

Document:-
A/CN.4/SR.2687

Summary record of the 2687th meeting

Topic:
Diplomatic protection

Extract from the Yearbook of the International Law Commission:-
2001, vol. I

*Downloaded from the web site of the International Law Commission
(<http://www.un.org/law/ilc/>)*

assigning a claim in paragraph 3. In any event, it was the principle that mattered and, although he approved of the premise developed by the Special Rapporteur, he disagreed with his conclusions. The problem which that raised was a fundamental one and it would therefore be desirable if the Commission adopted a clear position on the matter.

55. Lastly, he was concerned by the proposal made by certain members of the Commission that consideration should be given only to classical diplomatic protection, in other words, protection which the State exercised on behalf of individuals having its nationality. In his opinion, it would be very regrettable to stop there. The diplomatic protection of legal persons or shareholders was an essential aspect of the matter, and of considerable practical importance, and the Special Rapporteur should therefore not exclude it from the scope of his study.

56. Mr. DUGARD (Special Rapporteur) thanked Mr. Pellet and said that he had every intention of dealing with that question in his draft articles.

The meeting rose at 12.45 p.m.

2687th MEETING

Wednesday, 11 July 2001, at 10 a.m.

Chairman: Mr. Peter KABATSI

Present: Mr. Addo, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Momtaz, Mr. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma.

Diplomatic protection¹ (continued) (A/CN.4/506 and Add.1,² A/CN.4/513, sect. B, A/CN.4/514³)

[Agenda item 3]

¹ For the text of draft articles 1 to 9 proposed by the Special Rapporteur in his first report, see *Yearbook . . . 2000*, vol. I, 2617th meeting, para. 1.

² See *Yearbook . . . 2000*, vol. II (Part One).

³ Reproduced in *Yearbook . . . 2001*, vol. II (Part One).

FIRST AND SECOND REPORTS OF THE SPECIAL RAPPORTEUR (continued)

1. The CHAIRMAN opened the meeting by extending a warm welcome to Judge Al-Khasawneh, a member of the Commission until his election to ICJ.

2. Mr. SIMMA, praising the Special Rapporteur's heroic but not always successful efforts to imbue the traditional law on diplomatic protection with a progressive human rights element, said that article 9 was a good example of where human rights considerations might not be well placed. The rule of continuous nationality was firmly endorsed by State practice and even recent jurisprudence, and his impression was that Governments also seemed to be quite satisfied with it and applied it flexibly. It was clear, therefore, that continuous nationality was a rule of customary international law and very urgent and convincing reasons were needed for the Commission to change it as thoroughly as was proposed in the first report of the Special Rapporteur (A/CN.4/506 and Add.1). Again, a decisive factor for him was that the continuous nationality rule remained popular with foreign ministries and had not really led to major problems.

3. The general trend in international law of strengthening the position of individuals and even elevating them into bearers of rights under international law did not provide a sufficiently convincing reason to overturn the rule. One might even say that the development of international human rights law and the relevant procedures available to individuals could justify a certain division of labour between diplomatic protection and international human rights concerning the protection of individual rights and interests. With all due regard to the weaknesses of existing regimes in the field of human rights and in the protection of foreign investment, it was undeniable that those treaties and machineries were capable of reinforcing, and filling certain gaps in, the traditional law of diplomatic protection. That was particularly true with regard to the continuous nationality rule.

4. Attention had been drawn to various regimes such as those of UNCC and even the International Tribunal for the Former Yugoslavia, but they were not proof that general international law could not cope with the matter of adequate protection any longer. Rather they should be regarded as testimony to the fact that international law could very well come up with custom-made solutions if need be, and that should lead to some relaxation of pressure on established rules of diplomatic protection. However, he could accept that the rule ought to be made subject to certain exceptions, and that the desirability of such exceptions was growing under the impact of human rights. Exceptions should be allowed in the case of involuntary changes of nationality, for instance through marriage, and might follow the example of some countries in relaxing the condition of nationality having to be present throughout.

5. Some members had pointed to the mantra of globalization as a reason to overhaul the rule of continuous nationality. The impact of globalization on many issues in international law was undeniable, but as far as natural persons were concerned it did not lead to a really substantive increase in changes of nationality, although it might

have led to increases in changes of residence. The picture might be different in the case of legal persons, although the main reasons for companies or corporations changing or establishing certain nationalities were to avoid tight fiscal supervision or what was seen as over-rigid social legislation, and in such a context the notion of bona fide changes of nationality made little, if any, sense. He hoped that there would be no attempt to facilitate shareholder value shopping to the detriment of the fiscal or social policies of States by dismantling the rule of continuous nationality.

6. Lastly, article 9 should be referred to the Drafting Committee, where it should be revised in order to maintain the principle of continuous nationality but make it subject to exceptions for cases of involuntary changes of nationality.

