Nationality and Obligations of Loyalty in International and Municipal Law

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One of the topics taken up by Ivan Shearer early in his career was the non-extradition of nationals.[1] Indeed, he maintained a keen interest in topics related to nationality such as extradition and jurisdiction,[2] and the relationship between the state and the individual in the areas of human rights law and international humanitarian law, in which rules on nationality play a significant role. It was my personal experience that this concern for the individual was reflected in Professor Shearer's attention to his students. His wide-ranging interests and knowledge, combined with a vocation for teaching, enriched our understanding of the significance and context of the law, and the importance of international law in the lives of ordinary human beings.

Introduction and Summary

Once attributed by a state, nationality[3] has consequences on both the international and the municipal planes of law. In terms of municipal law, certain rules (rights, entitlements, privileges, obligations) are applicable to nationals but not to aliens. Weis points out that in order to distinguish the consequences of nationality at international law from the numerous rights and duties inherent in nationality under municipal law, one must extricate from the relationship between the state and its nationals those elements that 'presuppose the

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1 Ivan A Shearer, 'Non-Extradition of Nationals' (1966) *Adelaide Law Review* 273.

2 Ivan A Shearer, 'Jurisdiction' in Sam Blay, Ryszard Piotrowicz and B Martin Tsamenyi (eds), *Public International Law. An Australian Perspective* (1997) 161-92.

3 Not to be confused with citizenship, which may be defined as possession of the highest category of political rights/duties in municipal law. 'Nationality' here refers to the legal status of, or relationship between, an individual and the state, which regards him or her as its national, giving rise to personal jurisdiction over the individual, and standing *vis-à-vis* other states under international law. It should be distinguished from 'nationality' meaning belonging to an ethnic group, sometimes called a 'race' or 'nation', or a legal subclass used to group persons in the municipal law of certain states, usually according to ethnic background.

co-existence of States, which confer rights or impose duties on the State in relation to other subjects of international law'.[4]

In the international context, Shearer lists the 'international importance' of nationality as: (1) entitlement to exercise diplomatic protection, (2) state responsibility for nationals, (3) [duty of] admission, (4) allegiance, (5) right to refuse extradition, (6) determination of enemy status in wartime, and (7) exercise of jurisdiction.[5] In qualifying these elements as being of 'international importance', he indicates that they relate both to international and municipal law and to the international context of nationality. This paper asks whether an obligation of loyalty, sometimes referred to as 'allegiance', is a consequence of nationality, and if so, whether under municipal or international law, and examines the contours of such an obligation.

Although an obligation of loyalty by nationals to their states certainly appears to be a rule of international law, it will be argued that it is best conceived of as a concept and rule of municipal law, as opposed to international law. Loyalty can be said to be an important issue in terms of international relations, or in terms of states' expectations of their own nationals *vis-à-vis* other states, but the international context of loyalty should not be confused with the dictates of international law in relation to nationality. Likewise, emotional issues surrounding loyalty to the state must be separated from what the state can oblige persons to do, and the acts for which nationals and aliens can be held accountable by states.

It will be argued that the standard of duty or obligation that can be imposed on aliens by states under international law is so high, that the only practical difference in terms of the loyalty or obligation a state can require of its nationals is a duty of general military service, participation in armed conflict outside national territory, and to refrain from participation in international armed conflicts against the state. Obligations of loyalty are issues for municipal, not international, law. As opposed to dictating loyalty by nationals, international law sets limits on the way states may treat aliens, because of states' duties to other states, in addition to limiting how they treat their own nationals.

Some of these issues may lead states to regulate their municipal laws on nationality in one way or another, influence their positions on multiple nationality, or have ramifications for law and policy in specific areas, but the details are issues for municipal law.[6] The term allegiance may be used to denote

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4 Peter Weis, *Nationality and Statelessness in International Law* (1979) 32.

5 Ivan A Shearer, *Starke's International Law* (11th ed, 1994) 309.

6 Eg the Argentine military government that ruled between 1976 and 1983 reversed the Argentine policy, in effect since 1853, of favouring the naturalisation of foreigners, and for the first time instituted grounds for the revocation of the Argentine nationality of the native-born, namely treason, and naturalisation abroad. Numerous grounds for naturalised citizens to be denaturalised were established. Dionisio Petriella, *El Convenio de Doble Ciudadania entre la Argentina e Italia* (vol 30, 1988) 15-16. These provisions and their specific effects were reversed by the subsequent civilian government.

the loyalty required of individuals, but loyalty or duties to the state are not consequences of nationality under international law or on the international plane, but may be consequences of nationality under municipal law. Use of the term 'allegiance' to denote loyalty, duty or nationality should be abandoned in order to avoid confusion, especially in relation to the international plane, as Koessler aptly suggested in 1947 (discussed below).[7] Likewise, the use of 'temporary allegiance', which 'characterized and comprised the duty of the non-subject or alien present within the State or otherwise constructively a subject towards the latter' should be abandoned.[8]

The emotionally-charged nature of the subject should, however, not be ignored, and the reality that states do expect, and have a legitimate expectation of, their nationals' loyalty.[9]

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7 Maximilian Koessler, '"Subject,' 'Citizen,' 'National,' and 'Permanent Allegiance"' (1947) 56 *Yale Law Journal* 58.

8 Clive Parry, John P Grant, Anthony Parry, and Arthur D Watts (eds), *Encyclopaedic Dictionary of International Law* (1986).

9 The idea of an obligation of loyalty attaching to the national's relationship to his or her state seems to have its roots in the early days of modern international law and the establishment of nation states. The feudal relationship of allegiance, expanded on below, which incorporated rights and duties, is directly relevant in this sense. A difference can nonetheless be detected between the feudal norm and the 'national' one; whereas the former was contractual, the latter is emotional. Vattel, writing in terms of the post-feudal nation-state, says 'If every man is bound in conscience to love his country sincerely, and to procure its welfare as far as lies in his power, it is a shameful and detestable crime to do an injury to one's country. He who becomes guilty of it violates the most sacred of compacts and exhibits a base ingratitude; he disgraces himself by the blackest perfidy, since he abuses the confidence of his fellow-citizens and treats as enemies those who had reason to expect from him only his help and his services. We find traitors to their country only among men who are moved solely by base motives, who look to their own interest first, and whose hearts are incapable of any sentiment of affection for others. Therefore they are justly despised by all the world as the most infamous of all criminals.' Emmerich de Vattel, *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns* (transl Charles G Fenwick) (1758) (vol 3, 1916) 52. 'That we have some special obligation to our country is a view not confined to rabid nationalists but almost universally held. This appears particularly clearly in the case of war.' Alfred Cyril Ewing, *The Individual, the State, and World Government* (1947) 213. Gans points out that the relationship between citizen and country casts an 'intimacy' over even the duty to obey the law in one's country, as opposed to the laws of other states. Chaim Gans, *Philosophical Anarchism and Political Disobedience* (1992) 8. But Simmons writing on political obligation, concludes, 'citizenship does not free a man from the burdens of moral reasoning. ... Most of us have no special obligation of obedience. But second, even if we had such an obligation, the citizen's job would not be to blithely discharge it in his haste to avoid the responsibility of weighing it against competing moral claims on his action. For surely a nation composed of such "dutiful citizens" would be the cruellest sort of trap for the poor, the oppressed, and the alienated.' A John Simmons, *Moral Principles and Political Obligations* (1979) 200-01. The question of loyalty is thus directly related to questions of political obligation, moral obligation, and obedience.

Loyalty as a Consequence of Nationality

Justice Gaudron of the High Court of Australia, in describing the situation of Mrs Hill as a dual British and Australian national, stated 'it does appear that Mrs Hill understood that, at all relevant times from the grant of citizenship, her sole loyalty was to Australia'.[10] Referring to Mrs Hill's 'understanding' may indicate a feeling held subjectively, but the statement taken overall might also be interpreted to indicate that the judge regarded Mrs Hill's naturalisation as establishing a legal standard whereby Mrs Hill's 'sole loyalty' *should* be to Australia. In either case the comment is *obiter dicta*. There is no question however, that Mrs Hill's naturalisation in Australia did not terminate her British nationality. If loyalty is a consequence of nationality, Justice Gaudron's statement may indicate the Court's view of Mrs Hill's obligations as an Australian, but this is not to say that the United Kingdom might not equally hold Mrs Hill to an obligation of loyalty as a consequence of her British nationality.

The increasingly common incorporation of multiple nationality into international relations, such as Mrs Hill's situation described above, raises the question of the quality of the loyalty states expect of their nationals, when they accept that these individuals are also nationals of other states. Questions of power-relations, obligation and nationality are, however, not new. Attribution of nationality to another state's reigning monarch was a sensational topic in the late nineteenth century: Neubecker in 1897 cited a British statutory provision attributing British nationality to all Protestant descendants of the Electress Sophie, which at the time included the German Emperor.[11]

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10 *Sue v Hill and Another* (1999) 163 ALR 648, 677.

