Provisional

For participants only

18 June 2024

Original: English

International Law Commission

Seventy-fifth session (first part)

Provisional summary record of the 3658th meeting
Held at the Palais des Nations, Geneva, on Monday, 29 April 2024, at 3 p.m.

Contents

Present:

Temporary Chair:	Ms. Galvão Teles
Chair:	Mr. Vázquez-Bermúdez
Members:	Mr. Akande
	Mr. Asada
	Mr. Cissé
	Mr. Fathalla
	Mr. Fife
	Mr. Forteau
	Mr. Galindo
	Mr. Grossman Guiloff
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Mr. Lee
	Ms. Mangklatanakul
	Mr. Mavroyiannis
	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

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 3.10 p.m.

Opening of the session

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

Election of officers

Mr. Vázquez-Bermúdez was elected Chair by acclamation.

Mr. Vázquez-Bermúdez took the Chair.

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

Mr. Paparinskis was elected First Vice-Chair by acclamation.

Ms. Mangklatanakul was elected Second Vice-Chair by acclamation.

Ms. Okowa was elected Chair of the Drafting Committee by acclamation.

Ms. Ridings was elected Rapporteur by acclamation.

Introductory remarks by the Chair

The Chair said that, while the international legal system had basic rules and principles which provided its fundamental structure, it was also in a state of constant transformation and growth. The Commission had contributed hugely to the expansion and development of the international legal system over the previous 75 years: many of the normative instruments that now constituted the pillars of that system had their origins in its work. The international community was faced with increasing challenges, to which the Commission was contributing normative responses through a rigorous analysis of State practice and the identification of principles recognized by the international community, jurisprudence and doctrine. The Commission's contribution was based on working directly with Member States on the basis of its current agenda. With the inclusion of new topics in its programme of work, the Commission would continue its work to strengthen, clarify and expand international law for the benefit of all States and to promote and protect the values and interests of the international community as a whole.

Adoption of the agenda (A/CN.4/762)

Mr. Fathalla, welcoming the Commission's historic achievement in electing a Bureau with a female majority, said that, in view of the global situation, in which international law was increasingly disregarded, he wished to propose the inclusion of a new agenda item to enable the Commission to help restore the status of international law in the world. At some point during the current session, the Commission should take the lead among United Nations bodies by initiating a non-politicized discussion on how to address that task.

Mr. Jalloh said that he would support the inclusion of such a discussion in the Commission's programme of work during the current session, whether as a new agenda item or in a different form.

Mr. Patel said that he supported Mr. Fathalla's proposal for the inclusion of a new agenda item.

Mr. Oyarzábal, supported by **Ms. Oral** and **Mr. Mavroyiannis**, said that he too welcomed the new female majority on the Bureau. He suggested that the planned ceremony to mark the Commission's seventy-fifth anniversary would present an appropriate opportunity to hold the discussion proposed by Mr. Fathalla.

Mr. Grossman Guiloff, supported by **Mr. Ouazzani Chahdi** and **Mr. Ruda Santolaria**, said that he was in favour of Mr. Fathalla's proposal, as, even beyond the Commission's seventy-fifth anniversary, it was always appropriate to reflect on the value of international law in the world. However, such a discussion would be complex and would

require both extensive preparation and more than a single meeting; the Bureau might wish to make a proposal on the form and timing of a first, exploratory, meeting.

Ms. Galvão Teles said that she wished to congratulate the members of the Bureau on their election. Not only did the Bureau have, for the first time, more than one female member, but its three female members were from three different regions. She fully supported the proposal for the Bureau to further consider the content, format and potential outcomes of the discussions proposed by Mr. Fathalla. It should also consult the regional groups on the matter. The proposed discussions could be held in connection with the upcoming activities to commemorate the Commission's seventy-fifth anniversary in Geneva or with meetings of the Sixth Committee of the General Assembly in New York later in the year.

Mr. Cissé said that Mr. Fathalla's proposal merited consideration. International law was at a crossroads, with principles previously thought to be inviolable now being called into question. The Commission must reflect on the concerns raised if it wished to have greater credibility.

Mr. Paparinskis said that he agreed with the points made by Mr. Fathalla and with the approach proposed by Ms. Galvão Teles.

Mr. Fathalla said that, while the task of determining the best time and place for the discussions should be left to the Bureau, the discussions should take place under a new agenda item.

