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Summary record of the 2796th meeting

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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 be possible to protect persons who were otherwise without protection, but also on practical considerations: the injury that such persons suffered was associated with the injury to the vessel, and 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. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Niehaus, Mr. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Ms. Xue, Mr. Yamada.

Diplomatic protection¹ (continued) (A/CN.4/537, sect. B, A/CN.4/538,² A/CN.4/L.647 and Add.1)

[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).

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).

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 *Saiga* case and the two dissenting opinions in the *Reparation for Injuries* case had not been considered relevant. She had been particularly disappointed by the interpretation according to which the *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 *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

of others, such as permanent residents, would also have to be accepted. That surely posed no difficulty; she could not see why protection could not also be provided for permanent residents. She expressed her strong support for the retention of article 27 for reasons of both case law and policy.

7. Mr. BROWNLIE said that the Commission must beware of basing its arguments on incorrect factual assumptions. The idea that the States of nationality of ships' crews were inevitably politically or economically weak might not be true. Moreover, any attempt to transfer the right of exercising diplomatic protection from the State of nationality to the flag State would have no real effect on the problem, since flag States were often small countries. He also refuted the idea that small States were incapable of exercising their rights. States' power to exercise diplomatic protection depended neither on their size nor on their economic resources, but on their internal organization.

8. The comments made by Ms. Xue and other members of the Commission had tempered his enthusiasm for the inclusion of article 27; the course of the debate had caused him to change his mind. As Ms. Xue had said, the Commission should keep a sense of proportion: if its view was that the State could not exercise its diplomatic protection in respect of permanent residents, even though under the effective link criterion such protection would be justified, States should not be entitled to exercise such protection in respect of ships' crews. In his view, the Commission should rather deal with a related question, namely how to apportion priority in cases of competing protection.

9. Mr. MANSFIELD said that although even small States were in a position to exercise diplomatic protection if they were well managed, the real point was whether they considered a particular case worth pursuing. In practice, it was very rare for a small State to find a case sufficiently significant for it to exercise protection in respect of its nationals who were crew members. The flag State was often the only one that could act to help a crew, although it did not necessarily do so.

10. Mr. CHEE said that since States could exercise functional protection in respect of refugees and stateless persons, he did not see why similar protection should not be afforded to ships' crews, who in antiquity had been considered slaves and who, even in the modern world, needed protection. He was therefore in favour of including article 27 in the draft articles.

11. The CHAIRPERSON, speaking as a member of the Commission, said that he had noted Ms. Escameia's use, in her powerful speech on the need to protect ships' crews, of the word "protection" without prefacing it with the word "diplomatic". She must therefore have been thinking of the protection exercised by consulates and embassies and not of the customary institution with which the study was concerned.

12. The *Saiga* case clearly had nothing to do with diplomatic protection. The crew had been Ukrainian and the flag State had been Saint Vincent and the Grenadines. The two countries had nothing in common, not only in terms

of size, but also in terms of experience and capacity to mobilize the necessary legal resources.

13. The Commission could not adopt an article relating to the protection of ships' crews if the basic principles of the topic—the nationality rule and the exhaustion of local remedies—were not respected. It was obvious that seamen needed urgent protection, which could not be provided if the rule of the exhaustion of local remedies was observed. By including the protection of seamen in the topic, the Commission was in danger of depriving them of proper assistance, since if the State decided to exercise its diplomatic protection, other kinds of protection would be excluded. The protection of ships' crews was a real problem, but the solution should not be sought in diplomatic protection. The Drafting Committee had reached agreement on a text proposed by Ms. Xue, which would take the form of a "without prejudice" clause. That was the direction that should be taken.

14. Ms. ESCARAMEIA said that the *Saiga* case did indeed constitute an issue of diplomatic protection. She therefore rejected the argument that the nationality rule would not be observed, noting that there already existed exceptions, including stateless persons and refugees.

15. As to cases in which seamen might suffer injury, she believed that they were entitled to the emergency assistance they required in accordance with article 292 of the United Nations Convention on the Law of the Sea. They might, however, need another type of protection, in the case of ill-treatment. It was true that if the State exercised diplomatic protection it might take similar action in other cases, but, legally speaking, the question of exclusivity did not arise.