7. Mr. ELARABY, praising the wide-ranging research and the impressive analysis of State practice and doctrinal issues contained in the first report, said that diplomatic protection was commonly exercised by all foreign ministries and it had always been standard practice for diplomatic missions to intervene in various countries to protect the interests of individuals and legal persons. The new development in recent years, which should affect the doctrine itself, was the currently well-established tradition of having recourse to international organizations, such as WIPO, WTO and UNCC.

8. He fully shared the view expressed in the section of the report containing conclusions that the traditional rule of continuous nationality had outlived its usefulness and had no place in a world in which individual rights were recognized by international law, but it had to be borne in mind that there were certain conditions such as those set out in article 9 and certain exceptions. Consideration had to be given to the conditions under which a claim might be espoused by a State other than the State of original nationality. The Special Rapporteur had enumerated three conditions: that the State of original nationality had not exercised diplomatic protection itself, that it could bring a claim on its own behalf for injury to its general interests, and that diplomatic protection might not be exercised against any previous State of nationality. He fully subscribed to those conditions. However, he had some difficulty in accepting the reference to bona fide in paragraphs 1 and 2 of article 9. The term was rather subjective and introduced elements that were not easy to ascertain. It was usually open to various interpretations and he would prefer it to be replaced by the word "legal" or at least by a concrete term which would not create double standards. The genuine link formula referred to by ICJ in the *Nottebohm* case was more than adequate, as the Special Rapporteur himself recognized in the conclusions.

9. He fully supported the Special Rapporteur's emphasis on the individual, which was in line with the evolution in legal thinking about the rights of the individual in contemporary international law. Such a shift had occurred in UNCC of whose Provisional Rules for Claims Procedure article 5 permitted international organizations to submit claims on a par with Governments in the sense that they had the right to submit claims on their own behalf and also on behalf of individuals who were not able to find a Government to submit their claim.

10. Lastly, he fully endorsed the view expressed by other members that article 9 should be referred to the Drafting Committee.

11. Mr. ADDO, commending the Special Rapporteur for a lucid, objective and well-argued report, said that, although the traditional rule of continuous nationality appeared to be well entrenched in State practice, it was not entirely satisfactory. Rigid adherence to it and applying it strictly and doggedly would in certain instances lead to inequity. He had in mind involuntary changes brought about by State succession, where the population was sometimes subject to more than one change of nationality. Clearly, the rule might therefore cause great injustice in cases where the injured individual might have undergone a change of nationality in a bona fide manner. He inclined to the view that there was a need for a reassessment of the rule, which did not enjoy the status of an immutable and universal postulate and therefore had to be subjected to rigorous reappraisal in the light of current development in the law. The traditional rule of continuous nationality had outlived its usefulness and was indeed decadent. He himself joined the body of opinion which would reject it altogether. He endorsed the Special Rapporteur's view that article 9 sought to free the institution of diplomatic protection from the chains of the continuity rule, and in that regard would urge the Commission to adopt paragraphs 1, 2 and 4. He did not see the usefulness of paragraph 3, although he did not hold strong views about it. He too thought that the article should be referred to the Drafting Committee.

12. Mr. SEPÚLVEDA congratulated the Special Rapporteur for having systematized the subject of diplomatic protection and linked his analysis to State responsibility, and for the way in which he had questioned traditional concepts and prompted thought about the validity of principles which had been accepted as absolute truths but which nevertheless had to be subjected to new legal tests in order to determine their validity or obsolescence. Provoking controversy and encouraging discussion had undeniable merits, but it also entailed risks, one of which was that the debate might produce a negative outcome for the proposals formulated because the principle in question was deemed inadequate or was not yet right for incorporation as a rule in terms of progressive development of international law.

13. For example, the result of the controversy over article 2 had been that diplomatic protection did not include, in any circumstance, the use of force. Another example regarding a legal hypothesis to affirm the existence of a State obligation to provide diplomatic protection to an injured national had led to the conclusion that the hypothesis, formulated in article 4, did not have sufficient support in State practice and that there was no *opinio juris* to make it valid. A further illustration was to be found in article 5. The Special Rapporteur had referred to the *Nottebohm* case as authority for the position that there should be an effective or genuine link between the individual and the State of nationality and had questioned whether that principle reflected a principle of customary international law which should be codified. That too raised the question of habitual residence as a criterion for diplomatic protection.

14. Another highly controversial case was the one reflected in article 6, which specified that the State of nationality might exercise diplomatic protection on behalf of an injured national against a State of which the injured person was also a national where the individual's dominant or effective nationality was that of the former State. Equally controversial was whether a State might exercise diplomatic protection in the case of stateless persons and refugees, especially when that protection might be directed against the State of origin of the stateless person or refugee, a matter not provided for in article 8.