Mr. Sall said that he agreed that the issues raised by Mr. Fathalla should be discussed. It would, however, be preferable to delay those discussions, perhaps until the second part of the session, to give the Commission time to determine precisely what the topic of the discussions should be.

Mr. Forteau said that the proposal to include a new item on the agenda raised a procedural issue that should follow the applicable rules. In any case, a new agenda item was not needed in his view, as the important issues raised by Mr. Fathalla could – and, he would suggest, should – be addressed in connection with the work on the rule of law within the Planning Group. In addition, the discussions should be limited to the Commission's mandate, which involved not the enforcement of international law but its progressive development and codification.

Mr. Jalloh said that, in determining the time to be allocated to the proposed discussions, the Bureau should keep in mind that the Planning Group had a very limited amount of time available to it to complete its work. The question of what outcomes the discussions would be expected to lead to would also have to be addressed. At the current session, owing to factors beyond its control, the Commission would be meeting for only 10 weeks, although it had recommended a 12-week session to the General Assembly. He feared that the Commission would eventually face criticism for not delivering on the ambitious agenda that it had set out in the first year of the quinquennium, without it being remembered that the session length recommended by the Commission had been truncated for budgetary reasons.

Mr. Fife said that he was in favour of addressing the issues raised by Mr. Fathalla in the manner proposed by Mr. Forteau. As noted by Mr. Jalloh, the time available to the Commission must be considered.

Mr. Huang said that he found the topic raised by Mr. Fathalla interesting. However, it was the first time in his 15 years on the Commission that he had seen a new agenda item being proposed during the agenda adoption process. The Commission should consider whether such a practice was appropriate. In his view, it was not the time to put forward a new item.

The Chair said that there appeared to be general support among members for Mr. Fathalla's proposal for the Commission to reflect on its contribution to international law and the international legal system, a reflection that the Commission did to a certain extent already engage in in various contexts. As some members had expressed reservations regarding the inclusion of a new item on the provisional agenda, the proposed discussions could potentially take place under the existing item 14, "Other business". With regard to the

Commission's seventy-fifth anniversary, he felt it was especially important for the Commission to reflect on its past and future contributions to the progressive development and codification of international law on that occasion. He would suggest that the Bureau should discuss the matter and put forward proposals on how to address the issues raised by Mr. Fathalla.

The provisional agenda was adopted on that understanding.

Programme, procedures and working methods of the Commission and its documentation (agenda item 11)

The Chair said that, owing to the liquidity crisis facing the United Nations, the Commission's plenary meetings would not be webcast on United Nations Web TV. That was a regrettable development, as not only had the webcasts made the Commission's work accessible to representatives of States, academics and all members of the public interested in its work, but the recordings of them also served as a resource for future consultation. The measure would decrease the visibility of the Commission and its work. In addition, video links would no longer be provided for closed meetings. That was particularly unfortunate for the young lawyers who otherwise would have had the invaluable experience of assisting members of the Drafting Committee remotely. However, interested members of the public could listen to the proceedings at the Commission's plenary meetings through an audio-only online service, and audio recordings of the meetings would also be available online.

It was proposed that the Commission should maintain the 20-minute time guideline for statements delivered in plenary meetings. That guideline would not apply to statements delivered by the Special Rapporteur for the topic in question or the Chair of the Drafting Committee. He took it that the Commission agreed to the proposed working methods.

It was so decided.

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

The Chair said that, owing to the liquidity crisis affecting the United Nations, the duration of the Commission's seventy-fifth session had been reduced from 12 weeks to 10 weeks. The time available had been distributed as evenly as possible among the different topics on the Commission's agenda. Regrettably, the resulting restrictions on the use of the buildings and conference facilities at the United Nations Office at Geneva made it impossible to hold an event to commemorate the Commission's seventy-fifth anniversary at the Palais des Nations as planned. However, the secretariat, in close cooperation with the Bureau, had worked diligently to organize an alternative commemorative event, which would take place at the Geneva Graduate Institute on Friday, 24 May, from 1.30 p.m. to 6 p.m. The event would consist of a reception, sponsored by the Government of Switzerland, and a panel discussion on the Commission's contribution to the international legal system. Further details of the event would be shared with members as soon as possible.

