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Summary record of the 2776th meeting

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68. Mr. MELESCANU said that, in principle, he endorsed the idea of a broader provision on *lex specialis* to be worked out by the Drafting Committee, as suggested by the Special Rapporteur. However, he was concerned that if the exercise was not carried out properly, some difficulties would be encountered in the interpretation of the provision at a later stage. The discussion on general and special provisions had only just begun in the Study Group on the Fragmentation of International Law. The Drafting Committee would therefore have to clearly define the contents, scope and application of the *lex specialis* provision.

69. Mr. BROWNLIE, referring to concerns expressed about the relative absence of State practice, said it could be held that the positions of delegations of States before international tribunals were a form of State practice. Paragraph 119 of the report referred to the few pertinent decisions of PCIJ, and further research into the pleadings there might provide some State views. As for Mr. Melascanu's remarks on the approach to follow, he pointed out that, for the purpose of progressive development, one needed something to work on before it could be developed. Perhaps the Commission need say no more with respect to article 2 than that there was some unfinished business to be done.

The meeting rose at 1 p.m.

2776th MEETING

Wednesday, 16 July 2003, at 10 a.m.

Chair: Mr. Enrique CANDIOTI

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Chee, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Melescanu, Mr. Momtaz, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Ms. Xue, Mr. Yamada.

The responsibility of international organizations (concluded)* (A/CN.4/529, sect. E, A/CN.4/532,¹ A/CN.4/L.632)

[Agenda item 7]

REPORT OF THE DRAFTING COMMITTEE

1. Mr. KATEKA (Chair of the Drafting Committee), introducing the Drafting Committee's report on the respon-

sibility of international organizations (A/CN.4/L.632), said that in his first report (A/CN.4/532) the Special Rapporteur had proposed three articles, all of which had been referred to the Drafting Committee. The latter had examined them and adopted three texts, an encouraging development which held out hope for the progress of the Commission's work on the topic. Following is the text of the draft articles adopted by the Committee:

Article 1. Scope of the present draft articles

1. The present draft articles apply to the international responsibility of an international organization for an act that is wrongful under international law.
2. The present draft articles also apply to the international responsibility of a State for the internationally wrongful act of an international organization.

Article 2. Use of terms

For the purposes of the present draft articles, the term "international organization" refers to an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities.

Article 3. General principles

1. Every internationally wrongful act of an international organization entails the international responsibility of the international organization.

2. There is an internationally wrongful act of an international organization when conduct consisting of an action or omission:

- (a) Is attributable to the international organization under international law; and
- (b) Constitutes a breach of an international obligation of that international organization.

2. The topic was in fact a sequel to the draft articles on the responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session.² That did not mean that the Commission would simply copy the articles on State responsibility, but rather that it would follow the basic trend that had taken shape in respect of that topic. However, when an article on the current topic embodied the same legal principle as an article on State responsibility, the language should remain the same in order to avoid any confusion or ambiguity.

3. Draft article 1, on the scope of the draft articles, was composed of two sentences which the Drafting Committee had preferred to separate and place in two different paragraphs.

4. Paragraph 1 corresponded to the first sentence of article 1 proposed by the Special Rapporteur and had its origin in article 57 of the draft articles on State responsibility for internationally wrongful acts. It indicated that

* Resumed from the 2763rd meeting.

¹ Reproduced in *Yearbook ... 2003*, vol. II (Part One).

² See 2751st session, footnote 3.

the subject matter was the international responsibility of an international organization for an act that was wrongful under international law. The Drafting Committee had retained the text proposed by the Special Rapporteur with two drafting changes. It had deleted the word “question”, which it deemed superfluous. The new text therefore referred to “the international responsibility”, not to the “question of the international responsibility”. The last part of the paragraph had been drafted in the singular instead of the plural. That was a purely stylistic change and consistent with the Commission’s previous codification exercises. The last part therefore read “for an act that is wrongful” and not “for acts that are wrongful”. It had been suggested that reference should be made to “its internationally wrongful act”, but the Drafting Committee had rejected that suggestion, since it could have been argued that that formulation did not cover cases in which an international organization was responsible for the wrongful acts of its members under circumstances similar to those considered in Chapter IV of the first part of the draft articles on State responsibility. For the sake of clarity and in order to preclude any ambiguity, the Drafting Committee had therefore decided to retain the drafting style proposed by the Special Rapporteur.

5. It had further been suggested in the plenary that article 1 should deal with attribution. After considering the question, the Drafting Committee had decided that it was unwise to address that issue at the current stage for fear of limiting the scope. For example, it was not yet certain whether the draft articles should exclude situations in which an organization had accepted certain obligations that had to be fulfilled by one of its members and that member had then failed to do so. In that situation, the wrongful act might, in principle, be attributable to that State, but the Commission might decide that, under certain circumstances, the organization would have to bear responsibility. Paragraph 1 was therefore drafted in general terms. It did not give any indication of the acts for which an organization might be responsible or the circumstances under which a State might be responsible for an act of the organization. The commentary would explain that the article simply indicated what sort of issues the articles covered without providing a solution in advance. Paragraph 1 was drafted in such a way that it also covered the responsibility of an international organization which was a member of another international organization.

6. Paragraph 2 corresponded to the second sentence of article 1 proposed by the Special Rapporteur and dealt with the responsibility of a State for an internationally wrongful act of an international organization. It complemented paragraph 1 and filled a vacuum. The Drafting Committee had made some slight drafting changes. To be consistent with paragraph 1, the word “question” had been deleted and the words “conduct of an international organization” had been replaced by the words “the internationally wrongful act of an international organization”, to make it clear that reference was being made to the possible responsibility of a State for a *wrongful* act of an international organization.

