CONCEPT OF NATIONALITY UNDER INTERNATIONAL LAW AND MUNICIPAL LAW – VARIOUS DIMENSIONS

3.1 Introduction

Differing views about the nature of nationality and its relationship to issues of rights and duties lead to different opinions as to the definition of nationality and its consequences in municipal law. While commentators agree that nationality is an important basis for aspects of both municipal and international law, they cannot agree whether it is a status or a relationship. In fact both ideas seem applicable.[1] Santulli remarks that a relationship with the state is not a component of nationality but a condition of such nationality.

> *En effet le lien de fait est une condition de la nationalite mais pas une composante de celle-ci. Le droit interne choisit des faits qu'il utilise comme elements de rattachment (Anknupfung) pour opérer attribution de la nationalite. Mais, parce que le droit interne les utilise comme conditions de fait pour l'attribution de la nationalite, celle-ci se distingue logiquement de ceux-la, si bien que, si on les retient dans la definition de la nationalité c'est parce qu'ils sont necessaires a son attribution et non parce qu'ils en seraient un element constitutif.*[2]

Weis states the general rule, with which all experts seem to agree: "nationality as a term of municipal law is defined by municipal Law". Used in this way, each state can have its own definition of nationality, and dictate its consequences. Weis then

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[1] Albrecht Randelzbofer, "Nationality", in *Encyclopedia of Public International Law*, ed. Rudolf Bernhardt and Max Planck Institute for Comparative Public Law and International Law, vol.8(Amsterdam:Elsevier, 1985),416-424, 417. For a detailed discussion, see Peter Weis, *Nationality and statelessness in international law,* Alphen aan den Rijn: Sijthoff & Noordhoff, 1979, p 29-32.

[2] (Translation: *In fact the real link is a condition of nationality but not a component of nationality. Municipal law chooses "facts" that it uses as elements of rattachment ("Anknupfung") to operate attribution of nationality. However, as municipal law uses them as actual conditions for the attribution of nationality, such "facts" are logically to be distinguished from nationality itself. If we retain them as part of the definition of nationality it is because they are necessary for its attribution and not because they are a constitutive element thereof.) Carlo Santulli, Irregularites internes et efficacite internationale de la nationalite,* Paris, Universite Pantheon-Assas Paris-2, 1995, p. 3.

proposes a general characterisation of nationality on the municipal level as a "specific relationship between individual and State conferring mutual rights and duties". Here however, Randelzbofer disagrees, noting that nationality may be a condition for such rights and duties, but is not their source. He points to the fact that municipal legislation on nationality is confined to the attribution of nationality to human beings, and does not deal with consequential rights and duties. Weis thus sees the status relationship of nationality in municipal law as involving reciprocal substantive rights and duties depending on the state, whereas Randelzbofer sees it simply as a categorisation which may lead to such rights and duties.

The latter view seems to underscore arguments herein that nationality and citizenship are discrete things, and that maintaining the distinction is important for the weighing of the effects of state practice vis-a-vis multiple nationalities. It is interesting to note that Oppenheim's ninth edition begins the section on nationality by stating: "Nationality of an individual is his quality of being a subject of a certain state," whereas the seventh edition read: "Nationality of an individual is his quality of being a subject of a certain State, and therefore it citizen".[3]

According to Randelzbofer's view, nationality's effects on the municipal plane seem to be restricted to determining who is included in the class of nationals. Weis is however correct to point out that whether nationality itself has direct consequences in municipal law depends on municipal law, not on international law, and in many states this does involve rights and duties directly especially where nationality and citizenship are indistinguishable as legal categories, or when municipal law provides a right to claim diplomatic protection or to enter the state. Diplomatic protection and admission to territory are both usually considered consequences of nationality on the international plane, in terms of inter-state relations.

As to the definition of nationality at international law, Weis says that nationality "is a technical term denoting the allocation of individuals, termed nationals, to a specific State the State of nationality as members of that State, a relationship which confers upon the State of nationality… rights and duties in relation

[3] L.Oppenheim, in *International law. A treatise*, ed. Hersch Lauterpacht London, Longmans, Green & Co., 1948, pp.585-86.

to other states".[4] It should be emphasised that it is the state that possesses these rights and duties, not the individual, and that they apply in relation to other states.

Usually, a person's nationality is the same under municipal law and international law. There may however be instances where international law gives the effect of nationality of a particular state to persons who may not have that status under a state's municipal law.

3.2 Nationality in International Law

The introductory comment to the draft convention on the law of nationality proposed by a committee of the Harvard Law School in 1929 stated:

Nationality has no positive, immutable meaning. On the contrary its meaning and import have changed with the changing character of states. Thus nationality in the feudal period differed essentially from nationality, or what corresponded to it, in earlier times before states had become established within definite territorial limits, and it differs now from what it was in the feudal period. It may acquire a new meaning in the future as the result of further changes in the character of human society and developments in international organization. Nationality always connotes, however, membership of some kind in the society of a State or nation.[5]

This premise that the nature of nationality under international law is not immutable is an important point of departure for any enquiry about the consequences of current state practice toward multiple nationalities. There would seem to be few hard and fast rules of international law that dictate the contours of nationality in international law.

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[4] Weis, *Nationality and statelessness in international law*, London, Stevens and sons, 1956, p. 59.

[5] Manley O. Hudson and Richard W. Flournoy Jr., "Nationality – Responsibility of states – Territorial waters, drafts of conventions prepared in anticipation of the first conferences on the codification of international law, The Hague 1930", *The American Journal of International Law,(1929)* vol. 23, April, Supplement, p. 21.

3.3 Recognition of Nationality

It has been shown that states are free to attribute their nationality to whomever they choose on the basis of various modes, with no, or perhaps very few, exceptions. It is an accepted general principle of law that determinations of nationality are, for the purposes of international law, within the domain reserved to each state's municipal law, basically a reflection of state sovereignty within the system of international law and relations. The wide freedom accorded to states, if unfettered, could obviously lead to anomalous and dangerous results, should states begin to abuse this power. Thus, rather than obliging states not to legislate in a certain way with respect to attribution of nationality, international law dictates that when the consequences of such attribution are felt on the international level, it is up to international law whether a bestowal or removal of nationality must be recognized by other states. These are issues related to recognition of nationality. It should be remembered that the basic consequences of nationality at international law are the state's right to diplomatic protection of its nationals, and obligation to allow entry and residence of its nationals.

What constitutes an abuse of state power in this regard is a matter that may be considered controversial. For example, the offer by Spain to attribute Spanish nationality to the grandchildren of Spaniards directly, upon one year's residence, has led to estimates that over one million people, 400,000 from Argentina alone, will move to Spain pursuant to the offer.[6] Spanish generosity in relation to attribution of its nationality was also extended to the survivors of the "Abraham Lincoln Brigade" in 1996 (approximately 90 remaining men), who had travelled from the United States to fight the forces of Francisco Franco in the 1930s.[7] While Spain may validly consider theses groups its nationals, to what extent ate Argentina and the United States bound to do so?

The general rule in relation to attribution and recognition of nationality on the international plane is found in Article 1 of the 1930 Hague Convention:

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[6] David Sharrock, "Spanish welcome migrants", The Australian, 15 January 2003, 9; *Terra, cambio legislacion iberica. Unos 400.000 argentinos podran ser ciudadanos espanoles*, 8 January 2003 (internet), http://www.terra.com.ar/ canales/informaciongeneral /60 /60672. html, consulted 15 march 2006. In relation to the reasons underpinning the program, see Isambard Wilkinson, "Job, house, plane trip – just the ticket to viva Espana". *The Sydney Morning Herold*, 4-5 January 2003, p. 8.

[7] "An earlier foreign war. They fought Franco, in Abe's name", *The Economist*, 3 May 2003, p. 33.

> *It is for each State to determine under its own law who are its nationals. This law shall be recognized by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality.*[8]

International law thus seems to view nationality through a different lens than municipal law. It may recognise attribution of nationality or not, and as already stated, it may even find nationality where a state does not attribute it under its municipal legislation, although to label it as such causes semantic confusion.

A related issue is when states agree among themselves to treat their own nationals as aliens, in certain circumstances, when they are dual or multiple nationals. For example, Australia entered into a Consular Treaty with Hungary that was accompanied by an Exchange of Notes according to which Hungarian-Australian dual nationals will be regarded as Australians by Hungary if they enter that country on Australian passports with visas for temporary visits, and vice-versa.[9]

3.3.1 General Bases for Non-Recognition of Nationality under International Law

Although a nationality may be valid municipally, international law provides that states are not obliged to recognize such nationality (and may thus deny the state claiming the nationality the usual right of diplomatic protection) when the nationality in question has not been attributed in accordance with international law. Aside from the possible categories already discussed, examples include instances where the connection between the individual and the state is not deemed sufficient to warrant the state's claim to protect an individual vis-a-vis other status. Thus:

(1) Naturalisation of nationals of other states who are unconnected to either the territory or the nationals of a State is not required to be recognized.

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[8] Convention on Certain Questions Relating to the Conflict of Nationality Laws, 179. Randelzbofer states that it is the common view that the article reflect, of rule of customary international law. Randelzbofer, "*Nationality*", in *Encyclopedia of Public International Law,* Amsterdam, Elsevier, 1985.p 417.

[9] Ryszard W. Piotrowicz, "The Australian – Hungarian Consular Treaty of 1988 and the regulation of dual nationality", *The Sydney Law Review*, (1990) vol. 12, no. 2/3,pp. 569-583.

(2) Naturalisation of all persons of a given religious faith or political persuasion, speaking a given language, or being of a given race is not required to be recognized.

(3) Acquisition of real estate as a basis for a grant of nationality is questionable.

(4) Inhabitants of mandated and trust territories are not considered nationals of the administering State.

(5) Inhabitants of occupied territories can not be considered nationals of the occupying State.

(6) Automatic attribution of nationality upon marriage is cited by the ILC.[10]

In the example cited above, Spain decided to attribute its nationality to descendants of Spaniards upon their application and only after a period of residence, thus arguably reinforcing a claim to have validly attributed its nationality.

3.3.2 Considerations in Relation to Multiple Nationals

While multiple nationalities are not contrary to international law, the phenomenon has led to the production of specific rules related to the diplomatic protection of multiple nationals. Randelzbofer, while not stating they are customary, says they have found considerable support in international tribunals.[11]

3.3.3 Other Considerations of Recognition of Nationality and the "Nottebohm" Case

The *Nottebohm Case (Liechtenstein v Guatemala)*[12] is often cited (or confused) as dealing with issues of multiple nationality or conferment of nationality

[10] International Law Commission, *Report of the International Law Commission to the General Assembly, Fifty-fourth session,* Official Records, Fifty-seventh session, Supplement no. 10, A/57/10, New York, United Nations, 2002,pp. 174-75.

[11] Randelzbofer, *"Nationality",* in *Encyclopedia of Public International Law,* Amsterdam, Elsevier, 1985, p. 423.

[12] *Nottebohm Case (second phase), Judgment of April 6th, 1955*.For a summary of the facts, holdings and significance accompanied by interesting comments about the advocates. see Weis, *Nationality and statelessness in international law,* London, Stevens and sons, 1956,pp.176-81.

generally. This is arguably because the international Court of Justice (ICJ) applied a test of effective Nationality to the case a test which is commonly used by governments and courts in cases involving multiple nationalities. In fact, it is uncontroverted that Mr Nottebohm was never a multiple national according to the municipal laws of the countries in question. Rather, his case involved the right of a state not to recognise another state's attribution of nationality, and thus to exclude the second state from exercising a right of diplomatic protection. Some authors draw its relevance even more narrowly, in relation to the prerogative not to recognise a nationality attributed by naturalisation in certain circumstances. The case has precipitated much comment and controversy.

Mr Nottebohm had lived in Guatemala as a German national for 34 years, when during a trip to Europe before the outbreak of the Second World War, he acquired the nationality of the Principality of Liechtenstein by naturalisation, on what might be considered flimsy grounds payment of a substantial fee and an annual tax, and the swearing of an oath of allegiance. It was uncontroverted that he thereby lost his German nationality. Nottebohm returned to Guatemala on a Liechtenstein passport. His property was seized (as that of a German national or "enemy alien" during the Second World War) and he was interned in the United States pursuant to an agreement with the Government of Guatemala. Liechtenstein was neutral during the Second World War. It brought suit against Guatemala in the ICJ for the purportedly illegal confiscation of its national's property, and the treatment he suffered.

