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Held at the Palais des Nations, Geneva, on Thursday, 27 April 2023, at 10 a.m.

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* Reissued for technical reasons on 25 May 2023.

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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. Oyarzábal
	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 10.05 a.m.

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

Mr. Fife said that, as a new member of the Commission, he would raise only a few preliminary questions in respect of the definitions proposed by the Special Rapporteur in his first report on the settlement of international disputes to which international organizations were parties (A/CN.4/756). The nature of the problems to which solutions were being sought and the concerns that the Commission should address in order to respond to the expectations of the international community needed to be identified, as did the practical outcome of the work on the topic. The answers to those questions would affect the definitions chosen and could imply that the definitions should be somewhat broad or flexible, though without sacrificing clarity, given the large number and great variety of international organizations. His preference was to address the question of definitions with a view to ensuring their practical usefulness to the extent possible. Linking the resolution of definitional issues to clarification of their ultimate practical functions would also be in keeping with a legal tradition of the Nordic countries.

First, it should be borne in mind that international organizations had been established in response to common challenges and were often operating in difficult working and financial conditions. The topic in fact concerned the multilateral system. In the current international environment, there was sometimes a huge gap between what international organizations were asked to do and the resources and means made available to them to do it. That should be taken into account in the Commission's deliberations and could affect the choice of certain means or methods and the possibility of allowing for flexibility in reaching the desired ends.

Second, that observation did not mean that the lack of access to remedies was not a recurrent problem. As the Commission had already adopted articles on the responsibility of international organizations in 2011, it was now logically proceeding to consider the consequences of such responsibility. In 2012, the General Assembly had adopted resolution 67/1, which contained a political declaration affirming, *inter alia*, that the basic principles of the rule of law applied also to international organizations. Reference had already been made, in the Commission's current debate, to specific examples such as the cholera outbreak in Haiti linked to the presence of United Nations peacekeepers. The question, therefore, was how to better promote legal protection and legal certainty while recognizing the great differences between international organizations. He shared Mr. Forteau's view that it was important to understand and articulate the links between access to remedies and the law of immunities, albeit without entering into an analysis of the law of immunities or the law concerning the responsibility of international organizations, which were not the main focus of the topic.

Third, the scarcity of existing practice, which was a hindrance to codification, might well be due in large part to the lack of access to remedies, which reflected the very narrow scope for litigation in the context of international organizations and the limited possibility of individual recourse.

Fourth, and lastly, many issues seemed to depend largely on the specific rules governing the relevant or potential body for the settlement of disputes, including a special agreement, where applicable, and relevant contractual provisions. What was needed, therefore, was to actively encourage international organizations to conclude legal instruments and to adopt or revise relevant rules. If done appropriately, that would provide better access to legal certainty and better meet common concerns. It would thus seem appropriate to follow the Special Rapporteur's proposal of developing guidelines; his own view was that the consideration of model clauses would also be useful.

It would be helpful to know more about the internal practices of international organizations, with the aim of addressing some of the problems in respect of access to remedies. In view of the time and resources demanded by traditional systems of judicial settlement or international arbitration, other possible methods of resolution should not be excluded; they might take the form of ombudsman systems, administrative procedures or

other mechanisms that could serve as efficient and expeditious means of ensuring respect for equality.

The term "international organization" was defined in the 2011 articles with reference to an organization's possession of "its own international legal personality". However, the object and purpose of those articles was not to provide a definition applicable in all possible contexts. It was intended to apply only for the specific purpose of identifying the distinct responsibility of an international organization, for which legal personality was a prerequisite. That example usefully illustrated the close link between the choice of a definition and the aims envisaged by the text in question.

There had been considerable academic discussion of a broader definition of the term "international organization". The Special Rapporteur had offered good arguments for introducing the idea that an international organization had a will distinct from that of its members, but that might lead to lengthy discussions without necessarily having much practical effect. In his view, it would be preferable to use the definition in the 2011 articles, for the sake of terminological consistency and avoidance of fragmentation, and because the issue of responsibility of international organizations was not peripheral to the topic under consideration. A similar argument could be made with regard to the reference to "entities", which was a very broad and somewhat vague concept. He would prefer a more explicit reference to "States and international organizations"; it would also be useful to draw a distinction between entities that could establish an international organization and those that could become its members.