15. As for the debate on article 9, the Special Rapporteur's proposals were also the subject of controversy. The point was to decide whether there was enough justification for essentially changing a rule that had generally been recognized as a rule of customary law. Thus, it had to be determined whether diplomatic protection could be provided only when the claim was attributed continuously and without interruption to a person possessing the nationality of the claimant State. The Special Rapporteur considered that it was not imperative to reaffirm the principle of continuous nationality of the injured person, judging that it could cause a grave injustice to the individual who would potentially be left without protection. The Special Rapporteur had presented a lengthy list of State practice, judicial decisions and doctrinal opinions reaffirming the need for the continuous nationality rule, and there seemed to be no real basis for the statement in the report that it was supported by some judicial opinions, some State practice, some codification attempts and some academic writers.

16. On the contrary, there was in fact very little literature and argument that would call for a change in the continuous nationality rule. Umpire Parker had simply said that the rule was not clearly established.⁴ Politis had said that protection ought to be exercised in favour of the individual without regard to change of nationality unless such change was fraudulent.⁵ Van Eysinga had said that the continuity practice had not been "crystallized" into a general rule.⁶ Orrego Vicuña's opinion was that the continuity rule could be dispensed with in special circumstances,⁷ for example in the context of global financial and service markets and operations related thereto. The separate opinion of Sir Gerald Fitzmaurice in the *Barcelona Traction* case was that too rigid and sweeping an application of the continuity rule could lead to situations in which important interests went unprotected.⁸

17. As for the substance of the report, there was no clear State practice to justify changing the principle. The legal sources referred to dissenting opinions and separate opinions of judges, and the doctrine was sparse and uncertain. In those circumstances, it was preferable to abandon for good the idea of altering the rule.

18. A separate issue was the introduction of exceptions to the rule. They would include examples which had

been provided by the Special Rapporteur and mentioned during the debate. There were the cases of involuntary change of nationality which occurred in the case of State succession, of nationality being imposed, or of nationality being acquired through marriage or adoption.

19. It would be necessary to determine the final fate of paragraph 2 of article 9. The conclusion in chapter III of the report on paragraph 2 was insufficient to understand the nature and scope that should be attached to the transfer of claims and the report should explain the legal reasons underlying the transferability of claims.

20. Article 9, paragraph 3, created confusion, as it contained hybrid provisions that related to State responsibility as well as to diplomatic protection. The wording should be brought into line with that of the draft articles on State responsibility, especially in regard to the invocation of State responsibility for the breach of an international obligation.

21. Paragraph 4, was somewhat problematic in that the domestic legislation of many States stipulated that their nationals never lost their nationality. If paragraph 4 was applied, the new State of nationality would not be able in any circumstances to bring a claim against the original State of nationality, irrespective of whether the injury had occurred before or after the individual had changed nationality.

22. With those comments, he thanked the Special Rapporteur for having encouraged the Commission to challenge certain truths that, before the submission of his report, had seemed immutable.

23. Mr. GALICKI congratulated the Special Rapporteur on his first report and on his courage and honesty in contesting the widely applied rule of continuous nationality. He had presented all the pros and cons in an attempt to prove that the rule had outlived its usefulness. After a thorough presentation of the rule, its status, content and operation, the Special Rapporteur had concentrated mainly on criticizing it instead of developing the reasoning behind the new proposals contained in article 9. It was inadequately explained why, for example, article 3 stressed that diplomatic protection was a right of the State, which the State could exercise at its discretion, while article 9 sought to link diplomatic protection to injured persons and even to claims.

24. Although he fully agreed with the observation in the report that the individual's basic rights were currently recognized in both conventional and customary international law, the trend in the development of human rights protection could not be taken exclusively as justification for departing from the traditional rule of continuous nationality. Diplomatic protection also encompassed other rights, and more State practice should be adduced to support the new rule proposed in article 9.

25. Consideration should be given to the extent to which the Vattelien fiction that an injury to the individual was an injury to the State itself had become a reality in State practice. It should be remembered that, in diplomatic protection, States were exercising their own rights, while in human rights protection, priority was given to the rights of individuals.

⁴ See 2680th meeting, footnote 13.

⁵ *Ibid.*, footnote 14.

⁶ *Ibid.*, para. 4.

⁷ *Ibid.*, footnote 20.

⁸ See 2685th meeting, para. 22.

26. The proposals for the content of article 9 were very interesting and constituted progressive development of international law, but the section of the report containing conclusions did not provide sufficient explanations for them and should be reviewed and developed further. One paragraph indicated that in the contemporary world, nationality was not easily changed. Quite the opposite was true. The modern trend, based on growing recognition of the human right to a nationality, was to give more freedom for changes of nationality by individuals. That was even more apparent in relation to the nationality of legal persons, and article 9 should accordingly differentiate between natural and legal persons. The requirement of a bona fide change of nationality following an injury seemed weak, especially in respect of legal persons.

