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Unjust and Outmoded – The Doctrine of Continuous Nationality in International Claims†

1. A Wrong Without a Remedy

When State A seizes the property or injures the person of an alien – that is, a national of State B – the consequence must appear rather strange to someone unversed in the symbolism of international law. The aggrieved individual has no standing in the eyes of the international lawyer; it is only State B which has suffered an actionable wrong.

This simple and thoroughly artificial concept lies at the root of the "continuous nationality" rule: a claim must have been vested in a national of the claimant state (or a succession of such nationals) on the date of injury and continuously thereafter until the claim is filed.[1]

Many years may elapse, however, before the rule of continuous nationality runs its course. In the interim, some of the victims leave their homeland – either voluntarily or driven by the very forces which brought about the expropriation or bodily injury – some marry, and some die, leaving heirs born on the soil of their adopted country. New allegiances and loyalties are formed. Yet the doctrine of continuous nationality stubbornly refuses to bury the past, often with disastrous consequences. The wholesale migrations forced upon people in this century, and the greater mobility made possible by modern transportation, combine to make the doctrine of

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[1]Borchard, *The Diplomatic Protection of Citizens Abroad* §§ 306, 307, 308, 309 and cases cited (1915). Garcia Amador, *Draft Convention on Responsibility of the State for Injuries Caused in its Territory to the Person or Property of Aliens*, 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION OF THE UNITED NATIONS 49 (1961). Lillich, *International Claims: Their Adjudication by National Commissions* 81 (1962).

continuous nationality an archaic relic which does not serve the ends of justice.

A fairly common situation is this: State A, in its nationalization program, sweeps up property belonging to its own citizens as well as aliens. One of its nationals, fearing (often with ample justification) that his life as well as his property may be forfeit, emigrates to friendlier shores and in due course becomes a citizen of State B. Meanwhile State B has persuaded State A to pay a lump sum for the property of State B's nationals which State A had seized. The new citizen of State B cannot share in that recovery because he was not a citizen when the loss occurred; he is a so-called "late national"—*i.e.*, too late.

Another type of situation involves three nations instead of two. For example: a Canadian woman living in Europe is deprived of her property by a decree of expropriation. Later, she marries an American, giving up her Canadian citizenship. Canada will not espouse her claim, because she is no longer Canadian. The United States will not do so either, because it suffered no hurt when the axe fell; the property was not owned by one of its nationals at that time. There is no international tribunal where the unfortunate wife can find redress. She has suffered a wrong for which no legal remedy exists.

The Permanent Court of International Justice has set forth the rationale of the doctrine which produces that result:

> In the opinion of the Court, the rule of international law . . . is that in taking up the case of one of its nationals . . . a State is in reality asserting its own right . . . The right is necessarily limited to intervention on behalf of its own nationals because, 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, 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. 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.[2]

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[2]Panevezys-Saldutiskis Railway Case, P.C.I.J., Judgment dated February 28, 1939, ser. A/B no. 76, pp. 4-5, 9. "The traditional rule that only states have rights under international law precludes aggrieved individuals from presenting international claims directly to foreign states." Lillich, *International Claims: Their Preparation and Presentation* 7 (1962). "Whoever ill-treats a citizen indirectly injures the State which owes him an obligation of protection." Clay, *Recent Developments in the Protection of American Shareholders' Interests in Foreign Corporation,* 45 GEORGETOWN L. JOUR. 1, 8 (1965). *See also* Hackworth, *Digest of International Law* 803 (1943); 1 OPPENHEIM, INTERNATIONAL LAW 314 (1955); RALSTON, THE LAW AND PROCEDURE OF INTERNATIONAL TRIBUNALS 161 (1926); 1 HYDE, INTERNATIONAL LAW AS APPLIED BY THE UNITED STATES 314 (1945); 2 NIELSON, INTERNATIONAL LAW AS APPLIED TO RECLAMATIONS 893 (1933); JESSUP, A MODERN LAW OF NATIONS 99 (1959); 1 Whiteman, DIGEST OF INTERNATIONAL LAW 96 (1963).

Let us see how this principle has become firmly embedded in international law. We will then be in a better position to consider whether it should be nurtured, pruned, or uprooted.

In this connection it is well to bear in mind the different contexts in which the rule may be applied. Generally, it is more feasible to innovate in the distribution of lumpsum settlements by domestic tribunals than in the negotiations leading to such settlements, or in the espousal of individual claims. In short, while it may be desirable, if one were enunciating an ideal concept of international law *in vacuo,* for late nationals or non-nationals to be recognized, the hard fact is that a state is extremely loath to compensate individuals who were its nationals at the time their grievances arose, but subsequently transferred their allegiance to other states.

2. Development of the Doctrine

The 18th century teachings of Emer de Vattel in his classic treatise "Le Droit de Gens"[3] echoed the medieval concept of the absolute monarch, who wielded unfettered dominion over both people and property. In a very real sense, therefore, an injury to an individual was an injury to his sovereign.

