7.1 Introduction

Diplomatic protection is a function of the sovereignty of States under international law within the framework of their mutual rights and obligations in the international community. It is traditionally an inter-State practice. In precise language, diplomatic protection can be defined as a procedure for giving effect to State responsibility involving breaches of international law arising out of legal injuries to the person or property of the citizen of a State. With the expansion, in modern times, of economic and commercial intercourse between nations, diplomatic protection evolved into a rule of customary international law.

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.¹ In taking up the case of one of its nationals, by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right, the right to ensure in the person of its nationals respect for the rules of international law. Diplomatic protection and protection by means of international judicial proceedings constitute measures for the defence of the rights of the State.²

A notable fact in recent times is the enlargement of the functions of the State and an increase in the volume and incidence of direct State to State relations. There arise from these circumstances a growing number of bilateral and multilateral treaties between Governments involving the interests of individuals with provisions for the exercise of diplomatic protection by the State. Conventional law increasingly recognizes the right of the State to exercise diplomatic protection over its

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ressortissants in the event of State responsibility arising from a direct breach of treaty law.³

As the International Conference for the Codification of International Law, held at The Hague in March and April, 1930, must certainly be regarded as a landmark in any investigation into the problem of nationality in international law. There is, in such an appraisal, an obvious danger of both overestimating and underestimating the significance of that part of the Conference which dealt with nationality problems. The practical results were certainly not conspicuous. The number of rules adopted was comparatively small; the number of those adopted with the two-thirds majority required by the rules of procedure for the adoption of Conventions, still smaller. These rules are laid down in the Convention concerning Certain Questions Relating to the Conflict of Nationality Laws and in three Protocols, namely, the Protocol Relating to Military Obligations in Certain Cases of Double Nationality, the Protocol Relating to a Certain Case of statelessness, and the Special Protocol concerning Statelessness. The Agreements adopted by the Conference were to enter into force on the ninetieth day after a procès-verbal had been drawn up by the Secretary-General of the League of Nations as soon as ratifications or accessions by ten States had been deposited.

The Convention Relating to the Status of Refugees was adopted in Geneva 1951, the draft Convention on the Elimination of Future Statelessness was adopted in 1954, the draft Convention on the Reduction of Future Statelessness was adopted in 1954, the Convention Relating to the Status of Stateless Persons was adopted in New York 1954, the Convention on the Nationality of Married Women was adopted in 1957, the Convention on the Reduction of Statelessness was adopted in 1961, and the European Convention on Nationality was adopted in 1997.

### 7.2 Historical Evolution

The earliest roots of the idea of diplomatic protection may be traced even to pre-feudal times. The clan which formed the basis of primitive Society considered that an injury to a member of the clan constituted an injury to the clan itself, justifying collective vengeance. One cannot however rely heavily on this account. Primitive

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Society did not allow for much inter-communal intercourse at personal levels. Moreover, its legal systems conformed more to the principle of the personality of law than to the territoriality of law. The emergence of the political system of Nation States and the development of modern means of communications have been accompanied by growing commercial and economic intercourse between the political communities of the world. Individuals and capital moved across territorial boundaries in the cause of trade, employment and economic expansion. It was in this era that jurists began to address their minds to the question of diplomatic protection.

The origin of the doctrinal foundations of the institution of diplomatic protection is commonly traced to the writings of the Swiss jurist, Vattel:

Whoever ill-treats a citizen indirectly injures the State, which must protect that citizen. The sovereign of the injured citizen must avenge the deed and, if possible, force the aggressor to give full satisfaction or punish him, since otherwise the citizen will not obtain the chief end of civil society, which is protection.  

Vattel treated the subject within the broad framework of the wrongs committed by individuals, and the rights of States to avenge such wrongs directed against their citizens. Such a wrong, he said, “indirectly injures the State”.

7.3 The Classical Position

The classical foundation of diplomatic protection is a compromise between the two conflicting principles of (1) the personal sovereignty and (2) the territorial sovereignty of States. Borchard poses the question thus:

“……le citoyen a l’etranger est sous la protection de deux pays, celuiou il reside et celui auquel il doit allegiance. La question est de savoir lequel de ces deux pays aura la superiorite en fait de controle”.  

On the one hand, the doctrine of territorial sovereignty upholds that a State has full jurisdiction or dominium over all persons and things physically present within its

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domain or territory. On the other hand, the principle of personal sovereignty asserts that a State has *imperium* or jurisdiction over all persons who are its nationals the essential components of its corporate personality.

According to strictly classical doctrine, States accord to one another territorial sovereignty. They however reserve the right, on the basis of personal sovereignty, to offer protection to their nationals who, through a breach of an international obligation by another State, suffer injuries to their person or property. The classical argument runs as follows: a State is under no obligation to admit within its territory the nationals of another State. Once, however, a non-national legally enters the territory of a State, that State has an obligation towards his State of origin to provide him with a minimum standard of protection for his person and property.

In outlining his fundamental principles of diplomatic protection, Borchard declares that “each state in the international community is presumed to extend complete protection to the life, liberty and property of all individuals within its jurisdiction. If it fails in this duty toward its own citizens, it is of no international concern. If it fails in this duty toward an alien, responsibility is incurred to the state of which he is a citizen, and international law authorizes the national state to exact reparation for the injury sustained by its citizen”.

This dual classification of persons coming within the jurisdiction of a State as nationals and aliens followed the practice of Borchard’s day. At that time, the British Empire was undoubtedly a single international unit, and all His Majesty’s subjects were British nationals at the level of international law. Today, the Commonwealth of Nations which has evolved from the Old Empire admits, in the municipal laws of its Member States, of seven categories of persons:

1. Citizens of the given State;
2. British subjects without citizenship;
3. Eire citizens who were British subjects before 1949;
4. Protected persons;
5. Citizens of other independent Commonwealth States;

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(6) Non-British subject-citizens of the Republic of Ireland; and
(7) Aliens.

For the United Kingdom, for example, only the first category unambiguously constitutes nationals from a strict international law standpoint. *Prima facie*, citizens of other sovereign Commonwealth States and of the Republic of Ireland inclusive of persons under their protection are not United Kingdom nationals in international law; neither are they, according to municipal law, aliens. This introduces a *tertium quid* in the classification of individuals coming within the territorial jurisdiction of a Commonwealth State. A fundamental point of this chapter is to discover the exact status, in practice, of this *tertium quid* relative to the question of diplomatic protection between first, Commonwealth States and foreign States and secondly, between one Commonwealth State and another.

### 7.4 The Local Remedies Rule

In international practice, the injured national should first exhaust all local remedies in the domestic courts of the host State before his State of origin invokes its right of protection. Doctrinally, this pre-condition of the exhaustion of local remedies is a manifestation of respect for the principle of the territorial sovereignty of States. In practice, however, the pre-condition has been adopted as a safeguard against the abuse by States of their right of diplomatic protection.

