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First report on diplomatic protection

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Addendum

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Continuous nationality and the transferability of claims

Article 9

1. Where an injured person has undergone a *bona fide* change of nationality following an injury, the new State of nationality may exercise diplomatic protection on behalf of that person in respect of the injury, provided that the State of original nationality has not exercised or is not exercising diplomatic protection in respect of the injured person at the date on which the change of nationality occurs.

2. This rule applies where the claim has been transferred *bona fide* to a person or persons possessing the nationality of another State.

3. The change of nationality of an injured person or the transfer of the claim to a national of another State does not affect the right of the State of original nationality to bring a claim on its own behalf for injury to its general interests suffered through harm done to the injured person while he or she was still a national of that State.

4. Diplomatic protection may not be exercised by a new State of nationality against any previous State of nationality in respect of an injury suffered by a person when he or she was a national of the previous State of nationality.

Comment

1. The rule relating to the continuity of nationality is stated by Oppenheim as follows:

> "From the time of the occurrence of the injury until the making of the award the claim must continuously and without interruption have belonged to a person or series of persons (a) having the nationality of the State by whom it is put forward, and (b) not having the nationality of the State against whom it is put forward."[1]

Although this rule is well established in State practice and has received support in many judicial decisions, it may cause great injustice where the injured individual has undergone a bona fide change of nationality, unrelated to the bringing of an international claim, after the occurrence of the injury, as a result, *inter alia*, of voluntary or involuntary naturalization (e.g., marriage), cession of territory or succession of States. Doctrinally it is difficult to reconcile the rule with the Vattelian fiction that an injury to a national is an injury to the State itself, as this would vest the claim in the State of nationality once the injury to a national had occurred. The rule is also in conflict with the modern tendency to view the individual as a subject of international law. There is therefore a need for a reassessment of the continuity of nationality rule. This article 9 seeks to achieve.

[1] R. Y. Jennings and A. Watts (eds.), *Oppenheim's International Law,* 9th ed. (1992), p. 512 (hereinafter *Oppenheim's International Law*).

1. The classical formulation of the rule and its justification

2. The rule of continuous nationality is seen as "a corollary of the principle that diplomatic protection depends on the individual's nationality."[2] It was explained by Umpire Parker in *Administrative Decision No. V* in the following terms:

> "It is no doubt the general practice of nations not to espouse a private claim against another nation unless in point of origin it possesses the nationality of the claimant nation. The reason of the rule is that the nation is injured through injury to its national and it alone may demand reparation as no other nation is injured. As between nations the one inflicting the injury will ordinarily listen to the complaint only of the nation injured. A third nation is not injured through the assignment of the claim to one of its nationals or through the claimant becoming its national by naturalization. While naturalization transfers allegiance, it does not carry with it existing State obligations."[3]

3. The rule is primarily justified on the ground that it prevents abuse by individuals (who might otherwise engage in protection shopping) and States (which might otherwise acquire old claims for the purpose of putting political pressure on the respondent State).[4] In *Administrative Decision No. V*, Umpire Parker stated that:

> "any other rule would open wide the door for abuses and might result in converting a strong nation into a claim agency in behalf of those who after suffering injuries should assign their claims to its nationals or avail themselves of its naturalization laws for the purpose of procuring its espousal of their claims."[5]

To this Moore adds the exaggerated comment that the absence of the continuous nationality requirement

> "would allow [a person] to call upon a dozen Governments in succession, to each of which he might transfer his allegiance, to urge his claim. Under such a rule the Government supposed to be indebted could never know when discussion of the claim would cease. All Governments are, therefore, interested in restricting such pretensions."[6]

4. Another explanation for the origin of the rule is that Mixed Claims Commissions set up to adjudicate on injuries to aliens were limited in their jurisdiction by the terms of the ad hoc convention under which they were established

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[2] W. K. Geck, "Diplomatic Protection", in: *Encyclopedia of Public International Law* (*E.P.I.L.*) (1992), p. 1055; G. I. F. Leigh, "Nationality and Diplomatic Protection" (1971) 20 *I.C.L.Q.*, p. 456. See also *Panevezys-Saldutiskis Railway* case (Estonia *v* Lithuania) *1939 P.C.I.J.*, Series A/B, No. 76, p. 16.

[3] (1925) *A.J.I.L.*, pp. 613-614.

[4] E. M. Borchard, "The Protection of Citizens Abroad and the Change of Original Nationality" (1934) 43 *Yale Law Journal* pp. 377-380 (hereinafter Borchard, Change of Original Nationality); I. Brownlie, *Principles of Public International Law*, 5th ed. (1998), p. 483; E. Wyler, *La Règle Dite de la Continuité de la Nationalité dans le Contentieux International* (1990), pp. 35-36, 253-259; Geck, *supra*, note 2, p. 1056.

[5] *Supra*, note 3, p. 614. See also *Ambiati* case (U.S. *v* Venezuela), J. N. Moore, 3 *International Arbitrations*, p. 2348.