7. It should also be noted that paragraph 2 did not refer to the responsibility of a “member State” of an organization, but only to the responsibility of “a State”. That was a deliberate choice in order to make provision for the situa-

tions covered by Part One, Chapter IV, of the draft articles on State responsibility for internationally wrongful acts, in which a State might not be a member of an organization, but might, for example, direct, assist or coerce an organization to commit a wrongful act.

8. Article 2 (Use of terms), which so far defined only the term “international organization”, had been extensively discussed in the plenary before being referred to an open-ended Working Group, which had drawn up a text that the plenary had subsequently referred to the Drafting Committee. The Committee had worked on the basis of that text.

9. During the plenary debate, the comment had been made that a wide variety of organizations operating across the globe could regard themselves as “international”. Their members ranged from States to non-State entities. As it would be difficult to take account of all those organizations, it would be necessary to indicate clearly what type of “international organizations” the draft articles covered. That did not, however, mean that the principles and rules which would ultimately be prepared—or at least some of them—would not apply to other organizations. That point should be explained in the commentary. Some members had found the definition of “international organization”, as proposed by the Special Rapporteur, rather abstract and had asked for an explanation of the *types* of existing international organizations, so as to have a clearer idea of what the definition should include. Other members, however, had been of the opinion that the definition would have to rely on some genuine and verifiable characteristics. The text produced by the open-ended Working Group had been formulated on that basis. The article identified three criteria which an international organization should satisfy in order to fall within the scope of the topic: mode of establishment, legal personality and membership. The Drafting Committee had made only a few modifications to the text submitted by the Working Group.

10. As it stood, the text comprised two sentences. The first dealt with the first two elements of the definition, namely, the mode of establishment and the legal personality of the organization, and the second dealt with the membership requirement. As far as the mode of establishment was concerned, an “international organization” within the meaning of the draft articles had to be established by a “treaty” or “other instrument” governed by international law. The general view in the Drafting Committee had been that an international organization that came within the purview of those articles should be created by an act under international law clearly expressing the consent of the parties. The word “treaty” was broadly defined in article 2, paragraph 1 (a), of the 1969 Vienna Convention. The same definition was to be found in article 2, paragraph 1 (a), of the 1986 Vienna Convention. That definition also applied to the term “instrument”. The inclusion of both terms in the definition proposed in article 2 was useful as it covered declarations, resolutions, covenants, acts, statutes and the like. The Drafting Committee had considered other alternatives such as “agreements”, “forms of expression of consent”, “acts of international law” and “other means”, but had finally settled for “instrument” as the most appropriate term in the context. Article 2 likewise specified that such treaties or instruments should be “governed by international law”, a notion that

was also to be found in article 2, paragraph 2 (a), of the 1969, 1978 and 1986 Vienna Conventions. The aim was to distinguish between treaties and instruments governed by international law and other instruments regulated by national law.

11. The second criterion was that such an international organization should possess “its own legal personality”. The definition proposed by the Working Group had contained the bracketed phrase “distinct from that of its members”. The Drafting Committee had deleted it because it agreed with the general view expressed in the plenary that the phrase was superfluous, since that condition was already implied in the requirement of independent legal personality.

12. The third criterion was that there must be “States” among an organization’s members, for some international organizations’ members included other international organizations, territories and non-governmental organizations. The presence of States as members was indispensable in order to delimit the scope of the topic and exclude non-governmental organizations from the definition. The words “other entities” at the end of the sentence referred to international organizations, territories and non-governmental organizations, which could be members of an international organization. No express mention had been made of international organizations consisting solely of international organizations. In the view of the Drafting Committee, such international organizations were rare. It had, however, agreed in principle that there was no reason why the draft articles should not also apply to such international organizations.

13. Article 3 (General principles) reproduced articles 1 and 2 of the draft articles on State responsibility for internationally wrongful acts, except that it replaced the word “State” with the term “international organization”. The article proposed by the Special Rapporteur had received considerable support in the plenary and the Drafting Committee had therefore retained it, apart from changing the words “is attributed” in subparagraph (a) to the words “is attributable”, so as to be consistent with the wording of draft article 2 on State responsibility.

14. The point had been made in the plenary that the general principle embodied in article 3 was incomplete, since it covered only the responsibility of an international organization for an internationally wrongful act. It did not apply to the responsibility of a State for a wrongful act of an international organization, as dealt with in article 1, paragraph 2. The Drafting Committee had agreed with that viewpoint, but had drawn attention to the fact that the Commission was not yet in a position to lay down a principle on State responsibility for a wrongful act of an international organization. While article 1 on the scope of the topic must clearly state the issues involved, the article on general principles did not need to be exhaustive at the current stage. When work on the topic had made sufficient progress and there was a better understanding of how and under what circumstances a State might incur responsibility for a wrongful act of an international organization, the Commission could decide whether it was advisable to state some general principles on that issue. It would be premature to formulate a legal principle without a deeper knowledge of the circumstances entailing

such responsibility and of possible exceptions, although plainly the Commission would have to consider that matter at some time. The Drafting Committee had also taken note of a proposal made in the plenary (2755th meeting), which read:

“An internationally wrongful act of an international organization may also entail the international responsibility of a State because:

(a) The State has contributed to the wrongful act of the international organization;

(b) The international organization has acted as a State organ.”

15. The Drafting Committee had also considered a further issue that had been raised in the plenary, namely, the fact that article 3 did not contain a provision equivalent to draft article 3 on State responsibility, which stated that the characterization of an act of a State as internationally wrongful was governed by international law and was not affected by its characterization as lawful by internal law. The Drafting Committee held that that provision did not apply to international organizations and that that point should be explained in the commentary.

16. The CHAIR said that, if he heard no objection, he would take it that the Commission wished to adopt draft article 1.

It was so decided.

