Document:
A/CN.4/SR.2795

Summary record of the 2795th meeting

Topic:
Diplomatic protection

Extract from the Yearbook of the International Law Commission:-
that, in addition to diplomatic protection, functional protection also existed. He accordingly requested that article 23 should be referred to the Drafting Committee, which would decide whether it should be retained or whether the matter should be dealt with in the commentary.

52. Mr. GALICKI said that, like Mr. Economides, he was in favour of retaining article 23, which emphasized the existence of another system of protection.

53. Mr. SEPÚLVEDA said that he endorsed the idea of referring articles 26 and 21 to the Drafting Committee together, but that the Committee must be given guidance on how to proceed. He proposed that the Chairperson of the Commission should be given that task.

54. Mr. MANSFIELD said that he was in favour of retaining article 23.

55. Ms. XUE said that, if the purpose of article 23 was to indicate that diplomatic protection did not cover functional protection, the article should be included in the general part of the draft articles, since it dealt with the scope of the topic. Article 1, however, already stated that the draft covered relations between States, to the exclusion of relations between States and international organizations or between international organizations. Moreover, the words “without prejudice” were not appropriate because, in practice, there could indeed be prejudice. Consideration should be given to that aspect of the matter before article 23 was referred to the Drafting Committee.

56. Mr. CANDIOTI said that he was in favour of referring article 23 to the Drafting Committee because it was necessary to have a better understanding of the nature of diplomatic protection and to distinguish it from other types of protection.

57. He agreed with Mr. Pellet that it would be useful to mention the legal consequences of diplomatic protection—for example, in the introduction—and indicate that it was one way of giving effect to international responsibility. The matter should be dealt with either in the introduction or in the commentary, if only for the sake of consistency with the Commission’s earlier work.

58. Mr. PELLET said that he did not agree with Mr. Economides’s proposal. He did not understand why article 23, the provision that was least relevant to the topic, should be retained.

59. Mr. MOMTAZ said that, like Ms. Xue, he thought that the issue in article 23 related to the scope of the draft articles, which was already defined in article 1. He therefore agreed with Mr. Pellet’s view that there was no need to refer to it in the draft articles.

60. Mr. CHEE said that he agreed with the position taken by Mr. Economides on article 23.

61. Mr. DUGARD (Special Rapporteur), replying to Mr. Pellet, said that he was prepared to give further consideration to the possible inclusion of a provision on the “clean hands” doctrine. As to the consequences of diplomatic protection, he had had the impression that the Commission was not interested in taking up the matter, but he was prepared to accept the proposal by Mr. Candioti.

62. Since opinions seemed to be very divided on article 23, he proposed that the Commission should vote on it.

63. Mr. BROWNlie asked why the Special Rapporteur had reversed his position: if the “clean hands” doctrine had nothing to do with the topic under consideration, he saw no reason why a provision should be devoted to it.

64. Mr. DUGARD (Special Rapporteur) explained that he had not proposed to devote a provision to the subject, but he was prepared to think about the matter.

65. The CHAIRPERSON suggested that, if there was no objection, articles 24 and 25 should be excluded from the topic.

It was so decided.

66. The CHAIRPERSON said that, if he heard no objection, he would take it that article 26 should be referred to the Drafting Committee for consideration in conjunction with article 21.

It was so decided.

67. The CHAIRPERSON invited the Commission to vote by show of hands on whether article 23 should be referred to the Drafting Committee.

By a vote of 16 to 9, the Commission decided not to refer article 23 to the Drafting Committee.

68. The CHAIRPERSON suggested that he might hold informal consultations on the questions of “clean hands” and the consequences of diplomatic protection to determine whether the Commission should concern itself with them. If he heard no objection, he would take it that the Commission wished him to do so.

It was so decided.

The meeting rose at 1 p.m.

2795th MEETING

Friday, 7 May 2004, at 10 a.m.

Chairperson: Mr. Teodor Viorel MELESCANU

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Galicki, Mr. Kabatsi, Mr. Kolodkin, Mr. Koskeniemi, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Ms. Xue, Mr. Yamada.

[Agenda item 3]

**Fifth report of the Special Rapporteur (continued)**

1. Mr. DUGARD (Special Rapporteur), introducing his proposals on the diplomatic protection of ships' crews by the flag State, as contained in the fifth report on diplomatic protection (A/CN.4/538), said there was some support in the practice of States for the position that the flag State could protect members of the crew of a ship who did not have its nationality. There were also sound policy considerations in favour of such an approach. He had not originally intended to include an article on the topic, but, thanks to Mr. Gaja, he had developed an interest in the question; indeed, he confessed to meeting his proposal with some enthusiasm, since he believed that the diplomatic protection of ships' crews was a matter that deserved inclusion.

2. State practice emanated mainly from the United States of America. Under that country’s law, foreign seamen had traditionally been entitled to the protection of the United States while serving on its vessels, the view being that, once a seaman enlisted on a ship, the only relevant nationality was that of the flag State. That position had been endorsed by the United States Supreme Court, and by United States diplomatic communications, consular regulations and Department of State Instructions. Whether the practice of the United States provided evidence of a customary rule in favour of the protection of seamen by the flag State had been questioned, notably by Sir Arthur Watts who, in 1958, had argued that the practice was largely based on resistance to British claims during the Napoleonic wars of a right to stop foreign private vessels on the high seas and search them for deserters and those liable for military service in Britain. Strangely enough, the United States had come round to Watts’ point of view: in a communication to the International Law Commission dated 20 May 2003, the United States Department of State had informed it that the country’s policy, which stemmed from United States opposition to British impressment of seamen on United States merchant vessels sailing on the high seas during the Napoleonic wars, was flawed. The extraordinary situation had thus been reached in which the United States, from which most of the practice emanated, wished to denounce that practice. The most important award was that of McCready, but there had been others. In the *I’m Alone* case, the Canadian Government had claimed compensation on behalf of three non-national crew members after a Canadian vessel had been sunk by a United States Coast Guard ship. The United States had contested Canada’s right to claim on behalf of non-nationals; that it should do so was ironic, given that its practice had favoured such a right at that time. The Arbitral Commission, without examining the issue of nationality, had awarded compensation in respect of all three non-American seamen. Judicial support had also come from two dissenting opinions in the *Reparation for Injuries* case: Judges Hackworth and Badawi Pasha had taken the view that the flag State was entitled to exercise diplomatic protection in respect of crew members (pp. 197–207).