The doctrine of continuous nationality was enunciated for the first time in this country by the American Commissioners appointed to adjudicate claims under the July 4, 1831, Convention between the United States and France. The Convention did not define the eligibility of claimants. It merely stated in Article I that the Government of France undertook to pay twenty-five million francs in settlement of claims by citizens of the United States for seizure, capture, confiscation or destruction of their vessels or other property.[4] The Commission consisted of three members who filed a report dated December 30, 1835, in which they stated:

> . . . . that the relief provided for under the Convention could be accorded only to American citizens, for injuries to American property, and where the right to indemnity had never been transferred to the subject of a foreign government; that, to constitute a valid claim, the owner of the property must have been entitled at the time of the spoliation to the protection and aid of the United States. . . .[5]

One of the Commissioners appended a note, stating *inter alia:*

> The Commission required that the claim should be altogether American, that it should have originally belonged and have continued to belong to an American citizen.[6]

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[3]THE LAW OF NATIONS, translation of the 1758 edition by FENWICK 1117 (1967).

[4]1 MALLOY, *Treaties, Conventions, International Acts, Protocols and Agreements Between the United States and Other Powers* 524 (1909).

[5]MOORE, INTERNATIONAL ADJUDICATIONS, MODERN SERIES 351 (1933).

[6]*Ibid.*

For more than a century and a quarter, domestic and international tribunals have followed the general rule that a nationality tie must exist between claimant and claimant state at the time the claim arose and continuously thereafter.

The United States Claims Commission created pursuant to the February 2, 1848, Peace Treaty with Mexico (The Treaty of Guadalupe Hidalgo) held:

> No claim can be admitted as valid under the treaty which was not American in its origin, and which has not retained its American character up to the time of its presentation to the board.[7]

Under a later Convention between the United States and Mexico, July 4, 1868, a Mixed Claims Commission was created to adjudicate still-unsettled claims which had been presented under the Treaty of Guadalupe Hidalgo, and claims which had arisen thereafter.[8] The Convention itself did not define the nationality requirements, but the Commission dismissed numerous cases on the ground that the claimants had not been American citizens when their claims arose, and subsequent assignments to American citizens did not confer jurisdiction on the Commission.[9]

The doctrine of continuous nationality has been followed in connection with claims not only of United States citizens, but also of other nationals.[10] After World War I, the various Mixed Claims Commissions established between Mexico and the United States (1923), France (1924), Germany (1925), Spain (1925), the United Kingdom (1926) and Italy (1927) required ownership of the claim by a national from the time of inception to the date of presentation.[11] The same rule was followed by the Mixed Claims Commission of the United States and Germany under the Treaty of Berlin (1921).[12]

It should be noted that the doctrine of continuous nationality was not unopposed. Although the above Commissions and the United States Department of State adhered to the rule, its rigid application had been criticized in 1915 by Borchard:

> If it is the injury to the state in the person of its citizen which justifies diplomatic interposition, the mere fact that the claim subsequently by oper-

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[7]3 MOORE, *International Arbitrations* 2386 (1898) (Slocum's case) and 2388 (Dimond's case).

[8]1 MALLOY, *supra* note 4, 1107.

[9]2 MOORE, *supra* note 9, 1353 and cases cited in footnotes 2 and 3.

[10]8 Whiteman, *Digest of International Law*, 1234, 1235 (1967).

[11]FELLER, THE MEXICAN CLAIMS COMMISSIONS (1923-1934), 96 *et seq.* (1935); *Special Mexican Claims Commission Report to the Secretary of State* 17 (1940); *American-Mexican Claims Commission Report to the Secretary of State*, 194, 195, 196 (1947).

[12]*Mixed Claims Commission United States-Germany: Decisions and Opinions* 176-177 (1928).

ation of law passes into the hands of alien heirs would not seem to modify the injury to the state.[13]

The peace treaties concluded after World War II between the Allied and Associated Powers and Italy,[14] Bulgaria,[15] Hungary[16] and Rumania[17] provided for the restoration of property, rights and interests taken from "United Nations nationals" and for the payment of compensation where the property could not be restored, or where war damage losses had been suffered.[18] "United Nations nationals" were defined as "individuals who were nationals of any of the United Nations, or corporations which were organized under the laws of any of the United Nations, at the the coming into force" of each Treaty, provided the said individuals or corporations had the same status on the date of the armistice with that nation. This was a slight softening of the strict rule of continuous nationality, inasmuch as protection was extended to claimants who were not nationals of the espousing state on the date of the loss, but acquired such nationality before the armistice was signed.

Moreover, these treaties took a giant step by equating, for this purpose, nationality in any of the United Nations. Thus, a claimant who had, for example, British nationality at the time of his loss, French nationality at the time of the armistice, and American nationality at the time the treaty became effective would not be disqualified on the ground that his nationality was not continuous. The subsequent treaty arrangements with Germany did not follow these models.

In the aftermath of World War II, several East European states made lump-sum payments for the expropriated property of foreign nationals.[19] Each of these agreements stipulated that the property must have been owned by nationals of the espousing state on the date it was nationalized.[20]

[13]Borchard, *op. cit.*, note 1, 630.

[14]61 Stat. 1245 (1947); 42 *Amer. Jour. Int. Law Supp.* 47 (1948).

[15]61 Stat. 1915 (1947); 42 *Amer. Jour. Int. Law Supp.* 179 (1948).

[16]61 Stat. 2065 (1947); 42 *Amer. Jour. Int. Law Supp.* 225 (1948).

[17]61 Stat. 1757 (1947); 42 *Amer. Jour. Int. Law Supp.* 252 (1948).

[18]Article 78 of the Peace Treaty with Italy, Article 23 of the Treaty with Bulgaria, Article 26 of the Treaty with Hungary, and Article 24 of the Treaty with Rumania.

