

Maurer School of Law: Indiana University  
Digital Repository @ Maurer Law

Indiana Journal of Global Legal  
Studies

Volume 7 | Issue 2

Article 4

Spring 2000

# International Citizenship: The Future of Nationality in a Globalized World

Kim Rubenstein  
*University of Melbourne*

Daniel Adler

Follow this and additional works at: <http://www.repository.law.indiana.edu/ijgls>

 Part of the [International Law Commons](#)

## Recommended Citation

Rubenstein, Kim and Adler, Daniel (2000) "International Citizenship: The Future of Nationality in a Globalized World," *Indiana Journal of Global Legal Studies*: Vol. 7: Iss. 2, Article 4.

Available at: <http://www.repository.law.indiana.edu/ijgls/vol7/iss2/4>

This Symposium is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in *Indiana Journal of Global Legal Studies* by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact [wattn@indiana.edu](mailto:wattn@indiana.edu).



**JEROME HALL LAW LIBRARY**

INDIANA UNIVERSITY  
Maurer School of Law  
Bloomington

# International Citizenship: The Future of Nationality in a Globalized World

KIM RUBENSTEIN AND DANIEL ADLER\*

## INTRODUCTION

“Precisely what the pluralization of citizenship identities and solidarities might come to mean in concrete institutional terms . . . remains unclear,” ponders Linda Bosniak with good cause in *Citizenship Denationalized*.<sup>1</sup> This article attempts to identify the consequences for “nationality” in a world where “sovereignty” is challenged by the process of globalization.<sup>2</sup> In order to do so, our understanding of the crucial terms is fundamental. For example, what is nationality and what do we mean by a globalized world? Caveats necessarily apply when using the term “future” in a title and in a thesis.<sup>3</sup> Accordingly, we seek to describe trends evident in international forums, and suggest that their continuance, if that is the case, should prompt changes in our understanding of the legal value of nationality to better reflect the social and political realities of membership in a globalized world.

---

\* Kim Rubenstein: B.A., LL.B (Hons.) (Melb.); LL.M (Harv.); Senior Lecturer in Law, University of Melbourne. This Comment builds upon Kim Rubenstein’s chapter *Citizenship in a Borderless World* in *LEGAL VISIONS OF THE 21ST CENTURY: ESSAYS IN HONOUR OF JUDGE CHRISTOPHER WEERAMANTRY* (Anthony Anghie & Garry Sturgess eds., Kluwer Law International, 1998) [hereinafter *LEGAL VISIONS*]. Kim Rubenstein extends her appreciation to the American Society of International Law and the Academic Council of the United Nations (ACUNS) for inviting her to participate in their 1998 workshop at Yale, and her fellow participants whose ideas and suggestions were invaluable in her initial work on this Comment. Daniel Adler: B.A. (Melb.); LL.B (Hons.) (Melb.). We both thank Garry Sturgess for his insightful remarks on this Comment.

1. Linda Bosniak, *Citizenship Denationalized*, 7 *IND. J. GLOBAL LEGAL STUD.* 447, 506 (2000).

2. This poses an interesting theoretical question because sovereignty has usually been theorized in terms of the State. One result of this is that the relationship between sovereignty and civil society is often neglected. See JOSEPH A. CAMILLERI & JIM FALK, *THE END OF SOVEREIGNTY? THE POLITICS OF A SHRINKING AND FRAGMENTING WORLD* 23 (1992).

3. The ACUNS workshop participants were fortunate in being addressed by Professor Paul Kennedy, who set out the various problems in works that predict the future. Paul Kennedy, *Address at ACUNS/ASIL Summer Workshop* (Aug. 1, 1998). See also PAUL KENNEDY, *PREPARING FOR THE TWENTY-FIRST CENTURY* (1994).

In Part I of this Comment, “nationality” and “globalization” are defined. Part II concentrates on some tensions endemic to nationality, particularly in a globalized world. Part III follows with visions for the future.

Since ancient Athens,<sup>4</sup> theories of citizenship have rested on the idea of an autonomous polity. Common membership in a political entity forms the basis of most discussions of citizenship from Aristotle onward. In the writings of Aristotle, Bodin, Hobbes, Rousseau, and Marshall, citizenship is conceived of in terms of political institutions which are free to act according to the will of (as per Aristotle),<sup>5</sup> in the interests of (as per Rousseau),<sup>6</sup> or at least with authority over (as per Bodin or Hobbes),<sup>7</sup> their citizenry. Since the Enlightenment, national sovereignty has been the theoretical basis of this freedom and its subject—the modern State.

In its classical form, as espoused by the realist school of international relations,<sup>8</sup> the principle of sovereignty describes a world in which supreme power is exercised within a particular territorial unit.<sup>9</sup> Sovereignty is universal, and accordingly, the whole world is divided into these territorial units. Socially and territorially, cohesive States are capable of making rational decisions reflecting a national interest. These States are seen as the primary actors in the international arena, engaging with each other on the basis of formal equality.<sup>10</sup> While the system operates under the assumption of equality (either legal or moral), there are, and have always been, great power differentials between individual States. In light of this and other criticisms, sovereignty is more an ideal—a paradigm for the analysis and regulation of international relations—than strictly a descriptive category.<sup>11</sup> Nevertheless, reflecting the dominant paradigm of international relations over the past three centuries, the principle of sovereignty has had a strong normative effect. Sovereignty has

---

4. For a concise historical account of the origins of the different concepts of citizenship, see DOUGLAS KLUSMEYER, *BETWEEN CONSENT AND DESCENT: CONCEPTIONS OF DEMOCRATIC CITIZENSHIP* (1996).

5. See ARISTOTLE, *POLITICS* (H. Rackman trans., Harvard Univ. Press 1959) (c. 334 B.C.).

6. See JEAN JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* (Charles Frankel trans., Hafner Pub. Co. 1947) (1762).

7. See JEAN BODIN, *SIX BOOKS OF THE COMMONWEALTH* (M.J. Tooley trans., Basil Blackwell 1955) (1577); THOMAS HOBBS, *ON THE CITIZEN* (Richard Tuck & Michael Silverthorne trans., Cambridge Univ. Press 1998) (1642).

8. For an overview of International Relations realism, see STEPHEN GILL & DAVID LAW, *THE GLOBAL POLITICAL ECONOMY: PERSPECTIVES, PROBLEMS, AND POLICIES* 25-40 (1988).

9. CAMILLERI & FALK, *supra* note 2, at 3.

10. ANTHONY GIDDENS, *THE CONSEQUENCES OF MODERNITY* 65 (1990).

11. For a feminist critique of the notion of sovereignty, see Karen Knop, *Re/Statements: Feminism and State Sovereignty in International Law*, 3 *TRANSNAT'L. & CONTEMP. PROBS.* 293 (1993).

greatly influenced the way we perceive our relationships with our national communities and their interactions with each other. It has also fundamentally informed the legal principle of nationality.

However, given the challenges to the ideal of sovereignty, the legal principles associated with nationality need refashioning in order to better reflect the realities of citizenship and nationality in a globalized world. Of course, we are conscious of the current tension between citizenship as a progressive project and citizenship as a formal legal status. Thus, this Comment is reflective of the disparities often existing between law as an ideal and law as a pragmatic social tool.<sup>12</sup> However, seeing legal status as part of a progressive project, rather than as a purely formal, technical framework, law is viewed as a tool in itself, still useful for achieving social goals, even though it is not always successful.

## I. DEFINITIONS

Central to Bosniak's article is the unraveling of the word "citizenship." Definitions are similarly fundamental to our proposition that the legal status of nationality will need to be reconfigured and altered in the future.

### A. *Citizenship and Nationality*

We distinguish the terms "citizenship" and "nationality" in a technical legal sense. While essentially the same concept, these words reflect two different legal frameworks. Both terms identify the legal status of an individual in light of his or her State membership. But the term "citizenship" is confined mostly to domestic legal forums, while the term "nationality" is connected to the international law forum. As P. Weis states, "[c]onceptually and linguistically, the terms . . . emphasize two different aspects of the same notion. . . . 'Nationality' stresses the international, 'citizenship' the national, municipal aspect."<sup>13</sup>

While citizenship describes the technical legal relationship between the individual and the polity, it is more than merely a descriptive category. It is a

---

12. David Kennedy was present at Kim Rubenstein's presentation at the ACUNS workshop in 1998 and raised various concerns with the genre of this argument. See also David Kennedy, *New Approaches to Comparative Law: Comparativism and International Governance*, 1997 UTAHL. REV. 545 (1997).

