

Document:-  
**A/CN.4/2908**

**Summary record of the 2908th meeting**

Topic:  
**Draft report of the International Law Commission on the work of its fifty-eighth session**

Extract from the Yearbook of the International Law Commission:-  
**2006, vol. I**

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## 2908th MEETING

Monday, 7 August 2006, at 3 p.m.

*Chairperson:* Mr. Guillaume PAMBOU-TCHIVOUNDA

*Present:* Mr. Addo, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Mansfield, Mr. Melescanu, Mr. Momtaz, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Valencia-Ospina, Ms. Xue.

### Draft report of the Commission on the work of its fifty-eighth session (continued)

1. The CHAIRPERSON invited the members of the Commission to continue consideration of chapter IV of the draft report of the Commission.

#### CHAPTER IV. Diplomatic protection (continued) (A/CN.4/L.692 and Add.1)

##### E. Text of the draft articles on diplomatic protection (continued) (A/CN.4/L.692/Add.1)

2. TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO (continued)

*Commentary to draft article 11* (Protection of shareholders)

Paragraphs (1) and (2)

*Paragraphs (1) and (2) were adopted.*

Paragraph (3)

2. Mr. PELLET said that the words “*et c’est ce qu’ils devraient faire*” in the last sentence of the French version were clumsy. He would submit wording to the Secretariat that was closer to the English version.

*Paragraph (3) was adopted subject to the amendment proposed by Mr. Pellet for the French text.*

Paragraph (4)

3. Mr. DUGARD (Special Rapporteur) indicated that Mr. Matheson had suggested that the last sentence of paragraph (4) should be deleted and that he himself proposed that the first sentence of the footnote should be replaced by the following: “Practice rules of the United Kingdom include such investors.”

4. Mr. PELLET said that the last sentence of paragraph (4) was a useful clarification and should be retained.

*Paragraph (4) was adopted with the amendment to the footnote.*

Paragraphs (5) to (11)

*Paragraphs (5) to (11) were adopted.*

Paragraph (12)

5. Mr. DUGARD (Special Rapporteur) said that Mr. Matheson had made a proposal relating to paragraphs (9) to (12) and that it might be possible to accommodate his concerns by inserting a new footnote after the word

“customary” at the end of the second sentence, which would read: “See the submission of the United States to this effect in document A/CN.4/561 and Add.1–2”.<sup>373</sup>

6. Mr. PELLET said that, in the absence of an illustration, the last two sentences of paragraph (12) were unclear. He wondered whether the Special Rapporteur might not find one or two examples.

7. Mr. GAJA said that the meaning of the last sentence would be clearer if the word “compulsion” in the English version were properly rendered in the French version, namely, by “*contrainte*”, not “*obligation*”.

*Paragraph (12) was adopted with the amendments proposed by Mr. Dugard on behalf of Mr. Matheson and by Mr. Gaja.*

*The commentary to draft article 11, as amended, was adopted.*

*Commentary to draft article 12* (Direct injury to shareholders)

Paragraphs (1) to (4)

*Paragraphs (1) to (4) were adopted.*

*The commentary to draft article 12 was adopted.*

*Commentary to draft article 13* (Other legal persons)

Paragraphs (1) to (4)

*Paragraphs (1) to (4) were adopted.*

Paragraph (5)

8. Mr. PELLET said that the assertion in the fifth sentence was valid for court proceedings, but not for diplomatic proceedings. He proposed that the first part of the sentence should be amended to read: “This will require the competent authorities or a court to examine”.

*Paragraph (5), as amended, was adopted.*

*The commentary to draft article 13 was adopted.*

*Commentary to draft article 14* (Exhaustion of local remedies)

Paragraph (1)

9. Mr. CANDIOTI said that the statement in the first sentence of paragraph (1) was much too general and that the end of the sentence should be amended to read: “as a prerequisite for the exercise of diplomatic protection”.

*Paragraph (1), as amended, was adopted.*

Paragraph (2)

10. Mr. GAJA said that, in the second sentence, the words “where it engages in *acta jure gestionis*” referred more to immunities than to diplomatic protection and seemed to suggest something whose existence most members of the Commission did not accept, namely, functional protection by States. He therefore suggested that they should be deleted.