[19]Lillich, *Eligible Claims Under Lump-Sum Settlements,* 43 INDIANA L. JOUR. 817-821 (1968).

[20]Shortly after World War II the following states concluded lump-sum agreements for the compensation of nationalization claims:

April 12, 1947	Sweden-Yugoslavia
March 19, 1948	France-Poland
July 19, 1948	U.S.-Yugoslavia
September 27, 1948	Switzerland-Yugoslavia
December 23, 1948	U.K.-Yugoslavia
January 14, 1949	U.K.-Poland
June 25, 1949	Switzerland-Poland
September 28, 1949	U.K.-Czechoslovakia
November 16, 1949	Sweden-Poland
December 12, 1949	Switzerland-Czechoslovakia

The Agreement between the United States and Yugoslavia of July 19, 1948,[21] was limited to claimants who were United States nationals at the time their property was taken. Nothing was said about continuous nationality thereafter. The claims of persons who were Yugoslav nationals on the date of the loss (even though they acquired United States nationality prior to the date of the agreement) "shall be subject to compensation by the Government of Yugoslavia, either by direct negotiations between the Government and the respective claimants, or under compensation procedures prescribed by Yugoslav law."[22]

The International Claims Settlement Act of 1949[23] established a United States Commission to adjudicate claims of "nationals of the United States included within the terms of the Yugoslav Claims Agreement of 1948."[24] Nothing was said about continuous nationality except that "the applicable principles of international law" shall apply.[25]

Claim of Jerko Bogovich et al[26] was a case in which Yugoslavia had nationalized property of an American citizen who died shortly before the date of the Agreement, leaving heirs who were Yugoslav nationals. The Foreign Claims Settlement Commission (FCSC)[27] denied the claim on the ground that the thread of continuous United States nationality had been broken. Following "the applicable principles of international law," the Commission held that a "claim ordinarily must continue to be national at the time of presentation, by the weight of authority."

However, the Commission did not stop there. Although the claim had lost its United States nationality prior to filing, the Commission went on to

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June 2, 1950	France-Czechoslovakia
June 12, 1950	France-Hungary
July 19, 1950	Switzerland-Hungary
April 14, 1951	France-Yugoslavia
September 22, 1955	U.K.-Bulgaria

See also: BINDSCHEDLER, VERSTAATLICHUNGSMABNAHMEN UND ENTSCHADIGUNGSPFLICHT NACH VÖLKERRECHT 115-117 (1950).

[21]T.I.A.S. 1803, 62 Stat. 2658 (1948).

[22]Article 3.

[23]Public Law 81-455, 64 Stat. 12 (1950), 22 U.S.C. §1621 (1964).

[24]The Act in § 4(a) also gave the Commission jurisdiction to adjudicate claims under any *en bloc* settlement which might thereafter be entered into with any foreign government.

[25]*Id.*

[26]Docket No. Y-1757, Decision No. Y-857 (1954); FCSC DECISIONS & ANNOTATIONS 13 (1968).

[27]The War Claims Commission, an independent agency, was created by the War Claims Act of 1948. Public Law 80-896, 62 Stat. 1240, (1948) 50 U.S.C. App. § 2001 (1964). The International Claims Commission was created as part of the Department of State by the International Claims Settlement Act of 1949. Public Law 81-455, 64 Stat. 12 (1950) 22 U.S.C. §1621 (1964). In 1954 these two Commissions were abolished, and their functions transferred to the Foreign Claims Settlement Commission of the United States, the present

say that a claim must retain its national character "until its settlement or decision," thus extending the requirement of continuous nationality to a later point in time. The FCSC relied upon (a) an explanatory note in the Department of State Application Form; (b) and unpublished letter by the Department of State to an attorney; (c) the Department's abandonment of a claim it was espousing on behalf of a United States citizen when he died leaving his Japanese wife as his sole heir; and (d) an unpublished decision by the British-Mexican Mixed Claims Commission.

In 1955, Congress added Title III to the International Claims Settlement Act, directing the Commission to adjudicate "in accordance with applicable substantive law, including international law," the claims of "nationals of the United States" against the Governments of Bulgaria, Hungary, Rumania, Italy and the Soviet Union.[28] The Commission interpreted this statutory language as requiring adherence to the rule of continuous nationality, holding:

> Under well established principles of international law, unless otherwise provided by treaty, in order for a claim espoused by the United States to be compensable, the property upon which it is based must have been owned by a national or nationals of the United States at the time of loss, and the claim which arose from such loss must have been owned by a United States national or nationals continuously thereafter.[29]

Title IV of the International Claims Settlement Act, added in 1958, dealt with claims against Czechoslovakia. It provided:

> A claim . . . shall not be allowed unless the property upon which the claim is based was owned by a national of the United States on the date of nationalization or other taking thereof and unless the claim has been held by a national of the United States continuously thereafter until the date of filing with the Commission.[30]

Thus, Congress ratified the practice of the Commission by clearly establishing the principle of continuous nationality. When a person having a claim against Czechoslovakia died prior to the filing of the claim, the Commission limited the award to the interests beneficially owned by inheritors who were United States nationals.[31]

A new complication was created by the Polish Claims Agreement of July 16, 1960,[32] which apparently shortened the necessary period of con-

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independent national claims tribunal. Reorganization Plan No. 1 of 1954, 68 Stat. 1279, 19 Fed. Reg. 3985.

[28]Public Law 84-285 (1955); 22 U.S.C. § 1641-1641q (1964).