16. Lastly, with regard to the work of the Drafting Committee, she pointed out that the provisions on which agreement had been reached related to human rights mechanisms and bilateral investment treaties.

17. The CHAIRPERSON, speaking as a member of the Commission, noted that diplomatic protection was a power exercised at the discretion of the State and that the State was therefore not obliged to exercise it. If the intention was truly to protect seamen, diplomatic protection was not the way to do so. In practice, a State intervened only if it considered that its honour, dignity or basic institutions had been impugned. The fact that two States—the State of nationality and the flag State—were entitled to exercise diplomatic protection created enormous difficulties.

18. Mr. ECONOMIDES said that, first of all, he fully endorsed the remarks by Ms. Escameia. Secondly, he thought that the Commission would need a "without prejudice" clause indicating that the draft articles on diplomatic protection would affect neither "classical" diplomatic protection nor the consular protection afforded under the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations and under customary international law, particularly as diplomatic protection as the sovereign right of a State was often confused with the diplomatic protection exercised by an embassy or a consulate. The fact that two States could be involved posed no problem.

19. Mr. DUGARD (Special Rapporteur) said that such a situation already occurred in the case of dual nationality. He did not understand what the Chairperson had meant when he had said in his personal capacity that anyone could understand the situation by looking at the concurrent claims of the Ukrainian crew and the flag State, Saint Vincent and the Grenadines, in the *Saiga* case. The Chairperson had seemed to think that Ukraine, unlike Saint Vincent and the Grenadines, was a powerful State, but that was not the point: in fact, Saint Vincent and the Grenadines, which was far from being the most powerful State in the world, had sought to protect the nationals of Ukraine, which was a powerful State. The case simply showed that, more often than not, the State of nationality of the crew members did not concern itself with them at all.

20. Mr. MOMTAZ said that he first wished to draw attention to the quality of the work done by the Special Rapporteur to justify the need to protect seamen in the modern world. He would not go into the practice of the United States where diplomatic protection of a ship's crew was concerned, since the Special Rapporteur himself admitted that he was unsure whether it constituted proof that a customary rule existed in that regard. He did not think that the case law of the British courts, on which the Special Rapporteur had relied to support his argument, could be used. The section of the judgement issued by the Queen's Bench Division in *R. v. Carr* that he had cited was apparently based on a legal fiction well established in the nineteenth century: the assimilation of a ship to the territory of the flag State, and such an assimilation no longer had any place in the law of the sea. The law of the flag to which the report implicitly referred was now justified by the need to respect order in maritime areas not under State sovereignty. According to that law, it was up to the State whose flag the ship was flying to exercise its jurisdiction over the ship and the persons on board. Consequently, those persons were required to respect the laws of the flag State that were applicable to the ship and could, in turn, enjoy the rights accorded to nationals of the flag State. That was how the right to the protection of the law, mentioned in the decision by the British court, should be interpreted. In his view, the issue was not recognition of an alleged right to diplomatic protection in respect of the crew members of a ship, regardless of their nationality.

21. With regard to article 292 of the United Nations Convention on the Law of the Sea and the case law of ITLOS cited in connection with it, he commended the Special Rapporteur for having consulted on an article-by-article basis the excellent commentary to the Convention prepared by the University of Virginia.³ The commentary to article 292 left no doubt as to the drafters' intention. That article was intended solely to ensure the prompt release of a foreign ship detained by the port authorities because of an alleged violation of the Convention. Its purpose was thus to prevent, to the extent possible, any economic loss that the owner of the ship might suffer as a result of its detention. There was therefore no question of offering diplomatic protection to the ship's crew members who were injured by the detention. It was true that

the scope of article 292 was not limited to ships *per se* and that the implementation of that article would obviously have positive consequences for crew members who were deprived of their liberty or injured by an internationally wrongful act because of the ship's detention. Thus, as the Special Rapporteur had made clear, article 292 did not cover all situations in which crew members could be injured by an internationally wrongful act. The same held true when they were injured by a collision on the high seas or by any other internationally wrongful act committed by another ship at sea. He was thinking in particular of acts that could be committed by the authorities of a coastal State when a ship passed through waters over which that State exercised sovereignty or jurisdiction.

