

Diplomatic Protection by the Flag State in Favour of the Crew of a Ship

Sten Verhoeven, K.U. Leuven, Institute for International Law

1. Introduction

The Commission at its forty-eighth session, in 1996, identified the topic of “Diplomatic protection” as one of three topics appropriate for codification and progressive development.¹ Under Special Rapporteur John Dugard the enquiry into the rules governing diplomatic protection made quite some progress, certainly on the topics of nationality of the claims, including nationality of corporations, and the exhaustion of local remedies.

During the debates, the desire was expressed to include a number of other matters within the field of diplomatic protection, such as functional protection by international organizations of their officials, the right of the State of nationality of a ship or aircraft to bring a claim on behalf of the crew and possibly also of the passengers of the ship or aircraft, irrespective of the nationality of the individuals concerned, the case where one State exercises diplomatic protection of a national of another State as a result of the delegation of such a right, and the case where a State or an international organization administers or controls a territory.²

The scope of this paper is limited to the right of the State of nationality of a ship to bring a claim on behalf of members of the crew who are not nationals of the State. Since the debate departs from diplomatic protection by the State of nationality of a ship, it is imperative to address this issue and to find out how to determine this nationality before dealing with the existence of this kind of diplomatic protection as such. In the first part, it will be argued that the flying of a flag is the best manner to determine the nationality of a ship. In the second part, the existence of a rule of customary international law that the flag State can grant diplomatic protection to alien seamen will be examined.

2. The Nationality of a Ship³

The ascription of nationality to a ship is one of the most important means by which public order is maintained at sea. States usually grant their nationality to vessels by means of registration and by authorizing vessels to fly their flag. Originally, it seemed that States had complete discretion in this matter: in the *Muscat Dhows Case* the Permanent Court of Arbitration stated that it belongs to every sovereign to decide to whom he will accord the right to fly his flag and to prescribe the rules covering such grants⁴. This approach appeared to be followed at first sight by article 5 Convention on the High Seas⁵ of 1958. According to this

¹ *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10 (A/51/10)*, § 249 and annex II, addendum 1.

² *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10 (A/57/10)*, p. 123, § 188.

³ R. R. CHURCHILL and A. V. LOWE, *The Law of the Sea*, Manchester, Manchester University Press, 1999, pp.257-263; W. K. GECK, “Diplomatic Protection”, *EPIL* (1992), Vol. 1, pp. 1054-1055; G. P. PAMBORIDES, *International Shipping Law: Legislation and Enforcement*, The Hague, Kluwer Law International 1999, pp. 1-22; M. N. SHAW, *International Law*, Cambridge, Cambridge University Press, 2003, p. 729; E. SOMERS, *Inleiding tot het Internationaal Zeerecht*, Antwerp, Kluwer Rechtswetenschappen België, 1997, pp. 239-244.

⁴ *Muscat Dhows Case, RIAA*, Vol. XI, p. 83.

⁵ Convention on the High Seas, done at Geneva on 29 April 1958, *UNTS*, No. 6465, Vol. 450, pp. 82-103.

provision, each State has to fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. However, influenced by the *Nottebohm Case*⁶, the article went on and required a “genuine link” between the State and the ship. The introduction of this requirement gives rise to the difficulty of knowing what exactly constitutes such a link. Unfortunately this remains unclear, since the International Law Commission felt that it was not practicable to suggest specific criteria in the final draft of this convention. Equally, it remains uncertain what the consequences are if there is no genuine link between a vessel and the State whose nationality it purports to bear.

In spite of the fact that the Preamble of the Convention on the High Seas refers to its provisions as being “generally declaratory” of established principles of international law, it seems very unlikely that the requirement of a genuine link between the vessel and a State is part of customary international law. This helps to explain why this requirement has not been widely observed in practice. On the contrary, the use of flags of convenience with virtually no link between the State and the vessel flying its flag has multiplied due to the globalization of international trade.