[29]Claim of Margot Factor, Claim No. RUM 30214, Decision No. RUM-30 (1957), FCSC DECISIONS & ANNOTATIONS 159, 168 (1968).

[30]Public Law 85-604, 72 Stat. 527 (1958); 22 U.S.C §§1642-1642 (1964).

[31]Claim of National Bank of Westchester, White Plains, as Adminstrator With the Will Annexed, Estate of Meta Blum, Deceased, Claim No. CZ-1872, Decision No. CZ-3312 (1962), 17 FCSC SEMIANN. REP. 251 (July-Dec. 1962).

[32]T.I.A.S., No. 4545, 11 U. S. TREATIES 1953 (1960).

tinuous nationality by requiring that claims need be owned by United States nationals from the date the property was taken only "to the date of entry into force of the Agreement."[33] Despite this clear language the FCSC gave no effect to the relaxation introduced by the Polish Claims Agreement:

The statutory authority for administering the Polish Claims Program was Title I of the International Claims Settlement Act, which vested the Commission with jurisdiction to adjudicate claims "within the terms of any claims agreement hereafter concluded between the Government of the United States and a foreign government."[34] The statute further declared:

> In the decision of claims under this title, the Commission shall apply the following in the following order: (1) The provisions of the applicable claims agreement as provided in this subsection; and (2) the applicable principles of international law, justice, and equity.[35]

Although "the provisions of the applicable claims agreement"—the first criterion stipulated by the statute—clearly declared that the last date when the claim need be owned by a United States national was the date of the agreement, the FCSC in *Claim of Richard O. Graw, Executor of the Estate of Oscar Meyer, Deceased*[36] simply ignored this provision and proceeded directly to the second criterion, "applicable principles of international law." Having leaped the hurdle by taking no notice of its existence, the Commission found itself again on a solid footing. Citing Title IV of the Act, which stated that a claim against Czechoslovakia must be held by a national of the United States "on the date of nationalization or other taking . . . and . . . continuously thereafter until the date of filing with this Commission,"[37] the Commission held:

> It follows [*sic*] that claims within the purview of the Polish Claims Agreement of 1960, determined by the Commission in accordance with applicable principles of international law as provided by Section 4, Title I of the International Claims Settlement Act of 1949, as amended, must have been owned by United States nationals on the date of inception and continuously to the date of filing with this Commission.

The Yugoslav Claims Agreement of November 5, 1964,[38] used language similar to that in the Polish Claims Agreement, fixing the last date on which a claim must have been owned by a United States national as "the date of this agreement."[39] The FCSC, in *Claim of Nenad Popovic, Execu-*

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[33]Annex, Par. A, incorporated as an integral part of the Agreement by Article 7.

[34]§ 4 (a), Public Law 81-455, 64 Stat. 12 (1950), 22 U.S.C. § 1621-1627 (1964).

[35]*Id.*

[36]Claim No. PO-7595, Decision No. PO-8583 (July 28, 1965; 23 *FCSC Semi-ann. Rep.* 52 (July-Dec. 1965).

[37]§ 405, Public Law 85-604, 72 Stat. 527, 22 U.S.C. § 1642-1642p (1964).

[38]T.I.A.S., No. 5750, 16 *U. S. Treaties* 1 (1964).

[39]Article II.

tor of the Estate of Milord A. Mihailovic,[40] followed its own decision in *Claim of Richard O. Graw* rather than the Agreement, and denied a claim filed on behalf of the non-United States heirs of a United States national who died after the date of the Agreement but before filing a claim.

The Commission added another ground for reaching this conclusion—the provision in Section 5 of Title I of the International Claims Settlement Act[41] that the Commission shall certify to the Secretary of the Treasury "awards made in favor of . . . nationals of the United States under this title." The Commission cited with approval its dictum in *Claim of Jerko Bogovich, supra* (note 26), that claims must be American-owned not only until the date of the *en bloc* settlement agreement and the date of filing with the Commission but continuously until the final award and certification to the Secretary of Treasury.

In 1962, Title II was added to the War Claims Act,[42] giving the Foreign Claims Settlement Commission jurisdiction over certain claims by American citizens for personal injury and property damage suffered as a result of military action during World War II. Section 204 of the Act prescribed that a claim must be owned by a national of the United States at the time of loss and continuously thereafter until the date of filing.

If the original owner of a claim was not a national of the United States his subsequent assignment of the claim to an American citizen does not make the claim compensable.[43] Subrogees—in most cases insurance companies—are entitled to compensation only if the claims at their origin were owned by nationals of the claimant state.[44]

Title V was added to the International Claims Settlement Act in 1964,[45] giving the FCSC jurisdiction to adjudicate claims against Cuba. In the following year, claims against the Chinese Communist regime were added.[46] In both instances the property must have been owned by a United States national at the time of loss, and the claim must have been "held by one or more nationals of the United States continuously thereafter until the date of filing with the Commission."[47]

The FCSC has just begun to process claims against Rumania, Bulgaria and Italy pursuant to a 1968 amendment to the International Claims

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[40]Claim No. Y2-1846, Decision No. Y2-1555 (March 5, 1969).

[41]Public Law 81-455, 64 Stat. 12 (1950), 22 U.S.C. §1621-1627 (1964).

[42]Public Law 87-846, 76 Stat. 1107 (1962); 50 U.S.C. App. §§ 2017-2017p (1964).