[6] *Digest of International Law* (1906) 637. See also D. C. Ohly, "A Functional Analysis of Claimant Eligibility", in R. Lillich (ed.), *International Law of State Responsibility for Injuries to Aliens* (1983), p. 285.

and a "strict interpretation of the terms of the convention in question generally resulted in dismissal of the claim unless the claimant was able to prove that he possessed the nationality of the demanding State at the time of the presentation of the claim."[7] There was no need to insert in the terms of the convention any clause relating to the requirement of continuous nationality because the ordinary rules of treaty interpretation ensured that the nationality of the injured person was required both at the time of injury and at the time the claim was presented for adjudication.[8]

2. Status of the rule

5. The assertion is often made that the continuity of nationality rule has become a customary rule as a result of its endorsement by treaties, State practice, judicial decisions, attempted codifications and restatements and the writings of publicists.

6. The rule has "recurred in innumerable treaties, for instance, in nearly all of the 250 lump sum agreements concluded after World War II".[9] It is to be found in the Declaration of Algeria establishing the Iran-United States Claims Tribunal, which provides that:

> "claims of nationals of Iran or the United States, as the case may be, means claims owned continuously from the date on which the claim arose to the date on which this agreement enters into force, by nationals of that State …"[10]

It features in the practice rules of both the United States[11] and the United Kingdom.[12] And it has been confirmed by the decisions of mixed claims

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[7] I. M. Sinclair, "Nationality of Claims: British Practice" (1950) 27 *B.Y.I.L.*, p. 127. See also R. Y. Jennings, "General Course on Principles of International Law" (1967 II), p. 121 *Recueil des Cours*, pp. 476-477. Jennings, relying on Sinclair, says that there are good grounds for holding that the rule of continuous nationality of claims is procedural and not substantive.

[8] Wyler, *supra*, note 4, pp. 259-262; D. P. O'Connell, *International Law*, 2nd ed. (1970), p. 1037.

[9] Geck, *supra*, note 2, p. 1055. See also Sinclair, *supra*, note 7, p. 142; and Wyler, *supra*, note 4, pp. 43-48.

[10] Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (1981), 20 I.L.M., p. 230.

[11] In 1982, the Assistant Secretary of State for Congressional Relations, Powell A. Moore, wrote a letter to the chairman of the Home Committee on Foreign Affairs, in which he stated that "under the long-established rule of continuous nationality, no claimant is entitled to diplomatic protection of the State whose assistance is invoked unless such claimant was a national of that State at the time when the claim arose and continuously thereafter until the claim is presented. In effect, a claim must be a national claim not only at the time of its presentation, but also at the time when the injury or loss was sustained" ((1982) 77 *A.J.I.L.*, p. 836).

[12] In 1985, the British Government published its Rules applying to International Claims. These include the following rules:

"Rule I

"HMG will not take up the claim unless the claimant is a United Kingdom national and was so at the date of the injury.

"Comment. International law requires that for a claim to be sustainable, the claimant must be a national of the State which is presenting the claim both at the time when the injury occurred and continuously thereafter up to the date of formal presentation of the claim. In practice, however, it has hitherto been sufficient to prove nationality at the date of injury and of presentation of the claim (see "Nationality of Claims: British Practice", by I. M. Sinclair: (1950) XXVII B.Y.B.I.L. 125-144) …

commissions, arbitral tribunals and international courts.[13] In the *Kren* claim, for example, the United States-Yugoslavia Claims Commission held, in 1953, that:

> "It is a well settled principle of international law that to justify diplomatic espousal, a claim must be national in origin; that it must, in its inception, belong to those to whom the State owes protection and from whom it is owed allegiance (Borchard, *The Diplomatic Protection of Citizens Abroad,* p. 666). Further, although the national character will attach to a claim belonging to a citizen of a State at its inception, the claim ordinarily must continue to be national at the time of its presentation, by the weight of authority (Borchard, *supra*, p. 666), and there is a general agreement that it have a continuity of nationality until it is filed (Feller, *The Mexican Claims Commission,* p. 96)."[14]

The Permanent Court of International Justice was less explicit in its support for the rule in the *Panevezys-Saldutiskis Railway* case, but it made it clear in a matter involving the rule of continuity of nationality that diplomatic protection was limited to the protection of nationals and that "where the injury was done to the national of some other State, no claim to which such injury may give rise falls within the scope of diplomatic protection."[15] More recently the rule has been reaffirmed by the Iran-United States Claims Tribunal.[16]

"Rule II

"Where the claimant has become or ceases to be a UK national after the date of the injury, HMG may in an appropriate case take up his claim in concert with the Government of the country of his former or subsequent nationality …

"Rule XI

"Where the claimant has died since the date of the injury to him or his property, his personal representatives may seek to obtain relief or compensation for the injury on behalf of his estate. Such a claim is not to be confused with a claim by a dependant of a deceased person for damages for his death.

"Comment. Where the personal representatives are of a different nationality from that of the original claimant, the rules set out above would probably be applied as if it were a single claimant who had changed his national status."

See (1988) 37 *I.C.L.Q.*, pp. 1006-1008. See further on British practice, Sinclair, *supra*, note 7, pp. 131-144.

[13] *Minnie Stevens Eschauzier* (Great Britain *v* United Mexican States), 5 R.I.A.A., p. 209; *Stevenson* claim, 9 R.I.A.A., p. 494; *Milani* case, 10 R.I.A.A., p. 591; *Gleadell* case, 5 R.I.A.A., p. 44; *Bogovic* claim, 21 I.L.R., p. 156.