27. Much more should be said in the conclusions about the extension of the new rule to the transfer of claims; otherwise, article 9, paragraph 2, was somewhat enigmatic. No explanation was given as to what might be the result of the retention in paragraph 3 of the right of the State of original nationality to bring a claim on its own behalf. Did that open the door to the parallel competence of two States, that of the former nationality and that of the current nationality, to bring claims for an injury suffered by an individual?

28. Despite those doubts, he was firmly convinced that article 9, together with the comments made during the discussion, should be referred to the Drafting Committee.

29. Mr. CANDIOTI commended the Special Rapporteur for the stimulating material he had provided, which had given rise to a fruitful debate. His own view was that article 9 should begin by enunciating a rule that must reflect State practice, the opinions of writers and judicial decisions. The rule should state that the nationality of the protected person must be that of the protecting State at the time of the injury and at the time of the claim. It was the course that was generally accepted and, in his experience, was applied by foreign ministries. What was usually done when assessing the feasibility of exercising diplomatic protection was to verify the existence of the injury, ascertain that it had been committed against a national of the State and that the person was a national at the time he or she suffered the injury and remained a national, and determine whether local remedies in the responsible State had been exhausted.

30. One of the primary tasks of the Commission in codification was to take account of State practice and to reflect it in rules. He shared the Special Rapporteur's concern for the protection of individual rights, but thought that diplomatic protection was too limited an institution to take on that all-important task on a wide scale. Diplomatic protection was not a panacea for human rights problems, but rather a tool designed for a specific purpose, namely to give effect to State responsibility for wrongful acts against nationals abroad. While it could be instrumental in the defence of individual rights, it was not the only and ideal instrument for that purpose.

31. The Commission must not go beyond its mandate. It must acknowledge the very specific role of diplomatic protection. Article 9 should be referred to the Drafting

Committee, with the recommendation that the article should incorporate a general principle regarding the requirements of nationality at the time of the injury and of presentation of the claim, followed by possible exceptions, particularly those involving cases of involuntary change of nationality.

32. Mr. PELLET said that he both agreed and disagreed with Mr. Candiotti. He strongly agreed that a principle should be enunciated in article 9 and the principle was simply that the protected individual must have the nationality of the State exercising diplomatic protection at the time of the claim. He strongly disagreed, however, with the blunt statement that the individual must also have had the nationality of the protecting State at the time the injury was caused. Was the principle that of continuous nationality or was it that only the State of nationality could exercise diplomatic protection? At the previous meeting he had said that the nationality at the time of the injury was of no importance, while conceding that that was contrary to the traditional customary rule. He therefore endorsed the view of the Special Rapporteur and considered that the existence of a rule did signify that the rule was still suited to the modern international legal context.

33. Mr. ECONOMIDES said he fully shared Mr. Candiotti's point of view. It was borne out by the section of the comments on article 9 of the report, which described the fundamental principle of continuous nationality according to which the person who suffered injury must have been a national of the protecting State from the time of the injury through the time of the claim, and even beyond, through to the ruling on the claim. It was a rule of customary international law and the basis of extensive State practice. The first responsibility of the Commission in codification was to take account of that rule. Exceptions existed, of course, but they were mainly related to involuntary change of nationality. That was the foundation on which article 9 should be built, namely to add the exceptions to the basic rule.

34. Mr. MELESCANU said everyone was so far agreed on one point: that the discretionary power of the State was an acknowledged component of the institution of diplomatic protection. The question was when an individual was considered to be a national of a State, and when a State could exercise that power. Logically, if diplomatic protection was deemed to be a matter for the discretion of the State, it must be left to the State to decide whether a person was its national or not. Any additional conditions, for example, that the individual suffering injury must have been a national at the time of birth would only circumscribe that discretionary power.

35. Unquestionably, the individual must be a national of the State exercising diplomatic protection. But why must the individual be a national at the time of the injury? No arguments in support of that view had so far been advanced, by Mr. Candiotti or any other member, apart from references to the Vattelien fiction. He therefore agreed with Mr. Pellet that article 9 should address the very substance of the institution of diplomatic protection. A number of fundamental principles had already been identified and it should be a simple exercise to write them into the draft article.

36. Mr. OPERTTI BADAN said that he had serious doubts as to whether the discretionary power of the State to exercise diplomatic protection extended to recognition, also discretionary, of citizenship. The status of a national was a legal category that had nothing to do with protection. If one assumed that all rights had a temporal element and that any act with legal consequences must also have some temporal element, then protection must be deemed to come into play for an act that caused injury. The law normally considered that every act had its roots in the time at which it occurred. If the Commission wished to give precedence to the rights of the injured person, it could give the protecting State the option to choose the temporal element that provided the best protection for that person. The temporal element of the act that had caused the injury could not be ignored at the discretion of the State. Discretion could be exercised, however, in relation to whether the individual had also to be a national at the time when protection was exercised.