22. Under those circumstances, he thought that it was difficult, to say the least, to take article 292 as the basis for recognizing that States had the right to exercise diplomatic protection in respect of crew members on board ships flying their flag. At best, one might possibly accept such a right in cases where crew members were injured by the detention of a ship in violation of the provisions of the United Nations Convention on the Law of the Sea. That was not the line of reasoning taken by ITLOS. Contrary to what had been said, the Tribunal had not claimed in the *Saiga* case that the action taken by Saint Vincent and the Grenadines in respect of crew members who had not been nationals of that country was comparable to diplomatic protection.

23. The study by Kamto that the Special Rapporteur had quoted in his report made it clear that, according to the Tribunal, the rule requiring the exhaustion of local remedies and the subsequent exercise of diplomatic protection applied when a State had violated international law in respect of a foreign national.⁴ The Tribunal had noted that none of the violations of the rights of Saint Vincent and the Grenadines "can be described as breaches of obligations concerning the treatment to be accorded to aliens" (para. 98). They were direct violations of the rights of Saint Vincent and the Grenadines caused by the detention of the *Saiga*, a case to which article 292 of the United Nations Convention on the Law of the Sea was directly applicable. That was why the Tribunal had not insisted that the crew members of the *Saiga* should have exhausted all available local remedies. Under the circumstances, one could hardly speak of diplomatic protection exercised by Saint Vincent and the Grenadines, the flag State, in respect of crew members who were not its nationals.

24. With regard to the practical arguments cited in paragraph 63 of the report, he could not agree that "many of today's ships' crews come from politically and economically weak States with undistinguished human rights records". That was a political argument that did little to bolster the Special Rapporteur's theory. Paradoxically, States that practised open registry and were thus required to protect the vast majority of seamen could not claim that they respected human rights more. The poverty and blatant exploitation of crews on board ships flying flags of convenience showed, unfortunately, that those States cared little for the welfare of those individuals.

³ M. H. Nordquist, S. Rosenne and L. B. Sohn, eds., *United Nations Convention on the Law of the Sea 1982: A Commentary* (Dordrecht, Martinus Nijhoff, 1989), vol. V, p. 67.

⁴ See M. Kamto, "La nationalité des navires en droit international", *La mer et son droit mélanges offerts à Laurent Lucchini et Jean-Pierre Quéneudec* (Paris, Pedone, 2003), p. 343.

25. The fact that he rejected the arguments advanced by the Special Rapporteur should in no way be construed as a refusal to grant protection to seamen. He simply wished to show that the diplomatic protection exercised by a flag State could not be extended to crew members, whatever their nationality. He could not support the argument put forward by the Special Rapporteur in paragraph 73 of his report that “there is sufficient State practice to justify such a rule”. That being said, he was still quite open to the idea of giving a State the right to protect the crew members of a ship flying its flag. However, such protection could not be considered to be “diplomatic” under any circumstances. He agreed with Mr. Kolodkin that the protection in question was a kind of *sui generis* protection; perhaps it could be called quasi-functional protection, along the lines Mr. Chee had suggested. He therefore proposed that article 27 should be amended by deleting any reference to diplomatic protection, which would be limited to the crews of merchant ships, except for ships enjoying jurisdictional immunity, that is, State ships.

26. Mr. KOSKENNIEMI pointed out that the discussion had so far focused on three issues: State practice, practical considerations and doctrinal questions as to whether the subject was diplomatic protection, functional protection or some other type of *sui generis* protection. There appeared to be a consensus on the fact that the study of State practice was not conclusive. It would also seem that the divergences regarding the considerations set out in paragraphs 63 to 67 of the report of the Special Rapporteur were not so great. As to what Mr. Brownlie had, in a very pertinent comment, called “incorrect factual assumptions”, the discussion had been inconclusive. With regard to the third and last issue, he certainly agreed with those who said that it was not a matter of diplomatic protection.

27. Referring to practice, he said that he had been particularly struck by the sentence in paragraph 51 of the Special Rapporteur’s report: “Meyers, writing in 1967, states that he ‘does 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’”⁵. While the review of State practice had been inconclusive, it was nevertheless clear that that right of the State had never been challenged, at least until 1967, and not even later in fact, or the Special Rapporteur would have said so.