The ICJ held that Guatemala was not obliged to recognize Nottebohm's Liechtenstein nationality (*i.e.* to recognise Liechtenstein's claim on behalf of Nottebohm), as there was no genuine or effective link between the two, other than Nottebohm's naturalisation. It should be noted that the Court did not rule that Liechtenstein was not entitled to protect Nottebohm generally, just not vis-a-vis Guatemala. The Court also expressly avoided comment on the validity of Nottebohm's naturalisation under international law, Guatemala having urged it to declare the naturalisation itself invalid under general principles of law. The issue was one of specific opposability. But the case seemed to extend the principle of the

genuine or effective link from the context of multiple nationalities to recognition, or opposability of nationality, generally.

Randelzhofer cites the 1958 Flegenheimer Claim before the United States-Italian Conciliation Commission as evidence to the contrary. There, the Commission limited Nottebohm to its facts, holding that the effective link test should not be applied to persons possessing a single nationality.

But when a person is vested with only one nationality, which is attributed to him or her either jure sanguinis or jure soli, or by a valid naturalisation entailing the positive loss of the former nationality, the theory of effective nationality cannot be applied without the risk of causing confusion. It lacks a sufficiently positive basis to be applied to a nationality which finds support in a state law. There does not in fact exist any criterion of proven effectiveness for disclosing the effectiveness of a bond with a political collectivity, and the persons by the thousands who, because of the facility of travel in the modern world, possess the positive legal nationality of a State, but live in foreign States where they are domiciled and where their family and business center is located, would be exposed to non-recognition, at the international level, of the nationality with which they are undeniably vested by virtue of the laws of their national State, if this doctrine were to be generalized.[13]

3.4 Consequences of Nationality

Once attributed, nationality has consequences on both the international and the municipal planes of law. In terms of municipal law, certain rules (rights, entitlements privileges, obligations) are applicable to nationals but not to aliens. Weis points out that in order to distinguish the consequences of nationality at international law from the numerous rights and duties inherent in nationality under municipal law, one must extricate from the relationship between the state and its nationals those elements that "presuppose the co-existence of States, which confer rights or impose duties on the State in relation to other subjects of international law" (*i.e.* states, not individuals).[14]

[13] *Flegenheimer Claim, 20 September 1958 (Italian – United States Conciliation Commission),* International Law Reports (1958), pp. 91-150.

[14] Weis, *Nationality and statelessness in international law*, Stevens and sons, London 1956, p. 32.

In the international context, Shearer[15] lists the "international importance" of nationality as: (1) entitlement to exercise diplomatic protection, (2) state responsibility for nationals, (3) duty of admission, (4) allegiance, (5) right to refuse extradition (6) determination of enemy status in wartime, and (7) exercise of jurisdiction. In qualifying these elements as being of "international importance", he indicates that they relate both to international law and to the general international context of nationality. For our purposes here, it is important to examine these areas in terms of whether they constitute consequences or functions of nationality in international or municipal law, or are linked to a wider perception or importance of nationality in international relations.

3.4.1 The State's Right of Diplomatic, Consular or International Protection, and International Claims

Arguably the most important consequence (or function) of nationality on the international plane is that a sate may protect, or intervene on behalf of its nationals, when they are harmed by other states. This involves providing help or protection to nationals abroad by diplomatic or consular agents, or invoking a claim for compensation when another state has treated a national in violation of international law. The right involved is one of customary international law, of the state of nationality, not the individual. It is unconditional and is unlimited in time, but while states may provide a right to diplomatic protection to their nationals in their municipal laws, in terms of international law its exercise is at the complete discretion of the state.[16]

It would appear that sometimes states choose to subject their nationals to foreign jurisdiction.

> *Diplomatic protection is an inherent element of the personal jurisdiction of States over their nationals, and its exercise has to be recognised by other States, who can only question it by denying the existence of that specific relationship between State and individual which it presupposes, or the existence of the situation for which redress is claimed by the protecting State,*

[15] Gabriel Starke, *Starke's international law,*Editor by Shearer, London, Butter worth's,1994, p. 309.
[16] See generally weis, *nationality and statelessness in international law*, Stevens and sons, London 1956, pp. 32-44.

i.e., a breach of international law by another State in the person of the protected national or his rights.[17]

3.4.2 Diplomatic/Consular of Multiple Nationals

As in issues surrounding recognition of nationality, the diplomatic protection of multiple nationals essentially involves questions of opposability of nationality against other states. It would seem, however, that an increasingly important area of practical concern to states is when their nationals, who are also nationals of a second state, are treated by third states as nationals of the second state, when this results in harm or detrimental treatment.[18]

Returning to opposability, a situation in which the issue often arises is that of international claims, the issue being whether a particular nationality should be notionally attributed to a particular individual vis-a-vis a particular state in relation to a particular claim, usually under a treaty. This issue of protection can be divided into situations where the individual to be protected possesses the nationality of the state against which protection is sought, and situations where a third state or a court is confronted with an individual who possesses more than one nationality.[19] The issue of opposability and recognition may or may not be seen as reflecting an idea of standing at international law.[20]

According to the Principle of equality, found in Article 4 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, "a State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses". According to the principle of effective or dominant nationality (or, genuine or effective link, mentioned above), applied only

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[17] Weis *nationality and statelessness in international law*, Stevens and sons, London 1956, p. 43.

[18] Canadian Prime Minister Jean Chretien protested to the United States over the treatment of Canadian- Syrian dual national Maher Arar, who was deported to Syria from the United States rather than to Canada, on suspicion of having terrorist links. Arar alleged that while in Syria he was beaten, held in harsh conditions, and forced to sign a false confession. DeNeen L. Brown and Dana Priest, "Chretien protests deportation of Canadian", *The Washington Post*, 6 November 2003, A24.

[19] For a general discussion see Blaser, " La nationalite et la protection juridique international de l' individu", Impr. Rencontre 1962, pp. 54-64.

[20] In the *Salem Case* the court stated "the rule of international law is that in a case of dual nationality a third power is not entitled to contest the claim of one of the two powers whose national is interested in the case by referring to the nationality of the other power". *Salem Case, 8 June 1932* (*United States Egypt Special Arbitral Tribunal*), U.N. Reports (1932) vol. 2, 1161. Thus arguably, all states of nationality have in- principle standing to maintain a claim of protection.

vis-à-vis third states in the 1930 Hague Convention, the multiple national is to be treated as only possessing one nationality. "either the nationality of the country in which he is habitually and principally resident, or the nationality of the country with which in the circumstances he appears to be in fact most closely connected".

The principle of effective nationality was applied by the International Court of Justice in the Nottebohm Case, in the context of a single nationality. Australian courts also cited the principle in interpreting obligations under international refugee law with respect to East Timorese asylum-seekers from Indonesia who were Portuguese nationals, combining it with an idea of "effective protection".[21]

In its forty-eighth session (1996), the International Law Commission (ILC) took up diplomatic protection as a subject for codification, appointing Mr Mohamed Bennouna as Special Rapporteur.[22] In 1999 Mr Christopher John R. Dugard assumed the position. [23] Far from dismissing diplomatic protection as less important than in the past, the Special Rapporteur declared that the basis for his proposed articles was that:

> *As long as the State remained the dominant actor in international relations, the espousal of claims by States for violations of the rights of their national remained the most effective remedy for human rights protection.*[24]

In 2004, the ILC adopted 19 draft articles on diplomatic protection, articles six and seven being directly relevant to multiple nationalities.[25]

Article 6

Multiple nationality and claim against a third State

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[21] See *Jong Kim Koe v. Minister for Immigration & Multicultural Affairs* [1997] 306 FCA (Federal Court of Australia); *Lay Kon Tji v. Minister for Immigration & Ethnic Affairs* [1998] 1380 FCA; 'SRRP' *and Minister for Immigration and Multicultural Affairs* [2000] AATA 878 (Administrative Appeals Tribunal of Australia).

[22] International Law Commission, *Report of the International Law Commission to the General Assembly, Fifty-second session,* 141.

[23] International Law Commission, *Report of the International Law Commission to the General Assembly, Fifty-fourth session,* 121.

[24] International Law Commission, *Report of the International Law Commission to the General Assembly, Fifty-second session,* 143.

[25] International Law Commission, *Report of the International Law Commission to the General Assembly, Fifty-sixth session.* New York: United Nations General Assembly Official Records, Fifty-ninth session, Supplement No. 10(A/59/10), 2004, 38-44.

1. Any State of which a dual or multiple national is a national may exercise diplomatic protection in respect of that national against a State of which that individual is not a national.

2. Two or more States of nationality may jointly exercise diplomatic protection in respect of a dual or multiple national.

Article 7

Multiple nationalities and claim against a state of nationality

A State of nationality may not exercise diplomatic protection in respect of a person against a state of which that person is also a national unless the nationality of the former State is predominant, both at the time of the injury and at the date of the official presentation of the claim.

Judge Guggenheim raised the issue of dividing diplomatic protection into its two aspects, consular and diplomatic protection on the one hand, and espousal of claims by the state on the other, in his dissenting opinion in Nottebohm Should the effective link principle attach in the same way to both? Might current state practice toward multiple nationalities provide room for reflection in this regard?

3.4.3 State Responsibility to Other States for Acts of its Nationals

Shearer states that "the state of which a particular person is a national may become responsible to another state if it has failed in its duty of preventing certain wrongful acts committed by this person or of punishing the person after these wrongful acts are committed".[26]

Is it plausible that a State might argue that it is not responsible for the acts of one of its nationals, who are a multiple national, on the grounds that the other state of nationality should be held responsible, or even co-responsible?

The definition of state responsibility and the notion of imputability clarify that this cannot be the case. States are responsible to other states for "the breach of some duty which rests on a state at international law and which is not the breach of a purely

[26] Gabriel Starke, *Starke's international law,* Editor by Shearer, London, Butter worth's, 1994, p. 309.

contractual obligation". But the internationally delinquent act must be imputable to the state itself, not just to its national generally. For this reason, the commission of an internationally delinquent acts by a multiple national raises no conflict in terms of attribution of such conduct to one state or another, as for the act to be raised to the international plane it has to be linked to a specific state itself. This includes failure in carrying out a duty of punishment of guilty persons who harmed the states national in question. The multiple nationalities of individuals thus appeals to raise no difficulties in this context.

The ILC's Articles on State Responsibility also specifically refer to the ILC's work on diplomatic protection, cited above. Article 44(a) of the former states that any claim of state responsibility must be brought according to "any applicable rule relating to the nationality of claim", and Crawford's commentary to the articles notes that:

> *Paragraph (a) does not attempt a detailed elaboration of the nationality of claims rule or of the exceptions to it. Rather, if makes it clear that the nationality of claims rule is not only relevant to questions of jurisdiction or the admissibility of claims before judicial bodies, but is also a general condition for the invocation of responsibility in those cases where it is applicable.*[27]

3.4.4 The Duty to Admit Nationals and to Allow Residence

A state must grant its nationals entry onto its territory and allow them to reside there, and is under an obligation not to expel them. Weis considers a right to residence to be a matter for municipal law, pointing out that rights of the individual vis-a-vis his or her state of nationality only rise to the international plane when other states are drawn in. This is because it is "an accepted rule of international law that states are not unless bound by treaty obligations under an obligation to grant to aliens an unconditional and unlimited right of residence, though they may not expel them arbitrarily and without just cause". Thus a state that refuses to admit its nationals, or expels them to a state unwilling to receive them, violates a fundamental duty of positive international law in relation to territorial supremacy.[28] This is the case, for

[27] Crawford, *The International Law Commission's articles on state responsibility. Introduction, text and commentaries,* Cambridge University Press, 2002, p. 264.
[28] Weis, *nationality and statelessness in international law*, London, Stevens and sons, 1956, p.47.

example, of forced exile, when the receiving state has not consented.[29] The treatment of British Nationals (Overseas) and British Overseas Citizens may thus be called into question, as members of both categories are denied the right of abode in the United Kingdom under immigration legislation.[30]

Regarding former nationals, Weis finds that "no rule of universal customary international law can be proved to exist which binds States to admit former nationals who have not acquired another nationality".[31] He does admit one exception to this rule, following general principles of international aw, in cases that would constitute fraud, where a state denationalises individuals while overseas "solely for the purpose of denying them readmission or to prevent their return".

In other cases of denationalisation of an individual while abroad, he is willing only to say that there is "greater force" to the argument that the former state of nationality must readmit the individual. This is because the good faith of the state that admitted him on the basis of his former nationality would otherwise be betrayed.[32]

3.4.5 Jurisdiction

Jurisdiction is an aspect of sovereignty and refers to judicial, legislative, and administrative competence... The starting-point in this part of the law is the proposition that, at least as a presumption, jurisdiction is territorial.[33] This presumption is clear when enforcement of rules by states is contemplated. Without territorial presence of the person or *res* concerned, no enforcement of legal rules or obligations is possible. But it is clear that ability or power to enforce do not constitute jurisdiction. Mere physical presence is not enough: the state must be able to show that it is exercising its enforcement power on a recognised basis of prescriptive

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[29] Pellonpaa, *Expulsion in international law. A study in international alien's law and human rights with special reference to Finland,* Helsinki, suomalainen Tiedeakatemia, 1984, p. 21. Pellonpaa notes that denaturalisation and expulsion are common means of disposing of political dissidents, pp. 24-25.