4. There was not a wealth of literature on the subject and, as was usually the case, it was divided as to the existence of such a right. For instance, whereas Watts and Schwarzenberger were against it, Brownlie and Meyers were in favour. Writing in 1967, Meyers had stated that he did not know of “any cases in which an international tribunal or Court took the ground that the flag State was not permitted to protect an alien member of the crew”.\(^7\)

5. The *Saiga* case provided support for that position. The dispute had arisen out of the arrest and detention by Guinea of the *Saiga*, which was registered in Saint Vincent and the Grenadines (“Saint Vincent”). The crew had been largely Ukrainian nationals and there had also been three Senegalese workers on board at the time of the arrest. An attempt to secure the release of the vessel and crew had failed: the tribunal’s order to release them had been ignored by Guinea and the crew had been released only in 1998, when the matter had been referred to ITLOS. Guinea had objected to the admissibility of Saint Vincent’s claim, *inter alia*, on the ground that the injured individuals were not nationals of Saint Vincent and had not exhausted local remedies. The Tribunal had dismissed those challenges to the admissibility of the claim and held that Guinea had violated the rights of Saint Vincent by arresting and detaining the ship and its crew. Finally, it had ordered Guinea to pay compensation to Saint Vincent for damages to the *Saiga* and for injury to the crew.

6. Although the Tribunal decision was not a model of clarity, its reasoning suggested that it had also seen the matter as a case of diplomatic protection. Guinea had objected to the admissibility of the claim in respect of the crew on the ground that it constituted a claim for diplomatic protection in respect of non-nationals of Saint Vincent. In dismissing Guinea’s objection, the Tribunal had stated that the United Nations Convention on the Law of the Sea drew no distinction between nationals and non-nationals of the flag State, stressing that “the ship, every thing on it, and every person involved or interested in its operations are treated as an entity linked to the flag State. The nationalities of these persons are not relevant”\(^7\)

\(^1\) For the text of articles 1 to 10 of the draft articles on diplomatic protection provisionally adopted by the Commission at its fifty-fourth and fifty-fifth sessions, see *Yearbook … 2003*, vol. II (Part Two), pp. 34–35, para. 152.

\(^2\) Reproduced in *Yearbook … 2004*, vol. II (Part One).


\(^4\) Communication of the United States Department of State, on file with the Codification Division, Office of Legal Affairs.


(para. 106). Lastly, it had indicated the reasons of policy in favour of such an approach. It had stated that modern maritime transport was characterized by “the transient and multinational composition of ships’ crews” and warned that “ships could have a crew comprising persons of several nationalities. If each person sustaining damage were obliged to look for protection from the State of which such person is a national, undue hardship would ensue” (para. 107). The Tribunal had awarded compensation both for injury to the Saiga and for injury to its crew arising out of unlawful detention and personal injury.

7. The inclusion of a provision recognizing the right of the flag State to exercise diplomatic protection on behalf of non-national crew members had been debated in the Commission in 2002 (in an informal consultation) and in the Sixth Committee in 2002 and 2003. While the Commission had been evenly divided on the subject, the majority of speakers in the Sixth Committee had been opposed to its inclusion. Two reasons had been advanced against the inclusion of such a provision: the first was the obvious one that extending diplomatic protection to non-nationals did not accord with the traditional approach of international law. That could be readily conceded; the question was whether it would be right to extend the scope of diplomatic protection, in the same way that article 7 provided for the diplomatic protection of refugees and stateless persons. The second objection, which had been raised by most speakers in the Sixth Committee, was that the whole matter was regulated by article 292 of the United Nations Convention on the Law of the Sea. That article had been included in the Convention in response to the desire of delegations to include a safeguard procedural mechanism providing for the speedy release of crew and vessel. It had not been intended to cover the protection of crews in all cases, but was largely a procedural mechanism designed to ensure the prompt release of the vessel for economic purposes. It could, however, be used as a mechanism to secure the release of the crew as well as of the vessel, as was illustrated by both the Saiga case and the Grand Prince case. Article 292 was a useful mechanism for the release of the crew in conjunction with a request for the release of the vessel, but it was not a substitute for the diplomatic protection of crews, since there were numerous cases in which article 292 would not ensure their protection. It did nothing to ensure an internationally accepted standard of treatment while they were in custody. Interestingly, suggestions that the crew of the Saiga had been maltreated while in detention had not been raised in the proceedings, probably because they had been seen as designed to secure the release of the ship itself. Nothing in article 292 of the Convention provided for the protection of the human rights of the crew while in detention. There was therefore a need for a mechanism wider in scope than article 292 for the protection of ships’ crews. Draft article 27 sought to establish such a mechanism.

8. There were also strong policy reasons for allowing the flag State to exercise diplomatic protection in respect of a ship’s crew, as had been recognized by ITLOS in the Saiga case.

9. It should be borne in mind that many ships’ crews now came from politically and economically weak States with undistinguished human rights records and little interest in the protection of their nationals who had lost close contact with their own States while employed on foreign ships. When they suffered injury in the service of such ships, there was no incentive for the crew members’ State of nationality to protect them. In practice, therefore, crews were protected by the flag State or by no one.

10. Practical considerations relating to the bringing of claims should not be overlooked. It was much easier and more efficient for one State to exercise protection on behalf of all crew members than to require the State of nationality of each crew member to bring a separate claim for injuries on behalf of its nationals. In the Barcelona Traction case, ICJ had disapproved of the multiplicity of claims in respect of shareholders’ claims. Similar considerations applied to ships’ crews: it was undesirable that all States of nationality of crew members should bring proceedings; and if only one State was to bring them, it should obviously be the flag State. He therefore submitted that there was State practice in favour of granting diplomatic protection to ships’ crews, and that there were also sound policy considerations in favour of such a position.

11. As for the related case of passengers on board a ship, the important differences between passengers and crew had led him to conclude that passengers should not be granted diplomatic protection. The same applied to aircraft crews and passengers: there was no need for diplomatic protection, nor was there any supporting State practice. Still less was there State practice in the case of spacecraft, and it would be premature to embark on diplomatic protection in such cases.

12. Draft article 27 could thus be seen as an exercise in codification rather than progressive development, since there was sufficient State practice to justify such a rule. It was not a bold provision, as it was limited to injuries to a foreign national sustained in the course of an injury to a ship and would not extend to injuries sustained by that national while on shore leave. It was, moreover, supported by sound policy considerations. If the Commission decided not to adopt article 27, it should instead adopt a saving clause making it clear that the exclusion of such a rule from the draft articles was without prejudice to the evolution of a customary rule on the protection of ships’ crews by the flag State.