As members would recall, a casual vacancy had arisen in the Commission's membership following the election of Mr. Bogdan Aurescu to the International Court of Justice. His successor would be elected at a closed plenary meeting during the first week of the first part of the session. The result of the election would be announced immediately afterwards in a public plenary meeting.

The proposed programme of work for the first part of the Commission's current session would begin with the consideration of the topic "Settlement of disputes to which international organizations are parties" by the plenary Commission. In addition, the topic "Sea-level rise in relation to international law" would continue to be considered by the corresponding Study Group. The Commission would then take up the topics "Subsidiary means for the determination of rules of international law" and "Prevention and repression of piracy and armed robbery at sea". The Working Group on succession of States in respect of State responsibility would meet during the fourth week of the first part of the current session. All other items on the Commission's agenda would be taken up during the second part of its current session. The Planning Group, the Working Group on the long-term programme of work and the Working Group on methods of work would begin to meet from the third week of the first part of the current session. In line with the practice of the Commission, the

proposed programme of work would be applied with the necessary flexibility. He took it that the Commission agreed to the proposed programme of work for the first part of the session.

It was so decided.

Settlement of disputes to which international organizations are parties (agenda item 6) (A/CN.4/766)

Mr. Reinisch (Special Rapporteur), introducing his second report on the topic "Settlement of disputes to which international organizations are parties" (A/CN.4/766), said that he wished to express his appreciation for the constructive discussion and comments made during the debate in the Sixth Committee of the General Assembly. States had generally endorsed the Commission's decision to address all types of disputes, not only international disputes, to which international organizations were parties, and its current approach of working towards the development of guidelines that would reflect existing practice and make recommendations for the settlement of such disputes. Draft guideline 2, which defined the terms "international organization", "dispute" and "means of dispute settlement", had engendered a lively debate in the Sixth Committee, reflecting the discussion within the Commission. Due consideration would be given to the various suggestions made in that connection.

He was likewise grateful to those States and international organizations that had responded – often in great detail – to the Special Rapporteur's questionnaire, which had been sent by the secretariat in December 2022. The responses received contained highly valuable information, which had been used in the preparation of the second report and would also form the basis for the third report, to be drafted in 2025.

The second report focused on international disputes between international organizations and between international organizations and States or other subjects of international law arising under international law. The responses to the questionnaire showed that disputes between international organizations were a rare occurrence and provided interesting examples of such cases. According to the responses received, disputes between international organizations and States arose more frequently and often concerned headquarters or seat issues, including questions relating to the status, privileges and immunities of international organizations. The disputes that arose most frequently between international organizations and their member States typically concerned the scope of the former's powers and the latter's compliance with their obligations under the constituent instruments of such organizations.

The scope of the report was limited to disputes arising under international law. Non-international law disputes, which arose because international organizations often also had domestic legal personality and could thus be parties to disputes arising from contractual relationships governed by national or contract law or to tort disputes of a private law character, would be addressed in the Special Rapporteur's third report.

As explained in the introductory chapter of the report, distinguishing between international and non-international disputes was not always straightforward. Non-international disputes might involve a number of international law issues that could in turn give rise to an international dispute, for example, through the espousal of a tort claim for personal injury or property damage through diplomatic or functional protection. Conversely, the choice by international organizations and/or States to have their relationship governed by national law instead of international law by, for example, opting for a "private" contractual relationship instead of a treaty relationship, could give any disputes arising from such contractual relationships a non-international character.

The chapter also made it clear that non-international disputes to which international organizations were parties might also involve a number of international law issues, including the according of domestic legal personality to international organizations in keeping with their constituent instruments and the scope of the jurisdictional immunity enjoyed by such organizations, or questions such as access to justice. Nevertheless, the wording of draft guideline 3, which defined the scope of international disputes to which international organizations were parties, reflected the actual practice of international organizations and States as described in their responses to the questionnaire.

The second chapter of the report, which provided an analysis of the practice of settling international disputes to which international organizations were parties, drew on the information provided by States and international organizations in their responses to the questionnaire and on independent research conducted by the Special Rapporteur. It demonstrated that international organizations used all the different means of dispute settlement referred to in draft guideline 2 (c) to settle their disputes, although non-adjudicatory means were seemingly used more frequently than arbitration or recourse to international courts or tribunals.