13. P. WEIS, NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW 4-5 (Sijthoff & Noordhoff 2d ed. 1979) (1956).

normative project whereby “social membership becomes increasingly comprehensive and open ended.”<sup>14</sup> At the beginning of the twenty-first century, however, there is considerable debate about the continued viability and future direction of this project. Citizenship represents cohesion in a world increasingly characterized by fragmentation. As such, citizenship is drawn upon both in critique of contemporary individualism and (in some altered form) as a possible counterpoint to it. This premise stands in contrast to an earlier, confident, even triumphalist, discourse of citizenship as emancipation.

Though often talked about as a singular concept, the term “citizenship” is used to describe a number of discrete but related phenomena surrounding the relationship between the individual and the polity.<sup>15</sup> In *Citizenship Denationalized*, Bosniak describes citizenship as four separate concepts: (1) “citizenship as legal status;” (2) “citizenship as rights;” (3) “citizenship as political activity;” and (4) “citizenship as a form of collective identity and sentiment.” In this Comment, we concentrate upon citizenship in two senses. The first concentration is citizenship as a legal status<sup>16</sup> (the question as to whom the State recognizes as a citizen and the formal basis for the rights and responsibilities of the individual in the State). The second is a broader view of citizenship as the collection of rights, duties, and opportunities for participation that define the extent of sociopolitical membership<sup>17</sup> within a community. In this description, we are combining three of Bosniak’s definitions into one. Thus, we take the theoretical liberty of synthesizing two strains of citizenship: the liberal conception based on rights, and the republican conception based on participation and political activity. This description is broader than legal status because it looks to the material circumstances of life within the polity, notably to questions of social membership and substantive equality.<sup>18</sup>

---

14. BRYAN S. TURNER, *CITIZENSHIP AND CAPITALISM: THE DEBATE OVER REFORMISM* 135 (1986).

15. See Bosniak, *supra* note 1, at 455; see also Kim Rubenstein, *Citizenship in Australia: Unscrambling Its Meaning*, 20 MELB. U. L. REV. 503 (1995).

16. Roberto Alejandro refers to this as “[c]itizenship as universality and as a legal construction” in *HERMENEUTICS, CITIZENSHIP, AND THE PUBLIC SPHERE* 14 (1993).

17. Alejandro refers to this as “[c]itizenship as communality and participation.” *Id.* at 21.

18. A third view of citizenship which will not be of direct concern in this Comment is citizenship as “desirable–activity.” That is, looking at what we want citizens to be like—the “civic virtues” concept of citizenship. See Will Kymlicka & Wayne Norman, *Return of the Citizen: A Survey of Recent Work on Citizenship Theory*, 104 ETHICS 352, 353 (1994). Alejandro also refers to other models: for “[c]itizenship as amelioration of class conflicts,” see Alejandro, *supra* note 16, at 26; for “[c]itizenship as self-sufficiency,” see *id.* at 28; and finally, for his thesis of “[c]itizenship as a hermeneutic endeavor,” see *id.* at 33.

The legal rank of "citizen" in democratic societies is often intended to represent the progressive project of a broader conception of membership in the community. This is achieved infrequently,<sup>19</sup> however, as formal equality rarely embodies the need for substantial equality in social terms. Feminist and critical scholarship, particularly, have highlighted the failure of gender- and race-neutral conceptions, such as citizenship, to account for the differences of individuals within communities.<sup>20</sup> In Australia, for instance, legal citizenship status has not always accorded full and equal membership rights, as the position of the Aboriginal people illustrates. While formal legal citizens, Indigenous Australians were denied the most basic rights of citizenship, such as voting<sup>21</sup> and travel.<sup>22</sup> Even today, some thirty years after Aboriginal people achieved formal equality in terms of voting and travel rights, their social, cultural, and economic positions fall short of that of other Australian citizens. This undermines the nature of their membership in the community and our understanding of substantive citizenship. This inequality also gives rise to the notion of second-class citizens, which Bosniak discusses in the context of "Citizenship as Rights."<sup>23</sup>

Citizenship, as neither gender-, class-, nor race-neutral, but rather as affected by the position of different groups within a nation-State, has been evident throughout the ages and continues to be so. History, however, also relates a progression whereby our understanding of equality and membership has been challenged and expanded over time.<sup>24</sup> There is, then, an inherent tension in the development of citizenship. The citizenship project is about the

---

19. Bosniak refers to this in *Citizenship Denationalized* when she discusses Charles Black and Kenneth Karst's legal work on citizenship representing "full and equal membership." Bosniak, *supra* note 1, at 464.

20. See IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* (1990); see also Margaret Thornton, *Historicising Citizenship: Remembering Broken Promises*, 20 MELB. U. L. REV. 1072 (1996).

21. The right to vote exists in federal and state jurisdictions. In 1902, when the federal universal franchise was introduced, it denied the vote to Aboriginal people who were not already voting in their own states. It was not until 1962 that the federal electoral system universally allowed Aboriginal people to vote.

22. For a fuller account of Australia's historical treatment of Aboriginal people, women, and migrants, see JOHN CHESTERMAN & BRIAN GALLIGAN, *CITIZENS WITHOUT RIGHTS: ABORIGINES AND AUSTRALIAN CITIZENSHIP* (1997); ANN-MARI JORDENS, *REDEFINING AUSTRALIANS: IMMIGRATION, CITIZENSHIP AND NATIONAL IDENTITY* (1995); Ann-Mari Jordens, *Redefining 'Australian Citizen' 1945-1975* (Admin., Compliance & Governability Program Working Paper No. 8, 1993).

23. See Bosniak, *supra* note 1, at 463-70.

24. For a most influential account of this process, see T.H. MARSHALL, *CITIZENSHIP AND SOCIAL CLASS AND OTHER ESSAYS* (1950).

expansion of equality among citizens. However, as equality is based upon membership, citizenship status forms the basis of an exclusive politics and identity. At once anathema to the fulfillment of the citizenship project, politics and identity have also been essential to it, providing the sense of solidarity required for the development of modern citizenship in the nation-State.<sup>25</sup>

Globalization tears further at the tension within citizenship between the concepts of membership and equality. Globalization emphasizes different identities of membership as the norm, according less reason to utilize a singular notion of citizenship, or a single legal status linking directly to the nation-State, as a central concept in domestic and international law. Instead of identifying our rights and responsibilities by virtue of legal citizenship, our political, legal, and social rights and obligations could be determined through myriad alternative, nonnation-State frameworks.<sup>26</sup> At this point, however, it is sufficient to establish that citizenship is a status upon which legal rights and responsibilities are often linked. For example, these rights and responsibilities include political rights of voting and representation in democratic systems, legal rights of mobility and travel, and social rights such as welfare. Often, in the broader, nonlegal sense of membership of community, we include both expressions of membership or citizenship that are not only provided to formal citizens, such as paying taxation and other social rights and duties,<sup>27</sup> but also issues concerning one's self-identification—the identity of citizenship.

Interest in defining citizenship is linked to our interest in nationality and in international law. International law affirms that each State may determine who will be considered a citizen of that State.<sup>28</sup> Domestic laws concerning who is and who is not a citizen vary significantly; laws relating to citizenship

---

25. Anna Yeatman discusses this tension in the context of international law and human rights. See Anna Yeatman, *Who Is the Subject of Human Rights?*, in *CITIZENSHIP AND CULTURAL POLICY: STATECRAFT, MARKETS AND COMMUNITY* (D. Meredyth & J. Minson eds., forthcoming 2000). Peter Spiro also has written about this tension. See Peter J. Spiro, *The Citizenship Dilemma*, 51 *STAN. L. REV.* 597 (1999) (reviewing ROGERS M. SMITH, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY* (1997)).

26. For an excellent discussion of this in a domestic context, see Stephen H. Legomsky, *Why Citizenship?*, 35 *VA. J. INT'L L.* 279 (1994).

