THE NOTTEBOHM JUDGMENT

(SECOND PHASE)

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Of the Board of Editors

Introduction

Friedrich Nottebohm was born at Hamburg, Germany, a German national by birth and remained a German national until 1939. Since 1905 he had resided in Guatemala, where he carried on prosperous activities in the fields of commerce, banking and plantation. At the end of March or the beginning of April, 1939, he left for Germany and applied in October, 1939, after the outbreak of the second World War, for naturalization in the Principality of Liechtenstein and was naturalized on October 13, 1939. From this moment on he conducted himself exclusively as a national of Liechtenstein, particularly with regard to Guatemala, where he returned in 1940. On October 19, 1943, he was arrested by Guatemalan authorities and turned over to the armed forces of the United States in Guatemala. He was deported to the United States and interned there for two years and three months. During his internment in this country, in 1944, fifty-seven legal proceedings were commenced against him in Guatemala, designed to confiscate all his movable and immovable properties. When he was released from internment in the United States in 1946 and wanted to return to Guatemala to take up the defense against all the litigations pending against him there, he was refused readmission to Guatemala. In 1946 he went to Liechtenstein, where he has resided ever since. In 1949, three years after he had made Liechtenstein his effective and permanent domicile, his properties in Guatemala were confiscated under Guatemalan law.

By Application, filed on December 11, 1951, at a time when Nottebohm had been domiciled in Liechtenstein for five years, the Principality, espousing his case, instituted proceedings in the International Court of Justice against Guatemala. By the Judgment of November 18, 1953, the Court rejected the preliminary objection raised by Guatemala against the jurisdiction of the Court. In the second phase public hearings were held in February and March, 1955. In its Memorial, Liechtenstein asked the Court, as far as the merits were concerned, to adjudge and declare that the Government of Guatemala, by arresting, detaining, expelling and refusing to re-admit Nottebohm, and by seizing and retaining his property without compensation, acted in breach of its obligations under international law and, consequently, in a manner requiring the payment of reparation, and asked for payment by Guatemala, under various headings, of a sum perhaps running into ten million Swiss francs.

Guatemala had raised three pleas in bar, which, in the final submission, stated in substance:

> May it please the Court, as to admissibility, to declare that the claim of Liechtenstein is inadmissible
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> (1) on the ground of the absence of any prior diplomatic negotiations;
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> (2) (a) on the ground that Nottebohm has not properly acquired Liechtenstein nationality in accordance with the law of Liechtenstein;
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> (2) (b) on the ground that naturalization was not granted to Nottebohm in accordance with the generally recognized principles in regard to nationality;
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> (2) (c) in any case, on the ground that Nottebohm appears to have solicited Liechtenstein nationality fraudulently, that is to say, with the sole object of acquiring the status of a neutral national before returning to Guatemala and without any genuine intention to establish a durable link, excluding German nationality, between the Principality and himself.
>
> (3) on the ground of the non-exhaustion by Nottebohm of the local remedies.

As to the merits, Guatemala asked the Court to hold that no violation of international law had been shown to have been committed in regard to Nottebohm, either in respect of his property or his person; more especially, in regard to the liquidation of his property, to declare that Guatemala was not obliged to regard the naturalization by Liechtenstein as binding upon her or as a bar to his treatment as an enemy national in the circumstances of the case.

Liechtenstein, in its Reply and Final Submission, asked the Court to reject Guatemala's pleas in bar and to declare that the naturalization of Nottebohm was granted in accordance with the municipal law of Liechtenstein, and was not contrary to international law. As to the merits, Liechtenstein, in its Final Submission, asked the Court to adjourn the oral proceedings for not less than three months.

The Court, considering only the admissibility of the claims before it, decided, by a majority of eleven to three, that Liechtenstein was not entitled to extend its protection vis-à-vis Guatemala, and declared, therefore, the claim to be inadmissible *a limine*.

The *Nottebohm* Judgment (Second Phase) of April 6, 1955,[1] has already provoked a vast literature.[2] Much of this literature is highly

[1] [1955] I.C.J. Rep. 4; digested in 49 A.J.I.L. 396 (1955).

[2] See I. Seidl-Hohenveldern, "Der Fall Nottebohm," Recht der Internationalen Wirtschaft, July 5, 1955, pp. 147–149; A. Migliazza, in 7 Comunicazioni e Studi 582–594 (Milan, 1955); Erwin H. Loewenfeld, "Der Fall Nottebohm," 5 Archiv des Völkerrechts 387–410 (1956); Jack H. Glazer, "Affaire Nottebohm—A Critique," 44 Georgetown Law J. 313–323 (1955–56); J. Mervyn Jones, "The Nottebohm Case," 5 Int. and Comp. Law Q. 230–246 (London, 1956); unsigned note in 31 N. Y. U. Law Rev. 1135–1139 (1956); A. N. Makarov, "Das Urteil des Internationalen Gerichtshofes im Fall Nottebohm," 16 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 407–426 (1956); *idem*, "Consideraciones sobre el derecho de la protección diplo-

critical of the judgment, particularly the studies by Glazer, Jones, Löwenfeld, Makarov, Seidl-Hohenveldern and Verzijl. These critical attacks follow the sharp critique of the judgment by the three dissenting judges.[3] Criticism of this judgment can also be found in recent treatises on international law,[4] and has inspired a whole book.[5] On the other hand, the study by Mme. Bastid, daughter of Judge Basdevant, is extremely favorable to the judgment. Favorable voices, particularly American and Italian, have also been heard in recent years. Some of these statements are made without going into any analysis,[6] others on the basis of doubtful reasoning.[7] A very favorable opinion on the judgment has recently been voiced by Professor Jessup.[8] It is highly to be regretted that Judge Lauterpacht, in his recent brilliant book on the Court,[9] could not treat the

mática," 8 Revista Española de Derecho Internacional 519–524 (1955); Paul de Visscher, "L'Affaire Nottebohm," 60 Revue Générale de Droit International Public 238–266 (1956); Suzanne Bastid, "L'Affaire Nottebohm devant la Cour Internationale de Justice," 45 Revue Critique de Droit International Privé 607–633 (1956); J. H. W. Verzijl, in 3 Nederlands Tijdskrift voor Internationaal Recht 33 ff. (1956); Maury, "L'Arrêt Nottebohm et la Condition de la Nationalité Effective," 23 Zeitschrift für ausländisches und internationales Privatrecht 515 ff. (1958); Mariano Aguilar Navarro, "Reglementación internacional del Derecho de Nacionalidad," 10 Revista Española de Derecho Internacional 333–372 (1957). These writings will further be quoted only with the names of their authors. See also Hans Goldschmidt in 1960 Fordham Law Rev. 689 ff.

[3] Judges Klaestad and Read, and *Ad Hoc* Judge Guggenheim. The majority of the Court was composed of: Judge Hackworth, President; Judge Badawi, Vice President; Judges Basdevant, Zoričić, Hsu Mo, Armand-Ugon, Kojevnikov, Sir Muhammad Zafrulla Khan, Moreno Quintana, Córdova; *Ad Hoc* Judge M. García Bauer.

[4] See the critical remarks in 1 Georg Dahm, Völkerrecht 446, note 1, 447, note 6, 458, 459, note 13 (1958); Verdross-Zemanek, Völkerrecht 237, note 3 (4th ed., 1959); A. P. Sereni, 2 Diritto Internazionale 691 ff. (1958), states correctly that there must be "some link," but it cannot be said in general terms what the criteria of this link must be which justify the grant of nationality for international purposes; he adds that "even the most tenuous links are sufficient to justify the grant of nationality to one who voluntarily applies for it."

[5] H. F. Van Panhuys, The Role of Nationality in International Law (1959).

[6] G. Battaglini, La Protezione Diplomatica delle Società 216–217 (1957). Professor McDougal, in 4 South Dakota Law Rev. 45–46 (1959), quotes the Nottebohm Judgment as "sufficiently dramatic" and seemingly with approval, but does not go into any analysis. But now, apropos his violent attack on the link theory with regard to the nationality of ships, he also has his doubts about the Nottebohm Judgment; see 54 A.J.I.L. 36–40 (1960). Z. R. Rode, "Dual Nationality and the Doctrine of Dominant Nationality," 53 A.J.I.L. 139–149 (1959), takes no stand with regard to the Nottebohm Judgment, but only quotes, for the purposes of his study, the dicta of the Court concerning dual nationality.

[7] Mario Giuliano, "La sudditanza degli individui e il suo rilievo nell'ordinamento internazionale," 8 Comunicazioni e Studi 50–54 (1956), accepts the link theory as "autorevole." It is surprising that this sharply critical mind does not see that the Nottebohm case has nothing whatsoever to do with the special problem of dual nationality, and that there is no basis at all in positive international law for the link theory in the case of an individual who, at all times, had only one nationality.

[8] See Philip C. Jessup, in Proceedings, Second Summer Conference on International Law, Cornell Law School, June 23–25, 1958, pp. 43, 49.

[9] Sir Hersch Lauterpacht, The Development of International Law by the International Court (1958). The discussions on pp. 13, 15, 349 all refer to the Nottebohm Judgment of 1953, with which we are not concerned here.

Nottebohm Judgment (Second Phase), since it was rendered after he himself had been elected one of the Judges of the Court.

The judgment remains, therefore, highly controversial. On the other hand, all writers, whether they approve or attack the judgment, agree that it is of particular interest, of the highest importance and, possibly, of the most far-reaching effects. Under these circumstances, it seems justified to analyze the judgment once more. Naturally, this writer is absolutely in favor of judicial settlement of international conflicts and has the greatest respect for the two Courts and for their mission, not only to decide concrete cases, but also to develop international law. The *Nottebohm* Judgment is entitled to the highest respect. The majority with which it has been rendered is impressive; there is also a legal presumption in favor of the legal superiority of the majority opinion. But dissenting opinions may later become the law,[10] and "the degree of precariousness of the line dividing the content of a decision from the opposite is not invariably indicated by the size of the majority by which it was rendered." [11]

It is not intended here to go once more into all the relevant details of the practice of states, precedents and literature, insofar as they have already been covered in previous writings on this judgment; the statement of the issue and references can here suffice; only newer developments, not yet covered in the literature, will be treated in more detail. What is intended here is to give a complete and comprehensive analysis, considering the arguments *pro* and *con;* to study the judgment from all its aspects: from the point of view of theoretical and methodological problems, to study it *de lege lata*—from the points of view of matters of procedure and matters of substance—and to study it *de lege ferenda.*

Such analysis is in the sole interest of international justice; for scientific criticism takes away nothing from the legally binding force of the judgment for the parties in this case, and "the pronouncements of the Court, even if unanimous or approaching unanimity, are a legitimate object of scientific scrutiny." [12]

The Judgment (Second Phase)—De Lege Lata

A. Matters of Procedure

(1) *The Issue of Exhaustiveness of Judicial Reasoning*

Judge Klaestad starts his dissenting opinion [13] with the statement that the judgment deals with only one of the three pleas in bar, and some writers criticize this procedure. Common law courts, it is true, have often given many reasons, where one reason would have been sufficient,

[10] "A dissent in a court of last resort is an appeal to the broadening spirit of the law, to the intelligence of a future day where a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed." Charles Evans Hughes, The Supreme Court of the United States 68 (1928).