11 In the context of the succession to the throne of Sachse-Coburg-Gotha in 1893 by Alfred, Duke of Edinburgh and of Sachse-Coburg-Gotha, Queen Victoria's second son, Neubecker outlines the political and legal controversy in Germany and England at the time, over whether a reigning German Sovereign might also be considered another state's subject. He concludes that this could never be the case due to the position of Sovereign as such (author's transl): 'Duke Alfred is a German Sovereign and as such cannot be the subject of a foreign power, of another State.' Arguing that this position automatically terminated Alfred's British nationality, Neubecker nevertheless has to deal with the fact that the United Kingdom still seemed to regard the Prince as its national. He argues that even if England did give the Prince certain rights, that rights as such do not create a subject, only duties, and the Prince had none of the latter, as a German Sovereign. Friedrich Karl Neubecker, '*Thronfolgerecht und fremde Staatsangehörigkeit. Ist die Zugehörigkeit eines regierenden deutschen Fürsten zu einem fremden Staatsverband vereinbar mit den Normen des Staats- und Völkerrechts?*' Dissertation presented at the Königliche Friedrich-Wilhelms-Universiatät zu Berlin, Juristische Fakultät, Berlin, 1897, 14-15. This is an exclusive view of the multiple nationality that the Prince probably did possess in terms of the two countries' municipal laws. In regard to the Austrian nationality of the Prince of Thurn and Taxis, see Hans Kelsen, *Beiträge zur Kritik des Rechtsgutachtens über die Frage der Österreichischen Staatsbürgerschaft des Fürsten von Thurn und Taxis* (1924).

Before enquiring about the loyalty of multiple nationals, it must be asked whether loyalty is an inherent part or consequence of nationality at all. The International Court of Justice (ICJ) defined nationality in the *Nottebohm Case* as:

> a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State.[12]

While not addressing an obligation of loyalty specifically, the ICJ's pronouncement emphasises the emotion and obligation that are often seen to accompany nationality. The Court made this statement after restating the rule that it is up to 'each sovereign State, to settle by its own legislation the rules relating to the acquisition of its nationality'.[13] The Court declined to address whether 'international law imposes any limitations on [the state's] freedom of decision in this domain'.[14] It stated that whether nationality is effective *vis-à-vis* other states in international law, however, is a completely separate question. One aim of the author's study on the effects of state practice *vis-à-vis* multiple nationality was to examine the extent to which the ICJ's declaration is challenged or reinforced by the current practice of states in terms of multiple nationality. If effective nationality on the international plane means that an individual is more closely connected to one state than to any other, what about a world in which individuals increasingly have legal (not to mention social and emotional) ties to more than one state, such legal status often being built into national legislation and policy?

The standards involved in judging what constitutes a 'genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties', as well as the nature of links that might be perceived as a danger have, however, changed over time. A good example is Mr Gladstone's questioning, as British Prime Minister in the early 1870s, whether Catholics could be trustworthy subjects of the state.[15] Sports people, it seems, frequently choose to switch countries entirely, adopting another nationality altogether without necessarily becoming multiple nationals, purely on the basis of subjective self-interest. Such interest may be related to training facilities offered

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12 *Nottebohm Case (Second Phase)* [1955] ICJ Rep 4, 23. Randelzhofer does not consider that the ICJ in fact intended this to be a general definition of nationality, and says it is limited to the issue of 'diplomatic protection in the particular case of conferment of nationality by naturalization'. Albrecht Randelzhofer, 'Nationality' in Rudolf Bernhardt and Max Planck Institute for Comparative Public Law and International Law (eds), *Encyclopedia of Public International Law* (vol 8, 1985) 416-24, 421. Many authors do, however, cite this as a general definition.

13 *Nottebohm Case (Second Phase)* [1955] ICJ Rep 4, 20.

14 Ibid.

15 See the spirited public response that seeks to explain the Church's doctrine of papal infallibility in theological terms, as opposed to political, repudiating Gladstone's stand. John Henry Newman, *A Letter Addressed to His Grace the Duke of Norfolk on Occasion of Mr. Gladstone's Recent Expostulation* (1875).

by countries, financial or pecuniary incentives, the potential for winning, or even the chance to be put forward by a country to compete in the international arena. The world of international tennis has been cited for this proposition.[16]

Ideas of loyalty in an international context can be seen to move on two interconnecting planes. They are centred on the relationship between the individual and his or her own state, but go to the duty to defend it *vis-à-vis* other states. The notion thus seems to operate inwardly or internally, as well as outwardly or externally.

Nationality, 'Allegiance' and Loyalty

Although allegiance and loyalty are distinct things for the purposes of international law, they are dealt with here together, because in a certain context allegiance means or implies loyalty, and in another context it means or implies nationality. The fact that loyalty is expected of nationals in legislative and emotional reality makes the ease with which commentators and judges mix the terms, easy to understand. For the purposes of international law, however, such mixing is imprecise and arguably incorrect.

For example, in his significant work on dual nationality published in 1961, Nissim Bar-Yaacov introduces his subject as follows:

> Nationality is a legal and political tie which binds individuals to a State and renders them subject to its personal jurisdiction. The present meaning of nationality is associated with the establishment of sovereign States, and denotes the sum of obligations – or allegiance – which an individual owes to a State.[17]

Allegiance as a term of international law must first be defined, and its other meanings distinguished. Allegiance is:

> a term of English law, derived from feudal notions, and connoting the duty owed by the individual to his lord or sovereign as the correlative of his claim of protection upon such superior. Until displaced by the statutory scheme of nationality and citizenship introduced by the British Nationality Act 1948, the concept of permanent allegiance lay at the root of the status of a British subject – of British nationality. ... As a common law term and concept, the notion of allegiance has of course passed into the law of the United States and of some other (particularly Commonwealth) States with common law roots. It may possibly belong naturally to other municipal systems with feudal origins. Its increasing use by Anglophone writers to describe the duty owed by any individual to any State, though natural, has little justification.[18]

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16 Chip Le Grand, 'Pragmatism takes hold in nationality stakes. Adopting a new country is a common occurrence in world tennis', *The Weekend Australian* (20-21 January 2001) Sports 34.

17 Nissim Bar-Yaacov, *Dual Nationality* (1961) 1. Bar-Yaacov may well have been influenced by the ICJ: 'Naturalization is not a matter to be taken lightly. To seek and to obtain it is not something that happens frequently in the life of a human being. It involves his breaking a bond of allegiance and his establishment of a new bond of allegiance.' *Nottebohm Case* above 13. Under the municipal laws of many countries today, naturalisation does in fact not involve loss of nationality, or in that sense the breaking of a bond of allegiance.

18 Clive Parry et al (eds), above n 8, 16-17. See also Clive Parry (ed), *A British*

Parry thus clarifies that the term 'allegiance' is used to denote (1) a feudal legal relationship, (2) the present relationship/status of nationality, and (3) duties to the state. His criticism of its use in the latter sense is supported herein, but such use can also have palpable legal effect in some countries, for example in the United States of America.[19] It will be demonstrated that other states hold individuals to the same duty of obedience, without labelling this permanent or temporary 'allegiance'.

Koessler states that:

> the term "allegiance" in itself has become archaic. In its feudal setting, "allegiance" denoted a reciprocal correlation of interconnected rights and duties.

Digest of International Law (vol 5, 1965) 48. De Burlet labels the United Kingdom the exception in terms of adherence to allegiance as a source of nationality into modern times, indicating that the idea had ceased to be valid in most European states with the end of the absolute monarchies. '*C'est à la suite d'une assez longue évolution que la notion féodale d'allégeance qui désignait primitivement la foi absolue et inconditionelle due au suzerain par le vassal et qui impliquait protection du vassal par le suzerain, est devenue une institution permettant de départager l'étranger du non'étranger. Il fallut pour cela que l'allégeance en arrive à ne plus désigner que la foi due au Roi par ses sujets, ce qui ne fut possible qu'à partir du moment où la féodalité ayant englobé tous les hommes dans une hiérarchie de vassaux et de suzerains, le Roi se trouva placé au sommet de cette hiérarchie avec cette conséquence qu'il devenait automatiquement le seul bénéficiaire de la féauté lige ou foi inconditionelle*'. Jacques de Burlet, *Nationalité des Personnes Physiques et Décolonisation* (1975) 17 (author's transl) 'Only after quite a long evolution did the feudal notion of allegiance that originally designated the absolute and unconditional loyalty due the lord by the vassal, and implied protection of the vassal by the lord, become an institution allowing for the separation of foreigner from non-foreigner. For this to happen, the meaning of allegiance had to evolve to mean only the loyalty due the king by his subjects. This only became possible when the feudal system had encompassed all persons in a hierarchy of vassals and lords, and the king found himself placed at the summit of this hierarchy. As a consequence, he automatically became the only beneficiary of the vassal's fealty, or unconditional loyalty.' The feudal roots of the term 'allegiance' are illustrated by the lack of ideas of reciprocity underpinning obligation in Roman law. Yet obligation was clearly a consequence of membership in, or relationship to, the state, albeit not necessarily citizenship as such. See generally on treason and crimes against the state in Rome, O F Robinson, *The Criminal Law of Ancient Rome* (1995) 74-89.