27. For a discussion of social citizenship in the U.S. context, see Linda S. Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1988 *WIS. L. REV.* 955 (1988); Linda S. Bosniak, *Membership, Equality, and the Difference That Alienage Makes*, 69 *N.Y.U. L. REV.* 1047 (1994); Nora V. Demleitner, *The Fallacy of Social "Citizenship," or the Threat of Exclusion* 12 *GEO. IMMIGR. L.J.* 35 (1997).

28. Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, 12 *Apr.* 1930, art. 1, 179 *L.N.T.S.* 101, *reprinted in* WEIS, *supra* note 13, at 259 [hereinafter Hague Convention].

in each of the different States are also different.<sup>29</sup> As a result, many people acquire more than one nationality by fulfilling the formal requirements for citizenship in more than one domestic legal framework.

Nationality is important in international law in a variety of contexts, including:

- i. Entitlement to diplomatic protection;
- ii. State responsibility to another State for failing in its duty to prevent certain wrongful acts committed by one of its nationals extraterritorially;
- iii. State receipt of its own nationals. Paragraph 4 of article 12 of the International Covenant on Civil and Political Rights of 1966 provides “No-one shall be arbitrarily deprived of the right to enter his own country;”
- iv. Nationality is said to import allegiance, and one of the principal incidents of allegiance is the duty to perform military service for the State to which allegiance is owed;
- v. A State has a general right, in the absence of a specific treaty binding it to do so, to refuse to extradite its own nationals to another State requesting surrender;
- vi. Enemy status in time of war may be determined by the nationality of the person concerned; and
- vii. States may frequently exercise criminal or other jurisdiction on the basis of nationality.<sup>30</sup>

As the preliminary report on *Women's Equality and Nationality in International Law* explains, “nationality secures rights for the individual by linking her to the state. . . . By forging a link between individual and state, nationality makes one state’s interference with the national of another a violation of the other state’s sovereignty.”<sup>31</sup> There are also various treaties and conventions that impact nationality.<sup>32</sup> Some of the issues raised relating

---

29. The discussion on citizenship within the domestic sphere will be limited in this Comment to discussions of a general nature rather than specific consequences for a range of different legislative regimes.

30. This listing has been conveniently compiled in I.A.SHEARER, STARKE’S INTERNATIONAL LAW 309 (11th ed. 1994) (internal citations omitted).

31. Preliminary Report, COMMITTEE ON FEMINISM AND INTERNATIONAL LAW, WOMEN’S EQUALITY AND NATIONALITY IN INTERNATIONAL LAW, Taipei (May 6, 1998).

32. These are quite extensive, but, as cited by Nissam Bar-Yaacov and P. Weis, those specifically dealing with nationality include: 1906 Rio de Janeiro Convention on the Status of Naturalised Citizens; 1930 Hague Convention on Certain Questions Relating to the Conflict of



to dual nationality, and nationality in case law, will be examined further below. For the moment, we acknowledge nationality as a central dynamic of international law.

### B. Globalization

Just as citizenship describes a number of discrete but related phenomena surrounding the relationship between individual and polity, so too is globalization a term of multidimensional import.<sup>33</sup> In using the term globalization, we are essentially referring to the continued effect of the internationalization of the world framework. We are not discussing a world without nation-States, but rather one in which nation-States are fundamentally altered by the growth and interconnection of relationships between other nation-States and individuals around the world. This is not to say that the nation-State is obsolete or that globalization is an entirely new phenomenon.<sup>34</sup> However, the rapidity of the assault upon the nation-State by the quickening turns of globalization is new, and States have sought a range of economic and social directions by which to steady their Statecraft. Not surprisingly, the policy choices made by modern States have shifted with the gale-force pressure of the international political economy. Sovereignty has necessarily been altered without being abolished. States hold their place as key planks in the world system (though they are no longer the only important actors),<sup>35</sup> but globalization has transformed and will

---

Nationality Laws; 1930 Protocol Relating to Military Obligations in Certain Cases of Double Nationality; 1930 Special Protocol Concerning Statelessness; 1933 Montevideo Convention on Nationality; 1933 Montevideo Convention on Nationality of Women; 1954 Convention Relating to the Status of Stateless Persons; 1954 Convention on Nationality Between the Members of the Arab League; 1957 United Nations' Convention on the Nationality of Married Women; 1963 European Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality; 1973 Convention for the Reduction of the Number of Cases of Statelessness; 1977 Protocol to the European Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality; and 1977 Additional Protocol to the European Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality. NISSIM BAR-YAACOV, *DUAL NATIONALITY* (1961); WEIS, *supra* note 13. See also European Convention on Nationality, Nov. 6, 1997, Europ. T.S. No. 166.

33. See Adelle Blackett, *Globalization and Its Ambiguities: Implications for Law School Curricular Reform*, 37 COLUM. J. TRANSNAT'L L. 57, 60 (1998) (arguing that the differences in the employment of the term may be as important as the similarities); see also David Held et al., *Globalization*, 5 GLOBAL GOVERNANCE 483 (1999).

34. There was much discussion at the ACUNS 1998 workshop on whether globalization is a "new" concept. Even if it is not new, there are contexts as discussed below within which these issues are currently important.

35. In fact, Paul Kennedy argues that even if the autonomy and functions of the State have

continue to revise the extent to which the State's ship is sovereign. On this point, Manuel Castells identifies a growing "social schizophrenia," for the more the economy becomes interdependent on a global scale, the less can regional and local governments, as they exist today, act upon the basic mechanisms that condition the daily existence of their citizens. The traditional structures of social and political control over development, work, and distribution [of wealth] have been subverted by the placeless logic of an internationalised economy.<sup>36</sup>

Additionally, regional economies and markets have altered the ideal of sovereignty by promoting the free movement of goods and labor across nation-State borders. The General Agreement on Tariffs and Trade, the North American Free Trade Agreement, the European Union, and the Asia Pacific Economic Community are examples of this trend. Isolationist views of single States, about any matter, wilt under the pressure of these new frameworks. As Paul Kennedy argues, "globalisation threatens to undermine the assumed integrity of the nation-state as the central organizing unit of domestic and external affairs."<sup>37</sup>

Related to trade, yet also distinct, is the development of global institutions with authority beyond single governments. These institutions include organizations established to manage the machinery of transnational activities.<sup>38</sup> Financial markets are one example where the massive ebb and flow of international capital is beyond the control of nation-States, however constituted. A contrasting example is the World Trade Organization (WTO), which again evidences global institutional development. Furthermore, procedures to resolve disputes between countries, if we take the WTO as a case in point, are more legalistic and therefore more binding over the participating nation-States.<sup>39</sup> Thus, since global regimes and institutions can regulate matters beyond the control of any single government, national sovereignty is inevitably undermined as a consequence.

---

been eroded by transnational trends, no adequate substitute has emerged to replace it as the key unit in responding to global change. See KENNEDY, *supra* note 3, at 134. See also Paul Hirst & Grahame Thompson, *Globalization and the Future of the Nation State*, 24 *ECON. & SOC'Y* 408 (1995).

36. MANUEL CASTELLS, *THE INFORMATIONAL CITY: INFORMATION TECHNOLOGY, ECONOMIC RESTRUCTURING, AND THE URBAN-REGIONAL PROCESS* 347 (1989).

37. KENNEDY, *supra* note 3, at 53.

38. David Held discusses this as the disjuncture of international organizations. See David Held, *Democracy, the Nation-State and the Global System*, 20 *ECON. & SOC'Y* 138, 152 (1991).

39. See Kim Rubenstein & Jenny Schultz, *Bringing Law and Order to International Trade: Administrative Law Principles and the GATT/WTO*, 11 *ST. JOHN'S J. LEGAL COMMENT.* 271 (1996).

Supranational institutions like the United Nations General Assembly and Security Council, the International Court of Justice, and the European Court of Justice, to name but a few, are additions to this picture. These bodies are responsible for issues that arise where borders and national laws are less relevant, and where “universal principles”<sup>40</sup> are called upon to determine disputes within the international community. The whole development of international law and, more particularly, of a human rights framework, provide for global accountability of a new order. The human rights framework deals with citizens within nation-States and undermines older notions of sovereignty articulated in international law, whereby matters within a country were solely for its own determination. The human rights framework highlights that the State can no longer be protected from scrutiny in how it treats individuals within its territory.<sup>41</sup> The human rights aspect of globalization is further developed in Part II, where we argue that the law of nationality is being transformed and forced to keep pace with the realities of this framework.

