



The Protection of Foreigners in International Law

Ferry Eka Rachman¹, Eko Saputro¹, Akhirudin Vami Kemalsa¹

¹Master of Law, Faculty of Law, University of Airlangga, Indonesia

*Corresponding Author: Ferry Eka Rachman

Email: ferryekarachman@gmail.com



Article Info

Article history:

Received 02 January 2021

Received in revised form 08

January 2021

Accepted 13 January 2021

Keywords:

Legal Protection

Citizen

Foreigners

Abstract

This research aims to find out legal protection against foreigners and citizens who lives outside their nationality country. In discussing the issue of international legal protection against foreigners, a doctrinal approach and international court practice is used. From the opinion of international legal experts, it will be found legal principles and theories regarding the position of individuals as subjects of international law. The principles of citizenship are the main basis for the application of the principle of jurisdiction and country responsibility towards its citizens and foreigners. The results are, In principle, every country will be responsible for providing legal protection to every citizen of the country wherever he/she is and foreigners will receive legal protection, under certain limitations, both from the country where he/she is temporarily located and from the country of origin. Thus, a person's citizenship status is closely related to the protection of international law that will be given to him/her, against him/her, his/her property and family. The application of the principle of state responsibility against citizens abroad or foreigners is based more on the principle of state sovereignty. A sovereign state will apply its national laws to its citizens within its territorial boundaries. Apart from that what applies is legal provisions of other countries or provisions of international law.

Introduction

Individuals who reside in a country in the form of citizens and not citizens. People who are not citizens of this country are referred to as foreigners. To determine whether a resident is a citizen or not, this is regulated by the national law of each country. In the national law, it will be determined who includes citizens and who are not. Although each country has the authority to determine its citizenship rules that are enforced in the territory of that country, yet that country must also pay attention to the principles of international law that is contained in international agreement, international customary law and general principles of international law regarding citizenship (Schachter, 1991; Ardhiwisastra, 2003; Koh, 2004). According to Starke (2003), the importance of a person's nationality status for international law is in terms of: Granting diplomatic protection rights abroad. Every country has the right to protect its citizens abroad; A country which becomes the nationality of a certain person will be liable to another country if that country neglects its obligation to prevent acts against the law that are committed by the person concerned or the country does not punish him/her, after the acts against the law has been committed. In general, a country may not reject or accept back its citizens in its territory; Nationality is closely related to loyalty, and one of the main rights of loyalty is the obligation for military service in the country to which loyalty is dedicated; A country has broad rights, unless there is a special treaty binding it to exercise that right, to refuse extradition of its citizens to another country requesting surrender; The enemy's status in war can be determined by the nationality of the person; and A country exercises criminal jurisdiction and other jurisdictions based on someone's nationality (Deen-Racsmay, 2001; Starke, 2003).

Thus, it is quite important to determine the citizenship status of a person in advance so that there are no doubts about the application of the law to him/her. If doubts arise, then the rule of law used is the local national law that is recognized by that person or the law in force in the country that is suspected to be the nationality of that person, so argued Russell J in the *Stoeck v Public Trustee* case, as follows: "The issue of which country a person belongs in the end it to must be decided by the local national law of the country that claimed by that person as his/her country or alleged to be his/her country". This principle is also in accordance with articles 1 and 2 of The Hague Convention on the Conflict of Nationality Law in 1930, which reads as follows: Article 1: "Every country determines according to its own rights who is its citizen. This law must be recognized by other countries as long as it is consistent with international conventions, international customs and generally recognized legal principles regarding nationality". Article 2: "Every issue regarding whether a person is the nationality of a country must be determined in accordance with the laws of that country" (Starke, 2003).

Methods

In discussing the issue of international legal protection against foreigners, a doctrinal approach and international court practice is used. From the opinion of international legal experts, it will be found legal principles and theories regarding the position of individuals as subjects of international law. The principles of citizenship are the main basis for the application of the principle of jurisdiction and country responsibility towards its citizens and foreigners.

Results and Discussion

Individuals as International Law Subjects

Regardless of the position of an individual as a citizen or foreigner, he or she is a subject of international law, which has rights and obligations under international law in a limited sense. In this limited sense, it is the opposite of the definition of a country as a subject of international law in its full meaning. This view is based on the theoretical concept that only the country is a law subject, and individuals have certain rights and obligations through a country that is a participant to a convention, such as in the Red Cross Convention of 1949 (Mochtar & Agoes, 2003). By borrowing a term from Prof. Nguyen Quoc Din, that individuals are the subject of artificial international law, because it is the will of the country, which is formulated in conventional provisions, which makes individuals in certain matters the subject of international law (Mauna, 2003).