28. In his view, since there was practice that provided authentic protection for persons in need of it, the argument that the topic did not fit very well in an instrument of diplomatic protection was marginal. He therefore concluded that article 27 served a useful purpose and could be referred to the Drafting Committee. He was open to the suggestion made by Mr. Economides and others that it could be redrafted in the form of a saving clause, but had no real objection to it as it stood, provided that the word “diplomatic” was deleted and the article was made to refer only to “protection”, however it was to be classified.

29. Mr. CANDIOTI thanked the Special Rapporteur for the excellent analysis contained in his report and the very detailed and well-documented introduction of the topic.

They had sparked an interesting and rewarding discussion and had helped to clarify the nature of the assistance that the flag State could give to the crew of a ship when such persons, regardless of their nationality, had been injured as a result of an internationally wrongful act committed by another State.

30. In his view, the many facts and precedents studied and the many opinions expressed in meetings of the Commission, the Sixth Committee and the written communications of Governments clearly showed that that form of protection and assistance was outside the scope of the diplomatic protection that was to be codified in the draft articles. That was why he shared the view of members who considered it unnecessary to include a rule such as the one stated in article 27 in the text being drafted.

31. No one was questioning the right of the flag State to provide assistance to the crew of its ships in certain circumstances, but that was an act, mechanism or procedure that was covered by the general provision that the Commission had referred to the Drafting Committee indicating that the draft articles were without prejudice to other forms of protection in areas such as human rights and investments, which differed from diplomatic protection and were accordingly not subject to the rules governing that institution, such as the rule of nationality and the rule of the exhaustion of local remedies. It would, however, be useful if the commentaries to that general saving clause referred, as an example of other mechanisms or procedures, to the assistance that the flag State of a ship could provide to the members of its crew, without prejudice to the normative development of that type of protection in the context of the law of the sea, navigation law and any other appropriate context.

32. Mr. KABATSI said that the Special Rapporteur was proposing that article 27 should be included in the draft mainly on the grounds of State practice, as reflected in judicial decisions and the writings of some publicists, but also for some policy and practical reasons. He did not think that the State practice was convincing. The United States, the only State that could be said to have had a little practice in the distant past, now doubted the existence of such a rule of customary international law. The judicial decisions cited by the Special Rapporteur were not very clear either. The *Saiga* case was concerned with questions other than that of diplomatic protection *stricto sensu*. It was more concerned with the provisions of article 292 of the United Nations Convention on the Law of the Sea relating to the prompt release of a ship. True, in that case ITLOS had discouraged the multiplicity of claims, but the main problem had been that of the release of the ship and its crew. Publicists were divided. The policy arguments that militated in favour of article 27 had his sympathies, but the same practical and humanitarian considerations could apply as well to members of the crews of aircraft and spacecraft, perhaps even to drivers of trains and buses, to whom diplomatic protection was not extended today.

33. The policy to be applied by the Commission should flow from the indications given by the Sixth Committee, which had answered in the negative the question as to whether such a provision should be included in the draft articles. It might be true that some States were not capable

⁵ See 2795th meeting, footnote 7.

of or interested in protecting the interests of their nationals on foreign ships, but why should States take steps to protect their nationals who had chosen to work abroad for strictly personal reasons, and sometimes at the expense of their own country's interests? The special treatment given to ships' crews was totally out of balance with similar considerations that operated in favour of other equally deserving cases, such as foreign permanent residents. His position was that the draft articles on diplomatic protection should be restricted as much as possible to the relationship of the State with its nationals. Only some inevitable exceptions, such as stateless persons, should be permitted. Accordingly, he did not think that article 27 should be referred to the Drafting Committee.

34. Mr. FOMBA said that the parameters of the discussion on article 27 must be defined in the light of the relevant articles already adopted by the Commission. Article 1 defined diplomatic protection as being based on the principle of nationality, but left open the possibility of exceptions to that principle. As currently drafted, the article said that diplomatic protection could be exercised in respect of a non-national solely in the case of stateless persons and refugees. Article 3 restricted the scope *ratione personae* of the right to exercise diplomatic protection to the State of nationality alone. Article 5 set out the principle of dual or multiple nationality and the possibility that two or more States of nationality might jointly exercise diplomatic protection. If articles 1 and 3 were to be applied strictly in conjunction with article 27, it was clear that diplomatic protection must be limited to nationals alone and must fall within the competence solely of the State of nationality.

