Obsolete and Unjust: The Rule of Continuous Nationality in the Context of State Succession

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1. Introduction

The traditional rule of diplomatic protection concerning the nationality of claims is the principle of 'continuous nationality': in order for a State to exercise diplomatic protection for a person, he/she must possess its nationality at the time of the commission of the internationally wrongful act and remains a national of that State at least until that State takes up his/her claim. In the context of State succession, the application of the rule of continuous nationality results in neither the continuing State nor the successor State being able to exercise diplomatic protection on behalf of an individual which suffered damage as a result of an internationally wrongful act committed before the date of succession. The present paper addresses the issue whether or not the traditional rule of continuous nationality should apply in the specific context of succession of States where individuals lose their nationality involuntarily. In other words, does contemporary international law allow the successor State to take over the right to claim reparation on behalf of its new nationals even if they did not have its nationality at the time the damage

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1) This paper is mainly concerned with changes of nationality affecting natural persons (individuals) in the context of State succession. Our analysis is also applicable to judicial persons (corporations).
occurred? To the best of the author’s knowledge, this controversial question has not been comprehensively addressed in doctrine.

The first section of this paper examines the content of the diplomatic protection rule of continuous nationality and, more specifically, its application in the context of State succession. It will then refer to the numerous authorities which have suggested that the rule of continuous nationality is not appropriate in the context of State succession as it leads to unjust results. This paper will also examine the validity of the proposition that the successor State may claim reparation on behalf of its new nationals for pre-succession damages and the question of whether or not any exceptions exist. Finally, this paper will analyse relevant State practice and case law on the application of the rule of continuous nationality in the context of State succession. Such analysis of State practice has not been conducted in the past by scholars.

2. The Rule of Continuous Nationality in Diplomatic Protection and Its Criticisms

It is a well-known principle of international law that by the mechanisms of diplomatic protection a State offers to take up on the international level the claim of one of its nationals who has suffered injuries as a consequence of the commission of an act by another State. By doing so, it is generally admitted that the 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.” Since a State is, in fact, “asserting its own right” when protecting one of its nationals by exercising

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2) This paper only deals with internationally wrongful acts committed against individuals. It does not address the other question of the right to claim reparation of the successor State against a third State for internationally wrongful acts affecting directly the predecessor State before the date of succession. This question is fully examined in P. Dumberry State Succession to International Responsibility (Martinus Nijhoff, Leiden, Boston, 2007) (see pp. 309–336). This paper will also not address the other question of succession of States to obligations arising from an internationally wrongful act committed by the predecessor State against a third State before the date of succession. This question is dealt with by P. Dumberry, supra note 2, pp. 35–303; same author, ‘The Controversial Issue of State Succession to International Responsibility in Light of Recent State Practice’, 49 German Y.I.L. (2006) pp. 413–447; same author, ‘Is a New State Responsible for Obligations Arising from Internationally Wrongful Acts Committed Before Its Independence in the Context of Secession?’, 43 Canadian Y.I.L. (2005) pp. 419–453; same author, ‘New State Responsibility for Internationally Wrongful Acts by an Insurrectional Movement’, 17(3) European J.I.L (2006) pp. 605–621.

3) This question is examined in detail in Dumberry’s book, supra note 2, pp. 337–415.

4) Mavrommatis Palestine Concessions case, 30 August 1924, P.C.I.J., Jurisdiction, Series A, No. 2. The same explanation is found in Panevezys-Saldutiskis Railway case, 28 February 1939, P.C.I.J., Series A/B, No. 76.