17. Mr. MELESCANU said that, on the basis of the first three articles, he could see that, despite its similarities to the topic of State responsibility, the responsibility of international organizations had its own distinguishing features. He was among the members of the Commission who would have preferred a broader definition of international organizations. It was difficult to keep the definition within close confines, although he understood the practical requirement of limiting its scope on the basis of objective criteria. Having heard no strong objections to the idea that the draft articles might also cover the responsibility of other international organizations, he proposed that a “without prejudice” clause should be included to indicate that it could also apply to other international organizations not covered by the narrow definition given.

18. With regard to article 3, the best solution would be to consider the problem of the responsibility of States for the acts of international organizations in the context of the draft articles on State responsibility for internationally wrongful acts, because by taking it too far the Commission might become deadlocked.

19. Mr. PAMBOU-TCHIVOUNDA said that he had reservations about draft article 2. He had difficulty understanding the linear presentation of the article, which seemed to state two different things. The first sentence corresponded well to the title, but the second dealt with the composition of the international organization. Article 2 should therefore be entitled “Definition and composition”.

20. Mr. KAMTO said that he shared Mr. Pambou-Tchivounda’s views. Article 2 as drafted combined two elements that should be set out separately. In addition, the

use of the words “a treaty or other instrument governed by international law” might cause confusion. He had to admit that he had some difficulty seeing what the Commission was referring to. In his view, the definition of a treaty given in the 1969 and 1978 Vienna Conventions covered practically the whole range of international legal instruments expressing the will of the State to be bound. All the other ideas put forward in plenary fell under that definition. The Commission could perhaps explain what it meant by “other instrument governed by international law” so as to make its concerns clearer.

21. Mr. GAJA (Special Rapporteur) said that the Commission would be facing a never-ending task if it was to revert to questions that had already been discussed in plenary, then in the Working Group and finally by the Drafting Committee.

22. With regard to Mr. Melescanu’s comment on international organizations that were not covered by the definition proposed in article 2, he believed that the problem did not need to be addressed at the present stage and could be taken up again later.

23. He had no fundamental objection to Mr. Pambou-Tchivounda’s proposal that article 2 should be divided into two separate paragraphs, but thought the idea should have been brought up earlier to enable the Drafting Committee to look into it.

24. However, he did not agree with Mr. Kamto about the use of the words “other instrument”. The matter had been thoroughly discussed in plenary. The Drafting Committee suggested that examples of international organizations that had not been established by treaty should be given in the commentary. He thought that there might be implicit treaties in certain cases, something that would be mentioned in the commentary. He urged the members of the Commission not to reopen the debate on the substance of the issue.

25. Mr. PAMBOU-TCHIVOUNDA said that he was not trying to reopen the debate on substance, but thought that the two consecutive sentences clearly dealt with two different matters.

26. The CHAIR suggested that a logical connection should be introduced between the two sentences, for instance, with the words “such organizations could include as members ...”, in order to clarify the point.

27. Mr. Sreenivasa RAO thanked the Chair of the Drafting Committee for a job well done. The proposed text seemed well balanced and sufficiently clear. Perfection could always be sought, of course, but the Commission had made great progress in relation to its starting point.

28. Mr. GALICKI said that he endorsed article 2 as proposed by the Drafting Committee. It was carefully balanced and, more importantly, it faithfully reflected the discussion. Proposals designed to improve the definition of an international organization had been made. He thought the definition had two very important components: first, treaties alone must not be considered the basis for establishing an international organization; and, second, the members of international organizations were not only States. The inclusion of those two components was justified on the basis of the practice of international

organizations. Certainly, more criteria could be added and factors, sometimes artificial ones, could be included, but the two factors mentioned were the ones that he found to be the most important, as they gave a clear idea of what the Commission was thinking of when it referred to an international organization.

29. Mr. KAMTO said that he did not want to reopen a substantive discussion either, but that whenever someone could propose an idea for consideration that might clarify the Commission’s work, he or she should not hesitate to do so. His comments had been aimed solely at drawing attention to the fact that, when the Commission arrived at the stage of the commentary to the articles, it must take care to explain what it meant to say. He remained appreciative of the results achieved by the Drafting Committee and by the Working Group.

30. Mr. KATEKA (Chair of the Drafting Committee) said he hoped that the Commission would adopt the draft articles as they stood, with no amendments. The text was a balanced one and any addition, even the one proposed by the Chair, might upset that balance. During the next reading, the Commission could look into how to word things differently. For the present, he appealed to the members of the Commission to adopt draft article 2 as it stood.

31. The CHAIR said that, if he heard no objection, he would take it that the Commission wished to adopt draft article 2 on the use of terms, as proposed by the Drafting Committee and in the light of all the comments and observations which had been made during the meeting and would be reflected in the relevant summary record.

It was so decided.

32. The CHAIR said that, if he heard no objection, he would take it that the Commission wished to adopt draft article 3 on general principles, as proposed by the Drafting Committee.

It was so decided.

33. The CHAIR said that, if he heard no objection, he would take it that the Commission wished to adopt the report of the Drafting Committee on the responsibility of international organizations, as a whole.

It was so decided.

Diplomatic protection³ (continued) (A/CN.4/529, sect. A, A/CN.4/530 and Add.1,⁴ A/CN.4/L.631)

[Agenda item 3]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

34. Mr. KAMTO congratulated the Special Rapporteur on the draft articles included in his fourth report (A/CN.4/530 and Add.1) which he had submitted to

³ For the text of articles 1 to 7 of the draft articles on diplomatic protection and the commentaries thereto provisionally adopted by the Commission at its fifty-fourth session, see *Yearbook ... 2002*, vol. II (Part Two), chap. V, sect. C.