In addition to these developments, there is growing recognition that many issues of policy for individual States are not the sole concern of the nation-State, but of the global order as well. This recognition dates back to the beginning of the nation-State; postal reciprocity, international travel, and communication were, and will continue to be, affected by this reality. Environmental and nuclear problems represent pressing current concerns. Single nation-State action will not be sufficient to deal with global disorder in these areas. The “interconnectedness of global changes [is] now affecting our whole planet.”<sup>42</sup> Many writers talk about this phenomenon as an expression of a global civil society. Adding to the work of non-governmental organizations and other non-State-based organizations, are expressions of politics beyond the

---

40. There is a valuable debate over the terminology of universal human rights. See generally Abdullahi An-Naim, *What Do We Mean by Universal?*, 23 INDEX ON CENSORSHIP 120 (1994); Christina M. Cerna, *Universality of Human Rights and Cultural Diversity: Implementation of Human Rights in Different Socio-Cultural Contexts*, 16 HUM. RTS. Q. 740 (1994); Nancy Kim, *Towards a Feminist Theory of Human Rights: Straddling the Fence Between Western Imperialism and Uncritical Absolutism*, 25 COLUM. HUM. RTS. L. REV. 49 (1993); Samuel K. Murumba, *Cross-Cultural Dimensions of Human Rights*, in LEGAL VISIONS, *supra* note \*, at 207.

41. See Berta Esperanza Hernández-Truyol, *Reconciling Rights in Collision: An International Human Rights Strategy*, in IMMIGRANTS OUT!: THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES (Juan F. Perea ed., 1997); see also Berta Esperanza Hernández-Truyol, *Natives, Newcomers and Nativism: A Human Rights Model for the Twenty-First Century*, 23 FORDHAM URB. L.J. 1075. These articles argue that legislative proposals such as the California Proposition 187 are contrary to the international human rights framework and as such could be fought against and potentially invalidated.

42. KENNEDY, *supra* note 3, at 114.

nation-State, as identified by Paul Wapner in his work on environmental activism on the world civic stage.<sup>43</sup>

Finally, the continued growth and reliance on information technology has made knowledge accessible well beyond individual State borders. Electronic mail, the World Wide Web, the Internet in its other guises, corporate intranets, and other forms of data flow all promote discussion and knowledge. International collaboration on research and other projects is thereby facilitated. Libraries across the world are opened at the beck and call of individuals tapping away at their desks. Thus, we have moved well beyond the dissemination of knowledge through television networks and wire services that had previously contributed to our knowledge of issues and events outside domestic borders.

This dissemination of knowledge has meant that the concept of globalization includes “the compression of the world and . . . the intensification of the consciousness of the world as a whole.”<sup>44</sup> People are directly affected by these changes to be sure, but there is also a keen consciousness of other changes that are swirling about us, almost ready to prick our skin. As Jonathan Friedman argues, the essence of globalization “resides in the consciousness of the global, that is consciousness by individuals of the global situation, specifically that the world is an arena in which we all participate.”<sup>45</sup>

The concepts discussed in this definition of globalization relate to the discussion in Part I of Bosniak’s *Citizenship Denationalized*, “Denationalization in Fact.” Our discussion has a slightly different emphasis. Rather than trying to denationalize citizenship, we have discussed the trends away from a State-centered notion, in order to consider the impact of citizenship on the legal status of nationality.<sup>46</sup> Ultimately, however, our discussion draws conclusions that are similar to Bosniak’s.

---

43. Paul Wapner, *Politics Beyond the State: Environmental Activism and World Civic Politics*, 47 *WORLD POL.* 311 (1995).

44. J. FRIEDMAN, *CULTURAL IDENTITY AND GLOBAL PROCESS* 196 (1994) (quoting R. ROBERTSON, *GLOBALIZATION: SOCIAL THEORY AND GLOBAL CULTURE* (1992)). Note, however, the persuasive comments of Kennedy, that while the global economy is becoming more integrated and richer overall, the wealth is uneven. KENNEDY, *supra* note 3, at 49.

45. FRIEDMAN, *supra* note 44, at 196.

46. Bosniak, *supra* note 1, at 453-89.

## II. THE IMPACT OF GLOBALIZATION ON NATIONALITY

What does this all mean for the legal term “nationality?” This part of the Comment looks at nationality in law and analyzes how globalization is affecting its functionality as a legal and social tool. Is it as useful a legal concept if its operational framework is subject to significant change? And, if the nation-State is so wrought by a changing global environment, what is the impact on our legal understanding of nationality?

In looking at the impact of globalization upon the international legal notion of nationality, we briefly trace its development through the era preceding the current impact of globalization. From a historical perspective, nationality is linked to the bond of allegiance between the individual and the State.<sup>47</sup> Traditionally, this bond has been viewed as insoluble or at least exclusive. It dates from the European State system in the Middle Ages when the relationship between individual and State was derived from the inherent and permanent bond between subject and sovereign.<sup>48</sup> The common law recognized this bond and expressed it in the doctrine *nemo potest exuere patriam*—no man may abjure his country. According to Sir William Blackstone, an individual’s obligations to the sovereign represented “a debt of gratitude[] which cannot be forfeited, cancelled or altered by any change of time, place or circumstance.”<sup>49</sup> Similarly, Sir Matthew Hale, writing on the problems of dual allegiance in 1730, stated:

[H]ence it is, that the natural-born subject of one prince cannot by swearing allegiance to another prince put off or discharge him from natural allegiance; for this natural allegiance was intrinsic and primitive, and antecedent to the other, and cannot be devested without the concurrent act of that prince to whom it was first due.<sup>50</sup>

---

47. For a comprehensive historical study of dual nationality and its legal consequences, see Peter J. Spiro, *Dual Nationality and the Meaning of Citizenship*, 46 EMORY L.J. 1412 (1997). Although this article is written from a North American perspective, it contains much useful material on the history of nationality law in the international context.

48. See Calvin’s Case, 77 Eng. Rep. 377, 614, 629 (K.B. 1608), cited in Spiro, *supra* note 47, at 1420.

49. SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 117 (1884); see also Spiro, *supra* note 47 at 1420 (discussing Blackstone’s commentaries).

50. SIR MATTHEW HALE, HISTORIA PLACITORUM CORONAE: THE HISTORY OF THE PLEAS OF THE CROWN 68 (1736).

While the concept of insoluble allegiance was defensible in times of limited individual mobility, it became difficult to maintain in the face of large-scale international migration. Nonetheless, in the eighteenth and nineteenth centuries, characterized by aggressive nationalism and territorial competition between States, the concept of dual nationality was generally seen as undesirable, incompatible with individual loyalties, and destabilizing of the international order. Accordingly, insoluble allegiance was gradually replaced by exclusive, but transmutable, allegiance as the basis of nationality.

Just as the doctrine of insoluble allegiance is a product of medieval Europe, the development of exclusive allegiance as the basis for nationality reflects the state of international relations in the second half of the nineteenth century. This was the high water mark of classical international relations and of State sovereignty as the organizing principle of international relations. In this context, dual nationality was an intolerable affront to the absolute authority of the State with regard to its territory and its nationals.<sup>51</sup> Peter Spiro captures it this way:

Dual nationals represented on the one hand a constant source of international tension where one state attempted to protect its citizen from mistreatment at the hands of another state claiming the same individual as its own. On the other hand, the presumptively divided loyalties of dual nationals represented a potential threat from within the polity in times of international conflict.<sup>52</sup>

In the absence of an international accord on the grant and transfer of nationality, the international system developed a number of devices to prevent or counteract the common causes of dual nationality. These were as follows:

- (a) In cases of dual nationality acquired by naturalization it became common for the predecessor State to expatriate an individual who took up citizenship of a foreign State.<sup>53</sup> The requirement for this expatriation is clearly related to the exclusivity of allegiance.<sup>54</sup>

---

51. Expressions of the undesirability of dual nationality abound in the U.S. from the 1850s to the 1950s. See Spiro, *supra* note 47, at 1430 n.83. “[D]ouble allegiance in the sense of double nationality has no place in our law.” *Wong Kim Ark*, 169 U.S. 649, 729 (1898) (Fuller, J.)