[30] H.F. van Panhuys, *The role of nationality in international law – an outline,* Leyden, A. W. Sythoff, 1959, 56.

[31] Weis, *Nationality and statelessness in international law*, London, Stevens and sons, 1956 p. 57.

[32] Randelzbofer maintains that the duty of admission persists in this situation due to what would otherwise amount to deception of the state which has allowed the individual to enter on the basis that she or he can be obliged to return to her or his state of nationality.Randelzbofer, "*Nationality*", in *Encyclopedia of Public International Law,* Amsterdam, Elsevier, 1985.p. 422.

[33] Brownlie, *Principles of public international law*, Oxford University Press, 1966, p. 301.

jurisdiction. Shearer labels these "the territorial principle, the nationality principle, the protection principle, the universality principle, the passive personality principle".

Nationality is one or the key bases upon which states exercise jurisdiction over individuals, on a personal basis as opposed to a territorial one, jurisdiction which may be characterised as very broad. Already in 1895 Lawrence stated that modern international law adopts territorial jurisdiction:

> *As fundamental, but inasmuch as it could not be applied at all in some cases, and in others its strict application would be attended with grave inconvenience, various exceptions have been introduced, based upon the alternative principle that a state has jurisdiction over its own subjects wherever they may be.*[34]

The point of departure for considerations in relation to jurisdiction is state sovereignty.

> *The notion of state sovereignty recognizes the exclusive authority that a state has within its own borders over its own citizens, and aver other persons present there, and it also presumes that matters arising entirely within that state, or as between a state and its own citizens, are not subject to international law Exceptions are: the international law of state responsibility with respect to injury to aliens; the powers of the UN Security Council to act in the case of breaches of, or threats to, international peace and security (recent practice has tended to include also gross breaches of human rights occurring within state borders as constituting a threat to international peace and security); and the application of fundamental norms of human rights, which are no longer seen as lying behind an impermeable barrier of domestic jurisdiction.*[35]

According to the protective (or security) principle of jurisdiction, "international law recognises that each state may exercise jurisdiction over crimes

[34] Lawrence, *The principles of international law*, Boston, 1923 p. 199.
[35] Shearer, "*Jurisdiction*", Oxford University Press, Melbourne, 1997, pp. 161-62.

against its security and integrity or its vital economic interests".[36] Delineating the contours of this jurisdiction, and relating it to the underlying obligations is important as far as understanding the duties nationals and aliens owe states. But it seems difficult to circumscribe the norm, as it is left to each state to judge what is included. The category of acts that affect the state's security or vital economic interests can be so widely interpreted that the standard seems close to being arbitrary. Importantly, the jurisdiction is "over aliens for acts done abroad".[37] Thus if aliens can be held liable for such acts, the standard applicable to nationals also seems to be a matter of importance to international law. Are nationals held to an even higher standard, as far as obligations of loyalty to the state? Are there higher standards?

According to the principle of universal jurisdiction, certain crimes are so heinous that any state may try them without reference to territory or nationality, such as piracy, war crimes, and genocide.[38] Treaties such as the 1949 Geneva Conventions and their 1977 Additional Protocols provide for such jurisdiction, but whether states choose to exercise it in their municipal laws would seem to be another matter altogether. Such attempts have been the cause of much controversy.[39]

3.4.6 Protection of Nationals and the Use of Force

An altogether different issue is whether states have the right to use force to protect their own nationals abroad, when the state in which they are present is either unwilling or unable to protect foreign nationals. Genoni remarks that the right to use force outside national territory to this end was generally accepted until the First World War,[40] but protection of nationals was sometimes used as a pretext to intervene in the political or economic affairs of other states. He cites examples such as the military

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[36] Gabriel Starke, *Starke's international law,* Editor by Shearer, London, Butter worth's,1994, p. 211.

[37] Brownlie, *Principles of public international law*, Oxford University Press, 1966, p. 307. Lanham however, cites cases in relation to acts of nationals abroad, for this principle. Lanham,*Cross-border criminal law*,Melbourne, Pearson Professional, 1997, pp. 35-36.

[38] Shearer, "*Jurisdiction*", 171-74.For example, Spain's Constitutional Court ruled in 2005 that crimes of genocide and human rights violations could be prosecuted in Spanish courts, even if no Spaniards were involved. M. Elkin, "Court gives Spanish judiciary right to try any foreign genocide", *EI Pais (English edition with the International Herald Tribune),* 6 October 2005,1.

[39] Stefaan Smis and Kim Van der Borght, *Belgian Law concerning the Punishment of Grave Breaches of International Humanitarian Law: A contested law with uncontested objectives*, The American Society of International Law. ASIL Insights 2003 (internet), http://www.asil.org/insights/insigh112.htm, consulted 4 July 2003.

[40] Maurizio A. M. Genoni, *Die Notwehr im Volkerrecht*, vol.48. *Schweizer Studien zum int ernationalen Recht,* Zurich: Schulthess Polygraphischer Verlag, 1987, pp. 58-59.

intervention by France, Germany, the United Kingdom, and Japan, the United States and others, during the "Boxer Rebellion" in China in 1900.

Other writers posit that notwithstanding examples of what they label "highly dubious" justifications of use of force by states to protect their nationals in foreign territory, which instead constituted political intervention, such:

> *Abuse of the right to use force to protect nationals in foreign territory does not amount to a denial that the right exists. The practice of states and their expressions of opinio juris indicate that states do believe in this right and will continue to practice it when they consider it necessary to do so.*[41]

A recent example is the ultimatum given by Thai Prime Minister Thaksin Shinawatra to Cambodian Prime Minister Hun Sen in January 2003, to restore order and protect Thai nationals, or face Thai commandos in Pnomh Penh. Thailand accused Cambodian officials of inciting mobs to violence, resulting in injuries to six Thai nationals, the looting of Thai-owned businesses, and the burning of the Thai Embassy. "The Thai Ambassador, Chatchawad Chartsuwan, forced to flee with his staff by scaling a back wall and jumping into a boat on the nearby river, said police and firefighters had stood by".[42]

In many instances injury to nationals does not lead to "rescue" or use of force, but to demands to be involved in the investigative process. An example is the involvement of the United States Federal Bureau of investigation (FBI) in the murders of two US citizens in Indonesia, allegedly planned and carried out by members of the Indonesian military forces.[43]

Use of force is usually based on one of two arguments. The first is that the right stems from a states inherent right of self-defence under Article 51 of the United Nations' Charter, the attack, or threat thereof, amounting to an attack on the state

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[41] Timothy McCormack, "The use of force", in *Public international law. An Australian perspective*, ed. Sam Blay, Ryszard Piotrowicz, and B. Martin Tsamenyi, Melbourne: Oxford University Press, 1997, pp. 238-270, 253. McCormack cites the United States' armed interventions in Grenada and Panama (1990) as such instances.

[42] Mark Baker, "Fiery tug-of-war over Angkor Wat", *The Sydney Morning Herald*, 31 January 2003, p. 7.

[43] Matthew Moore, "FBI joins inquiry into US murders in Papua", *The Sydney Morning Herald,* 17 January 2003, p. 9.

itself. The second, that under customary law, the right exists alongside the UN Charter, and amounts to an exception to the ban on the use of force in Article 2(4).

Another basis for such use of force on behalf of nationals claimed by some authors is the doctrine of humanitarian intervention. Although what might be termed the classic concept of humanitarian intervention was based on notions of humanity, having developed from ecclesiastical justifications, and involved intervention by one state on behalf of persons in another state, some authors include intervention on behalf of nationals within studies surrounding the doctrine and practice.

Does a state have a right to use force against another state to protect its nationals, when the individuals in question also possess the nationality of the other state? If such right to use force is rejected generally, the point is of course moot. However, even if it is accepted that states have the right to use force to protect their nationals against other states, does multiple nationality change the equation? Extrapolating from the principle of equality in relation to the diplomatic protection of multiple nationals, it would seem that the right is weakened in relation to multiple nationals. The right to use force on behalf of nationals is claimed to exist when the second state is unable or unwilling to protect individuals as foreigners. Thus any intervention on the basis of the first state's nationality seems unjustified, as the principle of equality dictates that the second state may regard the individual solely as its national, and treat him or her accordingly. Even if the first state's nationality is the effective one, intervention only seems justified should the second state's treatment of the individual in question be related to the first nationality, and not to its own. This is the substance of the British claims rules cited above in relation to diplomatic protection (not "rescue").

However, while there may indeed be no basis for intervention in favour of multiple nationals against the other state of nationality on grounds of protection of nationals, in cases where there is justification to intervene generally, assuming the legality of an humanitarian intervention, multiple nationality would certainly not constitute a bar. This is because the intervention is not predicated on, or related to, nationality, but based on grounds of humanity.

In this sense, it would seem that the legality of any such intervention on behalf of multiple nationals depends on the legal basis for such intervention. The question might, however, be taken one step further. If general humanitarian grounds for intervention exist irrespective of nationality, do any multiple nationalities of the victims provide added weight to underpin the any multiple nationalities of the victims provide added weight to underpin the legality of such intervention, or does it amount only to what might be called political or social incentive? On its face, it would seem the question is more related to the nature and scope of humanitarian intervention than to questions related to nationality.

3.4.7 The Right to Refuse Extradition and Issues of Judicial Co-Operation

3.4.7.1 Extradition

A "state has a general right, in the absence of a specific treaty binding it to do so, to refuse to extradite its own nationals to another state requesting surrender".[44] Shearer notes that most relevant treaty provisions either bar such extradition absolutely provide that the states concerned "shall be under no obligation to surrender their own nationals". He traces the origins of the practice to antiquity.

It was mentioned above that this is a corollary to the principle of active nationality, which embodies what seems to be a preference in international law, that the state of nationality should prosecute its own nationals, or at least get the "first bite".[45]

Shearer reasons that the provisions of municipal law affect state policy. The Anglo- American attitude of liberal consent to extradition of nationals reflects the fact that under the Common Law jurisdiction in criminal law was for many years based

[44] Gabriel Starke, *Starke's international law,* Editor by Shearer, London, Butter worth's,1994, p. 309.

[45] An example is the rule related to jurisdiction embodied in the Statute of the International Criminal Court, according to which either the state of nationality, or the state where the crime was allegedly committed, must consent to the Court's jurisdiction. See generally Rights & Democracy International Centre for Human Rights and Democratic Development and The International Centre for Criminal Law Reform and Criminal Justice Policy, *International Criminal Court. Manual for the ratification and implementation of the Rome Statute,* Vancouver, Rights & Democracy International Centre for Human Rights and Democratic Development, The International Centre for Criminal Law Reform and Criminal Justice Policy, 2000,pp. 84-86.

strictly on territoriality. Thus, non-extradition of a national would amount to Sanctioning impunity.[46]

However, as the maxim *aut punire aut dedere* shows, on the basis of applicable treaties offenders must be punished or handed over.[47] Thus according to rules of state responsibility canvassed above, a state can be held liable should it fail to prosecute or punish its national for crimes in relation to foreign nationals or states.

In answer to the question whether multiple nationality might allow an alleged criminal to escape the jurisdiction of one state of nationality by fleeing to another, the response must be yes, and that a state's municipal law or policy may prevent the individual in question from being extradited. Although the second state might be held responsible at international law for not extraditing or trying the individual, this is far from certain. But Brownlie notes that "in general, states refuse to extradite nationals, but in some cases to do so without assuming responsibility for trying the suspect is an obvious abuse of power".[48]

Depending on the particular circumstances, as in any question of extradition, it would seem that a refusal to extradite a national charged with a serious offence to another state of nationality, combined with a refusal or inability to prosecute such offence, might present a case of abuse of power. It would arguably be more egregious in cases where the effective nationality is that of the first state. Such a policy would in any case not be conducive toward friendly relations between states.

Oeter states that "questions of the dominant or effective nationality have never been raised internationally in cases of extradition, it seems", but concludes that rather than holding the problem out as an argument against multiple nationality, it is in fact related to the policy by some (mostly European) states not to extradite their nationals.[49] He points out that the underlying problem is in fact the same in relation to

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[46] Shearer, *"Non-extradition of nationals",*Adelaide Law Review Association, University of Adelaide, 1966, pp. 297-98.

[47] Here, and generally in relation to extradition, Gabriel Starke, *Starke's international law*, Editor by Shearer, London, Butter worth's, 1994, p 317.

[48] Brownlie, *Principles of public international law*, Oxford University Press, 1966, pp. 319-20.