13. Mr. YAMADA requested clarification on two points. Article 27, as currently drafted, was limited to the injury suffered by crew members in the course of injury to the vessel. The flag State had exclusive jurisdiction over its vessel, so an injury sustained on board was a direct injury to the flag State, which could therefore invoke State responsibility against the wrongdoing State. He wondered which of the two mechanisms the Special Rapporteur considered the more effective: diplomatic protection, or a claim for direct injury. Secondy, by the same token, the courts of the flag State would have jurisdiction, and article 12 of the draft articles on the jurisdictional immunities of States and their property, on which negotiations had recently been concluded, was relevant in that case. The

\[\text{For the text of the draft articles 1 to 22 on the jurisdictional immunities of States and their property adopted by the Commission at its forty-third session, see Yearbook ... 1991, Vol. II (Part Two), pp. 13 et seq.}^{,} \text{para 28.}\]
14. Mr. CANDIOTI sought reassurance that article 27 related only to natural persons and that it constituted an exception to the principle of nationality, in the same way as article 7, on refugees and stateless persons.

15. Mr. DUGARD (Special Rapporteur) said that, before answering Mr. Yamada’s questions, which dealt with matters of substance, he would prefer to hear the views of other members of the Commission. As for Mr. Candioti’s question, he confirmed that the article was envisaged as an exception to the rule, in the same way as article 7.

16. Mr. KOLODKIN said that, in his view, the right of the flag State to exercise protection in respect of ships’ crews, whether or not such crews were nationals of that State, was sanctioned by international law. It was based on the provision of the International Law of the Sea concerning the indivisibility of a vessel and its crew, as was confirmed in the Saiga case. It was also in line with the widespread practice in relation to multinational crews.

17. The United Nations Convention on the Law of the Sea made no distinction, in the majority of cases, between ships’ crews in respect of their nationality but referred only to the prerogatives of the flag State, although some exceptions did exist, notably article 97, paragraph 1, which related to penal jurisdiction in matters of collision on the high seas. The provision awarded jurisdiction over the member of a ship’s crew not only to the flag State, but also to the State of nationality.

18. In the Volga case before ITLOS, the Russian Federation had demanded the immediate release not only of the vessel, but also of three crew members, who were Spanish nationals. It should be noted, however, that only their release had been in question, in accordance with article 292 of the United Nations Convention on the Law of the Sea. By contrast with the Saiga case, no claim for compensation had been made. Although he was convinced that the flag State had the right to exercise protection irrespective of the nationality of crew members, that did not necessarily mean that a provision to that effect was required in the draft articles. As had been pointed out in the Sixth Committee, protection provided by the flag State was different from diplomatic protection, since it was not based on the principle of nationality. The inclusion of draft article 27 would therefore constitute another exception to the general rule, which might not be desirable. If he was not mistaken, ITLOS had not, in the Saiga case, described the protection accorded to the crew as “diplomatic”. In his view, protection by the flag State was sui generis, based on the rules of the international law of the sea; as such, it should not form part of articles relating to diplomatic protection.

19. On the other hand, there was probably a case for reflecting the relationship between the flag State and diplomatic protection in the draft articles. Situations involving the rights both of flag States and of States of nationality seemed to arise extremely frequently. The question was therefore relevant, given that many vessels now sailed under flags of convenience. The point was not that States providing flags of convenience had little interest in the crews of the vessels that flew their flag, as the Special Rapporteur suggested in paragraph 63 of the report, but that many such States were not in a position to provide protection. States of nationality therefore often undertook the protection without asking the flag State whether it intended to take action. That gave rise to the question as to whether the flag State had a priority right to exercise protection. In his view, as a general rule it did not. The question should, however, be decided on a case-by-case basis, taking into account all the circumstances and the rules involved, especially the law of the sea. It was therefore worth considering the Special Rapporteur’s proposal that a saving clause along the lines of the one contained in paragraph 73 of the report should be adopted, although such a clause should emphasize that the right of the flag State to exercise protection in respect of ships’ crews was without prejudice to the right of the State of nationality to do so, rather than the other way round. In that case, however, the clause would become a “without prejudice” clause, and such clauses were obviously unpopular with members of the Commission.

20. Mr. BROWNlie, after commending the value of the materials provided by the Special Rapporteur, said that the evidence was less than conclusive, as far as the current state of customary international law was concerned. He was unimpressed by the efforts of members of the Commission to say that the Saiga case could be regarded as an authority on diplomatic protection. On the contrary, that case was concerned rather with State responsibility and article 292 of the United Nations Convention on the Law of the Sea.

21. He was, on the other hand, in favour of the progressive development of international law; and, as Mr. Pellet had said, the Commission should not be too bound by the current state of customary law. There were strong policy considerations in favour of extending diplomatic protection to crew members. That said, he was not attracted by the reference in paragraph 63 of the report to the fact that many crews came from weak States with poor human rights records. The Commission must avoid linking its legislative activities with such generalizations, whether they concerned diplomatic protection for ships’ crews or any other subject. Moreover, any policy consideration should be applied consistently. It therefore followed that the same rights should be applied in the case of the armed services of States; yet he suspected that in that area, too, there was little State practice.

22. An analytical problem arose in connection with article 27, which referred to damage done in the course of an injury to a vessel, thus associating the protection of crew members with the injury to the vessel. The Commission should give more thought to what constituted the basis of protection, as the policy considerations set out in paragraphs 62 to 65 of the Special Rapporteur’s report could well apply to other situations, such as the maltreatment of crew members on shore by the port authorities.

23. In that connection he wished to draw attention to other policy considerations that he considered to be more fundamental than those cited by the Special Rapporteur.
Specifically, the Commission ought to look carefully at the characteristics of diplomatic protection. While some members of the Commission had suggested that the topic was a vague one, he believed it to be one of the best established areas of customary international law; it was the fact that States had discretion in the exercise of diplomatic protection that gave rise to confusion. Although the notion of discretion did not arise when it came to entitlement, it could be problematic when human rights were involved. However, the notion of discretion did not affect the basic character of diplomatic protection as a well-established part of international law.

