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Summary record of the 2686th meeting

Topic:
Diplomatic protection

Extract from the Yearbook of the International Law Commission:-
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23. Article 9, paragraph 4, was acceptable, but its provisions should be broadened to exclude diplomatic protection by the new State of nationality against the original State of nationality. He also had strong doubts about the necessity or the relevance of paragraph 3: it was inappropriate to disassociate the general interest of the requesting State from the interest of the injured individual. Classic diplomatic protection covered only protection of the individual. The transferability of claims, a delicate question not adequately dealt with in the report, should be much more restrictive than was allowed for in paragraph 2. The continuity rule should apply except in the case of the involuntary transfer of claims, more particularly upon the death of the injured person.

24. Mr. MELESCANU said that he was speaking, without preparation, in order to obviate the impression that the dominant trend within the Commission was in opposition to the changes proposed in article 9 by the Special Rapporteur, who had given new life to a particularly important aspect of public international law. State responsibility was, after all, largely expressed through diplomatic protection, whether of individuals, company shareholders, ships or aircraft. At a time of globalization, problems involving property or capital investment took on ever greater importance. Another factor was the high concentration of power in the State, which was the only protector of private interests, whether of individuals or legal entities. It had to be conceded, however, that the exercise of diplomatic protection was, unfortunately, largely subordinate to political considerations. It was a fact of life and must be accepted as the premise for constructing an answer to the question of how individual interests could best be protected.

25. As could be seen from the comments by Mr. Rosenstock and Mr. Hafner, even from a practical point of view, there was some point to positive development of the law. The reservations expressed by Mr. Gaja and Mr. Economides were based on theory and precedent. Even in the theory, however, cracks had appeared in the edifice of diplomatic protection. Umpire Parker had clearly said that the injury was to the State only in the sense that the State was entitled to make sure that the provisions of international law were applied to its citizens.⁶ Logically, means should be made available to make good the injury, and the Commission should consider what those means were if, for political reasons, a State decided not to extend diplomatic protection. Article 9, paragraph 1, provided the answer: the protection could be provided by another State. International practice and doctrine thus came together to provide support for the Special Rapporteur's views. Despite the sound arguments for the old rule on continuous nationality, there was a stark choice between staying with that rule or encouraging the progressive development of the law. He would opt for the latter.

26. Mr. GOCO said that diplomatic protection was discretionary not obligatory. Cases existed in which, despite every reason to extend it, a State refrained from doing so. His country had extended diplomatic protection even in cases where the change of nationality had taken place

following an injury, but that practice was by no means universal.

27. The article should address another phenomenon of current international life: that of dual or multiple nationality, which was accepted internationally by virtue of the principles of *jus sanguinis* and *jus soli*, yet had been subjected to attempts to abolish them. Certain conditionalities were set out in paragraph 1 for the exercise of protection in a case of change of nationality in good faith by reason of marriage or naturalization. However, it was important that the rule should not be inflexible and could apply in cases where another State of nationality might also exercise diplomatic protection.

The meeting rose at 4.20 p.m.

2686th MEETING

Tuesday, 10 July 2001, at 10.10 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. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Momtaz, Mr. Operti 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]

FIRST AND SECOND REPORTS OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. HAFNER said that article 9 proposed by the Special Rapporteur in his first report (A/CN.4/506 and Add.1), addressed interesting problems, including that of change of nationality of an injured person who wished to bring claims for injuries suffered under his or her old nationality. According to the well-established basic rule of continuous nationality, the injured person must have the

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).

⁶ *Ibid.*, para. 4.

nationality of the State exercising the right of diplomatic protection at the time of the occurrence of the injury, as well as at the time of the presentation of the claim by the State. That rule seemed to follow from the fact that the State that espoused the claim was claiming its own rights; it was to be considered injured in the person of its nationals. A rule that covered the problems that could arise if a State disappeared or an injured person changed nationality due to marriage or similar events was thus justified. But it was one thing to deal with specific issues and another to draw general conclusions therefrom. Draft article 9, paragraph 1, as it stood, seemed to change the whole substance and meaning of the instrument of diplomatic protection: the State was no longer considered to be injured and entitled for that reason to present claims, but, rather, appeared to act only as a representative of the individual, as its agent. It no longer mattered whether the State was considered the victim of the injury in the persons of its nationals, but only whether the person had the nationality of that State. That would undoubtedly give new meaning to the condition of nationality within the framework of the draft articles on State responsibility. The main thrust of the instrument of diplomatic protection would be shifted from the State to the individual.