[43]Claim of Gerardo Soliven, Claim No. W-19156, Decision No. W-6211 (1965), FCSC DECISIONS & ANNOTATIONS 569 (1968).

[44]FELLER, THE MEXICAN CLAIMS COMMISSIONS (1923-1934) 112 (1935) and cases cited therein. *See* cases cited in FCSC DECISIONS & ANNOTATIONS 597 (1968) and Lillich, *International Claims: Their Adjudication by National Commissions* 96 (1962).

[45]Public Law 88-666, 78 Stat. 1110 (1964).

[46]Public Law 89-780, 80 Stat. 1365 (1965).

[47]§ 504(a).

Settlement Act.[48] The amendment implements the Claims Agreement with Rumania dated March 30, 1960,[49] and the Claims Agreement with Bulgaria dated July 2, 1963.[50] The Rumanian Agreement requires United States nationality on the date the claim arose, but is silent on continuous nationality thereafter, while the Bulgarian Agreement is limited to claims owned by United States nationals "continuously . . . until filed with the Government of the United States of America."[51] The 1968 amendment also reopened the Italian Claims Program for certain limited purposes, including claims arising during World War II "in territory ceded by Italy pursuant to the treaty of peace."[52] The FCSC was given jurisdiction to adjudicate such claims, provided they were "owned by persons who were nationals of the United States on September 3, 1943, and the date of enactment of this subsection [July 24, 1968]."[53]

The filing period for these three current programs opened on January 2, 1970, and closed on June 30, 1970.[54]

3. Straws in the Wind

Attempts have been made in Congress to relax the strict requirements of the continuous nationality rule and to extend eligibility to those who were not nationals of the United States at the time of loss but became naturalized later.[55]

Although these efforts have generally been unsuccessful, Congress has driven one wedge into the continuous nationality rule under a unique set of circumstances – when the lump-sum settlement proved to be larger than the total amount of all claims which met the requirement of United States nationality on as well as after the date of loss.

Pursuant to the Lombardo Agreement of 1947,[56] Italy paid $5 million to the United States for "the claims of United States nationals arising out of the war with Italy . . . " There was no definition of United States nationals

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[48]Public Law 90-421, 80 Stat. 420, 22 U.S.C. §1641b (1968).

[49]11 U.S.T. & O.I.A. 317, T.I.A.S. No. 4451 (1960).

[50]14 U.S.T. & O.I.A. 969, T.I.A.S. No. 5387 (1963).

[51]Article 3.

[52]§ 304 (c).

[53]*Ibid.*

[54]33 Fed. Reg. 112, F. R. Doc. 70-43, January 2, 1970.

[55]*Hearings before a Subcommittee of the Committee on Foreign Affairs, U. S. Senate,* 86th Cong., 1st Sess., on S. 706, May 29, 1959; *Hearings before a Subcommittee of the Committee on Interstate and Foreign Commerce, House of Representatives,* 86th Cong., 1st Sess., June 18, 1959; *Hearings before a Subcommittee of the Committee on the Judiciary, U.S. Senate, on Bills Amending the Trading with the Enemy Act and War Claims Act of 1948,* 86th Cong., 1st Sess., July 9, 1959. See 8 Whiteman, *supra* note 10, for details.

[56]61 Stat. 3962 (1947), Article II.

although Italian nationals were defined as those who had that status "at the time of the coming into force of this Memorandum of Understanding."[57]

The Lombardo Agreement of 1947 was implemented by Title III of the International Claims Settlement Act, enacted in 1955.[58] Section 304 provided:

> The Commission shall receive and determine, in accordance with the Memorandum of Understanding and applicable substantive law, including international law, the validity and amount of claims of nationals of the United States against the Government of Italy arising out of the War.

In 1958, a second sentence was added to Section 304:

> Upon payment of the principal amounts (without interest) of all awards from the Italian Claims Fund . . . the Commission shall determine the validity and amount of any claim under this section by any natural person who was a citizen of the United States on the date of enactment of this title.[59]

Thus, for the first time, late nationals were recognized, even though they were invited to share only what was left after full payment to claimants who were United States nationals at the date of loss. Under this program, 482 awards were made in the principal amount of $2,730,146 plus accrued interest of $929,165. After the program was completed and all costs deducted, there was an unexpended balance of $1,088,623.[60] Since the Lombardo Agreement did not contain a reverter clause, this money remained in the Treasury of the United States. Faced with the problem of what to do with it, Congress in 1968 added a new subsection (b) to Section 304, directing the Commission to "receive and determine or redetermine" the claims of "persons who were eligible to file claims under the first sentence of subsection (a) of this section . . . but failed to file such claims . . . within the limit of time required therefor."[61]

It would seem that late nationals will not be permitted to share in the undistributed balance of the Italian Claims Fund, because their eligibility stems from the second sentence rather than the first sentence of Section 304. The door which had been opened to late nationals just a crack in 1958 was slammed shut in 1968.

When Congress passed the 1968 amendment to the International Claims Settlement Act, it did not follow the recommendation in Sohn & Baxter, *Draft Convention on the International Responsibility of States for Injuries to Aliens* (1961):

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[57]*Id.*, Article III.

[58]Public Law 84-285, 69 Stat. 570 (1955).

[59]Public Law 85-604, 72 Stat. 531 (1958); 22 U.S.C. § 1641 (1964).

[60]Rode, *The 1968 Amendments to the International Claims Settlement Act of 1949*, 63 AMER. JOUR. INTERNAT'L LAW 296 (1969).