The local remedies rule has long been established as a customary rule of international law. It frequently appears in the provisions of treaties which specify procedures for the statement of inter-State disputes involving the interests of individuals. The rule has often been upheld in judicial and arbitral decisions of international tribunals.

The British Mexican Claims Commission in the *Mexican Union Railway (Ltd.,) Case*, 1930, asserted:

> “It is one of the recognized rules of international law that the responsibility of the State under international law can only commence when the persons

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concerned have availed themselves of all remedies open to them under the national laws of the State in question”.  

In the Panevezys-Saldutiskis Railway Case, 1939, the Estonian Government brought a claim against the Government of Lithuania on behalf of the Railway Company which it claimed possessed Estonian nationality. Apart from maintaining that the Estonian complaint could not lie on the grounds that the Company did not possess Estonian nationality, the Lithuanian Government further objected that local remedies had not been exhausted. The Permanent Court, by ten votes to four, declared that “the Lithuanian objection regarding the non-exhaustion of the remedies afforded by municipal law is well founded and….that the claim presented by the Estonian Government cannot be entertained”.

In the Ambatielos Claim Case of 1956 decided by an Anglo-Greece Commission of Arbitration, the United Kingdom Government raised the objection of non-exhaustion of legal remedies in the English Courts in respect of the acts alleged by the Greek Government to constitute breaches of the Anglo-Greece Treaty of 1886. The Commission found that the Greek claim was not valid on the basis of the non-exhaustion, by Mr. Ambatielos, of the legal remedies available in English courts to British nationals and foreigners alike. In its deliberations the Commission declared:

“The rule thus invoked by the United Kingdom Government is well established in international law”.

“The rule requires that local remedies shall have been exhausted before an international action can be brought”.

In the attempts made to codify international law the local remedies rule has been accorded general respect. The rule has found expression in conventions and resolutions at International Conferences of the American States. It was adopted in the Convention relative to the rights of aliens signed at the 1902 Mexico City Conference. At the 1933 Montevideo Conference, a resolution on the international responsibility of the State reaffirmed:

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“That diplomatic protection cannot be initiated in favour of foreigners unless they exhaust all legal measures established by the laws of the country before which the action is begun”.\textsuperscript{11}

The League of Nations Preparatory Committee of the 1930 Hague Codification Conference included the rule as one of its basis of discussion on State responsibility.

“Where the foreigner has a legal remedy open to him in the courts of the State (which term includes administrative courts), the State may require that any question of international responsibility shall remain in suspense until its courts have given their final decision………….

7.5 The Link of Nationality

7.5.1 Customary Law

Practice as well as doctrine maintains that it is the link of nationality between a State and an individual which alone gives the State the right to exercise its diplomatic protection on his behalf. In cases of “delegated protection”,\textsuperscript{12} or when a State exercises protection over the nationals of a protectorate or trust territory, it is the criterion of the link of nationality between the individual and the protected state which is operative. The Permanent Court in the \textit{Panevezys-Saldutiskis Railway Case}, 1939, affirmed:

“In the absence of a 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”.

\textsuperscript{11} The resolution continues: “There are excepted those cases of manifest denial or unreasonable delay of justice which shall always be interpreted restrictively, that is, in favour of the sovereignty of the State in which the difference may have arisen.” \textit{Y.I.L.C.}, 1956, II, p. 226.

\textsuperscript{12} Delegated protection”, as distinct from “protected status”, is a term used by Borchard to denote a state of fact when the interests of one sovereign state is confided, in the territory of another, to a third state on a temporary basis; e.g., See Parry “\textit{Plural Nationality and Citizenship with special reference to the commonwealth}”, B.Y.I.L., vol. XXX, 1953 p. 257 n.1 & 2; also Borchard, “\textit{Protection diplomatique des nationaux a l’etanger}”, (Session de Cambridge). A.I.D.I., 1931, op. cit., §204-5, pp. 471-5.
The Court strengthened this statement by quoting the obverse position:

“Where the injury was done to the national of some other State, no claim to which such injury may give rise falls within the scope of 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”.\textsuperscript{13}

More recently, in 1949 the International Court of Justice in its Advisory Opinion on the subject of \textit{Injuries Suffered in the Service of the United Nations} recited “the traditional rule that diplomatic protection is exercised by the national State”.

A project on diplomatic protection prepared by the American Institute of International Law in 1925 for adoption by the American Republics recorded in Article III:

“\textit{Every nation has the right to accord diplomatic protection to its nationals}…….”

Article IX added further:

“\textit{Every American Republic has the right to accord diplomatic protection not only to its nationals but also to the companies, corporations, or other juridical persons who, according to its law, are of the nationality of the country}”.\textsuperscript{14}

The actual practice of diplomatic protection is complicated by two fundamental facts. First, diplomatic protection is entirely a question of international law. Secondly, nationality, which provides the basis for diplomatic protection, is a subject which, under international law, is still today largely within the competence of municipal law. This second principle, as a customary rule of the law, has been repeatedly upheld in the dicta of international tribunals.

The Permanent Court, in its Advisory Opinion in 1923 to the Council of the League on the \textit{Nationality Decrees} in Tunis and Morocco, admitted that “the question whether a certain matter is or is not solely within the jurisdiction of a State is an

\textsuperscript{13} \textit{P.C.I.J.}, Ser. A/B, No. 76.
essentially relative question; it depends upon the development of international relations”. The Court nevertheless stated categorically:

“In the present state of international law, questions of nationality are, in the opinion of the Court, in principle within this reserved domain.”

The Court however put in the reservation that, in a matter, which, like that of nationality, is not, in principle, regulated by international law, the right of a State to use its discretion is nevertheless restricted by obligations which it may have, undertaken towards other States. That is to say, jurisdiction which, in principle, belongs solely to the State is limited by rules of international law.15

Consonant with this opinion, the Harvard Research Draft Convention on Nationality, in 1929, asserted that “under international law the power of a state to confer its nationality is not unlimited”.16 Thus conventional law proceeded to prescribe certain limits to the municipal competence of States in matters of nationality.

7.5.2 Conventional Law, the 1930 Hague Convention on Nationality

The 1930 Hague Convention on Certain Questions relating to the Conflict of Nationality Laws postulated in its preamble the general interest of the international community to secure that all its members should recognize that every person should have a nationality and should have one nationality only. It recognized as the ideal the abolition of all cases both of statelessness and of double nationality. It however took the positive view that under existing economic and social conditions the ideal was not yet attainable. The Convention thus provided in Article 1:

“It is for each State to determine under its own law who are its nationals”.

Article 1 however continues with the reservation:

“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”

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Article 2 nevertheless reinforces the first part of Article 1 by providing that any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State. These two provisions combined clearly refer the legal criteria for the determination of nationality to the provisions of municipal law, while Article 2 suggests that international law should recognize, subject to the reservation of Article 1, the criteria thus established.