The prevalence of negotiation, consultation or other amicable means of dispute settlement arguably reflected the fact that many treaties concluded by international organizations, and headquarters and seat agreements, expressly provided for amicable dispute settlement as a first step preceding other forms of third-party dispute settlement. That approach to dispute settlement also appeared to be a result of the internalized preference of international organizations and States to settle disputes discreetly and diplomatically in an informal manner. There was evidence to suggest that disputes involving international organizations were often successfully settled by means of negotiations and consultations among the disputing parties. The often-confidential dispute settlement means of mediation and conciliation, which were also provided for in agreements concluded by international organizations, were reportedly used less often. It appeared that the means of enquiry or fact-finding, although available in principle, were not often resorted to by international organizations.

The limited practice of arbitration as a means of settling international disputes to which international organizations were parties could be explained by the fact that arbitration was seldom provided for as a form of dispute settlement in treaties, and that international organizations and other parties were often reluctant to initiate arbitration. Arbitration clauses could nonetheless be found in multilateral privileges and immunities treaties and headquarters and similar agreements, and, less frequently, in constituent instruments of international organizations. The analysis in the second chapter showed that such clauses had actually been invoked and had led to the settlement of disputes. Regional economic integration organizations in particular had concluded treaties providing for arbitration as a form of dispute settlement, and the dispute settlement provisions of the United Nations Convention on the Law of the Sea had resulted in the institution of arbitration proceedings. The rare instances of *ad hoc* arbitration in disputes between international organizations and States were likewise analysed in the chapter.

The second chapter of the report also demonstrated that various international courts and tribunals had played an important role in the settlement of international disputes to which international organizations were parties. For example, even though States alone could be parties to contentious proceedings before the International Court of Justice, the Court had played a significant role in settling disputes involving international organizations by incidentally assessing, or at least addressing, the legality of their actions in cases such as *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, where the validity of United Nations Security Council resolutions had been called into question.

More relevant in practice had been the power of the International Court of Justice to render advisory opinions. In some instances, that power had been used to settle disputes between international organizations and States. The Convention on the Privileges and Immunities of the United Nations and other treaties provided for “binding” or “decisive” advisory opinions, whereby international organizations and States agreed in advance to accept the outcome of an opinion issued by the Court as decisive. Such a clause had been activated in *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*.

Moreover, the International Court of Justice had been requested to issue “regular” advisory opinions in a number of disputes between member States and between member States and international organizations. Such opinions had settled or at least contributed to the settlement of disputes in cases such as *Reparation for Injuries Suffered in the Service of the United Nations* and *Interpretation of the Agreement of 25 March 1951 between the WHO and*

Egypt. However, as clarified in *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, specialized agencies' ability to request advisory opinions might be limited in practice. Examples of cases in which the Court had been requested to issue an advisory opinion as a form of appeal against the decisions of the United Nations Administrative Tribunal and the International Labour Organization Administrative Tribunal had also been provided.

The section of chapter II on judicial settlement also illustrated that the standing of international organizations before international courts or tribunals was not limited to the United Nations system. For example, both the International Tribunal for the Law of the Sea and the Dispute Settlement Body of the World Trade Organization were open to members, which meant that international organizations that had become members could also be parties to disputes before such adjudicatory bodies. While the European Union, for example, had been a party to a dispute before the International Tribunal for the Law of the Sea only once, it had become a frequent user of the World Trade Organization dispute settlement system.

Since international organizations were not usually parties to regional human rights treaties, they could not be respondents in complaint proceedings before regional human rights courts. However, that situation might be about to change, as the European Union planned to accede to the Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention on Human Rights). On the other hand, some regional human rights courts already permitted international organizations to appear as claimants and to request advisory opinions. An overview of the rich practice of regional economic integration organizations in allowing the judicial settlement of disputes between such organizations and their member States was likewise provided. The second chapter of the report demonstrated that all the means of dispute settlement laid down in draft guideline 2 (c) were used in practice, albeit with differing degrees of frequency. It was on the basis of those empirical findings that he had proposed draft guideline 4 on "Practice of dispute settlement".

Turning to chapter III of the report, on policy issues and suggested recommendations, he said that the recommendations did not reflect legal obligations and were not intended to replace any such obligations that might be contained in various legal instruments. Rather, they were based on underlying policy considerations that were made explicit in the report and were mostly anchored in the rule of law as endorsed at the international level.