19 'Treason, being in essence a breach of allegiance to the government, can be committed only by a person who owes either perpetual or temporary allegiance. The term allegiance is not synonymous with loyalty but refers to the duty of obedience which one owes to a sovereign power within whose jurisdiction he finds himself in return for the protection which he receives from that sovereign. Allegiance is owed to the United States not only by its citizens, whether citizenship was acquired by birth or naturalization, but also by aliens temporarily present within the country. The difference between the allegiance owed by citizens and that owed by aliens is that the duty of a citizen exists wherever he may be, while the duty of an alien exists only while he is physically present within the United States.' Charles E Torcia, *Wharton's Criminal Law* (vol 4, 1981) 499-500. Used in this sense, allegiance gives rise to a right to exercise jurisdiction territorially, and generally over nationals. This definition of 'treason' however, does not match that of many countries' laws, an issue discussed below.

> But in modern states the obligations of the national to the nation are unconditional, rather than contingent upon the state's compliance with corresponding duties.[20]

He thus concludes that the terms 'nationality' and 'permanent allegiance' must today mean the same thing.[21]

It is clear that the historical nature of the feudal relationship of allegiance as reciprocal rights and duties leads modern authors to imply duties to the state into the relationship/status of nationality, which supplanted feudal allegiance.[22] Parry's contention that use of the term 'allegiance' to denote duties to the state, including loyalty in the abstract, is unjustified, should be examined more closely, especially in light of Koessler's statement that today, a national's obligations to his or her state are unconditional. A quick survey will illustrate that both Parry and Koessler are correct. It is here that the international context of loyalty, or allegiance as loyalty, must be separated from the requirements of international law, and Koessler's definition of 'permanent allegiance' as overlapping with that of 'nationality' in international law.

The consequences of nationality on the international plane enumerated so far all relate to the state and its relationship to other states: its right to exercise diplomatic protection and personal jurisdiction, its duty to admit nationals, the rights to refuse extradition and use force to protect nationals, and even the responsibility to other states for its nationals' acts.[23] The loyalty of the individual or performance of duties to the state can clearly be separated from those considerations: the state may choose not to exercise its right of diplomatic protection on behalf of even the most ardently loyal citizen. The obligation to admit nationals seems to attach to the status as long as it exists, even to those who might be characterised as disloyal, and may even attach to ex-nationals in certain circumstances; it is a duty toward other states, not a right of the individual concerned.

The individual's duties to the state thus seem to bear no relation to the consequences of nationality under international law enumerated thus far. Simply adding a duty of loyalty to the list of nationality's effects, balancing the consequences for the state with one binding the individual might be tempting, but is incorrect. International law itself does not define either what constitutes

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20 Koessler, above n 7, 68.

21 'Deprived of one of the essential ingredients, which went into its feudal meaning, namely of the subject's *right* to claim his lord's protection, and also *minus* the whole general background of the one-time feudal society, 'permanent allegiance,' referred to in a modern definition of nationality, cannot be more than a synonym for "nationality".' Above n 7, 69.

22 De Burlet even links the feudal relationship of 'allegiance' to the notion of effective nationality. '*Il est possible que la notion de nationalité effective trouve sa source dans la réalité de l'allégeance, cette dernière ayant indéniablement influencé la notion moderne de nationalité*'. De Burlet, above n 18, 19 (author's transl) 'It is possible that the notion of effective nationality originated in the reality of [feudal] allegiance, as the latter undeniably influenced the modern notion of nationality.'

23 Above n 5.

loyalty or allegiance in that sense.[24] The details of what loyalty (and allegiance, used in that sense) entails for the individual can only be found in municipal, as opposed to international law, and importantly, can extend both to nationals and categories of aliens.

It seems desirable to eliminate 'allegiance' from any technical use and redefine 'nationality' in plain words meaning the status of belonging to a state for certain purposes of international law.[25]

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24 'Most people have a working knowledge of the meaning of "nationality", but even scholars are at a loss to explain "allegiance". Characteristically, the Harvard Research on Nationality suggests defining nationality as "the status of a natural person who is attached to the state by the tie of allegiance", and then muddies the picture by saying "No attempt is made in this draft to define the meaning of allegiance. It may be observed, however, that the "tie of allegiance" is a term in general use to denote the sum of the obligations of a natural person to the state to which he belongs. The draft itself does not spell out these obligations, since they are quite different in different societies."' Koessler, above n 7, 69.

25 Ibid. An example of mixing of these ideas is found in a United States government statement on dual nationality. 'The country where a dual national is located generally has a stronger claim to that person's allegiance. However, dual nationals owe allegiance to both the United States and the foreign country. They are required to obey the laws of both countries. Either country has the right to enforce its laws, particularly if the person later travels there.' United States Department of State, *Dual Nationality* (2004) <http://travel.state.gov/law/dualnationality.html>. The meaning of 'allegiance' is unclear from this statement. The first sentence seems to use 'allegiance' in the context of loyalty or obligation, whereas the next sentences seem to describe the status/relationship of nationality at international law. By injecting what seems to be an emotional notion that presence implies a stronger obligation of loyalty, the statement arguably does not reflect that United States laws place obligations on all United States citizens/nationals without distinction based on multiple nationality. This statement seems largely unchanged from a State Department administrative ruling referred to by the United States Supreme Court in *Tomoya Kawakita v United States* (1952) 343 US 717, 734. The United States Supreme Court seems to have approved of the view adopted in the government statement on dual nationality, although the Court's holding can be distinguished as it seems to recognise duties not based on foreign nationality as such, but on residence and general obligation, which might apply to any person: 'That is a far cry from a ruling that a citizen in that position owes no allegiance to the United States. Of course, an American citizen who is also a Japanese national living in Japan has obligations to Japan necessitated by his residence there. There might conceivably be cases where the mere non-performance of the acts complained of would be a breach of Japanese law. He may have employment which requires him to perform certain acts. The compulsion may come from the fact that he is drafted for the job or that his conduct is demanded by the laws of Japan. He may be coerced by his employer or supervisor or by the force of circumstances to do things which he has no desire or heart to do. That was one of petitioner's defences in this case. Such acts – if done voluntarily and wilfully – might be treasonable. But if done under the compulsion of the job or the law or some other influence, those acts would not rise to the gravity of that offence. The trial judge recognized the distinction in his charge when he instructed the jury to acquit petitioner if he did not do the acts willingly or voluntarily "but so acted only because performance of the duties of his employment required him to do so or because of other coercion or compulsion". In short, petitioner was held accountable by the jury only for performing acts of hostility toward this country

In pointing out that the meaning of 'allegiance' does not necessarily coincide with duties to the state, Parry simply reinforces Koessler's contention that 'allegiance' means 'nationality' in terms of belonging to a state for the purposes of international law. The duties of the national to his or her state would indeed seem to be unconditional, but are found and defined in *municipal law*. The word 'allegiance' may be used in various ways by systems of municipal law, usually to denote an obligation of loyalty to the state, but such obligation does not stem from international law. Another use of the word 'allegiance' in the United States illustrates such a national obligation of loyalty. In the Adjudicative Guidelines for Determining Eligibility for Access to Classified Information, allegiance is defined as:

> the duty a citizen owes to his or her government. If allegiance is in doubt, an individual's willingness to safeguard classified information is also in doubt. Criticism of the U.S. Government is protected by freedom of speech. Expression of unpopular or antigovernment beliefs does not show lack of allegiance. An allegiance issue arises only when a person acts or prepares to act on those beliefs in a manner that violates the law.[26]

International Limits on Obligation

But whereas international law may not require or define loyalty specifically, it does not seem, at first glance, to prohibit states from defining or requiring it. The question is thus posed whether international law places an upper limit on what states may require of their nationals, in terms of loyalty or otherwise.

Prior to the United Nations (UN) Charter and the Universal Declaration of Human Rights[27] it was possible for states to maintain that while they might be responsible to other states for ill-treatment of foreign nationals, they had unfettered power over their own nationals. The classical approach of international law to the state-individual relationship was one of basically unconstrained power of the state. This is no longer the case. The Universal Declaration of Human Rights and universal and regional systems of international human rights treaties have limited states' power in a way that would have been inconceivable prior to 1945. While the regime of diplomatic protection allows states to protect their nationals (and certain other persons) against other states, international human rights law protects persons even against their own states.

Thus in broad terms, a state's own municipal laws or constitutional framework, its international obligations, and international law itself, limit its discretion in how it treats its own nationals. In terms of minimum standards of treatment, international limitations might be found in international human rights treaties to which the state has become party, such as the International Covenant

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which he was not required by Japan to perform.' *Tomoya Kawakita v United States* (1952) 343 US 717, 734.

26 Defence Security Service (USA), *Allegiance Test* (1997) <http://www.dss.mil/nf/adr/alleg/allegT.htm>.

27 Universal Declaration of Human Rights, GA Res 217A (10 December 1948).

on Civil and Political Rights (ICCPR).[28] But that said, the state still enjoys great freedom with respect to its own nationals, if not the freedom of pre-UN Charter regimes' ability to claim that how they treated their own nationals was of no concern to other states. In fact, the development of international human rights law and the greater standing of the individual on the plane of international law have created a more nuanced spectrum of the rights and duties that might define the relationship between the individual and his/her state of nationality.