[14] 20 I.L.R., p. 234.

[15] *Supra*, note 2, pp. 16-17. In this case the Court declined to rule on the preliminary objection relating to continuous nationality on the ground that it belonged to the merits.

[16] The requirement has been imposed on the claim rather than the claimant. Where the nationality of the claim changed between the jurisdictional cut-off date mentioned in the Algiers Declaration (i.e., 19 January 1981, the date of the entry into force of the Claims Settlement Declaration) and the date of filing, proof of nationality on the cut-off date has been held to be sufficient for purposes of jurisdiction (*Gruen Associates, Inc. v. Iran Housing Co. et al.* (1983), 3 I.U.S.C.T.R. p. 97; *Sedco, Inc., et al. v. National Iranian Oil Co.* (1985) 9 I.U.S.C.T.R., p. 248). The Tribunal has held that the date of injury rather than the date of signature of the contract which was violated is the starting date required for jurisdiction (*Phelps Dodge Corp. and Overseas Private Investment Corp. v. The Islamic Republic of Iran* (1986), 10 I.U.S.C.T.R., pp. 121, 126). If these requirements have not been fulfilled the Tribunal dismissed the claim for lack of jurisdiction (e.g. *James Ainsworth v. The Islamic Republic of Iran* (1988), 18 I.U.S.C.T.R., p. 95; *International Systems and Controls Corporation v. Industrial Development*

7. Many attempts have been made to codify the rule of continuity of nationality. One of the earliest of such attempts was Project No. 16 on Diplomatic Protection of the American Institute of International Law, which in 1925 proposed that:

> "In order that a diplomatic claim may be admissible, the individual in whose behalf it is presented must have been a national of the country making the claim at the time of the occurrence of the act or event giving rise to the claim, and he must be so at the time the claim is presented."[17]

In 1929, the Draft Convention on the Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners prepared by the Harvard Law School provided that:

> "(a) A State is responsible to another State which claims on behalf of one of its nationals only in so far as a beneficial interest in the claim has been continuously in one of its nationals down to the time of the presentation of the claim.
>
> "(b) A State is responsible to another State which claims in behalf of one who is not its national only if:
>
> (1) The beneficiary has lost its nationality by operation of law, or
>
> (2) The interest in the claim has passed from a national to the beneficiary by operation of law."[18]

A year later, the Preparatory Committee of the 1930 Hague Codification Conference formulated a more restrictive rule in Basis of Discussion No. 28:

> "A State may not claim a pecuniary indemnity in respect of damage suffered by a private person on the territory of a foreign State unless the injured person was its national at the moment when the damage was caused and retains its nationality until the claim is decided.
>
> "…
>
> "In the event of the death of the injured person, a claim for a pecuniary indemnity already made by the State whose national he was can only be maintained for the benefit of those of his heirs who are nationals of that State and to the extent to which they are interested."[19]

The continuity requirement appeared again in García-Amador's Third Report on State responsibility presented to the International Law Commission, which set out the following rule:

> "1. A State may exercise the right to bring a claim referred to in the previous article on condition that the alien possessed its nationality at the time of suffering the injury and conserves that nationality until the claim is adjudicated.

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and Renovation Organization of Iran (1986), 12 I.U.S.C.T.R., p. 259). On the relevant jurisprudence of the Tribunal see G. H. Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal* (1996), pp. 45-46, and C. N. Brower and J. D. Brueschke, *The Iran-United States Claims Tribunal* (1998), pp. 76-80.

[17] Article VIII. The text appears in *Yearbook ... 1956*, vol. II, p. 227.

[18] Article 15; ibid., p. 229.

[19] Ibid., p. 225.

"2. In the event of the death of the alien, the right of the State to bring a claim on behalf of the heirs or successors in interest shall be subject to the same conditions."[20]

In 1932, the Institute of International Law refused, by a small majority, to approve the traditional rule on continuity of nationality.[21] In 1965, however, it adopted a resolution which reaffirmed the traditional rule by stressing that the claim must possess the national character of the claimant State both at the date of its presentation and at the date of injury. On the other hand, it abandoned the requirement of continuity between the two dates. The resolution provided:

"*First Article*

"(a) An international claim brought by a State for injury suffered by an individual may be rejected by the State to which it is presented unless it possessed the national character of the claimant State both at the date of its presentation and at the date of the injury. Before a court (*juridiction*) seized of such a claim, absence of such national character is a ground for inadmissibility.

"(b) An international claim presented by a new State for injury suffered by one of its nationals prior to the attainment of independence by that State, may not be rejected or declared inadmissible in application of the preceding paragraph merely on the ground that the national was previously a national of the former State.

"*Article 2*

"When the beneficiary of an international claim is a person other than the individual originally injured, the claim may be rejected by the State to which it is presented and is inadmissible before the court seized of it unless it possessed the national character of the claimant State both at the date of injury and at the date of its presentation.

"*Article 3*

"(a) …

"(b) By date of injury is meant the date of loss or detriment suffered by the individual.