52. Spiro, *supra* note 47, at 1414.

53. See, e.g., Naturalisation Act, 1870, 33 & 34 Vict. 168, ch. 14, § 6 (Eng.). This can also be seen in the current Australian Citizenship Act, 1948, § 17 (Austl.).

54. Cf. U.S. Secretary of State Cass on the subject (“The moment a foreigner becomes

- (b) Where by birthright a child would obtain dual nationality by a combination of the operation of *jus soli* on the one hand and *jus sanguinis* on the other, the favored approach was to prevent the eventuality of dual nationality by the enforcement of an election upon majority. Thus, for example, the *Nationality & Status of Aliens Act of 1914 (UK)*<sup>55</sup> provided that subjects born abroad would lose their entitlement to British nationality by way of *jus sanguinis* if they did not make a declaration of retention of British nationality together with a declaration of divestment of any other nationality within one year of attaining the age of twenty-one.<sup>56</sup>

In other countries, such as the United States, no formal election was required, but the doctrine of exclusivity was maintained in that expatriation was implied where, in the totality of the circumstances, “the individual showed more attachment to the other country than to the US.”<sup>57</sup>

Throughout the first half of the twentieth century and well into the 1960s, there continued to be “a widely held opinion that dual nationality [was] an undesirable phenomenon detrimental to both the friendly relations between nations and the well-being of the individuals concerned.”<sup>58</sup> Not surprisingly then, this period saw a number of attempts to root out the occurrence of dual nationality by means of multilateral codification of the law on the subject. Among these are the *Harvard Research Draft (1929)*,<sup>59</sup> *The Hague Convention (1930)*,<sup>60</sup> *The Report of the ILC on Multiple Nationality (1954)*,<sup>61</sup> and *The European Convention on the Reduction of Cases of Multiple Nationality (1963)*,<sup>62</sup> each of which shared the premise that multiple national allegiances were undesirable and to be eradicated where possible. One example of this, *The Hague Convention*, provided in its preamble that

---

naturalized his allegiance to his native country is severed forever—He experiences a new political birth.”) J. B. MOORE, *A DIGEST OF INTERNATIONAL LAW* 574 (1906).

55. See *British Nationality and Status of Aliens Act, 1914*, 4 & 5 Geo. 5, ch. 17, § 1 (Eng.).

56. For a list of other national laws requiring election, see Note, *Draft of Convention on Nationality*, 23 AM. J. INT’L L. 21, 23 (1929) [hereinafter *Harvard Research Draft*].

57. Spiro, *supra* note 47, at 1440. Note that this formulation closely resembles the nationality test set out in the *Nottebohm* case discussed below.

58. BAR-YAACOV, *supra* note 32, at 4.

59. Research in International Law of the Harvard Law School, *The Law of Nationality*, 23 AM. J. INT’L L. 28 (Suppl. 29); *Harvard Research Draft*, *supra* note 56.

60. *Hague Convention*, *supra* note 28.

61. See *Report of the International Law Commission to the General Assembly on Multiple Nationality*, International Law Commission, at 6, U.N. Doc. A/CN.4/83 (1954), I.L.C. at 6.

62. *Convention on the Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality*, May 6, 1963, *supra* note 32.

“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.”<sup>63</sup>

Drawing on this historical outline, two important points are crucial to the development of our argument. First, the development in international law of nationality has moved from more rigid to more flexible forms. Second, this development has occurred in response to the changing structure of the international political economy. Nationality, therefore, can continue its development to better reflect the current political framework within which it operates, a framework in which the nation-State no longer dominates. It is our contention, developed further in Part III, that the principles against dual or multiple nationality are no longer valid in the current framework and that multiple citizenships are in fact the norm and will be embraced in the future.

As discussed, the importance of nationality arises variously in international law linked to the centrality of States to the international law machinery. If the State’s value decreases in international governance,<sup>64</sup> so too will the value of nationality. Looking specifically at the development of international law principles within the current system, there are tensions that need addressing. This section looks at some of those principles through decisions of the International Court of Justice, the European Human Rights Court, the United Nation’s Compensation Commission, the Iran-U.S. Claims Tribunal, and the Human Rights Committee under the International Covenant on Civil and Political Rights. The emergence of this later Committee in itself reflects changes that are altering the nature of nationality in a globalized world.

#### *A. International Case Law*

Case law is necessarily restricted to justiciable disputes in a given field. While an instructive approach, it is acknowledged that justiciable disputes represent but a small and often possibly unrepresentative cross-section of practice in a given area. This is particularly true of nationality in international law. Based as it is on the assumption of sovereignty, it is loath to limit the power of the State to determine under its own law who are its nationals.<sup>65</sup> Accordingly, instances in which supranational tribunals have cause to comment on issues of nationality are limited.

---

63. Hague Convention, *supra* note 28.

64. See Kennedy, *supra* note 12, at 548-50 n.4 (reviewing notions of governance).

65. Hague Convention, *supra* note 28, arts. 1-3.



Our review of international case law on nationality discloses two broad categories of cases: (1) standing cases, and (2) human rights cases. The standing cases require international arbitration because they involve a conflict between two States over the nationality of an individual. We identify these as standing cases because the question at issue is whether a particular State has standing to represent an individual in an action *vis-à-vis* another State. The principle of State sovereignty underlies these cases and can be expressed as follows: what a State does to one of its own nationals is not a matter for international law, whereas what a State does to a national of another State can be the subject of international law if the State to which the individual belongs takes issue on behalf of the citizen.<sup>66</sup> This principle itself is open to question within a globalized world.

### 1. *Standing Cases*

The leading case on the question of nationality for the purpose of diplomatic protection is *Nottebohm*.<sup>67</sup> It concerned a German national who lived and conducted business in Guatemala for most of his adult life. Shortly after the outbreak of war in 1939, Nottebohm made moves to acquire Liechtenstein nationality and was granted it in October of that year. After the grant, Nottebohm stayed in Liechtenstein for some seven years before returning to Guatemala, this time on Liechtenstein papers. Despite having acquired Liechtenstein nationality, Nottebohm was declared an enemy alien in Guatemala, was deported, and his property confiscated. In response, Liechtenstein sought to seize the court, asserting an alleged breach of international law in relation to its national, Nottebohm.

At the hearing, the preliminary question was whether Nottebohm's Liechtenstein nationality was effective at international law *vis-à-vis* Guatemala. In finding that it was not, the International Court of Justice held that "nationality 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."<sup>68</sup> While municipal law regarding citizenship is binding within a State, it need only be recognized in the international arena when "the legal bond of nationality accord(s) with the

---

66. WEIS, *supra* note 13, at 35.

67. *Nottebohm Case (Liech. v. Guat.)* (second phase), 1955 I.C.J. 4 (Apr. 6).

68. *Id.* at 23.

individual's genuine connection with the state which assumes the defence of its citizens by means of protection against other states."<sup>69</sup>

The preference for social connections over legal formalities could be read to allow the recognition at international law of a number of effective nationalities. This, however, does not appear to be the intent of the Court in *Nottebohm*. The International Court of Justice's concept of effective nationality is grounded in the concept of allegiance and a reluctance to recognize nationality without allegiance. Thus, the majority opinion states that naturalization involves "[the] breaking of a bond of allegiance and [the] establishment of a new bond of allegiance."<sup>70</sup> Similarly, the possibility of effective dual nationality is far from countenanced in the statement "the juridical expression 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 State*."<sup>71</sup> Based on notions of national allegiance, this test has difficulty recognizing multiple nationality for the purposes of public international law. Its justification is the apparent inequity of allowing an individual diplomatic protection against that individual's own State under cover of a second nationality, where that action would not be available to fellow citizens with a single nationality. As a result, multiple nationality is the exception rather than the rule. Historically, this was indeed the case. In a world where links to more than one nation are increasingly common, however, an alternative to so restricting the cause of action is to expand it, allowing States to intervene on behalf of *anyone* who has a significant link to that country, be it by birth, blood, or later association. Another alternative is to allow individuals and other non-State entities greater access to international legal systems. While both of these suggestions undermine the principle, making international law mute on the way a State treats its own nationals, this expression of unfettered sovereignty has already lost much of its force through the development of international human rights law in the second half of the twentieth century.

Cases decided since *Nottebohm* evidence some movement in this direction. They include cases before the Iran–U.S. Claims Tribunal and the UN Compensation Commission–Claims Against Iraq, and various cases based on human rights, each of which are discussed in the following sections.