⁴ See footnote 1 above.

the Commission, which were extremely useful and well thought out. It would appear, however, that the *lex specialis* provided for in article 21 did not correspond to the way it was provided for in article 55 of the draft articles on State responsibility for internationally wrongful acts.⁵ As Mr. Gaja had said at the preceding meeting, article 55 was designed to cover cases when there was an actual contradiction between a general rule and a special rule. If article 21 had been designed with the same purpose in mind, Mr. Galicki would be right to say that it should be revised to include the concept of incompatibility between the two types of rules. But that was not the purpose of article 21 as proposed by the Special Rapporteur. For it to apply, there had to be a conflict between the provisions of an investment protection treaty and the future draft articles on diplomatic protection. Whereas article 55 introduced the idea of the settlement of conflicts between rules contained in two legal instruments of differing scope, article 21 embodied the principle that, as far as the protection of corporations was concerned, preference should be given to special procedures as opposed to the rules of diplomatic protection. That was why article 21 should be retained as worded.

35. The wording of article 21 showed that the future articles on diplomatic protection would probably be residual rules and would therefore be residually applicable. It had been pointed out that there was a very large number of bilateral and multilateral investment treaties, but attention could also be drawn to the development of regional systems for the protection of human rights involving a dispute settlement mechanism. He therefore agreed with the members who had suggested that the provision should be broadened to apply to the draft articles as a whole and placed at the end. It might also be that the final wording would be arrived at only later, when the Commission had an overall view of the articles, since it could then decide what the scope of the *lex specialis* should be.

36. Article 22 called for two comments. First, the examples given by the Special Rapporteur in paragraphs 117 to 121 of his report to illustrate the diversity of legal persons and the difficulty of finding “common, uniform” features in them were interesting, but the situation was like that only because the examples given confused the legal nature of legal persons with their purpose or object. If a proper answer was to be given to the question of what a legal person was instead of trying to determine the purpose for which it had been set up, it would be discovered that such entities, which were so varied in the way they were set up and in their activities, were covered by one and the same functional definition. The basic feature common to all legal persons was their capacity to have rights and obligations, and that was true in both internal law and international law. Thus, if the internal law of a State, which was the relevant legal order, designated an entity as being a legal person or provided legal elements enabling it to be identified as such, that was sufficient: the international legal order had to accept it as such for the purposes of diplomatic protection. It therefore appeared that, on that point, paragraph 117 of the report was debatable and too categorical.

⁵ See 2751st meeting, footnote 3.

37. The second comment related to the use of the words *mutatis mutandis*. He had listened to the concern expressed by Mr. Gaja at the preceding meeting about that Latin expression, the exact meaning of which might not be correctly understood by everyone. He had then looked at various international law and general law dictionaries and had seen that those words could be used without confusing persons for whom the draft articles were intended.

38. Since he was in favour of the wording proposed by the Special Rapporteur for articles 21 and 22, he supported the proposal that they should be referred to the Drafting Committee.

39. Mr. KEMICHA congratulated the Special Rapporteur on the excellent work he had done to enlighten the Commission on the use of dispute settlement procedures provided for, on the one hand, by bilateral investment treaties and, on the other, by the ICSID machinery established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. The two mechanisms had the common feature of excluding the application of the rules of customary law concerning diplomatic protection, as was clearly indicated in article 27, paragraph 1, of the Convention. Everyone, including the Special Rapporteur, agreed that those mechanisms, which applied international arbitration techniques, offered better guarantees for investors than did diplomatic protection, which depended on the goodwill of States.

40. He therefore questioned whether an article 21 on a special investment protection regime, a *lex specialis*, should be included, since, from the standpoint of practice, such a special regime was the rule and diplomatic protection was the exception. He nevertheless understood the Special Rapporteur's didactic approach and welcomed the wise decision he had announced at the preceding meeting to make the reference to *lex specialis* applicable to the draft articles as a whole. Subject to that reservation, he recommended that draft article 21 should be referred to the Drafting Committee.

41. He had no major difficulty with the use of the Latin phrase *mutatis mutandis*, in draft article 22, but he was concerned that States might use diplomatic protection to benefit legal persons other than corporations, such as non-governmental organizations. A decision to exercise diplomatic protection on behalf of a natural or legal person was highly political and depended on the discretion of the State that took it. In some cases, the State might be tempted to take up the cause of a legal person properly registered in its territory against another State with which it did not have diplomatic relations and for which it wished to create problems, for whatever reason, wrong or right. In paragraph 120 of his report the Special Rapporteur referred to Doehring's view that a non-governmental organization had insufficient connection with its State of registration to qualify for diplomatic protection,⁶ but he did not transpose it to or take account of it in the proposed wording of draft article 22. He would be grateful for an explanation of the Special Rapporteur's position on that point and for an indication whether some sort of protective measure should be considered for that type of situation.

⁶ Doehring, *loc. cit.* (2774th meeting, footnote 7), pp. 573 *et seq.*

42. Ms. ESCARAMEIA, congratulating the Special Rapporteur on his excellent report, noted that Mr. Kamto had said, in relation to draft article 21, that article 55 of the draft articles on State responsibility did not necessarily apply because the situation was different. She was not sure that the situation was different. Her reading of the report was that the Special Rapporteur's intention had been to propose a replacement, even if some paragraphs were slightly too categorical, as Mr. Matheson had pointed out at the preceding meeting. Bilateral investment treaties or even multilateral agreements sometimes made no mention of diplomatic protection provided only for partial coverage or even set up mechanisms that ultimately failed. For that reason, it would be as well, from a pragmatic point of view, to insert, in draft article 21, the words "and to the extent that" between the word "where" and the words "the protection of corporations". Whenever the mechanisms foreseen failed or were not complete, the possibility of diplomatic protection should arise again. That was surely what the Special Rapporteur had had in mind.