24. His criticism of the Special Rapporteur’s reports, then, had to do with the fact that they tended to ignore or downplay the fact that diplomatic protection was the other side of the coin of the admissibility of claims, which would in fact be a better name for the topic. Admissibility of claims was not automatically complementary with State responsibility, although it was related to that topic. Many claims in fact had nothing to do with State responsibility, but instead related to the status of an asset of a State, including the fact of State ownership. Boundary disputes were an obvious example of such cases, but they might also involve moveables or archaeological property or patrimony, as in the Temple of Preah Vihear case, or even shipwrecks.

25. The Commission needed to define the legal interests of States so that when it considered affording protection to ships’ crews or members of the armed forces of a State who were not nationals of that State, it could take into account whether such cases were reflective of legitimate State interests. Referring to the interests of a State rather than of an individual might constitute an old-fashioned approach, but it was a realistic one nonetheless.

26. Mr. PELLET said he was concerned by Mr. Brownlie’s view—one quite likely held by many on the Commission—that the subject of diplomatic protection had more to do with the admissibility of claims than with State responsibility. He himself was not convinced that that was the case, and he was in fact radically opposed to so limited and procedural an approach. Mr. Brownlie’s statement, which doubtless drew on common law, had helped him to understand why Commission members often appeared to have so much trouble understanding each other when it came to the topic of diplomatic protection: clearly, radically different conceptions of the topic coexisted. It was unfortunate that the Commission had lost sight of the approach advocated by Mr. Bennouna, the previous Special Rapporteur, in his preliminary report on the topic.9

27. Mr. BROWNlie said he did not think that his differences with Mr. Pellet were so fundamental. He had not said that diplomatic protection had nothing to do with the enforcement of State responsibility, but only that it was not a total reflection or complement of it. He had merely sought to emphasize that the legal interests of States and diplomatic protection were closely linked. Because the Special Rapporteur was exploring the frontiers of the topic, it might be useful for the Commission to look at the definition of the legitimate interests of States.

28. Mr. ADDO asked Mr. Brownlie to clarify whether he supported the inclusion of article 27 in the draft articles.

29. Mr. BROWNlie said he supported the general thrust of the article, but felt that more thought had to be given to the scope of protection of crew members injured in an incident that did not involve an injury to the vessel.

30. Mr. MOMTAZ said that, according to Mr. Brownlie, article 292 of the United Nations Convention on the Law of the Sea appeared to focus on an injury to a vessel, as distinct from the collateral injury to passengers and crew. It thus seemed that the framers of the Convention had not considered the protection of the rights of crew members and passengers to be a primary concern. He therefore wondered whether one ought to conclude in the Saiga case that the main concern had been the injury to the vessel, rather than the protection of the crew.

31. Mr. BROWNlie said that the first concern of common-law lawyers was the basis of claim. That had clearly been a key issue in the Saiga case, where the basis of claim had been breaches of treaty obligations that had involved direct injuries to the State. Consequently, the Saiga decision could not be relied on unduly to support the proposition that diplomatic protection existed in respect of crew members.

32. Mr. CHEE said that in its judgment in the Saiga case, ITLOS had upheld a long-standing maritime custom that ships’ crews would be protected by the flag State regardless of their nationality. The case constituted an example of functional protection extended by a flag State. The Tribunal had reasoned that “the ship, every thing on it, and every person involved or interested in its operations are treated as an entity linked to the flag State. The nationalities of these persons are not relevant” (see paragraph 6 above). The Tribunal had further observed that modern maritime transport was characterized by “the transient and multinational composition of ships’ crews” and that “ships could have a crew comprising several nationalities. If each person sustaining damage were obliged to look for protection from the State of which such a person is a national, undue hardship would ensue” (ibid.). That concern was similar to the concern expressed by ICJ in the Barcelona Traction case.

33. With regard to the distinction drawn by the Special Rapporteur between ships’ crews and the crews of aircraft and his conclusion that the latter should not enjoy diplomatic protection, it should be noted that while ships’ crews generally had as their official travel documents a seaman’s registration card which they used chiefly while on shore leave, aircraft crews travelled on their national passports. The difference in travel documents reflected the different status accorded to the two types of crews: whereas ships’ crews were accorded functional protection by the flag State irrespective of nationality, airline crews had to bring private claims against the airline that employed them, unless a State was directly involved in the injury, as in the case of a civilian aircraft being shot down by a foreign military aircraft. He thus endorsed the

---

Special Rapporteur’s conclusion regarding aircraft crews in paragraph 71 of his report, which reflected current State practice. He likewise supported the adoption of article 27.

34. Mr. MANSFIELD said he supported the inclusion of article 27. There was sufficient State practice to justify its inclusion, and the decision as to whether to include it was thus ultimately a policy choice. He agreed with the Special Rapporteur that it was good policy to allow flag States to extend diplomatic protection to crews, a position that had been endorsed in the Saiga case.

35. The fact of the matter was that crews needed to be protected by flag States, as they were often absent from their States of nationality for long periods and might indeed have little contact with them. Moreover, the State of nationality might have little real capacity to afford any kind of protection to its nationals. He cited the example of Tuvalu, a small island State in the South Pacific with a long tradition of sending its young men off to work as seamen around the world. In practical terms, Tuvalu’s ability to exercise diplomatic protection was very limited, and could not compare with the capacity of large flag States, even if the flag in question was a flag of convenience. That flag States had good reason not to ignore the welfare of the crew was made clear in paragraph 65 of the Special Rapporteur’s report.

36. Several other points arose in that regard. Firstly, article 292 of the United Nations Convention on the Law of the Sea did not deal with the diplomatic protection of ships’ crews and had never been intended to do so. While it was an extremely important provision of the Convention, its purpose was to secure the prompt release of a ship’s crew rather than to protect crew members when a ship was under arrest or to address any infringement of crew members’ rights. The Commission would have to look beyond the scope of article 292 to find support for the notion of diplomatic protection for ships’ crews.

37. Secondly, the injury to crew members was directly linked to the injury to the vessel occasioned by an internationally wrongful act. The flag State would have direct information regarding the circumstances surrounding the injury to the vessel, whereas the strong likelihood was that the State or States of nationality of the crew members would not. In order to bring a claim, then, the States of nationality would in any case first have to obtain information from the flag State.

38. Thirdly, the right of a flag State to exercise diplomatic protection did not preclude a crew member’s State of nationality from exercising diplomatic protection. Thus, article 27 did not give the flag State priority over the State of nationality, but simply allowed it to exercise diplomatic protection if that was the best solution under the circumstances. However, the State of nationality was in no way barred from exercising diplomatic protection, should it choose to do so.