In its development, the position of individuals as subjects of international law has become important and the understanding that only country is subject of international law is starting to be abandoned, as in the case of the *Danzig Railway Officials Case*, the International Court of Justice issued a decision in its general dictum arguing that: "If an international agreement gives rights to individuals, this right must be recognized and have a validity in international law, meaning that it is recognized by an international judicial bodies". Likewise, there are courts in Nuremberg and Tokyo in trying war crimes perpetrators, in which case the perpetrators of crimes are individually responsible for war crimes and crimes against humanity, and cannot take refuge in their country (Mochtar & Agoes, 2003).

State Jurisdiction against Foreigners

The practice of exercise of jurisdiction by several countries which applies to people, their property, actions or events, varies and the differences are caused by historical and geographic factors of a country (Starke, 2001). In international law there are several principles of jurisdiction, The first one is territorial jurisdiction, the exercise of territorial jurisdiction by a country against property, people, actions and events that occur within the territory of a country

is recognized by international law for all member countries of the international community. According to article 9 of the Montevideo Convention of 1933, that: "The jurisdiction of states within the limits of national territory applies to all the inhabitants". Thus the enactment of the territorial jurisdiction of a country is within the limitation of its territory, and will remain attached to it because the country is sovereign. Also included in the territory of a country is the maritime coastline or the territorial sea, ships with the flag of a certain country, and ports.

The extension of the definition of territorial jurisdiction is the subjective territorial principle and the objective territorial principle. What is meant by subjective territorial principle is that a country exercises its jurisdiction to prosecute and punish a criminal act that is committed in the territory of its country, but the act is solved in the territory of another country. The application of this principle is not yet generally accepted in international practice but is included in the Geneva Convention for Suppression of Counterfeiting Currency, 1929 and the 1939 of Geneva Convention for Suppression of the Illicit Traffic Drug.

Meanwhile, in objective territory, a certain country can apply objective jurisdiction, if a criminal act or other act committed in another country but carried out or solved within the territory of their country, or the act has a very dangerous effect on the social and economic order in the territory of their country. This principle is also embodied in the two conventions mentioned above and is recognized in court decisions in the United States, United Kingdom and Germany. In addition, territorial jurisdiction against foreigners is also recognized, citing the opinion of Moore (1935) in his Lotus Case, among other things, stated there is no assumption of immunity that arises from the fact that the person who is subject to the case is a foreigner; a foreigner cannot demand exemption from the exercise of such jurisdiction except as long as that person can demonstrate the following: for reasons of special immunity, he/she is not subject to local law or local law is incompatible with international law (Starke, 2001). The exceptions from the exercise of this territorial jurisdiction are: against foreign heads of state, foreign representatives and consuls, foreign-owned ships, and foreign-owned armed forces, international institutions.

The second one is Individual jurisdiction, the application of this jurisdiction depends on the individual perpetrators involved in certain law events, not on the territorial aspects of a country. In international practice, this individual jurisdiction is exercised according to the principles of active nationality and passive nationality. According to the principle of active nationality, the country can exercise jurisdiction over all its citizens, whereas according to the principle of passive nationality, the country can exercise its jurisdiction if a citizen suffers a loss. International law recognizes this principle with certain limitations, such as in the Cutting Case, where countries that do not recognize this principle are also not obliged to give recognition to trials that are carried out by other countries against their citizens. The basis for justifying the principle of passive nationality is that every country has the right to protect its citizens abroad and if the territorial country where the crime occurred does not punish the person who caused the loss, then the country of origin of the victim is authorized to the criminal act, if that person is in its territory (Sarkar, 1962; McCarthy, 1989).

The third one is Jurisdiction according to the principle of protection, every country has the authority to exercise its jurisdiction against crimes related to security, integrity and vital economic interests, with reasons that the consequences of the criminal act are very large for the country in question and if jurisdiction is not exercised, then the perpetrator will escape from punishment for not violating local laws or extradition being rejected with the reason that it is not a political crime. For example, the court practice in England in the Joyce V DPP Case, the High Council argued that "a foreigner who betrays the Crown can be punished even if it is done abroad".

And the fourth one is Jurisdiction according to universal principles. A criminal act which is subject to this universal jurisdiction is a crime that falls under the jurisdiction of all countries wherever the criminal act is committed. *Jure gentium* criminal act and all countries have the right to arrest and punish the perpetrators, for example crimes of piracy and war crimes.

A foreigner is entitled to the same protection based on the laws of the country where he/she is located and is also entitled to certain rights to give him/her the possibility of living a decent life, as stipulated in article 9 of the Montevideo Convention in 1933, which reads: "Nationals and foreigners are under the same protection of law and the national authorities and the foreigners may not claim right other or more than those of nationals "

Regardless of the same protection of the rights of foreigners under the laws of the host before the court, international law does not prohibit a country from having a different treatment which puts its own citizens first than foreigners. In general, not all foreigners have the same rights and obligations. Foreign residents have greater rights and obligations than those in the territory of a temporary country, such as foreign tourists (Ardhiwisastra, 2003).