43. There had been a lengthy discussion at the preceding meeting on the question whether a general rule on *lex specialis* should be adopted and not simply a rule applicable only to corporations. She agreed with the Special Rapporteur that a *lex specialis* rule should be mentioned wherever that was justified. Since special rules, rather than general rules, would apply to corporations, it would be useful to mention the fact in draft article 21. It was by no means certain, however, that the same would apply in all other circumstances, especially in the case of individuals. In fact, she feared that, if the draft articles said that there would be a *lex specialis* for every entity, including individuals, that might preclude the use of diplomatic protection whenever special human rights regimes came into play. Such regimes were usually based on multilateral conventions and made no mention of diplomatic protection, but they undoubtedly did not preclude it. If it was decided to draft an article on *lex specialis* that would apply to individuals or other entities, the impression might be given that whenever a special regime—concerning human rights, for example—was applicable, it was somehow impossible to exercise diplomatic protection. That was not the aim of the draft articles. She therefore thought that it would be best to be careful and state that a *lex specialis* rule could apply exclusively and in its entirety only when expressly provided for and that otherwise the general rules of diplomatic protection also applied.

44. With regard to article 22, she supported Mr. Kateka's suggestion concerning the word "other" in the title, since corporations were legal persons. As for the reference to articles 17 to 21, it was clear that articles 18 and 19 did not apply, since there was no longer any reference to shareholders in article 22. Indeed, she was not sure that the reference to article 17, or even to article 21, should be retained. It might well be that only the reference to article 20, and perhaps to article 17, should be retained, but she reserved the right to speak again on the subject.

45. The expression *mutatis mutandis* was too vague. She agreed with Mr. Gaja that it gave no indication of how the regime should be applied to other persons, and that it should be more precise. The Special Rapporteur had said that it was extremely difficult to find examples of State practice in that regard, although Mr. Brownlie had drawn

attention to some cases heard by PCIJ. In the current context of globalization, she believed that in the future there would be far more interaction between foundations, non-governmental organizations and universities, for example, and that other such legal persons would be increasingly involved in international activities. More research should therefore be done in order to work out a rather more specific regulation or principle. She therefore supported Mr. Gaja's comment on the need to establish a link between such organizations and the State presenting the claim for diplomatic protection. Such a link could be based on a principle similar to that contained in draft article 17 relating to the nationality of a corporation or could be something slightly different. It was not, however, necessary for both States to recognize the legal personality of the entity; only the State presenting the claim for diplomatic protection would need to do so. Otherwise, a State that did not recognize non-governmental organizations or allow them a legal personality would feel free to treat them or any other entities however it liked. Moreover, the rule had not been applied in the case of corporations because there were States which did not recognize the legal personality of corporations.

46. The definition of a corporation, for the purposes of the draft article, given in paragraph 117 of the report, should be clearly stated at the very beginning of the commentary or, in any case, as soon as the subject of corporations was introduced. There were, after all, corporations without shareholders or limited liability; the term could even be used to describe entities that were not enterprises and were not run for profit.

47. Notwithstanding her reservations, she thought that draft articles 21 and 22 should be referred to the Drafting Committee.

48. Mr. DUGARD (Special Rapporteur) drew attention to an extremely important point in the statement by Ms. Escarameia, namely, her reference to the difference between special regimes for foreign investment and special regimes for human rights protection.

49. The purpose of bilateral and multilateral investment treaties was to exclude the normal rules of diplomatic protection. Those engaged in foreign investment considered the customary rules of diplomatic protection inadequate, since they were dependent on the discretion of the national State to intervene. In practice, States were very reluctant to intervene to protect foreign investments. International investment treaties were therefore drafted precisely in such a way as to eliminate the discretionary element and also to confer rights on the shareholders, something which was not possible under customary international law as reflected in the *Barcelona Traction* case.

50. There was thus a tension between investment treaties and the customary rules of diplomatic protection, whereas there was no such conflict with human rights conventions. In such cases, the two regimes were designed to complement each other, to work in tandem. Where the rules of diplomatic protection did not apply, the human rights conventions did, and vice versa. If the Commission therefore decided that the best course of action was to draft a general provision on *lex specialis*, it would be essential to

bear in mind the important difference between bilateral investment treaties and human rights instruments.

51. Mr. KOSKENNIEMI said that the Special Rapporteur's explanation of the difference between bilateral or multilateral investment protection treaties and human rights instruments was correct, in that the former had the intention of setting aside the general rules of diplomatic protection, whereas the latter had no such intention. The treatment of investment protection treaties in terms of *lex specialis* was therefore not the right way to proceed. The fact that the rationale of such treaties was to set aside the general rules of diplomatic protection was simply an illustration of the dispositive nature of such rules, so the reference to an operation of *lex specialis* as a conflict settlement rule became redundant. There was no reason to apply an interpretative principle such as *lex specialis* when the rule from which it was meant to derogate was not *jus cogens*. That led him to believe that there was no need to mention *lex specialis* at all in the draft articles, for two reasons. First, such a reference could inadvertently lead to the inference that, if a special regime that was relevant in some broad sense was in place, the diplomatic regime was completely and immediately excluded, and that was not the case. Second, as other speakers had noted, the language used by the Special Rapporteur, particularly in paragraph 112 of the report, was too categorical and tended to suggest that the rules of diplomatic protection applied either completely or not at all. It might therefore be better, as Mr. Brownlie had first proposed, not to mention *lex specialis* at all because the principle would apply in any case and, if it was constantly mentioned, any instrument lacking a reference to it might give rise to an *a contrario* conclusion.