[11] Lauterpacht, *op. cit.* 398.

[12] *Ibid.* 62.

[13] [1955] I.C.J. Rep. 28.

but in other cases have also restricted themselves to a narrow ground.[14] We fully recognize, with Judge Lauterpacht, the great difference between a municipal court with compulsory jurisdiction and private parties and an international court with, in the last analysis, its voluntary and therefore precarious jurisdiction and sovereign states as parties. That is why Judge Lauterpacht [15] devotes many pages to showing the necessity of exhaustive judicial reasoning and cumulation of *rationes decidendi,* and gives many reasons and examples; but he admits that "not every argument put forward by a party requires an answer." Although, therefore, Judge Klaestad's statement is correct,[16] this is, in our opinion, no ground for criticism. The ground chosen by the Court is sufficient for its decision and the decision is fully reasoned.

(2) *The Narrow Ground and Narrow Range of the Judgment*

Notwithstanding what has been stated in the first paragraph, it is essential to keep the narrow ground and range of the judgment fully in mind, in order to understand it correctly and to evaluate it, both *de lege lata* and *de lege ferenda.* It was the Court itself which underlined the narrow basis and range of the decision.[17] The judgment is, therefore, very much cut to this particular case. This fact has made some commentators raise the question whether the Court was not, however, unconsciously, too much under the impact of the fact that Nottebohm *had* been a German national and of the facts of Hitlerite aggression. But even the voicing of such doubt must be firmly rejected; for "judges, like Caesar's wife, should be above suspicion." [18]

Nevertheless, the narrow basis and range of the judgment have several consequences: (1) There is the possibility of a dangerously wide interpretation of the judgment.[19] (2) On the other hand, taking the narrowness seriously, coupled with the Court's "functional approach," may lead to paradoxical consequences. (3) The narrow basis and range of the judgment make the whole reasoning of the Court rather hybrid, as this reason-

[14] See, *e.g.*, People of State of New York *ex rel.* Halvey *v.* Halvey, 330 U. S. 616, where the U. S. Supreme Court stated: "The narrow ground on which we rest the decision makes it unnecessary to consider several other questions argued."At the 1959 Neuchâtel Session of the *Institut de Droit International,* during discussion of Art. 15, No. 15 of the Draft Resolution on Arbitration in Private International Law, an article which states that foreign arbitral awards shall not be recognized, "lorsque la sentence n'a pas prononcé sur toutes les conclusions des parties," Lord McNair stated that this point could not be accepted by a lawyer of a common law country.

[15] Lauterpacht, *op. cit.* 37–49.

[16] "The Court is not therefore called upon to deal with the other pleas in bar put forward by Guatemala or the Conclusions of the Parties other than those on which it is adjudicating in accordance with the reasons indicated above." [1955] I.C.J. Rep. 26.

[17] "The present task of the Court is limited to adjudicating upon the admissibility of the claim of Liechtenstein in respect of Nottebohm on the basis of such reasons as it may itself consider relevant and proper." *Ibid.* 16; see also p. 17.

[18] Bowen, L. J., in Leeson *v.* General Council of Medical Education (1889), 43 Ch. D. 366, 385.

[19] *Ad Hoc* Judge Guggenheim, [1955] I.C.J. Rep. 60–61.

ing goes and is bound to go much beyond the task of giving adequate reasons for this narrow judgment.[20]

(3) *The Basic Decision Was Neither Invoked Nor Discussed by the Parties*

When the Court limited its task to adjudication upon the admissibility of Liechtenstein's claim vis-à-vis Guatemala, it added that it would adjudicate this issue "on the basis of such reasons as it may itself consider relevant and proper." And that it did, on a basis, as Mervyn Jones states, "not even contended for by Guatemala nor discussed by Liechtenstein." [21] Judge Klaestad severely criticizes the solution upon these lines: on the ground that it does not conform with the argument and evidence submitted by the parties; and he adds that some facts "show how necessary it would have been, in the interest of a proper administration of justice, to afford to the Parties an opportunity to argue this point before it is decided." [22] Judge Read [23] goes even farther, and states that the matter is governed by the principle which the Court applied in the *Ambatielos* Case (Jurisdiction) of July 1, 1952: "The point raised here has not yet been fully argued by the parties and cannot, therefore, be decided at this stage." [24]

(4) *The Issue of Adjournment*

Guatemala contended that Nottebohm had applied for and obtained Liechtenstein nationality fraudulently. As no documentary evidence had been given by Guatemala with regard to this allegation in the course of the written proceedings, the Agent of Guatemala, after the close of the written proceedings and a few days before the oral hearings, submitted to the Court a considerable number of new documents. The Agent of Liechtenstein objected to the production of these documents. The Court decided on February 14, 1955, to permit the production of all these new documents, but

> reserved to the Agent of the Government of Liechtenstein the right . . . to avail himself of the opportunity provided for in the second paragraph of Article 48 of the Rules of the Court, after having heard the contentions of the Agent of the Government of Guatemala based on these documents, and after such lapse of time as the Court might, on his request, deem just.[25]

On the basis of these new documents, Guatemala submitted in the oral proceedings the new allegations of fraudulent concealment of enemy property. Liechtenstein, in its Final Submission as to the merits, requested the Court "to adjourn the oral pleadings for not less than three months in order that Liechtenstein may obtain and assemble documents in support of comments on the new documents produced by Guatemala."

But the judgment considered it "unnecessary to have regard to the

[20] The points 2 and 3 made in the text have been fully considered by Van Panhuys.

[21] *Loc. cit.* 238.

[22] [1955] I.C.J. Rep. 30–31.

[23] *Ibid.* 38.

[24] [1952] I.C.J. Rep. 45.

[25] [1955] I.C.J. Rep. 6.

documents," and rejected Liechtenstein's demand for adjournment, also on the technical ground that Liechtenstein, in asking for an adjournment, "did so only for the eventuality of the Application being held to be admissible and not for the purpose of throwing further light upon the question of the admissibility of the Application." [26]

This procedure was—we believe rightly—severely attacked by Judge Klaestad [27] and *Ad Hoc* Judge Guggenheim,[28] who strongly felt, in view of Article 48, paragraph 2, of the Rules of the Court and the Court's decision of February 14, 1955, as well as of Liechtenstein's demand, that adjournment should have been granted by the Court, all the more so, as, in Judge Klaestad's opinion, "these allegations of fraud now appear to constitute the main aspect of the case." In fact, *Ad Hoc* Judge Guggenheim opens, and Judge Klaestad begins and ends his dissenting opinion, with the statement that the case should have been adjourned.

(5) *The Issue of Joining the Pleas in Bar with the Merits*

The problem of adjournment is closely connected with the issue of joining the pleas in bar with the merits. A plea in bar may be so closely connected with the merits that it is impossible to adjudicate the former without prejudging the latter. Judge Lauterpacht [29] fully discusses the problem of joinder of jurisdictional objections to the merits and cites many cases in which the Court has ordered such joinder.[30] All the considerations given by the Court for such joinder in earlier cases apply eminently to Guatemala's pleas in bar. Such joinder to the merits was, therefore, strongly insisted upon by Judges Klaestad,[31] and Read,[32] and *Ad Hoc* Judge Guggenheim.[33]

(6) *Granting the Plea in Bar Cuts Off the Decision on the Merits*

Just as the issue of adjournment is closely connected with the issue of joining the pleas in bar with the merits, thus both these issues are closely related to the obvious consequence of granting the plea in bar, namely, of preventing the Court from adjudicating upon the merits of the case. Judge Read forcefully states:

> The allowance of a plea in bar prevents an examination by the Court of the issues of law and fact which constitute the merits of the case. It would be unjust to refuse to examine a claim on the merits on the

[26] *Ibid.* 24–25.
[27] *Ibid.* 32.
[28] *Ibid.* 65.
[29] Lauterpacht, *op. cit.* 113–115.
[30] It is interesting to see the reasons given by the Court for such joinder: "when the interests of the good administration of justice require it" (P.C.I.J., Ser. A/B, No. 75 (1939), p. 56); "where the preliminary question at issue appears to be entirely bound up with the facts, adduced by the Application, and can only be decided on the basis of a full knowledge of these facts, such as can only be obtained from the proceedings of the merits" (P.C.I.J., Ser. A/B, No. 52 (1933), p. 14).
[31] "This question of fraud is so closely connected with the merits of the case that it cannot be decided apart from them and without any appraisal of the various relevant facts which may be disclosed by a consideration of the merits. . . ." [1955] I.C.J. Rep. 33.
[32] *Ibid.* 38.
[33] *Ibid.* 65.

> basis of findings of law or fact which might be reversed if the merits were considered and dealt with.[34]

And he equally forcefully brings out a second consequence:

> . . . the allowance of the plea in bar would ensure that justice would not be done on any plane, national or international. I do not think that a plea in bar, which would have such an effect, should be granted, unless the grounds on which it is based are beyond doubt.[35]

Ad Hoc Judge Guggenheim emphasizes that a preliminary objection must be strictly interpreted and must not prevent justice from being done.[36]

The consequences of the granting of the pleas in bar and thereby cutting off adjudication as to the merits, are, indeed, far-reaching in two aspects:

(a) The real issue in the *Nottebohm* Case, apart from the complaints of arresting, deporting and not re-admitting him—is that of the legality under international law of the confiscation of his property, even if he had been, which he was not, a German national, *i.e.*, an alien enemy, at the critical time. Many writers hold this confiscation of private property as a war measure to be illegal[37] and, particularly, confiscation by states which have made only paper declarations of war. Here was a rare opportunity for the Court to adjudicate authoritatively upon the legality under international law of these war confiscations. It deprived itself of this opportunity.

