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International Law Commission

Seventy-fourth session (second part)

Provisional summary record of the 3648th meeting

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

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Present:

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

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 10.05 a.m.

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

Report of the Planning Group (A/CN.4/L.981)

Mr. Vázquez-Bermúdez (Chair of the Planning Group) said that the work of the Planning Group would be reflected in chapter X of the draft report of the Commission on the work of its seventy-fourth session (A/CN.4/L.981). The Group had held five meetings during the current session and had had before it the text of what had become sections C and D of chapter X, entitled "Other decisions and conclusions of the Commission". It had also had before it the topical summary of the discussion held in the Sixth Committee of the General Assembly during its seventy-seventh session, prepared by the Secretariat (A/CN.4/755); General Assembly resolution 77/103 of 7 December 2022 on the report of the International Law Commission on the work of its seventy-third session; and General Assembly resolution 77/110 of 7 December 2022 on the rule of law at the national and international levels.

The Group had reconstituted the Working Group on the long-term programme of work, of which he had been elected Chair, and the Working Group on methods of work, which had been chaired by Mr. Jalloh. The two Chairs had presented oral reports on the work done by their respective working groups at the 4th meeting of the Planning Group, which had taken note of their reports. The Group had also endorsed several recommendations made by the Working Group on methods of work, including a recommendation that the secretariat should be entrusted with the task of preparing, under the guidance of the Chair of the Working Group on methods of work, a draft internal practice guide, handbook or manual on the methods of work and procedures of the Commission, containing relevant material drawn from volume I of *The Work of the International Law Commission* and the reports of the Commission addressing methods of work from 1996 and 2011, as well as proposals for improvement made by members in the previous quinquennium, to be considered by the Working Group once it had completed its report on methods of work. Both working groups were expected to be reconstituted in 2024 to continue their work.

The Group had also dealt with the usual questions concerning the rule of law at the national and international levels; honoraria; documentation and publications; the *Yearbook of the International Law Commission*; the trust fund for assistance to Special Rapporteurs of the International Law Commission; assistance of the Codification Division; websites; and the United Nations Audiovisual Library of International Law.

The Group recommended the consideration of the convening in the current quinquennium of the first part of a session of the Commission in New York in 2026, subject to the availability of conference services. It also recommended holding a commemorative event for the seventy-fifth anniversary of the Commission in Geneva in 2024, including a solemn meeting with dignitaries and a day and a half of meetings with the legal advisers of the ministries of foreign affairs of Member States. Lastly, the Group recommended that the Commission should convene a 12-week session in 2024. That would mean that the seventy-fifth session would be held in Geneva from 15 April to 31 May and from 1 July to 2 August 2024.

The Chair said she took it that the Commission wished to take note of the oral report of the Planning Group.

It was so decided.

Succession of States in respect of State responsibility (agenda item 2)

Oral report of the Chair of the Working Group on succession of States in respect of State responsibility

Mr. Reinisch (Chair of the Working Group on succession of States in respect of State responsibility), recalling that the Working Group had been established as an open-ended Working Group at the Commission's 3621st meeting (A/CN.4/SR.3621), said that the Group had held four meetings. The purpose of the Working Group was to make a recommendation to the plenary Commission regarding the manner in which the Commission should proceed

with its work on the topic, in the light of the fact that the former Special Rapporteur was no longer a member of the Commission. The Working Group expressed its deep appreciation to the former Special Rapporteur, Mr. Šturma, for his outstanding contribution to the topic.

The Commission's work on the topic thus far had proceeded with the goal of drafting an instrument on succession of States in respect of State responsibility, on the basis of the proposals made by the Special Rapporteur, for eventual recommendation to the General Assembly. Initially, the form pursued had been that of draft articles, and several such provisions had been adopted at previous sessions. However, persistent concerns had been raised within the Commission, as recently as at the seventy-third session, with regard to both the final form of the Commission's output and the format for undertaking work on the topic. At the seventy-third session, the Commission had decided to change the form of the texts considered from draft articles to draft guidelines. Nonetheless, as was recorded in paragraph 86 of the Commission's report to the General Assembly on the work of its seventy-third session (A/77/10):

> "While several members expressed support for continuing the work of the Drafting Committee, a proposal was made to discontinue the Committee's work on an instrument, and, instead, to convene a Working Group, chaired by the Special Rapporteur, with the aim of producing a report on the topic that would be annexed to the Commission's report, as had been done with previous topics, including that on the 'obligation to extradite or prosecute (*aut dedere aut judicare*)'."

