Chapter Eight

Functions of Nationality

A number of rights attach to the individual as a national of a particular State. These include diplomatic protection and free movement rights. They might also encompass access to social, property and political rights. The situation differs between different States because rights granted on the basis of nationality in national legislation are not identical. This part deals with the two most important functions which nationality has at the international level, i.e., diplomatic protection and free movement rights. References to application of the rule or principle of non-discrimination will also be invoked. The chapter will pay due regard to changes caused by international migration.

8.1. Diplomatic Protection

8.1.1. Contents of Diplomatic Protection

It is a well established principle of international law that a State of nationality can afford diplomatic protection to its nationals wherever they are located.\(^1\) This is a right and not a duty of the State. The State will retain discretion whether to exercise diplomatic protection on behalf of a national. This has been re-confirmed by the ICJ. In *Barcelona Traction Company* the Court observed that:

[W]ithin the limits prescribed by international law the State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease ...\(^2\)

The ICJ already expressed its opinion in *Nottebohm*:

Diplomatic protection and protection by means of international judicial proceedings constitute measures for the defence of the rights of the State.\(^3\)


Borchard has qualified diplomatic protection as an extraordinary legal remedy whereas a duty to protect nationals will depend on the municipal legislation of the State.\(^4\) Therefore, in his view a State, in fact, defends its own right. Weis has argued that the concept of diplomatic protection is not concerned with protection of the rights of individuals but rather with the interest of the State to protect the national community as a whole.\(^5\) The State acquires the right to protect its nationals on the basis of its own sovereignty and a general prohibition on intervention in a State's internal affairs.\(^6\) The right of the State has been called Vattelian fiction and is based on the strong positivist assumption that only States are subjects of international law.\(^7\) Therefore, it is an exclusive right of the State to settle questions with another State. It is irrelevant whether the dispute which gave rise to exercise of diplomatic protection has arisen from an injury to private interests. This was confirmed by the PCIJ which stated in *Mavrommatis Palestine concessions*:

> 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 sole claimant.\(^8\)

Another view was held by Lauterpacht, who defended the idea that the State merely represents the individual at the international level because the individual does not have access to international tribunals.\(^9\) Both views are not contradictory but they emphasize different aspects of the concept of diplomatic protection. The main weakness of Lauterpacht’s approach is that it lessens the importance of the decision of the State whether to exercise the right to diplomatic protection.

At the same time his view was indirectly supported by the ICJ in *LaGrand*.\(^10\) The case did not lead to a remedy for nationals but it proved that diplomatic protection becomes a remedy in cases when there are no international tribunals.

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5. Weis Paul, *Nationality and Statelessness in International Law*, 2nd ed. (Sijthoff Noordhoff from the latest Table of Contents: Alphen aan den Rijn [u.a.] 1979) 34.
7. Supra note 5, 36. See references by Donner to Scelle and Vattel, supra note 6, at 19. For further discussion on fiction see Dugard John, ‘First report on Diplomatic protection’ (7 March 2000) UN Doc. A/CN.4/506, 5, para 11.
10. *LaGrand* (Germany v. United States of America) (Judgment) [2001] ICJ Rep 466. In this case the ICJ ruled that a violation of the obligation to provide for consular protection by a third State