Additional areas of protection for the individual in international law do not, however, prevent the state from requiring loyalty and allegiance from its nationals. International humanitarian law provides ample evidence of this: while the Geneva Conventions and their Additional Protocols[29] provide a system of fundamental protection and respect for the individual irrespective of nationality, they do not attempt to replace the system of diplomatic protection of nationals where it can be implemented, and they do not provide protection from charges of treason by states against their own nationals.[30]

It would seem that any limitations provided under international law as to what a state can require of its nationals, including loyalty, is the same upper limit as applies to issues generally. Should a state's requirement of loyalty (or definition of allegiance) demand that an individual participate in a breach of international law, the relevant rule would arguably be void on the international plane. These issues may thus be seen within the context of general limitations placed on states' conduct. But another way to reflect on the issue is to ask what a state can require of non-nationals, and whether nationals can be subjected to higher levels of obligation. International law does provide standards for the treatment of aliens *vis-à-vis* nationals.

The Parameters of Nationals' Obligations to their States

If an obligation of loyalty does attach to nationality as such in municipal law, it might be characterised as part of what the state requires and has a right to

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28 International Covenant on Civil and Political Rights (16 December 1966) 999 UNTS 171.

29 Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (12 August 1949), 75 UNTS 31 (Geneva Convention I); Convention for the Amelioration of the condition of the Wounded and Sick and Shipwrecked Members of Armed Forces at Sea (12 August 1949), 75 UNTS 85 (Geneva Convention II); Convention Relative to the Treatment of Prisoners of War (12 August 1949), 75 UNTS 135 (Geneva Convention III); Convention Relative to the Protection of Civilian Persons in Time of War (12 August 1949), 75 UNTS 287 (Geneva Convention IV); Protocol Additional to the Geneva Conventions (12 August 1949) and Relating to the Protection of Victims of International Armed Conflicts (8 June 1977), 1125 UNTS 3 (Protocol I); Protocol Additional to the Geneva Conventions (12 August 1949) and Relating to the Protection of Victims of Non-International Armed Conflicts (8 June 1977), 1125 UNTS 609 (Protocol II).

30 See also generally, F Kalshoven, *Constraints on the Waging of War* (2001) 40-60. This argument is presented below.

expect from its nationals, as opposed to aliens. Yet it is clear that a state can also impose various degrees of obligation on non-nationals, or categories thereof. Within a state's territory, aliens are subject to most laws on the same basis as nationals (sometimes referred to as a duty of 'temporary allegiance'). In relation to acts outside a state's territory, states maintain jurisdiction over acts of aliens committed abroad that affect the security or financial interests of the state.

Under the protective or security principle of jurisdiction, 'international law recognises that each state may exercise jurisdiction over crimes against its security and integrity or its vital economic interests'.[31] Delineating the contours of this jurisdiction, and relating it to the underlying obligations is important as far as understanding the duties nationals and aliens owe states. But it seems difficult to circumscribe the norm, as it is left to each state to judge what is included. The category of 'acts that affect the state's security or vital economic interests' can be so widely interpreted that the standard seems close to being arbitrary.[32] Might it constitute a basis for Iran's notorious charge of heresy against British author Salman Rushdie?[33] Importantly, the jurisdiction is 'over aliens for acts done abroad'.[34] Thus if aliens can be held liable for such acts, the standard applicable to nationals also seems to be a matter of importance to international law. Are nationals held to an even higher standard, as far as obligations of loyalty to the state?[35] Are there higher standards?

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31 Shearer, above n 2, 170-1; Shearer, above n 5, 211. Lawrence, citing other nineteenth-century authors, opposes jurisdiction on both the principle of passive nationality and the security principle, and denies a right of jurisdiction in such cases. He argues that 'an occasional failure of justice is preferable to putting the subjects of every state at the mercy of the law and administration of its neighbors'. T J Lawrence, *The Principles of International Law* (3rd ed, 1900) 222. But the security principle has old roots, arguably reflecting an idea expressed by Vattel. 'A Nation or State has the right to whatever can assist it in warding off a threatening danger, or in keeping at a distance things that might bring about its ruin. The same reasons hold good here as for the right to whatever is necessary for self-preservation. Vattel, above n 9, 14.

32 Shearer cites United States cases where aliens have been prosecuted under the protective principle in relation to immigration offences, sham marriages and fraudulent concealment of assets abroad. Shearer, above n 5, 211 fn 10. An Australian example of this power is perhaps found in the Passports Act 1938 (Cth) that 'extends to acts, matters and things outside Australia, and to everyone irrespective of nationality or citizenship'. David Lanham, *Cross-Border Criminal Law* (1997) 272.

33 Shearer, above n 2, 170-1.

34 I Brownlie, *Principles of Public International Law* (6th ed, 2003) 307. Lanham however, cites cases in relation to acts of nationals abroad, for this principle. Lanham, above n 32, 35-36.

35 Both Brownlie and Shearer point to the case of *Joyce v DPP* [1946] AC 347 in which the House of Lords found that an alien could be tried for the crime of treason. But the case does not seem to give rise to a general rule: as the alien in question had been issued with a British passport, and had held himself out as a Briton, the Court found that he thus owed a certain duty of allegiance to the Crown. See Brownlie, above n 34, 307.

Non-nationals can be held to a very high standard of accountability to any state generally, even if the state has no specific basis for territorial or personal jurisdiction over the relevant individual. Implementation of this notion is of course contingent on the state being able to seize the individual in question and thereby enforce its laws. But the practical modalities of enforcement do not influence the underlying norm.

Thus it must be asked, how is the level of obligation imposed on those with a relationship to the state, either personal or territorial, higher? Shearer states that '[r]esident aliens owe temporary allegiance or obedience to their state of residence, sufficient at any rate to support a charge of treason'.[36] The proposition that residence implies a higher level of obligation to the state is important, and is explored below. But the definition of 'treason' depends on municipal law, and in many states can be committed by anyone. Shearer's statement, while certainly correct, could be extended further: even non-resident aliens can be charged with treason or the equivalent, if a state's municipal law so provides.[37]

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36 Shearer, above n 5, 316.

37 It should be noted that 'treason' in terms of the Common Law, related to levying war against the sovereign, 'levying war' encompassing 'to use force to prevent the government from the free exercise of any of its lawful powers', cited in *The State v Ratu Timoci Silatolu and Josefa Nata,* 26 March 2002, High Court of Fiji, Criminal action no misc HAM 002 (2002), Wilson J (unreported). In the *Silatolu Case*, the Fijian High Court summarised the law of treason in Fiji, stemming from the law of England, and held that 'Treason is an offence against the King or Sovereign (His Majesty's Person) or against the Government, and I think that it may be committed by "any person or persons" whether allegiance is owed or not'. *The State v Ratu Timoci Silatolu and Josefa Nata*, 19. Thus while it would seem that treason can only be committed by someone owing 'allegiance' under the laws of the United States (see above n 19), the Court held that it could be committed by anyone under the laws of England and Fiji. The holding in *Silatolu* arguably reflects the fact that 'treason' as defined by Fijian (or English) law is simply one expression in municipal law of an obligation of loyalty to the state, irrespective of nationality or territorial presence. This kind of obligation may be expressed differently in different states, but it is not uncommon for it to attach to anyone, perhaps reflecting the security principle of jurisdiction. Before 1997 crimes endangering state security were known as 'counterrevolutionary' crimes in the People's Republic of China. Lawyers Committee for Human Rights, *Wrongs and Rights. A Human Rights Analysis of China's Revised Criminal Law* (1998) 41. This is not to say that the substance of what is criminalised under current Chinese law, notwithstanding what is to many a more palatable label, accords with international rules and standards of human rights. See Lawyers Committee for Human Rights, ibid 41-46. Mittlebeeler points out that in much of South African society, the traditional African notion of treason 'embraced many elements which would not in a Western system constitute treason. The crime of treason was any action that might be considered antagonistic to the welfare of the Ndebele king or the Shona chief. This included injuries to his person or household, as well as seditious plots ... misuse of his cattle could, in some cases, be considered treason, as well as the invocation of magic against him.' Emmet V Mittlebeeler, *African Custom and Western Law. The Development of the Rhodesian Criminal Law for Africans* (1976) 24. In Sweden, any person, regardless of nationality or residence can commit treason (*högmålsbrott*) and crimes against state security. Swedish

Obligations of the individual to the state can be related to two different considerations, one relating to obedience generally, the other to residence or closer personal connection. On the one hand, all persons present in the territory of a state can be made subject to generally applicable laws such as those related to public order. Being a tourist does not arrest the application of criminal laws. But it would be highly unusual for a state to attempt to tax the income earned abroad by tourists based simply on their temporary presence. It is unclear whether such a municipal law would contravene international law, but in any case it would arguably be very bad for tourism in the state concerned. On the other hand, taxing the foreign-earned income of resident aliens is quite common, based on their residence.

This is simply a reflection of the fact that in practical terms, municipal law can impose greater duties on persons with a territorial, but not necessarily personal, tie to the state. It is thus natural that residence may (and arguably should) entail an obligation of loyalty beyond simple obedience of the law generally. But if international law provides no grounds for opposing the prosecution of non-resident aliens for treason or equivalent crimes against the state, one must ask just what constitutes the 'loyalty' or obligation that attaches to residence or nationality (either directly or as a consequence).