The question before the Working Group had been whether, at the current juncture, the Commission should continue with the process of developing a text in the Drafting Committee and proceed to conclude the first reading of the draft guidelines or whether it should pursue a different course, as envisaged in the report, and convene a dedicated Working Group with a view to the eventual production of a report on the topic.

During the Group's extensive debate on the matter, two trends had emerged. Some members had expressed their preference for proceeding in an incremental manner, reconstituting the Group in its current form at the seventy-fifth session so that it could continue its deliberations on the way forward with a clear mandate to take a decision, possibly within a defined period of time and on the basis of a working paper to be developed by the Chair of the Group. That option had been seen as particularly attractive to some of the new members, who were not yet fully acquainted with the intricacies of the Commission's prior work on the topic.

The alternative approach, which was favoured by some other members, was to decide at the current session to discontinue the special rapporteur-led format of the work and opt instead for a working group-driven process aimed at preparing a final report that would be submitted to the General Assembly. The Working Group had considered a proposal along those lines, which would have involved recommending the reconstitution of the Group with a new mandate, and possibly with a restricted membership, to prepare such a final report on the topic within a period of two years. A preliminary report would be prepared for the consideration of the Working Group in the first year and would then serve as the basis for the final report to be approved by the Commission in the second year. That report would in turn be transmitted to the General Assembly with a recommendation that the latter should take note of the report.

While the preponderance of views within the Working Group had favoured the conversion of the current format into a working group-based process, with the goal of producing a final report as opposed to the adoption of draft guidelines, there nonetheless remained a preference for an incremental approach, whereby a decision on the way forward would be taken only at the seventy-fifth session, so as to allow more time for reflection.

Having heard the views expressed in the Working Group, and also having consulted with members bilaterally, he had concluded that there was a coalescence of views around several elements. Accordingly, on behalf of the Group, he wished to make several recommendations.

First, the Commission should, in principle, continue its consideration of the topic but should not proceed with the appointment of a new special rapporteur.

Second, the Working Group should be re-established at the seventy-fifth session with its current composition and should undertake further reflection on the way forward for the topic, taking into account the views expressed and the options identified at the Working Group meetings held at the current session.

Third, such further reflection should be undertaken on the basis of a working paper identifying the complexities surrounding the provisions adopted by the Commission thus far and outlining the options open to the Commission, with an indication of the advantages and disadvantages of each, to be prepared by the Chair of the Working Group in advance of the seventy-fifth session, in close collaboration with interested members of the Group.

Fourth, the Group should seek to make a recommendation that would allow the Commission to take a decision on the way forward at the seventy-fifth session.

Fifth, the Commission should appoint a new Chair for the Group at the current session, on the basis of a recommendation to be made by the Bureau, so that the preparatory work could be undertaken in advance of the seventy-fifth session.

He recommended that the Commission should take note of the report and approve the recommendations of the Working Group.

The Chair said she took it that the Commission wished to take note of the oral report of the Working Group, including the recommendations made.

It was so decided.

The Chair said that the Bureau would convene to discuss the appointment of a new Chair of the Working Group and make a proposal to the plenary Commission before the end of the current session.

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

Chapter V. Settlement of international disputes to which international organizations are parties (*continued*) (A/CN.4/L.977 and A/CN.4/L.977/Add.1)

The Chair invited the Commission to resume its consideration of the portion of chapter V of the report contained in document A/CN.4/L.977/Add.1, starting with paragraph (6) of the commentary to draft guideline 2, pending the informal distribution of revised proposals by the Special Rapporteur concerning paragraph (5) of the commentary.

Commentary to draft guideline 2 (Use of terms) (*continued*)

Paragraph (6)

Mr. Forteau said that the purpose of paragraph (6) was to state that a defining characteristic of international organizations was that they were established by a treaty or other instrument governed by international law. However, in footnote 51, the definitions of transnational corporations and multinational enterprises drawn from the United Nations Code of Conduct on Transnational Corporations and the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises did not relate to that particular characteristic and instead described other definitional criteria. His proposal was therefore to delete footnote 51. In addition, footnote 50 should be merged with footnote 48, since footnote 50 concerned the definition of non-governmental organizations (NGOs) in general, and not merely that of non-profit entities.