2. As a consequence, the traditional Vattelien conception of diplomatic protection⁴ would be thrown overboard. A new concept seemed to be emerging according to which the State was the agent of the national and more emphasis was placed on the well-being of the individual. In that sense, it was not entirely true that the Commission did not deal with human rights. Its work during the quinquennium reflected a certain tendency towards considering the State mainly as an instrument for raising claims in international law. The issue of injury as the basis for such claims had disappeared.

3. One problem that might result from article 9, paragraph 1, was certainly the time of the injury. During the discussion on State responsibility, he thought the members of the Commission had agreed that the breach occurred not when local remedies had been exhausted, but from the time of the breach itself. In the case of diplomatic protection, that would mean that the breach had occurred at a time when the person had had a different nationality. Referring to an issue raised by Mr. Gaja (2685th meeting), he said it was fully understandable that the new State should likewise be bound by the rule that had been breached in respect of the individual. Otherwise, it would appear to acquire a new right without assuming the reciprocal obligation. That argument reflected a State-oriented approach to diplomatic protection based on the traditional understanding. But the position of the individual also had to be taken into account: to request that such a condition should be applied would mean that the individual ran the risk of losing any possibility of being protected by a State.

4. That should not, however, mean that it was possible to generalize the contrary position, even though globalization and the rapid changes of nationality possible under existing conditions seemed to call for such a rule, which would certainly be an extremely progressive step.

It was doubtful, however, that States would be in a position to accept such a proposal. What it might be possible to do would be to enumerate cases in which such a risk might arise and to state explicitly the exceptional nature of the rule. Such cases could be divided into two categories: cases in which the impossibility of applying the rule of continuity of the claim was based on the disappearance of the State (e.g. by dismemberment); and others which resulted from circumstances relating to the individual, such as succession in the claim as a result of death, subrogation, assignment, marriage, adoption, etc. Those situations must be addressed: the basic idea should be that the Commission should cover any situation in which the individual would have no other possibility of obtaining protection by a State.

5. The wording of paragraph 1 had to be clarified. It spoke of a change of nationality, which he understood to mean that the original nationality was lost. Otherwise, a number of additional problems would arise. It might therefore be useful to refer to that condition in the text in order to avoid queries on possibly competitive claims.

6. With regard to the wording of paragraph 2, it was difficult to understand whether it referred to the claims of the individual or of the State. That it should be those of the State was certainly impossible and, if the paragraph dealt with the claims of an individual, it seemed to cover the possibility of subrogation. That issue should certainly be elaborated on and clarified in the text itself.

7. Paragraph 3 also raised problems. It could easily be omitted, since it had very little to do with diplomatic protection, given that the State was injured in its own right from the outset. The matter covered was direct injury to the State and should accordingly not be included in the text, since it would only confuse matters.

8. Paragraph 4 was similar to the rule on dual nationality. Although it differed from that rule, it seemed justified, since a change of nationality would amount to a new right that benefited the individual. As to the conclusion contained in the last paragraph of the report, it was true that even the European Union had considered that the Helms-Burton Act⁵ might be wrongful, but for different reasons than those stated in that paragraph, i.e. because of extra-territorial jurisdiction rather than any inconsistency with the rule expressed in article 9, paragraph 4.

9. In sum, the draft article was a progressive step which reflected a changed conception of the instrument of diplomatic protection. Hence, it should be reformulated and stricter conditions should be incorporated; that could be done by the Drafting Committee.

10. The other questions raised by Mr. Gaja (2685th meeting) must inevitably be answered within the framework of the draft articles. He did not know, however, whether the Commission had already taken a decision to deal with the diplomatic protection of companies, ships or aeroplanes or with that issue in the context of international organizations. If those problems were to be dealt with, it would undoubtedly have to be in the context of the draft articles on nationality and he would be

⁴ See 2680th meeting, footnote 4.