37. Mr. CANDIOTI, responding to Mr. Melescanu's call for justification of the link between nationality and the time of the injury, said that the justification was State practice. The principle generally applied was that the protected person must be a national of the protecting State at the time of the injury and at the time of presenting the claim. The State espoused that person's claim, adopting the injury as a violation of international law against itself in the person of one of its citizens. The initial relevant date for the exercise of diplomatic protection was normally that of the injury, and the test of the nationality link was applied, *inter alia*, to prevent protection shopping. Obviously, there could be exceptions, including involuntary change of nationality.

38. Mr. GALICKI said the Special Rapporteur had already answered the question of whether article 9 would be innovative or traditional, for in the first paragraph of the section of the report containing conclusions he proposed to free the institution of diplomatic protection from the chains of the continuity rule and to elaborate a new rule. Personally, he found the proposal very attractive and thought that there was indeed room for innovation, based on State practice of course. He had merely criticized the weak theoretical underpinnings of the proposal and suggested that it should be elaborated further. There was certainly room for progressive codification that could be incorporated in the draft.

39. Mr. KUSUMA-ATMADJA commended the Special Rapporteur for his excellent first report and his brave effort to create a new rule on diplomatic protection. He recounted a case illustrating State practice in the field of diplomatic protection in which legislation had been enacted in Indonesia to cater specifically for Indonesian nationals who had lost their nationality through marriage in the Netherlands.

40. Mr. PELLET said that he, for one, was not convinced by Mr. Candiotti's argument. To say that the traditional rule should be retained simply because it existed was no explanation of the rule. To suggest that the aim was to prevent forum shopping was also extremely artificial, since such a practice had only recently come into being and a provision could be made that, if it occurred, it would not be valid. The fact was that in virtually ev-

ery case a change of nationality was involuntary, occurring as a result of State succession, and the Commission was at one in thinking that, in such cases, the continuous nationality rule did not apply. True, in some countries women were still obliged to take their husband's nationality on marriage, but otherwise a change of nationality was almost invariably involuntary.

41. The case might also be argued on theoretical grounds, on the basis of the *Mavrommatis* case, but that argument, too, failed to stand up. It stemmed from the Vattelien fiction, dating from the early eighteenth century, which was a purely ideological construct based on the theory that the State was everything and the individual nothing. A State's prerogative of exercising diplomatic protection implied the requirement that an individual should have that State's nationality when the injury occurred. It was surely time, at the beginning of the twenty-first century, to move on from such an intolerable concept.

42. Mr. BROWNLIE said it was surprising that some members, especially Mr. Galicki, claimed that there was evidence of a change in State practice. The Special Rapporteur had clearly shown the paucity of current information. He himself had pointed out in print several times over the past decades that there were faults in the continuous nationality rule, particularly in relation to involuntary changes of nationality, but, if the Commission was to revise the rule, it must do so on a proper basis. Which part of the rule should be changed? Should the *Mavrommatis* approach be abandoned altogether or—more rationally—should unjustified aspects of the rule be discarded? If there was no proper evidence of State practice, it would be difficult to say what the effect of any change would be. It was known that States generally adopted a flexible, and often quite sensible, approach, but more information was required before any decision was made.

43. Mr. SIMMA said he entirely endorsed Mr. Brownlie's view. Those in favour of changing the rule neglected to consider the interests of the State confronted by a claim. If the Commission based itself on the *Mavrommatis* case, as it did in general, and on the *Nottebohm* case, it should surely hold that to cut the link between the injury and the claim would have an undesirable impact on what could be called the genuine nationality of the claim.

44. Mr. MELESCANU said that he had not been convinced by Mr. Candiotti's argument. Indeed, apart from ideological considerations, there was no real practical argument for requiring absolute continuity of nationality. As for the more general point made by some members that abandoning the absoluteness of the rule could give rise to abuse, with individuals indulging in forum shopping, States surely did not expose themselves to such abuse so easily. The Commission seemed to agree that the continuous nationality rule needed amending. The suggestion was that the amendment should take the form of a list of exceptions, but that merely amounted to another way of changing the rule.