*Paragraph (2), as amended, was adopted.*

<sup>373</sup> Reproduced in *Yearbook ... 2006*, vol. II (Part One).

## Paragraph (3)

11. Mr. GAJA said that, of the “two reasons” given in the third and fourth sentences, the first was not a reason at all and the second related to the burden of proof, a very sensitive question which the Commission had decided not to consider. It was also indicated that the burden of proof was on the respondent State to show that local remedies were available, but, pursuant to draft article 15 (a), local remedies did not need to be exhausted where there were no reasonably “available” local remedies and, in such a case, the burden of proof was on the applicant State. He therefore suggested that only the first sentence of paragraph (3) should be retained.

12. Mr. PELLET said that he fully endorsed Mr. Gaja’s suggestion, but for a much simpler reason: on second reading, the Commission was not required to indicate in a commentary the reasons for its hesitations or preoccupations.

*Paragraph (3), as amended, was adopted.*

## Paragraph (4)

13. Mr. CANDIOTI said that, as in paragraph (1) and for the same reason, the words “before an international claim is brought” in the first sentence should be replaced by “before diplomatic protection is exercised”.

14. Mr. PELLET said that the footnote whose reference was placed at the end of the paragraph, and others, such as the footnote whose reference was placed in the penultimate sentence of paragraph (5), should specify whether the decisions referred to were those of the European Commission of Human Rights or the European Court of Human Rights.

15. The CHAIRPERSON said that the Secretariat would attend to the matter.

*Paragraph (4) was adopted with the amendments proposed by Mr. Candiotti and Mr. Pellet.*

## Paragraph (5)

16. Mr. PELLET said that the statement at the beginning of the third sentence that local remedies did not include remedies as of grace gave rise to a problem because, in some countries, the request for clemency was a prerequisite for a claim to be brought. He therefore suggested that the sentence should be amended to read: “Local remedies do not include those whose ‘purpose is to obtain a favour and not to vindicate a right’ or requests for clemency, except where the latter are a prerequisite for the admissibility of subsequent claims.”

*Paragraph (5), as amended, was adopted.*

## Paragraph (6)

*Paragraph (6) was adopted.*

## Paragraph (7)

17. Mr. GAJA said that, contrary to the wording of the first sentence, it was not the “foreign litigant”, but

the claimant State which must produce the evidence available to it to support its claim in the process of exhausting local remedies. He therefore suggested that the words “The foreign litigant” should be replaced by “The claimant State”. The second sentence would then read: “The international remedy afforded by diplomatic protection cannot be used to overcome faulty preparation or presentation of the claim at the municipal level.”

*Paragraph (7), as amended, was adopted.*

## Paragraph (8)

18. Mr. PELLET proposed that the following words should be added at the end of the paragraph: “objections to the validity of the ‘Calvo clause’ in respect of general international law are certainly less convincing once it is accepted that the rights protected in the framework of diplomatic protection are those of the protected person and not those of the protecting State”. He also suggested that a footnote that referred back to paragraph (5) of the commentary to draft article 1 should be added to make it clear that diplomatic protection was not necessarily exercised in the context of the *Mavrommatis* fiction.

19. Mr. GAJA said that he supported Mr. Pellet’s proposal and suggested that the last two sentences should be merged into one, to read: “The ‘Calvo clause’ is difficult to reconcile with international law if it is to be interpreted as a complete waiver of recourse to international protection in respect of an action by the host State constituting an internationally wrongful act (such as denial of justice) or where the injury to the alien was of direct concern to the State of nationality of the alien.” The reference in the deleted phrase to the *North American Dredging Company* case could be moved to a footnote.

20. Mr. ECONOMIDES said that he was not sure whether draft articles adopted on second reading should include a reference such as the one contained in the footnote whose reference was placed at the end of the paragraph, which stated that a proposal by the Special Rapporteur had not been adopted by the Commission.

*Paragraph (8), as amended, was adopted.*

## Paragraph (9)

*Paragraph (9) was adopted.*

## Paragraph (10)

21. Mr. PELLET said that the footnote in the beginning of the third sentence should refer only to the *United States Diplomatic and Consular Staff in Tehran* case. A new footnote should then be added at the end of the paragraph with a reference to the *Avena* case and with the deleted sentence from the aforementioned footnote related to the *United States Diplomatic and Consular Staff in Tehran* case. That would show where the words “interdependence of the rights of the State and individual rights” came from.