The reference to "will" might also raise a small paradox; originally, doctrinal discussions on the definition of "international organization" had made reference to the will of the founding States. However, that thinking had become outdated. A kind of emancipation from that theory had taken place with the introduction of a functional test which, as expressed by former Commission member Paul Reuter, showed that the existence of an organization depended on objective criteria. The Special Rapporteur's report referred to the works of Finn Seyersted, whose theories concerning the objective international personality of international organizations stemmed from his experience as a practician in the International Atomic Energy Agency. However, it might be paradoxical at the current time to revert to the idea of "will", albeit in relation to an international organization or one of its organs. It would be simpler to use the definition that the Commission had already adopted in its articles on the responsibility of international organizations.

He was of the view that the definition of "dispute" should not include disputes on policy. Disagreement on facts or on a point of law should of course be included. International organizations had political bodies that were competent to deal with policy issues. Moreover, the reference to disagreement on "policy" that went beyond disagreement on a fact or a point of law could make the definition somewhat nebulous and could broaden the scope of the disputes covered by the draft guidelines in a manner that was not compatible with the political and other realities to which he had referred at the outset.

The proposed inclusion of disputes of a private law character was an interesting idea but should be approached with care. Such disputes must at least have a clear international law dimension; otherwise, the Commission could open the door to disputes that lent themselves to settlement under applicable national law or that concerned questions not of immunity but of *jure gestionis*.

Thanking the Special Rapporteur for his very rich report and eloquent presentation, he said that he looked forward to hearing the reactions of the other members of the Commission.

Mr. Paparinskis, commending the Special Rapporteur on the thoroughness of his first report on the topic and noting the multilingual nature of the sources cited, said that the topic flowed from the Commission's earlier work and was a logical and desirable next step. First, it tackled a long-recognized gap. The Commission's Working Group on the responsibility of international organizations had, in 2002, noted "the widely perceived need to improve methods for settling" disputes concerning the responsibility of international organizations. Second, the work on the topic was likely to unearth and foster practice that would lead to a better understanding of international organizations and contribute to the

Commission's engagement with other possible related topics. By way of example, in the commentary to the 2011 articles on the responsibility of international organizations, the Commission explained that one reason for "the limited availability of pertinent practice" that caused "difficulties in elaborating rules concerning the responsibility of international organizations" was precisely "the limited use of procedures for third-party settlement of disputes to which international organizations [were] parties". The topic was thus both right and ripe for consideration.

Turning to the scope of the topic, addressed in proposed draft guideline 1, he would welcome an explanation of the rationale for using the expression "settlement of disputes" rather than "settlement of international disputes", as in the title of the topic. If it was based on the assumption that disputes of a private law character would also be covered, he agreed with that drafting choice; he would also be open to considering Mr. Jalloh's proposal to revisit the title of the topic.

He suggested that the operative verb in the wording of the proposed scope, "apply to", should be replaced with "concern", to bring the language into line with the Commission's existing practice when describing the scope of guidelines, such as in guideline 1 of the 2021 Guide to Provisional Application of Treaties or guideline 2 (1) of the 2021 guidelines on the protection of the atmosphere. The verb "apply to" should be reserved for provisions describing the scope of articles or principles, such as article 1 of the 2019 draft articles on prevention and punishment of crimes against humanity or principle 1 of the 2022 principles on protection of the environment in relation to armed conflicts.

As to the proposed inclusion of disputes of a private law character, he agreed with the Special Rapporteur's observation, in paragraph 24 of the first report, that "in practice, the most pressing questions relate to the settlement of disputes of a private law character". For the output to be ultimately useful to the relevant actors, it was important that the Commission should have a full picture of the practice of international organizations in implementing obligations regarding the settlement of disputes of a private law character in such provisions as article VIII, section 29 (a), of the Convention on the Privileges and Immunities of the United Nations. He looked forward to reading the responses from States and relevant international organizations to the questionnaire circulated by the Special Rapporteur, as well as the memorandum by the Secretariat mentioned in paragraph 2 of the report.