45. Mr. CRAWFORD said that the occasional case of abuse or of forum shopping was not in itself the main consideration. More important was the fact that the rule dealt with rights that were essentially relative. For example, the expropriation by a State of property belonging

to one of its nationals did not retrospectively become a breach of international law if the person concerned changed nationality, at any rate not as far as the law relating to compensation for the expropriation of foreign property was concerned. It was true that human rights rules on the security of property applied irrespective of nationality, but not in such a case as he had cited. Most of the field was also covered by the vast number of treaty rules, too, even if some general principles of international law could be discerned behind them. The fact was that the jurisdictional clauses that would be used in invoking such responsibility were relative to treaty rights. An individual not a national of a country at the time of the breach did not, by definition, enjoy the treaty rights. It was irrelevant that many treaties were themselves drafted on the basis of some approximation of the *Mavrommatis* principle.

46. Therefore, he could not agree with the first part of Mr. Melescanu's comments, although he endorsed the second. The Commission should consider the whole situation and suggest practical solutions, especially in the context where individuals might be deprived of rights that they should have enjoyed under either dispensation. There was thus a need for some kind of "conflict rules", as adumbrated by Mr. Gaja (2685th meeting). Ultimately, however, many rights were conferred on individuals in their capacity as nationals of a particular State and no tampering with the *Mavrommatis* principle could change that situation.

47. Mr. ECONOMIDES said that the basic premise of the article was the protection of "genuine" nationals—individuals who had the same nationality throughout their lives—and he saw nothing wrong with that. Secondly, the time at which the injury occurred was crucial, according to the jurisprudence of the *Mavrommatis* case, because, as Mr. Pellet had said, it was from then on that the State itself was deemed to have suffered injury. The *raison d'être* of the rule was to avoid abuse, which was sometimes also a feature of State practice: large States would use diplomatic protection to place intolerable pressure on a smaller State to try and gain money or concessions. At the same time, an individual whose own State was not strong enough to provide protection might seek a stronger State. The continuous nationality rule had come into being to prevent such abuses. Without fully endorsing Mr. Melescanu's comments, he agreed that the rule could be retained but should be adapted to current circumstances by providing for exceptions to protect human rights. That was preferable to abandoning the provision altogether.

48. Mr. LUKASHUK said that those who favoured retention of the concept of continuous nationality nonetheless appeared to acknowledge that it did not fully correspond with modern requirements. It should be made more specific. One problem arose in connection with the situation in which an individual obtained the nationality of a State after suffering an injury. The Commission should state, if only in the commentary, whether such an individual was entitled to diplomatic protection. Indeed, the Commission should broach the whole question of defining what was meant by the term "diplomatic protection", how it was applied and when it was deemed to start. Clarification was necessary because, in some cases, current practice was for States to provide protection at a

consular or even an ambassadorial level without awaiting the exhaustion of local remedies.

49. Mr. HAFNER said he shared Mr. Economides's preference for listing exceptions to the existing rule. The Commission should therefore start to consider what those exceptions should be. Mr. Brownlie, Mr. Candioti, Mr. Pellet and Mr. Simma had, for example, suggested that the exceptions should include cases of involuntary changes of nationality. The term would, however, need to be defined. Marriage was not an involuntary action, nor could nationality acquired as a result of skill at basketball be considered involuntary. The Commission should give further consideration to the scope of any exceptions to the rule.

50. Mr. GALICKI said that he had sought only to find a realistic approach to the problem. The report described a number of failed attempts to codify the principle of continuous nationality and it was for the Commission to decide whether to make yet another attempt, along with a list of exceptions, or to adopt a more modern, courageous approach and create a principle suitable for current circumstances, along the lines suggested by the Special Rapporteur.

51. Mr. Brownlie had misunderstood his position: there was indeed insufficient evidence of State practice and the Special Rapporteur could usefully develop that aspect. Nonetheless, the Commission could not avoid the need to develop a new, precisely formulated principle, rather than adding a large number of exceptions which risked changing the balance within the article, to the point where it might be hard to determine which was more important, the principle or the exceptions. He had no doubt that, in its usual spirit of cooperation, the Commission would find an appropriate solution to the question.

52. Mr. CANDIOTI said that it would be useful to define how the Commission viewed its mandate with regard to diplomatic protection. Meanwhile, he wished to correct the impression that he was an adherent of an absolute continuous nationality rule: that would be an extreme position.

53. Far from supporting an absolute rule of continuous nationality, he believed that the article should open with a statement of the principle, including the relevant dates when the existence of the nationality link was required: the time at which the injury occurred and the time when the claim was formally made. In other words, the article should reflect State practice and the doctrine of many authorities. However, he also believed that, as Mr. Hafner had said, the Commission should consider the specific cases of an involuntary change of nationality that should be regarded as exceptions to the principle.