[49] Stefan Oeter, *"Effect of nationality and dual nationality on judicial cooperation, including treaty regimes such as extradition*", Rights and duties of dual national by: David A. Martin and Kay Hail bronner, 2003, pp. 58-59.

mono-nationals who live outside their countries of nationality, and proposes that the prohibition against extradition of nationals be abolished."

Regarding extradition requests based on the principle of active nationality and the possibility that various states of nationality might compete for the same individual, Oeter argues that "the principles governing the decision by the executive to grant extradition are flexible enough… to cope with the resulting problems". He reasons that such competing requests are routine, for example when one state requests extradition on the basis of territoriality, and another on the basis of nationality. As to competing extradition requests on the basis of passive nationality, as in cases of application of the principle of active nationality, there are means for states to arrive at decisions, and they are left considerable leeway. In relation to the *Pinochet* scenario canvassed above, Oeter's argument that personal jurisdiction based on passive nationality can override territoriality and active nationality certain egregious cases, has already been mentioned. Although the ILC's draft articles on diplomatic protection canvassed above would exclude diplomatic protection in such cases, the exercise of jurisdiction for a harm done to a national that would otherwise not be addressed arguably falls into a different category of legal norm.

3.4.8 Determination of Enemy Status in Wartime

Weis notes that nationality is sometimes used in municipal legislation as far as determining "enemy character" in wartime, but emphasises the distinction between the two notions.[50] He notes that:

> *Each belligerent State is free to apply - without prejudice to existing treaty obligations its own laws for determining enemy character.... Moreover, nationals of a neutral State acquire enemy character if they have in some way, identified themselves by their conduct with the enemy, e.g., by joining his armed forces: they have become assimilated to enemy nationals. This applies even to the belligerent's own subjects.*

Brownlie remarks that this amounts to a "functional approach to nationality" according to which aliens are not treated as nationals of their particular state of

[50] Weis, *Nationality and statelessness in international law*, *London*, Stevens and sons, 1956, pp. 9-12.

technical nationality, but on other bases such as allegiance, residence, control, and so on. Neff notes the difficulties states face in determining the nationality of persons and things in times of conflict, and separating "neutral" from "enemy" character. He remarks that the issue whether nationality of a neutral state automatically confers neutral status, remains unresolved.[51]

It is important to emphasise again that such determinations are matters for municipal law. As demonstrated above, while nationality may become relevant in the application of the Fourth Geneva Convention of 1949. (relating to the protection of civilian persons in time of armed conflict and occupied territories) as far as specific protection for those who are either not taking part in combat and not covered by diplomatic protection, the fundamental rules related to protection of victims of armed conflict are not affected by nationality.

3.4.9 Allegiance/ Loyalty [52]

The question of whether nationals are held to a certain standard of loyalty or obligation to the state under international law, posed above in the discussion on jurisdiction, was left unanswered. It is in this context that ideas and obligations of allegiance and loyalty must be clearly defined and set out, in particular because they are so often confused. Although allegiance and loyalty are distinct things for the purposes of international Law, they are dealt with here together, because in a certain context allegiance means or implies loyalty, and in another context it means or implies nationality. The fact that loyalty is expected of nationals in legislative and emotional reality makes the ease with which commentators and legislators mix the term easy to understand. For the purposes of international law, however, such mixing is imprecise and arguably incorrect.

Ideas of loyalty in an international context can be seen to move on two interconnecting planes. They are centered on the relationship between the individual and his or her own state, but go to the duty to defend it vis-a-vis other states. The

[51] Stephen C.Neff, *The rights and duties of neutrals. A general history,* Manchester, Manchester University Press, 2000.

[52] Much of this section has been previously published in Alfred Boll, "Nationality and obligations of loyalty in International and municipal law*", The Australian Year Book of International Law* (2004) vol. 24, pp. 37-63.

notion thus seems to operate inwardly or internally, as well as outwardly or externally. This has important ramifications for the consequences and context of multiple nationalities.

Although an obligation of loyalty by nationals to their states certainly appears to be international in nature, it will be argued that in terms of "black letter law" it is a concept and rule of municipal law, as opposed to international law. Loyalty can be said to be an important issue in terms of international relations, or in terms of states expectations of their own nationals vis-à-vis other states, but the international context of loyalty, or allegiance as loyalty, should not be confused with the dictates of international law in relation to nationality. Likewise, emotional issues surrounding loyalty to the state must be separated from what the state can oblige persons to do, and the acts for which nationals and aliens can be held accountable by states. It will be demonstrated that because even non-nationals bear obligations to states generally, expressing these as an obligation of loyalty when a state's nationals are involved, arguably does little to delineate the relevant legal standards.

Allegiance as a term of international law must first be defined, and its other meanings distinguished. Allegiance is:

> *A term of English Law, derived from feudal notions, and connoting the duty owed by the individual to his lord or sovereign as the correlative of his claim of protection upon such superior. Until displaced by the statutory scheme of nationality and citizenship introduced by the British Nationality Act 1948, the concept of permanent allegiance lay at the root of the status of a British subject - of British nationality…..As a common law term and concept, the notion of allegiance has of course passed into the law of the United States and of some other (particularly Commonwealth) states with common law roots. It may possibly belong naturally to other municipal systems with feudal origins. It's increasing use by Anglophone writers to describe the duty owed by any individual to any state, though natural, has little justification.*[53]

[53] Clive Parry et al., eds., *Encyclopaedic dictionary of international law* New York, Oceana Publications Inc., 1986, pp. 16-17. See also Clive Parry, ed., *A British digest of international law*, vol. 5 London, Stevens & Sons, 1965, p. 48.

Parry thus clarifies that the term "allegiance" is used to denote (1) a feudal legal relationship, (2) the present relationship/status of nationality, and (3) duties to the state. His criticism of its use in the latter sense is supported herein, but such use can also have palpable legal effect in some countries, for example in the United States. It will be demonstrated that states hold individuals to the same duty of obedience, without labelling this permanent or temporary "allegiance".

Koessler states that:

> *The term "allegiance" in itself has become archaic. In its feudal setting, "allegiance" denoted a reciprocal correlation of interconnected rights and duties. But in modern states the obligations of the national to the nation are unconditional, rather than contingent upon the state's compliance with corresponding duties.*[54]

He thus concludes that the terms "nationality" and "permanent allegiance" must today mean the same thing. It is clear that the historical nature of the feudal relationship of allegiance as reciprocal rights and duties leads modern authors to imply duties to the state into the relationship/status of nationality, which supplanted feudal allegiance. Parry's questioning of the of the use of the tern "allegiance" to denote duties to the state, including loyalty in the abstract, should be examined more closely, especially in light of Koessler's statement that today, a national's obligations to his or her state arc unconditional. A quick survey will illustrate that both Parry and Koessler are correct.

This issue seems all the more important because the overriding objection to persons possessing the nationality of more than one state has been seen in terms of conflicting loyalties and obligations to the states involved. The topic raises fundamental questions in relation to multiple nationalities, as far as the multiple national's obligations when her or his states of nationality require acts that are in fundamental discord. The context of armed conflict between states is the most-cited example and reason for many commentators adopting the view that multiple nationality in itself is a calamity for the states and the individuals affected. In fact, the

[54] Koessler, *'"Subject,' 'Citizen,' 'National,' and 'Permanent Allegiance'",* in Yale Law Journal, 1946-47 P. 68.

notion of loyalty or allegiance as loyalty would seem to be universally perceived as attaching to the relationship/status of nationality, but not without certain limits.[55]

3.5 Nationality in Bilateral and Multilateral Treaties and Relations

Nationality may be used as a category of reference in international agreements in order to identify groups o individuals regardless of the subject matter involved. Nationality or often "citizenship" is also used in international agreements to identify or categorise individuals with respect to certain topics of importance to states. This is because municipal law uses nationality as a means to categorise individuals in terms of providing privileges and entitlements, or imposing obligations, which is reflected when states make agreements with one another. Thus, whether or not nationality is used to delineate persons in international agreements essentially depends on the subject matter and how municipal law deals with the issue. Most bilateral taxation agreements are not centered on nationality, as the group of persons that both states wish to tax is either broader or narrower than their respective or mutual nationals. However United States tax treaties must deal to some extent with US nationals as a category, as the United States attempts to tax its national's worldwide income irrespective of residence. In other treaties, such as agreements relating to military service, nationality is the single focus of identifying the objects of the treaty as states that impose such an obligation commonly use nationality or citizenship as the criteria for defining the group affected.

The treaty norms of the European Union, which provide for equal treatment for all nationals of EU member states in many areas of law, and prohibit discrimination on the basis of nationality generally, illustrate the subject matter for which nationality has been used to discriminate among groups of person.[56] The prohibition against discrimination based on nationality has been interpreted in terms of the basic freedoms established by EU states, namely the freedom of movement, and the freedom of establishment, harking back to 19th century freedom of commerce and navigation treaties.

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[55] That we have some special obligation to our country is a view not confined to rabid nationalists but almost universally held. This appears particularly clearly in the case of war. Alfred Cyril Ewing, *The individual, the state, and world government*, New York, The Macmillan Company, 1947, p. 213.

[56] See generally Brita Sundberg. Weitman, *Discrimination on grounds of nationality. Free movement of workers and freedom of establishment under the EEC treaty* Amsterdam, North Holland Publishing Company, 1977.

Whether nationality as a relational factor or means of categorisation is either gaining or losing importance in municipal law or international relations is unclear. In anecdotal terms this is, however, the place where issues of globalisation perhaps become most relevant to the topic of multiple nationalities. If movement and contact across borders by individuals is indeed increasingly easy and frequent, it might be expected that states would not choose nationality as a fundamental means of categorising the rights, entitlements and obligations of individuals, but factors such as residence or employment. In Australia, all citizens have a right to participate in the national medical scheme, Medicare, but only those citizens resident in Australia and thus subject to taxation, and similarly-situated permanent residents, are entitled to receive benefits under the scheme. Where national funds are concerned, states clearly have an interest in avoiding financial benefits accruing to the same individual from multiple states, simply on the basis of a formal status.

There is evidence to suggest that states are increasingly aware of such issues, but also of the hardship that can be caused to individuals in this regard. Aleinikoff and Klusmeyer recommend for example, that "citizenship status not be the gatekeeper to access to social benefits and the labor market". [57] On the other hand, nationality is a convenient way to delineate whole categories of people should this result be desired. As in issues surrounding state policy toward inclusion and exclusion, it may be expected that the desirability of nationality as an *Anknupfungspunkt* may vary over time, and according to subject matter.

3.6 International Protection

The first of these elements is the right of the State whose national a person is to grant him protection in relation to other States. As stated by Commissioner Nielsen in the United States-Mexican Special Claims Commission in the case of *Naomi Russell.*[58]

"Nationality is the justification in international law for the intervention of one government to protect persons and property in another country" This protection,

[57] T. Alexander Aleinikoff and Douglas Klusmeyer, *Citizenship policies for an age of migration* Washington, DC, Carnegie Endowment for International Peace, 2002, p.63.

[58] *Opinions of Commissioners* (Sp. CI.C.) (1931), p. 44, at. P. 51; U.N. Reports, vol. IV, p. 805, at p. 811.

which has been termed diplomatic protection is different from the internal, legal protection which every national may claim from his State of nationality under its municipal law, *i.e*. the right of the individual to receive protection of his person, rights and interests from the State. International diplomatic protection is a right of the State, accorded to it by customary international law, to intervene on behalf of its own nationals, if their rights are violated by another State, in order to obtain redress. Its exercise involves the resort to all forms of diplomatic intervention for the settlement of disputes, both amicable and non-amicable, from diplomatic negotiations and good offices to the use of force. As a rule, only amicable means will be resorted to. The usual agents to afford protection are the consular officers of the State, or in more serious cases, its diplomatic representatives.

States have always jealously guarded this right against any restriction by municipal law or administrative practice. When, for example, Salvador embodied in its Constitution of December 6, l883, a provision interpreting "denial of justice" in a manner designed to restrict the interventions of foreign Powers on behalf of their nationals on this ground, and a provision designed o exclude claims against the Government for indemnification for damage suffered in consequence of political disturbances, the diplomatic corps protested on December 24, 1883, and stated that:

Whenever the rights of subjects of the Governments of which they were the representatives should be affected, they would not fail to require that these rights be respected, that they would sustain all just claims, and would demand redress in all cases in which diplomatic intervention might be justified by international law.

On the advice of the Law Officers the British Government protested against similar provisions in the Salvadorian Constitution of August 13, 1886, and in a Law concerning Foreigners of September 29, 1886. Provisions making recognition of foreign nationality dependent on registration with local authorities and creating a presumption of renunciation of foreign nationality by the acceptance of a public appointment were equally found open to objection.