22. Mr. DUGARD (Special Rapporteur) said that, to meet Mr. Pellet’s request for greater clarity, the reference in the footnote to the *Avena* case could be deleted.

23. Mr. PELLET thanked the Special Rapporteur, but said that it was still necessary to cite the paragraph of the *Avena* decision from which the words “interdependence of the rights of the State and individual rights” had been taken.

24. Mr. DUGARD (Special Rapporteur) said that he would explain where those words came from in the footnote.

*Paragraph (10), as amended, was adopted.*

Paragraph (11)

*Paragraph (11) was adopted.*

Paragraph (12)

25. Mr. PELLET suggested that the words “or Government” should be added in the last sentence after the word “diplomatic” and that a new footnote should be added to refer to the *Arrest Warrant* case. He also proposed that the words “as a private individual” should be added after “on behalf of its national” in the same sentence.

26. Mr. MELESCANU said that it might be preferable to place the words “a Government” before “or diplomatic official” in order to better respect the order of priorities.

*Paragraph (12), as amended, was adopted.*

Paragraph (13)

*Paragraph (13) was adopted.*

Paragraph (14)

27. Mr. GAJA suggested that the wording of the second sentence should be amended to read: “This does not preclude the possibility that exhaustion of local remedies may result from the fact that another person has submitted the substance of the same claim before a court of the respondent State.”

*Paragraph (14), as amended, was adopted.*

*The commentary to draft article 14, as amended, was adopted.*

*Commentary to draft article 15 (Exceptions to the local remedies rule)*

Paragraphs (1) and (2)

*Paragraphs (1) and (2) were adopted.*

Paragraph (3)

*Paragraph (3) was adopted with drafting changes proposed by Mr. Candiotti and Mr. Melescanu.*

Paragraph (4)

28. Mr. FOMBA proposed that the words “of the case” should be inserted after “circumstances” in the first sentence to bring it into line with the first sentence of paragraph (11).

*Paragraph (4), as amended, was adopted.*

Paragraphs (5) and (6)

*Paragraphs (5) and (6) were adopted.*

Paragraph (7)

29. Mr. DUGARD (Special Rapporteur) said that Mr. Matheson had proposed that, in the last part of the penultimate sentence, the words “whose airspace has been accidentally violated” should be replaced by “while in normal or accidental overflight of its territory”.

30. Mr. GAJA said that he endorsed that proposal. If a plane was shot down by mistake, the exhaustion of local remedies could not be required. It would therefore be better not to refer to the violation of airspace.

31. Mr. ECONOMIDES said that the example cited in that part of the sentence should be deleted entirely because, even in the case of the violation of airspace, no State had the right to shoot down an aircraft. The text should not give the impression that it was permissible to shoot down an aircraft if there was a violation of airspace.

32. Mr. DUGARD (Special Rapporteur) said that the intention of the phrase had been to take account of the example of the aerial incident referred to in paragraph (8), which was always cited in support of the principle embodied in paragraph (c). Such accidents were regrettable, but they were an unfortunate fact of life and could not be ignored.

33. Mr. CHEE said he agreed with Mr. Economides and noted that the Convention on International Civil Aviation prohibited a State from shooting down an aircraft that accidentally violated its airspace.

34. Mr. DUGARD (Special Rapporteur) said he was aware that such a prohibition existed in international law, but wondered what happened to the right of the State of nationality of passengers killed in such circumstances to exercise diplomatic protection on their behalf.

35. Mr. MANSFIELD suggested that the text proposed by the Special Rapporteur should be retained, but worded more concisely to read: “where he is on board an aircraft that is shot down by a State while overflying its territory”.

36. Mr. MELESCANU said it should perhaps be specified that reference was being made to civil aircraft; he did not think that the principle was applicable to all aircraft.

37. Mr. PELLET said that he disagreed with Mr. Melescanu. The problem arose in the same way for military aircraft and Mr. Mansfield’s proposal was thus very sensible.

38. Mr. CHEE said that he disagreed with Mr. Pellet. A distinction should be drawn between civil aircraft and military aircraft and the new article 3 *bis* of the Convention on International Civil Aviation expressly prohibited States from shooting down civil aircraft which flew above their territory without authority.