"(c) By date of presentation is meant, in case of a claim presented through diplomatic channels, the date of the formal presentation of the claim by a State and, in case of resort to an international court (*juridiction*), the date of filing of the claim before it."[22]

8. Most writers are at best equivocal in their support for the continuity rule. Few display the unqualified enthusiasm for the rule manifested by Edwin Borchard, who

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[20] *Yearbook ... 1958*, vol. II, document A/CN.4/111, p. 61, article 21.

[21] (1932) *Annuaire de l'Institut de Droit International*, vol. 37, p. 278. See further Wyler, *supra*, note 4, p. 41. Cf. Borchard, Change of Original Nationality, *supra*, note 4. Borchard was the Special Rapporteur whose proposal that the traditional rule be reaffirmed was rejected.

[22] Resolution on the National Character of an International Claim Presented by a State for Injury Suffered by an Individual, Warsaw Session, 1965, *Resolutions de l'Institut de Droit International, 1957-91* (1992), pp. 55-56 (1965 II) *Annuaire de l'Institut de Droit International*, vol. 51, pp. 260-262.

saw the reasons to sustain it to be "of fundamental and impregnable validity".[23] Instead opinions range from a questioning of the customary status of the rule[24] to criticism of its fairness from the perspective of both the State and the individual.[25] Wyler, in his comprehensive study, rightly concluded that few jurists are prepared to defend the rule without qualification.[26]

9. The continuity of nationality rule is supported by *some* judicial decisions, *some* State practice, *some* codification attempts and *some* academic writers. On the other hand, there is strong opposition to it.

10. In *Administrative Decision No. V*, Umpire Parker repeatedly stated that the requirement of continuous nationality was not a general principle of international law. He declared:

> "The general practice of nations not to espouse a private claim against another nation that does not in point of origin possess the nationality of the claimant nation has not always been followed. And that phase of the alleged rule invoked by the German Agent which requires the claim to possess continuously the nationality of the nation asserting it, from its origin to the time of its presentation or even to the time of its final adjudication by the authorized tribunal, is by no means so clearly established as that which deals with its original nationality. Some tribunals have declined to follow it. Others, while following it, have challenged its soundness."[27]

In 1932, the Institute of International Law was unable to reach agreement on the continuity rule. Special Rapporteur Borchard's proposal that the rule be endorsed was powerfully challenged by Politis, who stated:

> "The Reporter relies on the practice of diplomacy and jurisprudence in order to state the rule that protection ought not to be given or could no longer be exercised when the injured person has changed his nationality since the date of injury. The real situation is entirely different. A great number of cases apply a contrary theory. In truth, protection ought to be exercised in favour of the individual, without regard to change of nationality, except in those cases in which he makes a claim against the Government of his origin, or decided to acquire a new nationality only for a fraudulent purpose, in seeking the

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[23] Change of Original Nationality, *supra*, note 4, p. 373. See also pp. 300, 377-380. See further E. M. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims* (1915), pp. 660-667 (hereinafter Borchard, *Law of International Claims*).

[24] O'Connell, *supra*, note 8, p. 1036.

[25] G. Balladore-Pallieri, "La Determinazione internationale della cittadinanza di fini dell'esercizio della protezione diplomatica" in *Scritti di Diritto Internationale in Onore di Tomaso Perassi* (1957) vol. 1, p. 123; Geck, *supra*, note 2, pp. 1055-1056; H. F. van Panhuys, *The Role of Nationality in International Law: An Outline* (1959), p. 90; C. Joseph, *Nationality and Diplomatic Protection — The Commonwealth of Nations* (1969), p. 29; Ohly, *supra*, note 6, p. 72; Brownlie, *supra*, note 4, p. 483.

Ohly has contended that

"by leaving such claims uncompensated, strict application of the continuous nationality doctrine allows wrongful international conduct to remain unretributed, rewarding the State whose actions gave right to the claim with additional incentive to conduct itself in a similarly wrongful manner in the future" (*supra*, note 6, p. 286).

[26] *Supra*, note 4, pp. 228-231. See also Joseph, *supra*, note 25, pp. 26-29.

[27] *Supra*, note 3, p. 614.

protection of a strong Government, capable of giving more influence to his claim. The objection raised by the Reporter of the difficulty of proving this fraud is not conclusive. Diplomatic practice shows numerous cases in which it has been possible to offer similar proof; there are celebrated cases, chiefly in the field of divorce, in which fraud has been held established and as a result no account has been taken of the change of nationality, which had been effected."[28]

This failure to reach consensus influenced van Eysinga to find in his dissenting opinion in the *Panevezys-Saldutiskis Railway* case that the continuity practice had not "crystallized" into a general rule.[29]

11. Codification proposals are likewise inconsistent in support for the rule. The 1960 Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens proposed that:

"A State has the right to present or maintain a claim on behalf of a person only while that person is a national of that State. A State shall not be precluded from presenting a claim on behalf of a person by reason of the fact that that person became a national of that State subsequent to the injury.