⁵ *Ibid.*, footnote 23.

grateful for information from the Special Rapporteur in that regard.

11. Mr. DUGARD (Special Rapporteur) said that, on the basis of the informal discussions held on the subject, his understanding was that he had a mandate to deal with the diplomatic protection of corporations and shareholders, but not with the protection extended by international organizations.

12. Mr. ELARABY, referring to the work of UNCC, which authorized those who had been injured during the Iraqi invasion of Kuwait to present their claims through a State, either the State of nationality or of residence, or through an international organization, said that persons of various nationalities residing in Australia, Canada, the United Kingdom or the United States, for example, sent their claims through the State in which they were resident. A great many claims, mainly from persons who did not have clearly defined nationalities (for example, Palestinians), were presented through the United Nations Development Programme (UNDP), the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) and sometimes the Office of the United Nations High Commissioner for Refugees (UNHCR). All those claims were accepted as if they had been sent by the proper authorities. The Commission should look at that practice as well and review its decision to consider international organizations outside the scope of its mandate under the topic.

13. Mr. GAJA said that the problem was to see how the ability of an international organization to exercise diplomatic protection affected the ability of the State to exercise diplomatic protection. He continued to believe that the four issues he had raised at the preceding meeting were all very relevant to the exercise of diplomatic protection by the State of nationality.

14. Mr. GOCO pointed out that Mr. Hafner had said that article 9, paragraph 4, applied to a situation of dual nationality. Perhaps he could explain that idea further, since article 9 dealt with a change of nationality, i.e. the loss of a previous nationality, whereas a dual national held two nationalities simultaneously.

15. Mr. HAFNER, replying to Mr. Gaja, said that he had referred only to some of the many problems relating to the question of continuous nationality and nationality itself for the purposes of the diplomatic protection of natural persons. As to Mr. Goco's question, he had said that paragraph 4 reminded him of the dual nationality rule, but that there was a difference between that rule and what was contained in paragraph 4, a difference that was quite justified and could be supported.

16. Mr. SIMMA recalled that, at the fifty-second session of the Commission, open-ended informal consultations had been established. In the report of the informal consultations,⁶ it had been agreed that the draft articles should, for the time being, endeavour to cover the protection of both natural and legal persons. The informal consultations had, however, added that the protection of legal persons raised special problems and accepted that

the Commission might at a later stage wish to reconsider the question whether to include the protection of legal persons. In his view, that meant that the Commission should still be dealing with both natural and legal persons. It seemed, however, that the inclusion of legal persons had not been fully taken into consideration in the Special Rapporteur's work on article 9.

17. Mr. HERDOCIA SACASA said he agreed with Mr. Hafner that there were other options that had not been exhausted in the proposed text of article 9. There was nothing at all outdated about the rule of continuous nationality, which alone was able to guarantee the stability of an institution that was at risk from the power games played by States. Mr. Hafner's idea of attempting to regulate, precisely and directly, specific exceptions to the principle of continuous nationality, yet without making the general principle itself an exception, seemed right.

18. Mr. DUGARD (Special Rapporteur), replying to Mr. Elaraby, said that, in the report that he would eventually submit on the protection of companies and shareholders, he would take account of the jurisprudence of UNCC with regard to dual nationality. He would, however, prefer not to have to deal with the principles of the protection provided by international organizations. It was proper to draw a distinction between traditional diplomatic protection and functional diplomatic protection, as the Working Group on diplomatic protection had confirmed on a number of occasions. As Mr. Simma had pointed out, a decision had been taken at the fifty-second session that the draft articles should cover both natural and legal persons, but, given that a draft article on legal persons had not been discussed or approved in principle, the emphasis would obviously be on natural persons. That was clear from both article 1 and article 9, which essentially required the Commission to decide whether it wished to retain the traditional interpretation of the rule of continuous nationality or whether it considered that the traditional rule should be completely revised or else retained, but with a number of exceptions. In his view, that was the principle that should be considered first. Once the question of natural persons had been considered, it might be necessary to include specific articles dealing with continuous nationality and the transferability of claims relating to legal persons. For the time being, he merely requested guidance on the question whether the traditional principle should be retained or not.