52. Mr. ECONOMIDES said that, in the case of both human rights and investment protection, the problem was not so much *lex specialis* as the priority to be given to remedies that were more effective than those provided by human rights instruments or investment treaties, compared to the weighty political procedure of diplomatic protection, which should be reserved for the more extreme cases. From that point of view, diplomatic protection was not totally excluded, in that it could come into play if the defendant State did not implement the decision arising out of the remedy of first resort. It was not that there was mutual and complete exclusion, as in the case of *lex specialis, sensu stricto*. Rather than a provision on *lex specialis*, therefore, it would be preferable to have a different kind of provision on the remedies that should be resorted to before diplomatic protection was invoked. That would, however, mean that the draft articles could not immediately be referred to the Drafting Committee for its consideration.

53. Mr. MANSFIELD (Rapporteur) said that, although it was quite clear that the Commission was simply codifying a residual rule relating to corporations, the situation was quite different in the case of natural persons. A blanket application of the *lex specialis* principle, as suggested in the draft articles, could create problems. The Commission should perhaps look at the matter in greater detail or even consider another provision. If the draft articles were referred to the Drafting Committee, the latter could consider requesting the Commission to establish a small group to examine the issue in greater depth.

54. Mr. BROWNLIE said that his doubts concerning the need to include a *lex specialis* provision related more to the commentary than to draft article 21 itself. On the other hand, although the Commission had always included the rule in any articles that it drafted, in the draft articles on diplomatic protection it had not only included *lex specialis* but seemed to want to define its meaning and even to venture into the complicated maze of relations and hierarchies that constituted international law. That had been the crux of the *Pinochet* case, in which general principles of international criminal law had begun to gain in importance without anyone taking into account that they were beginning to contradict the standard regime of immunity of Heads of State. It would take the Commission years to disentangle the question of priorities of that kind. The sensible course of action would therefore be not to include any *lex specialis* provision, or else to include it but to say as little as possible about its application.

55. Mr. MATHESON said that the answer might be simply to recognize that there were important special regimes in the area of investment protection and that the purpose of the draft articles was not to modify or supersede such special regimes. As a result, rules of customary law could continue to be used, to the extent that they were not inconsistent with those regimes. That idea could be stated in an article—which was the intention of draft article 21—or in the commentary.

56. Mr. KAMTO said that the debate had confirmed him in his view that draft article 21 related to a preference principle, giving more flexibility to investment treaties and more effectiveness to human rights instruments. In the draft articles, therefore, the *lex specialis* clause should, as in the draft articles on State responsibility, appear as a waiver clause at the end, worded in such a way as to ensure that all *lex specialis* regimes—investments, human rights, questions of immunity and so on—would be covered by the provision.

57. Mr. GAJA said that the problem of priorities related to the treaty regime and did not need to be defined in draft articles concerned with general international law. Apart from peremptory norms, all rules of general international law could be subject to derogation by treaty, including such rules as the exhaustion of local remedies rule. The Commission should therefore envisage a provision of a general nature.

58. Mr. CHEE said that international law was passing through a process of erosion, in which the rules of customary international law and of diplomatic protection were gradually being replaced by new State practice, such as bilateral investment treaties, of which there were currently more than 2,000. Priority should thus be given to such State practice.

59. Mr. DUGARD (Special Rapporteur) said he wished to make it clear that, when he had drafted article 21 and the commentary thereto, he had had in mind only bilateral and multilateral investment protection treaties; he had been concerned that corporations and their shareholders protected by such treaties might be prejudiced if there was no *lex specialis* clause. Mr. Brownlie and Mr. Matheson had correctly pointed out that, as it stood, the provision did not take sufficient account of the possibility of us-

ing customary international law in cases where there were gaps in investment treaties. It was an important criticism. Since he had not had human rights treaties in mind, he had not made draft article 21 a general clause applicable to the draft articles as a whole. The extension of the scope of the clause to human rights instruments was not without risk, however, as the following example would illustrate: a State whose national was detained without trial or tortured in another State could not exercise its diplomatic protection on behalf of its national if the defendant State was party to a human rights convention and the procedure under that convention consequently applied. The person detained or tortured would then be deprived of a protection that could have been more effective. Thus, a measure of prudence was in order when formulating the rule. The Commission currently had three options: it could avoid having any *lex specialis* provision at all; it could apply such a provision only to bilateral or multilateral investment treaties; or it could couch the provision in general terms. The fourth option mentioned by some members of the Commission, namely, to draft a more substantive provision, might lead the Commission into a whole new topic, that of the conflict between special regimes and customary law.

60. Mr. KOLODKIN said that he had no clear-cut position on draft article 21 but took note of Mr. Brownlie's remark that the provision might be superfluous, since, according to a general legal principle special law took precedence over general law for questions covered by the former. If the Commission decided to retain the article, it must determine whether it should apply to the draft articles as a whole—in other words, to natural persons as well. That would entail defining what was meant by special rules for protecting that category of persons, and that was no easy task. It might well be asked whether human rights treaties really constituted special laws which would rule out the possibility of the State having recourse to diplomatic protection. In that connection, it would be advisable to study practice of States and their views on the question, which seemed relevant to the discussions underway in the Study Group on the Fragmentation of International Law. Moreover, there was no reference in article 21 to a limitation which appeared in article 55 of the draft articles on State responsibility, namely, that article 21 should be applied not only in the case where, but also to the extent to which, the matter was governed by special provisions of international law. The introduction of such a limitation in article 21 would avoid the unjustified exclusion of the right to diplomatic protection. He was not certain that the subordinate clause in the text of the draft article was really necessary.

61. With regard to draft article 22, there did not seem to be enough information on State practice to justify a draft article on the diplomatic protection of legal persons other than corporations. The Special Rapporteur explained the reasons for the situation, but they did not solve the problem. The *mutatis mutandis* formula hardly seemed very useful under the circumstances. Could the members of an international non-governmental organization be likened to company shareholders? There was good reason to ask (a) what amendments and adjustments would have to be made to the rules in order to apply them to other legal persons, and (b) exactly what other legal persons they might be in view of the very broad range of persons concerned

and the different treatment given them by various legal systems, as the Special Rapporteur himself recognized in paragraph 121 of the report. Prudence was called for on the matter, which perhaps should remain outside the scope of the study.