(b) The judgment prevented justice from being done to Nottebohm,[38] making him, for all practical purposes, a stateless person and depriving him of the only legal remedy he had.[39]

There are other issues in this case which have procedural aspects, such as whether it is allowed to consider the motives, the problem of burden of proof, the issues of estoppel and of denial of justice; but they will be more conveniently dealt with in considering matters of substance.

[34] *Ibid.* 34.

[35] *Ibid.* 35. Mervyn Jones, *loc. cit.* 234, asks: "Is it the case that under international law a claim may be rejected *a limine* by an international tribunal without reference to the merits, although the procedural rules concerning the nationality of the claim have been complied with?" See also Van Panhuys, *op. cit.* 98.

[36] [1955] I.C.J. Rep. 64.

[37] See, *e.g.*, Philip C. Jessup, 49 A.J.I.L. 57 (1955); Glazer, *loc. cit.* 321; Seidl-Hohenveldern, *loc. cit.* 149.

[38] See dissenting opinions; unsigned note (cited note 2 above), p. 1139. Glazer states that the retroactive effect of the judgment, sixteen years after Nottebohm's naturalization, six years after he had established his permanent domicile in Liechtenstein, is "extremely harsh" and calls the judgment "but a hollow triumph of form." *Loc. cit.* 325.

[39] Common law courts are careful not to deprive a plaintiff of his only legal remedy. Thus, the application of the doctrine of *forum non conveniens* "presupposes *at least two forums* in which the defendant is amenable to process" (Gulf Oil Corp. *v.* Gilbert, 330 U. S. 501, 1947); see also Slater *v.* Mexican Nat. R. Co. (194 U. S. 120): "the defendant can always be found in Mexico"; and, *e.g.*, Bramwell, B.: "so that in all cases there will be a remedy" (Crawley *v.* Isaacs, 1867, 16 L.T. (N.S.) 529,531).

B. Matters of Substance

I. Nationality

(1) *Competence of an International Tribunal to Investigate and Decide upon the Nationality of Claims*

It is universally recognized that an international court or tribunal is competent to investigate and decide the true nationality of a claim; this is not only its right, but also its duty, as its own jurisdiction depends on the true nationality of the claim. Hence also an official document concerning nationality has, it is true, particular value, constituting prima facie evidence, but is rebuttable. That this is the law, is shown by the unanimity of the literature and by many international decisions, such as the *Flutie* Cases.[40] Invoking the *Flutie* Cases and the precedents there quoted, the United States-Italian Conciliation Commission, established under the Peace Treaty with Italy of 1947, in a recent case has taken a particularly strong stand. The Commission stated:

> Abundant doctrine in international law confirms the power of an international court to investigate the existence of the nationality of the claimant, even when this is established *prima facie* by the documents issued by the State to which he owes allegiance and in conformity with the legislation of said State. . . .
>
> The Commission, in conformity with the case law of international tribunals . . . is not bound by the provisions of the national law in question, either as regards the manner or as regards the form in which proof of nationality must be submitted.[41]

That this is so, is fully granted by *Ad Hoc* Judge Guggenheim, but he also states the limitations:

> The plaintiff must therefore *prove* that nationality has been conferred by means of a valid act in accordance with the municipal law of the claimant State; and the defendant, if he disputes this, must establish the contrary.[42]

The burden of proof was, therefore, here on Guatemala. Further, an international court can only "up to a certain extent" ascertain whether the nationality exists; the court "*cannot freely* examine the application and interpretation of municipal law"; particularly the court cannot decide with regard to the discretionary power of administrative authorities; "it cannot exercise the power of a Court of Appeal with regard to municipal law"; in the same sense Judge Klaestad [43] and Judge Read.[44]

Here the issue of an international court's powers to investigate and decide the nationality of claims must be discussed, because of the reasoning of the parties and because of Guatemala's pleas in bar (2 a and 2 b). The judgment, it is true, is not based on the exercise of such competence; for,

[40] U. S.-Venezuelan Arbitrations, 1903, Ralston, Venezuelan Arbitrations of 1903, p. 34.

[41] U. S. *ex. rel.* Flegenheimer *v.* Italy, Sept. 20, 1958, excerpted in 53 A.J.I.L. 944–958 (1959).

[42] [1955] I.C.J. Rep. 50 ff.

[43] *Ibid.* 28–29.

[44] *Ibid.* 35–37.

without deciding the validity of Nottebohm's nationality, it takes it for granted.

(2) *Nationality in International Law* [45]

To create a theoretical framework for the evaluation of the judgment, it seems necessary to give a brief exposé on nationality in international law.[46] Our international law came historically into being by the decentralization of the medieval European *communitas Christiana* into a plurality of sovereign states. International law and sovereignty developed, therefore, *uno actu*. Sovereignty, a basic concept of present international law, as a legal concept, is a bundle of competences conferred by international law. Any *a priori* or unlimited political concept of sovereignty must, with inescapable logic, lead to the non-existence of international law as law. Sovereignty is, therefore, essentially a relative notion; its content depends on the stage of development of international law. In order to guarantee a somewhat peaceful living together of a plurality of sovereign states, international law, as its first task, had to delimit the competences of the legal order of the sovereign states as to space, as to persons, as to matters and as to time.

As the sovereign states and the international community are primarily territorial communities today, international law delimited the competences between sovereign states as to space by direct rules of international law, rules of content. But international law delimited the personal competence of sovereign states only indirectly, by rules of competence, giving to the sovereign states, and only to them,[47] the competence to regulate the acquisition and loss of their nationality in principle through their municipal legislation, as they think fit. This is positive international law, recognized by the Hague Codification Conference of 1930, by the Harvard Research in International Law,[48] by international courts and tribunals, by the literature. "In the present state of international law,"—this phrase is revealing—stated the Permanent Court of International Justice, "questions of nationality are, in principle, within the reserved domain";[49]

[45] See H. W. Briggs, The Law of Nations 452–524 (2nd ed., 1952); A. Verdross and K. Zemanek, Völkerrecht 234–247 (4th ed., 1959); 1 Dahm, Völkerrecht 444–495 (1958); Rundstein, 16 Zeitschrift für Völkerrecht 14 ff.; Naujoks, 6 Temple Law Quarterly 451 (1932), 7 *ibid.* 176 (1953); Makarov, Allgemeine Lehren der Staatsangehörigkeit (1947).

[46] This writer developed these ideas thirty-two years ago in his study, "Zum Problem der doppelten Staatsangehörigkeit," 2 Zeitschrift für Östrecht 401–437 (1928). These ideas are today to a wide extent recognized by the literature; they are strongly emphasized by Van Panhuys, *op. cit.* 149 ff. See also Josef L. Kunz, "La Teoria General del Derecho Internacional," Academía Interamericana de Derecho Comparado e Internacional, Cursos Monográficos, Vol. II, 1952, pp. 327–444.

[47] Not necessarily to the protecting state as regards the protected state, P.C.I.J., Ser. B, No. 4 (1923); nor to the Mandatory Power with regard to the inhabitants of a territory under mandate, League of Nations Council, 1923, Official Journal, 1923, p. 604.

[48] Draft on the Law of Nationality, 23 A.J.I.L. Spec. Supp. (1929).

[49] P.C.I.J., Ser. B, No. 4 (1923).

Article 1 of the Hague Convention on the Conflict of Nationality Laws of April 12, 1930, states: "It is for each State to determine under its own law who are its nationals." [50]

Furthermore, it is necessary to distinguish clearly between "nationality" and "citizenship." Nationality is a concept of international law, citizenship a concept of municipal law. International law is only concerned with nationality, the "belonging of a person to a state." As the quoted Article 1 correctly states, sovereign states are given the competence to determine who are their "nationals," not merely their citizens. The *Nottebohm* Case turns on his nationality, not his Liechtenstein citizenship.

This determination of nationality belongs to the *"domaine réservé"* of the sovereign states; but what belongs to this exclusive jurisdiction is, as the Permanent Court of International Justice in 1923 correctly stated, "an essentially relative question; it depends upon the development of international relations." There are *no* matters at all which "by nature" belong to this reserved domain, which "can" only be regulated by municipal law. And this right of the sovereign states is, as the Court in 1923 also correctly stated, a competence given to them *by* international law. But it is incorrect, as the Court in 1923 did, to speak of matters of reserved domain as "matters not regulated by international law." They *are* regulated by international law through this attribution of competence to the sovereign states; if a federal constitution attributes to the states of the union the exclusive competence to legislate upon matters of the law of domestic relations, it cannot be said that this matter is not regulated by federal law. Because of the *"compétence de la compétence"* in favor of international law, the latter may regulate problems of nationality directly by rules of international law, rules of content, as is often done by peace treaties, treaties of cession, the minorities treaties concluded at the end of the first World War. States may conclude treaties on problems of nationality bilaterally or multilaterally.

International law gives to sovereign states the competence to determine by municipal law who are their nationals only *in principle.* They have a wide discretionary competence, but their competence is *not* unlimited; it is, indeed, in a wide and somewhat vague way, *limited* by general international law. The states may choose between many and different connections for granting their nationality; all these often conflicting principles, such as *jus soli* and *jus sanguinis,* may be legally applied by different states. It is evident that no clear repartition of human beings between the different states can result; hence, international law recognizes multiple nationality as well as statelessness.

But all these various principles, however different, have one thing in common: there is between the state granting its nationality and the person to which it is granted, *some* connection which present-day international law considers sufficient. In *this* sense, we may speak of a wide "link" necessity, as pertaining to the international law actually in force.

Hence, if a state confers its nationality on a person, in consequence

[50] 179 L. N. T. S. 89; 24 A.J.I.L. Supp. 192 (1930).

of the competence given to it by international law and *within* this widest limitation established by general international law, it executes not only an act of municipal law, but it executes an international competence given to it. That is why "this law shall be recognized by other states"; that is why "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." [51] If, on the other hand, a state confers its nationality in disregard of this broad limitation, it acts in violation of international law by conferring it, *e.g.,* on a person who has no connection at all with this state or a connection which, under present-day international law is not recognized as sufficient, such as mere acquisition of real estate in a country or compulsory naturalization. In such a case, foreign states not only need not recognize the nationality thus conferred, but may protest against the statute, demand its abolition regardless of damage suffered, and not merely refuse to recognize it in connection with diplomatic protection.

General international law may contain other rules limiting the validity of the grant of nationality; but such norms seem to have developed only with regard to fraud and with regard to the still controversial concept of abuse of rights (*abus de droit*).