19. Mr. MOMTAZ said that, in chapter III of the first report entirely devoted to continuous nationality and the transferability of claims, the Special Rapporteur had shown extraordinary intellectual integrity: while himself being in favour of abandoning the rule of continuous nationality, the transparency of his study was such that both those for maintaining the rule and those against could find arguments to support their view. However, the numerous examples drawn by the Special Rapporteur from State practice, jurisprudence and doctrine showed that the rule of continuous nationality was extremely well established in international law and there could be little doubt of its customary basis. For that reason, the rule should be retained, unless the Commission wished to be innovative and accept the risk of rejection that was inevitable with such an undertaking.

⁶ *Ibid.*, footnote 24.

20. The new realities of international life and the problems caused for the international community by State succession, particularly when it occurred in violent circumstances, could not be ignored. There had been situations in which individuals had found a nationality imposed on them by a State which, for various reasons, sometimes ethnic or religious, refused to extend them its protection. In such conditions, inspiration must be drawn from the Latin saying *Hominum causa omne jus constitutum est* (Law is established for the benefit of man) and the rules of international law must be made more flexible so that their application would not have excessively unjust and inequitable consequences for the very individuals that they were meant to protect.

21. It was agreed that there was a growing tendency for the traditional approach of international law based on State sovereignty to be supplanted by a human rights-based approach. Thus, the jurisprudence of the International Tribunal for the Former Yugoslavia, wishing to avoid the harmful consequences of applying nationality links too strictly, simply disregarded them and emphasized other criteria which were more to the advantage of the individual. The Tribunal had called into question the definition of the term “protected person” given in the first paragraph of article 4 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949. According to that definition, a victim must, to qualify as a protected person, have a nationality different from that of his oppressor. That, however, had almost never been the case during the bloody armed conflicts that had engulfed the territory of the former Yugoslavia. In its judgement in the *Celebici* case, the Trial Chamber of the Tribunal had skirted the difficulty by applying the criterion of emotional ties rather than of the actual place of residence—which could in any case often be the same—without there being any legal link in terms of nationality. According to the Trial Chamber, in situations where State succession had occurred violently, as had been the case after the break-up of the former Yugoslavia, the nationality criterion could not be decisive in the definition of the concept of “protected person”, where such a person’s nationality had been imposed on him. That jurisprudence had been confirmed by the Appeals Chamber of the Tribunal in its judgement in the *Tadić* case.

22. That example provided an excellent illustration of how international law was developing in a direction that favoured the individual. He was therefore in favour of including some well-defined exceptions to the rule of continuous nationality of the claimant, such as cases in which nationality had been imposed on an individual or withdrawn from him. In such situations, provision could be made for the exception that a State to which the injured individual had emotional ties, or even ties of allegiance, but whose nationality he had not obtained could take up the cudgels for that individual and extend diplomatic protection to him. The application of that criterion could, in practice, give rise to some problems, sometimes insoluble. Such a solution might, however, provide an answer to Mr. Hafner’s concern, although it could appear revolutionary. In all cases where provision was made for an exception to the rule of continuous nationality of a State other than that of nationality of origin, the State could not exercise diplomatic protection against the State whose nationality

the injured individual had held previously. That was the idea expressed in article 9, paragraph 4.

23. Mr. MELESCANU, referring to Mr. Momtaz’s comments, said that, while it was certainly possible to think of other exceptions to the principle of continuous nationality, such as emotional or actual ties, as Mr. Momtaz had said, thereby solving various categories of problem, no solution would be found for the basic problem, which was that which occurred when a State chose, for reasons of its own, not to exercise its diplomatic protection. That was the main problem and the Commission should give guidance to the Special Rapporteur by adopting a position on the issue. It must decide whether it wished to abandon the traditional rule of continuous nationality or abide by it strictly.