Despite the fact that the genuine link requirement appears to have little influence on State practice, it was repeated in the UN Convention on the Law of the Sea⁷ in article 91, stating that *every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag, that ships have the nationality of the State whose flag they are entitled to fly and that there must be a genuine link between the State and the ship*. However, there exists already some case law that contradicts the genuine link requirement. Firstly, the ICJ declared in its advisory opinion on the Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization that, after registration, the nationality of the vessel is the one of the flag under which it flies, and the third parties should recognize this without entering into the issue whether a genuine link exists or not between the vessel and the flag State⁸. Furthermore, in two cases, the European Court of Justice followed the traditional approach and refused to look behind the flag of two EC-beneficially owned fishing vessels registered under flags of convenience⁹. Finally, the International Tribunal for the Law of the Sea concluded in the *M/V Saiga Case* (No. 2) that *the purpose of the provisions of the Convention [on the Law of the Sea] on the need for a genuine link between a ship and its flag State is to secure more effective implementation of the duties of the flag State and not to establish criteria by reference to which the validity of the registration of ships in a flag State may be challenged by other States*¹⁰.

In conclusion, the only effect of the requirement of a genuine link was to cause confusion. Nowadays, customary international law –apart from the obligations of party States to the Convention on the High Seas and the Convention on the Law of the Sea- seems to give preference to the criterion of the flying of the flag of a State to determine the nationality of the ship¹¹, even in the case of flags of convenience. Moreover, even under the UN Convention on the Law of the Sea, the requirement of a genuine link seems to be virtually inexistent,

⁶ *Nottebohm Case*, ICJ Rep. 1955, p. 4.

⁷ UN Convention on the Law of the Sea, done at Montego Bay on 10 December 1982, *ILM* (1982), Vol. 21, pp. 1261-1354.

⁸ *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization Case*, Advisory Opinion, ICJ Rep. (1960), p. 171.

⁹ *Anklagemyndigheden v. Peter Michael Poulsen* (Case C-286/90), European Court of Justice, 24 November 1992, *ECR* 1992, p. I-6019, §§ 13-15; *Commission v. Ireland* (Case C-280/83), European Court of Justice, 2 December 1992, *ECR* 1992, p. I-06185, § 24.

¹⁰ *M/V Saiga Case* (No. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment, International Tribunal for the Law of the Sea, 1 July 1999, § 83 at http://www.itlos.org/start2_en.html.

¹¹ R. CHURCHILL and A. V. LOWE, *The Law of the Sea*, Manchester, Manchester University Press, 1999, p. 258.

taking into account the judgment of the International Tribunal for the Law of the Sea in the *M/V Saiga Case*.

Having established that the nationality of a ship is determined by the flying of the flag of a State, the remaining issue is to examine if a rule of customary international law exist allowing the flag State to exercise diplomatic protection over the crew of the ship.

3. Diplomatic Protection Granted by the Flag State to the Crew of a Ship

Generally, diplomatic protection can only be granted to nationals, whether they are natural persons or companies.¹² Exceptionally, however it can also be exercised in favour of non-nationals. This was confirmed in the advisory opinion of the ICJ of 11 April 1949 on *Reparation for Injuries Suffered in the Service of the United Nations*, where the general rule of nationality was repeated, but the Court continued stating that there existed exceptions to this rule.¹³ If diplomatic protection granted to an alien seaman is included in those exceptions is open to some doubt, though this appears to be the prevalent opinion and practice.

Firstly, there exists some State practice in this regard. Especially the United States of America was very active to protect alien seamen serving on ships flying its flag.¹⁴ It has to be added though that this practice was contested and that recent practice is not that widespread due to absence of relevant incidents. Secondly, most case law seems to accept the rule.¹⁵ In the *I am alone Case*, the arbitrators accepted that the flag State could protect the rights of a crew member who was not the flag State's national.¹⁶ Recently, the International Tribunal for the Law of the Sea confirmed this rule in the *M/V Saiga Case No. 2*, declaring 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 and that the nationalities of these persons are not relevant*.¹⁷ Thirdly various learned authors accept the existence of the rule.¹⁸ For example, in their separate opinion to the *Reparation for Injuries Suffered in the Service of the United Nations Case* Judge Hackworth and Judge Badawi Pasha referred to the diplomatic protection of seaman by the flag State¹⁹, as being one of the exceptions to the nationality of claims rule the Court had in mind.