7.5.2.1 Multiple Nationalities

Article 3 of the Convention explicitly admits of multiple nationalities. It provides in part:

“.......a person having two or more nationalities may be regarded as it’s national by each of the States whose nationality he possesses.”

Article 4, consonant with the principle of personal sovereignty of States, adds:

“A State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses.”

Article 5 defines the “master nationality rule” on the basis established by private international law. Within a third State, a multiple national shall be treated as if he had only one nationality. The third State is given the competence to apply the rule. The criterion of master nationality is either the country in which the national is “habitually and principally resident”, or the country with which “he appears to be in fact most closely connected”.

Thus the rule of the link of nationality as a basis for diplomatic protection by the national State suffers a dilution under conventional law. In the first place, diplomatic protection is deemed to be inapplicable with respect to multiple nationals between their States of nationality. In the second place, multiple nationals may have in third countries the protection of only one State the State of master nationality.

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7.5.2.2 Limitations on the International Recognition of Nationality and on the Reliance of the Nationality Link for Diplomatic Protection

The only limitations placed on the international recognition of nationality are those expressed in the reservation of Article 1 of the Convention: (1) international conventions, (2) International custom, and (3) the principles of law generally recognized with regard to nationality. On the two latter points, Judge Read claimed, international law has not evolved any clear understanding or agreement. Outside the provisions specified in international conventions, the limitations placed in practice on the international recognition of nationality are not well defined. Neither is there any clear duty on States, outside specific conventional provisions, to recognize the nationality conferred by other States in the exercise of their domestic jurisdiction.\(^{18}\)

Professor Guggenheim has treated this difficult problem of the International recognition of nationality and the effects of this recognition for purposes of international law by an incisive analytical method. He first posits that it is not the function of an international tribunal, faced with this question, to decide upon the domestic validity of municipal law. For it to do this is for it to assume the functions of a municipal court of appeal. An international tribunal must only be concerned with municipal law as fact.\(^{19}\)

Its function is to consider the validity, at an international level, of municipal law, as well as the international effects of this validity or invalidity. Within this scheme he makes a clear three-fold distinction between:

(a) The invalidity of nationality on an international level which would render inoperative international consequences, like diplomatic protection. Such invalidity may be established through the motive of fraud, lack of good faith, imposition of nationality by compulsion, etc;

(b) The validity of nationality on an international level with no reliance on this validity for certain international effects. This can arise through multiple


nationalities and through the application of the master nationality rule for diplomatic protection;

(c) The validity of nationality on an international level with full reliance on this validity as a basis for international consequences, like diplomatic protection and treaty rights of nationals.

7.5.3 Effectivity and Validity Decisions of International Tribunals

7.5.3.1 The Nottebohm Judgement

In an attempt to reconcile the apparent divergence between the municipal considerations of nationality and the international effect of diplomatic protection, the International Court of Justice, in the celebrated Nottebohm Case, divorced the two elements by applying the theory of effective nationality. The Court argued that the conferment of nationality, by naturalisation, on the individual, Mr. Nottebohm, was an act performed by the national State, Liechtenstein, “in the exercise of its domestic jurisdiction”. The crucial question posed by the Court was whether that municipal act had the international effect of entitling that State, Liechtenstein, to the right to exercise its diplomatic protection over Mr. Nottebohm against the specific country, Guatemala. The Court, by eleven votes to three, replied to the question in the negative. It maintained that in order that a State may enjoy the international consequence or effect of nationality to exercise its right of diplomatic protection, the link of nationality between the State and its national must not merely be formal but effective.

To arrive at this decision, the Court based its definition of nationality on extra-legal factors. “Nationality”, said the Court is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical connection of the fact that the individual upon whom it is conferred….. is in fact more closely Connected with the population of the State conferring nationality than with that of any other. The essence of the Court’s decision rested on the following conclusion:

“Conferred by a State, Nationality ... only entitles that State to exercise protection vis-à-vis another State, if it constitutes a translation into juridical terms of the individual’s factual connection with the State which has made him a national.”  

The Court did not examine the validity at an international level of Liechtenstein’s naturalisation of Nottebohm. It side-stepped this question. It immediately delved into the consequential issue of whether the unilateral act of Liechtenstein, by which it granted nationality to Nottebohm, directly entailed an obligation on the part of Guatemala to recognize its effects: namely, Liechtenstein’s right to exercise its protection vis-à-vis Guatemala. Judges Klaestad, Read and Guggenheim, in their respective dissenting opinions, recorded a procedural disagreement on this point. Judge Guggenheim, in particular, reinforced his procedural dissent with these substantive remarks:

“Une telle dissociation entre nationalité et protection diplomatique ne trouve aucune base ni dans une règle coutumière ni dans un principe général de droit reconnu par les nations civilisées, au sens l’article 38, litt. Ib) et c), du Statut de la Cour.”

This procedure was adopted by the Court notwithstanding the fact that Nottebohm had only one nationality, that of Liechtenstein. The import of the Court’s decision, in this particular case, was to render inoperative the general rule of international Law, outside the well-established exceptions relating to dual nationality, that the State of nationality has the right to exercise diplomatic protection over its national abroad. Judge Guggenheim raised the further point of the implications of this decision concerning other international effects or rights derived from nationality. For example, treaty rights.

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As a corollary to the Nottebohm decision, one is led to pose three fundamental questions:

(a) Does international law thereafter contemplate the imposition of the condition of “effectiveness” of the nationality link as the limiting basis for the exercise of diplomatic protection by the national State of an individual?

(b) If so, does this stipulation relate only, as in the Nottebohm Case, to nationality acquired through naturalisation, or does it apply irrespective of the mode of acquisition of nationality?

(c) Could the principle of factual connection even without the nationality link to the Defendant State be normally relied upon for rejecting a claim presented by the national State of an individual?

An affirmative reply to these three questions, as amply demonstrated in the Dissenting Opinion of Judge Guggenheim, could lead, in practice, to the destruction of the institution of diplomatic protection, if the content of such a notion of effective nationality were to gain currency as an established rule of positive international law. Not surprisingly, therefore, international tribunals and qualified authors, in their references to and comments on the Nottebohm case have commonly underscored the limited application and *sui generis* character of the decision.

7.5.3.2 The Flegenheimer Case

The *Flegenheimer Case*, 1958, stands in striking contrast with the *Nottebohm Case*, 1955. The first difference is merely a superficial one. The *Nottebohm Case* was concerned with the exercise of diplomatic protection under customary international law. The *Flegenheimer Case* was concerned with the same question, but this was provided for in a Treaty.