35. The Special Rapporteur put forward various arguments in favour of article 27. According to him, article 292 of the United Nations Convention on the Law of the Sea was useful, but could not replace the diplomatic protection of crews since it did not cover all, and probably not even most, of the situations in which the members of a ship's crew could be injured by an internationally wrongful act. Consequently, a mechanism with a broader scope than that of article 292 was required to protect those crews. The key words in the argument developed by the Special Rapporteur were "policy reasons", "simplification" and "operativeness". Without article 27, a saving clause would make it possible to pave the way for the establishment of a customary rule. Arguing that there were sufficient State practice and cogent policy considerations to support such an uncontroversial provision, the Special Rapporteur concluded that the principles of traditional diplomatic protection must be gradually extended and that that was more in the nature of codification than of progressive development.

36. The question that arose was whether and to what extent State practice could be described as being sufficient. Certain expressions used by the Special Rapporteur (in paragraphs 44 and 73, for example) raised questions about that and the statement that it was much more a case of codification might accordingly have to be made much less categorical. In his view, the members of ships' crews of all nationalities had to be protected in the best possible manner. The United Nations Convention on the Law of the Sea provided some protection, but, upon scrutiny, it

appeared quite limited and inadequate. That left entirely or almost entirely open the question of the diplomatic protection of such crews. The traditional approach must remain the rule, as a consequence of which normal diplomatic protection came into play, but only if the persons concerned could claim a nationality. It must be acknowledged that that solution based on principle could unfortunately not be applied in all cases, for a number of reasons. In order to avoid or minimize such difficulties, the most logical, rational and practical solution would be to accord such a right to a flag State as an exception and on the basis of analogy and necessity. He would therefore *a priori* be in favour of the adoption of article 27 rather than of a saving clause, on the understanding that the article's wording could be reviewed and that it should normally be mentioned in article 1, paragraph 2, and placed after article 7 in the text. Lastly, concerning the question of the extension of diplomatic protection to other categories of persons, he very broadly shared the Special Rapporteur's point of view.

37. Mr. COMISSÁRIO AFONSO said that everything said so far showed that the Commission had no legal basis for enabling a flag State to exercise diplomatic protection in respect of the members of a ship's crew who were not its nationals. No example of the practice of States had been put forward to support any wish by the Commission to make that a customary rule. Even the practice of the United States was of no help in that regard. International arbitral awards were likewise inconclusive, as the Special Rapporteur stated in paragraph 48 of his report. As to the *Saiga* case, which had come up so often during the discussion, the Special Rapporteur had aptly demonstrated that it related mainly to the procedural mechanism outlined in article 292 of the United Nations Convention on the Law of the Sea for achieving the prompt release from detention of a ship and not to diplomatic protection *per se*. It could be agreed that, for reasons of principle, the Commission should move towards the progressive development of international law, but it would be going against strong objections, not only from some of its members, but also, more importantly, from members of the Sixth Committee of the General Assembly. In the absence of any clear legal precedents and without even the semblance of a consensus on the matter, that would be difficult to envisage. Above all, however, article 27 was contrary to article 1, which the Commission had adopted at its fifty-fourth session, in 2002. He was therefore of the opinion that it would be at the least premature to transmit article 27 to the Drafting Committee. While he had no objection to the principle that it embodied, the arguments put forward in favour of its adoption had failed to convince him.

38. Mr. RODRÍGUEZ CEDEÑO said that the question of the protection of the crew members of a ship was also governed by other legal regimes, such as the United Nations Convention on the Law of the Sea, and more specifically article 292, which provided for the exercise of protection by the flag State, although that differed from diplomatic protection as dealt with in article 27. The rules relating to diplomatic protection by the State of nationality of the victim were also applicable. There was no doubt that protection under the United Nations Convention on the Law of the Sea was not the same as diplomatic protection. The important thing was to decide whether the