(3) *The Issue of Estoppel and the "Functional Approach"*

Was not Guatemala estopped by her own acts from denying that she had recognized Nottebohm's Liechtenstein nationality? The judgment itself enumerates all these acts: granting a visa of Guatemala to Nottebohm's Liechtenstein passport; registering him in Guatemala in the Register of Aliens as a Liechtenstein national, changing his identity document in the same sense; issuance of a certificate to the same effect by the Civil Registry of Guatemala.[52] But the Court reasoned that "no proof has been adduced that Guatemala had recognized the title to the exercise of protection relied upon by Liechtenstein as being derived from the naturalization it granted to Nottebohm." A number of writers state that a case of estoppel could have been made, but that the judgment rejected the estoppel. That analysis is incorrect. Van Panhuys is right when he says that "even the principle of estoppel was applied in a functional way," [53] for the Court held that these acts of recognition by Guatemala refer only to "control of aliens," and not to diplomatic protection.

This "functional approach"—so dear to the American "Realist School" —applied throughout the judgment, has far-reaching consequences. The first is the tearing apart of the "recognition by other states," [54] for all purposes of which Article 1 of the 1930 Hague Convention speaks. Second, this "functional approach" has the paradoxical consequence that Guatemala *is,* perhaps, estopped from denying Nottebohm's Liechtenstein nationality for all other purposes except diplomatic protection. Here

[51] Hague Convention, 1930, Arts. 1, 2; Stoeck *v.* Public Trustee, [1921] 2 Ch. 67.

[52] [1955] I.C.J. Rep. 17–20. [53] *Op. cit.* 66.

[54] Clive Parry, "The Duty to Recognize Foreign Nationality Laws" (Makarov Festgabe, 1958, Vol. I, pp. 337–368), deals with a different problem, namely, the recognition of foreign nationality laws by a state in shaping its own law of nationality.

Judge Read's argumentation comes in.[55] Nottebohm's admission as a Liechtenstein national brought into play the obligations which general international law prescribes as to the treatment of resident aliens. Guatemala contended that Nottebohm, who had been admitted to Guatemala as a Liechtenstein national, had, with regard to his person and with regard to the confiscation of his property, not been treated in violation of international law. But the treatment by Guatemala made Judge Read declare: "I am bound, in such circumstances, to proceed on the assumption that Liechtenstein might be entitled to a finding of denial of justice, if the case should be considered on the merits." Hence Guatemala will be estopped from denying Nottebohm's Liechtenstein nationality for all purposes, yet, as she is not estopped, as far as diplomatic protection is concerned, Nottebohm is deprived of the *only* legal remedy he had.

(4) *Was Liechtenstein Nationality Granted to Nottebohm in Accordance with Liechtenstein Law?*

That it was not, was Guatemala's plea in bar (2 a) as a ground for the inadmissibility of the Application. The judgment merely briefly states that Liechtenstein produced a certificate of naturalization, and gives the circumstances under which naturalization was granted to Nottebohm under the Liechtenstein Nationality Law of January 4, 1934.[56] Guatemala had attacked the validity of the naturalization, particularly with regard to two points.

One point made was that Nottebohm had not lost his German nationality. The answer to this allegation is: (a) Nottebohm *did* lose his German nationality automatically under the German Nationality Law of July 22, 1913, Article 25. A certificate of the Senate of Hamburg of June 15, 1954, was produced attesting the loss of German nationality by Nottebohm in consequence of his naturalization by Liechtenstein. Under Article 2 of the Hague Convention of 1930, the question whether a person possesses German nationality must be determined in accordance with German law. (b) Guatemala was unable to prove its allegation, and the burden of proof was on the defendant.[57] (c) Under international law, the validity of a naturalization does not depend on the loss of earlier nationality.

Guatemala's other point was that the Liechtenstein law demands that the "applicant must have ordinarily resided in the territory of Liechtenstein for at least three years"; but, under the same law, "the applicant can be exempted from this requirement by way of exception." The grant of this exception is, under Liechtenstein law, by discretionary decision of the Reigning Prince, a decision which cannot be reviewed by the State Court of Liechtenstein. The Reigning Prince *had* granted the exemption. There cannot be the slightest doubt that, as far as Liechtenstein law is concerned, Nottebohm had been a Liechtenstein national since 1939, and Guatemala's contention to the contrary "fails through lack of evidence to support it."[58]

[55] [1955] I.C.J. Rep. 46–48.
[56] *Ibid.* 15–16.
[57] Mavrommatis Case, P.C.I.J., Ser. A, No. 5, p. 30.
[58] Judge Read, [1955] I.C.J. Rep. 36.

(5) *Was Liechtenstein Nationality Granted to Nottebohm in Accordance with International Law?*

That it was not, was Guatemala's plea in bar (2 b) as a ground for the inadmissibility of the application. Both parties agreed that, under Articles 1 and 2 of the Hague Convention of 1930, it is for each state to determine under its own law who are its nationals, and that 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." This agreement on Article 2 resolves nothing; neither does its invocation by the Court, as this article is in abstract terms and contains no criteria; it had been controversial in the literature. There were, of course, no treaties between Liechtenstein and Guatemala. Guatemala conceded that "there is no system of customary rules nor any rigid principles by which States are bound"; only rules concerning fraud and abuse of rights exist.[59]

(a) The issue of abuse of right (*abus de droit*).—This issue is still controversial.[60] It is not necessary to investigate it further because it is recognized that

> The doctrine . . . cannot be invoked by one State against another unless the State which is admittedly exercising its rights under international law causes damage to the State invoking the doctrine.
> . . . It is sufficient to point out that Liechtenstein caused no damage to Guatemala. . . .[61]

(b) The issue of fraud.—The issue of fraud was brought up by Guatemala in different ways. It was said that Liechtenstein had acted fraudulently in granting its nationality to Nottebohm. But, as Judge Klaestad stated, the burden of proof was on Guatemala and "no evidence has been given in support of such contention." No damage was caused to Liechtenstein; finally, Guatemala was not at war with Germany.

It was further contended that Nottebohm did not act in good faith, but fraudulently, in applying for and in obtaining the certificate of naturalization. Here again no proof was given by Guatemala. It was said that his motive was not to dissociate himself from Germany, but solely "to escape from the consequences of his German nationality under the shield of a neutral nationality." But, as the dissenting opinions and many writers state, this contention is untenable for many reasons. First, the burden of proof was on Guatemala and no such proof was given. Second, it is hardly admissible for the Court to consider the motives of Nottebohm and it is extremely difficult to prove them. Third, he *did* lose his German nationality. Fourth, it is of the greatest importance to insist upon the fact that Guatemala in October, 1939, was not at war with Germany. This was the time of the First Consultative Meeting of the Foreign Ministers of the American Republics at Panama, where a declaration of Pan American neutrality was adopted, a "Pan American Neutrality Zone"

[59] *Ibid.* 40.

[60] See Mervyn Jones, *loc. cit.* 237; Lauterpacht, *op. cit.* 162; Van Panhuys, *op. cit.* 164.

[61] Judge Read, [1955] I.C.J. Rep. 37–38.

was established, and the Inter-American Neutrality Committee was set up. Fifth, even if Nottebohm had changed his nationality for the purpose of becoming the national of a neutral state, there existed no rule of municipal or international law rendering his naturalization invalid for that reason only.

Finally, Guatemala charged later that Nottebohm's case was a "cloaking case," to use such naturalization as a cloak for the property of enemy nationals in Guatemala. But, as has been stated before, these allegations were not proved and could be considered only by granting an adjournment and joining the pleas in bar to the merits.[62]

(6) *The Judgment's Dualistic Conception of International Law*

As the case stood, it must be said that Nottebohm certainly did acquire Liechtenstein nationality, and did so validly, both under Liechtenstein and international law. Nor did the judgment adopt the allegations of Guatemala's pleas in bar (2 a and 2 b), although it is unfortunate that the Court twice,[63] rather one-sidedly, refers to allegations concerning fraud, which had not been proved by Guatemala. The judgment does not adjudicate upon the validity of the acquisition of Liechtenstein nationality by Nottebohm.[64]

The judgment approaches the issue of nationality in an orthodox way:

> It is for Liechtenstein, as it is for every sovereign State, to settle by its own legislation the rules relating to acquisition of its nationality. . . . It is not necessary to determine whether international law imposes any limitations on its freedom of decision in this domain. Furthermore, nationality has its most immediate, its most far-reaching and, for most people, its only effects within the legal system of the State conferring it. Nationality serves above all to determine that the person upon whom it is conferred enjoys the rights and is bound by the obligations which the law of the State in question grants to or imposes on its nationals. This is implied in the wider concept that nationality is within the domestic jurisdiction of the State.
>
> To exercise protection, to apply to the Court, is to place oneself on the plane of international law. . . .
>
> The naturalization of Nottebohm was an act performed by Liechtenstein in the exercise of its domestic jurisdiction. The question to be decided is whether that act has the international effect here under consideration.[65]

These dicta cannot be accepted. First, there is an obvious confusion between nationality, a concept relevant in international law, and citizenship. The question here turns on Nottebohm's nationality, not on his Liechtenstein citizenship.

Second, it is highly to be regretted that this judgment of the highest international court reveals an extreme dualistic conception of international

[62] Judge Klaestad, *ibid.* 32–33; *Ad Hoc* Judge Guggenheim, *ibid.* 58, 64–65.

[63] *Ibid.* 25, 26.

[64] *Ibid.* 20. "The present Judgment does not decide the question, in dispute between the Parties, whether the naturalization granted to Mr. Nottebohm was valid or invalid either under the national law of Liechtenstein or under international law." Judge Klaestad, *ibid.* 30.

[65] *Ibid.* 20–21.

law, a conception which is theoretically untenable and apt to lead to the denial of international law as law. The judgment, in typically extreme dualistic fashion, makes a complete separation between municipal and international law. It creates the impression that a sovereign state, in granting its nationality and in making its nationality law, acts on a purely domestic level and by its own authority,[66] and that a state's "reserved domain" has nothing to do with international law. This exclusive jurisdiction is, as the Permanent Court of International Justice correctly stated, given to the state *by* international law. The states, having the attribution of competence given to them by international law, a competence authorizing them to confer their nationality, not only their citizenship, perform an international act. That is why third states have to recognize this nationality; that is why third states have to determine the nationality of a person under the law of the state in question. But this competence granted to the states is not unlimited, but limited by what we have called the link theory in the widest sense. If, on the other hand, states enact a nationality law or confer nationality in violation of this widest limitation set by international law, they commit an international delinquency.