24. Mr. LUKASHUK said that the report under consideration was particularly convincing in that the Special Rapporteur did not conceal the fact that practice ran counter to the position that he had adopted in article 9 with regard to continuous nationality. It could, however, be said that the draft article reflected a general trend in the development of international law, whereby increasingly greater importance was attached to the individual. That was no accident, since it merely followed the development of domestic law. More and more modern constitutions, including that of the Russian Federation, placed a legal obligation on the State to protect its nationals and thus conferred on the latter the right to diplomatic protection. The Commission should attempt to reflect that development in international law.

25. The Special Rapporteur showed the greatest objectivity in setting out the relevant jurisprudence. Diplomatic protection had always been considered a discretionary power of the State and an individual who changed nationality could no longer be protected by the State when he lost its nationality. That way of seeing the issue had been progressively contested, in the literature and elsewhere, and a new concept had gradually emerged in practice, even though it was clear from the discussions in the Commission that by no means were all members in sympathy with the new way of viewing the issue. The fact remained that diplomatic protection was increasingly considered a right of the individual which formed part of human rights and should therefore be extended even to a person who had changed nationality. The Commission could not, in any case, shut its eyes to contemporary reality: diplomatic protection was one of the most basic instruments for the protection of human rights in international relations.

26. It was, however, essential to take account of the specific nature of the machinery for implementing the protection of human rights. Otherwise, their effectiveness might be jeopardized. The fact was that international law was still inter-State law and that human rights were protected through States and the machinery set up by States for that purpose. To ignore their specific nature would run the risk of harming the machinery. The question remained controversial and it was difficult to accept what the Special Rapporteur seemed to be saying in his comments on article 9, namely, that the individual should be considered a subject of international law. In any case, it was a question of principle, to which the Commission

could not provide a casual answer while drawing up articles on diplomatic protection.

27. There was also a danger that article 9 would raise problems not with regard to the protection of the individual, but with regard to property, including intellectual property rights. That raised the question of the protection of legal persons. The Commission should admit that it was unable, in the absence of jurisprudence and established practice, to codify detailed rules in that regard, even though it could no longer leave legal persons without protection. The only solution was therefore that it should restrict itself to stating general principles, without going into detail.

28. The question was entirely different when it came to international organizations, since they were part of the international machinery for the protection of human rights, quite independently of the institution of diplomatic protection.

29. Lastly, he said that article 9 represented an important step in the progressive development of international law, fully in line with contemporary trends.

30. Mr. BROWNLIE said that the Special Rapporteur had set himself the arduous task of attacking a principle which was, as he himself had admitted, very generally supported by State practice in a field where Governments claimed that they encountered no difficulties. The Special Rapporteur's laudable aim became obvious on reading article 9, but it was equally plain that the provision prompted some basic objections.

31. The first of those objections was rooted in the existence of the principle established by PCIJ in the *Mavrommatis* case, which the Special Rapporteur had not ignored, since he had quoted from the judgment of the Court in his first report. That principle was often called stuffy and old-fashioned by the *bien pensants*, despite the fact that nationality and citizenship reflected social realities. It was extremely artificial to suggest that the *Mavrommatis* principle was the invention of some elderly lawyers who were completely out of touch with the real world. For that reason, he did not subscribe to the assumption that that rule was unsound in policy. Moreover, it currently represented the law and the Special Rapporteur himself recognized that State practice confirmed that situation.

32. The second basic objection related specifically to State practice and the lack of evidence that it was changing.

33. Thirdly, he considered that the rationale of the principle of continuous nationality had not been taken sufficiently seriously by the Special Rapporteur. The principle had a dual purpose, namely, that established in the *Mavrommatis* case and the desire to prevent the individual from choosing a powerful protector State by an opportunist shift of nationality—a very real possibility which worried Governments. If the Special Rapporteur had taken the rationale of the continuous nationality principle more seriously, he would have found it easier to segregate cases of involuntary change of nationality, standard examples being State succession, death and marriage, in which the rationale did not apply.

34. A further problem arose from the mandate of the Commission: in order for it to develop the law, there had to be some sign of change, however faint it might be. So far, the Special Rapporteur had failed to show evidence of any emergent practice. Further investigation of practice in cases of State succession might reveal situations in which States did waive the continuous nationality principle. The comments by Mr. Momtaz on the International Tribunal for the Former Yugoslavia were interesting in that regard.