39. Lastly, as the Commission had often noted, the exercise of diplomatic protection by a flag State was a right, but not a duty. There might well be cases in which a crew member was injured by the wrongful act of a port State where it might be inappropriate to exercise diplomatic protection. For example, a crew member on shore leave might suffer an injury that had nothing to do with an injury suffered by the vessel as the result of an unlawful act. While the current drafting raised some difficulties, article 27 sought to make it clear that the right of the flag State to exercise diplomatic protection was limited to situations where the crew had been injured in the course of an injury to the vessel. Accordingly, he hoped that the text would be referred to the Drafting Committee.

40. He also agreed with the Special Rapporteur that no similar case could be made for diplomatic protection in respect of ships’ passengers or the crew and passengers of an aircraft.

41. Mr. PELLET said he had been very favourably impressed by the chapter of the report on diplomatic protection of ships’ crews by the flag State. He nevertheless wondered whether the practice cited by the Special Rapporteur, which derived from two States, one of which had been somewhat reluctant to apply the rule in question, really demonstrated the existence of a rule of customary law; he himself was not convinced that it did. Even though the States in question were the United Kingdom and the United States, they could hardly be called representative of the international community as a whole, and the practice cited could not be considered to be general. As for the Saiga case, its interpretation was the subject of controversy, to say the least.

42. Yet the fact that a rule was not part of customary law did not preclude its inclusion in the Commission’s draft articles, as the Commission’s task was not only to codify but also to develop international law. Thus, while he was not convinced of the justification for article 27 in positive law, it seemed justified de lege ferenda. As the exercise of diplomatic protection was one means of invoking State responsibility, and ships’ crews were among the most likely categories of individuals to be affected by the consequences of an internationally wrongful act, there were sufficient policy reasons, well adduced by the Special Rapporteur and Mr. Mansfield, for seeking to facilitate their protection by means of article 27. He was not, however, convinced that the exercise of some form of protection by the flag State would be effective, especially since, as the Special Rapporteur had noted, many flag States, particularly in the case of flags of convenience, might well have little interest in protecting the members of crews on vessels flying their flag.

43. It was for that reason that he supported draft article 27 as submitted by the Special Rapporteur, not because he believed it reflected a customary rule. On the other hand, he was vigorously opposed to the saving clause proposed in paragraph 73 as an alternative to article 27. He took exception to the Special Rapporteur’s penchant for disposing of problems by constantly resorting to “without prejudice” clauses. Article 27 had every right to a place in the draft, even if it was not about diplomatic protection in the strict sense, but rather about the protection of persons with a view to invoking the responsibility of the State, and even if there was some uncertainty about the existence of a rule: after all, the Commission’s main purpose was to dispel such uncertainties. The Special Rapporteur had convinced him of the advisability of including a provision
along the lines of the one in article 27, and it would be most undesirable to fall back on a “without prejudice” clause.

44. Lastly, paragraph 46 of the report referred to a communication dated 20 May 2003 from the United States Department of State; he would be grateful if the secretariat would circulate that document to members of the Commission.

45. Mr. BROWNIE said he agreed with almost everything that Mr. Pellet had said. He remained irritated, however, by the erroneous assumption that small States were incapable of achieving results in the international arena. Not only was that a huge generalization, but it was also basically untrue. As the result of a case in ICJ, the small State of Nauru, whose population was about 12,000, had obtained from Australia a settlement amounting to 107 million Australian dollars. It was a question of leadership, not size.

46. Earlier in the debate he had raised the point that the policy considerations evoked by the Special Rapporteur in relation to ships’ crews probably applied with equal cogency to members of the armed forces of foreign States. He would like to hear others’ thoughts on that point. He himself found it inconsistent to devote so much attention to ships’ crews while ignoring parallel cases.

47. Mr. MANSFIELD said it was simply not realistic to contend that small States had access to resources commensurate with those of major Powers.

48. Mr. PELLET pointed out that the Certain Phosphate Lands in Nauru case had concerned not diplomatic protection, but rather the responsibility of States. As to whether the members of armed forces of a foreign country could be protected by the country they served, that was an interesting question and one that could be pursued. The example of the members of the French Foreign Legion came to mind: they had very strong links with the country that they served and one could easily imagine extending protection to them. The only difference was that, as the result of a case in ICJ, the small State of Nauru, whose population was about 12,000, had obtained from Australia a settlement amounting to 107 million Australian dollars. It was a question of leadership, not size.

49. Mr. CANDIOTI pointed out that if the draft articles were to be extended to include protection of ships’ crews, consideration would need to be given to the question as to whether the requirement of exhaustion of local remedies should be waived along with the nationality requirement, in the interests of freedom of navigation, maritime commerce and securing the speedy release of the crew.

50. The CHAIRPERSON, speaking as a member of the Commission, said that he was concerned that including protection of crews would involve elaborating a rule that did not take account of two fundamental prerequisites for the exercise of diplomatic protection, namely nationality and exhaustion of local remedies.

51. Mr. CHEE said that the Certain Phosphate Lands in Nauru case referred to by Mr. Brownlie was probably exceptional. Most flag States were poor, developing countries that raised revenue from the registration of ships. The shipowners’ prime concern was to secure the release of the vessel itself. In effect, the State of the shipowner paid the flag State to protect the ship’s crew.

52. Mr. DUGARD (Special Rapporteur) said that while many authors made an exception in the case of members of armed forces, he had not put forward a proposal on that subject, having regard to the developments in the international community relating to mercenaries. Although the employment of mercenaries was now prohibited by a convention, many armed forces still employed foreign nationals. The distinction between foreign nationals and mercenaries was a very tenuous one, however, and it was for that policy reason that he believed it would be unwise to draw attention to the subject.

53. Mr. BROWNIE asked for confirmation that article 27 applied to the crews of naval vessels.

54. Mr. MOMTAZ, responding to Mr. Canadiot’s remark, said that in the Saiga case, ITLOS had found that the rule that local remedies must be exhausted in the exercise of diplomatic protection was applicable solely when a State had breached an international obligation concerning the treatment to be accorded to aliens. The Tribunal had considered that none of the violations of rights claimed by Saint Vincent could be described as breaches of obligations concerning the treatment to be accorded to aliens, and that they were all direct violations of the rights of Saint Vincent. In other words, if the claim was based on the injury to the vessel, local remedies need not be exhausted.