[61]Public Law 90-421; 82 Stat. 420 (1968).

> A State has the right to present or maintain a claim on behalf of a person only while that person is a national of that State. A State shall not be precluded from presenting a claim on behalf of a person by reason of the fact that that person became a national of that State subsequent to the injury.[62]

The Explanatory Note acknowledges that the above statement is a departure from the traditional rule and would extend eligibility to late nationals even though the change in nationality was involuntary (for example, when an alien died leaving American heirs).

Despite the prestigious credentials of the *Draft Convention*, it has had no visible effect on the actions of the United States Congress or the Department of State.

4. The Policy of the Department of State

The Department of State has steadfastly supported the doctrine of continuous nationality. Secretary of State Fish stated in 1871:

> By adopting a foreigner... as a citizen, this Government does not undertake the patronage of a claim which he may have upon the country of his original allegiance or upon any other government. To admit that he can charge it with this burden would allow him to call upon a dozen governments in succession, to each of which he might transfer his allegiance, to urge his claim.[63]

Describing the converse situation, in which the United States might nationalize the property of a citizen who thereafter became a national of another country, Secretary Fish stated in 1874:

> It would be a monstrous doctrine, which this Government would not tolerate for a moment, that a citizen of the United States who might deem himself injured by the authorities of the United States or of any State could, by transferring his allegiance to another power, confer upon these powers the right to inquire into the legality of the proceedings by which he may have been injured while a citizen.[64]

Secretary of State Bayard declared in 1887:

> Subsequent naturalization does not alter the international status of a claim which accrued before naturalization.[65]

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[62]Article 23, paragraph 6, Draft No. 12, April 15, 1961. In the rare circumstance of a nationality change in the reverse direction, the Draft restates the orthodox rule in Article 23, paragraph 7: "The right of a State to present or maintain a claim terminates if, at any time during the period between the original injury and the final award or settlement, the injured alien, or the holder of the beneficial interest in the claim while he holds such interest, becomes a national of the State against which the claim is made."

[63]4 Moore, DIGEST OF INTERNATIONAL LAW 636 (1906). The notion that a person whose property had been nationalized would obtain citizenship in a succession of countries in order to acquire espousers of his claim, is not only fanciful but exaggerates the efficiency of the Department of State and other foreign offices as collection agencies.

[64]*Id.*, 637.

[65]*Ibid.*

The Department of State still professes this policy. However, one should remember by way of mitigation that the Department, which bears the responsibility for negotiating settlements of international claims both on an individual and lump-sum basis, must temper idealism with practicality. It is difficult enough to obtain compensation when the property of United States nationals is expropriated. Another dimension is added to the problem when "the client" is a former national of the respondent state who became a United States national after his property had been expropriated. The respondent state takes the position, understandably, that whatever it does to its own nationals is a purely domestic matter and will not become the concern of another state by virtue of any subsequent change in an individual's nationality.

However, there is a difference between rights and remedies. The latter should be as broad as the former, but rarely are. Yet, if a right is not recognized as such, there is no chance to obtain a remedy.

5. Dual Nationality

The concept that injury to an alien is an injury to the state of which he is a national runs into difficulty when an individual "enjoys" dual nationality, particularly if one of the states to which he owes allegiance is the expropriater and the other is the espouser.[66] The modern trend is in the direction of pragmatism, affording hope that the nationality rule may be relaxed to embrace late nationals.

The older rule of international law was set forth in a case involving war damage sustained during the Civil War. The injured party was a British subject under British law and an American citizen under American law. The American and British Claims Commission, set up by the Treaty of Washington of 1871, rejected the claim, stating:

> The practice of nations in such cases is believed to be for their sovereign to leave the person who has embarrassed himself by assuming a double allegiance to the protection which he may find provided for him by the municipal laws of that other sovereign to whom he thus also owes allegiance. To treat his grievances against that other sovereign as subjects of international concern would be to claim a jurisdiction paramount to that of the other nation of which he is also a subject. Complications would inevitably result, for no government would recognize the right of another to interfere thus in behalf of one whom it regarded as a subject of its own.[67]

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[66]*See* Griffin, *International Claims of Nationals of Both the Claimant and Respondent States—The Case History of Myth* in 1 THE INTERNATIONAL LAWYER 400 (1967), which shows that the question of dual nationality was controversial and decided inconsistently by national and international tribunals from 1814 to the present time.

[67]BISHOP, INTERNATIONAL LAW CASES AND MATERIALS 422 (1962); 3 MOORE, INTERNATIONAL ARBITRATIONS 2529 (1898).

A tribunal of the Permanent Court of Arbitration has stated flatly:

> An international tribunal has no jurisdiction over a claim advanced on behalf of a person who, although possessing the nationality of the claimant state, also possesses the nationality of the respondent state.[68]

The Convention on Certain Questions Relating to Conflict of Nationality Laws, signed at The Hague on April 12, 1930, declared in Article 4:

> A State may not afford diplomatic protection to one of its nationals against a state whose nationality such person also possesses.[69]

Since World War II, the United States practice has been contrary to this rule. The Foreign Claims Settlement Commission has recognized the claims of American nationals even if they were also nationals of the respondent state.