(7) *The Specific Link Theory*

While recognizing indirectly the validity of Nottebohm's Liechtenstein nationality, the judgment creates the specific link theory *ex novo*. This theory can be stated in the judgment's own words:

> . . . nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. 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 . . . it constitutes a translation into juridical terms of the individual's connection with the State which has made him its national.[67]

And the Court states apodictically: "this is the character which nationality must present."[68]

(8) *Critique of the Specific Link Theory*

It is, of course, true that the judgment does not create the specific link theory as a precondition for the validity of a nationality, but, always using the "functional approach," only as a sufficient title for Liechtenstein's right to exercise diplomatic protection with regard to Nottebohm, and even so only with regard to diplomatic protection exercised by an application to the International Court of Justice, and only vis-à-vis Guatemala. The Court had to consider the case of the acquisition of nationality by way of naturalization. But, in spite of the narrow basis and the narrow range of the judgment, it referred to all kinds of acquisition

[66] Mario Giuliano, a dualist, speaks, therefore, of a "mera libertà di fatto."
[67] [1955] I.C.J. Rep. 23. [68] *Ibid.* 24.

of nationality. That can be seen by the Court's mentioning the different principles, basic for the grant of nationality and necessary by the diversity of ethnographic conditions. The judgment declared that

> a State cannot claim that the rules it has thus laid down are entitled to recognition by another State unless it has acted in conformity with this general aim of making the legal bond of nationality accord with the individual's genuine connection with the State.[69]

That the genuine link is thus a functional precondition for all types of grant of nationality is further affirmed by the Court's dictum, speaking of nationality "conferred, either directly by the law or as the result of an act of the authorities."

(a) We have noted before that this basic decision was neither claimed, nor discussed by the parties. The "genuine link" theory was only indirectly discussed on behalf of Guatemala in connection with the argument of abuse of right. Here Professor Henri Rolin (Belgium), Counsel for Guatemala, the brilliant international advocate, who may be said to have won by his pleadings the *Anglo-Iranian* Case for Iran, developed this theory with his usual skill and subtlety. But it is not in this sense that the Court adopted it.

(b) Whether the genuine link theory would be desirable *de lege ferenda,* has, of course, no importance in evaluating the judgment *de lege lata.* The Court stated correctly, as it was bound to do, that "It must decide this question on the basis of international law."[70] Did it do so? With regard to this problem, the statement of Judge Read is pertinent:

> . . . I do not question the desirability of establishing some limitation on the wide discretionary power possessed by sovereign States: the right, under international law, to determine . . . who are their own nationals and to protect such nationals.
>
> Nevertheless, I am bound, by Article 38 of the Statute, to apply international law as it is—positive law—and not international law as it might be if a Codification Conference succeeded in establishing new rules limiting the conferring of nationality by sovereign States. . . .[71]

Under Article 38 of the Statute the Court is under a duty "to decide in accordance with international law," *i.e.,* in accordance with international conventions, international customary law, or, as a source, if there are no conventions and customary law, the general principles of law recognized by civilized nations; and, finally, as a mere subsidiary means for the determination of rules of international law, judicial decisions and the teachings of the most highly qualified publicists of the various nations. This wording constitutes a compromise between civil law and common law jurists.

(c) True, the "genuine link" theory was not invented by the Court. But the Court was unable to quote treaties or to show any general principles of law. There are writers (like Redslob), who have defended this

[69] *Ibid.* 23.
[70] *Ibid.* 17.
[71] *Ibid.* 39.

theory; but the sharp attack to which the *Nottebohm* Judgment has been subjected by many writers of different nations proves convincingly that this theory by no means constitutes the *communis doctorum opinio*. The Court, like Guatemala, was unable to quote a single judicial precedent in favor of the genuine link theory as constituting positive international law. It is certainly true that the genuine link theory finds expression in the practice of a number of states, such as the United States and many others.[72] It is perfectly true that many nationality laws demand previous domicile for granting nationality by way of naturalization. But it is one-sided if the Court states that "The Liechtenstein Law of January 4th, 1934, is a good example" of the genuine link theory.[73] Liechtenstein and Guatemala had agreed that dispensations from the requirements of previous domicile are frequent. As Mervyn Jones states,[74] Guatemala's own nationality law exempts from the condition of five-years' residence "Spaniards and Ibero-Americans without defining them." The Court could, therefore, have stated equally well that Guatemala's own nationality law is a good example of the dispensation from the requirement of previous domicile. There are states which allow naturalization, "as an exceptional measure" without any connection.[75] There are, finally, states granting naturalization without any condition;[76] none of these laws has been attacked as being in violation of international law. Certainly, compulsory naturalization is internationally illegal; there must be, as Sereni states, a minimum link; but "even the most tenuous links are sufficient to justify the grant of nationality to one who voluntarily applies for it";[77] or, as Van Panhuys formulates it, "the voluntary application by the applicant and the willingness of the state to grant its nationality constitute the minimum link which general international law demands."[78] The practice of states proves the statement by Judge Klaestad that "international law does not, however, require previous residence in the country as a condition for naturalization, nor does it presuppose a subsequent residence there."[79]

The Court has not been able to prove a rule of customary general international law establishing the condition of a genuine link for other forms of acquisition of nationality. It is clear that the acquisition of nationality *jure soli* may be wholly fortuitous, and a child may have no specific link at all with the country in which it has been born. On the other hand, a person may be a national of a state *jure sanguinis* without having the slightest genuine link with that country. Both types of situations are

[72] See U.N. Legislative Series: Laws Concerning Nationality, U.N. St./Leg./Ser. B 4, and Add. 1 and 2 (Sales No. 1954 V1), 1954, as well as Supplement, St./Leg./Ser. B 9 (Sales No. 59,3). We find, *e.g.* the following Cambodian Statute of 1954, Art. 21: "La nationalité cambodgienne est la lien à la fois spirituel et politique qui unit une personne physique ou morale à l'Etat cambodgien."

[73] [1955] I.C.J. Rep. 22.

[74] *Loc. cit.* 236.

[75] *Ibid.*, note 12.

[76] "A special nationality law exists in the Soviet Union in enabling aliens, whatever their nationality or race, to acquire Soviet Union citizenship. No special conditions have to be fulfilled for that purpose." Kojevnikov, in 1952 Yearbook of the International Law Commission 7 (U.N., 1958).

[77] See footnote 4 above.

[78] *Op. cit.* 156.

[79] [1955] I.C.J. Rep. 29.

very frequent and never have been regarded illegal by the practice of states. In this sense Judge Read remarks:

> In the case of many countries such as China, France, the United Kingdom and the Netherlands, the non-resident citizens form an important part of the body politic and are numbered in their hundreds of thousands or millions. Many of these non-resident citizens have never been within the confines of the home State.[80]

Ad Hoc Judge Guggenheim states:

> International law does not, for example, in any way prohibit a State from claiming as its nationals, at the moment of their birth, the descendants of its nationals who have been resident abroad for centuries and whose only link with the State which grants its nationality is to be found in descent, without the requirement of any other element connecting them with that State. . . .[81]

The Court has, therefore, been unable to quote precedents or to show a rule of customary general international law in favor of the requirement of a genuine link, particularly if we take into consideration the very stringent conditions which the Court laid down in the *Asylum* Case for the coming into existence of a rule of customary international law.[82]

(d) It is highly interesting to note—a circumstance not mentioned in the judgment—that five years prior to the *Nottebohm* Judgment, when Nottebohm brought an action against the United States for reparation as the result of the seizure of his property as that of an alien enemy, the action was settled out of court in favor of Nottebohm; it was recognized by the United States that "the evidence showed the party . . . as non-enemy."[83]

(e) There is another critique, valid also *de lege ferenda*. The Court itself states that previous or subsequent domicile in the country of naturalization is, by no means, the only proof of a genuine link:

> Different factors are taken into consideration, and their importance will vary from one case to the next: the habitual residence of the individual concerned is an important factor, but there are other factors such as the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children, etc.[84]

Thus, the *new* rule created by the Court replaces the objective criteria of nationality with vague and subjective criteria, a replacement that is bound to lead to uncertainty. Judge Read makes a strong attack:

> . . . When one considers the occasions for invoking [nationality] . . . it becomes evident that certainty is essential. There must be objective tests, readily established, for the existence and recognition of the

[80] *Ibid.* 44.

[81] *Ibid.* 56. See also Mervyn Jones, *loc. cit.* 239–240.

[82] This point is made by Judge Klaestad. [1955] I.C.J. Rep. 30.

[83] See the detailed statement in Glazer, *loc. cit.* 323.

[84] [1955] I.C.J. Rep. 22.

> status. That is why the practice of States has steadfastly rejected vague and subjective tests . . . sincerity, fidelity, durability, lack of substantial connection. . . .[85]

In the same sense *Ad Hoc* Judge Guggenheim attacks the replacement of objective by subjective considerations, points to the fact that the new rule is in no way in accordance with present practice and warns of the danger that such vague principles would open the door to arbitrary decisions.[86]

(f) As the Court, by its own authority, established the *new* rule of the "genuine link," it measured the facts of the case as against this new rule and tried to show that the conditions of this new rule are not fulfilled. The Court asked "whether the factual connection between Nottebohm and Liechtenstein in the period preceding, contemporaneous with and following his naturalization appears to be sufficiently close, so preponderant in relation to any connection which may have existed between him and any other State, that it is possible to regard the nationality conferred upon him as real and effective, as the exact juridical expression of a social fact." Let us repeat that nothing in positive international law authorized this question. The Court then goes on to say that Nottebohm had no settled abode in Liechtenstein, no interests exercised or to be exercised there, no intention to transfer all or some of his interests and business activities there; that the naturalization was lacking in the genuineness requisite to an act of such importance.[87] All these statements are legally irrelevant, because they do not refer to conditions established by positive international law.