39. Mr. DUGARD (Special Rapporteur) said that the wording proposed by Mr. Mansfield would probably meet all the concerns raised by the members of the Commission.

40. Mr. KABATSI said that he had no objection to the substance of Mr. Mansfield's proposal, but the reference to a State shooting down an aircraft was inappropriate. A State did not commit such an act, but did bear responsibility for it.

41. Mr. PELLET said that it would be sufficient to say "shot down by the armed forces of a State".

42. Mr. MANSFIELD suggested that, to take account of Mr. Kabatsi's concern, the last part of the sentence should read: "where he is on board an aircraft that is shot down while in overflight of another State's territory".

*Paragraph (7) was adopted with the amendment proposed by Mr. Mansfield.*

Paragraph (8)

43. Mr. GAJA proposed that, in the last sentence, the words "can be expected" should be changed to read "would be expected" to indicate that the Commission did not take a position, particularly as the idea was criticized in the following paragraph.

*Paragraph (8), as amended, was adopted.*

Paragraphs (9) to (11)

*Paragraphs (9) to (11) were adopted.*

Paragraph (12)

44. Mr. GAJA said that the paragraph was superfluous and should be deleted.

*Paragraph (12) was deleted.*

Paragraphs (13) to (18)

*Paragraphs (13) to (18) were adopted.*

*The commentary to draft article 15, as amended, was adopted.*

*Commentary to draft article 16* (Actions or procedures other than diplomatic protection)

Paragraph (1)

45. Mr. PELLET suggested the deletion of the first sentence, which stated that the rules on diplomatic protection and the principles governing the protection of human rights served a common goal. That contradicted paragraph (4), according to which "[i]ndividual rights under international law may also arise outside the framework of human rights"; nor did he see how that sentence could be combined with draft article 17 (Special rules of international law). If the first sentence was deleted, paragraph (1) would then begin with the words: "Article 16 is not intended".

46. Mr. MOMTAZ said that the reference to human rights was justified, since draft article 18 on protection of ships' crews emphasized the protection of crew members.

47. Ms. ESCARAMEIA said that, to meet Mr. Pellet's concern, the first sentence could be shortened to read: "The customary international law rules on diplomatic protection have evolved over several centuries and the more recent principles governing the protection of human rights complement them."

48. Ms. XUE said that she was also in favour of deleting the first sentence, but for another reason: it did not reflect the actual history of the law.

49. Mr. ECONOMIDES said that, in that context, the link between diplomatic protection and the protection of human rights was not without justification. However, it could be stated more neutrally in the following manner: "The customary international law rules on diplomatic protection and the principles governing the protection of human rights complement each other. The present articles are therefore not intended ...".

50. Mr. PELLET said that he supported the proposal by Mr. Economides.

51. Mr. CANDIOTI pointed out that, in the third sentence of the French version, the words "*telles que les organisations non gouvernementales*" should be replaced by "*engagées dans la protection des droits de l'homme*".

52. Mr. MELESCANU, also referring to the French version, said that the words "*ou morales*" should be inserted after "*personnes physiques*".

*Paragraph (1) was adopted with the amendments proposed by Mr. Economides, Mr. Candiotti and Mr. Melescanu.*

Paragraph (2)

53. Mr. PELLET said that, in the penultimate sentence, it was going too far to say that the decision of the ICJ in the *South West Africa* cases holding that a State might not bring legal proceedings to protect the rights of non-nationals had been expressly repudiated by the Commission in its draft articles on responsibility of States.<sup>374</sup> He did not see how such an absolute assertion could be reconciled with draft article 3, paragraph 1, pursuant to which a State was only entitled to exercise diplomatic protection on behalf of its nationals.

54. Mr. DUGARD (Special Rapporteur), referring to footnote 725 of the draft articles on responsibility of States,<sup>375</sup> said that the Commission had debated for two days whether it should repudiate the *South West Africa* decision in its draft articles and it was now accepted that it had done so. It was important to refer to article 48, paragraph 1 (b), because the Commission had been criticized for not having made it clear on first reading that the draft articles on diplomatic protection did not contradict that provision.

<sup>374</sup> *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 26, para. 76.

<sup>375</sup> *Ibid.*, p. 127.