The report addressed the concept of the rule of law, which had originally been developed at the national level, and showed that it was also relevant at the international level, including in respect of international organizations. The report focused on the concept of the rule of law as relied upon by the United Nations in its resolutions on the topic. With a view to dispute settlement, three aspects of the rule of law appeared to be of overriding importance: access to dispute settlement; judicial independence and impartiality; and due process and a fair trial.

On the basis of those considerations, he suggested recommending that arbitration and/or judicial settlement of disputes should be made available more widely for the settlement of disputes to which international organizations were parties. The report specifically noted various developments in that regard, such as the adoption in 1996 of the Permanent Court of Arbitration Optional Rules for Arbitration Involving International Organizations and States, and their amendment in 2012, and the repeated proposals to extend the contentious jurisdiction of the International Court of Justice to international organizations. Suggested guideline 5, entitled "Access to arbitration and judicial settlement", therefore read: "Arbitration and judicial settlement should be made available and more widely used for the settlement of international disputes to which international organizations are parties."

The report discussed the core rule of law requirements of impartiality and independence of adjudicators, respect for due process, and equality of the parties. Those principles were enshrined in both the procedural rules and the practice of international courts and tribunals. In his view, it would be useful to make those requirements explicit in a separate guideline 6 on "Dispute settlement and rule of law requirements". The suggested guideline would read: "The means of adjudicatory dispute settlement made available should conform to the requirements of the rule of law, including the independence and impartiality of adjudicators and due process."

As to the future programme of work on the topic, in his third report, due in 2025, he would analyse practice in the settlement of non-international disputes to which international organizations were parties, and he would suggest further guidelines reflecting actual practice. The Commission could then conclude its first reading on the topic and send the entire set of guidelines to the General Assembly. It was proposed that the second reading would take place in 2027 in order to finalize the guidelines on the topic.

Mr. Forteau said that the wealth of information included in the Special Rapporteur's report and the replies from Governments to his questionnaire, as contained in the memorandum by the secretariat (A/CN.4/764), would be extremely useful for the Commission's work on the topic. It was regrettable, however, that, in their replies, Governments had focused on their practice as host countries to international organizations rather than addressing any of the many kinds of disputes they might have with international organizations as member States of those organizations. The replies provided by international organizations were also rather limited. For example, the United Nations Office of Legal Affairs had stated that "the great majority of the disputes of a public international law character that the United Nations has encountered concern the interpretation or application of bilateral agreements to which the Organization is party". However, there were also differences in the interpretation of the Charter of the United Nations or other multilateral instruments by the United Nations and by its Member States, which were regrettably not discussed in the replies.

With regard to the general approach taken by the Special Rapporteur, it might be questioned whether the report was entirely faithful to the scope of the topic decided upon at the previous session. According to draft guideline 1, the scope was limited to the settlement of disputes to which international organizations were parties. However, some of the issues addressed in the report seemed to fall outside that scope. First, "indirect challenges to acts of international organizations in contentious inter-State proceedings" did not seem relevant, as they concerned only disputes between States, even if the disputes involved the actions of international organizations. Similarly, it was not clear that the many references to advisory opinions fell within the scope of the topic, as advisory opinions were intended to address legal questions and not to settle disputes, with the exception of advisory opinions that the parties to a dispute agreed in advance to consider binding. As the Special Rapporteur noted, a party to a dispute might request an advisory opinion in order to strengthen its legal position, but that did not make the advisory opinion a mechanism for the settlement of disputes in the sense of draft guideline 1. He was not convinced by the idea of advisory opinions as "indirect forms of settling disputes", as set out in paragraph 153 of the report. If the topic were to include all "indirect" forms of settling disputes, the scope would become vague and overly broad.

More fundamentally, it might be questioned whether the key distinction – between international and non-international disputes – around which the Special Rapporteur's approach was based, was the most appropriate. He doubted that that distinction was legally relevant when it came to considering the regime applicable to the settlement of disputes to which international organizations were parties. Instead, the more decisive distinction was the one between, on the one hand, disputes between international organizations and other international organizations or States and, on the other, disputes between international organizations and individuals. For the former category, it could be assumed that the regime applicable to disputes between States, namely the absence of the right to an effective remedy, also applied, whereas for the latter category it could be assumed that there was a right to an effective remedy and that it was necessary to find the legal means to give it concrete effect. There were thus very different rules applicable to the two categories of dispute, but that was not reflected in the proposed guidelines in the report.