55. Mr. CANDIOTI said the information just provided by Mr. Momtaz bore out his suspicion that inclusion of protection of ships’ crews within the scope of diplomatic protection would not actually facilitate the protection of such crews. It would even be counterproductive, since it would undermine the traditional requirements of nationality and exhaustion of local remedies on which diplomatic protection was based and prevent ships’ crews from being protected rapidly and effectively.

56. Mr. PELLET said that he too was beginning to have doubts. He did not see why protection needed to be provided more rapidly for the members of ships’ crews than for anybody else. As Mr. Kolodkin and others had stated, such protection was not in fact diplomatic protection. On the other hand, the policy considerations advanced by the Special Rapporteur remained valid. Perhaps the solution would be to delete the word “diplomatic” in article 27 and to add, after the words “crew of the ship”, a phrase such as “notwithstanding the right of diplomatic protection, which continues to be the prerogative of the State of nationality”. There seemed to be a need for a provision to indicate that the particular type of protection envisaged was supplemental to the diplomatic protection which could be exercised by the State of nationality of the crew.
57. Mr. DUGARD (Special Rapporteur), responding to the comments by Mr. Candioti and Mr. Yamada, said that the difficulty with the protection of ships’ crews was that one was frequently confronted with situations in which there was a direct injury to the State through the ship. Article 292 of the United Nations Convention on the Law of the Sea provided for prompt release in such a situation. In the Saïga case, the Tribunal had not properly distinguished between direct and indirect injury, and that was why it had found that it was unnecessary to exhaust local remedies. In other situations, however, he could see no reason why a State should not be required to exhaust local remedies. If, in the Saïga case, Saint Vincent had brought a claim on behalf of the injured crew arising from maltreatment by Guinea, then the local remedies available to the crew members would have had to have been exhausted before the matter proceeded to the international level.

58. Mr. ECONOMIDES said that he found the chapter of the report on diplomatic protection of ships’ crews by the flag State to be the most stimulating of all, although he agreed with Mr. Brownlie that the language of paragraph 63 was somewhat blunt and should be reworded. He endorsed article 27 for the reasons given by previous speakers, in particular Mr. Mansfield. The reasons for making such a rule were legitimate, irrespective of whether the protection that was its subject had actually been established in international custom, reflected an embryonic rule or constituted a new rule. The Drafting Committee would undoubtedly have to look into a number of problems, including whether the protection envisaged was truly diplomatic protection. Mr. Kolodkin had spoken of sui generis protection; Mr. Chee had referred to functional protection: both characterizations were apposite. Some wording must be found to indicate that the situations envisaged were not orthodox cases of diplomatic protection, but were analogous cases that warranted treatment in a separate provision and that should not be incorporated among the exceptions set out in article 7.

59. In his view, the ships covered in the provision must be those of the merchant marine fleet, not naval vessels. The third and thorniest question was whether direct injury suffered by seamen should be envisaged, or whether the injury had to be to the ship, with collateral indirect injury suffered by the seamen. To maintain coherence with the law of the sea, perhaps a restrictive approach should be taken and the option of indirect injury that flowed from an injury to the ship itself should be the one chosen, in which case the exhaustion of local remedies requirement could then be retained; for otherwise it would be impossible to know which court an injured person must address in order to exhaust such remedies. That would likewise be in accord with the United Nations Convention on the Law of the Sea, which aimed at rapid administration of justice in such situations. That matter should now be considered by the Drafting Committee.

60. Ms. XUE said the question as to whether draft article 27 was acceptable actually boiled down to two basic issues. Firstly, what was the legal basis for the flag State to claim the right to exercise protection; or, in other words, did the nationality of a ship give the right to protection just as in the case of nationals? Secondly, if both the flag State and the State of nationality of the crew member had the right to protection, were those rights mutually exclusive or did they coexist?

61. On the first question, the Special Rapporteur seemed to suggest in his report that State practice, particularly that of the United States and the United Kingdom, demonstrated inconclusive and even conflicting approaches. If the answer to that question was in the affirmative, State practice was needlessly complicated. Article 91 of the United Nations Convention on the Law of the Sea clearly provided that ships had the nationality of the State whose flag they were entitled to fly, but that there must be a genuine link between the State and the ship. There was a twofold problem with ships. Firstly, while in many cases the nationality of a ship was based on a genuine link between the ship and the flag State, in many other cases, for example ships flying a flag of convenience, that might not be the case. Accordingly, when a ship was in trouble and had suffered injury, the flag State might not have an interest in exercising protection. Secondly, unlike nationals, ships were vehicles. The nationality of a ship had two legal aspects: territorial and national. The flag State could exercise jurisdiction and protection both over the ship and over the people on it. Where the people on the ship, particularly the crew, possessed nationalities different from that of the ship, multiple nationalities would be involved. Accordingly, unlike the case of nationals, the nationality of the ship did not always provide a clear legal basis for the flag State to claim an exclusive right to protection of the crew members. In the early days of United States practice, in order to provide protection to crews on board its ships, that country had been required by law to treat foreign crew members as nationals in order to avoid the possibility of competing claims. That practice had been challenged, however, because the crew members’ nationality had not changed. That showed that the flag State, on the basis of its linkage of nationality with the ship, could claim the right to protection of both the ship and its crew. Nevertheless, that nationality was not the same as that of the nationals. A ship could not be easily compared to a corporation: it had nationality, but was not a national. On that point, she agreed with the view that the Saïga case was not a case of diplomatic protection.

62. The second question that she had raised could now be answered with some certainty. Both the flag State and the State of the crew member could exercise protection over the crew, and their rights coexisted but could be competing. Owing to the nature of their duties, foreign crew members were linked more to the flag State than to their national State. Their situation could be compared to that of a foreign national working in another State, who was subject to the laws of the State of residence but was also entitled to the protection of his or her own State.

63. Thus, in substance there was nothing wrong with article 27, but that did not mean it should be included in the draft on diplomatic protection. Cases involving foreign crew members were far more complicated. The policy considerations referred to by the Special Rapporteur in support of an article covering only one type of situation concerning protection of foreign crew members needed to be reviewed. The Special Rapporteur had narrowly interpreted the Saïga decision as having been based solely...
on article 292 of the United Nations Convention on the Law of the Sea and as being confined to the release of the vessel, and had sought to formulate a general rule of diplomatic protection applicable to all cases involving the protection of foreign crew members. Yet the right of the flag State to exercise protection on behalf of the ship as a whole, including its crew, was set forth in several provisions of the Convention; the principle expressed in the Saïga decision did not necessarily apply only to the case of release. Article 27 also failed to cover other situations in which crew members might need protection; for example, when they were injured on shore while in the service of the ship. Was the Commission expected to grant the flag State an exclusive right to protect in respect of injury caused to the vessel and the crew, as in the Saïga case, or to make provision for all situations in which crew members of foreign nationality might need protection either from the flag State or from their State of nationality? The Special Rapporteur’s policy consideration was not clear. In her practical experience of handling cases of injury to Chinese seamen on board foreign ships, it was usually China, the State of nationality of the crew member, and not the flag State, which provided protection. In order to avoid undue hardship for the crew members, it was preferable to leave it open to the flag State or the State of nationality of the crew member to exercise protection as the case required.