55. Mr. PELLET said that he agreed in principle on repudiating the Court's decision, but thought that it was not possible to draw the *a contrario* conclusion that a State could protect the rights of non-nationals. He proposed saying that, today, it was not acceptable that a State might not bring legal proceedings under any circumstances to protect the rights of non-nationals, that the decision to that effect by the ICJ in the *South West Africa* cases had been expressly repudiated by the Commission in its draft articles on responsibility of States and that the possibility of instituting proceedings to protect the rights of non-nationals was open to a State if a text so provided or pursuant to article 48, paragraph 1 (b), of the draft articles on responsibility of States, which permitted a State other than the injured State to invoke the responsibility of another State if the obligation breached was owed to the international community as a whole.<sup>376</sup>

56. Mr. DUGARD (Special Rapporteur) suggested that the penultimate sentence should be replaced by: "The view taken by the International Court of Justice in the 1966 *South West Africa* cases holding that a State may not bring legal proceedings to protect the rights of non-nationals has to be qualified by the articles on responsibility of States for internationally wrongful acts."

57. Mr. VALENCIA-OSPINA said that the words "qualified by" should be replaced by "qualified in the light of".

*Paragraph (2), as amended, was adopted.*

Paragraph (3)

58. Ms. ESCARAMEIA said that the footnote at the end of the paragraph, which dealt with the right to petition an international human rights monitoring body, should also refer to the Committee on the Elimination of Discrimination against Women.

*Paragraph (3), as amended, was adopted.*

Paragraphs (4) to (6)

59. Mr. PELLET said that he had serious problems with paragraphs (4), (5) and (6). Although individual rights under international law might arise outside the framework of human rights, as indicated in paragraph (4), paragraph (5) referred to "treaties on the protection of investment" and paragraph (6) to "subjects other than human rights, such as the protection of foreign investment". Given that investment was taken up in draft article 17, paragraphs (4), (5) and (6) were out of place in the commentary to draft article 16. The distinction between draft articles 16 and 17 was already rather vague and that would only add to the confusion.

60. The CHAIRPERSON suggested that paragraphs (4), (5) and (6) be moved to the commentary to draft article 17.

61. Mr. GAJA said he was aware that paragraphs (5) and (6) could cause confusion, although they were not entirely unjustified. He suggested deleting them and

explaining in the commentary to draft article 17 why the protection of investment was the subject of a separate provision.

62. The CHAIRPERSON, speaking as a member of the Commission, said that he supported Mr. Gaja's suggestion.

63. Mr. ECONOMIDES said it was clear that draft article 16 covered all treaties, basically those relating to human rights, apart from those on the protection of investment, which were the subject of draft article 17. In his opinion, paragraph (4) should be retained and paragraphs (5) and (6) should be merged to create the following sentence: "The actions or procedures referred to in article 16 include those available under both universal and regional human rights treaties, as well as any other relevant treaty, apart from a number of treaties on the protection of investment, which are referred to in article 17."

64. Mr. PELLET said that he was not very convinced by Mr. Economides' interpretation of the distinction between draft articles 16 and 17, but was prepared to go along with his proposal, provided that the second sentence in paragraph (6) was also deleted. An introductory paragraph should also be added to draft article 17 to explain why it dealt with the protection of investment.

65. Mr. DUGARD (Special Rapporteur) suggested deleting the words "for example, in a number of treaties on the protection of investment" in the first sentence of paragraph (5), deleting paragraph (6) and adding an introductory paragraph to draft article 17, as suggested by Mr. Pellet.

*Paragraph (4) was adopted.*

*Paragraph (5) was adopted subject to the amendment proposed by the Special Rapporteur.*

*Paragraph (6) was deleted.*

Paragraph (7)

*Paragraph (7) was adopted.*

Paragraph (8)

66. Mr. PELLET said that the last sentence in the footnote at the end of the paragraph should be deleted because it was not at all demonstrated that, in the *Selmouni* case, the Netherlands could have both intervened before the European Court of Human Rights and exercised diplomatic protection. He had often urged the Commission to consider the question whether diplomatic protection could be exercised in the case of an individual claim. Having failed to do so, the Commission could not now give the question short shrift in a footnote.

67. Mr. ECONOMIDES said he supported that suggestion: the last sentence in the footnote was a mere supposition.

68. Mr. DUGARD (Special Rapporteur) said that he had simply wanted to give an illustration, but he was prepared to delete the sentence if members felt that it was speculative.