Mr. Reinisch (Special Rapporteur) said that he saw merit in combining footnote 50, which contained definitions of NGOs, and footnote 48, which did not contain any definitions but which referred to arrangements with NGOs. Perhaps a similar approach could be taken in respect of footnote 51, the purpose of which was to cite the two most widely used definitions of transnational corporations and multinational enterprises, by incorporating the contents of that footnote into footnote 49.

Mr. Forteau said that his concern about footnote 51 was that it provided a list of definitional criteria that did not correspond to the statement made in the first sentence of paragraph (6) and that could in fact apply to certain international organizations. For example,

the ownership criterion described at the end of the footnote could apply to certain international financial organizations, such as the Bank for International Settlements. Consequently, the lengthy definitions provided in footnote 51 could give rise to confusion and did not allow for a clear distinction to be made between international organizations, on the one hand, and transnational corporations and multinational enterprises, on the other, which was the very purpose of paragraph (6). Alternatively, the footnote could be amended to merely refer to the Code of Conduct on Transnational Corporations without citing its contents.

Mr. Jalloh said that, in the light of Mr. Forteau's concern, perhaps the words "which are not international organizations as understood for the purposes of these draft guidelines" could be inserted at the end of the first sentence of paragraph (6), in order to make it clear in the text itself that transnational corporations and multinational enterprises did not fall within the scope of the term "international organization" for the purposes of the draft guidelines.

Mr. Reinisch (Special Rapporteur) said he was not sure that Mr. Jalloh's proposed amendment would assuage Mr. Forteau's concerns. Moreover, such an addition seemed unnecessary in the light of the statement at the beginning of the first sentence that international organizations were established by instruments governed by international law. If the Commission decided not to maintain the definitions provided in footnote 51, which he had understood to be broadly accepted, perhaps it would not be necessary to reproduce the contents of the footnote elsewhere, since footnote 49 already contained references to both the OECD Guidelines for Multinational Enterprises and the work of the United Nations Commission on Transnational Corporations.

Mr. Jalloh said that, in his view, the definition of transnational corporations provided in footnote 51 helped to clarify the text of paragraph (6).

Mr. Ruda Santolaria said that footnote 51, and the widely accepted definitions it contained, helped to clarify how international organizations could be distinguished from other entities that did not have the same legal standing. The footnote should thus be retained.

Mr. Vázquez-Bermúdez said he agreed with Mr. Jalloh and Mr. Ruda Santolaria that the information contained in footnote 51 helpfully explained what was meant by "corporate entities with a profit-making purpose" and should be retained.

Mr. Forteau said that, if members wished to retain footnote 51, he would not oppose the consensus. However, he maintained that the sole purpose of paragraph (6) was to highlight one of the criteria used to distinguish an international organization from an NGO or a transnational corporation or multinational enterprise, namely, whether it had been established by an instrument governed by international law. Not only did footnote 51 not specifically address that criterion, but the definitions it contained effectively excluded from the scope of the draft guidelines enterprises that were also international organizations, such as the Enterprise of the International Seabed Authority and joint enterprises undertaken by two States to exploit marine resources. In his view, retaining footnote 51 could confuse readers rather than clarify the text of the paragraph.

Mr. Reinisch (Special Rapporteur) said that, in the light of the point raised by Mr. Forteau regarding the overriding purpose of paragraph (6), it would be preferable not to combine footnote 50 with footnote 48 and footnote 51 with footnote 49. Footnotes 50 and 51 clearly dealt, respectively, with non-profit-making entities and for-profit entities. The definitions set out in footnote 51 were unlikely to be interpreted so broadly as to cover, for example, joint enterprises based on treaties between States. For the sake of clarity, all the footnotes should be retained as they currently stood.

The Chair suggested that the Commission should accept Mr. Jalloh's proposal to add language to the end of the first sentence of paragraph (6) to the effect that transnational corporations and multinational enterprises were not regarded as international organizations for the purposes of the draft guidelines, as they were not established by an instrument governed by international law. The footnotes could then be retained as they currently stood.

Paragraph (6) was adopted on that understanding.

Commentary to draft guideline 1 (Scope) (*continued*)

Paragraph (5) (*continued*)

The Chair said that, as had been agreed at the preceding meeting, in paragraph (5), footnotes 12 to 15 had been combined into a single footnote citing sources in which the four terms used by the Commission to refer to non-international law could be found. The text of the new footnote 12 had been circulated informally to the members.