35. Two further comments were necessary. First, article 9 suffered from a structural imbalance. The axis of the provision was the concept of a bona fide change of nationality following an injury, but there was no indication of the applicable law or of the precise conditions of that change.

36. The second comment related to the human rights dimension. There was a tendency to forget that diplomatic protection was a means of providing individuals with protection and assistance. Although it was admittedly a discretionary power of the State, it was still a valid institution. Of course, it did not guarantee that human rights would be safeguarded, but the machinery for the protection of human rights, including the institutions in Strasbourg, did not constitute guarantees either and the results achieved were far from impressive. It was unwise to criticize certain institutions of international law for inadequately protecting human rights, when the new institutions established for that purpose did no better. All those institutions had to be kept in place in the hope that their coincident efforts would to some extent protect human rights.

37. The Commission must ask itself whether it would not be advisable to adopt a more structured approach to the special cases or functionally specialized topics, including legal persons, mentioned by various members

38. Mr. RODRÍGUEZ CEDEÑO congratulated the Special Rapporteur on article 9 and said that he particularly appreciated its "human rights" focus.

39. In his first report, the Special Rapporteur acknowledged that continuous nationality was a well-established rule of international law, while pointing out that it could give rise to serious injustice when the injured person had changed nationality, voluntarily or not, following an injury. In the Special Rapporteur's opinion, it was essential to free the institution of diplomatic protection from the chains of that rule, which was no longer valid, and to strive to establish a flexible regime that took account of the current realities of the world.

40. The Special Rapporteur's argument was based on developments in international law, which reflected shifts in international relations and tended to place increasing emphasis on the individual as a subject of international law. The modern view of international law was that its purpose was not solely to regulate relations between States, but to provide individuals with stronger protection, particularly of their human rights. To that end, legal rules must not only be consistent with social reality, but promote change, and that entailed the difficult task of re-appraising accepted standards.

41. The aim was therefore to draw up a rule which guaranteed better protection of the human rights of natural, but not of legal persons. The approach adopted by the Special Rapporteur required the use of criteria other than that of continuous nationality, which should not be merely theoretical. Nor should it be forgotten—and that was an argument for retaining the current rule—that efforts to offer stronger protection of human rights might produce sensitive, if not dangerous, situations.

42. The Special Rapporteur's approach was valid, although not sufficiently supported by practice or legal theory. A rule would have to be formulated which struck a balance between the need to develop the law and the concern to prevent abuses in the exercise of diplomatic protection, especially by the most powerful States. The complexity of naturalization procedures, the criterion of the effective link and the amount of attention paid to questions of nationality by general international law were guarantees against abuses. In his opinion, the purpose of the condition laid down in the second part of paragraph 1, and above all in paragraph 4 of article 9, which should be retained at all costs, was to prevent possible abuses.

43. In conclusion, he believed that further thought should be given to the criterion of nationality, if the maintenance of an established rule of international law were to be reconciled with the need to prevent abuses.

44. Mr. CRAWFORD drew attention to the fact that, historically, diplomatic protection had been based on the notion that the State was seeking to vindicate rights which it had established for itself in the person of its nationals, whether individuals or corporations. That conceptual basis had then been extended to ships, aircraft and their crews. Subsequently, there had been a substantial development of individual human rights, whose field of application overlapped to a considerable extent that of diplomatic protection. It should be remembered that human rights had three specific characteristics: they had been conceived as the rights of individuals themselves and not as the rights of a particular State, they also applied to the nationals of the State responsible for the breach and the procedures by which States could seek to vindicate human rights did not expressly or implicitly require any connection of nationality between the acting State and the individual whose rights had been impaired. Some parallelism therefore existed between the protection of human rights and diplomatic protection, which the European Court of Human Rights had clearly recognized in the field of expropriation in the *Lithgow* case. The question was whether that underlying theory had changed and it was tempting to think that that was so in a world where there was much less reluctance to recognize the rights of non-State entities at the international level.