<sup>376</sup> *Ibid.*, p 126.

69. Mr. GAJA suggested that the footnote should be deleted because the illustration was unnecessary and made no sense without the last sentence.

70. Mr. PELLET, referring to the second sentence, said it would be wise to make it clear that: “Where, however, a State resorts to such procedures, it does not *necessarily* abandon its right to exercise diplomatic protection ...”.

*Paragraph (8) was adopted with the amendments proposed by Mr. Gaja and Mr. Pellet.*

*The commentary to draft article 16, as amended, was adopted.*

Commentary to draft article 17 (Special rules of international law)

Paragraph (1)

*Paragraph (1) was adopted.*

Paragraph (2)

71. The CHAIRPERSON said that, in keeping with the earlier suggestion, the Special Rapporteur would propose an introductory paragraph to precede paragraph (1). Since the new paragraph was linked to paragraph (2), its consideration would be postponed until the next meeting.

*It was so decided.*

Paragraph (3)

*Paragraph (3) was adopted.*

Paragraph (4)

*Paragraph (4) was adopted.*

Commentary to draft article 18 (Protection of ships’ crews)

Paragraph (1)

*Paragraph (1) was adopted.*

Paragraph (2)

72. Mr. FOMBA suggested that the last sentence should be deleted because the idea it expressed was better explained in paragraph (7).

73. Ms. ESCARAMEIA said that, on the contrary, it should be retained because the paragraph referred to a number of matters, including not only policy considerations, but also the practice of States, judicial decisions and writings of publicists, all of which were taken up individually in the following paragraphs.

74. Mr. ECONOMIDES said he also thought that the sentence should be retained and suggested the insertion of a cross-reference in parentheses to paragraph (7). Moreover, the words “*dans une certaine mesure*” in the first sentence of the French text were too weak.

75. Mr. MOMTAZ said that that wording was actually well chosen because the practice of States, judicial decisions and the writings of publicists with regard to the protection of ships’ crews were not clear-cut.

*Paragraph (2) was adopted as it stood.*

Paragraph (3)

76. Mr. MOMTAZ said that there was a contradiction between paragraph (3) and the communication from the United States to the Commission in May 2003.<sup>377</sup> It would be better to delete the paragraph because the United States had repudiated the practice to which it referred.

77. Mr. DUGARD (Special Rapporteur) said that this raised the interesting question of what was to be done when a State that had consistently pursued a particular line in its practice and judicial decisions then repudiated its own practice. As the rule under consideration relied heavily on the practice of the United States, he did not think it was appropriate to ignore that practice just because a particular Administration had made a certain comment for reasons of political convenience at a particular time. At most, the Commission might refer to the communication from the United States in a footnote.

78. Mr. MOMTAZ said that paragraph (3) was very affirmative and gave the impression that the United States pursued that practice, although that had not been the case for quite some time.

79. Mr. CANDIOTI said that the Commission should be careful about referring in a footnote to a recent opinion of the United States, which might change its position in a year’s time. It would be sufficient to describe that State’s past practice and to delete the word “traditionally” in the second line.

80. Mr. PELLET said he agreed with that deletion, but stressed the need to indicate that the United States seemed to have repudiated its practice, something it had every right to do. He suggested that a footnote should be added to the first sentence with a reference to the communication.

81. Mr. CHEE noted that crew members at sea did not carry a passport, but a registration card. Once on board, they were regarded as a group and, regardless of their nationality, they were protected by the flag State, which could exercise diplomatic protection. That had been the opinion of the International Tribunal for the Law of the Sea in the “*Saiga*” case and it was the practice of the United States.

82. Mr. DUGARD (Special Rapporteur) proposed that paragraph (3) should be amended by saying that the traditional practice of the United States, in particular, supported such a rule, by describing that practice and noting in the last sentence that doubts had been raised, *including by the United States*, and by referring at that point to the United States communication. He would submit a new version of paragraph (3) at the next meeting.

83. The CHAIRPERSON said he took it that the members of the Commission agreed to the Special Rapporteur’s proposal.

*It was so decided.*

<sup>377</sup> Communication of 20 May 2003 to the International Law Commission (archives of the Codification Division of the Office of Legal Affairs of the United Nations). See also *Yearbook ... 2004*, vol. I, 2795th meeting, p. 29, para. 2.