Article 83 of the United Nations Peace Treaty with Italy of 10 February 1947 provided for the establishment of a Conciliation Commission by Italy and any member state of the United Nations. This Commission was to decide on any disputes between the two States involving certain categories of injuries suffered by “United Nations nationals” in Italy prior to Armistice date, 3 September 1943, when Italy was
still an enemy State. Article 78 §9 (a) defines “United Nations nationals”. The first sentence lays down positive criteria; the second sentence negative ones. In its first sentence, the Article states:

“United Nations nationals means individuals who are nationals of any of the United Nations, or corporations or associations organized under the laws of any of the United Nations, at the coming into force of the present Treaty, provided that the said individual, corporations or associations also had their status on 3 September 1943, the date of the Armistice with Italy.”

The second sentence of the Article continues:

“The term United Nations nationals also includes all individuals, corporations or associations which, under the laws in force in Italy during the war, has been treated as enemy.”

Among the provisions specifying the violation of rights which could give rise to diplomatic protection was the following, expressed in Article 78 §3:

“The Italian Government shall invalidate transfers involving property, rights and interests of any description belonging to United Nations nationals, where such transfers resulted from force or duress exerted by Axis Governments or their agencies during the war.”

On 18 March 1941 Albert Flegenheimer was allegedly forced to sell 47,907 shares owned by him in the Italian Company, Società Finanziaria Industriale Veneta to a subsidiary Italian Company. The sum realized was 277,860.60 U.S. dollars, when the actual value of the shares was between four and five million dollars. In June 1951 the United States Government made a formal demand to the Italian Government on behalf of Albert Flegenheimer under Article 78 §3 of the peace Treaty, and Article III §16 (b) of the Lombardo-Lowett Agreement. The United States Government demanded annulment of the sale by the Italian Government, and claimed restitution.

The Italian Government, in its reply of 15 October 1951, contested the admissibility of the claim of the United States Government on the grounds that Albert

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23 The Treaty came into force on 14 September 1947.
24 This Agreement came into force on 14 August 1947.
Flegenheimer did not possess the status of a “United Nations national” under the Treaty. In expressed terms, the Italian Government maintained that the claim was inadmissibility because Flegenheimer did not, in effect, possess United States nationality. Thus the Italo-American Conciliation Commission, established in 1956 by the two Governments under Article 83 of the Peace Treaty, had to decide on the basic question of the right of the United States Government to exercise diplomatic protection on behalf of Albert Flegenheimer vis-a-vis Italy.

7.5.3.3 The Merge Claim

In striking contrast, the same Italo-American Commission, Constituted under a different President, applied the principle of “effective nationality” in the Merge Claim, 1955. A significant point of difference between the two cases was that Dame Strunsky-Merge was a dual national possessing the nationality of each of the two States, Italy and the United States of America, which were the parties to the dispute.25 In contradistinction, in the Flegenheimer Case only one of the two States parties to the dispute: the United States of America claimed Flegenheimer as it’s national.

In this Merge Claim Case, Dame Merge, as a national of the United States, submitted a claim under Article 78 of the 1947 Peace Treaty with Italy for compensation for the loss, as a result of the war, of certain property in Italy owned by her. The Italian Government contended that the claim ought to be rejected because the claimant was, under Italian law, an Italian national by marriage. The Commission was therefore called upon to decide the preliminary question of whether a person having dual nationality was entitled to claim compensation under the Treaty.

The Italian contention was based on the general custom codified in Article 4 of the Hague Convention. For the Italian Government pleaded:

“There exists a principle of international law, universally recognized and constantly applied, by virtue of which diplomatic protection cannot be exercised in cases of dual nationality when the claimant possesses also the nationality of the State against which the claim is being made.”26

The Commission, in treating the preliminary question before it, first concluded, from an interpretation of the Treaty, that the Treaty contained no “definition specifically referring to dual nationality and therefore capable of being a governing rule for those cases”. The Tribunal therefore turned to the principles and practice of international law relating to diplomatic protection in cases of dual nationality and accordingly resolved to apply either:

“(a) The principle according to which a State may not afford diplomatic protection to one of its nationals against the State whose nationality such person also possesses.”

Or

“(b) The principle of effective or dominant nationality.”

The first principle barring diplomatic protection of the individual who is a national of both the claimant and respondent States was invoked by the United States British Claims Commission established under the Treaty of Washington of 8 May 1871 in the Alexander Case between Great Britain and the United States.27

The second principle gained great currency during the Venezuelan Arbitrations of 1903-5. Relying on the concept of the dominant or active nationality in private international law as determined by domicile the Commissions, under this arbitral régime, applied the notion of effective nationality in the Miliani,28 Stevenson,29 and Mathison30 cases. In particular, in the Mathison Case brought by Great Britain against Venezuela, Umpire Plumley declared:

“The claimant was born in. Venezuela on September 14, 1858. He now resides and has always resided in Venezuela. His father was of British parents and was born in Trinidad. No question is made that by the law of Great Britain one born in another country of a British father domiciled in such foreign

country is a British subject. It is admitted that if he is also a Venezuelan by the laws of Venezuela, then the law of the domicile prevails and the claimant has no place before this Mixed Commission.”

7.6 The Nationality of Claims

International Law attempts to prescribe some time limits around the link of nationality as the basis for the exercise of diplomatic protection. A failure to do this could result in the abusive exercise of diplomatic protection. A strong State can claim, after some individual had suffered injury in another State, that the injured individual has acquired its nationality ex post facto. Thus, in the exercise of diplomatic protection, weak States can be placed in an unequal position vis-à-vis strong States. From the practice as determined by an examination of the decisions of international tribunal three rules seem discernible:

(1) The link of nationality must exist at the date when the injury giving rise to the claim occurred;
(2) The link of nationality must exist at the time when the international claim is presented;
(3) The link of nationality must exist continuously from the date of the injury up to the time of presentation of the claim.

7.6.1 Nationality at the Date of Injury

The first rule has been concisely expressed by the United States Department of State in the formula: “a claim must be national in origin.” This rule has long been respected by practice, jurisprudence and doctrine. There have been however two interpretations given to it:

(a) The link of nationality must exist at the moment of the original injury even before there arises any international delict: that is, even before local remedies have been exhausted and a denial of justice, constituting the international delict, has been established.
(b) The link of nationality must exist at the moment of the international delict. This may occur under conventional law by a violation of the treaty rights of the individual, or under customary law when denial of justice is established.

Some authors are of the opinion that the dies a quo, the date from which the link of nationality must exist, should be determined by the time of occurrence of the international delict only. This follows logically from the fact that international law, concerned with breaches of international obligations, should restrict itself to considerations of conditions only as they exist at the time of the international violation. International tribunals have not, however, found it expedient to make a distinction between the above two interpretations since there is usually a coincidence between the time of the injury to the individual and that of the international violation. Even in treaties, the question has been frequently left open for either interpretation. The Institute of International Law, at its Session in Warsaw in 1965, has however opted, in Article 3 of its Resolution, for the first interpretation in defining the second rule, which it formally adopted.