Should the Commission endorse the inclusion of disputes of a private law character, he would encourage the Special Rapporteur to explicitly take account of the private law perspective in all drafting proposals, as he had perhaps already done when omitting the qualifier "international" before "disputes" in proposed draft guidelines 1, 2 (b) and 2 (c). He would be interested to learn the Special Rapporteur's views on any general substantive parameters for determining the "private law character" of disputes – a concept that, as pointed out by colleagues, might seem ambiguous and unwieldy but, for exactly that reason, needed to be addressed, as it was, as Mr. Akande had noted, the key technical term in many relevant instruments shaping organizational practice. Possible issues for consideration included whether disputes of a private law character were those arising under a contract or out of a tortious act, as classified under the relevant domestic legal order or general principles of private international law; those that did not concern public international law or did not relate to the actual performance of main functions under constituent instruments; or those that did not necessarily include a review of political or policy matters. Another issue was whether different criteria applied for different instruments, in light of different meanings and practices of application.

The relationship between the substantive definition (or definitions in different instruments) of "private law character" and the applicable procedure for determining the character of disputes, on which some light was perhaps thrown by paragraphs 60 and 61 of the advisory opinion of the International Court of Justice on the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, was another important question for consideration.

Noting the similarity between the framing of the current topic and the 2021 Guide to Provisional Application of Treaties, he agreed with the Special Rapporteur that a set of guidelines would be an appropriate form of output. The argument given in paragraph (1) of

the commentary to guideline 2 of the Guide, that its purpose was to provide guidance to States and international organizations regarding relevant law and practice, seemed equally applicable to the current topic. He would wait to familiarize himself with responses regarding State and organizational practice on the topic before expressing any views on possible substantive approaches.

Certain points related to the scope of the topic did not seem to have been addressed in the first report. The concept of "international administrative law", in the sense of "disputes involving the staff of international organizations", had been excluded from the topic, as explained by Sir Michael Wood in the 2016 syllabus annexed to the report of the Commission's sixty-eighth session. An explicit statement of the related assumptions and rationale would be helpful for clearly delimiting the scope and avoiding any conflation of distinct legal arguments. An example of such conflation could be found in paragraph 24 of the first report, which quoted the leading international administrative law advisory opinion, that of the International Court of Justice on the *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, to explain the preferred approach to private law disputes. More generally, to the extent that the current topic might be informed by concerns about challenges to immunities before domestic courts, as Mr. Akande had noted, several well-known cases had arisen out of disputes involving the staff of international organizations. He thus thought it preferable that international administrative law should be explicitly addressed and excluded.

A second point concerned the role of internal rules within international organizations for the settlement of disputes to which they were parties. Internal bodies, such as tribunals, of an international organization could be crafted so as to bind the organization regarding individual claims, as recognized by the International Court of Justice in the *Effect of Awards* case; he would be interested to hear the Special Rapporteur's views on whether such internal bodies could consider disputes of a private law character. The "rules of the organization", as defined in article 2 (b) of the 2011 articles, might also be a helpful concept in distinguishing between internal disputes and disputes settled by bodies external to the international organization, using the distinction between internal and international aspects of the rules, as explained in the commentary to article 10 of the 2011 articles and by such scholars as Christiane Ahlborn.

A third point was related to the relationship between the current topic and the 2011 articles, particularly regarding the content of responsibility. According to article 33 of the 2011 articles, obligations concerning the content of the responsibility of international organizations, set out in part three of the articles, might be owed to States, to other organizations or to the international community as a whole, and were without prejudice to any right which might accrue directly to any other person or entity. There was ground for reasonable disagreement on the extent to which the obligations set out in part three of the 2011 articles, and the analogous obligations set out in part two of the 2001 articles on responsibility of States for internationally wrongful acts, reflected applicable law in disputes where responsibility was directly invoked by non-State entities, a recent example being the discussion on restitution in the exchange of pleadings in the pending Permanent Court of Arbitration case No. 2020-07, *Nord Stream 2 AG v. the European Union*. It might be helpful to state explicitly that the (tertiary) rules on methods of settling disputes addressed under the current topic were without prejudice to the position on the scope and content of the (secondary) rules in part three of the 2011 articles, even if non-State entities invoked the responsibility of international organizations through the medium of those methods.