The Special Rapporteur seemed to consider that the category of "international" disputes did not include disputes with individuals. In his second report, he dealt only with disputes between organizations and disputes between organizations and States, and sometimes even explicitly excluded disputes involving private parties. That approach raised the question of how to deal with international disputes with individuals. The question of international disputes with individuals had been discussed at the Commission's previous

session, resulting in the somewhat convoluted commentary to draft guideline 1, which would need to be revised as work progressed, as recommended by some States.

International disputes between international organizations and individuals were one of the central issues of the topic at hand. The question arose as to whether international organizations had an obligation in such cases to organize an effective remedy. That question was not addressed as such in the second report, and it seemed that it would not be in the third report either, given that the latter would focus on non-international disputes arising under a law other than international law. That lacuna was problematic. When an individual had his or her international rights violated, in particular human rights guaranteed by international norms, that clearly constituted an international dispute.

In paragraph 213 of the report, the Special Rapporteur argued that access to justice was considered to be a right in most national legal systems, but that it was not easily transposable to the international level. That was a questionable argument. If the parties to a dispute were an international organization and an individual whose international rights had been violated, it would be difficult to assert that there would be no obligation under international law for the international organization to provide the right to an appropriate and effective remedy.

The analysis of the relevant practice showed that a much more detailed approach to the topic was required. It could not be argued that the same regime applied to all international disputes involving an international organization. For example, building on what had been done in the context of the law of treaties and the law of responsibility, it would be helpful to distinguish more clearly between disputes governed by the organization's institutional law and disputes concerning the rights and obligations that bound the international organization to other subjects of international law beyond its institutional framework. In the first instance, the settlement of disputes was governed first and foremost by the founding treaty and rules of the international organization, while in the second they were governed by general international law and treaties concluded with third parties. In his view, that distinction should be reflected in the Commission's work on the topic. For example, in the event of a dispute between the Security Council and a State Member of the United Nations or between the European Commission and a State member of the European Union, he did not believe that the international organization could freely choose the means of dispute settlement it wished to use; it depended above all on the founding treaty and the organization's rules.

At the Commission's previous session, he had raised the question of the extent to which the principle of freedom of choice of the dispute settlement method applied to relations between international organizations and other organizations or States. In his view, that question remained of central importance. According to the Special Rapporteur, as noted in paragraph 202 of the report, international organizations were free to choose the means of dispute settlement they wanted to use. He was not convinced that that was the case. An international organization's capacity in terms of dispute settlement necessarily depended on its founding treaty and the limits set by its member States. Such limits were rightly highlighted in the commentaries adopted by the Commission at its seventy-fourth session, particularly in paragraph 33 of the commentary to draft guideline 2. In his second report, the Special Rapporteur should have attempted to identify the limits that could be placed on the choice of means of settlement for international disputes involving an international organization.

In chapter III of the report, the Special Rapporteur did partly examine that question from the perspective of the concept of the rule of law, arguing that there were strong policy reasons for favouring independent and impartial third-party adjudication. That was no doubt true, but it was still necessary to determine to what extent that was legally possible in the light of existing practice, and in particular the rules specific to each international organization.

He wondered why the Special Rapporteur recommended that international organizations should more widely use arbitration and judicial settlement for the settlement of disputes with other international organizations or States. After all, as was noted in paragraph 199 of the report and in draft guideline 4, practice did not seem to be moving in that direction. Furthermore, States were not subject to any such guideline. General Assembly resolution 2625 (XXV) and the Manila Declaration on the Peaceful Settlement of

International Disputes did not contain any recommendations comparable to that contained in draft guideline 5. That imbalance between the recommendations made to States in those international instruments and those made to international organizations in draft guideline 5 raised questions.