Military service and armed conflict

It would seem that a national's obligation of loyalty can only be related to military service, or an obligation to physically defend the interests of the state *vis-à-vis* other states in the context of armed conflict. This was argued, although not in relation to an issue of loyalty, by the Conservative Member of Parliament Enoch Powell in 1981 in relation to revision of the United Kingdom's

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nationals are mentioned only in relation to a prohibition on working in the diplomatic service of a foreign state in affairs that affect Sweden, without permission. Ch 19, s 4 Gerhard Simson (ed), *Das Schwedische Kriminalgesetzbuch vom 21. Dezember 1962* (1976) 150-58. Norway's Penal Code's provisions on state security also attach to 'anyone' with the exception of s 97a: 'Any Norwegian citizen or resident of Norway who receives from a foreign power or party or organization acting in its interest, for himself or for a party or organization, economic support to influence public opinion about the country's form of government or foreign policy or for party purposes, or is accessory thereto, shall be punished by jailing or imprisonment up to two years.' *The Norwegian Penal Code* (transl H Schjoldager) (1961) 45-54. Under Romania's Communist government, offences against state security were broadly defined. Treason could only be committed by a Romanian citizen or stateless person residing in Romania, but exactly the same acts committed by foreigners or stateless persons were punishable by penalties including death. Simone-Marie Vrabiescu Kleckner (ed), *The Penal Code of the Romanian Socialist Republic* (1976). In Nigeria, following England, treason and sedition were general crimes, not related to a link of nationality. C O Okonkwo, *Okonkwo and Naish on Criminal Law in Nigeria* (1980) 337-48. For an historical survey of treason in feudal France, see S H Cuttler, *The Law of Treason and Treason Trials in Later Medieval France* (1981).

Nationality Act: 'Nationality, in the last resort, is tested by fighting. A man's nation is the nation for which he will fight'.[38] It might be noted however, that:

> national patriotism is a relatively modern basis for [military] service. It requires a sense of one's country as an entity that can legitimately demand contributions and to which loyalty should be given. Principled refusal to comply on the grounds of dissatisfaction with government is also relatively modern; such a basis of refusal depends on a belief that there are reciprocal obligations between citizens and their governments.[39]

But even resident aliens can be obliged to perform compulsory military service to maintain public order or in case of a sudden invasion.[40]

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38 International Law Association Committee on Feminism and International Law, 'Final report on women's equality and nationality in international law', 265. The MP made the statement while opposing transmission of British nationality by mothers to their children by *jus sanguinis*. '[T]his law was for some bound up with a stereotype of women as devoted to "the preservation and care of life" and therefore incapable of demonstrating the love of country that would entitle them to pass its nationality on to their children. ... Ayelet Shachar argues that even now, the Israeli paradigm of the citizen as soldier means that women are, to some degree, lesser citizens of Israel because although both men and women are obliged to perform military service, women can be exempted if they are wives or mothers.' Ibid.

39 Margaret Levi, *Consent, Dissent, and Patriotism* (1997) 42-43. 'Throughout the eighteenth century (and into the nineteenth) a single shilling pressed into the hand of a drunken man in a public house by a recruiting sergeant constituted the enlistment of a soldier in the British army. In France, the dreaded *milice royale* relied on a lottery to choose which peasants would be forced into the King's service. The army was not a popular institution, at least not for those who had to serve in its rank and file. Some joined because they liked the life, but most did so because they were coerced or needed the work or were fleeing from something worse. Those who refused did so because being in the army was inconvenient or actively repugnant. ... It was only with the American and French revolutions that national patriotic feeling began to take root, but it took root very slowly.' The notorious reputation of press gangs lives on today.

40 Shearer, above n 5, 315. In *Polites v The Commonwealth* (1945) 70 CLR 60, 70, the High Court of Australia unanimously held that an Act of Parliament obliged aliens to serve in the armed forces, notwithstanding any possible rule of international law to the country. The Court accepted that there was a general rule of international law 'which prevented the imposition upon resident aliens of an obligation to serve in the armed forces of the country in which they resided, unless the State to which they belonged consented to waive this ordinarily recognized exemption. This rule, however does not prevent compulsory service in a local police force, or, apparently, compulsory service for the purpose of maintaining public order or repelling a sudden invasion. ... [T]he distinction is drawn between the use of military force for ordinary national or political objects and police action to preserve social order or to protect the population against an invasion by savages.' It held that regulations requiring aliens to serve in the Pacific region were valid, notwithstanding the rule. While several justices held that such service during the Second World War did not contravene the rule, Chief Justice Latham held that Parliament knew what it was doing and the legislation was valid under the Australian Constitution and thus valid. 'It is not for a court to express an opinion upon the political propriety of this action. It is for the Government of the Commonwealth to consider its political significance, taking into account the

It would seem that the quality or nature of the service imposed is important in this sense. Karamanoukian cites the quasi-unanimous opinion of writers that military service cannot be imposed on resident aliens in peacetime,[41] and a similar prohibition in time of war.[42] He remarks however, that state practice '*n'est pas conforme à cette conception ... et certains Etats poussent l'illégalité jusqu'à l'incorporation des nationaux des pays occupés*'.[43] He states that no legal justification can be found to compel aliens either temporarily or permanently resident to do military service in wartime:[44]

> *Quant à l'incorporation d'office des étrangers résidants, elle semble prendre de plus en plus d'extension; de grandes puissances comme de petites s'en rendent coupables. Une telle pratique est désapprouvée par la doctrine, et le droit international positif, coutumier et conventionnel, l'interdit. Mais le comportement continu des Etats apportant des atteintes au statut des étrangers*

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obvious risk of the Commonwealth having no ground for objection if Australians who happen to be in foreign countries are conscripted for military service there. Parliament has, in my opinion, placed upon the Executive the responsibility of making agreements with other countries which will remove international difficulties or of accepting the risk of such difficulties being created.' *Polites v The Commonwealth*, 73. 'During the Second World War most belligerent states compelled resident aliens to perform some kind of service connected with the war effort, even to the extent of making voluntary service in the armed forces an alternative to the performance of compulsory civilian duties.' Shearer, above n 5, 315. 'In the US, aliens can be called up for service, but have the right to opt out, in which event: (a) if they subsequently leave the US, they cannot return; and (b) if they stay, they will not be granted US citizenship. The position as to alien migrants, as distinct from temporarily resident aliens, is at least open to doubt. In 1966 the Australian Government purported to make alien migrants subject to compulsory service, formal protests being received from the USSR, Italy, Spain, and other countries.' Shearer, above n 5, 315 fn 13. For historical examples of the liability of aliens to military service see McNair (Lord), *International Law Opinions* (1956) 113-37.

41 Aram Karamanoukian, *Les Etrangers et Le Service Militaire* (1978) 163-68.

42 Ibid 219-23.

43 Ibid 219 (author's transl) 'does not conform to this concept ... and certain states push illegal practice as far as the conscription of nationals of occupied countries.'

44 '*Une personne vivant à l'étranger ne rompt pas ses liens juridiques avec sa patrie jusqu'à ce qu'elle perde sa nationalité par une manifestation expresse de sa volonté, ou par une décision de l'Etat don't elle est la ressortissante. Donc elle continue à être soumise à la compétence personnelle de son pays d'origine qui limite, dans le cas d'imposition du service militaire, la compétence territoriale de l'Etat de résidence. La souveraineté territoriale ne peut aller jusqu'au rejet des «droits que chaque Etat peut réclamer pour ses nationaux en territoire étranger»; elle ne peut imposer le service militaire aux personnes qui ne sont pas ses sujets sans le consentement de leur propre Etat.*' Ibid 264-65 (author's transl) 'A person living abroad does not break legal ties to his or her country until nationality is lost, either through a clear expression of individual will, or a decision by the state of which she or he is a national. He or she thus continues to be subject to the personal jurisdiction of the home country that limits, as far as the imposition of military service, the territorial jurisdiction of the state of residence. Territorial sovereignty does not go so far as to negate the "rights that each state may claim for its nationals in foreign territory"; such sovereignty does not allow for the imposition of military service on non-nationals without the consent of their own state.'

dans le domaine pourrait conduire à le neutralisation de la coutume actuellement existante.[45]

Such practice, even if incompatible with international law, illustrates the limits inherent in Shearer's qualification of the imposition (to be approved of in terms of international law), of an obligation on the restricted category of resident aliens, to assist in the maintenance of public order, and in the event of a 'sudden invasion'.

If this is accepted, the national's duty of loyalty cannot be distinguished by an obligation to defend national territory as such, as resident aliens can be obliged to do so as well when the nation's territory itself is at risk. Obligation or a duty of loyalty as a consequence of nationality must thus relate to military service in terms of a system of conscription, and in relation to conflicts fought outside national territory, which aliens, even permanent residents, can clearly not be obliged to undertake.[46] It might be reduced to an obligation to take part physically in the 'long-term' protection of the state, should municipal law require this. Prior to the UN Charter, which outlawed war with certain exceptions, it might have been labelled an obligation to take part physically in an element of the outward expression of the state's foreign policy. The limitations on the use of force contained in the Charter arguably serve to restrict the significance of such obligations in practical terms, at least in terms of recent practice.