State Responsibility against Foreigners

Basically, the rights and obligations of the state towards people, both citizens and foreigners, are determined by the state and the nationality of the person concerned. Each person is subject to state power and must obey the laws in force in the territory of the country, except for foreigners with certain limitations, such as political rights, positions in government. Citizenship of a person is closely related to his/her country, because it creates mutual rights and obligations. The state is obliged to protect its citizens wherever they are, and every citizen remains subject to the power of his/her country and obeys the laws applicable in his/her country. For citizens who are abroad, the enactment of state power and the rule of law for them is limited by the power and law of the country where they are located (Istanto, 1998).

The practice of country in treating foreigners residing in the territory of their country is always accompanied by certain limitation, such as in the areas of taxation, rights to certain jobs, residence, property ownership, privileges and civil immunity and immigration.

In the doctrine of international law there are several opinions regarding the entry of foreigners into the territory of a country, which are: A country is obliged to granting permits to all foreigners; A country is obliged to granting permits to all foreigners, with requirements that country may refuse certain groups, for example drug addicts, people suffering from dangerous diseases; A country is bound to allow foreigners to enter but by imposing requirements on entry permits; A country has the full right to prohibit all foreigners according to its will.

The practice of countries in granting entry permits for foreigners in the territory of their countries, is always accompanied by certain requirements regulated in the national laws of each country. This action is in accordance with the reflection of the principle of state sovereignty adhered by a country, even court practice in America and Britain confirms that the prohibition of entry to foreigners by a country is an event of territorial sovereignty. Exceptions to the prohibition of entry of foreigners into the territory of a country, can be determined in binding international agreements for these countries. In international law itself there is no obligation to allow the entry of foreigners freely and does not specify a certain period of time for foreigners who enter the territory of a country (Starke, 2003).

A country is responsible for foreign citizens and their assets in the territory of the country. Multilateral and regional international agreements or through national law establish the rights and obligations of country against foreigners who are in the territory of a country, violations of these obligations cause the country must be responsible for these foreigners. In addition,

there are reasons for the emergence of state responsibility as a result of actions taken by organs or their officials in the form of mistreatment of foreigners and actions or negligence that are economically and physically detrimental to foreigners. (Tontowi & Iskandar, 2006).

There are 2 opinions regarding the treatment of foreigners. The first one is International Minimum Standard. This view is held by developed countries, according to this opinion, treating foreigners in the country must meet international minimum standards, namely in accordance with international law and effective protection according to international law. If these requirements are not met, then state responsibility will arise. The application of this principle appears in the case of *The Neer Claim* in 1926. In this case, the court argued that a treatment of foreigners was an international crime if the treatment constituted outrage, bad faith, deliberate negligence or lack of action by the government and the second one is National Treatment Standard. This view is held by developing countries, according to this principle foreigners should be treated the same as countries treat their citizens. Application of this standard can be found in article 9 of the Montevideo Convention in 1933.

With the difference in views of the two different interests, as a middle way, Garcia Amandor expressed his opinion regarding the responsibility of the state, especially with regard to the treatment of foreigners, as his report to the International Law Commission in 1957, as follows: Foreigners enjoy the same rights and guarantees as citizens of the countries where they live, not less than guarantees enjoy the fundamental human rights that have been established and recognized by international law; If these rights are violated, it will create responsibility for the state towards the perpetrators. In this case the country of origin can provide diplomatic protection. For this reason, the country of origin needs to understand the law principles that apply in the country where citizens live (Adolf, 2002).

With regard to state responsibility for foreigners, it is also known as Denial of Justice, which in a broad sense means losses incurred for foreigners abroad due to violations of international justice that is committed by executive, judicial, legislative officials. In a narrow sense it means the abuse of the judicial process or the improper administration of justice, for example in the *Chattin Claim* case of 1972, the United States-Mexico General Claims Commission argued that “the irregularity of the court case process is proven by the presence of improper hearings, not giving the opportunity to the defendant to know all the claims filed against him/her, the undue delay of the case, the open examination in court is only a formality” (Starke, 2003).

Furthermore, there are also three issues related to state responsibility for the treatment of foreigners, namely the Nationality of Claims, Exhaustion of Local Remedies and Expropriation. In the case of the Nationality of Claims, the state provides legal protection to its citizens abroad in the event of an act that is detrimental to its citizens by another country. In determining the nationality of its citizens who suffer losses, it is determined by the national law of the country that file a claim.

Exhaustion of Local Remedies, is intended to ask the state responsibility that have gone through all the national legal mechanisms of the local state. So foreigners who are involved in a case in another country, must first use the local national legal mechanism. In the case of the *Ambatioles Arbitration*, the British Party rejected the demands of the Turkish citizens, who were represented by their country, because the Turkish citizens had not used all the legal remedies in force in the UK (Tontowi & Iskandar, 2009).