Mr. Forteau, welcoming the preparation of the new footnote 12, said that, for the sake of clarity, the words "in other topics" should be inserted between "referring" and "to" at the start of the second sentence so that it read "In addition to referring in other topics to 'national' law".

Paragraph (5), as amended, was adopted.

Commentary to draft guideline 2 (Use of terms) (*continued*)

Paragraph (5) (*continued*)

The Chair invited Mr. Asada to introduce his proposal for a new paragraph to be added to the commentary to draft guideline 2. The text had been circulated informally to the members.

Mr. Asada said that he wished to propose the insertion of a new paragraph, after current paragraph (5), which would read:

> "The reference to an entity 'established by a treaty or other instrument governed by international law' is not intended to exclude the rare cases in which international organizations are established by a non-legally binding instrument. An example is the Organization for Security and Cooperation in Europe (OSCE), which was originally created as the Conference on Security and Co-operation in Europe (CSCE) by the Helsinki Final Act of 1975, but was later institutionalized by the Charter of Paris for a New Europe of 1990 and renamed as the OSCE in 1995. Both the Helsinki Final Act and the Charter of Paris were explicitly designated as not treaties."

In the plenary debate and in the discussions of the Drafting Committee, he had raised the question of how international organizations created by a non-legally binding instrument, such as OSCE, should be treated. During the discussions in the Drafting Committee, he had proposed some amendments to the definition of "international organization" contained in draft guideline 2 (a) to clarify that international organizations whose constituent instruments were not legally binding could also fall under that definition. The fact that OSCE participating States had been involved in disputes regarding privileges and immunities was part of the rationale behind the amendments he had proposed in the Drafting Committee. However, for the sake of expediency, he had withdrawn his proposals on the understanding that the point would be dealt with in the commentary. Although other members had expressed support for that approach, the point in question had not been explicitly mentioned in the commentary produced by the Special Rapporteur. If his new text could not be inserted as a new paragraph after the current paragraph (5), it could simply be added to the end of that paragraph. He considered the point to be too significant to be relegated to a footnote, which many readers might ignore. He would appreciate input from other members on the placement or the wording of his new text.

Mr. Mavroyiannis said that paragraph (5) contained some factual inaccuracies concerning the timeline of the establishment of the United Nations Industrial Development Organization (UNIDO) as a specialized agency of the United Nations. While UNIDO had originally been a subsidiary organ of the General Assembly, it had not separated from the United Nations in 1979. Rather, in 1975 the authors of the Lima Declaration and Plan of Action on Industrial Development and Cooperation had recommended that the General Assembly should transform UNIDO into a specialized agency, and in 1979 a draft constitution had been prepared by an intergovernmental committee in Vienna. Discussions on the draft constitution had continued until 1985, when it had been adopted. The

Commission should avoid giving the impression that, between 1979 and 1985, UNIDO had been outside the United Nations system.

Mr. Zagaynov, referring to the question of decisions adopted at conferences of States as a source of creation of international organizations, said that, to his knowledge, not all the decisions adopted at such conferences were governed by international law.

Although he did not object to Ms. Mangklatanakul's proposal at the preceding meeting to add the Association of Southeast Asian Nations (ASEAN) as a further example of an organization established by a conference decision, the new footnote 46 seemed to him to be contradictory.

He found the new paragraph proposed by Mr. Asada to be problematic, not least because the legal personality of OSCE was in dispute. It was not for the Commission to resolve that dispute. In his view, OSCE should not be cited as an example.

Mr. Cissé said that a number of African organizations were not mentioned in paragraph (5), including the Economic Community of West African States and the Economic Community of Central African States. Reference could also be made to similar organizations in North Africa, provided that the necessary research was carried out.

Ms. Mangklatanakul said that, to her mind, the example of ASEAN, and the question of when and how it had become an international organization, attested to the diversity of the means by which such organizations could be established and the need to widen the scope of paragraph (5) to accommodate cases such as ASEAN and OSCE, which she understood to be the rationale behind the new text proposed by Mr. Asada.