Issues of obligation or loyalty however, not only go to what the state can require individuals to undertake, but what it can prevent them from doing. This is essentially the basis for the security principle of jurisdiction. In terms of participation in armed conflict, international humanitarian law does not prevent the attribution of (privileged) combatant status, and thus the potential to become a prisoner of war, on the basis of nationality.[47] Membership in the armed forces of a party to the conflict brings with it the privilege to engage in hostilities and not be prosecuted simply on that basis, although serious breaches of humanitarian law of course attract sanction and universal jurisdiction. Thus, within the framework of the laws of armed conflict, a national could join enemy armed forces, and assuming she or he is not a mercenary or a spy, be entitled to immunity from prosecution for having taken part in hostilities as such, for

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45 Ibid 264 (author's transl) 'The spontaneous conscription of resident aliens would seem to be increasingly widespread, a practice of which both great and small powers are guilty. Doctrine disapproves of such practice, and positive, customary and conventional international law forbids it. But continuous behaviour by states that infringes upon the status of aliens in this domain could lead to the neutralisation of current custom.'

46 For a study on the history of military service in Australia, Canada, France, Great Britain, New Zealand and the United States in terms of the general issue of why citizens do or do not consent to actions by the state, see Levi, above n 39.

47 See art 43(2) of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), (8 June 1977). See Howard S Levie, 'Prisoners of war in international armed conflicts' (1977) 59 *International Law Studies - US Naval War College* 74.

example against a charge of murder. But such immunity does not entail exemption from prosecution for treason or similar crimes under municipal law.

Any individual who falls into the power of a belligerent while serving in the enemy armed forces should be entitled to prisoner-of-war status no matter what his nationality may be, if he would be so entitled apart from any question of nationality; subject to the right of the Detaining Power to charge him with treason, or a similar type of offence, under its municipal law and to try him in accordance with the guarantees contained in the relevant provisions of the Convention.[48]

The case of deserters who join the opposing side is similar, although they do not seem to benefit from the protections of the Geneva Conventions if captured by their (original) side.

If such persons are captured by members of their own forces, they are entitled to receive from the soldiers capturing them the same treatment as any other captive, even though their national authority may decide, in accordance with national law, that they are not to be treated as enemy combatants and prisoners of war, but as members of its own forces liable to trial for treason. They may also be tried for treason after the termination of hostilities and their repatriation to their home country.[49]

But without the nationality of the state in question, it is hard to see how the same obligation related to loyalty could be imposed on aliens who are combatants under international law. This is especially so, given that the privilege to partake in hostilities as a combatant is a cornerstone of the modern law of armed conflict. Of course the same cannot be said for non-international armed conflicts, where humanitarian law contains no notion of privilege and the status of combatant does not exist. In those situations nationals and non-nationals alike may be held to the same standard of obligation or loyalty to the state, and be equally prosecuted for taking part in hostilities.

Multiple nationals may be compelled to participate in armed conflicts even against another state of nationality, at their own peril in terms of their obligations under the municipal laws of the other state. Legomsky disagrees, stating that:

> [o]n one point the law is settled: International law forbids states from compelling any persons – whether dual nationals or mononationals – to take up arms against their other states of nationality. This principle was first codified in article 23 of the Annex to the 1907 Hague Convention Respecting the Laws and Customs of War on Land. Although not all the world's nations have ratified it, the Convention appears to have attained the status of customary international law.[50]

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48 Ibid 76.

49 L C Green, *The Contemporary Law of Armed Conflict* (1993) 115-16. Levie distinguishes between deserters and defectors, noting that both become prisoners of war while in the power of the opposing side and that both may be tried for treason, but that defectors are entitled to prisoner-of-war status if captured by their original side. Levie, above n 47, 76-81.

50 Stephen H Legomsky, 'Dual Nationality and Military Service: Strategy Number Two' in David A Martin and Kay Hailbronner (eds), *Rights and Duties of Dual*

This contention is dubious, and may be questioned. In fact it seems unlikely that the treaty provision was intended to relate to multiple nationals, and Legomsky cites no primary or secondary sources in support of his proposition. Such a rule would not seem to exist in international law, and it actually seems quite certain that the opposite is true.

Article 23 of the Annex to the 1907 Regulations is not contained in the Regulations' section on belligerents, but in the section on (the conduct of) hostilities. It is one of seven articles in a chapter entitled 'Means of Injuring the Enemy, Sieges, and Bombardments', and thus arguably meant to be a constitutive norm in relation to the means and methods of warfare, as opposed to rules relating to protected persons. The relevant section (h) was not contained in the 1899 version of the rules.[51] It reads (in relevant part):

> Art. 23. In addition to the prohibitions provided by special Conventions, it is especially forbidden –
>
> (h) To declare abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party.
>
> A belligerent is likewise forbidden to compel the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war.[52]

While the Convention and its attached regulations have indeed been characterised as customary norms,[53] a general or customary rule of international law prohibiting states from employing persons they regard as their nationals, in an armed conflict against another state of nationality, is not cited by other writers on the subject. On its face, the provision does not state that it applies to multiple nationals.

It may be remarked at the outset that the general context of the development of norms in relation to multiple nationality argues against Legomsky's interpretation, including multilateral and bilateral treaty practice in relation to military service generally. Such a rule would (in 1907) have entailed the express recognition of multiple nationality, at a time in history when some version of indelible allegiance or nationality was still in the minds of legislators and commentators. As opposed to giving effect to foreign nationality, much state practice and comment favoured forcible expatriation upon attribution of another nationality on the basis of conflicting obligations. It seems more apt to qualify practice as 'in denial' as far as even the existence of multiple nationality, and certainly unfavourable to obliging states to give effect to another nationality in such a constraining fashion. The obligation to fight for

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Nationals. Evolution and Prospects (2003) 77-126, 119.

51 To compare the 1899 and 1907 provisions, see Dietrich Schindler and Jirí Toman, (eds), *The Laws of Armed Conflicts. A Collection of Conventions, Resolutions, and other Documents* (3rd ed, 1988) 83.

52 'Convention (IV) Respecting the Laws and Customs of War on Land, signed at The Hague, 18 October 1907. Annex to the Convention. Regulations Respecting the Laws and Customs of War on Land,' in Schindler and Toman (eds), ibid 69-98

53 Schindler and Toman (eds), ibid 63.

one's country if so required was unquestionable and ineffaceable, and the primary reason for opposition to the existence of multiple nationality in the first place. The 1930 Hague Convention[54] contains no such rule, and no treaties dealing with nationality or military service can be cited for the proposition.

Moreover, not only the position of the article within the Regulations, but the development of international humanitarian law generally, calls Legomsky's reading of the 1907 Regulations into question. The 1899 and 1907 Peace Conferences codified much of the customary law of war, complementing the Geneva Conventions of 1864 and 1906. Rules relating to specific attribution of what today would be called combatant status, and that of protected person, were still basic in nature. The rule espoused in article 23(h) was arguably intended as such a basic or fundamental norm, to prevent states from forcing nationals to fight against their own countries, for example because they were permanently resident, or in the context of occupied territories. To maintain that states extended this rule in 1907 to persons they deemed to be their own nationals is unfounded, as it is at the present time.

The well-known *Kawakita Case* may be cited as an illustration in this regard.[55] Although Kawakita, a dual United States-Japanese national, had not fought in the Japanese military against the United States, he was convicted of treason for mistreating American prisoners in his work as an interpreter in Japan during the Second World War. Holding that American dual nationals are subject to obligations that are unconditional, the Court stated that a defence to charges of treason is compulsion, but cited no obligation on the part of the other state of nationality not to use the national against his own (other) country. That military service against another state of nationality in wartime should be an exception seems an unwarranted extrapolation.

> Circumstances may compel one who has a dual nationality to do acts that otherwise would not be compatible with the obligations of American citizenship. An American with a dual nationality who is charged with playing the role of the traitor may defend by showing that force or coercion compelled such conduct.[56]

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54 Convention on Certain Questions Relating to the Conflict of Nationality Laws, (12 April 1930), 179 LNTS 89, no 4137.

55 *Tomoya Kawakita v. United States*, 343 U.S. 717, 72 S. Ct. 950 (1952).