exercise of diplomatic protection could in certain circumstances be extended to the flag State. On the basis of practice, doctrine and case law, that possibility had to be taken into account in order not to leave such persons without protection. Protection under the United Nations Convention on the Law of the Sea was limited because it covered only the release of the ship in the context of a violation of the Convention. It was also not exclusive, because the State of nationality continued to be entitled to exercise diplomatic protection in respect of its nationals. In addition, it depended on there being injury to the ship, as clearly shown in the Special Rapporteur's proposed article 27. In that case, the principles of nationality and the exhaustion of local remedies were not complied with; the mechanism was thus a distinct and exceptional one which was justified by matters of urgency and policy considerations. The Convention did not cover all situations, however, and in some cases the only protection would be diplomatic protection by the State of nationality. Given the practical difficulties that could arise from the exercise of diplomatic protection in respect of the crew of the ship by the State of nationality, he was in favour of article 27, it being understood that the power of the flag State to exercise protection did not prevent the State of nationality from also exercising its diplomatic protection. Article 27 could thus be referred to the Drafting Committee, which might find a saving clause similar to the clauses already adopted in order to ensure that a category of persons was not left without protection. However, such a clause must not facilitate multiple claims.

39. Mr. BROWNLIE said that he had changed his mind; given the weakness of the case made by the supporters of article 27, he joined its opponents.

40. Mr. GAJA said that the case in which crew members did not have the nationality of the flag State had become very common and it would therefore be useful to consider whether diplomatic protection should be granted by the State of nationality of the ship. Thousands of persons were involved. It was not so much what could be drawn from practice or from the *Saiga* decision which led him to support a rule allowing protection by the flag State, but policy considerations. The main policy consideration was based on the fact that injury to crew members was likely to be incidental to injury to the ship and only the flag State was likely to present a claim under those circumstances. The flag State, whether large or small, would do so, if only at the instigation of the shipowners, regardless of their nationality. The shipowners were in a position to step in with their lawyers and had an interest, even if they had chosen a flag of convenience, to obtain the release of the ship and, later on, reparation. The policy issue was whether, since only the flag State was likely to intervene formally, it would not be wise to have the crew members also benefit from that intervention and to cover them by a claim that the flag State might make. Article 292 of the United Nations Convention on the Law of the Sea certainly did not provide an adequate remedy, as the Special Rapporteur had shown. It covered the release of the crew, but was totally silent on the issue of reparation for injury. A claim for reparation could not be submitted under the procedure in article 292. Moreover, the *Saiga* decision on the merits was not based on that provision.

41. One criticism of the proposed rule was that it would detract from the rights of the seamen's States of nationality. That criticism was based on the premise that the flag State would be the only State entitled to exercise diplomatic protection. However, it would be preferable to consider the flag State's right to exercise diplomatic protection as an additional, rather than an exclusive, right, a point which had already been made several times in the discussion. That was what the Special Rapporteur appeared to have in mind, as shown in paragraph 66. He personally thought that it would be preferable to expressly clarify the additional nature of that right in article 27 and to insert the article after article 7. Despite differences of opinion among the Commission's members on the subject, he was in favour of referring article 27 to the Drafting Committee.

42. Mr. CHEE pointed out that article 292 of the United Nations Convention on the Law of the Sea, referred to in connection with the *Saiga* case, related to the first of two stages of a practice identical to that used in domestic law. The principle consisted in posting a bond in exchange for the immediate release of a ship. Prompt release had been a crucial consideration which had led to the Convention. Ships in ports or along the coasts of developing countries had been stopped and the goal had been to prevent that practice. Prompt release was the first stage. Then, at a later stage, the merits were considered and a court must rule on functional protection, nationality, etc., as explained by the Special Rapporteur in his report.

43. States which used a flag of convenience did so for various reasons, above all for tax and wage considerations. They also tried to avoid regulations in effect in big States, which had all kinds of cumbersome rules—for example, concerning a ship's age—that some developing States did not have the means to apply.

44. In the *I'm Alone* and *Saiga* cases, the crew members of the injured ship, regardless of their nationality, had submitted a claim. In the *I'm Alone* case, the crew members, regardless of their nationality, had been entitled to damages, which meant that some aspects of protection were involved.

45. When crew members were on board a ship, they were subject to the jurisdiction of the flag State, which meant that they also came under the protection of that State. That was the point of the decisions taken in a number of cases referred to by the Special Rapporteur, and that was perfectly understandable. The issue then arose that because ships were not subject to diplomatic protection, they should not be protected by that principle. However, a consular official must protect his nationals and also had other administrative functions. In practice, sometimes the functions of consular protection and diplomatic protection were interchangeable. For that reason, it was important not to adhere too strictly to the notion of diplomatic protection: once a State intervened, inter-State procedure was involved. Generally speaking, the States of nationality of the crew members were not eager to protect their own nationals, whereas, for economic reasons, shipowners were prepared to take legal action to enable the flag State to exercise protection and the crew could thus be protected by the flag State through consular protection

or diplomatic protection, strictly speaking. If non-national crew members were not included in the protection, they would be left to their fate. Thus, for humanitarian reasons, crew members must be protected under article 27.

