligations to establish dispute settlement mechanisms, and in considering the scope of such obligations, the Commission would inevitably have to consider provisions of the kind typically included in treaties establishing the privileges and immunities of international organizations. Section 29 of the 1946 Convention on the Privileges and Immunities of the United Nations was one such example:

"The United Nations shall make provisions for appropriate modes of settlement of:

(a) Disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party;

(b) Disputes involving any official of the United Nations who by reason of his official position enjoys immunity, if immunity has not been waived by the Secretary-General."

With regard to the scope of the topic, the Special Rapporteur had raised a question of fundamental importance, namely, that of whether disputes of a private law character were included. In his view, such disputes should be included. He agreed with the Special Rapporteur that, in practice, the most pressing questions related to the settlement of disputes of a private law character. It was in the specific area of private law disputes that existing rules of international law might impose obligations on international organizations to make provision for the settlement of disputes. Such disputes could not be ignored if the Commission wished to deal with what international law had to say about the settlement of disputes involving international organizations. He would not be opposed to amending the title of the topic, as had been suggested by Mr. Jalloh.

If the Commission accepted that disputes of a private law character fell within the scope of the topic, it needed to decide whether to deal with all such disputes or only some of them. In his view, the Commission should concern itself with situations in which international law had something to say about the settlement of disputes of a private law character and those in which the settlement of private law disputes had implications for international law. The Commission should examine situations in which either treaty law or customary international law suggested that international organizations had an obligation to settle disputes of a private law character. Such obligations could arise from treaty provisions of the kind mentioned earlier or from the human rights obligations of the international organization or the State in whose territory it operated and whose courts might be considered as a forum for the resolution of the dispute.

He agreed that, when it came to the outcome of work on the topic, it was difficult to imagine that the Commission could profitably suggest rules that could lead to a draft treaty. For one thing, if the scope of the topic included disputes involving private parties, a draft treaty might not be the best outcome, since some matters might be regulated by a treaty, others by contracts between the organization and the private party and others still in the organization's internal law and procedures. It would be more profitable at the current stage to consider the substantive results that the Commission was seeking to achieve.

He shared the view that, in some cases, the Commission should make recommendations for best practice, which might include model dispute settlement clauses to be included not only in treaties but also in contracts. However, it should not confine itself to recommendations that were in the nature of *lex ferenda*; in appropriate cases, the Commission should provide a considered view as to what was currently required under international law. It should, for example, reflect on the meaning of treaty provisions that created obligations to establish mechanisms for the resolution of disputes of a private law nature. In the context of the dispute concerning the United Nations and cholera in Haiti, for example, one of the key questions was whether the claim at issue was of the kind that fell within the scope of the obligation to make provision for private law disputes. In his view, the Commission should seek to illuminate those questions of existing law. In previous sets of draft guidelines, the Commission had not only stipulated what should be done, in the form of recommendations, but also what must be done, in the form of obligations. He would encourage the Commission to take the same approach in the context of the topic under consideration.

With regard to the definition of the term "international organization", there was nothing to prevent the Commission from deviating from the definition that it had used in its previous work on the responsibility of international organizations, although the reasons for any such departure should be adequately explained. That said, he saw no inconsistency between the Special Rapporteur's proposed definition and the definition used in the Commission's previous work, although the Special Rapporteur's definition was slightly more elaborate. It seemed to him that the proposed definition was intended to explain the basis on which it might be concluded that an international organization possessed international legal personality. For an entity to be an international organization, it needed to have a will that was distinct from that of its members. He shared the view that, in practice, the organization's distinct will was usually manifested in the fact that at least one of its organs was autonomous from its members or was able to operate on a majority basis. It was that distinct will that justified the conferral of separate legal personality. He would be willing to support the inclusion of a reference to the notion of separate legal personality in the definition itself.

Although it was noted in paragraph 67 of the report that legal disputes formed the "core" of what would be discussed in the context of the topic, the Special Rapporteur's proposed definition of the term "dispute" also covered disagreements concerning points of policy. It seemed that the intention was to reflect the broad range of methods of dispute settlement that might be available and might include non-adjudicatory methods. Yet the Commission should not allow the methods of dispute settlement to dictate the kinds of disputes that it dealt with. As the Commission's role and the expertise of its members were anchored in international law, it should restrict itself to legal disputes as traditionally understood. It was true that such disputes could be resolved in a variety of ways, including through political or diplomatic methods such as negotiation and mediation, but it did not follow that the Commission should try to address all the types of disputes that might be resolved through such methods. In its work on the topic, the Commission should employ a definition of the term "dispute" that was strictly limited to legal disputes while considering a wide range of methods by which such disputes might be resolved.

Lastly, the proposed definition of the term "dispute settlement" would be more appropriate as a definition of the term "methods of dispute settlement". He would suggest that the text should be amended accordingly.

Mr. Nguyen said that he was grateful to the Special Rapporteur for his excellent and meticulous first report, which provided a helpful inventory of the Commission's work on a topic that had long resisted codification.