Under the Agreement between the United States and Yugoslavia of July 19, 1948,[70] many claims were presented to the Foreign Claims Settlement Commission by naturalized American citizens who were still Yugoslav citizens under Yugoslav law. Yugoslavia does not recognize automatic expatriation upon the acquisition of foreign citizenship, and specific release from Yugoslav citizenship must be granted by that government. The Commission ruled that retention of Yugoslav nationality was not relevant to the question of whether the claimant satisfied the nationality requirements of United States law.[71]

This principle has been, and is being, followed without exception in all other United States claims programs. It recognizes the equities of the situation, for under the old rule numerous claimants with dual nationality would have been deprived of protection. Respondent states, while recognizing that these claimants were still their citizens, had not the slightest intention or desire—and, under the respective agreements, not even the obligation—to reimburse them for the damage inflicted through nationalization, expropriation, and other taking of their property.[72]

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[68]The Canevaro Case, Tribunal of the Permanent Court of Arbitration (1912); Scott, *Hague Court Reports* 284 (1916). However, where the claimant was a dual national but not a national of the respondent state, the fact of dual nationality was ignored. In Enrique Rau v. Mexico, German-Mexican Commission. Decision No. 51, a claim against Mexico by a person with both German and Russian nationality was allowed. *See also* FELLER, THE MEXICAN CLAIMS COMMISSIONS (1923-1934) 98 (1935).

[69]*League of Nations Document* No. 1930, V. 3; BISHOP, INTERNATIONAL LAW CASES AND MATERIALS 423 (1962). *See also* 24 AMER. JOUR. INTERNAT'L LAW SUPP. 11 (1930). Earlier, the prevailing view had been supported by the *1929 Draft of Harvard Research in International Law on the Responsibility of States. See* 23 AMER. JOUR. INTERNAT'L LAW SPEC. SUPP. 131, 200 (1929).

[70]T.I.A.S. 1803; 62 Stat. 2658 (1948).

[71]Note, FCSC DECISIONS & ANNOTATIONS 108 (1968).

[72]*Per contra,* the Note by the Government of Yugoslavia accompanying the Settlement Agreement with the United States, dated November 5, 1964 stated: "Under the respective Yugoslav laws foreign nationals are entitled to equal treatment with Yugoslav nationals in

International tribunals have not been inclined to settle claims of dual nationals in this way, and have developed a new concept—dominant nationality. In *Liechtenstein v. Guatemala* (the *Nottebohm* case)[73] the International Court of Justice held that Liechtenstein was without standing to present a claim on behalf of Nottebohm. The Court reasoned that Nottebohm, although a naturalized citizen of Liechtenstein, was not attached to that state "by his tradition, his establishment, his interests, his activities, his family ties, his intentions for the near future."

The *Nottebohm* case was followed by the United States-Italian Conciliation Commission set up under the Peace Treaty of 1947 in *Claim of The United States ex rel Florence Strunsky Mergé v. Italy*.[74] The claimant was a native-born American who married an Italian, thus acquiring dual nationality. The Commission denied the claim on the ground that the claimant's dominant nationality was Italian rather than American. She resided and reared her children in Italy, and "the interests and permanent professional life of the head of the family were established" in that country.

Although dominant nationality has not been a criterion in United States adjudications under lump-sum agreements, the doctrine is approved by the Department of State, which had declared in an internal memorandum:

> A State is not required to recognize a claim asserted against it by another State on behalf of an individual possessing the nationality of both States, unless such individual has a closer and more effective bond with the claimant State.[75]

The doctrine of dominant nationality is based upon a crucial concept—that nationality is not an absolute, but may be subject to degrees and shadings. Moreover, citizenship alone is not an infallible touchstone of what, for want of a better word, we may call loyalty. And loyalty is a two-way relationship.

6. A Plea to Abolish the Doctrine of Continuous Nationality

The concept of dominant nationality may furnish an ideological lever for over-turning the doctrine of continuous nationality. If, when an individual

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respect of compensation for nationalization or other takings of property; consequently, claims of nationals of the United States which were not owned by nationals of the United States on the date on which the property . . . was nationalized or taken by the Government of Yugoslavia will be treated by the Government of Yugoslavia under compensation procedures prescribed by Yugoslav laws no less favorable than those of Yugoslav nationals for similar property." FCSC DECISIONS & ANNOTATIONS 763 (1968).

[73]*I.C.J. Rep't.* 4 (1955); 49 AMER. JOUR. INTERNAT'L LAW 336 (1955); INTERNATIONAL LAW REPORTS 349 (1955).

[74]Case No. 3, Decision No. 55, *Third Collection of Decisions of the Italian-United States Conciliation Commission* 1, 12-14 (1953); 53 AMER. JOUR. INTERNAT'L LAW 139 (1959).

[75]8 Whiteman, DIGEST OF INTERNATIONAL LAW 1252 (1967).

possesses dual nationality, we apply a pragmatic test to determine whether he has a true affinity—through family ties, business relations, birthplace of children, domicile, etc.—with the state to which he has presented a plea for espousal, why not use the same test in all cases, abandoning the technical nationality concept entirely?