46. Mr. BROWNLIE said that the text should not appear to say that the consular protection procedures under article 292 of the United Nations Convention on the Law of the Sea were of the same kind as diplomatic protection, because that was not the case. The Commission could not base itself on practice, which was uncertain. For example, Ms. Xue had said that China was interested in protecting crew members on ships of non-Chinese nationality, which contradicted the idea that States were not interested in exercising diplomatic protection in such a case. For reasons associated with the strategic importance of their merchant marine, the United Kingdom and the United States had granted their protection to crew members, regardless of their nationality, although that historical situation was no longer of great importance. As to human rights, it seemed to him that they would be better protected through better legal certainty. To that end, there should be a rule of priority: the State of nationality of the individual crew members should have the first option of exercising its protection and, if it did not do so, then action could be taken by the State of nationality of the ship.

47. Ms. XUE said that ships could not be regarded as being part of the territory of the flag State and that the notion of protection by the flag State was based, not on the principle of territoriality, but on that of the jurisdictional control of the flag State. She also doubted that it could be asserted, as the Special Rapporteur had done, that the flag State would necessarily be more active than the States of nationality of the crew members of a ship. It was not a question of the size or influence of the State or whether it had a good human rights record, and the Commission should closely examine actual maritime practice.

48. Mr. ECONOMIDES said that although consular protection and the protection of crew members under the law of the sea were realities, the question was whether the Commission should go further and extend diplomatic protection to non-national members of crews; that would be progressive development. He noted that even if the flag State usually had little interest in the protection of crew members of another nationality, the situation could change and it was not for the Commission to rule out that possibility in advance.

49. Mr. MOMTAZ stressed that if the flag State did not want to protect the crew members, it was not because there were no legal rules, but because there was no effective link between the ship and the flag State; adopting article 27 would not solve that problem.

50. The CHAIRPERSON, noting that views were very divided, suggested holding an indicative vote on whether article 27 should be referred to the Drafting Committee.

51. Mr. DUGARD (Special Rapporteur) pointed out that normal practice in the Commission was for the Special Rapporteur to report on the number of speakers who had spoken in favour of the provision and those who had spo-

ken against and that the Commission held an indicative vote only if there was a division of opinion.

52. Mr. BROWNLIE said that he had himself changed his mind during the discussion and other members had perhaps done so, too.

53. Mr. PELLET said that he, too, had changed his mind, in that he would like the draft articles to contain a provision on the protection of ships' crews, but not as it was currently formulated in article 27. He asked whether the Drafting Committee would have the leeway to say that the protection of the crew members of a ship did not constitute a case of diplomatic protection.

54. The CHAIRPERSON proposed first holding an indicative vote on whether to refer article 27 to the Drafting Committee. If the proposal was voted down, he would hold a second vote on whether the Drafting Committee should consider drafting a provision on the link between diplomatic protection and the protection of ships' crews, which could take the form that the Drafting Committee deemed appropriate.

55. Mr. ECONOMIDES said that, at the procedural level, it was preferable to have only one vote on the referral of article 27 to the Drafting Committee, but giving the latter considerable leeway in drawing up the provision.

56. Mr. PELLET, stressing that the main thrust should be decided in plenary, said that he supported the Chairperson's proposal.

57. The CHAIRPERSON invited the Commission to vote by show of hands on whether article 27 should be referred to the Drafting Committee.

The proposal that article 27 should be referred to the Drafting Committee was rejected by 15 votes to 12.

58. The CHAIRPERSON proposed that the Drafting Committee should be requested to consider preparing a provision on the link between the protection of crew members by the flag State and diplomatic protection, and to report on its conclusions in plenary. He invited the Commission to vote on that proposal by show of hands.

The proposal that the Drafting Committee should consider preparing a provision on the link between the protection of crew members by the flag State and diplomatic protection was adopted by 16 votes to 4, with 5 abstentions.

The meeting rose at 1 p.m.

2797th MEETING

Wednesday, 12 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,