In cases that were less clear-cut, the intention of States at the inception of the organization in question was of paramount importance. For instance, the States that had signed the political declaration establishing ASEAN might well have intended for it to remain a loose arrangement through which the participating States could address security concerns in the region. That might also be the case for OSCE. In practice, the three types of international organization described in paragraph (5) – those established by treaties, those created by resolutions of international organizations and those set up by decisions adopted at conferences of States – did not appear to cover cases in which an entity had operated as an international organization *de facto* before officially attaining that status. If members decided against the inclusion of ASEAN and OSCE as specific examples, the Special Rapporteur could instead consider adding language to the effect that the "decisions at conferences of States" by which international organizations could be created included political declarations.

Ms. Okowa, noting that Mr. Savadogo had made a similar proposal at the preceding meeting, said that the first clause of the first sentence would be clearer if it was reformulated to read: "Most international organizations are established by treaties. The terminology used in the particular instrument may vary, but the effect is invariably the same, irrespective of nomenclature." The new third sentence would begin "Constituent instruments of international organizations include".

Ms. Oral said that she did not find the new footnote 46 to be contradictory, as it made clear that ASEAN had first been established as an association and that it had later become an organization through its charter. She was in favour of retaining the example of ASEAN. The new text proposed by Mr. Asada and the specific example of OSCE warranted closer examination.

Mr. Forteau proposed that the words "instruments designated as" [*des instruments dénommés*] should be inserted after "constituent instruments of international organizations include" to reflect more closely the language used in article 2 (1) of the Vienna Convention on the Law of Treaties.

Mr. Fife said that the paragraph did not seek to provide a comprehensive and exhaustive classification of international organizations or a litmus test for the determination of international legal personality that would be satisfied in all cases. Rather, the intention was to take a practical approach by using definitions that would suit the purposes of the topic, which concerned dispute settlement. He agreed with Mr. Asada that the paragraph was not intended to exclude certain cases. Mr. Zagaynov had referred to the existence of a dispute

over the legal personality of OSCE, which pointed to the relevance of dispute settlement in relation to international organizations. While the topic involved clarification of the issue of international legal personality, the paragraph under consideration was not aimed at resolving such questions. He therefore proposed that, in the new paragraph proposed by Mr. Asada, the words "is not intended to exclude the rare cases in which international organizations are established by a non-legally binding instrument" should be amended to read "is not intended to resolve such questions relating to the existence of international legal personality such as". Then the example of OSCE and others could be mentioned.

Mr. Reinisch (Special Rapporteur), referring to the questions raised about how treaties should be referred to in the draft guidelines, said that one of the reasons that he had chosen the word "treaties", rather than "agreements", in the first sentence of paragraph (5) was that it was the generic term used in the Vienna Convention on the Law of Treaties. He proposed that the beginning of the first sentence should be revised to read "Most international organizations are established by treaties, regardless of how they may be referred to: they include". The proposal made by Mr. Forteau could then follow: "instruments designated as".

He understood Mr. Mavroyiannis's concern over the phrase "After separating from the United Nations" with respect to UNIDO, which in fact had not separated from the Organization. He therefore proposed that the phrase should be replaced with "After decisions taken within the United Nations in 1979", with the footnote indicating the General Assembly resolution on the transitional arrangements relating to the establishment of the United Nations Industrial Development Organization as a specialized agency.

He would deal with the proposal for a new paragraph (5) *bis* at a later time.

Mr. Cissé had made valid suggestions concerning other important regional organizations. However, most of the ones that Mr. Cissé had mentioned had been established by treaties and thus were not examples of organizations established by decisions adopted at conferences of States.

With respect to the suggestion made by Ms. Mangklatanakul, it was his understanding that ASEAN had not been established as an international organization but rather as a very informal association and that it had indeed been the ASEAN charter that had transformed it. He therefore suggested that the proposed new footnote 46, which had been circulated informally, outlining the history of how ASEAN had been established should be retained. The debate on her suggested addition of a reference to political declarations and on how that might be in line with Mr. Asada's suggestion to refer to non-legally binding instruments could be postponed until the discussion of the new paragraph (5) *bis* that Mr. Asada had prepared.

At the preceding meeting Mr. Savadogo had proposed the addition of a reference to the United Nations Conference on Trade and Development, which had been created by a General Assembly resolution. Because, unlike UNIDO, it had not subsequently been transformed into a separate international organization, he would prefer not to include it among the examples in paragraph (5).