62. Mr. MOMTAZ, referring to draft article 21, said it was clear that the provisions of the different draft articles introduced thus far by the Special Rapporteur could not be binding on States and were purely declaratory in nature. States were therefore free to agree not to apply such provisions in their relations. There had been many cases where an agreement had been reached to avoid applying the rules which the draft articles on diplomatic protection were trying to codify. A good example was the second Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by Iran and the United States, of 19 January 1981,⁷ setting up the Iran–United States Claims Tribunal, which had jurisdiction to decide, under certain conditions, on claims filed by the nationals of one State against those of the other. The provisions of that declaration were undeniably special rules which derogated from those contained in the draft articles. In that connection, he did not see why the scope of article 21 should be limited to corporations and their shareholders and, like other members, was in favour of a more general provision which would be placed at the end of the draft articles and would apply to the provisions as a whole. He was thus in favour of the third option proposed by the Special Rapporteur.

63. There might be some doubt about the need for article 22, at least as far as the protection of non-governmental organizations was concerned, particularly since it was not based on established practice likely to be codified. He therefore endorsed the opinion of Doehring, as referred to in paragraph 120 of the report: in most cases, non-governmental organizations did not have a sufficient link with their State of registration to be able to claim diplomatic protection from it.⁸

64. Mr. FOMBA said the first question to be asked in connection with draft article 21 was the extent to which the expression *lex specialis* could be considered as being provided for and clearly defined in international law in terms of both form and substance. That was probably why Mr. Melascanu, with other members, had expressed some justifiable concerns. More importantly, pending the outcome of the debate on the fragmentation of international law, which should provide some clarifications in that regard, it should be recalled that Article 38, paragraph 1 (a), of the Statute of the International Court of Justice drew a distinction between general and particular international conventions. Moreover, the Court had used the expression *lex specialis* in a number of cases—for instance, in its decisions in the *Barcelona Traction and Military and Paramilitary Activities in and against Nicaragua* cases, where it had referred to the specific character of *lex specialis* (paras. 62 and 274, respectively). The Commission had included a provision relating to *lex specialis* in article 55 of its draft articles on State responsibility for internationally wrongful acts, and the legitimacy of that provision seemed to have been demonstrated by the Special Rap-

⁷ *ILM*, vol. 20, no. 1 (January 1981), p. 230.

⁸ See footnote 6 above.

porteur. In his view, the provision should be placed at the end of the draft articles.

65. As far as the wording of article 21 was concerned, the French text should use the words *des règles spéciales* instead of the words *les règles spéciales*. Like Mr. Economides, he thought that the contradiction between customary international law relating to diplomatic protection and special investment treaties was not absolute, but conditional.

66. With regard to article 22, he endorsed the Special Rapporteur's conclusions in paragraphs 122 and 123 of his report. The existence of legal persons other than corporations depended on different domestic laws, not on international law. As to whether such legal persons should be given diplomatic protection, it was too early, even though there did not seem to be any well-established practice, to reach a negative and definitive conclusion. For the individual, the governing criteria was nationality, just as for corporations nationality was defined according to their place of establishment, headquarters or other criteria; for legal persons other than corporations, the criteria should be the most relevant legal link established by analogy and *mutatis mutandis*. He endorsed Mr. Kateka's proposal on the title of article 22: "Other legal persons" would better reflect the contents of the provision. In conclusion, he considered that articles 21 and 22 could be referred to the Drafting Committee.

67. Mr. DAOUDI, referring to draft article 21, said that, if the Special Rapporteur's reasoning was followed and bilateral investment treaties were regarded as *lex specialis* that excluded the application of customary rules relating to the diplomatic protection of corporations and their shareholders, the following points would need to be borne in mind.

68. Bilateral investment treaties could provide for direct recourse to international arbitration either *ad hoc* or in the framework of an international body not only by corporations (legal persons) but also by natural persons (investors). Moreover, since those natural persons benefited from direct access to international courts in certain areas of international law, as other members of the Commission had pointed out at the preceding meeting, another means of indicating a derogation from the application of customary rules with regard to diplomatic protection needed to be found. It seemed that a general article applying to the draft articles as a whole, along the lines of article 55 of the Commission's draft articles on State responsibility for internationally wrongful acts, would be more in line with the Special Rapporteur's objective.

69. That was all the more justified in that article 21 provided for the exclusion of the application of the four draft articles. It was not clearly stated, however, that those provisions would not be applied if the respondent State did not comply with the arbitral award which settled the dispute. It was also not certain that, where an investment treaty was involved, the application of the provisions of the four articles as a whole could be ruled out, particularly in view of the reference to the nationality of corporations.

70. In draft article 22, the Special Rapporteur proposed the application *mutatis mutandis* of the principles embodied in articles 17 to 21 to legal persons other than corporations, the justification being that it was not possible to

draft further articles dealing with the diplomatic protection of each kind of legal person, according to paragraph 113 of the Special Rapporteur's report. In the commentary to the article, the Special Rapporteur cited the cases of universities and municipalities, as well as the case of partnerships. He nonetheless had the impression that the persons most likely to be included in the category of legal persons to which diplomatic protection was extended were non-governmental organizations, as was borne out by paragraphs 117 to 120 of the report.

71. In the first place, he was not sure that the rules relating to the diplomatic protection of corporations and their shareholders could be applied *mutatis mutandis* to other bodies, even subject to some changes. On the one hand, it was questionable whether the members of a non-governmental organization could be likened to the shareholders of a corporation. On the other hand, a non-governmental organization's link with a State was not at all the same as that of a corporation. Whatever sympathy one might feel for non-governmental organizations, giving the States where they were registered the possibility of exercising diplomatic protection over them would be giving certain States a further means of interfering in the internal affairs of other States. It was significant that, in paragraph 120 of his report, the Special Rapporteur referred to diplomatic protection in the context of internationally wrongful acts whose victims were legal persons, such as foundations in developing countries where they financed projects relating to social welfare, women's rights, human rights or the environment.