---

69. *Id.*

70. *Id.* at 24.

71. *Id.* at 23 (emphasis added).

a. *Iran–U.S. Claims Tribunal*<sup>72</sup>

One of the functions of the Iran–U.S. Claims Tribunal was to determine claims under the *Claims Settlement Declaration of the Democratic and Popular Republic of Algeria* (Declaration).<sup>73</sup> Article II of the Declaration states the Tribunal was established “for the purpose of deciding claims of nationals of the United States against Iran and claims of nationals of Iran against the United States.”<sup>74</sup> In its deliberations, the Tribunal considered the claims of some applicants who were both Iranian citizens under Iranian law and U.S. citizens under U.S. law.

The Tribunal found it had “jurisdiction over claims against Iran by dual Iran-United States nationals when the dominant and effective nationality of the claimant during the relevant period . . . was that of the United States.”<sup>75</sup> In so finding, the Tribunal rejected an argument based on the Hague Convention and older customary law that diplomatic protection is excluded in the case of dual nationality.<sup>76</sup> Its reasons were twofold:

- (a) as individuals had standing before the tribunal, the questions arising did not replicate those involving the right of States to represent individuals at public international law;<sup>77</sup> and
- (b) even with regard to cases such as *Nottebohm* involving diplomatic protection in the stricter sense, the law has developed from the codification in The Hague Convention (Article 4) that “[a] State may not afford diplomatic protection to one of its nationals against a State whose nationality such a person also possesses.”<sup>78</sup>

Thus, the current law allows claims of dual nationals where their dominant and effective nationality is not that of the respondent State. This rationale is based on the *Nottebohm* principle that nationality is a juridical translation of social fact.<sup>79</sup>

---

72. Iran-U.S. Claims Tribunal: Decision in Case No. A/18 Concerning the Question of Jurisdiction over Claims of Persons With Dual Nationality, Apr. 6, 1984, 5 IRAN-U.S. CLAIMS TRIB. REPORTS 251 [hereinafter Iran-U.S. Claims Tribunal].

73. Declaration of the Government of the Democratic and political Republic of Algeria concerning the Settlement of Claims by the Government of the United States and the Government of the Islamic Republic of Iran, 20 I.L.M. 230 [hereinafter Declaration].

74. Declaration, *supra* note 73.

75. Iran-U.S. Claims Tribunal, *supra* note 72, at 253.

76. *Id.* at 262-63.

77. *Id.* at 261.

78. *Id.* at 260.

79. *Id.* at 263.

Two further comments in the majority judgment advance our argument:

- (a) the Tribunal's statement that the move toward the recognition of effective over formal nationality is consistent with "the contemporaneous development of international law to accord legal protections to individuals, even against the State of which they are nationals;"<sup>80</sup> and
- (b) the final sentence of the judgment stating that in cases where "the tribunal finds jurisdiction based upon a dominant and effective nationality . . . the other nationality may remain relevant to the merits of the claim."<sup>81</sup>

Though the majority opinion maintains the notion that an individual must have a dominant and effective nationality, the two quotes in the preceding paragraph indicate a broadening of the *Nottebohm* notion of one nationality based on allegiance.

This position is developed in the concurring opinions of Members Holzman, Aldrich, and Mosk,<sup>82</sup> who would allow claims by all nationals of the United States and Iran, regardless of whether they held dual nationality.

*b. UN Compensation Commission—Claims Against Iraq*<sup>83</sup>

A more radical position came from the UN Compensation Commission (Commission) when it assessed individual claims against Iraq following the Iraqi invasion of Kuwait in 1990. While not a court, the Commission did have a quasi-judicial function. Its chief purpose was to process claims against Iraq arising from the invasion and occupation of Kuwait and to make payments from the Compensation Fund.

When confronted with Iraqi dual nationals making claims against the Fund, the Commission dealt with the question in an administrative fashion. It developed a strategy for determining claims in an expedited manner. The application of the dominant and effective nationality test was incompatible with the speedy administration of the Fund.<sup>84</sup> As a result, there were no inquiries

---

80. *Id.* at 265.

81. *Id.* at 265-66.

82. *Id.* at 267-73.

83. Claims Against Iraq (Category "A" Claims), 109 I.L.R. 2 (U.N. Compensation Commission 1994).

84. *Report and Recommendations Made by the Panel of Commissioners Concerning the Sixth Installment of Claims for Departure from Iraq or Kuwait (Category "A" Claims)*, U.N. SCOR Compensation Commission Governing Council, 51st Sess., ¶ 29, U.N. Doc. S/AC.26/1996/3 (1996).

made into the factual attachments and connections of dual national applicants. Instead, a test of *bona fides* was applied. Thus, Iraqi dual nationals were entitled to have their applications considered as long as they were not seen to have acquired their second nationality mainly or solely for the purpose of claiming compensation.<sup>85</sup> As there were no claims from Iraqi dual nationals who had applied for a second nationality after establishment of the eligibility criteria for compensation, the Commission did not deny any claims from dual nationals on the basis of the acquisition of a second nationality *mala fides*.<sup>86</sup>

Each of these standing cases shows a move away from traditional approaches to dual nationality. Unlike *Nottebohm*, where allegiance was the central factor in nationality determination, effective nationality is considered more in the broader sense of social fact. This concept is highlighted further in the human rights cases.

## 2. Human Rights Cases

Whereas the standing cases present nationality as a preliminary issue, the human rights cases consider the rights of citizenship or nationality in a substantive sense. They are justiciable because of international instruments that stand with State sovereignty as the basis of international law. By and large, the cases evolve where human rights law is called upon to imbue an individual with certain rights of membership though citizenship is formally lacking (e.g., where individuals have the right to reside in a certain country). There are also other human rights cases where human rights law is called upon by individuals seeking to escape undesirable consequences of unwanted nationality.<sup>87</sup> Finally, there are other international law cases not centered upon human rights as such, where the nationality issues raised in *Nottebohm*<sup>88</sup> arise. For present purposes, we concentrate on human rights cases where an

---

85. *Id.* ¶¶ 29-31.

86. *Id.* ¶ 31.

87. *See, e.g.*, Case 37/74, *Van den Broeck v. Commission*, 1975 E.C.R. 235 (where nationality was imposed by law on a female official upon her marriage and was disregarded by the Court in determining a right to an expatriation allowance); Case 257/78, *Devred, née Kenny-Levick, v. Commission*, 1979 E.C.R. 3767 (also dealing with expatriation allowance and holding that the concept of "nationality" should be interpreted so as to avoid any unwarranted difference in treatment between male and female officials).

88. *Nottebohm Case (Liech. v. Guat.) (second phase)*, 1955 I.C.J. 4 (Apr. 6). One example concerns fishing rights. *See* Case C-280/89, *Re British Fishing Boats: Commission (Spain Intervening) v. Ireland* [1993] 1 C.M.L.R. 273 (1992) (regarding the nationality of vessels). In this Comment we do not go into great detail in the area of maritime law.

individual seeks the protection of principles associated with nationality, when nationality is lacking.

*a. Beljoudi v. France*<sup>89</sup>

In 1950, Mohand Beljoudi was born in France to Algerian parents. He lived in France from birth and was unacquainted with either the Islamic religion or Arabic, the language of Algeria. He went to school in France and married a French woman in 1970. Nevertheless, Beldjoudi did not attain French citizenship because he did not comply with the relevant statutory procedure for converting his "special civil status" to full citizenship.

On the basis of a history of criminal convictions resulting in a number of terms of imprisonment, the relevant Minister issued a deportation order. The case cited is the decision of the European Court of Human Rights with regard to Beldjoudi's deportation.

While not decided on grounds of nationality,<sup>90</sup> the logic of effective nationality underwrites the majority opinion and the concurring judgments in their finding that the decision to deport Beldjoudi, if implemented, would be in breach of Article 8 of the European Convention on Human Rights.

Article 8 of the Convention provides:

- (1) Everyone has the right to respect for his private and family life, his home and his correspondence.
- (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.<sup>91</sup>

In interpreting this Section, the majority explains that the expulsion of a person from the country in which his or her immediate family resides will give

---

89. *Beldjoudi v. France*, 234 Eur. Ct. H. R. (ser. A) (1992).