7.6.2 Nationality at the Time of Presentation

The second rule does not only require the nationality link to exist at the date of the injury; this is considered to be insufficient. What is crucial is that even if the claim has thereafter changed its national character, for example, through succession by the death of the injured individual, the person in whose behalf the claim is finally presented must be a national at the time of the presentation of the claim.

The American Institute of International Law, in 1925, formulated the rule as follows:

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

The Institute of International Law, in adopting this rule in Article 1 of the 1965 Resolution in Warsaw, has elaborated on its formulation, in terms of the national character of claims, in the following words:

(a) Une reclamazione internationale presentée par un État en raison d’un dommage subi par Un individu peut être rejetée par l’État auquel elle est présentée si elle ne possède pas le caractère national de l’État requérant à la date de sa présentation comme à la date du dommage. Devant la juridiction saisie d’une telle reclamation, le défaut de caractère national est une cause d’irrecevabilité.”

Article 2 adds further

“Lorsque le bénéficiaire d’une reclamation internationale est une autre personne que l’individu lesé originalement, la reclamation peut être rejetée par l’État auquel elle est présentée et est irrecevable devant la juridiction saisie, a moins d’avoir possédé la caractère national de l’État requérant aussi bien a la date du dommage qu’à celle de sa présentation.”

For well over a century international tribunals, within specific provisions of treaties, have consistently applied the rule as defined above. But great controversies have emerged over the diverse constructions given to the term “the time of presentation of the claim”. Borchard, from an exhaustive examination of such decisions, enumerated seven different interpretations in his 1931 Report to the Cambridge Session of the Institute of International Law. In this diversity of interpretations constituting a time limit around the link of nationality, for the admissibility of an international claim, the rule has, in all cases, been related to the dies ad quem.

In an attempt to prescribe a uniform construction for the term in treaties of arbitration, the Institute, in Article 3 (c) of its recent Warsaw Resolution, has proffered the following definition:

32 These interpretations differentiate between: (1) the informal initiation of diplomatic representations; (2) the formal demand for an international claim; (3) the conclusion of a Treaty establishing a Claims Tribunal; (4) the ratification of such a Treaty; (5) the initiation of proceedings before a Claims Tribunal; (6) the pronouncement of a Judgement; (7) the regulation of the Claim. (Borchard: Protection diplomatique des nationaux a l’étranger”, A.I.D.I., 1931, I, p. 284.)
7.6.3 Continuity of Nationality from the Date of Injury Up to the Time of Presentation

The third rule holds that the link of nationality must exist continuously from the moment of the injury to the time of presentation of the claim. Under this rule, a State loses its right to exercise its diplomatic protection once there is a change in the nationality of the claim, even if the claim is retransferred to its original nationality. The rule insists on the continuous existence of the national character of the claim from the dies a quo, the time of the injury, to the dies ad quem, the time of presentation.

Commenting on the application of the rule in his comprehensive Report to the Institute of International Law in 1963, Briggs made the following observations:

In most of the cases in which an international tribunal has, in expressis verbis, stated that a claim must be continuously national from origin to presentation, the court was in fact confronted only with the problem of deciding whether or not the claim possessed the nationality of the claimant State at either or both of the two critical dates. Cases in which a tribunal has been confronted with a claim impressed with such nationality at both critical dates but which, between those dates, had lost and reacquired such nationality, have been rare and controversial.33

He however revealed that the rule received wide application, particularly since the end of the Second World War, by U.S. International Claims Commissions which were required, by Congressional legislation, to apply, in addition to relevant treaty provisions, the applicable principles of international law for the settlement of claims of United States nationals arising out of nationalization and other takings by the Governments of the Socialist countries of Central and Eastern Europe. Thus the rule was applied in the Kren Case and the Halwax Claim by the Commission

established under the United States-Jugoslavia Settlement of Pecuniary Claims Agreement of 19 July 1948. The U.S. Foreign Claims Settlement Commission was created in 1954, as a successor to the first Commission, to deal with similar claims against the Governments of the Soviet Union, Bulgaria, Hungary, Rumania, Czechoslovakia and Italy. This latter Commission applied or upheld the rule in at least fourteen cases. In his conclusion of this study, Briggs remarked:

“The jurisprudence of the Foreign Claims Settlement Commission of the United States from 1956 to 1961 has given impressive support to the traditional rule of international law that a claim must be national in origin. In varying the requirement in special circumstances, both the United States Congress and the Commission were at pains to emphasize that, except where otherwise varied by international agreement, or, in the case of national claims commissions, by special legislative exceptions, the United States adhered to the established rule of international law that a claim must be national in origin and continuously thereafter at least to the date of presentation or filing of the claim with the tribunal.

The Preparatory Committee of the 1930 Conference for the Codification of International Law proceeded even further. It maintained that an international claim by a State is inadmissible “unless the injured person was its national at the moment when the damage was caused and retains its nationality until the claim is decided”. 34

7.7 Renunciation of Diplomatic Protection by States

Consonant with the Calvo Doctrine of assimilating foreigners to the legal status of nationals, some Latin American States have sought, by conventional law, to renounce among themselves their right of diplomatic protection of their nationals. The Pact of Bogota for the pacific settlement of inter-state disputes was drawn up at the Ninth International Conference of American States held at Bogota in 1948. Article VII of this Treaty reads:

“The High Contracting Parties bind themselves not to make diplomatic representations in order to protect their nationals, or to refer a controversy to

34 Basis of Discussion, No. 28, L.N. Publ., V, Legal, 1929, vol. 3.
a court of international jurisdiction for that purpose, when said nationals have had available the means to place their case before competent domestic courts of the respective state.\textsuperscript{35}

As the Article stands, it has the effect of a renunciation of the State’s right of diplomatic protection, even in the face of a denial of justice, for those States which have ratified the Treaty without making reservations to this provision. Nine States including Mexico have made such ratifications and have thus waived their right of diplomatic protection \textit{inter se}. The United States of America, which has not since ratified the Treaty, recorded reservations to this Article on signing the Pact in 1948.\textsuperscript{36} The United States reservation was based on two objections. First, the renunciation of its right of protection. Secondly, the implicit attempt to abolish within the inter-American legal system the requirement that States maintain a minimum international standard of treatment of the person and property of aliens.

\subsection*{7.8 Convention on Certain Questions Relating to the Conflict of Nationality Laws (THE HAGUE, 1930)\textsuperscript{37}}

As the International Conference for the Codification of International Law, held at The Hague in March and April, 1930, must certainly be regarded as a landmark in any investigation into the problem of nationality in international law. There is, in such an appraisal, an obvious danger of both over estimating and underestimating the significance of that part of the Conference which dealt with nationality problems. The practical results were certainly not conspicuous. The number of rules adopted was comparatively small; the number of those adopted with the two-thirds majority required by the rules of procedure for the adoption of Conventions, still smaller. These rules are laid down in the Convention concerning Certain Questions Relating to the Conflict of Nationality Laws and in three Protocols, namely, the Protocol Relating to Military Obligations in Certain Cases of Double Nationality, the Protocol Relating to a Certain Case of statelessness, and the Special


\textsuperscript{37} L.N. Doe. C. 24. M. 13. 1931, V.
Protocol concerning Statelessness. The Agreements adopted by the Conference were to enter into force on the ninetieth day after a procès-verbal had been drawn up by the Secretary-General of the League of Nations as soon as ratifications or accessions by ten States had been deposited.