72. Although the Special Rapporteur's proposal was based on two examples of international jurisprudence, there was not enough international practice to support it. The Commission should be as demanding in connection with the need for sufficient State practice in that area as it was in that of unilateral acts of States. If there was no practice justifying the inclusion of a specific category of legal persons in the draft articles on diplomatic protection, it would be wiser not to rush matters.

73. In conclusion, he proposed that, in article 21, the reference to *lex specialis* should be deleted and that there should be only a general reference along the lines proposed by Mr. Kamto. He also proposed that article 22 should be deleted and that the relevant rules should be derived from State practice.

74. Ms. XUE, referring to article 21, said it seemed that many members would prefer a more general provision along the lines of article 55 of the draft articles on State responsibility for internationally wrongful acts, and that point of view was certainly understandable. Human rights had been mentioned, but those provisions might also concern special rules relating to the exhaustion of local remedies, particularly if the Commission subsequently decided to transpose articles 8 to 10 to Part Four of the draft text. If some countries drafted specific rules on the need to exhaust local remedies before acceding to a procedure for the settlement of disputes, those special rules must take precedence; the provisions of the draft articles on the exhaustion of local remedies would thus not apply.

75. In his statement at the preceding meeting, Mr. Economides had raised another question which warranted consideration and related to the absolute or relative nature of special rules. If rules were absolute—if the dispute settlement procedures provided for in a bilateral investment treaty or by ICSID resulted in a definitive settlement and were binding on the parties—the matter was straightforward, and in that case draft article 21 was valid. However, if the settlement was not definitive, it could not be said that the rules of customary law relating to diplomatic protection did not apply. If one of the parties to the dispute did not comply with the decision handed down, a complaint could be lodged through diplomatic channels, as was shown by the treaty provisions referred to in the footnotes of the pages corresponding to the last sentence of paragraph 108 of the Special Rapporteur's report. It must be remembered that bilateral and multilateral investment protection treaties were concluded to prevent abuses of diplomatic protection; the proper protection of foreign investments promoted the stability of diplomatic relations.

76. That was the theory. In practice, when two parties, a State and a foreign investor, agreed on settlement procedures, that was in their own interest, and they would endeavour to settle their dispute under that procedure. That was why the Commission must either make article 21 a general provision or consider the possibility of deleting it because it stated the obvious. If the majority of the members wanted to refer the article to the Drafting Committee, however, she would not object.

77. Having read the commentaries to article 22, she now had a better understanding of why the Special Rapporteur had initially tried to limit the provisions to corporations. Unfortunately, for perfectly logical reasons, he now had in mind legal persons other than corporations, but he was neglecting an important factor, namely, the virtual absence of State practice in that regard. As the Special Rapporteur himself had acknowledged, legal persons other than corporations were extremely diverse and sometimes very complex in nature. As it stood, the article did not indicate how or according to which criteria to identify the effective link between them and the State likely to exercise diplomatic protection. The very fact that the expression *mutatis mutandis* was used showed that there was a great deal of uncertainty. As Mr. Kabatsi had pointed out at an earlier meeting, moreover, it was doubtful whether articles 18 and 19 could be applied to legal persons other than corporations and, in particular, to non-governmental organizations, foundations, partnerships and the other legal persons mentioned by the Special Rapporteur. That would be going too far, and the political uncertainties inherent in the discretionary nature of diplomatic protection raised far more serious problems which warranted careful consideration. Like other members of the Commission, she thought that it would be useful to give more in-depth consideration to relevant State practice.

78. Mr. DUGARD (Special Rapporteur) asked Ms. Xue and Mr. Momtaz whether they considered that, since there was no State practice on the protection of legal persons other than corporations, the Commission should not include a provision such as article 22 in its draft text or whether, on the contrary, it should include it with a view to the progressive development of the law.

79. Mr. MOMTAZ said that he was not in favour of the progressive development of the law in that area and agreed with Mr. Daoudi that the provision should be deleted.

80. Ms. XUE said she also thought that it would be better to delete article 22 and to bring the matter before the Sixth Committee to seek the views of States.

81. Mr. YAMADA said that when customary law relating to diplomatic protection and special rules were in conflict, it was the special regime which prevailed under customary international law and article 21 was not necessary. When rules relating to diplomatic protection and special rules were not entirely in conflict and some of them were compatible, both would be applied in parallel, in accordance with customary international law; as article 21 stood, however, the special regime would prevail. Was that the Special Rapporteur's objective?

82. Mr. DUGARD (Special Rapporteur) said that Mr. Yamada had put his finger on a weakness in article 21. It would need to be clearly stated, either in the commentary or in the article itself (if it was referred to the Drafting Committee), that when the two regimes were compatible, they both applied.

83. Mr. MANSFIELD (Rapporteur) said that he was not in favour of a very elaborate rule concerning *lex specialis* and that it was necessary to be clear if a generalized provision was decided upon. In that sense, he endorsed Mr. Economides' comment: draft article 21 should be dropped and the matter should be dealt with in the commentaries, or, if it was decided to draft a general provision, information relating to its scope should be given in the commentary.

The meeting rose at 1 p.m.

2777th MEETING

Friday, 18 July 2003, at 10 a.m.

Chair: Mr. Enrique CANDIOTI

Present: Mr. Addo, Mr. Al-Baharna, Mr. Al-Marri, Mr. Brownlie, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Melescanu, Mr. Momtaz, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Ms. Xue, Mr. Yamada.