56 Ibid Ct. 950, 962 (1952). At another point the Court stated 'Of course, an American citizen who is also a Japanese national living in Japan has obligations to Japan necessitated by his residence there. There might conceivably be cases where the mere non-performance of the acts complained of would be a breach of Japanese law. He may have employment which requires him to perform certain acts. The compulsion may come from the fact that he is drafted for the job or that his conduct is demanded by the laws of Japan. He may be coerced by his employer or supervisor or by the force of circumstances to do things which he has no desire or heart to do. That was one of petitioner's defenses in this case. Such acts – if done voluntarily and wilfully – might be treasonable. But if done under the compulsion of the job or the law or some other influence, those acts would not rise to the gravity of that offense. The trial judge recognized the distinction in his charge when he instructed the jury to acquit petitioner if he did not do the acts willingly or voluntarily "but so acted only because performance of the duties of his employment required him to do so or because of other coercion or

Importantly, the Court cites with approval an excerpt from an article by Orfield, which can be said to entail the rule, in addition to reflecting reality:

> In time of war if he supports neither belligerent, both may be aggrieved. If he supports one belligerent, the other may be aggrieved. One state may be suspicious of his loyalty to it and subject him to the disabilities of an enemy alien, including sequestration of his property, while the other holds his conduct treasonable.[57]

As regards the voluntary taking up of arms by a multiple national on behalf of one state of nationality against another, Legomsky states that state practice varies as to whether such conduct results in denaturalisation.[58] He notes virtually unanimous practice as far as criminalising such behaviour however, with no exception for multiple nationals.[59] This is a function of states' municipal laws, and the wide latitude states have in prescribing the standard of loyalty expected of their nationals. Rather than punishing dual nationals for such conduct, Legomsky argues that states should instead regard such participation as either a 'voluntary decision to expatriate' or grounds for denationalisation.[60] Aleinikoff and Klusmeyer only call for a facilitated ability to ensure expatriation by the individual.[61] Whereas Legomsky regards the issue as a matter of choice due to his interpretation of the 1907 Hague Regulations, Aleinikoff and Klusmeyer relate the issues to 'a broader point: Dual nationality is not invariably in the interest of the persons holding such a status'.[62]

Along these lines, it may be argued that a higher standard of obligation or loyalty can be imposed against nationals, in terms of not taking up arms against the state in situations of international armed conflict, even when other persons could not be held responsible for the same conduct. But it would seem that states' municipal legislation has not always concurred with this delineation of an obligation of loyalty: a nineteenth-century French statute held ex-French nationals to the same standard of obligation and loyalty as nationals, punishing them with death should they ever take up arms against their former country.[63] Italy's 1912 law on nationality/citizenship, which excluded multiple nationality, probably in deference to the United States, held that the effect of naturalisation elsewhere was expatriation in Italy, but that military service obligations persisted nonetheless when in Italy.[64] Torpey points to the problematic essence:

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compulsion". In short, petitioner was held accountable by the jury only for performing acts of hostility toward this country which he was not required by Japan to perform.'

57 Ibid. See generally Lester B Orfield, 'The Legal Effects of Dual Nationality' (1949) 17 *The George Washington Law Review* 427.

58 Legomsky, above n 50, 120.

59 Ibid 120-22.

60 Ibid 122.

61 T Alexander Aleinikoff and Douglas Klusmeyer, *Citizenship Policies for an Age of Migration* (2002) 35.

62 Ibid.

63 George Cogordan, *La Nationalité au Point de vue des Rapports Internationaux* (1879) 246-47. Cogordan approves of the provision.

64 John Torpey, *The Invention of the Passport - Surveillance, Citizenship and the State* (2000) 105.

'one of the principal reasons states might have for denying recognition of dual citizenship [is] the possibility of conflicting military loyalties and obligations'.[65] Although it might be argued that the law did no more than seize the principle that obligations had to be fulfilled before expatriation would be recognised, it arguably sowed confusion in terms of the nature of expatriation, creating obligations for the individual at the same time as the notional corresponding obligations of the state had been withdrawn.

States' Definitions and Requirements of Loyalty

Loyalty or obligation to the state thus arguably falls into three basic categories: (1) all persons can be held accountable to a state for acts against its security or financial interests; (2) resident aliens can be held to an even higher duty of loyalty in terms of being obliged to defend the state physically during an invasion. They cannot be forced to perform general military service; and (3) nationals are bound by all of the above, and in addition can be obliged to perform general military service, to fight for their state of nationality outside its borders, and may be obliged to avoid partaking in international hostilities against the state. While international law provides this basic framework, it is municipal law that defines the details of each of the three categories. And while states may place special obligations on their nationals in municipal law, by a special category of offence applicable only to their nationals and related to loyalty to the state, as demonstrated, this seems largely emotional in character, as states can and do criminalise the same conduct by non-resident aliens. The special context of a national's acts is illustrated by the judge's comment in sentencing Ana Montes for treason against the United States, upon a conviction of spying for Cuba. 'If you cannot love your country, ... you should at least do it no harm.'[66]

States may in fact choose to exempt foreign nationals from charges of treason and similar offences in order to boost confidence or perhaps make themselves more attractive as a place to live or do business. In 2003 the Hong Kong government reportedly amended its draft anti-subversion bill:

> to exempt foreign nationals from treason charges, a move to reassure several hundred thousand affluent residents who have obtained citizenship elsewhere, most often Britain or Canada, as a precaution against a clampdown by Beijing.[67]

Oppenheim remarks that naturalised persons might be seen as owing a greater duty of allegiance than the native born, pointing to the fact that states often apply deprivation of nationality as a penalty only to naturalised persons (in the form of denaturalisation).[68] But this is not the case everywhere. In

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65 Ibid. He says 'the law facilitated the rapid resumption of citizenship by expatriates'.

66 Tim Golden, 'Unapologetic American who spied for Cuba gets 25 years' jail', *The Sydney Morning Herald* (18 October 2002) 12.

67 Tyler Marshall, 'HK subversion bill sparks alarm on human rights', *The Sydney Morning Herald* (15-16 February 2003) 21.

68 Robert Jennings and Arthur Watts, *Oppenheim's International Law* (1992) 887 fn 3. Carter points out that 'in the United States, a willed allegiance is required

September 2002, the Israeli government revoked the citizenship (nationality) of a native-born Israeli (Arab), Nahad Abu Kishaq, for allegedly having been involved in suicide bombings, with further cases for revocation pending.[69] Abu Kishaq had not been convicted of any crime, but was stripped of his citizenship under 'Article 11(b) of the citizenship law, which grants the interior minister the authority to revoke the citizenship of anyone whose actions violate his obligation of loyalty to the state.'[70]

Because the definition of what constitutes loyalty or obligation in municipal law varies from state to state, it can be said to be related to the concept embodied in each state's municipal law of the appropriate relationship between the individual and the state. This might be termed a national concept of human rights. At any given point in time, it must also reflect social norms, including ideas of patriotism. For example, stating an opinion critical of a government official may be uncontroversial in one state, protected in another, judged defamatory in a third, held to be seditious in a fourth, and in a fifth constitute a violation of an obligation of loyalty such that the orator's nationality might be revoked. Notions of loyalty and obligation in municipal law thus depend on the state's own national concept of democratic rights or entitlements, and the individual's position *vis-à-vis* the state.[71]

On the other hand, a state's municipal legislation does not have to have a concept of, or rules regarding, loyalty. Instead, loyalty may be seen as a natural part of every person's emotional existence within the state. Vattel saw reason and individual interest dictating such emotion:

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only of immigrants seeking to become citizens. ... Even if one concedes that a national community is in fact desirable, our history teaches us to be suspicious of the loyalty oath, and our recent constitutional jurisprudence, for better or worse, teaches that an oath cannot be imposed.' Stephen L Carter, *The Dissent of the Governed. A Meditation on Law, Religion, and Loyalty* (1998) 13.

69 Mazal Mualem and Jalal Bana, 'Yishai revokes citizenship of Israeli Arab', *Ha'aretz* <http://www.haaretz.com>. See also Ross Dunn, 'Citizenship Israel's new weapon in war against suicide bombers', *The Sydney Morning Herald* (2002) 10; Mazal Mualem, 'I'm not Israeli, says Arab stripped of citizenship', *Ha'aretz*, (12 September 2002) 2.

70 Mualem and Bana, above n 69.

71 In most states these ideas have changed markedly over time, in relation to concepts of fundamental human rights, and their international context. Carter points out that the American Revolution announced by the Declaration of Independence was 'an act of disallegiance, the breaking of the tie of presumptive obligation that we describe as loyalty'. Carter, above n 68, 4. He postulates that the Declaration's famous idea that governments must be based on the consent of the governed belies the real justification behind the American colonists' breaking the tie of allegiance to George III, namely the lack of capacity for dissent. He emphasises that what 'should perhaps be treated as the heart of the Declaration [are the words]: "In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury. A Prince, whose character is thus marked by every act which may define a Tyrant, is unfit to be the ruler of a free people"'. Carter, ibid 5.

> The love and affection of a man for the State of which he is a member is a necessary result of the wise and rational love which he owes to himself, since his own happiness is bound up with that of his country, a sentiment which should also follow from the contract which he has made with the social body. He promised to procure its welfare and safety as far as should be in his power. How, then, can he serve it zealously, faithfully, and courageously if he has no real love for it?[72]

Describing the situation of ethnic Turks in Germany, and arguments for permitting their naturalisation without loss of their Turkish nationality, Keskin writes that 'inner ties and loyalty to the state and society cannot be decreed by law. Rather, they are the result of equal rights and acceptance in life within a society made up of the majority and minorities.'[73]

Multiple Nationality, Expatriation, and Obligation

It was observed that multiple nationality does not lead to any reduction in the loyalty a state can expect from its nationals. Minimum standards of respect for the individual in international law apply to all persons, but nationality still means certain obligations that can go beyond what aliens can be required to do by the state. So while states can compel nationals to fight, they may not compel aliens to do so, except in immediate defence of the state's territory. Claims that multiple nationals cannot be required to fight against one state of nationality by another must be rejected, reflecting a reality that can mean hard consequences for multiple nationals in extreme cases. The context of armed conflict between states is the most-cited example for the view, not shared by the author, that multiple nationality in itself is a calamity for the states and the individuals affected.[74]

Koessler's contention that a national's obligations to his or her state(s) are unconditional is correct, but we might add, they exist within the boundaries of applicable international law. While multiple nationality does mean multiple obligations of loyalty, when such obligations are set out, they are circumscribed by both fundamental standards of treatment of the human being (the law of human rights and international humanitarian law), and the fact that states can require even aliens to respect high standards of obligation. The reality of

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72 Vattel, above n 9, 51.