On the proposed definitions, he broadly shared the conclusions reached by Mr. Forteau. He had considerable sympathy with the Special Rapporteur's approach to defining "international organization", which was in line with the mainstream view in international institutional law. However, it should not be forgotten that the issue had already been thoroughly discussed during the Commission's work on the responsibility of international organizations, culminating in the definition in article 2 (a) of the 2011 articles, from which the Special Rapporteur's proposed language departed to some extent. That did not mean that the Commission could not adopt a different approach for the topic at hand, but there should be good reasons for doing so, as Mr. Akande had noted. For example, if the definition in the 2011 articles had proved to be unworkable in practice or otherwise problematic or if the

current topic was sufficiently different from the topic addressed in the 2011 articles, a different approach might be warranted. He would also be interested in the Special Rapporteur's views on the practical implications of his proposal and, in particular, whether some entities might be covered by the proposed guidelines on dispute settlement but not by the definition in the 2011 articles, or vice versa.

The wording of proposed draft guideline 2 (a) in some respects built on the 2011 definition, particularly the requirement of a "treaty or other instrument governed by international law" as the legal basis for the establishment of an international organization. He agreed that the approach adopted in article 2 (a) of the 2011 articles and elaborated in paragraphs (5) and (6) of the commentary thereto applied with equal force to the topic under consideration.

He had slight reservations, however, about the proposal to integrate the separate second sentence of the definition in the 2011 articles ("International organizations may include as members, in addition to States, other entities") into the first sentence of the current definition, before the description of the legal basis, as "an entity established by States and/or other entities". He considered "and/or" to be an inelegant formulation, and he did not agree with the substantive focus on establishment, which the Special Rapporteur acknowledged to be a more limited concept than membership. The suggested wording was taken from paragraph (5) of the commentary to conclusion 4 of the 2018 conclusions on identification of customary international law, but that paragraph did not purport to provide a general definition. Rather, it addressed the very specific question of whether practice of international organizations counted as custom; it was therefore not obviously relevant as an authority for the topic of dispute settlement. He suggested that the second sentence from the 2011 definition should be added and its wording slightly modified to reflect the broad and uncontroversial concept of membership of organizations by other organizations: "International organizations may include, as members, States and other entities".

The most significant proposed change with respect to the 2011 articles was the replacement of "possessing its own international legal personality" with "possessing at least one organ capable of expressing a will distinct from that of its members". He agreed with the substance of the proposal and with the view expressed by the Special Rapporteur in the report that "the possession of international legal personality" was "the consequence of an entity being created as an international organization and not itself a prerequisite or a defining element" of such an organization. Nevertheless, the previous definition's focus on "personality" did not make it unsuitable for the current topic because the international organizations to be addressed would share that characteristic, even if it was better understood as a consequence of being an international organization rather than a criterion for becoming one. By explicitly flagging the possession of international legal personality, the definition would make the point that only entities that acquired the status of a subject of international law with the capacity to operate on the international plane could meaningfully engage in dispute settlement, without purporting to provide an authoritative general explanation of when an international organization came into being. Moreover, the contiguity of the topics concerning secondary rules on the responsibility of international organizations and tertiary rules on the settlement of disputes to which international organizations were parties, far from suggesting grounds for divergence, strongly favoured terminological consistency.

In the report, the Special Rapporteur invited the Commission to consider whether the topic should be limited to legal disputes or comprise all kinds of disputes, including those concerning a point of "policy". The idea of extending dispute settlement to policy issues was interesting, and could perhaps be more meaningfully discussed if the Special Rapporteur provided examples of such disputes. At the current stage, it was not obvious that the contrast between more and less juridical forms of dispute settlement mentioned in paragraph 72 of the report would be helpful in justifying engagement with policy disputes, as Mr. Akande had noted. The judgments of the International Court of Justice on jurisdiction and preliminary objections in the case concerning *Arbitral Award of 3 October 1899 (Guyana v. Venezuela)* explained the variety of means that could be employed for settling the same legal dispute, where various degrees of formalization and involvement of third parties did not affect its ultimately legal character. The same point was made from a different perspective in the 19 September 2016 decision on competence of the compulsory conciliation commission

between Timor-Leste and Australia in the case concerning the Timor Sea. In sum, he would be inclined to limit the topic to the traditional scope of legal disputes.