"The right of a State to present or maintain a claim terminates, if, at any time during the period between the original injury and the final award or settlement, the injured alien, or the holder of the beneficial interest in the claim in which he holds such interest, becomes a national of the State against which the claim is made."[30]

More recently Orrego Vicuña, Special Rapporteur to the International Law Association Committee on Diplomatic Protection, has advanced the following proposal:

"8. Continuance of nationality may be dispensed with in the context of global financial and service markets and operations related thereto or other special circumstances. In such context the wrong follows the individual in spite of changes of nationality and so does his entitlement to claim.

"…

"9. Transferability of claims should be facilitated so as to comply with the standard set out under 8 above.

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[28] (1932) *Annuaire de l'Institut de Droit International* (Oslo session), pp. 487-488. For Borchard's response see *supra*, note 4. For an account of this matter, see Brigg's Report to the 1965 Session of the Institute of International Law: (1965 II) *Annuaire de l'Institut de Droit International* (Warsaw session), pp. 108-114.

[29] *Supra*, note 15, pp. 34-35.

[30] Article 23(6) and (7), in L. B. Sohn and R. R. Baxter, "Responsibility of States for Injuries to the Economic Interests of Aliens", (1961) 55 *A.J.I.L.*, p. 579. See also article 24(2), which provides:

"A State is not relieved of its responsibility by having imposed its nationality, in whole or in part, on the injured alien or any other holder of the beneficial interest in the claim, except when the person concerned consented thereto or nationality was imposed in connection with a transfer of territory. Such consent need not be express …".

"10. Only the State of the latest nationality should be able to bring a claim under the rule set out in 8 above. This claim shall not be made against the former State of nationality. It is a requirement that changes of nationality and transferability of claims be made *bona fide*."[31]

3. Uncertainty about the content of the rule

12. The dubious status of the requirement of continuity of nationality as a customary rule is emphasized by the uncertainties surrounding the content of the alleged rule. There is no clarity on the meaning of the date of injury, nationality, continuity and the *dies ad quem* (the date until which continuity of the claim is required).

13. The "date of injury"[32] is usually construed to mean the date on which the alleged injurious act or omission of the respondent which caused damage to a national of the claimant State took place. Article 3(b) of the 1965 resolution of the Institute of International Law confirmed this interpretation. However, the argument has been advanced that the *dies a quo* is that on which the international delict occurred, that is, the date on which the respondent State failed to pay compensation or the date of the denial of justice.[33] International tribunals have, however, refused to draw such a distinction.[34]

14. Another issue which has been raised with regard to the requirement of nationality at the time of injury is the definition of national. It has been contended before various claims commissions that a declaration of intention to become a national filed at the time of the injury should be sufficient to satisfy the continuous nationality rule. Although the United States-Mexican General Claims Commission on occasion accepted such a declaration of intention supported by residence in the new State of nationality as equivalent to nationality at the origin of the claim, this contention has not been seen as satisfactory by subsequent international claims commissions.[35]

15. The term "continuity of nationality" is misleading as in practice little attempt is made to trace the continuity of nationality from the date of injury to the date of presentation of the claim. Instead only these two dates are considered.[36] Consequently the 1925 American Institute of International Law[37] and the 1965 Institute of International Law[38] proposals require that the holder of the claim be a national of the claimant State at the time of injury and presentation only. Thus a claim could be espoused by the original State of nationality if, after subsequent changes of nationality by its holder or its transfer to nationals of other States, the claim ends up in the hands of a national of the State whose national the injured person was at the time of the injury. The practical relevance of this rule is, however,

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[31] *The Changing Law of Nationality of Claims*: Final Report submitted to the International Law Association Committee on Diplomatic Protection. Unpublished manuscript, p. 27, rules 8-10.

[32] See generally on this subject, Wyler, *supra,* note 4, p. 53.

[33] Joseph, *supra,* note 25, p. 25.

[34] Borchard, *Law of International Claims, supra,* note 23, p. 663.

[35] Ibid., 662-663; Wyler, *supra*, note 4, p. 91.

[36] Cf. Joseph, *supra,* note 25, pp. 24-26, who sees continuity as a third and separate requirement.

[37] *Supra,* note 17.

[38] S*upra,* note 22.

questionable. This was stressed by Briggs in his 1965 report to the Institute of International Law:

> "If the judicial decisions of international tribunals have thus established the rule that, in order to be admissible, a claim must possess the nationality of the State asserting it not only at the origin but also on the date of its presentation to an international tribunal, is there an additional requirement, namely: that such a claim must have been *continuously* national during the period between those two dates? Tribunals are seldom confronted by such a problem. In most instances where a tribunal has stated *in expressis verbis* that a claim must be "continuously" national, from the origin to its presentation, what the tribunal has actually had to decide was whether or not a claim possessed the nationality of the claimant State on one or both of the two crucial dates. (See the *Gleadell* and *Flack* cases, above; and the *Benchiton* case, below.) Cases where a tribunal has had to deal with a claim that possessed the required nationality on both of the crucial dates but lost or re-acquired that nationality in the period between those two dates have arisen seldom and have been controversial."[39]