Considering that it is of importance to settle by international agreement questions relating to the conflict of nationality laws. Being convinced that it is in the general interest of the international community to secure that all its members should recognize that every person should have a nationality and should have one nationality only. Recognizing accordingly that the ideal towards which the efforts of humanity should be directed in this domain is the abolition of all cases both of statelessness and of double nationality. Being of opinion that, under the economic and social conditions which at present exist in the various countries, it is not possible to reach immediately a uniform solution of all the above-mentioned problems.

Being desirous, nevertheless, as a first step toward this great achievement, of settling in a first attempt at progressive codification, those questions relating to the conflict of nationality laws on which it is possible at the present time to reach international agreement. Have decided to conclude a Convention and have for this purpose appointed as their Plenipotentiaries.

7.9 Protocol Relating To Military Obligations in Certain Cases of Double Nationality (The Hague, 1930)

The Undersigned Plenipotentiaries, on behalf of their respective Governments, with a view to determining in certain cases the position as regards their military obligations of persons possessing two or more nationalities, have agreed as follows:

A person possessing two or more nationalities who habitually resides in one of the countries whose nationality he possesses, and who is in fact most closely connected with that country, shall be exempt from all military obligations in the other country or countries. This exemption may involve the loss of the nationality of the

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other country or countries. Without prejudice to the provisions of Article 1 of the, present Protocol, if a person possesses the nationality of two or more States and, under the law of any one of such States, has the right, on attaining his majority, to renounce or decline the nationality of that State, he shall be exempt from military service in such State during his minority.

A person, who has lost the nationality of a State under the law of that State and has acquired another nationality, shall be exempt from military obligations in the State of which he has lost the nationality. The High Contracting Parties agree to apply the principles and rules contained in the preceding articles in their relations with each other, as from the date of the entry into force of the present Protocol. The inclusion of the above-mentioned principles and rules in the said articles shall in no way be deemed to prejudice the question whether they do or do not already form part of international law. It is understood that, in so far as any point is not covered by any of the provisions of the preceding articles, the existing principles and rules of international law shall remain in force. Nothing in the present Protocol shall affect the provisions of any treaty, convention or agreement in force between any of the High Contracting Parties relating to nationality or matters connected therewith.

7.10  Protocol Relating to a Certain Case of Statelessness (The Hague, 1930)

The Undersigned Plenipotentiaries, on behalf of their respective Governments, with a view to preventing statelessness arising in certain circumstances, Have Agreed as follows:

In a State whose nationality is not conferred by the mere fact of birth in its territory, a person born in its territory of a mother possessing the nationality of that State and of a father without nationality or of unknown nationality shall have the nationality of the said State. The High Contracting Parties agree to apply the principles and rules contained in the preceding article in their relations with each other, as from the date of the entry into force of the present Protocol.

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The inclusion of the above-mentioned principles and rules in the said article shall in no way be deemed to prejudice the question whether they do or do not already form part of international law. It is understood that, in so far as any point is not covered by any of the provisions of the preceding article, the existing principles and rules of international law shall remain in force. Nothing in the present Protocol shall affect the provisions of any treaty, convention or agreement in force between any of the High Contracting Parties relating to nationality or matters connected therewith.

7.11 Draft Convention on the Elimination of Future Statelessness (1954)\textsuperscript{40}

Whereas the Universal Declaration of Human Rights proclaims that “everyone has the right to nationality.” Whereas the Economic and Social Council has recognized that the problem of stateless persons demands “the taking of joint and separate action by Member nations in co-operation with the United Nations to ensure that everyone shall have an effective right to a nationality.” Whereas statelessness often results in suffering and hardship shocking to conscience and offensive to the dignity of man, whereas statelessness is frequently productive of friction between States. Whereas statelessness is inconsistent with the existing principle which postulates nationality as a condition of the enjoyment by the individual of certain rights recognized by international law. Whereas the practice of many States has increasingly tended to the progressive elimination of statelessness. Whereas it is imperative, by international agreement, to eliminate the evils of statelessness.

7.12 Draft Convention on the Reduction of Future Statelessness (1954)\textsuperscript{41}

Whereas the Universal Declaration of Human Rights proclaims that “everyone has the right to a nationality.” Whereas the Economic and Social Council has recognized that the problem of stateless persons demands “the taking of joint and separate action by Member nations in co-operation with the United Nations to ensure that everyone shall have an effective right to a nationality.” Whereas statelessness often results in suffering and hardship shocking to conscience and offensive to the

\textsuperscript{40} U.N. Doc. A/2693, pp. 3-7.

\textsuperscript{41} U.N. Doc. A/2693, pp. 3-7.
dignity of man. Whereas statelessness is frequently productive of friction between States. Whereas statelessness is inconsistent with the existing principle which postulates nationality as a condition of the enjoyment by the individual of certain rights recognized by international law. Whereas the practice of many States has increasingly tended to the progressive elimination of statelessness. Whereas it is desirable to reduce statelessness, by international agreement, so far as its total elimination is not possible.

7.13 Convention Relating to the Status of Stateless Persons (NEW YORK, September 28, 1954)\(^{42}\)

Considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly of the United Nations have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination. Considering, that the United Nations has, on various occasions, manifested its profound concern for stateless persons and endeavoured to assure stateless persons the widest possible exercise of these fundamental rights and freedoms.

Considering that only those stateless persons who are also refugees are covered by the Convention relating to the Status of Refugees of 28 July 1951, and that there are many stateless persons who are not covered by that Convention. Considering that it is desirable to regulate and improve the status of stateless persons by an international agreement.

For the purpose of this Convention, the term “stateless person” means a person, who is not considered as a national by any State under the operation of its law. This Convention shall not apply: To persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance so long, as they are receiving such protection or assistance. To persons who are recognized by the competent authorities of the country in which they have taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.

\(^{42}\) U.N. Doc. E/Conf. 17/5.
To persons with respect to whom there are serious reasons for considering that: They have committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provisions in respect of such crimes. They have committed a serious non-political crime outside the country of their residence prior to their admission to that country. They have been guilty of acts contrary to the purposes and principles of the United Nations.


The Convention on the Reduction of Statelessness is a 1961 United Nations multilateral treaty whereby sovereign states agree to reduce the incidence of statelessness. The Convention was originally intended as a Protocol to the Convention Relating to the Status of Refugees, while the 1954 Convention Relating to the Status of Stateless Persons was adopted to cover stateless persons who are not refugees and therefore not within the scope of the Convention Relating to the Status of Refugees.