Since, according to the traditional theory, individuals do not possess rights under international law, at least not unless they are conferred on them by treaty, and in particular not in relation to their own State, and hence do not have a right to

diplomatic protection, that State has full discretion to exercise this right or not and to employ any diplomatic means thought fit. It is not a legal right but an extraordinary legal remedy. This is the position under international law, notwithstanding the possibility that nationals may have a right to diplomatic protection by their municipal law.

Few States grant their nationals such a right by their constitutional law. The Constitution of the German Empire of 1870 provided:

"Against foreign States all Germans equally have the right to demand the protection of the Reich" (Article 3, Para 6), and the Weimar Constitution of 1919 laid down similarly that "Against foreign States all Reich nationals have both within and without the Reich a claim to the protection of the Reich'' (Article 112).

But German constitutional lawyers deny the legal character of this norm because the national has no legal claim to protection and cannot enforce its exercise.

Drawing a logical conclusion from the nature of diplomatic protection as a right of the State, Borchard is of the opinion that the State is fully sovereign in employing its right and is not in any way bound by or subject to the exercise or non-exercise of his rights by the protected national. In fact, the ratio of this right seems not so much the protection of the individual national against violation of his rights, as the interest of the State to protect the national community as a whole the nation against other States, whether violated in its rights collectively or in the person of individual members.

According to Borchard the protecting Government which takes up the claim of one of its nationals is neither the agent nor the trustee for the claimant. He contends that the individual has no enforceable control over the claim either in its presentation or in the distribution of any award which may be made as a result of protective intervention. The Government has, therefore, power to settle, release or abandon the claim without the claimant deriving a claim against his own State for such action. It would seem equally to follow that, once diplomatic action has been resorted to, renunciation of the claim by the national is irrelevant for its exercise by the State.

The question of the nature of protection was touched upon by the Permanent Court of International Justice in the *Mavrommatis case.*[59] The Court had to deal with the British contention, advanced by Sir Cecil Hurst, that it had no jurisdiction seeing that the issue was not a dispute between two States but between a private person and a State. The Court held, on this point, in favour of the plaintiff, in these words:

Subsequently the Greek Government took up the case. The dispute then entered upon a new phase; it entered the domain of international law and became a dispute between two States…….. It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights—its right to ensure, in the person of its subjects, respect for the rules of international law.

The question, therefore, whether the present dispute originates in an injury to a private interest, which in point of fact is the case in many international disputes, is irrelevant from this standpoint. Once a State has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the State is the sole claimant. The fact that Great Britain and Greece are the opposing parties to the dispute arising out of the Mavrommatis concessions is sufficient to make it a dispute between two States within the meaning of Article 26 of the Palestine Mandate.

In the *Panevezys-Saldutiskis Railway Case* the Permanent Court of International Justice described the nature of diplomatic protection in the following terms:

In the opinion of this Court, the rule of international law on which the first Lithuanian objection is based is that in taking up the case of one of its nationals, by resorting to diplomatic action or international judicial proceedings on his behalf, Lithuania is in reality asserting its own right, the right to ensure in the person of its own nationals respect for the rules of international law. This right is necessarily limited to intervention on behalf of its own nationals because, in the absence of a

[59] *P.C.I.J.*, Series A, No. 2.

special agreement, it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection, and it is as a part of the function of diplomatic protection that the right to take up a claim and to ensure respect for the rules of international law must be envisaged. When 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 the diplomatic protection which a State is entitled to afford, nor can it give rise to a claim which that State is entitled to espouse.[60]

Another aspect of this question *i.e.*, the nature of the claim advanced by a State on behalf of its national was authoritatively stated by the Permanent Court of International Justice in the *Factory at Chorzow Case*.[61]

International protection of nationals, as distinct from other cases of States exercising protection over individuals, is permanent and universal. It is not proposed to deal here at any length with protection of non-nationals, which again can be divided into temporary and, as a rule, local protection accorded to persons who at the same time enjoy the protection of their national State, and protection accorded to non-nationals in lieu of protection by the State of nationality. To the former category belong:

1. *Protection of de facto subjects (protégés), i.e.,* the protection granted by diplomatic representatives of European States to nationals of Eastern States who are in their service a practice based on custom which is gradually becoming obsolete owing to the abolition of Capitulations and the progressive development of the Eastern States concerned to full membership of the community of nations.

2. *Protection of proteges* in the strict sense, *i.e.,* the protection accorded by the diplomatic or consular representatives of a State to nationals of another State in countries where the latter has no diplomatic representation, under agreements concluded between the two States. Into this category there falls also the protection of nationals of a belligerent in the territory of the other accorded by a neutral State, the so-called "Protecting power," under agreement or upon request.

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[60] *Cf.* The observations on the nature of diplomatic protection in the Advisory Opinion of the International Court of Justice on *Reparation for Injuries Suffered in the Service of the United Nations (I.C.J. Reports.* 1949, p. 174, at pp. 181, 182), and the dissenting opinions by Judge Hackworth (pp.202-4) and Judge Badawi Pasha (pp.206-8).

[61] *P.C.I.J.*, Series A, No.17, at pp.25-9.

3. *Protection accorded to alien seamen* serving in a warship or merchant vessel carrying the flag of the protecting State, a practice based on international custom and municipal law; such protection is limited to the period of services. This protection is purely temporary and does not affect the political status of the seamen, who remain aliens and retain their nationality.

4. *Functional protection of its agents* afforded by an international Organisation. According to the aforementioned Advisory Opinion of the International Court of Justice on *Reparation for Injuries Suffered in the Service of the United Nations*, the United Nations as an Organisation has, in the event of one of its agents in the performance of his duties suffering injury in circumstances involving the responsibility of a State, the capacity to bring an international claim against the responsible *de jure or de facto* Government with a view to obtaining the reparation due in respect of the damage caused to the victim or to persons entitled through him.

3.7 The Duty of Admission

One of the elements inherent in the concept of nationality is the right to settle and to reside in the territory of the State of nationality or, conversely, the duty of the State to grant and permit such residence to its nationals. This right is frequently laid down in the constitutional law of the State, *e g.,* in the Weimar Constitution of Germany of 1919 (Article 111), and in the Swiss Constitution as amended in 1928 (Article 44 (1)). It is a right of the national which he possesses under municipal law. There exist in fact a few exceptions to this rule, in the form of municipal laws which permit the expulsion of nationals as a penal sanction in connection with conviction for a crime. Thus the ancient penal measure of banishment still forms part of French criminal law, but since the nineteenth century it has only been resorted to in isolated Instances (such as the banishment of one Malvy in 1921). It may now only be imposed for certain political offences as a penalty of limited duration, not exceeding ten years.

As between national and State of nationality the question of the right of sojourn is not a question of internatioa1 law. It may, however, become a question bearing on the relations between States. The expulsion of nationals forces other States to admit aliens, but, according to the accepted principles of international law, the

admission of aliens is in the discretion of each State except where a State is bound by treaty to accord such admission. It is likewise an accepted rule of international law that States are not unless bound by treaty obligations under an obligation to grant to aliens an unconditional and unlimited right of residence, though they may not expel them arbitrarily and without just cause. It follows that the expulsion of a national may only be carried out with the consent of the State to whose territory he is to be expelled, and that the State of nationality is under a duty towards other States to receive its nationals back on its territory. It is significant that on April 2, 1817. France enacted an Ordinance providing that a sentence of banishment is to be commuted into detention in a fortress if other States refuse to admit the person sentenced to banishment.[62]

When a national of one State is expelled to another State which has not consented to admit him, or when a State is prevented from returning a foreign national to the State of his nationality by the latter's refusal to receive him back, the foreign State may demand from the State of nationality that it should refrain from expulsion or, as the case may be, re-admit its national, on the ground of the duty of the State to grant to its nationals the night to reside on its territory. That duty of the State towards its nationals under municipal law becomes a duty towards other States; it becomes an obligation of international law. While the right of sojourn in the form of the converse duties of States resulting from it is generally accepted as forming part of international law, it is difficult to find any authority in positive international law on this pint. It was mentioned by Finland in her observations on the points drawn up by the Preparatory committee to the Conference for the Codification of International Law.

The reason is obviously not that the existence of this duty under international law is in any way denied or disputed, but rather that it is generally accepted as an inherent duty of States resulting from the conception of nationality. It is based on the territorial supremacy of States. If States were to expel their nationals to the territory of other States without the consent of those States or were to refuse readmission, thus forcing States to retain on their soil aliens whom they have the right to expel under international law, such action would constitute a violation of the territorial supremacy of these States. It would cast a burden on them which, according to international aw,

[62] *Cf*, Lessing, *Das Recht der Staatsangehorigkeit und die Aber kenning der Staatsangehorigkeit zu straf-und Sicherungszwecken,* Brill, 1937, p. 113.

they are not bound to undertake, and which, if persistently exercised, would necessarily lead to a disruption of orderly peaceful relations between States within the community of nations.

3.8 The Practice of International Tribunals

The following review of decisions of international tribunals purports to examine whether any rules of general. Customary, international law can be derived from them as regards proof of nationality. Any existing rule of particular international law would, of course, lake precedence, but in general the treaties and compromise for the establishment of the tribunals are silent on this point.

As far as can be ascertained, treaties containing provisions as to the means of evidence which shall constitute proof as between the contracting States for the establishment of a person's nationality are rare.

The Treaty between Spain and Argentina of 1863, which provides in Article 7 that inscription in the register of nationals at the Legation or Consulate of the State concerned shall be proof of the respective nationality, is one of them. The so-called Rome Convention of April 1922, *i.e.,* the Treaty on questions of nationality signed by the successor States of the Austro-Hungarian Monarchy and Italy, contains in Article 2 provisions as to the kind of certificate which was to be considered proof of nationality between the Contracting states. The Treaty also contained provisions for the settlement of disputes as to the nationality of individuals by arbitration. The Treaty was ratified by Austria Italy and Poland only.

Settlement of disputes concerning nationality by arbitration has, in international relations, so far been the exception rather than the rule. The competence of the Arbitral Tribunal for Upper Silesia, according to the Geneva Convention of May 15, 1922, to determine questions of nationality, with effect erga omnes in the territories of the Contracting States, constitutes a notable exception.

The cases reviewed accordingly largely concern claims in which the question of the nationality of the claimant, or of the person on whose behalf the claim was lodged by the claimant state, was prejudicial for the question of the nationality of the claim and consequently for the question of jurisdiction of the tribunal, rather than

cases where the tribunal was called upon to adjudicate on a dispute relating to nationality.

3.8.1 Municipal Law of Evidence

It was stated by the president of the Franco-Mexican claims commission (Professor J.H.W. Verzijl), in the *Pinson case* [63] that in regard to proof of nationality three different systems had been propounded:

(1) The international tribunal has full freedom of appreciation of the evidence produced which is not limited by rules of evidence of municipal law.

(2) The international tribunal has to follow the law of the claimant's State.

(3) The international tribunal has to follow the law of the Defendant State.

The third system finds support in certain individual awards of the Permanent Court of Arbitration in the *Expropriated Religious Properties Case*, decided in 1920. It will be recalled that the jurisdiction of the Court in this case was based on a compromise between the Governments of France, Great Britain and Spain, on the one hand, and the Portuguese Government, on the other, concluded in Lisbon on July 31, 1913. Of the eighteen individual claims espoused by the Spanish Government, seventeen were declared inadmissible on the ground that the Spanish nationality of the claimants had not been proved. With slight variations the Tribunal rejected each of them in the following terms:

Whereas, the Portuguese government makes the objection in the first place that this claim does not come under the jurisdiction of the Tribunal, because the aforementioned claimant does not in any manner prove his nationality;

Whereas, the Spanish Government has had knowledge of this exception through the Portuguese counter case and has not draw up any statement;

Whereas, the Tribunal is charged, by virtue of Article 1 of the compromise, to render judgment upon claims relative to the property of nationals of Spain, France and Great Britain, but whereas the claimant does not prove in the manner prescribed

[63] *U.N.Reports*, vol. V, p. 361; *Annual Digest*, 1927-28, Case No. 194.

by the Spanish Civil Code and the Portuguese Civil Code that he belongs to one of the aforementioned nationalities……..[64]

The Court did not give reasons why the claimant ought to have proved possession of Spanish nationality according to Portuguese law; and its reasoning has been criticised by the Franco - Mexican Claims Commission in the *Pinson Case*, by Schwarzenberger and by Feller.

In the *Russell Claim,* decided in 1931 by the United States- Mexican Special Claims Commission, Commissioner Nielsen said:

The rights of American citizenship are not matters constituted by Mexican law, either as regards the definition of such rights in the light of constitutional or statutory provisions of law, or as regards methods of proof. [65]

Mention may also be made of the case of *Ruinart Pere & Sons v. Franzmann*, decided by the Franco-German Mixed Arbitral Tribunal. In that case the Tribunal held that it had no jurisdiction as the defendant had proved that he did not possess German nationality according to German law, although a Belgian Court of Appeal had held that he was a German national under the provisions of a special Belgian Law of November 17, 1921, concerning the Sequestration and Liquidation of Assets of German Nationals (Article 2).