16. The absence of agreement over the content of the continuity rule is nowhere more apparent than in the dispute over the meaning to be given to the *dies ad quem*, the date until which continuous nationality of the claim is required. The following dates have been suggested and employed as the *dies ad quem*: the date on which the Government endorses the claim of its national, the date of the initiation of diplomatic negotiations on the claim, the date of filing of the claim, the date of the signature, ratification or entry into force of the treaty referring the dispute to arbitration, the date of presentation of the claim, the date of conclusion of the oral hearing, the date of judgement and the date of settlement.[40] The practical significance of the dispute over the *dies ad quem* is illustrated by the case of *Minnie Stevens Eschauzier*, whose claim was rejected because she lost her British nationality when she married an American national between the presentation of the claim and the award.[41] The disagreement over the *dies ad quem* can largely be explained on the grounds that different conventions have been interpreted to set different dates. This was made clear by Umpire Parker in *Administrative Decision No. V:*

> "When the majority decisions in these cases come to be analysed, it is clear that they were in each case controlled by the language of the particular protocol governing the tribunal deciding them, which language limited their jurisdiction to claims possessing the nationality of the nation asserting them not only in origin but continuously — in some instances to the date of the *filing* of the claim, in others to the date of its *presentation* to the tribunal, in others to the date of the *judgment* rendered, and in still others to the date of the *settlement*. This lack of uniformity with respect to the period of continuity of

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[39] "La Protection Diplomatique des Individus en Droit International: La Nationalité des Reclamations", (1965 I) *Annuaire de l'Institut de Droit International*, pp. 72-73. Emphasis in original.

[40] Wyler, *supra*, note 4, pp. 75-80; Briggs, *supra*, note 39, p. 24ff; Sinclair, *supra*, note 7, pp. 128-130. Brownlie, *supra*, note 4, pp. 483-484; G. Schwarzenberger, *International Law*, 3rd ed. (1957), vol. 1, pp. 597-598**;** F. V. García Amador, *The Changing Law of International Claims* (1984), p. 504.

[41] *Supra*, note 13.

> nationality required for jurisdictional purposes results from each case being controlled by the language of the particular convention governing."[42]

However satisfactory this explanation may be, it hardly succeeds in providing evidence of clear State practice to found a customary rule.

17. The element of the continuous nationality rule that has attracted least contention is the requirement that the claim must have originated in an injury to a national of the claimant State. According to Borchard,

> "[f]ew principles of international law are more firmly settled than the rule that a claim, in order to justify diplomatic support, must *when it accrued* have belonged to a citizen … This principle that a claim must be national in origin arises out of the reciprocal relation between the Government and its citizens, the one owing protection and the other allegiance. To support a claim, originally foreign, because it happened to come into the hands of a citizen would make of the Government a claim agent." [43]

Thus a State may not claim on behalf of an individual who became its national by naturalization after the date of injury. To allow this, several decisions assert, would permit the new State of nationality to act as a claim agent.[44] Naturalization is not retroactive, it transfers allegiance, it does not transfer existing obligations. However, where the injury is a continuing one the new State of nationality may institute a claim.[45] The same principle has been applied to the claim of foreign heirs to deceased nationals, the assignment of claims to foreign assignees[46] and insurance subrogation.[47] Inevitably this leads to inequities in individual cases.

4. Jurisprudential and policy challenges to the continuity rule

18. The objections to the continuity rule are not confined to its uncertain content and unfairness. From a theoretical perspective it is out of line with both the Vattelian fiction that an injury to the individual is an injury to the State itself and the growing

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[42] *Supra,* note 3, pp. 616-617. Emphasis in original.

[43] *Supra,* note 23, p. 660. Emphasis in original. See also ibid., pp. 462, 627, 628, 629, 637, 638; Geck, *supra,* note 2, p. 1055; M. N. Shaw, *International Law,* 4th ed. (1997), p. 565; Brownlie, *supra,* note 4, p. 483; Joseph, *supra,* note 25, pp. 24-25; C. Parry, "Some Considerations upon the Protection of Individuals in International Law" (1956 II) *Recueil des Cours,* p. 702; Sinclair, *supra,* note 7, p. 126; *Benchiton* case, in *Annual Digest and Reports of Public International Law Cases 1923-1924,* p. 189.

On this issue Schwarzenberger states:

"Unless the governing instrument calls for a different interpretation, the individual, corporation or ship must possess the nationality of the claimant State at the time of the injury (*dies a quo*). The reason is that the claim is that of the subject of international law which puts forward its claim. If, at the time of the injury, the individual concerned had another nationality or was stateless, the claimant State has received no injury" (*supra,* note 40, p. 597).

[44] *Administrative Decision No. V, supra,* note 3, p. 614; *Ambiati* case, *supra,* note 5, p. 2348.

[45] Borchard, *Law of International Claims, supra,* note 23, p. 661. The notion of "continuous wrong" was raised by Austria to allow it to protect "Czech-Germans" naturalized in Austria after the Second World War, arising from confiscatory measures against their property taken by Czechoslovakia: van Panhuys, *supra,* note 25, p. 95.

[46] *Stevenson* claim, *supra,* note 13, p. 494.

[47] Borchard, *Law of International Claims, supra,* note 23, pp. 627-629, 636-638; Brownlie, *supra,* note 4, pp. 484-485.

tendency to see the individual as a subject of international law. Moreover, there are strong policy objections to it. For these reasons it is a rule ripe for reassessment.