The Nansen International Office for Refugees was an organization of the League of Nations, which was internationally in charge of refugees from war areas from 1930 to 1939. It received the Nobel Peace Prize in 1938. Their Nansen passports, designed in 1922 by founder Fridtjof Nansen were internationally recognized identity cards first issued by the League of Nations to stateless refugees. In 1942 they were honored by governments in 52 countries and were the first Refugee travel documents.

7.15 Convention Relating To the Status of Refugees (GENEVA, July 28, 1951)\textsuperscript{43}

The Convention relating to the Status of Refugees (CRSR) is a United Nations multilateral treaty that defines who is a refugee, and sets out the rights of individuals who are granted asylum and the responsibilities of nations that grant asylum. The Convention also sets out which people do not qualify as refugees, such

\textsuperscript{43} U.N. Doc. A/Conf.2/108.
as war criminals. The Convention also provides for some visa-free travel for holders of travel Documents issued under the convention.

The Convention was approved at a special United Nations conference on 28 July 1951. It entered into force on 22 April 1954. It was initially limited to protecting European refugees from before 1 January 1951 (after World War II), though states could make a declaration that the provisions would apply to refugees from other places. A 1967 Protocol removed the time limits and applied to refugees "without any geographic limitation", but declarations previously made by parties to the Convention on geographic scope were grandfathered in. Although, like many international treaties, the Refugee Convention was agreed in Geneva, it is incorrect to refer to it as "the Geneva Convention," because there are four treaties regulating armed conflict known as the Geneva Conventions.

Denmark was the first state to ratify the treaty on 4 December 1952. As of July 2013 there were 145 parties to the Convention, and 146 to the protocol. Most recently, the President of Nauru, Marcus Stephen, signed both the Convention and the Protocol on 17 June 2011 and acceded on 28 June 2011. Madagascar and Saint Kitts and Nevis are parties only to the Convention, while Cape Verde, the United States of America and Venezuela are parties only to the Protocol.

Considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on December 10, 1948, by the General Assembly have affirmed the Principle that human beings shall enjoy fundamental rights and freedoms without discrimination.

Considering that the United Nations has on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights, and freedoms. Considering that it is desirable to revise and consolidate previous international agreements relating to the status of refugees and to extend the scope of and the protection accorded by such instruments by means of a new agreement. Considering that the grant of asylum may place unduly heavy burdens on certain countries and that a satisfactory solution of a
problem of which the United Nations has recognized the international scope and nature cannot therefore is achieved without international co-operation.

Expressing the wish that all States, recognizing the social and humanitarian nature of the problem of refugees, will do everything within their power to prevent this problem from becoming a cause of tension between States. Noting that the United Nations High Commissioner for Refugees is charged with the task of supervising international conventions providing for the protection of refugees, and recognizing that the effective co-ordination of measures taken to deal with this problem will depend upon the co-operation of States with the High Commissioner.

For the purposes of the present Convention, the term “refugee” shall apply to any person who: Has been considered a refugee under the Arrangements of May 12, 1926, and June 30, 1928, or under the Conventions of October 28, 1933 and February 10, 1938, the Protocol of September 14, 1939, or the Constitution of the International Refugee Organisation.

7.16 The Convention on the Nationality of Married Women (1957)

The Convention on the Nationality of Married Women is an international convention passed by the United Nations General Assembly in 1957. It entered into force in 1958 and as of 2013 it has 74 state parties.

Before the Convention on the Nationality of Married Women, no legislation existed to protect married women’s right to retain or renounce national citizenship in the way that men could. Women’s rights groups recognized a need to legally protect the citizenship rights of women who married someone from outside their country or nationality. The League of Nations, the international organization later succeeded by the United Nations, was lobbied by women’s rights groups during the early 20th century to address the lack of international laws recognizing married women’s rights of national citizenship. The Conference for the Codification of International Law, held at The Hague in 1930, drew protests from international women’s rights groups, yet the League declined to include legislation enforcing married women’s nationality.
rights. The League took the position that it was not their role, but the role of member states, to deal with equality between men and women.

The International Women’s Suffrage Alliance (IWSA, later renamed the International Alliance of Women) launched a telegram campaign in 1931 to pressure the League of Nations to address the lack of legislation. Women from around the world sent telegrams to the League of Nations as a protest. The League made the concession of creating an unfunded Consultative Committee on Nationality of Women.

The Pan-American Conference in Montevideo passed a Convention on the Nationality of Married Women in 1933. It was passed by the Pan American Conference at the same time as the Treaty on the Equality of Rights between Men and Women. These were the first pieces of international law to explicitly set sexual equality as a principle to be incorporated into national legislation which was required of countries ratifying the convention and treaty. Lobbying by the American National Women's Party has been credited with this legislation. However, neither the International Labour Organization (ILO) nor the League of Nations passed any legislation on the issue during the interwar years.

The issue of the nationality of married women was a leading women’s rights issue facing the United Nations after its establishment. The United Nations Commission on the Status of Women was created, and made it a priority of their agenda, launching a study in 1948. The Commission recommended to the United Nations Economic and Social Council that legislation be drafted to give women equal rights as set out in Article 15 of the Universal Declaration of Human Rights. The Convention on the Nationality of Married Women entered into force on August 11, 1958. As of 2013, the convention has been ratified by 74 states. It has been denounced by the ratifying states of Luxembourg, Netherlands, and United Kingdom.

The Convention was concluded in the light of the conflicts of law on nationality derived from provisions concerning the loss or acquisition of nationality by women as a result of marriage, divorce, or of the change of nationality by the husband during marriage. It allows women to adopt the
nationality of their husband based upon the woman's own decision, but does not require it.

The Convention seeks to fulfill aspirations articulated in Article 15 of the Universal Declaration of Human Rights that everyone has a right to a nationality and no one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

7.17 European Convention on Nationality (Strasbourg, 1997)

The European Convention on Nationality was signed in Strasbourg on 6 November 1997. It is a comprehensive convention of the Council of Europe dealing with the law of nationality. The Convention is open for signature by the member States of the Council of Europe and the non-member States which have participated in its elaboration and for accession by other non-member States. The Convention came into force on 1 March 2000 after ratification by 3 countries. As at 6 March 2014, the Convention has been signed by 29 countries, but has been ratified by only 20 of those countries.

Article 4d provides that neither marriage nor dissolution of marriage shall automatically affect the nationality of either spouse, nor shall a change of nationality by one spouse during marriage automatically affect the nationality of their spouse. Common practice among states at the beginning of the 20th century was that a woman was to have the nationality of her husband; i.e., upon marrying a foreigner the wife would automatically acquire the nationality of her husband, and lose her previous nationality. Even after the nationality of a married woman was no longer dependent on the nationality of her husband, legal provisions were still retained which automatically naturalising married women and sometimes married men as well. This led to a number of problems, such as loss of the spouse’s original nationality, the spouse losing the right to consular assistance since consular assistance cannot be provided to nationals under the jurisdiction of a foreign state of which they are also nationals, and becoming subject to military service obligations. Article 4d addresses this situation.
Article 5 provides that no discrimination shall exist in a state's internal nationality law on the grounds of "sex, religion, race, colour or national or ethnic origin". It also provides that a state shall not discriminate amongst its nationals on the basis of whether they hold their nationality by birth or acquired it subsequently.