54. Mr. GOCO, congratulating the Special Rapporteur on his well-researched report on an extremely important topic, said that some features of article 9 did, however, call for further consideration. For example, clarification was required with regard to paragraph 2, whereby the rule that a new State might exercise diplomatic protection on behalf of the injured person, provided the original State had not exercised such protection, applied when a claim had been transferred bona fide to a person possessing the

nationality of another State. What exactly was meant by bona fide in that context? Plainly the citizenship issue was no longer involved, because there had been a transfer of claim. Since a change of nationality did not debar the original State from bringing a claim on its own behalf, although the claim was also that of an individual, was the claim in fact being pursued in the State's general interests or in the interests of the individual?

55. The view that a new State of nationality might not be entitled to exercise diplomatic protection was perfectly valid and stemmed from the hostile response to the Helms-Burton Act. Nevertheless, the essential point was that diplomatic protection was afforded at the discretion of a particular State and there were many situations in which a State might justifiably hesitate to give such assistance. On the other hand, he recalled an example he had quoted at the preceding session in which a State had exercised diplomatic protection on behalf of a person who had been naturalized in another country, because of the peculiar circumstances of the case and the plight of the individual concerned.⁹

56. While the comment on the article contained in the report defined the rule by quoting Oppenheim, the principle of continuous nationality and the transferability of claims could be summarized by stating that the basic requirements were the continuing viability of the claim itself and the continuing nationality of the claimant.

57. According to the Special Rapporteur, as there was uncertainty about the content of the continuous nationality rule, it was difficult to reconcile that rule with the Vattelian fiction that an injury to a national was tantamount to an injury to the State itself. Moreover that rule conflicted with the modern tendency to view the individual as a subject of international law. The report recommended the approach of recognizing the State of nationality at the time of the injury to its national as the claimant State. Hence article 9 was formulated as a means of freeing the institution of diplomatic protection from the chains of the continuity rule and of introducing a degree of flexibility consistent with modern international law, while at the same time taking account of the fears of potential abuse that had inspired the rule. In his opinion, those trepidations were far-fetched, because it was not easy to acquire citizenship through naturalization.

58. It was also necessary to re-examine paragraph 3. If the State of original nationality had not exercised protection, the change of nationality of an injured person, or the transfer of the claim to a national or another State did not preclude the State of origin from bringing a claim on its own behalf for injury to its general interests. But what was the origin of the claim? Was it the injury to the person or the injury to the State? It seemed to him that, although the claim arose from an injury to a person, the State considered that its general interests had been injured, because the person in question had suffered harm while he or she was still its national. In his view, that paragraph was consonant with the Vattelian fiction and was therefore more important than paragraph 1.

59. The rule governing the transmissibility of the claim was not dissimilar to the provisions in local and domestic statutes on the transferability of claims. It was, however, unclear whether in essence citizenship was of any significance if a claim had been assigned to a person possessing the nationality of another State. It was referred to in paragraph 1, but paragraph 2 stated that the rule applied to a bona fide transfer of a claim. In his opinion, the nationality of the injured party was indeed a central issue, even if the notion was absent in paragraph 2.

60. He recommended that article 9 should be referred to the Drafting Committee.

61. Mr. HERDOCIA SACASA said that the Special Rapporteur's excellent report had enabled the Commission to focus on the relationship between the State and the individual, a subject of major importance in international law. Article 9 did not really call into question the continuous nationality rule in the context of diplomatic protection. The principle that an individual must have been the national of the claimant State, both at the time the injury occurred and when the claim was presented, in order to enjoy that State's diplomatic protection had been accepted in Latin America since 1925. The article purported to revise the basis of diplomatic protection, because a new actor had appeared on the international stage and was demanding his full rights as a subject of international law. The crux of the matter was how to reconcile the appearance of an individual possessing "arms" rights and claims with an institution born of a fiction, where according to Vattel the injury suffered by an individual constituted an injury to the State and where, as a result of the findings in the *Mavrommatis* case, diplomatic protection was regarded as the right of a State. As ICJ had acknowledged in paragraphs 77 and 89 of its judgment in the *LaGrand* case, article 36 of the Vienna Convention on Consular Relations applied not only to the rights of States, but also to those of the individual. Harmonization of the situation arising from the Vattelian fiction with individual rights, which often did not owe their existence to the State but were inherent, was difficult. Contrary to the opinion held by some people, a strengthening of the rights of the individual enhanced State sovereignty and that was also the intention behind the draft article.

62. The problem was how to secure congruence between the rights of the individual and the rights of the State without upsetting the delicate balance between them. Overemphasis of either would seriously damage an institution that had the dual purpose of safeguarding the rights of both States and individuals. In his opinion, the two functions were interrelated. Those who said that diplomatic protection, and therefore the continuity rule, should be revised in the light of the modern focus on the individual were right on the whole, yet such a revision should not jeopardize the efficacy of the institution and must follow the criteria guiding the Commission in its codification and progressive development of international law, namely State practice, judicial decisions and doctrine.