19. Diplomatic protection is premised on the Vattelian notion that an injury to a national is an injury to the State.[48] Logic would seem to dictate that an injury to an alien accrues to the State of nationality immediately at the time of injury and that subsequent changes to the person or nationality of the individual are irrelevant for the purposes of the claim.[49] Yet in the *Stevenson* case[50] this argument was dismissed by the British-Venezuelan Claim Commission of 1903. Here a British subject, long resident in Venezuela, had suffered an injury at the hands of the Venezuelan authorities. Before the claim was arbitrated, the injured national died, and his claim passed by operation of law to his widow, a Venezuelan national according to Venezuelan law, and his 12 children, 10 of whom were also Venezuelan nationals according to Venezuelan law. The British Agent argued that in a claim brought by one State against another, the claimant State seeks redress for an injury to itself and does not merely act as representative for its injured national. Thus the fact that the injured national has since acquired the nationality of the respondent State should not bar the claim, which is founded on an injury to the claimant State *through* its national. Umpire Plumley rejected this argument:

> "The attention of the Umpire has not been brought to an instance where the arbitrators between nations have been asked or permitted to declare the money value of an indignity to a nation simply as such. While the position of the learned Agent for Great Britain is undoubtedly correct, that underlying every claim for allowance before international tribunals there is always the indignity to the nation through its national by the respondent Government, there is always in Commissions of this character an injured national capable of claiming and receiving money compensation from the offending and respondent Government. In all of the cases which have come under the notice of the Umpire — and he has made diligent search for precedents — the tribunals have required a beneficiary of the nationality of the claimant nation lawfully entitled to be paid the ascertained charges or dues. They have required that this right should have vested in the beneficiary up to and at the time of the treaty authorizing and providing for the international tribunal before which the claim is to appear."[51]

Other claims commissions have endorsed this approach.[52]

20. There are sound logical reasons for rejecting the continuity rule and simply recognizing as the claimant State the State of nationality at the time of injury to the national. Indeed this is the solution advocated by Wyler in *La Règle Dite de la*

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[48] See the commentary to article 3 above, A/CN.4/506, para. 62.

[49] O'Connell, *supra,* note 8, p. 1034; Geck, *supra,* note 2, p. 1056; Jennings, *supra,* note 7, pp. 475-476.

[50] *Supra,* note 13, p. 494.

[51] Ibid., p. 506

[52] In the *Milani* case the Italian-Venezuelan Commission stated:

> "While it remains true that an offence to a citizen is an offence to the nation, nevertheless the claimant before an international tribunal is ordinarily the nation on behalf of its citizen. Rarely ever can the nation be said to have a right which survives when its citizen no longer belongs to it" (*supra,* note 13, p. 591).

See also the *Studer* case discussed by Hurst, in (1926) 7 *B.Y.I.L.,* p. 168.

Continuité de la Nationalité dans le Contentieux International (1990).[53] Nevertheless, such a solution is not without its weaknesses, which is conceded by Wyler.[54] In particular, it fails to take account of the new role of the individual in the international legal order.

21. While the individual person may not yet qualify as a subject of international law,[55] the individual's basic rights are today recognized in both conventional and customary international law. Neither the continuity of nationality rule nor the Vattelian notion that gives the State of nationality at the time of injury the sole right to claim, acknowledge the place of the individual in the contemporary international legal order. This was stressed as early as 1932 by Politis when he successfully challenged Borchard's proposal that the Institute of International Law adopt the traditional rule on continuity of nationality.[56] Subsequently jurists such as Geck,[57] O'Connell[58] and Jennings[59] have criticized the rule on similar grounds. It therefore seems preferable to reject the doctrine of continuous nationality as a substantive rule of customary international law. Although the doctrine of continuous nationality creates particular hardships in the case of involuntary change of nationality, as in the case of State succession, it would be wrong to reject it in this case only. Marriage, for instance, may involve a change of nationality and is involuntary, but there seems to be no good reason why it should affect the operation of the rule of nationality of claims differently from cases of State succession.[60]

22. Article 3 of the present draft articles affirms the right of the State of nationality alone to exercise diplomatic protection on behalf of an injured individual, principally on the grounds that this affords the most effective protection to the individual. Article 9 does not depart from this principle in allowing the new State of nationality to institute proceedings on behalf of the individual. By permitting the claim to follow the changed circumstances of the individual it does, however, introduce an element of flexibility into the bringing of claims which accords greater recognition to the rights of the individual while at the same time recognizing that the State is likely to be the most effective protector of individual rights.