But there are also one-sided statements in the judgment, based on motives, or referring to allegations by Guatemala, which she has failed to prove. Thus the Court states that he had always retained his connections with members of his family who had remained in Germany, and always had business connections with that country. Quite correct; but is there here anything illegal under municipal or international law? And when the Court continues that "there is nothing to indicate that the application for naturalization . . . was motivated by any desire to dissociate himself from the Government of his country," we are amazed; not only is this a statement of motives, but there is no proof that Nottebohm, while having business and family connections with Germany, was politically an adherent of the Hitler Government. The Court, in rather strange statements, says that in 1946 he attempted to return to Guatemala, "and he now complains of Guatemala's refusal to admit him"; that "There, too, were several members of his family who sought to safeguard his interests"; that he went to Liechtenstein only because of the refusal of Guatemala to admit him; that he did not in any way alter his manner of life.[88]

This extremely one-sided recital is vigorously attacked by Judge Klaestad, who correctly states that Guatemala had taken measures to

[85] *Ibid.* 46.
[86] *Ibid.* 55–56.
[87] *Ibid.* 24–26.
[88] *Ibid.* 25–26.

confiscate his property during his internment in the United States and that it was only natural that he wanted to return to Guatemala to defend his interests. The dissenting Judge recalls that Nottebohm's property was confiscated in 1949, at a time when he had been domiciled for more than three years in Liechtenstein.[89] At the time of the judgment, we may add, Nottebohm had been a Liechtenstein national for sixteen years and had fulfilled even the "genuine link" condition by a domicile in Liechtenstein for nine years. Much more detailed is the criticism by Judge Read[90] and by *Ad Hoc* Judge Guggenheim.[91]

(9) *The Special Problem of Dual and Multiple Nationality*

As the Court was unable to prove that its new genuine link theory is positive international law with regard to the case at bar, namely, with regard to an individual who, at all times of his life, had only one nationality, it took refuge in its reasonings as to the very particular and entirely different problem of dual and multiple nationality. It is, therefore, necessary to investigate this problem. The judgment[92] bases its reasoning on the problem of dual nationality, which in no way fits this case. The Court, considering the narrow basis and the narrow range of the judgment, had to deal with the acquisition of nationality by naturalization and the validity of the naturalization as a sufficient title for Liechtenstein's right to exercise diplomatic protection by way of an application to the International Court of Justice vis-à-vis Guatemala. But, in spite of this narrow range, in spite of its functional approach, the reasoning of the judgment necessarily goes farther. It speaks of all types of double nationality, *e.g.*, through a conflict of the *jus soli* and *jus sanguinis*. It speaks of a conflict of nationality not only from the point of view of the exercise of diplomatic protection through an application to the International Court of Justice vis-à-vis a particular state. The judgment is forced to admit that "In most cases arbitrators have not strictly speaking had to decide a conflict of nationality as between States"; that "courts of third States . . . have done so not in connection with the exercise of protection, which did not arise before them."[93]

The judgment states that

> International arbitrators [in cases of dual nationality] . . . have given their preference to the real and effective nationality, that which accorded with the facts, that based on stronger factual ties between the person concerned and one of the States whose nationality is involved.[94]

The judgment cites the Bancroft Treaties, and concludes wrongly that the "genuine link" theory is proved by the practice of states, arbitral and judicial decisions and the opinion of the writers. The judgment itself does not invoke any established rule of international law, but speaks only of "tendencies."[95] The judgment invokes the studies under the auspices

[89] *Ibid.* 31.
[90] *Ibid.* 44–46.
[91] *Ibid.* 56, 61–62.
[92] *Ibid.* 21–23.
[93] *Ibid.* 21–22.
[94] *Ibid.* 22.
[95] *Ibid.*

of the League of Nations and the United Nations and Articles 1 and 5 of the 1930 Hague Convention.

Has the judgment, at least with regard to the entirely different problem of dual or multiple nationality, proved the genuine link theory as a condition established by general international law? We think not. First, such problems arose in third states, not with regard to diplomatic protection, but with regard to conflicts concerning military service, with regard to treaty rights enjoyed by the nationals of a particular state, with regard to problems of conflict of laws, where nationality may play a subordinate rôle, as, *e.g.*, in common law countries the connecting factor is not nationality, but domicile; there are, therefore, no precedents for the case at bar. The quotation of the Bancroft Treaties is not pertinent, as Judge Read [96] and *Ad Hoc* Judge Guggenheim,[97] as well as many writers, point out; they do not constitute a precedent for the *Nottebohm* Case. These treaties were bilateral treaties, binding only on the contracting parties, to which neither Liechtenstein nor Guatemala belonged; they were abrogated on November 6, 1917, and cannot be regarded as reflecting the rules of general international law. The present case, as *Ad Hoc* Judge Guggenheim points out, is entirely different: Nottebohm was not a Liechtenstein national who went to Guatemala, was naturalized there and returned to Liechtenstein. Also the judgment's invocation of Articles 1 and 5 of the 1930 Hague Convention means little; the judgment does not invoke the first sentence of Article 1, nor the very different, but basic, Articles 3 and 4. In order to show a customary rule of general international law, it is necessary, as the Court did in the *Asylum* Case,[98] to point to repeated and recurrent acts; no evidence of such custom has been given.[99]

As to precedents concerning double nationality in municipal courts and international tribunals, the pattern is, by no means, so simple, but rather involved. In *Re Chamberlain's Settlement* [100] the court decided to take over Chamberlain's assets in England under the Treaty of Versailles, holding him to be a German, *i.e.*, an ex-enemy national, under German law, although he was also a native-born British subject and his German naturalization at a time when the King was at war with Germany would, under English law, normally not be recognized. At the same time, the court made it crystal clear that, should he ever return to England, he would be hanged for high treason, the court regarding him for purposes of *that* action exclusively as a British subject.

As to international tribunals occupied with the problem of dual or multiple nationality, we must distinguish:

(a) If a person has two or more nationalities, he may be regarded as its national by each of the states whose nationality he possesses. This is

[96] *Ibid.* 41. [97] *Ibid.* 59–60.

[98] [1950] I.C.J. Rep. 276 ff.

[99] The U. S.–Italian Peace Commission considered the Bancroft Treaties carefully and took them for the basis of its decision, but under completely different circumstances: for there the two nationalities claimed were those of two states bound by a Bancroft Treaty, and the time involved was a time when this treaty was fully in force.

[100] Great Britain, [1927] 2 Ch. 533.

the basic rule of Article 3 of the Hague Convention of 1930. Each state may regard him *exclusively* as its own national, regardless of any "genuine link" requirement. Hence, *each* state may exercise diplomatic protection vis-à-vis *third* states. Thus, in *William MacKenzie* v. *Germany*,[101] the United States espoused the case of a British subject, born in Canada of a British father, who *jure soli* was also an American national, who had returned to England while still a minor. No "genuine link" with the United States prior to settling in Massachusetts in 1894 could have been claimed.

(b) An exception is when the problem of dual nationality arises within a third state, and only for this hypothesis the exceptional rule of Article 5 of the Hague Convention of 1930 is made. But the same problem may arise in an international tribunal, if a state espouses the case of a dual national against a state of which he is *not* a national. The same problem may also arise, apart from diplomatic protection, if a dual national himself can bring an action against a state of which he does not possess the nationality, as was possible under the Mixed Arbitral Tribunals established by the Peace Treaties concluded after the first World War.[102] Here the relatively closer link prevailed.

(c) Further exception from the first general hypothesis is the diplomatic protection exercised by a state through the espousal of a case of a double national against a state whose nationality he equally possesses. The great majority of cases are those in which the action is brought against the state of the other nationality, with which state the individual has closer relations and which is, at the same time, the state responsible for the wrong. In such a situation the international tribunal may, as in the *Flutie* Cases and the *Flegenheimer* Case, decide that the person in question does not possess one of the two nationalities, and specifically not the nationality of the espousing state. But also in the normal case, when both nationalities are recognized as valid, the many decisions of international tribunals, as Briggs states, "have not led to a uniform rule."[103] Van Panhuys[104] has now made a careful study on this subject and has convincingly proved that there is much confusion and a great lack of clarity, but that the principle of equality will be considered as the primary rule of general international law. In this sense the basic Article 4 of the Hague Convention of 1930—an article quoted by the judgment—provides:

> A State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses.

The mere fact that a person has the nationality of two states, regardless of the question with which state he has relatively closer factual ties, prevents any of these two states from exercising diplomatic protection against the other state. This principle, reaffirmed by Article 4 of the Hague

[101] U. S.–Germany, Mixed Claims Commission, 1925. Decisions and Opinions of the Commission 628; 20 A.J.I.L. 595 (1926).

[102] See, *e.g.*, Baron Frederic de Born *v.* Jugoslavia, Hungary-Jugoslavia, Mixed Arbitral Tribunal, 1926, 3 Recueil des Décisions des Tribunaux Arbitraux Mixtes 501.

[103] Work cited note 45 above, p. 516. [104] *Op. cit.* 73–81.

Convention of 1930, has also prevailed in the practice of international tribunals. It is true that sometimes, as in the *Canevaro* Case,[105] the principle of relatively closer ties with the defendant state has also been invoked. But it can be said, with Van Panhuys, that both principles were used, that the second served only to reinforce the first, and that, under the circumstances of the case, both principles would have led to exactly the same result. To that must be added that it by no means follows from the *Canevaro* decision that Peru could exercise diplomatic protection of this double national against Italy.

It is, therefore, doubtful whether there is, even under the special hypothesis of double or multiple nationality, a general rule of international law requiring a "genuine link" as a prerequisite for the exercise of diplomatic protection. But even where the "closer link" test was applied by international tribunals, they prove nothing as to the case at bar, and this for two different reasons.

The judgment, speaking of cases of double nationality, says:

> In order to decide this question arbitrators have evolved certain principles for determining whether full international effect was to be attributed to the nationality invoked. The same issue is now before the Court.[106]

But this is obviously not the case. Nottebohm was at no time a double national. He never was a national of Guatemala. Judge Read is right in stating that "the problems presented by conflicting claims to nationality and by double nationality do not arise in this case." He is equally right in stating: "I do not think that it is permissible to transfer criteria designed for cases of double nationality to an essentially different type of relationship."[107] *Ad Hoc* Judge Guggenheim also emphasizes that

> The test of *effective connection* with respect to nationality has only been laid down for the purpose of resolving conflicts arising out of dual nationality. . . .[108]

The much-invoked Hague Convention of 1930 is *not* a convention concerning problems relating to nationality laws in general, but only a convention concerning questions relating to the *conflict* of nationality laws. Judge Basdevant long ago, in a scientific writing,[109] defended the "genuine link" theory, but he dealt there with problems of *double* nationality. Van Panhuys maintains that the Court in the *Reparation* Case referred "to the ordinary practice whereby a state does not exercise protection on behalf of one of its nationals against a state which regards him as its own national,"[110] hence to the equality doctrine. But in the *Nottebohm* case, Van Panhuys continues, "the Court openly declared itself in favor of the principle of effective nationality, but it did so in a *completely different context.*"

[105] Tribunal of the Permanent Court of Arbitration, 1912, James Brown Scott, Hague Court Reports, 1916, p. 284.

[106] [1955] I.C.J. Rep. 22.