The second system, *i.e.,* that nationality has to be proved before an international tribunal in accordance with the law of evidence of the State whose nationality is to be proved, has frequently been asserted by the parties before international tribunals. It was upheld by the German-Mexican Mixed Claims Commission in an interlocutory resolution made by the Umpire, Senor Cruchaga Tocornal, in 1927, in the *Klemp Claim*. The question was whether a consular certificate issued by a German Consul in Mexico was sufficient proof of German nationality. The Umpire held that it was not. He based his findings on the ruling that:

The nationality of a person is an integral part of his civil status and must be proven in the manner established by local law of the country whose nationality the

[64] Scott, *Reports*, vol. II, p.20,
[65] *U. N. Reports*, vol. IV, p. 805, at p. 808.

interested party claims, is a principle accepted by both parties to the present claim and is in accord with the general doctrine of international law. [66]

3.8.2 Rules of Evidence

(a) Nature at rue Evidence Required

The first question which arose in claims cases before international tribunals as to evidence of nationality was that of the conclusiveness of the proof to be furnished. Convincing proof was required by the United States-Mexican General Claims Commission in *Hatton's Case*. The case of *William A. Parker* has also been cited in support, but it was explicitly stated in this case:

…….the Commission rejects the contention that evidence put forward by the claimant and not rebutted by the respondent must necessarily be considered as conclusive. But, when the claimant has established a prima facie case and the respondent has offered no evidence in rebuttal, the latter may not insist that the former pile up evidence to establish its allegations beyond a reasonable doubt without pointing out Some reason for doubting……..[67]

That prima facie evidence is sufficient was indeed the view held by international tribunals in the majority of cases. It was held with practically unbroken uniformity" that a certificate of naturalisation was prima facie evidence of nationality. This view was also taken in the *Dominquez Case*, decided by the United States Spanish Commission. More recently, prima facie evidence was considered sufficient by the Mexican Claims Commissions in the cases of *Lynch* and *Pinson*. In both these cases the Presiding commissioners took the view that to ask for conclusive evidence would be to ask for a "*probatio diabolica*."

(b) Admission by Defendant

What constitutes satisfactory evidence will be determined by the tribunal on the merits of the case. Since the task of the tribunal is the ascertainment of truth, the

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[66] 24 A.J (1930), at p. 620. He cited Fiore, *Derecho international Privado*, s. 345. Ralston, *The Law and Procedure of International Tribunals,* Stanford University Press 1926, p. 160.

[67] *U.N. Reports,* vol. IV, p. 39.

fact that the nationality of the claimant has not been disputed by the defendant Government is not decisive. It was held in the *Parker Case:*

On the other hand, the Commission rejects the contention that evidence put forward by the claimant and not rebutted by the respondent must necessarily be considered as conclusive……[68]

(c) The "Best Evidence" Rule

The so-called "best evidence'' rule is a rule of common law, whose scope has not been precisely defined. The term has, for this reason, been subjected to criticism. It certainly covers the principle that the terms of a document have to be proved by the document itself, and that copies of documents are only to be admitted when the original has been lost or destroyed. International tribunals, however, not being bound by local rules of evidence, are not bound by this rule. They have followed it in so far as they have preferred primary or direct evidence to secondary or indirect evidence. Not being tied to any strict rule, they have, however, admitted secondary evidence, even when primary evidence might have been available. International tribunals have almost invariably considered themselves free to assess weight of such evidence. Certified copies of documents have been accepted somewhat freely as sufficient proof of the contents of the original document.

The British-Mexican Claims Commission referred indirectly to the "best evidence" rule in the *Udell Case*. In *Cameron's Case,* decided by the same Commission, the British Commissioner referred to the rule as regards establishment of birth, for which, in England, the Register of Births was the best evidence.

(d) Specific Methods of Proof

Writers on international law have, in a somewhat eclectic way, reviewed the attitude of international tribunals towards specific kinds of proof and methods of establishing nationality, including documentary evidence, both as regards their admissibility and as regards their probative force. It is submitted that such eclecticism serves little purpose. The decisions were largely taken by tribunals established *ad hoc* and, in the absence of the principle *stare decisis*, their practice can only to a very

[68] *U.N. Reports*, vol. IV, p. 35, at p. 39.

small extent be considered as having contributed to the development of rules of evidence by way of precedent. Decisions as to the admissibility of certain means and modes of proof and their probative value were taken on the merits of each case, and have to be understood in the light of all the circumstances of the case. The probative value of certain types of documentary evidence, such as documents describing a person as a national of a certain State, depends on the intrinsic value of the document itself, and on the nature and amount of evidence required by the issuing authority for the establishment of the nationality of the person.

(e) Evidence of Naturalisation: the Question of Fraud

The question of evidence of nationality which has occupied international tribunals most frequently is that of proof of nationality acquired by naturalisation. The certificate of naturalisation, and, in the case of countries such as the United States, where naturalisation proceedings are conducted by the courts, and the judicial record of the proceedings are the best evidence. Other evidence will only be admitted where it can be shown that the certificate or record has been lost or destroyed. Such other evidence may include circumstantial evidence and even the testimony of witnesses as to the naturalisation proceeding. The latter was accepted in the *Mantin Claim* before the United States-Mexican Claims Commission in 1868.

A problem which frequently exercised the Claims Commissions was whether they were conclusively bound by evidence of naturalisation, whether the claim to a particular nationality by a person to whom a certificate of naturalisation had been granted could be validly contested by the defendant government. This is the so-called question of impeachment of certificates of naturalisation. It is one of the few questions in this field where a rule seems to have been developed by international tribunals by way of precedent.

3.9 Nationality and Rules Concerning Conflicts of Criminal Jurisdiction

3.9.1 Nationality as a Basis for the Extraterritorial Operation of Penal Laws

Although the exercise of penal jurisdiction by a State in respect of crimes committed within its boundaries is considered nowadays to be normal procedure, even if the acts are committed by foreign nationals, history shows that this so-called

territorial principal was not by any means always taken for granted, in fact it only gradually came to replace the principle of personal jurisdiction. At present, however, it can even be said that in this domain personal jurisdiction has retreated further into the background than has been the case in private international law, since in procedural matters connected with prosecution, trial and punishment the laws of the prosecuting State alone, and never the national laws of the offender are applied. Nor is it usual to apply the municipal law of the accused in questions concerning substantive penal law, unless perhaps for deciding preliminary questions, *e.g*. crimes against family law, such as bigamy and adultery. Lately, however, suggestions have been made that, as far as questions of jurisdiction and punishment are concerned, the national laws of the criminal should receive more consideration.

As long as a State abstains from performing acts of sovereignty inside the territory of another State, international law does not, in principle, forbid the former to take legislative measures also in the field of penal law in respect of facts occurring beyond its frontiers. This is not to say, however, that there are no limitations upon a State's jurisdiction in these matters. The PCIJ considered this problem in the *Lotus Case,* but unfortunately without committing itself to any definite view Unlike Dahm, who adheres to a different interpretation of this judgment. At present, the exercise of criminal jurisdiction with regard to crimes committed abroad must be considered to be an exception, both from the point of view of international law and as a matter of desirable penal law. Here nationality plays an important role in that either the nationality of the accused (principle of active nationality) or the nationality of the victim (principle of passive nationality) is often considered as providing ground for such an exception. These two principles will be dealt with successively.

a. The Penal Laws follow the National Abroad (Principle of Active Nationality)

The principle of active nationality, proving that even in time field of criminal law the personal concept of law is not entirely obsolete, corresponds to a certain extent to the view which is often held that nationals should not be extradited to foreign States.

This principle is applied by a great many countries in the world. Two arguments are frequently adduced in its support: (1) the allegiance owed by the national to his State, and (2) the fact that the jurisdiction which a State chooses to exercise over its own nationals can never be a concern of other States.

Though often bracketed together these two arguments are of a totally different nature. The appeal to allegiance (1), which is closely connected with the conception of personal jurisdiction to be discussed elsewhere, bears rather a positive character. If it is used to prove the admissibility of the principle of active nationality under international law, it presupposes that jurisdiction exercised by a State over its own nationals at home or abroad must be seen as an attribute of sovereignty and must as such be respected by other States. The argument under 2, on the other hand, is of a negative nature, and may perhaps be derived from the foundation of most rules governing the treatment of aliens, namely, that the interests of a person come within the orbit of international law solely in the event that he is a national of a foreign State. Thus specified, the second argument must lead to the premise that a State may also extend its penal laws to cover stateless persons committing a crime abroad, a conclusion which would be in line with the general position of stateless persons.

b. The Penal Laws protect the National Abroad (Principle of Passive Nationality)

The principle of passive nationality rests on a less stable foundation than the principle of active nationality. It has been explained as an application of the principle of protection; it is submitted, however, that in most cases an injury to the interests of the national may not be regarded as an attack on the existence or safety of his State. This could at best be the case if the infliction of the said injury is part of enemy action against the latter because of his nationality. Then penalization would be justifiable as a measure of self-defence. In some laws the principle of passive nationality has in fact been adopted in this limited meaning.

To others the principle is rather a consequence of the duty of the State to protect the interests of its nationals abroad, a task which has found recognition in international law too. It may be asked, however, whether this point of view is correct. The national who moves to foreign territory, places himself under the protection of the foreign Government: if this protection does not comply with the applicable

standards of international law which may include the duty to punish acts directed against foreign nationals the national State may apply international remedies.

3.10 Nationality and the Application of Remedies under International Law

3.10.1 Nationality as a Requirement of the Application of Remedies under International Law

The present part will be devoted to the significance of nationality in the application of remedies under international law when those standards have been violated. It is in this field that the institution of diplomatic protection, interpreted in its broadest sense, operates; it includes within its scope not only lodging protests, demanding redress etc., but also instituting proceedings before international bodies. The exercise of such protection may sometimes result in the employment of coercive means, such as *e.g.* reprisals. In view of the necessary limitation of this study the allied topic of consular protection will not be dealt with, although here also nationality has important consequences.

Diplomatic protection is an ancient phenomenon but, strictly speaking, it only began to be considered as the application of a legal remedy in the first half of the 19th century. The modern conception of nationality was also developed in that period and it is not by chance that it was at the same time that the rule appeared that in order to enable a State to present a diplomatic claim on behalf of an individual the latter must possess the nationality of the Complainant State. This requirement, on the one hand, limited, and on the other hand, extended the possibility of instituting diplomatic action. The limitation resulted from the fact that henceforth an action on behalf of residents of foreign nationality was excluded; the extension from the fact that such action was considered admissible on behalf of subjects of the Complainant State even when they resided abroad.

In the award in *Laurent (Eng) v US* Umpire Bates still fought shy of this extension although fully realizing the necessity of the requirement of nationality.[69]

The growing significance thus allotted to nationality by international procedural law, is closely related to its function in the system of rules governing the treatment of aliens which could actually be developed by diplomatic practice and international jurisdiction. Thus, the principle, which will be dealt with later, according to which an unlawful act against a person must be procedurally treated as if it were an unlawful act against his State, is closely related to the principles underlying the law governing the treatment of aliens as defined above.

Despite this relationship the functions of nationality in these different fields should be clearly distinguished. For instance, it is conceivable that a rule of substantive law (*e.g.* a treaty) ordains that State ***A*** is obliged to treat the nationals of States ***B, C*** and ***D*** in some prescribed way. In that case it makes no difference which of the three nationalities an individual may possess. Procedural law may then lay down that in case of a violation of this rule solely the Government of ***B*** is entitled to take action on behalf of subjects of ***B.*** Naturally, in the latter case, everything depends on the individual possessing the specific nationality belonging to the complainant State; in practice this difference will be of importance if one Government is willing to take diplomatic action and another is not.

The aforementioned principle that any wrong committed by a State against an individual must be dealt with procedurally as if it were committed against his State is so central a concept in international procedural law that it must be assigned a place of the first importance in any consideration of the subject In justifying this rule it has long been customary to appeal to a statement by Vattel which will again be quoted here if only to perpetuate such a pleasant geature:

> *'Quiconque offense l'Etat, blesse ses droits, trouble sa tranquillite, ou lui fait injure en quelque manière que ce soit, Se declare son Ennemi, et Se met dans le cas d'en etre justement puni. Quiconque maltraite un Citoyen offense*

[69] As regards this entire development the following literature may be consulted: RdA II, 161 ff; *Spanjaard*, 71 1o8, 152, 155 ff; *Freeman*, AJ 1946, 138 f; *Shea*, II; *Makarov*, 17 ff; *Dunn*, chapter IV; *Borchard, Rep* 362 f; *Sinclair,* BY 1950, 131 ff; *Mervyn Jones*, ICLQ 1956, 243 n.

indirectement l'Etat, qui doit protéger ce Citoyen. Le souverain de celui-ci doit venger son injure, obliger, s'il le peut, l'aggresseur a une entiere reparation, ou le punir; puisqu'autrement le Citoyen n'obtiendrait point la grande fin de 1'association Civile, qui est la sureté.