63. He therefore believed that article 9, while protecting States from abusive claims, should provide for exceptions in cases where the continuous nationality rule would certainly lead to a denial of justice to persons

⁹ See *Yearbook* . . . 2000, vol. I, 2620th meeting, para. 13.

who had acquired a new nationality. The introduction of provisions to that effect would constitute true progressive development of the subject matter. In that context, reference would have to be made to State succession and to the possibility of retaining the nationality of the predecessor State, for example, in the event of a transfer of territory or the separation of part of territory, as well as to other cases, like unification or dissolution of States, in which no such possibility existed.

64. He was in favour of an article 9 which, in paragraph 1, would embody the general rule of continuous nationality and, in paragraph 2, would set out as fully as possible well-founded exceptions to the rule to cover instances of involuntary acquisition of nationality, since that would greatly further the progressive development of international law.

65. Mr. DUGARD (Special Rapporteur) said the debate had shown that there were no absolute truths when it came to diplomatic protection. Obviously, the Commission had choices to make with respect to continuous nationality. The prominence given in the debate to the Vattelien fiction and the *Mavrommatis* case had demonstrated the relevance of history, yet it was important to stress that the Vattelien legal fiction, which had infected the thinking of all members, did not really form the foundation of the continuous nationality rule because, according to that rule, the State was injured at the moment of injury to its national and hence the State of nationality at the time of injury would be the claimant State and there would be no need for the injured national to retain his or her nationality at the time the claim was presented.

66. Article 9 was innovative in that it required the Commission to abandon the traditional continuity rule in favour of a more flexible, just rule. Although strong support had been expressed for that position by Mr. Melescanu, Mr. Pellet and several other members, that had been a minority view. It was, however, interesting that those adopting that stance had accepted that the traditional rule on continuous nationality had the status of a customary rule of international law. Clearly, he had been much more convincing in his arguments than counsel before Umpire Parker,¹⁰ because in the *Administrative Decision V* case the customary rule had been rejected.

67. On the other hand, there had been unanimous agreement that flexibility and change of some kind were necessary. Mr. Economides had summed up the idea very well by saying that reasonable exceptions should be allowed and it had also been suggested that those exceptions should be made in the event of State succession and marriage. Personally he disagreed with Mr. Pellet that most changes of nationality were involuntary, because people did change nationality by means of naturalization. The question might well arise in the Drafting Committee whether such changes of nationality after a long period of residence were sufficiently reasonable to constitute an exception to the rule. Nevertheless, it was quite clear that there was support for the view that reasonable exceptions should be permitted to the traditional rule, but that an attempt should be made to avert abuse. At the same time,

Mr. Hafner and Mr. Kateka had warned that it would be difficult to distinguish between voluntary and involuntary changes of nationality.

68. The criticisms of article 9 had not challenged the philosophy of the views advanced in it. Some valid criticisms had been voiced in relation to the notion of a bona fide change of nationality and some members had felt that insufficient attention had been paid to the transfer of claims. Fault had likewise been found with some of the paragraphs of the article.

69. Unfortunately some important issues affecting the traditional rule had not been dealt with in the debate. If that rule were to be retained, consideration would have to be given to the *dies a quo* and the *dies ad quem* when the provisions were reformulated.

70. The apparent differences of opinion in the debate had not really been very wide. The question was whether a change should be made to the guiding principle itself or whether exceptions should be made to the rule. It was, at the current time, plain that a new rule had to be formulated which confirmed the traditional view subject to some exceptions. He therefore recommended that the text be referred to the Drafting Committee.

71. The CHAIRMAN stated that, in his opinion the most appropriate action would be to refer article 9 to the Drafting Committee.

72. Mr. ECONOMIDES said that if article 9 were sent to the Drafting Committee, it would be tantamount to starting again from zero, as so far no principles or exceptions had been put down on paper. The Commission had a very heavy programme and he feared that the Committee would be unable to produce a valid amended text in the short time available to it. He therefore proposed that the Special Rapporteur should submit a new version of article 9 to the Commission at its next session taking account of all the ideas expressed in the debate.

73. Mr. DUGARD (Special Rapporteur) said he agreed entirely with Mr. Economides.

74. Mr. SIMMA said that the Drafting Committee could best employ the short time at its disposal with consideration of the draft articles referred to it at the preceding session.

75. Mr. PELLET said that, apparently, he was not the only person who held that the concepts of the transfer of claims and the nationality of claims were common-law notions which had nothing to do with international law. He hoped that the Special Rapporteur would take note of his concern and respond at some later date.

76. The CHAIRMAN said that, if he heard no objections, he would take it that the Commission wished to request the Special Rapporteur to recast article 9.

It was so agreed.

The meeting rose at 1.05 p.m.

¹⁰ See footnote 4 above.