A more general question was whether a definition of "dispute" was necessary at all, at least at the current stage. Treaties commonly envisaged jurisdiction for "disputes regarding interpretation or application" without including a particular definition of "dispute". Similarly, for the purposes of the current topic, the Commission could perhaps take the existence of the technical meaning of "dispute" in international law as a given, without providing a more elaborate explanation. Crafting a satisfactory definition would require reducing to a single proposition judicial pronouncements on the issue rendered in particular institutional settings, something which the International Court of Justice itself had not attempted to do, as illustrated by its reference to three different sources in paragraph 63 of its 22 July 2022 judgment in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gambia v. Myanmar)*. Thus, "dispute" was perhaps best left out of the list of definitions and addressed instead in the commentary to the definition of "dispute settlement". Even if the Commission did decide to define the term, it might wish to do so at a later stage when it was clear whether or not the definition needed also to cover "disputes of a private law character", which might raise issues distinct from those raised by international disputes.

From one perspective, a definition of "dispute settlement" might also be best left for discussion in the commentaries, where it could be addressed with greater flexibility. However, from a different point of view, which he was ultimately inclined to support, the Special Rapporteur's proposal rightly situated the definition within the flexible general system of peaceful settlement of international disputes. Could the Special Rapporteur confirm that the wording "resort to regional agencies or arrangements" from Article 33 of the Charter of the United Nations had been omitted from the proposed definition because it was not necessarily apposite for dispute settlement by international organizations? He also wished to draw attention to the question he had raised earlier as to whether disputes of a private law character could be considered by internal bodies (tribunals) of international organizations.

In terms of authorities and materials, one source that might be relevant for the commentaries was the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization, which had, in its recent annual thematic debates, considered the use of negotiation and enquiry (2018), mediation (2019), conciliation (2020), arbitration (2021), judicial settlement (2022) and regional agencies or arrangements (2023). In addition, the Movement of Non-Aligned Countries had recently proposed further consideration of "other peaceful means". Regarding paragraph 80 of the report, he would be interested to hear the Special Rapporteur's further thoughts about how fitting the public international law definition was in relation to the other legal orders within which disputes to which international organizations were parties were settled in practice.

In sum, he supported draft guideline 1, except that he would prefer to replace "apply to" with "concern". He supported draft guideline 2 (a) in principle but would prefer it to be aligned with the definition in article 2 (a) of the 2011 articles. He did not support draft guideline 2 (b) because it was not obviously necessary. In any event, he would not support the extension of the definition of "disputes" to include disputes about policy issues. He supported draft guideline 2 (c) as proposed. Lastly, he fully supported the Special Rapporteur's proposed future programme of work, including discussion of disputes of a private law character. For the outcome to be useful to States, international organizations and other relevant entities, it should be informed and guided by practice. He therefore looked forward with considerable interest to the responses from States and relevant international organizations, as well as the memorandum by the Secretariat. He was in favour of referring the draft guidelines to the Drafting Committee in light of the debate.

Mr. Grossman Guiloff said that he wished to thank the Special Rapporteur for his first report, which was rich and accessible in terms of drafting and length. Indeed, the length of reports was something the Commission needed to discuss in the context of the Working Group on methods of work. He also wished to commend the Special Rapporteur for drawing attention to the useful insights to be gained from the contributions that different legal bodies had made on the topic and to the need to clarify and develop the existing framework. In that

connection, the Special Rapporteur was to be lauded for having consulted a variety of sources and bodies from different regions of the world.