45. Nevertheless, for the reasons given by Mr. Brownlie, it seemed unwise to start from the opposite assumption. There was a large grey area where some of the purposes and functions of diplomatic protection could and should be extended to persons who, for whatever reason, lacked the nationality of the protecting State, but who must be assimilated with that State for that purpose. Indeed, bilateral agreements on the protection of investments contained broad provisions in that respect. Nonetheless, the structure of modern diplomatic protection, which was

largely treaty-based, was highly dependent on negotiations between States, in which the role of the State as legislator could not really be divorced from its role as the ultimate insurer of the rights in question. A leading case had shown that it was possible to think of diplomatic protection while at the same time considering that individuals had rights at the international level, without classifying those rights as human rights. States still had a role as legislators, but they had a major role as protectors and the principles of diplomatic protection remained valid, though not exclusive.

46. Without subscribing to all the Special Rapporteur's premises, it was therefore possible to arrive at a considerable number of his conclusions if sufficiently carefully drawn exceptions were made, for example, with regard to involuntary changes of nationality. In doing so, the recommendation made by Mr. Gaja (2685th meeting) should be followed and care should be taken to ensure that States were not able to vindicate rights that were not opposable to them. The tendency to amalgamate all the innumerable bilateral investment treaties into one treaty seemed to ignore the fact that the treaties had been negotiated on their own merits and disputes which arose under them related to rights conferred on the parties by those treaties.

47. The Special Rapporteur's proposals should therefore be referred to the Drafting Committee, but on the opposite assumption to the one he had adopted, with a view to achieving middle ground on the need for functional protection consistent with the bases of the institution of diplomatic protection.

48. Mr. PELLET said that he was one of those who considered diplomatic protection to be a fiction, and a fiction which had outlived its usefulness. The fact remained, though, that if its fictional aspect—in other words, the artificial and ideologically oriented explanation of Vattel and of PCIJ in the *Mavrommatis* case—was removed, the institution of diplomatic protection could be helpful. In that connection, he considered that Mr. Brownlie had provided a somewhat partial view of the principle set out in the judgment in the *Mavrommatis* case and of the criticisms it had prompted. No one was disputing the fact that the State could protect individuals possessing its nationality when an internationally unlawful act had caused them an injury. The criticisms related to another element, namely, the trick of claiming that, by exercising its protection, the State was exercising its own right. That was where the fiction lay.

49. As the Special Rapporteur had indicated on a number of occasions in his report, it was clear that the peculiar idea that, when a State took up the cause of one of its nationals, it was exercising its own right had been fabricated to thwart recognition of the international legal personality of private individuals at a time when the "sovereignty-minded" sensitivity of States had been exaggerated. But that "sovereignty-minded" obsession no longer had any justification: the individual had well and truly become a subject of international law, as ICJ had recognized in its judgment in the *LaGrand* case. In that regard, he noted that the Special Rapporteur contradicted himself in his report because he endorsed that view in one paragraph of his report only to challenge it subsequently in another. It was certainly a controversial

question, but as far as he was concerned there was no doubt: the individual was a subject of international law who, as such, could either assert his rights directly (particularly in the areas of human rights and investments) by taking his case to the competent international courts or seek the protection of the State of which he was a national. Given the marginal and often ineffective nature of the direct submission of a case to international courts by individuals, the institution of diplomatic protection was useful, and even indispensable.

50. Like the Special Rapporteur, he considered that a State which extended its diplomatic protection to one of its nationals was asserting the right of the interested party and not its own right. In such a context, the criterion of continuous nationality no longer had any *raison d'être* and must definitely be rethought. Even so, it seemed that article 9 did not follow through to its conclusion the logic that was its inspiration. If the State defended the right of a national, what authorized a State whose nationality the injured person no longer had to exercise its protection on behalf of that person? If the fictional aspect of the *Mavrommatis* principle was abandoned, the traditional rule should purely and simply be reversed: the protecting State was only and could only be the State whose nationality the individual injured by the internationally wrongful act had at the time of the claim. The State of original nationality, for its part, could not complain about anything, except if the injured individual had dual nationality, and that could be a source of problems that should be dealt with in the draft, or if it had itself suffered a direct injury by reason of the internationally wrongful act. In such a case, it was not exercising its diplomatic protection, but acting on its own behalf. The problem was then no longer one of diplomatic protection, but one of reparation. In addition to those two situations, there was a third, that in which the State of original nationality had already begun to act, as rightly provided for at the end of paragraph 1.