Article 6 relates to the acquisition of nationality. It provides for nationality to be acquired at birth by descent from either parent to those born within the territory of the state. States may exclude partially or fully children born abroad. It also provides for nationality by virtue of birth in the territory of state; however, states may limit this to only children who would be otherwise stateless. It requires the possibility of naturalisation, and provides that the period of residence required for eligibility cannot be more than ten years lawful and habitual residence. It also requires to "facilitate" the acquisition of nationality by certain persons, including spouses of nationals, children of its nationals born abroad, children one of whose parents has acquired the nationality, children adopted by a national, persons lawfully and habitually resident for a period before the age of eighteen, and stateless persons and refugees lawfully and habitually resident on its territory.

Article 7 regulates the involuntary loss of nationality. It provides that states may deprive their nationals of their nationality in only the cases of voluntary acquisition of another nationality, fraud or failure to provide relevant information when acquiring nationality, voluntary military service in a foreign military force, or adoption as a child by foreign nationals. It also provides for the possibility of loss of nationality for nationals habitually residing abroad. Finally it provides loss of nationality for "conduct seriously prejudicial to the vital interests of the State Party".

Desiring to avoid discrimination in matters relating to nationality; Aware of the right to respect for family life as contained in Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms; Noting the varied approach of States to the question of multiple nationality and recognizing that each State is free to decide which consequences it attaches in its internal law to the fact that a national acquires or possesses another nationality.

The member States of the Council of Europe and the other States signatory to this Convention, Considering that the aim of the Council of Europe is to achieve
greater unity between its members; Bearing in mind the numerous international instruments relating to nationality, multiple nationality and statelessness;

Recognizing that, in matters concerning nationality, account should be taken both of the legitimate interests of States and those of individuals; Desiring to promote the progressive development of legal principles concerning nationality, as well as their adoption in internal law and desiring to avoid, as far as possible, cases of statelessness;

Agreeing on the desirability of finding appropriate solutions to consequences of multiple nationality and in particular as regards the rights and duties of multiple nationals; Considering it desirable that persons possessing the nationality of two or more States Parties should be required to fulfill their military obligations in relation to only one of those Parties; Considering the need to promote international co-operation between the national authorities responsible for nationality matters. This Convention establishes principles and rules relating to the nationality of natural persons and rules regulating military obligations in cases of multiple nationalities, to which the internal law of States Parties shall conform.

7.18 Summary

Diplomatic protection is a procedure under customary international law for giving effect to State responsibility arising out of an international delict affecting the person or property of a national or subject of a State. Practice insists on the prior exhaustion of local remedies in the allegedly offending State before the Claimant State has a right of recourse to diplomatic protection. The fundamental basis of protection is the link of nationality between the State and the individual. Diplomatic protection is normally excluded when the individual possesses the nationality of both the claimant and the respondent States.

Under conventional international law, provisions are made particularly in agreements relating to trade, commerce, navigation and establishment, and in peace treaties, according certain rights to nationals with the guarantee of jurisdictional clauses for affording diplomatic protection in the event of violation of such treaties.
International tribunals have, in some cases, applied the principle of effective nationality as a limit to the nationality link for purposes of diplomatic protection. This power is exercised within the context of the recognition that while diplomatic protection is a question of international law, nationality, which is its basis, is still largely governed by municipal law. Moreover, international tribunals have claimed and exercised the competence to examine the international validity of the nationality link for establishing a State’s right to protection. It is the purpose of this chapter to discover and ascertain the extent to which normal international practice has been operating in the diplomatic protection of the citizens or nationals of the Member States of the Commonwealth, first against non-Commonwealth States, and secondly \textit{inter se}.

The Commonwealth of Nations is a unique phenomenon in international law. One of its distinctive features is that it functions in the absence of a Constitution or an International Treaty. It is neither a State a Confederation nor an International Organization. It possesses no international personality. It is, in fact, an association of fully sovereign States which, through an historical process, has evolved to maintain certain peculiar relationships \textit{inter se}. One of these concerns nationality. The Convention and the Protocols cover between them only a small section of the field of nationality, and they make law only as between the contracting States: they create only particular, not general or universal, international law. On this point, however, the following provision contained in the Convention and the Protocols should be borne in mind:

The principles and rules in the Convention, Protocol shall in no way be deemed to prejudice the question whether they do or do not already form part of international law.

The question whether some of the provisions are only declaratory of existing customary international law or whether they make new law is not easy to determine. While the direct and immediate effect of these Agreements was not great, their indirect significance is considerable, as they may be taken to reflect the views of two-thirds, or at least of the majority, of the Governments represented at the Conference. Moreover, the subsequent nationality legislation of a number of States, including
States which did not become parties to the Treaties mentioned, has been influenced by the principles adopted at the Conference.

Similarly, the careful preparatory work done, at the request of the Council of the League, first by the Committee, of Experts for the Progressive Codification of International Law, and then by the Preparatory Committee for the Codification Conference, throws considerable light on the subject; and the replies of the Governments to the points made by the Committee, the bases of discussion drawn up by the Committee in the light of those replies, and the proceedings in the First Committee dealing with nationality and in the Plenary Session of the Conference, are highly instructive. The Governments replies, quite apart from the valuable information they contain on the legislation and jurisdiction of the various countries give proof of the practice of the individual States in matters of nationality which itself is a source for the ascertainment of international law. Taken as a whole and read with a critical eye, the preparatory documents and transactions of the Conference contain important information as to existing international law in the field of nationality. The voeux and recommendations to be found in the Final Act of the Conference, the Convention and the Protocols in so far as these are not merely declaratory of existing international law may be taken as evidence of the prevailing trends in international law in this matter.

As the International Conference for the Codification of International Law, held at The Hague in March and April, 1930, must certainly be regarded as a landmark in any investigation into the problem of nationality in international law. There is, in such an appraisal, an obvious danger of both overestimating and underestimating the significance of that part of the Conference which dealt with nationality problems. The practical results were certainly not conspicuous. The number of rules adopted was comparatively small; the number of those adopted with the two-thirds majority required by the rules of procedure for the adoption of Conventions, still smaller. These rules are laid down in the Convention concerning Certain Questions Relating to the Conflict of Nationality Laws and in three Protocols, namely, the Protocol Relating to Military Obligations in Certain Cases of Double Nationality, the Protocol Relating to a Certain Case of statelessness, and the Special Protocol concerning Statelessness.