The report was intended to open a dialogue, which was an essential way for the Commission to deal with such an important topic, particularly as the needs of the international community could not simply be addressed through *ad hoc* policies adopted by States. International organizations were designed to address specific needs on a more permanent basis and to act with an international rather than a national perspective. However, there was still a need to regulate all aspects of the valuable work done by such organizations, and the current project on peaceful settlement of disputes was undoubtedly a meaningful and much-needed normative development.

The proposed scope and outcome of the work on the topic were addressed in chapter II of the report. He noted the proposal that the scope of the topic should be limited to intergovernmental organizations, to the exclusion of entities incorporated under municipal law, multinational corporations or non-governmental organizations, and suggested that the word "intergovernmental" should perhaps be replaced with another appropriate term.

The report also raised the question of whether disputes of a private law character should be included within the scope of the topic. That was an area where difficult issues concerning access to justice and the protection of human rights could arise, especially when an international organization was accorded broad jurisdictional immunities and no effective mechanism of dispute settlement was provided as a substitute for the jurisdiction of domestic courts. That problem was highlighted in the judgment of the European Court of Human Rights in *Waite and Kennedy v. Germany*, in which the Court recognized that, when States established international organizations and attributed to them certain competences and accorded them immunities, there might be "implications as to the protection of fundamental rights". Significantly, the Court had found that States were not absolved from responsibility in such situations, because they were ultimately responsible for having created a legal order where no recourse against the organization was possible. Against that backdrop, he believed that the Commission could provide useful insights to States, so as to ensure that they did not confer immunities on an organization unless it first established effective mechanisms of dispute settlement available to individuals. It was troubling to note that the granting of immunities to organizations, including private legal persons, without first requiring them to establish such mechanisms was a generalized phenomenon across the Americas. He therefore agreed with the Special Rapporteur that the scope of the topic should encompass disputes of a private law character, including those relating to labour matters and tort claims brought by injured third parties. Should the Commission accept that view, he supported the proposal made by other members of the Commission that the title of the topic should be adjusted accordingly.

He was willing to support the Special Rapporteur's proposal that the outcome of the work on the topic should take the form of a set of guidelines, since that would enable the Commission to go beyond existing legal arrangements and to offer recommendations based on best practices and a balanced consideration of the problems and interests involved. However, the text and commentaries of the guidelines needed to be very carefully worded when referring to specific aspects of dispute settlement governed by rules of international law because, as Mr. Akande had noted, the legal value of a concrete norm contained in a guideline could be a mere recommendation or, by operation of customary law or other sources of law, could amount to codification. The terms used to denote the outcomes of the Commission's work, and the corresponding methodology for each type of outcome, should be more clearly distinguished and more consistently applied. The Commission could tackle that issue in its discussions on methods of work.

He concurred with the suggestion made in the report that the topic should focus on "legal disputes arising either under international or domestic law", which was consistent with the inclusion of disputes of a private law character within the scope of the topic. Whether uniform guidance could be offered in relation to policy disputes was open to question, as such disputes could differ radically from one another in both scope and significance. It was an area where the Commission needed to tread carefully, particularly if such disputes were not subject to dispute settlement under customary law or a treaty. In that connection, he would be interested in hearing the views of the Special Rapporteur and colleagues on the value of

distinguishing between an obligation to submit to means of peaceful settlement and an obligation to settle; in other words, of distinguishing between obligations of conduct and obligations of result.

The definition of an international organization as having been established "by States and/or other entities" required some additional clarification. In fact, while international organizations could admit different categories of members, they could be established only by subjects of international law with the legal capacity to create organizations endowed with international legal personality. That capacity currently lay with States and with international organizations on which such capacity had been conferred either explicitly or implicitly. Not all international organizations necessarily had that power. In fact, in its advisory opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, the International Court of Justice stated that international organizations were subjects of international law that did not, unlike States, possess a general competence. According to the Court, such organizations were governed by the "principle of speciality", meaning that they were invested by the States that created them with powers, the limits of which were a function of the common interests whose promotion those States entrusted to them.

Other subjects of international law, such as individuals, also had defined rights and duties under the international legal order, but they did not currently possess the capacity to enter into treaties or to create international organizations. Once an international organization had been established by subjects with the necessary capacity, its membership might well be open to individuals or other entities, if envisaged in the organization's statute or governing instrument. However, it was important not to confuse membership of an organization with the capacity to establish an organization.