73 Author's transl Hakki Keskin. '*Staatsbürgerschaft im Exil*', Ulrich Büschelmann (ed), *Doppelte Staatsbürgerschaft - ein europäischer Normalfall?* (1989) 43-54, 52.

74 For historical examples, see generally Ludwig Bendix, *Fahnenflucht und Verletzung der Wehrpflicht durch Auswanderung* in Georg Jellinek and Gerhard Anschütz (eds), *Staats- und völkerrechtliche Abhandlungen* (1906); Ernst Otto Hörnig, '*Die mehrfache Staatsangehörigkeit in Rechtsprechung, Verwaltung und Gesetzgebung. Eine rechtsvergleichende Studie*', dissertation presented at the Eberhard-Karls-Universität zu Tübingen (1939); Hudson and Flournoy Jr, 'Nationality – Responsibility of states – Territorial waters, drafts of conventions prepared in anticipation of the first conference on the codification of international law, The Hague 1930'; Georg Schulze, '*Die Bedeutung des Militärdienstes für Verlust und Erwerbung der Staatsangehörigkeit*' dissertation presented at the Königlichen Bayerischen Julius-Maximilians-Universität (1910).

multiple nationality emphasises that it is the individual who has to beware of being subject to the requirements of more than one state, and that these requirements are for most part not in conflict. Should more states decide to tax their nationals' income on the basis of nationality, for example, one might imagine that many multiple nationals would choose to renounce multiple nationality in favour of single nationality. In comparison, it may be supposed that the prospect of war between states today, being in most cases highly unlikely, does not amount to a consideration that causes individuals to contemplate taking such a drastic step. This is not to say that the present situation will remain static.

Likewise, it should be emphasised that the vast majority of individuals' obligations to states do not correspond to, or follow, nationality, but accrue to all persons. This reflects the primacy of the territorial jurisdiction and power of the state. But specific or higher obligations related to nationality attach to the possession of nationality under municipal law alone. The Permanent Court of International Justice (PCIJ) foreshadowed this conclusion in its *Advisory Opinion on the Acquisition of Polish Nationality*, in which it recognised that the political allegiance of minorities might not in fact be to their state of nationality.[75] Although the case dealt more with an obligation to attribute nationality, and rights in municipal law as a consequence of nationality, by not addressing obligations to the state, the Court indicated that obligations of the individual are conceptually matters of municipal law.[76]

But if municipal law determines the legal consequences of nationality on the municipal level, can higher degrees of obligation or loyalty persist with respect to former nationals, as under the French decree of 1811 mentioned above? Put another way, can aliens be held to a higher standard of loyalty to a state on the basis of previously having possessed that state's nationality? Although it might be tempting to argue that the ex-national might be held to such a standard, especially given the contention that states can define the loyalty required of nationals and the breadth of the obligations they can impose even on aliens, the author concludes that current state practice toward multiple nationality emphasises the importance of the absence of an attribution of nationality in municipal law.

That a national can be tried for taking up arms in an international armed conflict against his or her country of nationality, notwithstanding any 'privilege' or status of 'combatant' under international humanitarian law, while an alien combatant cannot, supports the argument that an absence of nationality, or being an alien, has the consequence of limiting states' treatment of individuals. Thus, rules that make expatriation conditional upon the fulfilment of obligations owed pose no problem in practice, but arguments that any higher obligations persist, notwithstanding a loss of nationality in municipal law, are dubious.

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75 Acquisition of Polish Nationality, Advisory Opinion No 7 [1923] PCIJ (ser B), No 7, 6-26, in Manley O Hudson (ed), *World Court Reports* (1969) 244.

76 Ibid.

Obligations of States to their Nationals

The discussion herein has taken up both nationals' obligations of loyalty to their states, as well as the constraints placed on states in terms of the treatment of nationals and aliens. Whether such constraints on states might be conceived of as duty of loyalty by states to their nationals, is however, doubtful. As has been seen, the main international ramifications of nationality, diplomatic protection, a duty of admittance, state responsibility, extradition, and determination of enemy status in wartime, largely allow the state to do with its nationals as it pleases. They are rights and duties *vis-à-vis* other states, not toward the individuals involved.

Although such examples are increasingly rare, some states even go out of their way to deny persons they claim as nationals a right of permanent residence. This is the case of British Nationals (Overseas), the cohort of around 3.3 million citizens of the former Crown Colony of Hong Kong. As Hong Kong ceased to be a Dependent Territory of the United Kingdom at midnight on 30 June 1997, the United Kingdom could of course no longer guarantee to other states that British nationals could be returned to Hong Kong, as only the People's Republic of China could make such decisions with respect to its territory from that date onward. But rather than provide its nationals with a right of entry into the United Kingdom, as Portugal did for Macanese, or for that matter a choice of nationality, as Australia did in the case of Papua New Guinea, Britain maintains that the status of British National (Overseas), while not requiring a visa or entry certificate for admission to the United Kingdom, brings with it no right of residence (while still giving it rights *vis-à-vis* other states).

It might rightly be asked whether this is nationality at all. But no matter how discriminatory and repugnant such provisions may be according to fundamental standards of equality, they are so on the municipal plane, on which it is Britain's prerogative to provide its nationals with rights, or not. On the international plane, as long as the individual in question can be returned to a territory, provisions that exclude even entry and residence do not contravene the state's obligations *vis-à-vis* other states. The crucial caveat that allows the United Kingdom this latitude is the fact that British Nationals (Overseas) are considered to be Chinese nationals by the People's Republic of China, and thus can in fact be sent back to Hong Kong, on that basis. Only this peculiar example of multiple nationality allows the United Kingdom to pretend that its British Nationals (Overseas) are British nationals at all, without any attached rights. It might be supposed that as states realise this, the value of British National (Overseas) passports will decrease, and those of the Hong Kong Special Administrative Region will increase, as the latter represent a real connection to territory.

The issue raises the question of the practice of expulsion or banishment, not uncommon in Vattel's time, which could today only occur with the consent of the receiving state. Deprivation of nationality is, however unfortunate, still a part of state practice. For example, article 19 of the Greek Penal Code, under which it is claimed 60,000 members of the Turkish minority of Western Thrace

were deprived of their nationality, was only abrogated in 1998. It provided that 'a person of non-Greek ethnic origin leaving Greece without the intention of returning may be declared as having lost Greek nationality'.[77]

These issues raise the fundamental question of what states owe their citizens/nationals, and the extent to which citizens are beholden to their governments. Standards and expectations of loyalty, in this sense, cannot be divorced from politics, or the fundamental concept of human rights embodied in each state's municipal legal order. In classical Athens, a right of emigration without a loss of property was interpreted to mean that:

> if a person remains in Athens under these circumstances he signifies his approval of the regime and undertakes "under no compulsion or misunderstanding" to live his life "as a citizen in obedience to us".[78]

Such hard-nosed pragmatism is perhaps rare today, as totalitarian states rarely allow a right of emigration without loss of property, and participatory democracies do not conceive of their citizens as living in obedience to a regime. Still, it behoves even democratic governments to heed Vattel's mid-eighteenth century admonition, that liberty, justice and transparency can only strengthen citizens' loyalty:

> This love of one's country is natural to all men. The good and wise Author of nature has been careful to give them a sort of instinct which binds them to the place of their birth, and they love their Nation as a thing intimately connected with them. But that natural instinct is often weakened or destroyed by unfortunate circumstances. The injustice or severity of the government too easily destroys it in the hearts of the subjects. Can self-love bind an individual to the interests of a country in which everything is done in view of a single man? On the other hand, we find every free people filled with zeal for the glory and prosperity of their country. Let us call to mind the citizens of Rome in the prosperous days of the Republic, and let us look to-day at the English and the Swiss.[79]

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77 Trakyanin Sesi Online, 'Greece: Greek Nationality Law, discriminating on the basis of race' (2004) <http://www.trakyaninsesi.com/english/pages/10.htm>. Human Rights Watch claims that 'between 1955-1998, approximately 60,000 Greek citizens, the majority ethnic Turks, lost their citizenship as a result of the article'. Human Rights Watch, 'Positive Steps by the Greek State' (2004) <http://www.hrw.org/reports/1999/greece/Greec991-05.htm>.

78 Richard E Flathman, 'Political Obligation' in Michael Walzer (ed), *Studies in Political Theory* (1972) 293.

79 Vattel, above n 9, 51.