[107] *Ibid.* 42.

[108] *Ibid.* 59.

[109] Jules Basdevant, Conflits de Nationalité dans les Arbitrages Vénézuéliens de 1903–1905 (1909).

[110] *Op. cit.* 78.

The second reason is, that even where courts of third states or international tribunals, in cases of double nationality, did apply the effective nationality test, they did so because they had to choose between two nationalities; and they did not create a precedent for the "genuine link" theory of the judgment; they did not ask for a link, "so preponderant in relation to any connection which may have existed between him and *any other* state," but only for stronger links with one or the other state, of which he possessed nationality. It is arguable that a dual national has equally strong links with both the states of which he is a national, or that he has the closest links with a third state of which he is not a national but in which he is domiciled; but all that is irrelevant. The test, as applied by courts of third states or international tribunals does not evaluate an *absolute* genuine link, but only *relatively* stronger links as between those states of which he possesses the nationality.

The judgment has hardly proved the existence of an "absolute link" rule even in cases of double nationality, having nothing to do with the case at bar. Nor has the judgment proved the genuine link as a requirement of positive international law in cases where the person involved has had at all times only one nationality. The genuine link theory, as Mervyn Jones states,[111] is a novel one, based only on the authority of the Court; the conclusion is, therefore, inescapable that the genuine link theory is not required by international law and, as applied in the *Nottebohm* Case, constitutes a clear-cut instance of judicial legislation.

II. Diplomatic Protection

General international law actually in force contains norms for the treatment of aliens, including the rule of the international minimum standard; a violation of these rules by the state of the residence of the alien constitutes an international delinquency. Under general international law, the state of nationality has the right of diplomatic protection on behalf of its nationals abroad. This is merely a right, not an international duty; how and whether the state of nationality in a concrete case will or will not exercise diplomatic protection is, as far as international law is concerned, discretionary with that state. Diplomatic protection can be exercised through the state of nationality's Embassies, Legations, Consulates, by diplomatic protests and demands; it may be exercised by coercive measures; it may also be exercised by espousing the case of its injured national before international tribunals or an international court. The state exercises *its* right and does not act as an agent or attorney of the injured private individual. Under general international law, individuals are not subjects of international law and cannot bring *their* case into an international court against another state. Statements to the contrary by defenders of human rights,[112] are not correct statements of the international law in force, but merely critiques of this law or proposals *de lege ferenda.*

111 *Loc. cit.* 242.

112 *Institut de Droit International,* 1931, 1932; H. Lauterpacht, International Law and Human Rights 27 (1950).

The Permanent Court of International Justice stated in the *Mavrommatis* Case, 1924,[113] and in the *Panevezys-Saldutiskis Railway* Case, 1939,[114] that

> the rule of international law is that in taking up the case of one of its nationals, by resorting to diplomatic protection or international judicial proceedings on his behalf, a state is in reality asserting its own right, the right to ensure in the person of its nationals respect for the rules of international law.

That is why international tribunals have held that the case, which in the prior exhaustion of local remedies was between the private individual and a local court, entirely changes its character by the espousal of the state of nationality. It becomes, then, an international procedure between states; the espousing state has a right to dispose of the claim, can compromise it, can accept less than the damage suffered by its national. The payment of indemnities is from state to state and the espousing state is not bound by international law to give the full indemnity to its national. Diplomatic protection is the right of the state; that is why a private individual cannot, through a Calvo clause, contract away the right of his state. While there are cases in which diplomatic protection can be exercised for non-nationals, the general rule is that diplomatic protection can be exercised only by a state and only on behalf of a person who was its national, both at the time of the alleged injury and at the time when diplomatic protection was being exercised.[115] The *Panevezys* Case states:

> The right [of diplomatic protection] is necessarily limited to intervention on behalf of its own national, because, in the absence of a special agreement, *it is the bond of nationality* between the state and the individual which *alone* confers upon the state the right of diplomatic protection.[116]

The *Nottebohm* Judgment approaches, first, the problem of diplomatic protection, as well as that of nationality, in an orthodox fashion, invoking cases of the Permanent Court of International Justice.[117] But, although granting the Liechtenstein nationality of Nottebohm, it decides that the exercise of diplomatic protection on his behalf is inadmissible vis-à-vis Guatemala. The international law actually in force restricts the right of diplomatic protection only where nationality does not have to be recognized, and in cases of dual nationality, where the action is brought against a state whose nationality the individual also possesses. No such condition arises in the *Nottebohm* case. That is why Judge Klaestad attacks the "severance of diplomatic protection from the question of nationality."[118] And Judge Read states: "Nationality and diplomatic protection are closely inter-related. The general rule of international law is that nationality gives rise to a right of diplomatic protection."[119] *Ad Hoc* Judge Guggen-

[113] P.C.I.J., Ser. A, No. 2, p. 12.
[114] P.C.I.J., Ser. A/B, No. 76, p. 16.
[115] Lauterpacht, *op. cit.* 183.
[116] P.C.I.J., Ser. A/B, No. 76, 1939, p. 16.
[117] [1955] I.C.J. Rep. 24.
[118] *Ibid.* 30.
[119] *Ibid.* 46.

heim treats this problem clearly: There are examples of situations in which the grant of nationality is invalid with the direct consequence that it cannot form the basis of diplomatic protection; none of these situations applies here.[120] As to other situations, a rule of law would have to be proved and it has not been proved. There is no precedent vis-à-vis a state of mere domicile.

The judgment adds, therefore, a new restriction on a state's right to exercise diplomatic protection and this new restriction has no basis in international law. It is, as Mervyn Jones says, "a *novel* principle," an "entirely *new* theory of international claims."[121] And the *Lotus* Judgment stated: "Restrictions upon the independence of states cannot be presumed."

The extreme dualistic conception, upon which the *Nottebohm* Judgment is based, has separated municipal and international law. The functional approach which the judgment uses has severed the conferring of nationality from its recognition by foreign states, has severed nationality from diplomatic protection, has severed the different forms of diplomatic protection, and has questioned the recognition of nationality as a sufficient title for diplomatic protection vis-à-vis different states. By severing nationality from the closely interrelated diplomatic protection, "diplomatic protection has been diluted," "the decision represents a departure from international tradition, and facts of the case do not warrant such a departure."[122]

The judgment severs not only nationality as the link for the exercise of diplomatic protection by the state. It also severs nationality as the link between the individual and the law of nations. It deprives Nottebohm of the *only* legal remedy he had, sixteen years after his acquisition of Liechtenstein nationality, with the result that no justice is being done to him either on the national or international level.

The Judgment (Second Phase)—De Lege Ferenda

I. General Remarks

It must be stated *de lege lata* that the *Nottebohm* Judgment is not based on international law actually in force. Judge Lauterpacht has stated that the Court must apply the law in force; it is not its function deliberately to change the law so as to make it conform with its own views of justice and expediency; and he speaks of the "hazardous course of judicial legislation."[123] Even common law courts, as Mr. Justice Holmes stated, can change the law only "interstitially." On the other hand, it is recognized that the International Court of Justice has an important task to fulfill in developing international law. Where is the borderline between development of international law and judicial legislation? Judge Lauterpacht gives four examples of judicial legislation: relying on general principles of law, relying on parallel developments, absence of a generally accepted

120 *Ibid.* 53–54.
121 *Loc. cit.* 231, 243.
122 Glazer, *loc. cit.* 314.
123 *Op. cit.* 75, 19.

rule of international law, and a certain flexibility of international law.[124] None of these examples applies here.

Most writers speak of the *Nottebohm* Judgment as of a "novel" or "entirely new" doctrine; even those who approve the judgment call it "revolutionary." Professor Oliver Lissitzyn and Mr. Loftus Becker agreed that "the Nottebohm decision could be called fairly unpredictable." [125] This is dangerous for the Court's own activity, since it does not have very much to do. Communist states and new Asian and African states do not go to the Court. It is usually the European states which resort to the Court. But Judge Lauterpacht has asserted that

> an International Court which yields conspicuously to the urge to modify the existing law may bring about a drastic curtailment of its activity. Governments may refuse to submit disputes to it.[126]

And so devoted an adherent of international judicial procedure as Mr C. Wilfred Jenks states that

> one of the main qualities in a Court likely to make it attractive to governments is not . . . the extent to which they are attempting to develop the law imaginatively on constructive lines, but the predictability of the Court as a whole. . . . There must exist a reasonable degree of confidence that the Court will follow those rules of law, right or wrong, which have hitherto been regarded as usually accepted. . . . When an international court suffers from a certain lack of predictability, compulsory jurisdiction is likely to suffer.[127]

In evaluating the *Nottebohm* Judgment *de lege lata,* the eventual desirability of the new norm created by the judgment does not enter. But in evaluating the judgment *de lege ferenda,* it is exactly this desirability, together with the willingness of states, which has to be considered. Although the judgment is binding only for the specific case on the parties, and *stare decisis* is no part of international law actually in force, naturally the prestige of the Court will give to its judgment a high degree of persuasive authority. States have followed in their practice the line laid down in a judgment of the Court. But, from a legal point of view, the judgments do not constitute international law. As Judge Lauterpacht has stated, "they are not binding upon *states,* nor are they *binding* upon the Court." [128] Whether the new doctrines, on which the *Nottebohm* Judgment is based, will become international law, depends entirely on the practice of states.

II. Nationality and Diplomatic Protection

There is no doubt that it might be desirable to achieve a clean distribution of the world's population among the existing sovereign states and

[124] *Ibid.* 155–220.

[125] Proceedings, Second Summer Conference on International Law, Cornell Law School, 1958, pp. 146–147. [126] *Op. cit.* 76.

[127] *Institut de Droit International,* Annuaire, 1957, Vol. I, pp. 169–171. See also E. Giraud, *ibid.* 272–273. [128] *Op. cit.* 22.

thus avoid all conflicts of dual or multiple nationality as well as of statelessness. But in order to achieve that, it would be necessary for international law to regulate the problems of nationality, not by a mere attribution of competence to the sovereign states, but directly by substantive rules establishing uniform principles for the grant of nationality. Even that, as this writer stated thirty-two years ago, would not be sufficient. For even if a universal treaty to this effect were concluded and ratified, the difference of languages and the difference of interpretation by municipal courts would soon again introduce causes of conflict. It would, therefore, be necessary also to create a Supreme International Court of Nationality to keep the application of the universal treaty uniform. But the achievement of such a universal treaty is not politically possible. Much that would be desirable *de lege ferenda* cannot be done. It would, for instance, be highly desirable to end the chaotic status of American divorce laws by a uniform Federal statute on divorce; but it cannot be done. The *Nottebohm* Judgment itself recognizes the political impossibility because of "the diversity of demographic conditions."[129] But it lays down the new rule that every principle for the grant of nationality, however diverse, must embody the genuine link doctrine as laid down by the Court.