3.11 The Concept of Enemy Nationality

In an armed conflict here the (genuine) international police force will not be considered communities fighting to the death stand facing each other. The fact of belonging to one of these communities, of having belligerent nationality, thus acquires great pregnancy. It has long been held that a doctrinary contrast keeps the Anglo-Saxon and the Continental countries divided on the legal position enjoyed by the belligerent national. The Anglo- Saxon world the *locus classicus* is a verdict of the Supreme Court of the US in *The Rapid* (1814) is said to emphasize that the national is a component part of his State, so that not only States but also their nationals face each other as enemies and should so face each other. Every peaceful contact between them is therefore illegal. English case law accordingly developed the rule that the declaration of war is not only addressed to the Sovereign, but also to his subjects incidentally this rule was also accepted by Grotius. According to the verdict in *Wells v Williams,* the declaration of war may even be limited to a part of the nationals.

In Continental countries, on the other hand, Rousseau's doctrine was often followed, according to which only the States are each other's enemies, the nationals as such having nothing to do with this state of affairs; the latter become enemies only incidentally namely, in combat. In this trend of thought the citizen is dissociated from the State; only the army, being a State organ, conducts the war. This conception, originally promoted by the system of mercenary armies, may not seem very realistic, but it was kept alive for humanitarian reasons in order to protect the non combatant.

3.12 Nationality in Municipal Law

Rules relating to the attribution or determination of nationality in municipal law have been covered above. Rules relating to the international recognition of nationality are relevant in international terms, but not on the level of municipal law in relation to determinations of who falls within the category of nationals. That is of course left to municipal law. Recognition of nationality in municipal law is however

relevant when municipal law expressly regulates when multiple nationality will or will not be recognised, and when such policies have effects in municipal law.

It was argued that the consequences of nationality in municipal law depend solely on municipal law, and thus vary from state to state. If one follows Weis and other authors, nationality is a relationship or status that confers mutual rights and duties. If one follows Randelzhofer, nationality is never a source for rights and duties, just a condition for their extension.

Fundamental consequences of nationality at international law that at first glance seem to provide benefits to the individual, the state's right of diplomatic protection, and the duty to allow nationals entry, may be the subject of a state's municipal law, but this seems seldom to be the case, as many states do not express either norm as a right or entitlement capable of being claimed by their nationals.[70]

3.13 National and Aliens

Classifying human beings in municipal law using nationality as a lens should allow one to discern its significance as a category in municipal law. This means dividing municipal law's scope as it relates to human beings according to the basic categories of nationals and aliens. Those categories can of course be divided further. Sundberg Weitman presents four categories according to which states treat individuals: (1) aliens to whom prohibitions and restrictions apply (2) aliens who are accorded preferences, (3) nationals who are subject to certain limitations, and (4) nationals to whom favours are extended by law.[71]

It has already been seen that some countries have categories of nationals to whom different laws apply: China has at least three categories (avoiding the sensitive question of the "Chinese" nationality of people on Taiwan), being related to

[70] Many passports contain annotations requesting that the bearer be allowed to pass, and be afforded assistance by foreign authorities should she or he require it, but no mention related to diplomatic protection or a right of entry, An exception is the Swiss passport, which contains no request for unhindered passage or assistance, but reads "The holder of this passport is a Swiss citizen and is entitled to return to Switzerland at any time".

[71] Sundberg-Weltman, *Discrimination on grounds of nationality*. *Free movement of workers and freedom of establishment under the EEC treaty,* North Holland, 1977.

"mainland" China, Hong Kong and Macau.[72] In most countries the category of nationals overlaps with the category of citizens.

There are a few exceptions however, where individuals cannot be classified into basic categories of "national" and "alien". An example is that of the Cook Islands, whose municipal legislation does not create a category of nationals or citizens at all. It establishes a category of persons with the rights of permanent residency, but all Cook Islanders are New Zealand citizens and nationals.

It is submitted that this does not necessarily mean that for the purposes of international law there are no nationals of the Cook Islands, just that the country's municipal legislation has not identified who they are, and that their protection has been delegated to New Zealand by agreement.[73] Perhaps the more important question regards the international legal personality of both the Cook Islands (and Niue, as another state associated with New Zealand), given that all persons over whom those countries might claim nationality based jurisdiction are uncontrovertibly New Zealand nationals/citizens.

Yet the Cook Islands are party to bilateral and multi-lateral agreements in its own right, and maintain accredited diplomatic representatives in Wellington.[74] It would seem that for the purposes of Cook Islands' municipal law, nationality is irrelevant, and one cannot divide persons into Cook island nationals, and aliens. Permanent residents and non-residents are subject to the Cook Islands' territorial jurisdiction alike, but the state does not extend personal jurisdiction either inside or outside its borders in relation to the category of people who would normally constitute its nationals, as such. That is left to New Zealand.

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[72] They are arguably categories of nationality and not of citizenship, because the territory to which individuals would be returned by other states is not all of China, but the relevant administrative region. This proposition may, however, be questioned.

[73] Upon "decolonisation" many newly independent states existed for some time before they enacted laws on nationality. In the context of former French territories in Africa. See Gunter Breunig, *Staatsangehorigkei*t und *Entkolonisierung*, Berlin, Duncker & Humblot, 1974.

[74] The New Zealand Ministry of Foreign Affairs and Trade states that "The Cook Islands is a self-governing state in free association with New Zealand. The key features of the free association relationship are provided for in the Cook Islands Constitution Act 1965. In May 1973 the Prime Minister of New Zealand, Rt Hon Norman Kirk, and the premier of the Cook Islands Hon Albert Henry exchanged letters in which they clarified aspects of the relationship of free association.New Zealand Ministry of Foreign Affairs and Trade, *Cook Islands Country paper March 2006, Relations with New Zealand,* 2006 (internet), http://www.mfat.govt.nz/foreign/regions/pacific/country/cookislands paper.html,consulted on 19 March 2006.

In the typical case, however, there are only one category nationals, over whom the state can exercise junsdiction wherever they reside. The principles of equality and the effective/genuine link may limit the opposability of nationality in relation to multiple nationals on the international plane, but not in terms of a state's treatment of its own nationals, even when abroad. Regardless of residence, nationals can be obliged to declare worldwide income and pay taxes on it, as in the case of the USA,[75] be obliged to vote in national elections, and to perform military service. But there are also clearly privileges of nationality or citizenship in many countries that distinguish nationals from aliens or permanent residents (usually the most preferentially treated class of aliens under municipal 1aw). The treatment accorded depends on municipal law; in theory a state could extend the benefits of nationality/citizenship to all persons regardless of nationality.

An attempt to delineate the obligations, rights, entitlements and privileges of nationality found in municipal law cannot be comprehensively undertaken here. The general areas themselves can be discerned however, from how states regulate their conduct vis-a-vis aliens, either as a purely internal matter, or under agreements with other states. Non-discrimination is the overall issue, thus the existence of discrimination arguably indicates areas where nationality is relevant, even adopting the view that nationality itself does not necessarily give rise to rights and entitlements itself, as it is will a precondition for those things. These areas include: civil and political rights, the right to contract, religious freedom, freedom of speech and publication, access to education, access to the courts and judicial guarantees, employment membership in professions, the right to apply for licenses and to enter into fiduciary relationships, entitlements to participation in social insurance or pension schemes, rights of inheritance, rights in relation to real and personal property, treatment in terms of taxation, and an obligation of military or other service to the state.

[75] Every U.S. citizen or resident must file a U.S. income tax return unless total income without regard to the foreign earned income exclusion is below an amount based on filing status. Internal Revenue Service, United States Department of the Treasury, Publication 54, 2005 (internet), http://www.irs.gov/publications/p54/ar02.html, consulted on 19 March 2006.Taxation of worldwide income on the basis of nationality seems infrequent.

Juxtaposed to nationals as a category is the category of aliens, which can in turn be subdivided into more specific categories of persons according to each state's municipal law. Permanent resident non-nationals seem to be the most privileged group: they may in some cases vote, they are generally allowed to work and travel freely, to purchase real estate, to exercise most professions, and to return to, and reside in, the state. But they may also be obliged to fulfill some of the duties that apply to nationals, such as paying taxes. It would seem that the only difference in their treatment, stemming from international law, is that they are exempt from compulsory military service, with certain exceptions. In terms of loyalty and obligation but both privileges and obligations are extended to them on the basis of their territorial link to the state, as opposed to a personal link. There seems to be no barrier in international law however, to the revocation of privileges extended to resident non-nationals under municipal law, with the exception of vested rights, which applies to all persons regardless of alienage.

This is a reflection of the broad discretion with which states can treat aliens on their own territory. Should they abuse or ill-treat aliens (including "grossly unfair discrimination or outright arbitrary confiscation of the alien's property"), their states of nationality can exercise diplomatic protection or assert a claim for compensation. But there is no specific duty to admit aliens, and no duty not to expel or deport them. And once they have been admitted, there is also no obligation to accord them national treatment. Shearer notes that:

> *A number of states, including the Afro-Asian group, hold that the national standard of treatment should apply, inasmuch as aliens entering impliedly submit to that standard, otherwise they could elect not to enter.* [76]

It could also be argued that aliens are, or should be aware that when they enter national territory they are in some respects a legally disadvantaged group. Were they not, diplomatic protection might seem superfluous and indeed to some extent unjustified. While international law may not define the contours of national's loyalty to their own states, it does put limits on the way states may treat aliens.

[76] Gabriel Starke, *Starke's international law,* Editor by Shearer, London, Butter worth's,1994, p. 316.

3.14 Loyalty and Obligation

It was argued above that loyalty or obligation to the state is fundamentally a concept of municipal law, as opposed to a concept of international law. Related laws must be separated from emotions or opinions surrounding nationality and loyalty and the trappings thereof. It must be recognized however, that questions of nationality and multiple nationality are imbued with emotion in terms of the individual's link to the state. In the United Kingdom, an oath of allegiance as part of the naturalisation process was only introduced in 2002, for emotional as opposed to legal reasons. [77]

The view adopted regarding whether nationality is a reciprocal relationship between an individual and the state, or just a condition for such a relationship, dictates in turn how the notion of loyalty is viewed within municipal law. Following Weis nationality as reciprocal rights and duties, its definition and parameters vary according to the municipal law of each state. Following Randelzhofer however, it would seem that loyalty proves to be an exception to his statement that nationality itself does not involve rights and duties on the municipal level, if one accept that a duty of loyalty, however defined, attaches directly to the status/relationship of nationality. For our purposes, either view can be adopted.

If an obligation of loyalty *i.e.* allegiance as loyalty does attach to nationality as such in municipal law, it might be characterised as part of what the state requires and has a right to expect from its nationals, as opposed to aliens. Yet it is clear that a state can also impose various degrees of obligation on non-nationals, or categories thereof. Within a state's territory, aliens are subject to most laws on the same basis as nationals. In relation to acts outside a state's territory, it has already bee mentioned that states maintain jurisdiction over acts of aliens committed abroad that affect the security or financial interests of the state, under the principle of protective or security jurisdiction. Non-nationals can thus be held to a very high standard of accountability to any state generally, even if the state has no specific basis for territorial or personal jurisdiction over the relevant individual. Implementation of this notion is of course

[77] Britain said yesterday asylum seekers would have to swear allegiance to their newly adopted country, as well as pass a 'Brit test' of Basic English language and customs, if they wanted to be granted citizenship. Immigrants would take the oath in an initiation ceremony designed to give arrivals the feeling becoming a Briton was 'something to celebrate'. Asylum seekers to swear allegiance, The Age, 8 February 2002, p. 9.

contingent on the state being able to seize the individual in question and thereby enforce its laws. But the practical modalities of enforcement do not influence the underlying norm.

Thus it must be asked, how is the level of obligation imposed on those with a relationship to the state, either personal or territorial, higher? Shearer states that "resident aliens owe temporary allegiance or obedience to their state of residence, sufficient at any rate to support a charge of treason". The proposition that residence implies a higher level of obligation to the state is important, and is explored below. But the definition of "treason" depends on municipal law, and in many states can be committed by anyone. Shearer's statement, while certainly correct, could be extended further: even non-resident aliens can be charged with treason or the equivalent, if a state's municipal law so provides. The Inter-American Court o Human Rights confirmed this when it held that Peru's prosecution of Chilean nationals for treason did not violate the Inter-American Convention on Human Rights provisions on the right to nationality.