Ms. Mangklatanakul said that ASEAN should not be included among the examples of organizations established by decisions adopted at conferences. The Association had been established with the signing of a document that was not a legally binding treaty. Rather, it was considered a security instrument. OSCE, however, could already be regarded as such an organization, as it had been established by a legally binding instrument at the outset. The definition of "international organization" was too narrow and thus excluded many organizations. The fact that those organizations were not covered should be reflected in the commentary. Organizations that were not established by treaties should also be taken into account in the future.

Mr. Grossman Guiloff said that there were many organizations that had been created by resolutions, such as the Inter-American Commission on Human Rights, to take one example. He therefore agreed that there were many ways in which international organizations could be established and later institutionalized.

Mr. Forteau said that Ms. Mangklatanakul's concerns had already been taken into account in draft guideline 2 (a), which stated that international organizations were established

by a treaty or other instrument governed by international law. He therefore proposed that paragraph (5) of the commentary should include an additional sentence based on wording from paragraph (4) of the commentary to article 2 of the Commission's 2011 articles on the responsibility of international organizations: "In order to cover organizations established by States on the international plane without a treaty, guideline 2 refers, as an alternative to treaties, to any 'other instrument governed by international law'." The new sentence would be placed after the first sentence and the words "In addition" at the beginning of the next sentence would be deleted.

Mr. Vázquez-Bermúdez said that he agreed with the solution proposed by Mr. Forteau.

Paragraph (5), as amended, was adopted.

Paragraph (7)

Paragraph (7) was adopted.

Paragraph (8)

Mr. Sall said that the word "subsequently" in the second sentence should be deleted, as it was implicit in the word "becoming" and was thus redundant.

Mr. Fathalla said that, in the second sentence, the words "or observers" should be added after "members" because some entities were or would become only observers rather than members of international organizations.

Mr. Forteau said that, although the word "subsequently" was to some extent superfluous, given that it was followed by "becoming", the emphasis was useful and he was in favour of maintaining the sentence as currently worded. He did not agree that a reference to observers should be added, since they did not fall within the scope of the specific circumstances envisaged in paragraph (8).

Paragraph (8) was adopted.

Paragraph (9)

Paragraph (9) was adopted.

Paragraph (10)

Mr. Jalloh said that, to enhance readability and for consistency with the approach adopted in paragraph (9), the words "as was the case with the Special Court for Sierra Leone" should be added at the end of the second sentence. Although details of the agreement establishing the Special Court were provided in footnote 57, the addition of that short phrase would serve to clarify in the body of the text the type of organization concerned.

Mr. Savadogo said that he found the wording of the first sentence difficult to understand and wished to propose an alternative formulation in which the text following the words "*d'autres entités*" [other entities] was replaced with "*cette formule n'implique pas nécessairement le participation de plusieurs États*" [this wording does not necessarily imply that several States must be members].

Mr. Forteau, making a substantive observation in response to Mr. Jalloh's suggestion, said that, in his view, the example of international tribunals did not entirely correspond to the definition of "international organization" set forth in draft guideline 2. He failed to see how a court could express a will distinct from that of its members, as required pursuant to subparagraph (a) of the draft guideline. Courts and tribunals applied the law; they did not have a will of their own, and it was for that reason that he had expressed reservations about the inclusion of that criterion in the definition.

Mr. Reinisch (Special Rapporteur) noted that, given the complexity of the subject matter, there would always be cases in which it was difficult to find examples that met the definition precisely. With regard to Mr. Jalloh's suggestion, he was willing to accommodate the addition, although, as a general rule, he had endeavoured to confine information of that

kind to the footnotes. With regard to Mr. Savadogo's suggestion, he was somewhat reluctant to incorporate all of the alternative text proposed. The aim of the first and second sentences was to highlight the fact that, as demonstrated by the agreement between the United Nations and the Government of Sierra Leone, an international organization could have just one State as a member even though the definition contained in the draft guideline, when referring to the members of an international organization, used the plural form "States". In his view, the statement that "a plurality of States" as members was not a requirement captured that element of the definition neatly and effectively. He suggested, therefore, that the current wording should be retained, with the word "necessarily" inserted before "imply" to address the concern raised.

Paragraph (10), as amended, was adopted.

Paragraphs (11) to (13)

Paragraphs (11) to (13) were adopted.

Paragraph (14)

Mr. Savadogo pointed out that the citation of the second source referred to in footnote 65 appeared to be inaccurate.

Paragraph (14) was adopted, subject to the verification and correction of footnote 65.