90. It is noted by the majority that the Convention does not in principle prohibit the Contracting States from regulating the entry and length of stay of aliens. *Id.* at 41.

91. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 8, 213 U.N.T.S. 221.

rise to a contravention of “the right to respect for family life afforded by Article 8” if it is not justified when weighed against what may be regarded as necessary and thus allowable pursuant to Article 8(2).<sup>92</sup> In order for an action to be within the bounds of the Convention, “the interference [must] correspond[] to a pressing social need and, in particular, [one] that it is proportionate to the legitimate aim pursued.”<sup>93</sup>

Though citizenship is not the issue, the Court’s discussion of the level of the interference caused by deporting the applicant engages the discourse of effective nationality. In the end, the applicant’s deportation is severely disruptive of his private and family life for the very reason that his social and familial networks are thoroughly entrenched in the French State. The applicant has the fullest effective nationality, in the *Nottebohm* sense, where nationality is expressed as “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.”<sup>94</sup> In such situations, the majority found that deportation is justifiably proportionate only in “exceptional circumstances.”<sup>95</sup> Though the applicant was convicted of various crimes and made eligible for deportation under the relevant statute, the disruption to the applicant’s family life made deportation unjustified from a public policy standpoint.

The logical extension of the effective nationality principle is explored in the concurring opinion of Judge Martens. If effective nationality represents a shift from nationality based on formal admission to a State to nationality acknowledged on the social facts of an individual’s participation in the life of a community, it is arguable that any distinction between formal citizens and fully effective citizens is artificial. Or as Martens frames it in his analysis of Beldjoudi’s case: “In my opinion, mere nationality does not constitute an objective and reasonable justification for the existence of a difference as regards the admissibility of expelling someone from what, in both cases, may be called his own country.”<sup>96</sup> Here, we see a fluid approach to the place of nationality in international law.

---

92. Beldjoudi v. France, *supra* note 89, at 41.

93. *Id.* at 43.

94. *Nottebohm Case (Liech. v. Guat.) (second phase)*, 1955 I.C.J. 4, 23 (Apr. 6).

95. Beldjoudi v. France, 234 Eur. Ct. H. R. (ser. A) at 44 (1992).

96. *Id.* at 37 (Martens, J., concurring).

*b. Stewart v. Canada*<sup>97</sup>

The Human Rights Committee (Committee) under the International Covenant on Civil and Political Rights illustrates the definition of globalization as argued in this piece. It is a decision-making body in an international law context that determines disputes brought to it from individuals in countries that have signed the Optional Protocol of the International Covenant on Civil and Political Rights. While the Committee lacks determinative powers, and thus does not destroy notions of sovereignty, its political might and existence weakens the nation-State's total control over human rights matters within its jurisdiction. In *Stewart v. Canada*, Charles Edward Stewart was a British citizen born in 1960 who, from the age of seven, had lived in Ontario, Canada, with his family. Though Stewart considered himself to be a Canadian citizen for most of his life, he was never naturalized and as such never achieved that status.

Between 1978 and 1991, he was convicted of some forty-two criminal offenses, the last of which triggered a move by the Canadian government to deport him to the United Kingdom in accordance with the Canadian Immigration Act. As a result, he complained of violations of various articles of the International Covenant on Civil and Political Rights.

The determinative article was Article 12(4), which provides: "No one shall be arbitrarily deprived of the right to enter his own country." Thus, the Committee considered two questions of mixed law and fact: (a) was Canada the applicant's own country; and if so, (b) was the applicant being arbitrarily deprived of his right to enter Canada? The Committee answered both of these questions in the negative. It held that the words "own country" used in Article 12(4) of the Covenant are broader than the concept "country of his nationality" and are applied to individuals who, though not nationals in a formal sense, are also not "aliens" within the meaning of Article 13.<sup>98</sup> In arriving at this view, the Committee was influenced by Article 13 of the Covenant which speaks of "an alien lawfully in the territory of a State party" when discussing the rights of State parties to expel these persons. The Committee then commented that it is less clear

---

97. *Stewart v. Canada*, U.N. Doc. CCPR/C/58D/538/1993, in 4 INT'L HUM. RTS. REP. 418 (1997).

98. *Id.* ¶ 12.3.



who, in addition to nationals, is protected by the provisions of article 12, paragraph 4. Since the concept “his own country” is not limited to nationality in a formal sense, that is, nationality acquired on birth or by conferral, it embraces, at the very least, an individual who, because of his special ties to or claims in relation to a given country cannot there be considered to be a mere alien.<sup>99</sup>

In considering the category of people described in the preceding paragraph, the Committee saw it as including: “nationals of a country who have there been stripped of their nationality in violation of international law and of individuals whose country of nationality has been incorporated into or transferred to another national entity whose nationality is being denied them.”<sup>100</sup>

As Canada placed no unreasonable impediments on the applicant from acquiring formal nationality, the Committee held that Canada was not the applicant’s “own country” for the purposes of Article 12(4). However, the Committee was not prepared to find that the words “his own country” extended to individuals who had either chosen not to acquire the nationality of their home country or committed criminal acts which prevent them from doing so.

This reasoning is based on a “rights and obligations” view of citizenship. In the opinion of the Committee:

Countries like Canada, which enable immigrants to become nationals after a reasonable period of residence, have a right to expect that such immigrants will in due course acquire all the rights and assume all the obligations that nationality entails. Individuals who do not take advantage of this opportunity and thus escape the obligations nationality imposes can be deemed to have opted to remain aliens in Canada. They have the right to do so, but must bear the consequences.<sup>101</sup>

---

99. *Id.* ¶ 12.4.

100. *Id.*

101. *Id.* ¶ 12.8.

A dissenting opinion by Elizabeth Evatt and Cecilia Medina Ouroga, and supported by an additional four members of the Committee, offers a more liberal interpretation. Evatt and Ouroga criticize the majority for failing to recognize that the protection offered by Article 12(4) exists “because it is deemed unacceptable to deprive any person of close contact with his family or his friends or . . . the web of relationships that form his or her social environment.”<sup>102</sup> Considering Stewart’s family ties, his long standing residence in Canada, and desire to remain in Canada, the dissenters found that Canada was his “own country” and that he was entitled to protection from deportation. In a separate dissenting opinion, Prafullachandra Bhagwati took the argument a step further by allowing that an individual may have more than one country as his “own” within the meaning of Article 12(4).<sup>103</sup>

The decision dilutes nationality as a legal tool for resolving international law dilemmas involving a person’s connection to the nation-State. In fact, the dissenters are more consistent in interpreting nationality as a progressive project concerned with the broader indicia determining a person’s attachment to a community and identifying that person as a member.

Both the standing and human rights cases display tensions in the functionality of the formal status of nationality in international law. If law is to be an effective tool for the resolution of international matters, then it needs to be refashioned in the future.

### III. EFFECTIVE NATIONALITY AS THE FUTURE

The arguments raised in Bosniak’s *Citizenship Denationalized* over whether postnational forms are properly described in terms of citizenship are somewhat circular. Statist theorists argue that citizenship necessarily entails membership of a bounded political community with a shared public culture, a requirement placing citizenship firmly in the nation-State. In opposition, Cosmopolitan thinkers prefer focusing on citizenship as political activity and allow for its existence outside the nation-State.

At one level, this is little more than a definitional argument. As illustrated above, and as Bosniak clearly outlines, citizenship is both a contested and a fluid concept—remarkable for its ability to retain relevance for more than 2000 years. As a result, citizenship is not subject to a concise or agreed upon definition. Within the broad discourse of the jurisprudence, sociology, and

---

102. *Id.* ¶ C-5.

103. *Id.* ¶ C-6.

politics of membership, citizenship ambulates to the point where it is what we define it as being. Thus, in any descriptive sense, the importance of the definitional argument is defunct; except, of course, inasmuch as it weighs on the future of the citizenship project. In this normative sense, the discussion is of fundamental importance as it poses the question: "How do we proceed in the struggle for equality of membership and participation in political life?"

In Bosniak's words, the denationalization of citizenship is an "aspiration."<sup>104</sup> It is important because citizenship has an "enormous legitimizing function. To characterize a set of social practices in the language of citizenship is to honor them with recognition as politically and socially consequential—as centrally constitutive and defining of our collective lives. To refuse them the designation [as citizenship values] is, correspondingly, to deny them such recognition."<sup>105</sup> Thus, the question is not: Can citizenship have postnational forms? It clearly can depending on how we define the term. Rather, the question is: Is it desirable that relations and affiliations outside traditional national citizenship are canvassed?