64. The Special Rapporteur had noted (para. 63) that many seamen came from poor countries and worked on ships flying flags of convenience. Ms. XUE was not convinced by the argument that if the flag State was entitled to exercise diplomatic protection, it would act as an incentive to protect such persons. Clearly, the Saïga decision had in no way changed the economic and social conditions that prevailed in those countries. More often than not, seamen were badly treated on board rather than incidentally by another State. The general rules on the treatment of seamen were more likely to ensure protection of their human rights.

65. The legal regimes for ships, aircraft and spacecraft each had special rules. For all of them, similar issues arose with regard to foreign nationals on board, either in service or as passengers; and, depending on the particular situation, either the State of nationality of the person and the State of registration had competing claims to the right to exercise protection, or else neither exercised that right. What justification was there for singling out seamen for preferential treatment? The State of nationality often chose not to exercise the right to protection, not because international law did not provide for such a right, but for a variety of other reasons. According the flag State the right to exercise diplomatic protection would not address the Commission’s considerations in any way, and therefore article 27 should not be retained.

66. Mr. GALICKI said the Commission should not rule out the possibility of extending the scope of article 27 to include crews of spacecraft because, as rightly noted by the Special Rapporteur, spacecraft resembled ships in terms of the multinational character of their crew and the length of time that the crew might be compelled to remain on board. It should be specified that all such persons must be treated, in accordance with existing legal norms, as crew members. As yet, there was no legal distinction between passengers and crew members. The rights of the State of registration of the spacecraft with regard to crew members—stemming from the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, and from the Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space—were very wide and went beyond the rights of States of registration of aircraft under aviation law. Pursuant to the Treaty, the State of registration of the spacecraft retained jurisdiction and control over such persons both on board the spacecraft and outside the craft, whether in outer space or on a celestial body. That included crew members not possessing the nationality of the State of registration. In the event of a landing on the territory of other States, the Treaty provided that such persons were to be returned to the State of registration, not to their State of nationality. The link between the State of registration and the crew members of a spacecraft was much stronger than that between the crew members and the State of registration of an aircraft and was no weaker than that between the flag State and the ship’s crew. Although he agreed with the Special Rapporteur that there was no State practice in favour of protection of crew by the State of registration of the spacecraft (para. 72), there was sufficient reason to consider crew members of spacecraft as possible subjects of diplomatic protection in a process of progressive development. Space law contained other examples of legal regulations for future eventualities where State practice did not yet exist, such as the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, which dealt with the legal status of the Moon’s natural resources based on the principle of the common heritage of mankind. Under the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, the spacecraft’s crew must be treated as envoys of mankind in outer space and given special international protection, which, in his opinion, should also include diplomatic protection exercised by the State of registration of the spacecraft. Such a possibility should be included either in article 27 or in a saving clause. The Commission should at least specify that such persons were protected on the same basis as crew members of ships.

67. Mr. MATHESON said that despite the persuasive case which the Special Rapporteur and others had made for article 27, on balance he was not in favour of its adoption in the current exercise on diplomatic protection.

68. To begin with, State practice and the literature were divided as to whether the State of nationality of the ship had such a right, at least as a matter of diplomatic protection. As the Special Rapporteur had noted, State practice emanated mainly from the United States, and yet the United States Government itself had taken the position that there was no such customary right, that United States historical practice was mixed and that previous United States assertions of such a right were a historical vestige from an earlier period in which crew members had been commonly liable to impressment. Under the circumstances, it would be preferable to wait for further State practice to emerge, rather than prematurely pronouncing
on the state of the law or attempting to develop it in a particular direction.

69. The protection of a ship’s crew by the State of nationality of the ship was not a matter of diplomatic protection in the usual sense, and he agreed with the points made in that regard by Mr. Kolodkin and Ms. Xue. It did not fall within the definition of diplomatic protection in article 1, which was limited to action by a State on behalf of its nationals. Admittedly, the Commission had extended diplomatic protection beyond representation of nationals to include refugees and stateless persons, but those were cases in which there was no State of nationality to offer protection; that was not true in the case of ships’ crews. The protection of ships’ crews was a different kind of protection, one that was based on the special status of a flag State and intimately connected with the law of the sea, in particular the provisions of the United Nations Convention on the Law of the Sea. It would be preferable to leave such matters for further development elsewhere, rather than to attempt to accommodate them in the context of diplomatic protection.

70. The Special Rapporteur and Mr. Mansfield had cited convincing policy considerations in favour of allowing the flag State to exercise diplomatic protection on behalf of all crew members. Admittedly, there might be circumstances in which foreign crew members might not be effectively protected by their State of nationality. However, that applied to diplomatic protection in general, since such protection always depended on the capability and interest of the State of nationality of the claimant, which might often be marginal. What was not clear to him was that a flag State, and especially States providing flags of convenience, would necessarily be more interested in or capable of protecting foreign crew members than would their State or States of nationality. Therefore, on balance he preferred the Special Rapporteur’s alternative formulation, namely, a saving clause that left the question open, pending further evolution of State practice and future development in the overall context of the law of the sea.

71. Lastly, he endorsed the Special Rapporteur’s point that, regardless of the formulation adopted, article 27 should not cover aircraft, spacecraft or the passengers of ships, since in none of those cases was there currently any significant State practice or any persuasive policy reason for adopting a particular rule. He also agreed that it would be premature and problematic to attempt to include the protection of members of armed forces under the topic of diplomatic protection.

72. Mr. ADDO said he supported the inclusion of article 27, given the Special Rapporteur’s convincing demonstration that there was sufficient practice to justify doing so.