He was uncomfortable with the approach proposed by the Special Rapporteur in chapter III of the report. While it was no doubt true that there were strong policy reasons for favouring independent and impartial third-party adjudication as the preferred form of dispute settlement due to rule of law considerations, as stated in paragraph 203, from a practical point of view there were also likely strong policy reasons for not favouring it as the preferred form of settlement in disputes between international organizations or States. The Special Rapporteur seemed to have got somewhat carried away in his analysis of the relevant practice. In paragraph 205, for example, he stated that the General Assembly had called for wider acceptance of the jurisdiction of the International Court of Justice, when, in fact, the resolution in question simply called on States to "consider" accepting the Court's jurisdiction, which was a very weak recommendation and showed a reserve that the Commission could not ignore. The General Assembly's most recent resolution on the rule of law, resolution 78/112, adopted in December 2023, contained the same cautious formulation. Furthermore, the replies to the questionnaire did not indicate that there was an urgent need in that area when it came to disputes between international organizations and other international organizations or States. Similarly, the citation in footnote 572 from the working paper prepared by Sir Michael Wood (A/CN.4/641) used neutral wording on encouraging States to accept "dispute settlement procedures" and not specifically "arbitration" or "judicial settlement".

Even if the rule of law required the establishment of effective remedies at the domestic level, he doubted that, in the current state of international law, the same obligation applied to relations between international organizations and States. In general international law, judicial settlement was not the be all and end all of dispute resolution. Other means of dispute settlement might prove just as effective, or even more so in some cases. The Commission should therefore think twice before asserting that arbitration and judicial settlement should be the preferred form of dispute settlement between international organizations and States.

A very good example was provided in the reply received from the World Food Programme, which explained in detail why it preferred amicable negotiation as a means of dispute resolution with States in order to ensure the proper execution of its missions in the field and to take account of material and budgetary constraints. Of course, in other situations, recourse to a court or tribunal might prove necessary, but the position expressed by the World Food Programme showed that it was important not to have an overly idealized vision of arbitration and judicial settlement in international relations. What should matter most in relations between international organizations or between international organizations and States was not the means of dispute settlement to be favoured, but the objective to be met, namely ensuring the effective settlement of the dispute. To his mind, the Commission's recommendations should focus on the need to ensure that disputes between international organizations or between international organizations and States were settled fairly and effectively, regardless of the means of dispute settlement used. The Manila Declaration contained a number of general principles that could inspire the Commission's work at the current session, in particular the obligation to "seek in good faith and in a spirit of cooperation an early and equitable settlement of their international disputes".

Turning to the suggested guidelines, he said that the wording of draft guideline 3 was too ambiguous. It suggested that international disputes included disputes with individuals, since it referred to "other subjects of international law" in addition to international organizations and States, even though the opposite argument was made in the report, as the Special Rapporteur considered disputes with individuals to constitute non-international disputes. That ambiguity should be resolved before the draft guidelines were referred to the Drafting Committee.

With regard to draft guideline 4, he would reserve his drafting comments for the discussions in the Drafting Committee, but wondered whether it was the function of a guideline to describe practice.

In draft guideline 5, it should be clearly stated that it did not apply to international disputes with individuals, as in such cases more was required by law than a general recommendation to make available access to judicial settlement. Furthermore, to his mind the Commission should not recommend that arbitration and judicial settlement should be "more widely used" in relations between international organizations and States. It was sometimes better to negotiate a settlement rather than spend a lot of energy, time and money on arbitration and legal proceedings, especially as the budgetary resources of international organizations were limited. The draft guideline should simply state that arbitration and judicial settlement "should be made more widely available". On the other hand, the decision as to whether or not to bring a specific case before a court was a choice that must be left to the sole discretion of the parties to the dispute.

Finally, with regard to draft guideline 6, the title of the guideline did not correspond exactly to its content, which covered only certain means of dispute settlement. The exact scope of the draft guideline was unclear. On the one hand, it suggested that "the requirements of the rule of law" – in other words all such requirements – would apply internationally, which seemed highly unlikely. On the other hand, it gave only an illustrative list of those requirements, which raised the question of what the other requirements of the rule of law were. The use of the conditional "should" was particularly problematic, as it suggested that an international court would not necessarily be obliged to act independently and impartially, which he assumed was not what the Special Rapporteur meant. By its very nature, a court must act independently, impartially and in compliance with the rules of a fair trial. Given those issues, he wondered whether it was necessary to maintain draft guideline 6.

Finally, concerning the future programme of work on the topic, he considered the Special Rapporteur's proposal to complete the first reading as early as the following year to be overly ambitious. Given the work that remained to be done on international and non-international disputes with individuals, the Commission would certainly need more time to complete its work on the topic.

The meeting rose at 5.55 p.m.