T.M.C. ASSER INSTITUTE – THE HAGUE

INTERNATIONAL LAW IN THE NETHERLANDS

edited by

H.F. van Panhuys†, W.P. Heere, J.W. Josephus Jitta
Ko Swan Sik and A.M. Stuyt

VOLUME THREE

SIJTHOFF & NOORDHOFF – ALPHEN AAN DEN RIJN – 1980
OCEANA PUBLICATIONS INC. DOBBS FERRY, N.Y.

that no State could legitimately legislate on the penal, private, or administrative law of another State, so there seems to be little reason why the prohibition on assuming competence over another State in the field of nationality should need any particular legal justification.[51] The rule was confirmed in Article 1 of the 1930 Hague Convention: "It is for each State to determine under its own law who are its nationals ...". This implies, inevitably, that the determination of who are the nationals of a State does not belong to the competence of another State and, *consequently*, cannot take place according to the rules of another State. So the rule of Article 2 of the Convention, reading "Any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State", is again superfluous though not untrue.[52]

2.3 *The consequences of conferring or withdrawing nationality in breach of international law*

The question of these consequences brings up the more general question of sanctions in international law vis-à-vis an internationally relevant act of a State which is in breach of a rule of international law. One specific aspect of the question which is particularly important is whether the act will have the effect of producing the results intended by the actor. We here enter the area of nullity in international law, dealt with more fully elsewhere.[53] It is not clear whether international law does in fact impose the sanction of nullity in the present case. But even if a conferment or deprivation of nationality were to be considered null internationally, it is unlikely that the act would also be considered null within the municipal law sphere of the State concerned.[54] In any case we face a category of legal acts which, in contradistinction to, for example, territorial encroachments, is especially susceptible to the sanction of nullity on the international plane: acts which Tammes has termed "immaterial legal acts".[55] Such imperfect conferring or withdrawal of nationality may then, in principle, be ignored by another State; the

51. This reasoning is preferred to Verzijl's "[C]ommon sense indicates that it shall be the law of the country whose citizen a person claims to be", this being "a principle so self-evident that it is hardly believable that the opposite view can reasonably be taken". Verzijl, op.cit., vol. 5 p. 21.

52. The formulation of the rule begs the question whether the law on nationality has been obscured by an unjustified impact of conflicts law reasoning.

53. Ko Swan Sik, "Nietigheid en het volkenrecht" [Nullity and international law], *Rechtsgeleerd Magazijn Themis* 1971 pp. 417-456; Verzijl, op.cit. vol. 5 p. 25, and, particularly, vol. 6 p. 50 et seq.

54. Cf. Verzijl, op.cit. vol. 5 p. 26.

55. A.J.P. Tammes, *Internationaal Publiekrecht* [Public International Law], 2nd. rev.ed. (1973) p. 5. Guggenheim speaks of acts of "caractère déclaratoire, statique, susceptible de non-reconnaissance". See P. Guggenheim, "La validité et la nullité des actes juridiques internationaux", 74 Hague Recueil (1949-I) pp. 195-268 at p. 238).

act is "not opposable", it need not be recognized. This is in fact the core of Article 1 of the 1930 Hague Convention.[56]

Meanwhile, in drawing such consequences, due account should be taken of the peculiar state of international law, in which authoritative institutions clothed with enforcement power are lacking. Effectiveness will play a predominant role and consequently, *"ex facto jus oritur"* applies to a large extent.

It is submitted that the right to deny recognition to foreign imposition or withdrawal of nationality on the ground of this being contrary to international law should find its limit where such denial would result in a person being regarded as a national of another State, contrary to the law of this latter State. Such imposition of an undesirable national upon a State would amount to creating a fictitious nationality. If a person is illegally saddled with the nationality of State X, then non-recognition may be effective internationally. If, however, a person is illegally deprived of the nationality of State Y, it is submitted that it is not only unrealistic, but even inadmissible, to deny effect to such (illegal) deprivation, and to consider the person to be still a national of State Y.[57] In this case the effectiveness of the illegal act cannot and, therefore, should not, for lack of an effective counter-measure, be answered by ineffective non-recognition.

2.4 *The attitude of other States, in casu the Netherlands*

In the light of the preceding sections we will now inquire whether the Netherlands and its organs comply with the 'ground rule' according to which any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State.[58]

56. The Article reads: "It is for each State to determine under its own law who are its nationals. This law shall be recognized by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality".

57. This is in accordance with the view of R.D. Kollewijn, *Tien jaren Nederlandse Rechtspraak Internationaal Privaatrecht (1954-1963)* [Ten years Dutch case-law concerning private international law] (1963), hereafter: *Tien jaren*, p. 26 and 51 et seq., though, admittedly, wholly in contrast to the view of Professor Verzijl. With regard to the German Decree of 25 November 1941 withdrawing German nationality from Jews who had their ordinary residence outside Germany in circumstances which made it clear that their sojourn was not merely transitory, Verzijl, commenting upon an Israeli court decision of 1954, wrote: "According to normal legal principles the Court would, just as the court of any other civilized State, have had to deny the validity of the German Decree of 1941 and to draw therefrom the conclusion that [...] had remained a German citizen [...]". Op.cit., vol. 5 p. 45. See, for another contrary view: J.G. Merrills, "One nationality or two? The strange case of *Oppenheimer v. Cattermole*", 23 I.C.L.Q. (1974) pp. 143-159 at pp. 152-153. See also H. Lauterpacht, "The nationality of denationalized persons", 1 *The Jewish Yearbook of International Law* (1948) pp. 164-185.

58. For a similar inquiry with regard to England and Australia: P.E. Nygh, "Problems of nationality and expatriation before English and Australian Courts", 12 I.C.L.Q. (1963) pp. 175-188. A specific question is whether the duty to follow the State concerned only refers to its laws, or also to the interpretation and application of these laws by its organs. In its decision of 10 September 1959 (N.J. 1959 No. 596) the Dutch Supreme Court refused an appeal in