73. Mr. Sreenivasa RAO agreed that State practice on the question was mixed. There was no disagreement that crew members of ships should enjoy protection, but the question was by whom and under what circumstances. Regardless of the terms in which paragraph 63 of the report was couched, the fact remained that not every State was equally able to ensure the protection of ships’ crews. That being the case, the point was whether protection should be left to be covered by article 292 of the United Nations Convention on the Law of the Sea, or whether it should be placed under the broader rubric of diplomatic protection, as recommended in article 27. He had no objection to such a step. The only issue then would be deciding whether such protection was exclusive or non-exclusive. Ms. Xue had argued persuasively that non-exclusive protection would serve interests better. That might be where the compromise lay. The Special Rapporteur’s own compromise proposal to remove the word “diplomatic” should be examined by the Drafting Committee.

74. It was not clear what rights of the crew members fell within the strict scope of diplomatic protection. Rights unrelated to the crew’s service on board the ship should fall within the scope of diplomatic protection by the State of nationality, and he did not think that such a situation had been discounted. That point should be clarified in the Drafting Committee. He was not opposed to the inclusion of article 27, with the incorporation of many of the useful suggestions made. The flag State should have priority in protecting a crew whose ship was in distress in foreign jurisdiction, but the State of nationality should also be allowed to come to the aid of crew members who were its nationals, either while they were serving on the ship or in any other situation. If, for example, a crew member went on shore at a port and was arrested for an offence committed prior to his or her employment on the ship, that was clearly a matter for the State of nationality. However, if the issue was the right of crew members to be protected along with the ship, the flag State should come into the picture. Incidentally, it was his understanding that when the Commission spoke of crew members, it really had in mind only the captain. Most cases with which he was familiar had to do with the detention of the captain and the ship itself, rather than of the crew.

75. Mr. YAMADA said he was not convinced that article 27 was needed, but would not object if the majority was in favour of its being referred to the Drafting Committee. The Saiga case did not involve diplomatic protection, which was not an effective institution for protecting crew members, a matter which should be dealt with elsewhere.

76. The contradiction inherent in article 27 could be seen by considering the case of the more than 800,000 Koreans living in Japan. Many of them had been born there, but as they did not have Japanese nationality, Japan could not exercise diplomatic protection on their behalf, whereas article 27 would allow it to do so if such persons were crew members of a Japanese ship.

77. More than half of the Japanese merchant marine fleet was registered outside Japan. The captain, the chief engineer and the navigator were usually Japanese, whereas the other crew members tended to come from other Asian countries. Article 27 did not prejudice Japan’s right to exercise diplomatic protection in respect of the Japanese crew of ships registered in other countries.

78. Ms. XUE said that Mr. Yamada’s pertinent remarks served as further evidence that the Commission should not include article 27 in the draft. If the provision were
included, then, logically, permanent residents in foreign countries would also have to be covered by such protection, since they, too, had often lived abroad for so long that they had been forgotten by their State of nationality. Who would exercise diplomatic protection on behalf of such persons if they suffered injury in a third country? What would be the genuine link? The Commission was in danger of undermining the whole basis for diplomatic protection.

79. Mr. CHEE wondered what jurisdiction applied when a crime was committed on board ship. There was a conflict between public international law and admiralty law, which provided that the captain of a ship had jurisdiction in such cases.

80. Mr. MANSFIELD, responding to comments by Mr. Yamada and Ms. Xue, reiterated that the argument for allowing the flag State to exercise the protection of ships’ crews was not based solely on the notion that it ought to allow the flag State to exercise the protection of ships' crews was not based solely on the notion that it ought to allow the flag State to exercise the protection of ships' crews. It was the flag State that was in a position to provide information on what had actually occurred.

The meeting rose at 1 p.m.

2796th MEETING
Tuesday, 11 May 2004, at 10 a.m.

Chairperson: Mr. Teodor Viorel MELESCANU

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kolodkin, Mr. Koskeniemi, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Niehaus, Mr. Operti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodriguez Cedeño, Mr. Sepúlveda, Ms. Xue, Mr. Yamada.


[Agenda item 3]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. The CHAIRPERSON invited the Commission to comment on article 27 contained in the Special Rapporteur’s report (A/CN.4/538).

2. Ms. ESCARAMEIA said that she felt obliged to take the floor because a number of members had changed their position on article 27. Originally, the Commission had seemed to be in favour of adopting the provision, but more and more objections had been raised and the majority had changed their minds. The objections raised fell into two categories: those relating to the validity of case law and those relating to policy considerations.

3. Where case law was concerned, she was surprised that the \textit{Saiga} case and the two dissenting opinions in the \textit{Reparation for Injuries} case had not been considered relevant. She had been particularly disappointed by the interpretation according to which the \textit{Saiga} case related exclusively to article 292 of the United Nations Convention on the Law of the Sea. In her view, the question of ships’ crews who did not have the nationality of the flag State could be understood only in the context of diplomatic protection and not merely in terms of article 292 of the Convention. If ITLOS had relied only on article 292, why would the question of nationality have arisen? Why would the Tribunal have drawn a distinction between the direct damages caused to the State and the indirect damages caused to persons protected by the State? The \textit{Saiga} case related to article 292 in terms of the prompt release of the ship and the crew and to diplomatic protection in terms of the protection of ships’ crews. The Tribunal had clearly recognized that, when damage was caused to the crew members in the context of damage to the ship, the nationality of those concerned was of no relevance. It had not addressed the question of diplomatic protection for the crew members because it was concerned only with harm suffered as a result of the damage caused to the ship, but, if the crew members had been ill-treated, for example, the question of diplomatic protection would have arisen.

4. Turning to the question of policy considerations, she noted that the objections were of two kinds: some speakers had maintained that the criteria for diplomatic protection—nationality and the exhaustion of local remedies—had not been met, while others believed that if the case for ships’ crews was accepted it would open the door to many other cases and the situation might become unmanageable.

5. With regard to the nationality criterion, some members believed that the case of ships’ crews was not comparable to that of stateless persons or refugees. In her view, the situation of crew members was similar to that of refugees, since they had lost contact with their own Governments and lacked the power to invoke their country’s protection. As several members had pointed out, States of nationality were not necessarily weak and might well have the means to protect their nationals. At the same time, ships’ crews did not generally have the means or the necessary level of education to assert their rights. Another objection had been that, if the flag State were authorized to exercise protection, other States would automatically lose their entitlement to do so. In her view, the question of exclusivity did not arise. The exhaustion of local remedies rule was also irrelevant, since, where a crew was ill-treated, for example, the rule would not be observed.

6. Another set of arguments was based on the idea that, if the right of crews to protection was accepted, the right...