Concerning the second defining element, that an international organization must have been established "on the basis of a treaty or other instrument", the key point was that the agreement in question should be governed by international law. In that context, it was interesting to note the *sui generis* nature of certain constitutive agreements that were not embodied in a binding instrument but stemmed from a general consensus as to the nature of the organization in question and its powers to act under international law. That was the case of the International Criminal Police Organization (INTERPOL), whose Constitution was not subject to signature or ratification but which was widely regarded as having international personality and had entered into headquarters agreements with France and Belgium. Similarly, the Inter-American Commission on Human Rights had been created in 1959 by a resolution of the Organization of American States.

Concerning the third and final defining element, the Special Rapporteur rightly argued that, when the powers granted to an organization gave it the ability to act under international law, the organization should be regarded as having international personality. However, the Commission needed to re-examine the statement in the report that international legal personality "should be regarded as a consequence of an organization's ability to express its own will – distinct from that of its members – through its organs". Firstly, introducing the requirement of a distinct will would raise complex theoretical and practical issues, which needed to be addressed very carefully. In fact, the existence of a distinct will as such was not decisive; a cooperation entity created by States could be devoid of legal capacity but nevertheless be able to express its own will in the form of recommendations or policy statements. Such an entity would not, as Mr. Forteau had already indicated, possess international legal personality as a consequence of that modest ability.

Secondly, as the report itself suggested, the decisive criterion for determining whether an organization had international legal personality was whether or not it had been granted the capacity to act on the international plane. In its advisory opinion on *Reparation for Injuries Suffered in the Service of the United Nations*, the International Court of Justice recognized that it was the founding States that "had the power, in conformity with international law, to bring into being an entity possessing objective international personality". As a result, the Court considered that the United Nations was "capable of possessing international rights and duties", and that it had the "capacity to maintain its rights by bringing international claims".

However, since organizations were governed by the "principle of speciality", the consequences arising from international personality were limited by the powers conferred on

a particular organization to act on the international plane. Thus, the extent of rights and duties that an organization was able to acquire as a result of its legal personality would not be the same for each organization. That aspect did not appear to have been addressed in the report, perhaps because of its preliminary nature.

In sum, the definition of "international organization" proposed in the report required further analysis, since it could imply a substantial revision of the Commission's position on the subject. He therefore wished to suggest that the definition provided in article 2 (a) of the articles on the responsibility of international organizations should be used in the current context. The careful drafting of that article could help the Commission avoid some of the problems he had mentioned, while its flexibility meant that it could encompass organizations with a wide variety of members.

With regard to the definition of "dispute" proposed in the report, the inclusion of disagreements over "policy" within the scope of the topic appeared to contradict the proposal in paragraph 30 of the report that such disagreements should be excluded. For the reasons he had already stated, he believed that the Commission's work on the topic should be limited to legal disputes, without prejudice to possible cases in which policy disputes might fall within a mandate to settle disputes under treaty or customary law. The valuable taxonomy proposed by Mr. Jalloh could be expanded to include the type of dispute, the source of possible obligations and the character of the obligation to resort to settlement mechanisms as an obligation of conduct or of result.

Lastly, he wished to express his support for the Special Rapporteur's proposals on the future programme of work. He looked forward eagerly to the second report, which would focus on practice in the settlement of international disputes to which international organizations were parties, and to the memorandum by the Secretariat, which would be drafted on the basis of the responses to the questionnaire circulated to States and international organizations. Account should also be taken of the excellent work done by learned societies and academic centres.

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

The Chair announced that the Planning Group was composed of Mr. Vázquez-Bermúdez (Chair), Mr. Akande, Mr. Argüello Gómez, Mr. Asada, Mr. Aurescu, Mr. Fife, Mr. Forteau, Mr. Galindo, Mr. Grossman Guiloff, Mr. Huang, Mr. Jalloh, 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 and Mr. Nguyen (*ex officio*).

The meeting rose at 11.25 a.m.