Paragraph (15)

Ms. Ridings, recalling the concerns regarding the notion of collective will that she and other members had raised at plenary meetings and before the Drafting Committee, proposed that the phrase "and expressing the collective will of its members" should be inserted before the second comma in the last sentence and that the text following that comma should be adjusted to read "can also be considered to express their organization's own will". The purpose of the proposed amendment was to avoid the implication that organizations expressing the collective will of their members did not meet the definition of an international organization.

Mr. Forteau said that, while he had intended to suggest the deletion of the last sentence on the grounds that some organizations – notably, the Group of Seven – did not express a collective will, the alternative proposed by Ms. Ridings would resolve his concerns, with just one small adjustment: in the additional text proposed, the word "and" should be replaced with "when" in order to make clear that the text was setting forth a condition that must be satisfied in order for the entity to be considered an international organization under the draft guideline.

Mr. Grossman Guiloff said that he had doubts about the proposed qualifier "when expressing the collective will of its members". It seemed to imply that there might be occasions when an organization operating on the basis of unanimity did not express the collective will of its members. He wondered whether such a situation was possible. If it was not, the addition was unnecessary.

Mr. Reinisch (Special Rapporteur) said that he understood Ms. Ridings's concern and would accept her proposed addition. He also understood Mr. Grossman Guiloff's fear that adopting the proposal as amended by Mr. Forteau would be extremely restrictive in its effect. He suggested, therefore, that the Commission should revert to the formulation initially proposed by Ms. Ridings.

Mr. Jalloh said that, although he was intrigued by the proposals from Ms. Ridings and Mr. Forteau, he was grateful to Mr. Grossman Guiloff for having drawn attention to the unduly narrow qualification that the amendment proposed by Mr. Forteau would introduce. In his view, the sentence should be adopted as drafted by the Special Rapporteur. However, he would accept the amendment as initially proposed by Ms. Ridings if there was a consensus on doing so.

Paragraph (15), as amended, was adopted.

Paragraph (16)

Mr. Mavroyiannis said that he had doubts about the requirement of possession of international legal personality as part of the definition of "international organization" in draft guideline 2. Controversy remained over whether some organizations, including OSCE, as was noted in footnote 74, possessed international legal personality. That issue perhaps required closer examination.

Mr. Reinisch (Special Rapporteur) said that Mr. Mavroyiannis's observation confirmed his initial position that international legal personality was simply a consequence of being an international organization, not a requirement. However, he did not wish to reopen the debate or to question the agreements that had resulted from lengthy discussions. In drafting the text, he had endeavoured to adhere both to agreements reached in the Drafting Committee and to the definition of "international organization" contained in the 2011 articles on the responsibility of international organizations. Moreover, an explanation of how the concept of international legal personality should be understood was provided in the subsequent paragraphs.

Mr. Oyarzábal said that, in the first sentence, the word "maintains" should be replaced with "reaffirms", a word that better reflected the tenor of the discussions in the Drafting Committee.

Paragraph (16), as amended, was adopted.

Paragraph (17)

Mr. Paparinskis, supported by **Mr. Forteau**, proposed that the entire paragraph should be deleted. The paragraph related to international organizations only incidentally, insofar as necessary to support the point being made; that was also true of paragraphs (18) and (19). Furthermore, in paragraphs (7) to (9) of the commentary to article 2 of the 2011 articles on the responsibility of international organizations, the Commission had managed to make the same point by referring to four court cases, without mentioning works of scholarship. While he was not advocating precisely the same approach, the relevant paragraphs of the 2011 commentary might serve as a guide for the formulation of a more streamlined alternative paragraph.

Mr. Reinisch (Special Rapporteur) said that, if paragraph (17) was deleted or replaced, useful substantive information that reflected statements delivered in plenary meetings and the Commission's lengthy discussions regarding the concept of international legal personality would be lost. He had tried to present that information in a matter-of-fact style and was somewhat surprised that colleagues with a background in academia would prefer that the commentary should not reflect the detail of discussions to which they had contributed. However, he had no objection in principle to the paragraph's deletion if that was the collective wish.

Mr. Fife, supported by **Ms. Mangklatanakul**, **Mr. Jalloh** and **Mr. Ouazzani Chahdi**, said that paragraph (17) reflected the lively discussions that had taken place in a factual and very readable manner. The paragraph, including all the academic references contained in the footnotes, should therefore be retained as currently drafted.

Paragraph (17) was adopted.

The meeting rose at 1.05 p.m.