The Calvo Doctrine, this clause is often contained in contracts between Central and South American governments with foreign companies or persons who have concessions or rights under the contract. The purpose of the submission of this clause is to ensure that legal disputes arising out of the contract will be transferred to the local courts of the country that granted

concessions and to remove the jurisdictions of the international arbitral tribunal or prevent requests for diplomatic action to the country of origin of the company or individuals who enjoy concessions. (Starke, 2003).

Expropriation is defined as the takeover of private ownership by the country. According to the United Nations Resolution on Permanent Sovereignty over Natural Resources adopted by the United Nations General Assembly in 1962 it was stated that; "Expropriation must be carried out based on broad interests and fair compensation. Expiration should not be discriminatory and should not be directed at a particular nationality".

An expropriation is not based on law if it is carried out in a discriminatory manner, only aimed at certain nationalities, the inability of the country to compensate fairly and not based on reasons of public policy. If the expropriation is not in accordance with the law, then compensation is called damage not compensation. This compensation is based on calculation standard of normal standard, even covering future losses, as in the case of the Amoco Finance Case in 1985 (Tontowi & Iskandar, 2006).

In the practice of country, there are several legal protection institutions that can be used by foreigners in solving legal problems: An agreement between the country of origin and the country where citizen is located to regulate the protection of its respective citizens and their property; Foreign investment protection agencies, including guarantees from the local government (host state) if there is nationalization action, such as the Agreement between Indonesia and Belgium concerning Mutual Encouragement and Protection for Investment on January 15th, 1972; Insurance Guarantee Agreement, which member consists of the recipient countries of capital and investors in the Convention Establishing the Multilateral Investment Guarantee Agency under the auspices of the World Bank; Exhaustion of local remedy, in the form of a legal action by a foreigner who has been harmed by means of a claim before a local court; Through diplomatic protection. This effort was made because of a violation of international law through negotiations or prosecutions in court on behalf of its citizens. Thus, if diplomatic protection actions have been taken, the party in the case is the country, according to the opinion of the Permanent International Court in the case of Mavrommatis Palestine Concession in 1924; and Prosecution through a court forum in a third country, if the object in dispute is in the jurisdiction of the forum country, for example the tobacco case in the Bremen court between the Indonesian government and the owner of a tobacco company owned by a Dutch citizen, because the disputed object is located in Germany (Ardhiwisastra, 2003).

Conclusion

In principle, every country will be responsible for providing legal protection to every citizen of the country wherever he/she is and foreigners will receive legal protection, under certain limitations, both from the country where he/she is temporarily located and from the country of origin. Thus, a person's citizenship status is closely related to the protection of international law that will be given to him/her, against him/her, his/her property and family. The application of the principle of state responsibility against citizens abroad or foreigners is based more on the principle of state sovereignty. A sovereign state will apply its national laws to its citizens within its territorial boundaries. Apart from that what applies is legal provisions of other countries or provisions of international law.

References

- Adolf, H. (2002). *Aspek-Aspek Negara Dalam Hukum Internasional*. Jakarta: Grafindo.
- Ardhiwisastra, Y. B. (2003). *Hukum internasional, Bunga Rampai*. Bandung: Alumni.

- Deen-Racsmay, Z. (2001). The Nationality of the offender and the jurisdiction of the international criminal court. *Am. J. Int'l L.*, 95, 606.
- Istanto, F. S. (1998). *Studi Kasus Hukum Internasional*. Jakarta: PT Tatannusa.
- Koh, H. H. (2004). International law as part of our law. *The American Journal of International Law*, 98(1), 43-57.
- Mauna, B. (2001). *Hukum Internasional Peranan, Fungsi Dalam Era Dinamika Global*. Bandung: Alumni.
- McCarthy, J. G. (1989). The Passive Personality Principle and Its Use in Combatting International Terrorism. *Fordam Int'l LJ*, 13, 298.
- Mochtar, K., & Agoes, E. R. (2003). *Pengantar Hukum Internasional*. Bandung: Alumni.
- Moore, J. B. (1935). *International Law Applied to Reclamations, Mainly in Cases between the United States and Mexico*. JSTOR.
- Sarkar, L. (1962). The Proper Law of Crime in International Law. *Int'l & Comp. LQ*, 11, 446.
- Schachter, O. (1991). *International law in theory and practice*. Brill Nijhoff.
- Starke, J.G. (2003). *Hukum Internasional 2*. Jakarta: Sinar Grafika.
- Tantowi, J., & Iskandar, P. (2009). *Hukum Internasional Kontemporer*. Bandung: PT. Refika Aditama.