The *1961 Draft Convention on the International Responsibility of States for Injuries to Aliens* advocated the denial of relief to a claimant who is a national in name only and is not bound to the espousing state by the real-life ties described in the *Nottebohm* and *Mergé* cases:

> A State is not entitled to present a claim on behalf of a natural person who is its national if that person lacks a genuine connection of sentiment, residence, or other interest with that State.[76]

We suggest that the converse proposition is equally valid: a state is entitled to, and *should* present a claim on behalf of a natural person who is its national and has a genuine connection of sentiment, residence or other interest with that state, although he was a non-national at the time of loss. And once the eligibility of such late nationals is accepted, it would not outrage one's sense of justice to go a step further and recognize the claim of a person who, even though not a national, has established his roots—home, family and career—in the espousing state and may, in fact, be waiting out the pre-naturalization residence period.[77]

The idea that a state might under certain circumstances espouse the claim of a non-national was advanced as early as 1929 by Borchard in the *Draft Convention on the Responsibility of States for Damages Done in Their Territory to the Person or Property of Foreigners:*

> A state is responsible to another state which claims in behalf of one who is not its national only if (1) the beneficiary has lost his nationality by operation of law, or (2) the interest in the claim has passed from a national to the beneficiary by operation of law.[78]

Although the doctrine of continuous nationality is the corollary of a legal fiction—that expropriation (or any other international wrong) constitutes an injury which is actionable by the state rather than the individual—a cogent

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[76]Article 23, paragraph 3, Draft No. 12, 199, 200, 205-206

[77]M.D. Copithorne, Deputy Head, Legal Division, Department of External Affairs, Canada, has stated: "In summary terms, I believe that it is past time for the development of claims rules that will lessen the gap between legal rights and legal remedies and will be more in keeping with the evolving concepts of international rights for individuals. Such a development need not necessarily involve the abandonment of the notion of nationality nor the evaluation of the individual to the international legal plane. In short it is not terribly radical. What it does envisage is a translation of the nationality rule from an irrefutable assumption to a *prima facie* presumption." 1969 PROCEEDINGS, AMERICAN SOCIETY OF INTERNATIONAL LAW 30, at 34.

[78]Article 15(b) AMER. JOUR. INTERNAT'L LAW SUPP. 198 (1929).

practical argument has been advanced in its favor. *En bloc* settlements of international claims usually have not produced a fund large enough to pay all claims in full; consequently, "to add any other group, contrary to the general practice in the past, would simply dilute what is already inadequate."[79]

To support this conclusion, one must take the position that there are two classes of citizens: first, those who enjoyed that status at the time that their property was seized; and second, those who became naturalized at a later date. It happens that most of the former are native-born Americans, while most of the latter are former nationals of the expropriating state who chose to come here for freedom's sake.

Other fields of law do not recognize any such distinction. All citizens are alike in their obligation to obey the law of the land in which they live. All have the same duty to pay taxes and serve in the armed forces, and all have equal access to the courts. In purely human terms, the loss suffered by a foreign-born person who later emigrated to this country is just as poignant as that of a native-born American who had elected to risk his capital in foreign investment. When a state negotiates an international settlement, either individually or *en bloc,* it should seek compensation on behalf of all who owe it allegiance at that time, and all should share *pari passu* in the recovery, however inadequate it may be.

Looking at the evolution of law, one is encouraged to feel that even the most firmly entrenched shibboleths are not impregnable. Ever since courts of equity were set up to temper hidebound legal rules, the trend (allowing for occasional lapses and retrogressions) has been in the direction of common-sense and fairness, toward the goal of "Equal Justice Under Law" inscribed on the facade of the United States Supreme Court. Discrimination, not only in race relations but in such mundane fields as taxation, is universally deplored if not always curtailed.

Many nations have seized American property and paid nothing for it. Cuba alone has nationalized more than $3 billion of assets owned by United States citizens, plus uncounted treasure belonging to its own nationals.[80] Communist China has virtually abolished private property. Some

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[79]*Senate Committee on Foreign Relations,* S. Rept. No. 2358, 85th Cong., 2d Sess. (1958). The same committee stated earlier: "While sympathetic to the plight of those unfortunate individuals who were not American citizens when they sustained war losses, the committee has had to keep uppermost in view the interest of those individuals who did possess American nationality at the time of loss. It is these persons who have a paramount claim to any funds which may be available." S. Rep. No. 1050. 84th Cong., 1st Sess. (1955).

[80]For a chart analyzing the various United States foreign claims programs by number of claims, number of awards, amount asserted, amount awarded, size of fund, and percentage of awards actually collected, *see* Freidberg, "A New Technique in the Adjudication of International Claims" 10 VIRGINIA JOUR. INTERNAT'L LAW ___ (Spring, 1970).

Latin American nations have recently promulgated nationalization decrees, although on a smaller scale and more selectively.

The United States has not yet obtained settlements for American property expropriated by a number of foreign states. When the political climate permits negotiation toward that end—and history shows that such a time invariably comes—it is fitting and proper that our government should seek recompense on behalf of all those who are Americans in the broadest sense of dominant loyalty, affinity and identity—and not merely those who were citizens on the date of loss and continuously thereafter.[81]

The United States is a nation of immigrants and recent descendants of immigrants, and somewhere in the background of many Americans will be found oppression in one form or another by a foreign government—foreign in its basic view of the relationship between individual rights and state power. When the United States magnanimously takes in a refugee, should he not be accepted with all his assets and liabilities, including his claim to be compensated for property seized by the government from which he fled? If the United States, to which he now owes allegiance, does not speak for him, no state will.

[81] *Cf.* 2 O'CONNELL, INTERNATIONAL LAW 1117 (1935): "The most that can be said is that before a State may be the attorney for the individual claimant, and offers its diplomatic machinery for this purpose, it must have some adequate connection with him, one perhaps falling short of nationality, though ordinarily taking the form of nationality. . . ."