23. The principal policy reason for the rule of continuous nationality is that it prevents abuse of diplomatic protection.[61] Today the suggestion made by Moore that without this rule an injured person could "call upon a dozen Governments in succession, to each of which he might transfer his allegiance, to urge his claim"[62] is rightly seen as fanciful. Modern States are cautious in their conferment of nationality and generally require prolonged periods of residence before naturalization will be considered. It is ridiculous to presume or even to suggest that the powerful industrialized nations, which are most able to assert an effective claim

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[53] *Supra*, note 4, p. 264.
[54] Ibid.
[55] *Supra*, para. 1.
[56] *Supra*, note 28. See also F. V. García Amador, First Report, *Yearbook ... 1956*, vol. II, document A/CN.4/96, p. 194.
[57] *Supra*, note 2, p. 1055.
[58] *Supra*, note 8, pp. 1034-1036.
[59] *Supra*, note 7, pp. 476-477.
[60] O'Connell, *supra*, note 8, p. 1036; van Panhuys, *supra*, note 25, pp. 92-94.
[61] *Supra*, para 3.
[62] *Supra*, note 6.

of diplomatic protection, would fraudulently grant naturalization in order to "buy" a claim.[63] Even if this was done the defendant State would in most instances successfully be able to raise the absence of a genuine link, as required in the *Nottebohm* case,[64] as a bar to the action.[65] In his separate opinion in the *Barcelona Traction* case, Sir Gerald Fitzmaurice stated:

> "[T]oo rigid and sweeping an application of the continuity rule can lead to situations in which important interests go unprotected, claimants unsupported and injuries unredressed, not on account of anything relating to their merits, but because purely technical considerations bring it about that no State is entitled to act. This situation is the less defensible at the present date in that what was always regarded as the other main justification for the continuity rule (and even sometimes thought to be its real *fons et origo*), namely the need to prevent the abuses that would result if claims could be assigned for value to nationals of States whose Governments would compel acceptance of them by the defendant State, has largely lost its validity."[66]

5. Conclusion

24. The traditional "rule" of continuous nationality has outlived its usefulness. It has no place in a world in which individual rights are recognized by international law and in which nationality is not easily changed. It is difficult not to agree with Wyler's concluding comment that:

> "Anyway, the effectiveness of diplomatic protection would be appreciably enhanced if it were freed from the continuity rule."[67]

Article 9 seeks to free the institution of diplomatic protection from the chains of the continuity rule and to establish a flexible regime that accords with contemporary international law but at the same time takes account of the fears of the potential abuse that inspired the rule.

25. Article 9, paragraph 1, allows a State to bring a claim on behalf of a person who has acquired its nationality bona fide after suffering an injury attributable to a State other than the person's previous State of nationality, provided that the original State of nationality has not exercised or is not exercising diplomatic protection in respect of the injury.

26. A number of factors ensure that the rule will not lead to instability and abuse. First, it recognizes, in accordance with the Vattelian fiction, that priority should be given to a claim brought by the original State of nationality. Only when this is not done and the individual changes her/his nationality does the claim follow the individual. Secondly, the injured individual who changes nationality is not able to choose which State may claim on his/her behalf: the original State of nationality or the new State of nationality. Only the new State of nationality may institute a claim and only when it — the State — elects to do so.

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[63] Van Panhuys, *supra*, note 25, p. 92.

[64] *1955 I.C.J. Reports*, p. 23.

[65] See Ohly, *supra*, note 6, pp. 288-289.

[66] *Barcelona Traction, Light and Power Company Limited* case, *1970 I.C.J. Reports*, pp. 101-102. See also Ohly, *supra*, note 6, p. 286.

[67] *Supra*, note 4, p. 268.

27. Thirdly, the new nationality must have been acquired in good faith.[68] Where a new nationality is acquired for the sole purpose of obtaining a new State protector, this will normally provide evidence of a mala fide naturalization.[69] Borchard's criticism, made in 1934, that this "confuses motive with illegality or bad faith"[70] is not without substance. However, in the post-*Nottebohm* world no State is likely to initiate proceedings on behalf of a naturalized national where there is any suggestion that naturalization has not been obtained in good faith and where there is no connecting factor between the individual and the State.

28. Article 9, paragraph 2, extends the above principle to the transfer of claims.

29. Article 9, paragraph 3, ensures the right of the State of original nationality to bring a claim where its own national interest has been affected by the injury to its national. The proviso to paragraph 1 also recognizes the special rights of the State of original nationality. This reaffirms the principle contained in article 3 of the present draft articles.

30. The abolition of the continuity rule must not result in the State of new nationality being allowed to bring a claim on behalf of its new national against the State of previous nationality in respect of an injury attributable to that State while the person in question was still a national of that State. The hostile response to the Helms-Burton legislation,[71] which purports to permit Cubans naturalized in the United States to institute proceedings for the recovery of loss caused to them by the Cuban Government at the time when they were still Cuban nationals,[72] illustrates the unacceptability of such a consequence. Article 9, paragraph 4, which ensures that this may not happen, draws support from the proposal of Orrego Vicuña to the International Law Association.[73]

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[68] This requirement is included in Orrego Vicuña's proposal to the International Law Association: *supra,* note 31, rule 10.

[69] See Politis, *supra,* note 28.

[70] Change of Original Nationality, *supra,* note 4, pp. 383-384.

[71] Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996, Public Law, pp. 104-114, of 12 March 1996, reproduced in (1996) 35 I.L.M., p. 357.

[72] See V. Lowe, "US Extraterritorial Jurisdiction: The Helms-Burton and D'Amato Acts", (1997) 46 *I.C.L.Q.*, pp. 386-388.

[73] *Supra*, note 31, rule 10. See also the statement by Politis to the Institute of International Law, *supra,* note 28.