Unlike States, international organizations each had a different legal personality depending on the functions entrusted to them by States. Moreover, the disputes involving them were varied: they could be parties to disputes with States, regardless of whether those States were their members or not, other international organizations or individuals. Those factors needed to be taken into account when formulating a common procedure for the settlement of disputes to which international organizations were parties. The inclusion of disputes of a private character within the scope of the topic might raise issues relating to the waiver of the immunity of the international organization or the possibility of claimants invoking the responsibility of member States. In practice, the number of disputes of a private character arising from United Nations peacekeeping operations, contractual disputes, employment issues and human rights violations had increased dramatically, such that they now threatened to outnumber all other disputes involving international organizations. He appreciated the Special Rapporteur's recognition that the settlement of disputes of a private character was one of the most challenging issues to address.

With regard to the outcome of the Commission's work on the topic, he had doubts about the suitability of draft articles, for two reasons. First, hardly any of the Commission's draft articles relating to the law of international organizations had successfully made the transition to treaties that had entered into force. Second, the current international environment favoured the flexibility of guidelines over binding documents. Guidelines could serve as the starting point for fostering consensus on contentious issues, encouraging broader acceptance and cooperation among States and increasing their willingness to enter into binding agreements in the future. The production of a set of draft guidelines would also be in line with the Commission's recent practice of producing outputs other than draft articles.

Turning to the definition of the term "international organization", he wished to emphasize that international organizations were primarily composed of States that had delegated some portion of their legal authority to them. Even when the members of an international organization were other international organizations, as was the case with the Joint Vienna Institute, their membership depended on the consent of their member States. It was worth noting that cases of dependent territories obtaining membership of international organizations were relatively rare. He therefore suggested that, in the first element of the definition, the word "largely" should be inserted before "by States". That amendment would serve to reflect the dominant role of States while also acknowledging the potential involvement of other entities.

The establishment of an international organization by an agreement or instrument governed by international law was the basis for the creation and recognition of its legal personality as being distinct from those of its member States and/or other entities. He

therefore agreed with the Special Rapporteur's conclusion that the possession of international legal personality was "the consequence of an entity being created as an international organization". In turn, the fact that an organization had organs capable of expressing its will was a consequence of its separate legal personality as a subject of international law. The permanent organs of an international organization contributed to the stability and continuity of its functions and operations, allowing it to maintain consistency in its decision-making and mandate implementation, irrespective of any changes in the composition of its member States and their representatives. Permanent organs were able to facilitate coordination and cooperation among member States and/or other entities, streamlining decision-making processes and enhancing the organization's overall efficiency and effectiveness in achieving its objectives. It was not enough for such permanent organs merely to exist; they had to be capable not only of expressing the organization's will but also of performing the tasks or functions entrusted to them by member States and/or other entities. Moreover, the organization's will was not independent; it had to be aligned with the will of its member States and/or other entities. The legitimacy of an international organization as an independent actor was a product of its legal personality, which allowed it to engage with other actors, such as States, other international organizations and non-State entities, with greater authority and credibility. While the Commission had previously wondered whether the concept of an international organization should not be defined by something other than the "intergovernmental" nature of the organization, it had consistently maintained the element of "possessing its own international legal personality", for example in its 2011 articles on the responsibility of international organizations. He agreed with Mr. Forteau that the Commission should not deviate too much from the definition contained in those draft articles. Consequently, the third element of the definition should be reworded to read "having permanent organs capable of representing its legal personality".

With regard to the term "dispute", the scope of the definition depended on whether the Commission wished to include disputes other than legal ones, for example the legal aspects of policy disputes, and disputes of a private character. If disputes of a private character were to be included, it might be more suitable to use wording such as "express and implicit positive opposition", as individual victims might not have a comprehensive understanding of the immunity, privileges and jurisdiction of international organizations. A clear and accessible definition would ensure that those with limited knowledge of the intricacies of international law were able to effectively engage in dispute resolution processes. Moreover, it was important to strike a balance between establishing a definition that was flexible enough to accommodate the diverse range of disputes that might involve international organizations and one that was specific enough to provide clear guidance to the parties involved. By carefully taking those various factors into account and tailoring the definition accordingly, the Commission could develop a comprehensive and nuanced understanding of disputes involving international organizations, which would better serve the needs of all parties.

He supported the referral of the draft guidelines proposed by the Special Rapporteur to the Drafting Committee.

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

The Chair (Co-Chair of the Study Group on sea-level rise in relation to international law) said that, in addition to Mr. Aurescu, Mr. Cissé, Ms. Galvão Teles and Mr. Ruda Santolaria, who were the other Co-Chairs, the Study Group on sea-level rise in relation to international law was composed of: Mr. Akande, Mr. Argüello Gómez, Mr. Asada, Mr. Fathalla, Mr. Fife, Mr. Forteau, Mr. Galindo, Mr. Grossman Guiloff, Mr. Huang, Mr. Jalloh, Mr. Laraba, Mr. Lee, Ms. Mangklatanakul, Mr. Mavroyiannis, Mr. Mingashang, Mr. Nesi, Ms. Okowa, Mr. Ouazzani Chahdi, Mr. Oyarzábal, Mr. Paparinskis, Mr. Patel, Mr. Reinisch, Ms. Ridings, Mr. Ruda Santolaria, Mr. Savadogo, Mr. Tsend and Mr. Vázquez-Bermúdez, together with Mr. Nguyen (Rapporteur), *ex officio*.

The meeting rose at 10.50 p.m.