51. To be logical, it would first be necessary to state the principle that only the second State, namely, the State whose nationality the injured individual had at the time he introduced his claim, could act, and only subsequently mention the exceptions to the rule. It was true that it might be asked whether that approach was valid because it represented a radical break with the traditional approach. In fact, despite the Special Rapporteur's efforts, he was not convinced that the rule of continuous nationality was not a customary rule, the criticisms being of the fiction rather than of the existence of the rule itself. On that point, he shared the opinion of Mr. Momtaz.

52. Rules were made in order to be amended when they were no longer adapted to a changing international society. In the same way as Mr. Melescanu, he held to the conviction that the Commission would be continuing to play its role in the progressive development of international law by proposing to amend that traditional rule because it was out of step with all contemporary developments in international law. Moreover, that change of direction would not go against any of the previous articles that the Commission had referred to the Drafting Committee, since the draft articles proposed by the Special Rapporteur were careful not to take up the principle stated by Vattel and PCIJ in the *Mavrommatis* case in any of the three options set out at the fifty-second session for ar-

ticle 1 following informal consultations.⁷ His view was that the new direction would be entirely in line with option three which had been adopted at that session for article 1, as well as for article 3, and which he preferred.

53. In short, the Commission should therefore clearly and firmly indicate that, in a case of change of nationality, only the State of actual nationality at the time of a claim could exercise its protection. Then, and only then, should it state the exceptions, namely: first of all, the case mentioned in article 9, paragraph 1, where the State of original nationality had exercised or was in the process of exercising its protection at the date on which the change of nationality occurred; and then the case in which the State of original nationality itself had suffered injury, which was the subject of paragraph 3, although there one was straying outside the strict confines of diplomatic protection and it would perhaps be preferable to refer to it in the commentary. If, however, one wanted to keep it in the draft article, the wording might be amended to read: "Nothing in the preceding paragraphs affects the right of the State of original nationality to bring a claim on its own behalf for injury it has suffered by the internationally unlawful act having also caused harm to the injured person while he or she was its national." Paragraph 4, which prevented the new State of nationality from exercising its diplomatic protection against the State of original nationality, should be retained, partly for the reasons given by the Special Rapporteur in the last paragraph of his report. But there was a slightly different problem in that one was no longer really in the realm of diplomatic protection on account of an injury caused by a third State. In that regard, he considered that the Helms-Burton Act was quite simply unacceptable under international law.

54. He had some reservations about two aspects of article 9. First, paragraph 1 did not satisfy him for two reasons. The Special Rapporteur did not exclude the possibility of the State of original nationality exercising its diplomatic protection, whereas it should be excluded in principle, as had already been said. It would be desirable not to stick to the half-measure proposed by the Special Rapporteur. He also disagreed with the introduction of the idea of good faith. He was far from convinced by the analysis the Special Rapporteur had made, in the section of the report containing conclusions, of the judgment of ICJ in the *Nottebohm* case. In fact, the Court had carefully avoided saying that Mr. Nottebohm had acquired Liechtenstein nationality in bad faith; it had simply observed that that nationality was not enforceable against Guatemala through the lack of an effective link. The effective link requirement was sufficient to prevent the risks of abuse of recourse to diplomatic protection because the granting of nationality produced an effect only if an effective link existed. In that regard, he was surprised that the Special Rapporteur was inventing new rules of the law of nationality in the context of the draft articles on diplomatic protection. Secondly, he did not understand how one could assign a claim. For him, the notion of assigning a claim or of the assignability of a claim was alien to international law; it was a common law concept transposed into international law. He was therefore opposed both to paragraph 2 and to the inclusion of the notion of

⁷ *Ibid.*

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. Candiotti, 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