Paragraph (4)

*Paragraph (4) was adopted.*

Paragraph (5)

84. Mr. DUGARD (Special Rapporteur) said that the words “albeit not unambiguous” in the first sentence should be deleted.

*Paragraph (5), as amended, was adopted.*

Paragraph (6)

85. Mr. PELLET, referring to the first sentence, said that it was preferable to speak of a case involving something akin to diplomatic protection “of the members of the crew” or even a “case involving something akin to protection of the members of the crew” without mentioning the word “diplomatic”.

86. Mr. DUGARD (Special Rapporteur) stressed that the International Tribunal for the Law of the Sea had seen the “*Saiga*” case as being related to diplomatic protection. He therefore suggested saying something along the lines of “a case involving something akin to, but different from, diplomatic protection”.

87. Mr. PELLET said it was essential to refer above all to the protection of the members of the crew. He proposed the following wording for the French version: “[*Le Tribunal*] y a également vu une affaire de protection des membres de l'équipage s'apparentant à la protection diplomatique sans se confondre avec celle-ci.”

*Paragraph (6), as amended, was adopted.*

Paragraph (7)

*Paragraph (7) was adopted.*

Paragraph (8)

88. Mr. MOMTAZ pointed out that the fourth sentence contradicted draft articles 2 and 3 by saying that neither of the two States was accorded priority, whereas, in actual fact, priority was accorded to the State of nationality of the members of the crew, which was entitled, pursuant to draft articles 2 and 3, to exercise diplomatic protection on behalf of its nationals. It would therefore be better to delete the words “without priority being accorded to either” at the end of the fourth sentence.

89. Ms. ESCARAMEIA said that she was opposed to the deletion of those words, which reflected the conclusion of a lengthy debate, at the end of which the Commission had decided that there was to be no priority. The argument which referred to the right provided for in draft articles 2 and 3 was not valid: by the same token, it could be argued that draft article 18 gave priority to the right of the flag State.

90. The CHAIRPERSON, speaking as a member of the Commission, said that, as he saw it, the main point was that both possible actions were recognized. The words “without priority being accorded to either” could thus be deleted.

91. Mr. CHEE said that he supported Ms. Escarameia's point of view.

92. The CHAIRPERSON said that, owing to the lack of time, the Commission would continue its consideration of paragraph (8) of the commentary to draft article 18 at the next meeting.

*The meeting rose at 6.09 p.m.*

## 2909th MEETING

*Tuesday, 8 August 2006, at 10 a.m.*

*Chairperson:* Mr. Guillaume PAMBOU-TCHIVOUNDA

*Present:* Mr. Addo, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kateka, Mr. Mansfield, Mr. Melescanu, Mr. Momtaz, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Valencia-Ospina, Ms. Xue.

### Draft report of the Commission on the work of its fifty-eighth session (*continued*)

CHAPTER IV. *Diplomatic protection (concluded)* (A/CN.4/L.692 and Add.1)

E. *Text of the draft articles on diplomatic protection (concluded)* (A/CN.4/L.692/Add.1)

2. *TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO (concluded)*

*Commentary to article 18 (Protection of ships' crews) (concluded)*

Paragraph (8) (*concluded*)

1. The CHAIRPERSON recalled that the previous day's discussion of paragraph (8) have revolved around the possible deletion of the third sentence of the paragraph.

2. Mr. ECONOMIDES said that, in the third sentence, the phrase “without priority being accorded to either” was somewhat inaccurate, in that it implied that both the diplomatic protection exercised by the State of nationality and that exercised by the flag State should be recognized, yet the diplomatic protection exercised by the State of nationality was already recognized. The sentence was intended to convey the idea that diplomatic protection exercised by the flag State should be recognized alongside that traditionally exercised by the State of nationality. Since the Commission should not attempt to regulate the priority between them, it would be more apt to word the sentence: “The diplomatic protection exercised by the flag State in seeking redress for the crew should be recognized alongside the diplomatic protection of the State of nationality, which may apply in all cases and which is the traditional form.” The two States could agree which was to exercise diplomatic protection, if they so wished. Usually it was the flag State which would exercise such protection, but it was not out of the question that the State of nationality of the crew might do so.