

Defining protected persons through the nationality criteria: an interpretation dilemma

IOJLS VOL. 3

ODILE VANDENBOSSCHE

Background informations

PhD Research: « *The concept of nationality in International Humanitarian Law in view of determining the status and treatment of individuals* »

- Multiple occurrences of the term 'nationality' in the Geneva Conventions
- Multiple understandings/meanings of the term 'nationality' in the Geneva Conventions
- Global analysis and further developments

Protected persons – Article 4 GCIV

« Persons protected by the Convention are those who at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals. »

Which protection regime for protected persons?

Extensive protection:

- Part II GCIV: General protection
- Part III GCIV : Status and Treatment of Protected Persons

Who is a protected person?

Principle:

- Non-nationals
- *'In the hands of a Party to the conflict'*
- Stateless
- Refugees

Who is a protected person?

Exceptions:

- *A contrario* nationals in the power of their country of nationality
- Nationals of States not bound by the Geneva Conventions
- Nationals of neutral States with diplomatic representation
- Nationals of co-belligerent States with diplomatic representation
- Persons protected by GCI, GCII or GCIII

Who is a protected person?

Issues:

- Not a clear rule
- Inconsistency with the wordings used by scholars
- Gaps
- Different interpretations/understandings

1st approach - broad interpretation

Allegiance as a the crucial test:

- Mostly found in jurisprudence
- Challenges to the 'nationality' criteria
- New allegiance criteria
- Substance of the relations (*Tadic*)
- Other ties included: ethnicity, religious beliefs,...

1st approach - broad interpretation

Pros:

- Object and purpose of the Geneva Conventions
- Expansion of the category of protected persons
- Changing nature of armed conflicts

1st approach – broad interpretation

Cons:

- Why not included in Article 4 GCIV ?
- Difficulty of proof
- Unclear criterion
- No limitation to the category of protected persons

2nd approach - strict interpretation

- Supported by scholars
- Literal interpretation
- Legal link/formal bond between the State and its citizens

2nd approach – strict interpretation

Pros:

- Legal certainty
- Easy implementation and proof
- No interference with States' prerogatives

Cons:

- Less people are protected
- Remaining gaps

Steps ahead...

- New Commentary to GCIV
- Adoption of guidelines
- Taking into account the conflict at hand
- Status *versus* treatment

Ongoing research project... All
suggestions/comments are welcomed

Odile Vandebossche

PhD Candidate – University of Liège

ovandebossche@uliege.be