From the above it seems very likely that a rule of customary international law exists allowing a flag State to grant diplomatic protection to the crew of a ship flying its flag even if they are aliens. Unfortunately, the scope of the rule is not that very clear. From the few relevant cases, it can be deduced that a flag State can exercise diplomatic protection in favour of the (alien) crew, if there exists some link between damage to the crew and to the ship. The judgment of the International Tribunal for the Law of the Sea in the *M/V Saiga No. 2* provides some

¹² *Panevezys-Saldutiskis Railway Case*, PCIJ Publ., Series A/B, No. 76, p. 16; *Nottebohm Case*, ICJ Rep. 1955, p. 24; *Barcelona Traction Light and Power Company Ltd. Case*, ICJ Rep. (1970), p. 33 § 35; P. DAILLIER and A. PELLET, *Droit International Public*, Paris, LGDJ, 2002, p. 809, No. 495.

¹³ *Reparation for Injuries Suffered in the Service of the United Nations Case*, Advisory Opinion, ICJ Rep. (1949), p. 181.

¹⁴ See A. D. WATTS, "The Protection of Alien Seamen", *ICLQ* 1958, Vol. 7, p. 691 and following.

¹⁵ See A. D. WATTS, *Ibid*.

¹⁶ *I am Alone Case*, RIAA, Vol. III, p. 1609.

¹⁷ *M/V Saiga Case (No.2)* (Saint Vincent and the Grenadines v. Guinea), Judgment, International Tribunal for the Law of the Sea, 1 July 1999, § 106 at http://www.itlos.org/start2_en.html.

¹⁸ I. BROWNLIE, *Principles of Public International Law*, Oxford, Oxford University Press, 2003, p. 460; R. JENNINGS and A. WATTS, *Oppenheim's International Law*, London, Longman, 1992 Vol. I, Parts 2-4, p. 937, § 411.

¹⁹ Judge HACKWORTH (Diss. Op.), *Reparation for Injuries Suffered in the Service of the United Nations Case*, Advisory Opinion, ICJ Rep. (1949), p. 202; Judge BADAWI PASHA (Diss. Op.), *Reparation for Injuries Suffered in the Service of the United Nations Case*, Advisory Opinion, ICJ Rep. (1949), p. 206-207.

guidance by considering the ship and everything and everyone involved in its operation as a unit, a separate entity linked to the flag of a State.²⁰ When damage is caused to this entity or when damage caused to the crew has an impact on the functioning of the entity, the flag State can exercise diplomatic protection. According to the Tribunal, the rationale of this rule is that, since a multinational cargo and crew characterizes modern maritime transport, undue hardship would ensue if each person sustaining damage is obliged to look for protection from the State of which such person is a national. This does not however exclude the diplomatic protection granted by the national State of a crewmember: when the damage of the crewmember is not related to or has no impact on the entity mentioned, it seems appropriate that the national State would exercise diplomatic protection, since it is very unlikely that a flag State will do this: if the entity linked to its flag has not suffered damage, the flag State willingness to exercise diplomatic protection will probably not be present.

4. Conclusions

1. In light of the above analysis, it is clear that the diplomatic protection by the flag State in favour of the crew of a ship, and certainly in favour of alien crewmembers, is clouded in doubts. As a result it is imperative that this issue should be clarified by the work of the International Law Commission on diplomatic protection. Despite the reluctance of the Special Rapporteur to include this and other topics in the draft articles on diplomatic protection, it seems desirable to deal with this issue of diplomatic protection by the flag State in favour of the crew of a ship for the sake of establishing a clearer rule in this issue and for the completeness of the draft articles on diplomatic protection.
2. Despite some still existent doubts on the customary law status of this form of diplomatic protection and its scope, strong indications can be found which confirm that diplomatic protection by the flag State in favour of the crew of a ship is part of customary international law. In light of the *M/V Saiga Case No. 2*, this kind of diplomatic protection should be exercised when damage to (alien) crewmembers is linked to or causes damage to the ship, which is considered as a unit, an entity comprising not only the ship itself, but also the cargo and the crew. If this link is not present, it is preferable that diplomatic protection should be exercised by the national State of the crewmember suffering damage.

²⁰ *M/V Saiga Case (No.2)* (Saint Vincent and the Grenadines v. Guinea), Judgment, International Tribunal for the Law of the Sea, 1 July 1999, § 106 at http://www.itlos.org/start2_en.html.