> *Whatever the consequence of nationality in law, they exist solely with respect to Chile and not Peru, and are not altered by the fact that the criminal behavior in question is classified as treason. "Treason" is simply the nomem iuris that the State uses in its laws and does not mean that the defendants somehow acquired the duties of nationality that Peruvians owe.* [78]

Obligations of the individual to the state can be related to two different considerations, one relating to obedience generally, and the other to residence or closer personal connection. On the one hand, all persons present in the territory of a state can be made subject to generally applicable laws such as those related to public order. Being a tourist does not arrest the application of criminal laws. But it would be highly unusual for a state to attempt to tax the income earned abroad by tourists based simply on their temporary presence. It is unclear whether such a municipal law would contravene international law, but in any case it would arguably be very bad for

[78] *Castillo Petruzzi et al. Case*, Judgment of 30 May 1999, para. 102, Inter-American Court of Human Rights, (internet),http://www.corteidh.or.cr/seriec_52_ing.doc, consulted 19 March 2006. The Court held, however, the Peru had violated numerous other provisions of the Convention.

tourism in the state concerned. On the other hand, taxing the foreign-earned income of resident aliens is quite common, based on their residence.

This is simply a reflection of the fact that in practical terms, municipal law can impose greater duties on persons with a territorial, but not necessarily personal, tie to the state. It is thus natural that residence may and arguably should entail an obligation of loyalty beyond simple obedience of the law generally. But if international law provides no grounds for opposing the prosecution of non-resident aliens for treason or equivalent crimes against the state, one must ask just what constitutes the "loyalty" or obligation that attaches to residence or nationality (either directly or as a consequence). It would seem that it can only be related to military service, or an obligation to physically defend the interests of the state vis-à-vis other states in the context of armed conflict. This was argued, although not in relation to an issue of loyalty, by the Conservative MP Enoch Powell in 1981 in relation to revision of the United Kingdom's Nationality Act: "Nationality, in the last resort, is tested by fighting. A man's nation is the nation for which he will fight". It might be noted however, that:

> *National, patriotism is a relatively modern basis for military service. It requires a sense of one's country as an entity that can legitimately demand contributions and to which loyalty should be given. Principled refusal to comply on the grounds of dissatisfaction with government is also relatively modem; such a basis of refusal depends on a belief that there are reciprocal obligations between citizens and their governments.* [79]

But even resident aliens can be obliged to perform compulsory military service to maintain public order or in ease of a sudden invasion.

It would seem that the quality or nature of the service imposed is important in this sense. Karamanoukian cites the quasi-unanimous opinion of writers that military service cannot be imposed on resident aliens in peacetime, [80] and a similar prohibition in time of war. He remarks however, that state practice "n'est pas conforme a cette

[79] Margaret Levi, *Consent, dissent, and patriotism*,Cambridge, Cambridge University Press, 1997, pp. 42-43.
[80] Aram Karamanoukian, *Les etrangers et le service militaire,* paris, Editions A. Pedone, 1978, pp. 163-68.

conception…. et certains Etats poussent l'illégalite jusqu'a l'incorporation des nationaux des pays occupés". [81] Although he states that no legal justification can be found to compel aliens either temporarily or permanently resident to do military service in wartime.

> *Quant a l'incorporadon d'office des etrangers residants, elle semble prendre de plus en puls d'extension; de grandes puissances comme de petites s'en rendent coupables. Une telle pratique EST desapprouvee par la doctrine, ET le droit international positif, coutumier ET conventionnel, I'interdit. Mais le comportement continu des Etats apportant des atteintes au statut des etrangers dans le domaine pourrait conduire a la neutralization de la coutume actuellement existante.* [82]

Such practice, even if incompatible with international law, illustrates the limits inherent in Shearer's qualification of the imposition (to be approved of in terms of international law), of an obligation on the restricted category of resident aliens, to assist in the maintenance of public order, and in the event of a "sudden invasion".

If this is accepted, the national's duty of loyalty cannot be distinguished by an obligation to defend national territory as such, as resident aliens can be obliged to do so as well when the nation's territory itself is at risk. Obligation or a duty of loyalty as a consequence of nationality must thus relate to military service in terms of a system of conscription, and in relation to conflicts fought outside national territory, which aliens, even permanent residents, can clearly not be obliged to undertake. It might be reduced to an obligation to take part physically in the "long-term" protection of the state, should municipal law require this. Prior to the United Nations Charter, which outlawed war with certain exceptions, it might have been labeled an obligation to take part physically in an element of the outward expression of the state's foreign policy. The limitations on the use of force contained in the Charter arguably serve to restrict

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[81] (Translation: *does not conform to this idea … and certain states push the breach of the law as far as the enlistment of nationals of occupied countries*.).

[82] (Translation: *The conscription of resident alien's seems to be a more and more widespread practice, of which great as well as small powers are guilty. Doctrine disapproves of such practice and positive, customary and conventional international law forbids it. However continuous state practice infringing upon foreigners' status in this field could lead to the neutralisation of current custom.*).

the significance of such obligations in practical terms, at least in terms of recent practice.

Issues of obligation or loyalty however, not only go to what the state can require individuals to undertake, but what it can prevent them from doing. This is essentially the basis for the security principle of jurisdiction. In terms of participation in armed conflict, international humanitarian law does not prevent the attribution of privileged combatant status, and thus the potential to become a prisoner of war, on the basis of nationality. Membership in the armed forces of a party to the conflict brings with it the privilege to engage in hostilities and not be prosecuted simply on that basis, although serious breaches of humanitarian law of course attract sanction and universal jurisdiction. Thus, within the framework of the laws of armed conflict, a national could join enemy armed forces, and assuming she or he is not a mercenary or a spy, be entitled to immunity from prosecution for having taken part in hostilities as such. But such immunity does not entail exemption from prosecution for treason or similar crimes under municipal law.

> *Any individual who falls into the power of a belligerent while serving in the enemy armed forces should be entitled to prisoner-of-war status no matter what his nationality may be, if he would be so entitled apart from any question of nationality; subject to the right of the Detaining Power to charge him with treason, or a similar type of offense, under its municipal law and to try him in accordance with the guarantees contained in the relevant provisions of the Convention.*

The case of deserters who join the opposing side is similar, although they do not seem to benefit from the protections of the Geneva Conventions if captured by their original side.

> *If such persons are captured by members of their own forces, they are entitled to receive from the soldiers capturing them the same treatment as any other captive, even though their national authority may decide, in accordance with national law, that they are not to be treated as enemy combatants and prisoners of war, but as members of its own forces liable to trial for treason.*

They may also be tried for treason after the termination of hostilities and their repatriation to their home country. [83]

But without the nationality of the state in question, it is hard to see how the same obligation related to loyalty could be imposed on aliens who are combatants under international law. This is especially so, given that the privilege to partake hostilities as a combatant is a cornerstone of the modern law of armed conflict. Of course the same cannot be said for non-international armed conflicts, where humanitarian law contains no notion of privilege and the status of combatant does not exist. In those situations nationals and non-nationals alike may be held to the same standard of obligation or loyalty to the state, and be equally prosecuted for taking part in hostilities.

Along these lines, it may be argued that a higher standard of obligation or loyalty can be imposed against nationals, in terms of not taking up arms against the state in situations of international armed conflict, even when other persons could not be held responsible for the same conduct. But it would seem that states municipal legislation has not always concurred with this delineation of an obligation of loyalty: a 19th century French statute held ex-French nationals to the same standard of obligation and loyalty as nationals, punishing them with death should they ever take up arms against their former country. Today, Colombia's Constitution stipulates that former nationals who act against the national interest in an international war may be tried and sentenced for treason.

Oppenheim remarks that naturalised persons might be seen as owing a greater duty of allegiance than the native born, pointing to the fact that states often apply deprivation of nationality as a penalty only to naturalised persons in the form of denaturalisation.

Loyal or obligation to the state thus arguably falls into three basic categories (1) all people can be held accountable to a state for acts against its security or

[83] L.C.Green, *The contemporary law of armed conflict,* Manchester, Manchester University Press, 1993, pp. 115-16. Levie distinguishes between deserters and defectors, noting that both become prisoners of war while in the power of the opposing side and that both may be tried for treason, but that defectors are not entitled to prisoner of war status. Levie, "*Prisoners of war in international armed conflicts"* New Port, U.S, Naval War college, 1979, pp. 76-81.

financial interests; (2) resident aliens can be held to an even higher duty of loyalty in terms of being obliged to defend the state physically during an invasion. They cannot be forced to perform general military service; and (3) nationals are bound by all of the above, and in addition can be obliged to perform general military service, to fight for their state of nationality outside its borders, and may be obliged to avoid partaking in international hostilities against the state. While international law provides this basic framework, it is municipal law that defines the details of each of the three categories. And while states may place special obligations on their nationals in municipal law, by a special category of offence applicable only to their nationals and related to loyalty to the state, as demonstrated, this seems largely emotional in character, as states can and do criminalize the same conduct by non-resident aliens. The special context of a national's acts is illustrated by the judge's comment in sentencing Ana Montes for treason against the United States, upon her a conviction of spying for Cuba. "If you cannot love your country…..... you should at least do it no harm". [84]

3.15 The Relation between Nationality as a Term of International Law and as a Term of Municipal Law

When examining the function of nationality one should constantly keep in mind both the distinction and the interrelation between nationality used as a term of international law and as a term of municipal law. This interrelation is immediately evident, if it is realized that not only international, but also municipal, law may attach consequences to the fact that an individual belongs to the population of a particular State. When issuing rules to that effect, the authority concerned, be it an organ of international law or of municipal law, begins from the important and established fact, that the world is divided into mutually independent States, each with its own people.

Incidentally, it should be noted that according to traditional views the existence of a State is made conditional, for purposes of international law, upon the existence of a country, a sovereign Government, and last but not least a people . Hence, the members of such a people have at times been characterized as the "composing elements" of the State, an expression, however, that may easily lead to misconception.

[84] Tim Golden, "Unapologetic American who spied for Cuba gets 25 years jail", *The Sydney Morning Heraid, 18 October 2002,* p. 12.

Be this as it may, the phenomenon just referred to constitutes for the maker and interpreter of the law what has rightly been called by Italian publicists: *a situazione giuridica originaria* that is a starting point not made by the law, but presupposed by it. From the standpoint of the individual nationality may be seen ff, as a juridical translation of that basic phenomenon or in other word a juridical translation of the latter's dependent status in the society of States. Although, as will be seen later, nationality is not by any means the only tie linking a person with groups of other individuals which is taken into consideration by international law, its preponderant significance at present cannot be denied.

If it is right to assume that there exists a concept of nationality as a concept of international law, then of course the relevant "nationality rules" must also be found in international law, were it only by means of construction. The essence of these "rules" is to lay down what *factual* criteria must be applied for the identification of an individual as a member of a certain group and to that extent they resemble methods of identification applied in the sphere of biology.

The fact that nationality as a term of international law does not necessarily coincide with nationality as relevant in municipal law does not mean that, for purposes of determining who are a State's nationals, international law may not, as a general rule.

3.16 Summary

In summing up it may be said that there is an important difference between the conception of nationality as a term of international law and nationality as a term of municipal law. For the purpose of international law, only the rights and duties of States arising from the status of nationality, *i.e.,* of the State of nationality in relation to other States, are relevant; for the purpose of municipal law, nationality connotes a specific relationship between national and State of nationality, conferring mutual rights and duties on both.

The obligation resting on the State of nationality in relation to other States is the duty to allow the national to reside on a territory under its sovereignty unless another State is willing to admit him and to admit him to such territory.

The right is the right of the State of nationality to exercise permanent and unconditional protection of its national in relation to other States and, conversely, the duty of other States to recognize the existence of this right. Nationality in the sense of international law is a technical term denoting the allocation of individuals, termed nationals, to a specific State the State of nationality as members of that State, a relationship which confers upon the State of nationality the above mentioned rights and duties in relation to other States. Nationality is normally the link between the individual and international law. Since in international law as it is constituted at present, rights of international law are such rights as are in the absence of any supra-national Legislative authority recognized by the subjects of international law or have to be recognized by such subjects, it may be more accurate to speak of a relationship whose conferment upon States of the rights and duties mentioned has to be recognized by other States, *i.e.,* is accepted by international law.

It can be seen from this definition at the international law concept of nationality has developed from municipal law, from the municipal conception of nationality. While in the great majority of cases identity of terminology denotes an identity of substance, this is not necessarily so here. The meaning of the term nationality in international law while usually coinciding with nationality in municipal law may be both wider and narrower than its meaning as defined by municipal law.