The strongest arguments against the radical pluralization of citizenship come from liberal nationalists. These scholars<sup>106</sup> see national identity as doubly threatened. It is threatened from below by "fragmentation in the form of divisive multiculturalist politics in liberal democratic states, and fundamentalist ethnocultural rivalries elsewhere."<sup>107</sup> It is threatened from above by accelerated globalization that reifies the values of the market and weakens the individual's bond with his or her community of origin.

The above forces are said to undermine the operation of liberal democratic communities. While pluralist communities should be acknowledged, national identities need to remain primary as liberalism depends on the sense of "common good" or "shared fate" that they, and only they, engender.<sup>108</sup> Absent "institutional arrangements at the transnational level that can command the solidarity and deploy the resources and authority necessary to ensure their achievement,"<sup>109</sup> distributive justice and equality of treatment are likely to

---

104. See Bosniak, *supra* note 1, at 489.

105. *Id.* at 489-90.

106. See, e.g.; DAVID MILLER, ON NATIONALITY (1995); Yael TAMIR, LIBERAL NATIONALISM (1993).

107. See Bosniak, *supra* note 1, at 498.

108. *Id.* at 499-500 (internal quotations omitted).

109. *Id.* at 499.

remain national projects, "justified on the basis that members of a community must protect one another and guarantee one another equal respect."<sup>110</sup>

Bosniak objects to the liberal national position on a number of grounds. First, it necessitates a continued "privileging" of the national on the basis that it automatically excludes nonnational others from "the domain of normative concern."<sup>111</sup> Second, the reality of global relations means that national protectionist or isolationist policies will often be counterproductive to progressive outcomes.<sup>112</sup> Third, nationalist aspirations may encourage national over class solidarity.<sup>113</sup> Finally, Bosniak contends a national focus may be counterproductive to democratic ideals in a world where the power to address "many of today's most pressing problems" lies outside the practical limits of the nation-State's power.<sup>114</sup>

Thus, Bosniak rejects liberal nationalism in favor of some form of plural citizenship. Based on the arguments outlined above,<sup>115</sup> she advocates less the demise of national citizenship, as "the decentering or 'demoting' [of] the nation" in order to facilitate "an aspiration toward a multiple [and] pluralized understanding of citizenship identity and citizen solidarity."<sup>116</sup>

To the extent that Bosniak looks beyond the bounds of the nation-State when addressing the future of citizenship, her argument is strong. What her argument openly omits, however, is what consequences this will have in practical terms. This Comment has argued that one significant consequence is the altering of the legal principles of nationality.<sup>117</sup> In concrete terms, we predict a future that includes the following:

- (1) an increasing willingness in international treaty law to acknowledge and encourage dual and multiple nationality;
- (2) a dilution of the centrality of allegiance and the consequences of nationality in domestic and international case law;

---

110. *Id.* (quoting MILLER, *supra* note 106, at 187).

111. *See* Bosniak, *supra* note 1, at 501.

112. *Id.* at 504.

113. *Id.*

114. *Id.*

115. Namely that there is an increasing trend for people to locate their fundamental political affinities and actions with "a variety of communities that are neither defined nor circumscribed by nation-state boundaries." *Id.* at 505.

116. *Id.* at 506.

117. Kim Rubenstein has suggested some consequences in the domestic context for citizenship in *Citizenship in a Borderless World*, in LEGAL VISIONS, *supra* note \*, at 183. Gary Sturgess has also suggested some practical consequences in *Citizen, Customer, Community: Changing Attitudes to Political Membership in INDIVIDUAL, COMMUNITY NATION: 50 YEARS OF AUSTRALIAN CITIZENSHIP* (Kim Rubenstein, ed., Australian Scholarly Publishing, forthcoming 2000).

(3) a movement away from the centrality of the State in international law.

All the Conventions against multiple nationality are premised upon resolution of conflict and the difficulties arising from multiple nationality. In our view, due to the developments described in this Comment as globalization, multiple nationality will become the norm in international law. This trend can already be seen in the 1997 *European Convention on Nationality*<sup>118</sup> which includes a chapter on “Multiple Nationality” and allows the retention of multiple nationality in certain circumstances.<sup>119</sup> As Bosniak argues, this is not necessarily the demise of the nation-State or citizenship denationalized, but rather citizenship multinationalized. In this situation, notions of effective nationality will become even more important in the resolution of conflicts. Thus, we contend that effective nationality takes into account a much broader notion of citizenship. It is not concerned with the formal legal status of an individual, nor solely concerned with allegiance, but with issues of social fact, identity, and justice in a given situation.

The concept of effective nationality facilitates a theoretical (if not yet a practical) entry point for the acknowledgment of layered and/or fragmented nationality appropriate to the circumstances of our participation in a given national, supranational, regional, or even nonterritorial communities. Surely, such a diversity of participation will produce conundrums in terms of conflicts and priorities of interest. But in a theoretical framework that “privileges” a fluidity of networks over a static allegiance, our legal concept of citizenship and nationality must have the flexibility to accommodate the struggle for membership and participation in the polity which has defined the citizenship project since the development of civil rights in eighteenth-century Britain. In tracing the development of principles of nationality in international law, we have highlighted the centrality of allegiance in *Nottebohm*.<sup>120</sup> The case law since has broadened the concept of effective nationality, concentrating less on sole nationality and allowing consideration of other matters. This broadening of approach to issues of nationality will no doubt continue. While not totally denationalizing nationality, as there is still some interest in the relationship between the individual and the State, formal links to the State are but one

---

118. See *European Convention on Nationality, opened for signature* Nov. 6, 1997, Eur. T.S. No. 166. The Convention has institutionalized and recognized as a fact of international life the concept of multiple nationality. See also Ryszard Pitorowicz, *One Nation or Two? New Developments in Citizenship Law*, 72 *AUSTL. L.J.* 673 (1999).

119. See *European Convention on Nationality, supra* note 118, arts. 14-17.

120. See *Nottebohm Case (Liech. v. Guat.) (second phase)*, 1955 *I.C.J.* 4 (Apr. 6).

factor under consideration. This also picks up on Bosniak's discussion of citizenship as identity.<sup>121</sup> The theoretical notions of effective nationality are concerned with a person's connections in fact—their social, political, and psychological connections. Accepting this, one would think current restrictions confining causes of action in international law to State nationals should be lifted to allow States to intervene on behalf of *anyone* who has a significant link to that country, be it by birth, blood, or later association.

Another alternative is to allow individuals and other non-State entities greater access to international justice. To do so denationalizes citizenship still further in certain circumstances. Identities previously unseen by international law are suddenly recognized through their attachment to non-State players. For instance, membership of a non-governmental organization or a religious body could be recognized in international law as granting standing. The acceptance of this will open the face of citizenship to incorporate multifaceted connections well beyond the nation-State.

While both of these suggestions undermine international law saying nothing about the way a State treats its own nationals, the expression of unfettered sovereignty has already lost much of its weight through the development of international human rights law in the second half of the twentieth century.

Where does this leave the principles outlined in our definitions of nationality, such as the entitlement to diplomatic protection and a State's general right in the absence of a treaty to refuse to extradite its own nationals to another State requesting surrender? Our argument on multiple nationalities extends to all of these principles. Effective nationality should be the stronger consideration rather than formal nationality. It is not based simply on allegiance, as in *Nottebohm*, but on the social, psychological, and cultural facts relevant to the situation.

All of these changes represent the continued growth of citizenship as a flexible concept. Its fluidity and flexibility is its great strength which, as Bosniak argues, legitimizes the progressive content of citizenship. In doing this, it flows into the international arena through nationality. As international law becomes more flexible in its use of nationality, so too it becomes part of citizenship's progressive project. While this may lead to less certainty in the resolution of disputes between nations, it will lead to more appropriate, just outcomes in individual cases. This puts it more in line with a rights-based, individualized focus for international law, rather than a sovereignty-based one.

---

121. See Bosniak, *supra* note 1, at 479-88.

This is where the progressive citizenship project meets nationality, melding, strengthening, and integrating them as one and the same tool for building justice in a new era.