Such a development of international law seems to us entirely undesirable. First, it is not always possible, under the conditions of modern life, to determine with what state a person has a factual connection, absolutely preponderant in relation to any connection which may have existed between him and any other state. Second, the important link of nationality which, under present international law, is a legal link, imperiously demands objective and secure criteria, whereas the "genuine link doctrine" introduces purely subjective criteria, shifting from case to case, and would therefore necessarily lead to a situation of uncertainty as to nationality which would be undesirable from all points of view.

It is, of course, technically true that the judicial legislation concerning the genuine link theory, introduced by the *Nottebohm* Judgment, does not touch nationality as such, but only nationality as a sufficient title for Liechtenstein to exercise diplomatic protection, and that only by an application to the International Court of Justice, and even so only vis-à-vis Guatemala. But as the inadmissibility of Liechtenstein's application is not based on any special reason which Guatemala may have had for refusing to recognize the effects of the nationality in the field of diplomatic protection, but exclusively on the allegedly missing "genuine link" in granting nationality by naturalization, the result is practically the same. In spite of the Court's dualistic conception and functional approach, the judgment is exposed to a wide interpretation as to the other effects of nationality, "for example, treaty rights enjoyed by the nationals of a particular State in regard to monetary exchange, establishment and access to municipal courts of a third State, etc."[130] The Nottebohm legislation would not only introduce the highest degree of insecurity and uncertainty

[129] [1955] I.C.J. Rep. 23.

[130] *Ad Hoc* Judge Guggenheim, *ibid.* 63.

into the problem of nationality, but also tear apart the unity of the institution of nationality.

The International Court of Justice has, by its judgments, made two additions to the law of diplomatic protection. The case on *Reparations for Injuries Suffered in the Service of the United Nations*[131] brought an extension of the right of diplomatic protection from states to international organizations. While this approached international legislation, it can be fully justified as falling under the legitimate task of the Court to develop international law. For the Court reasoned not only by analogy, but on the basis of the positive international law of the U.N. Charter, bringing out the implied powers of the United Nations. There is little doubt that this decision is on the way to becoming international law. But the *Nottebohm* Judgment diluted the long-established right of diplomatic protection by states. Not only is this judicial legislation *de lege lata* in complete contradiction to the rule of international law that nationality should not be dissociated from diplomatic protection in cases where the protected person has only *one* nationality, but it is also undesirable *de lege ferenda.*

True, it could be said that it would be desirable in the interest of peaceful relations to prevent states from exercising diplomatic protection on behalf of persons who are not really their nationals. It is also true that the exercise of diplomatic protection can and has been abused by powerful states vis-à-vis weaker states. Yet the necessity of retaining the institution of diplomatic protection is universally recognized and is today, perhaps, more important than ever. The growing international connections, the mass migrations from state to state, the activity of investment and establishment abroad, often furthered by the state also in states where there is, as in Communist states or the new African and Asian states, less legal security for foreign persons and assets, have led writers even to consider the question whether municipal law should not create a legal duty for the state to exercise diplomatic protection on behalf of its nationals.[132]

The judicial legislation laid down by the *Nottebohm* Judgment restricts the right of diplomatic protection by states without any basis in positive international law and severs nationality as the principal link from diplomatic protection. Nor can it be said that the *Nottebohm* doctrine is "progressive" in the sense of enhancing the individual's right to protect himself independently of his state. For the judgment stands not only on the orthodox viewpoint that a state exercises its own right through diplomatic protection, but enhances this exclusive right of the state by its doctrine. On the other hand, it is true that, under general international law, the individual has no standing in an international court; that, in spite of the emphasis by the United Nations on "Human Rights," international law, as it is today, and international organization are still inadequate to give

[131] [1949] I.C.J. Rep. 174; 43 A.J.I.L. 589 (1949).

[132] See Karl Doehring, Die Pflicht des Staates zur Gewährung diplomatischen Schutzes (1959).

direct international protection to individuals. Private persons must rely on diplomatic protection by their states. Hence, the severance of nationality from diplomatic protection, as nationality is the link between an individual and the law of nations, is of far-reaching consequence. Under its novel doctrine the *Nottebohm* Judgment declared the application of Liechtenstein inadmissible at a time when Nottebohm had been a Liechtenstein national for sixteen years and had had his permanent domicile in Liechtenstein for nine years. As there is no other state in the world that could exercise diplomatic protection on behalf of Nottebohm, the latter, for all practical purposes, has been rendered stateless. Is that progressive? Is it in accordance with Article 15 of the Universal Declaration of Human Rights, which, although containing no legal norms, lays down moral principles that "everyone has the right to a nationality"? Is that in accordance with the efforts of the United Nations? [133] The *Nottebohm* Judgment has not only precluded the Court from the possibility of adjudicating the important issue of war confiscation measures, but it has also deprived Nottebohm of the only legal remedy he had, has made him practically stateless, and has prevented justice from being done to him, either on the municipal or international level. That cannot be a proper administration of international justice.

It must also be taken into consideration that the *Nottebohm* Judgment declared Liechtenstein's application inadmissible vis-à-vis a mere state of domicile. This brings up serious problems *de lege ferenda.* Latin American states, disappointed with the *Asylum* Case [134] and the *Haya de la Torre* Case,[135] should approve the *Nottebohm* Judgment. Does this judicial legislation not look like abolishing diplomatic protection in behalf of aliens domiciled in the country, a goal for which, by way of the Calvo clause, they have aimed, at least, to make the individual renounce the invocation of diplomatic protection by his state. Shall there be no more diplomatic protection on behalf of nationals domiciled abroad for business purposes? Today, when the states of nationality are no longer allowed to exercise diplomatic protection on behalf of nationals abroad through coercive measures, involving the use or threat of force, or under the Charter of the Organization of American States, not even through non-military reprisals, such a rule would be in contradiction with the maintenance of international order and involve the danger of anarchy. Such a rule would be undesirable not only from the point of view of the state of nationality and of the national involved, but also from a world point of view and from the point of view of the underdeveloped countries themselves. For all these reasons, Seidl-Hohenveldern hopes that the practice of states will not follow the *Nottebohm* Judgment.

Not only is the new norm, on which the judgment is based, undesirable *de lege ferenda,* but it is also irreconcilably in conflict with the policies of

[133] Convention on Refugees, 1951; Convention on Stateless Persons, 1954.
[134] [1950] I.C.J. Rep. 266; 45 A.J.I.L. 179 (1951).
[135] [1951] I.C.J. Rep. 71; 45 A.J.I.L. 781 (1951).

a number of states which, up to now, have not been changed, either as far as the granting of nationality or the claim to exercise diplomatic protection on behalf of their nationals is concerned. There are many states which do not demand a "genuine link" as a precondition for granting nationality by naturalization. There are many states which consider as their nationals individuals born by mere chance as their nationals *jure soli,* and who for a long time have had no connection with the country of their birth. There are many states which consider as their nationals persons whose parents have lived for centuries abroad and are nationals only *jure sanguinis.* There are, as Mervyn Jones states, "hundreds of thousands of British subjects in foreign countries who have never seen their native land and who, from generation to generation have acquired British nationality by descent." [136] There are millions of "overseas Chinese," and so on. Practically all states regard as their nationals even those nationals who have been domiciled abroad for a long time for carrying on business activities, like Nottebohm in Guatemala, and claim to exercise diplomatic protection on their behalf.

Judgments of the International Court of Justice are binding in the specific case on the parties concerned, but do not constitute international law. But they may become international law by the practice of states through custom or treaty. On the other hand, the practice of states may act in such a way as to preclude the norm laid down in a judgment from becoming international law. Thus the rule laid down in accordance with international law actually in force by the *Lotus* Case,[137] which was not liked by a number of maritime states and by a part of legal opinion, was changed by the Brussels Convention of 1952,[138] and this change has now also entered the 1958 Geneva Convention on the High Seas.[139] The same may happen to the *Nottebohm* Judgment. Mervyn Jones suggests that "in future Claims Conventions the prudent draftsman will endeavor to limit, to define or even perhaps to exclude the link theory." [140] It should be added here *de lege ferenda* that the genuine link theory would not only bring about uncertainty, but would make proof by the complainant state much more intricate and difficult, whereas the application may be held inadmissible, as in the *Nottebohm* Case, under the mere attack by the defendant state, even if it did not ask for it, and even without having furnished proof.

The continuing criticism of the *Nottebohm* Judgment by writers furnishes ample proof that the genuine link doctrine is far from corresponding to the *communis doctorum opinio.* Nor has the genuine link doctrine been applied by later international decisions. It is particularly necessary to say a few words with regard to the decision in the case of *Florence*

[136] *Loc. cit.* 239.

[137] P.C.I.J., Ser. A, No. 10 (1927).

[138] International Convention for the Unification of Certain Rules Relating to General Jurisdiction in Matters of Collision or Other Incidents of Navigation, Brussels, May 10, 1952, 53 A.J.I.L. 532 (1959).

[139] Geneva Convention on the General Regime of the High Seas, 1958, 52 A.J.I.L. 842 (1958).

[140] *Loc. cit.* 243.

Strunsky-Mergé v. *Italy,*[141] rendered on June 10, 1955, by the United States–Italian Conciliation Commission, established under the Peace Treaty with Italy of 1947; for this decision, rendered after the *Nottebohm* Judgment, is often quoted as confirming the "genuine link" doctrine established by this judgment. But Professor de Yanguas Messía (Madrid), the "Third Member," *i.e.,* the deciding judge in this case, himself told this writer at the 1959 Neuchâtel Session of the *Institut de Droit International,* that this decision had nothing to do with the *Nottebohm* Judgment, as the situation before the Commission was entirely different, namely, a situation of dual nationality. A later decision, rendered by the same Italian–United States Conciliation Commission on September 20, 1958, in the case of *United States ex rel. Flegenheimer* v. *Italy,*[142] limited the link theory of the *Nottebohm* Judgment to cases of dual nationality and beyond these limits repudiated it *expressis verbis,* stating:

> There does not in fact exist any criterion of proven effectiveness for disclosing the effectiveness of a bond with a political collectivity, and the persons by the thousands who, because of the facility of travel in the modern world, possess the positive legal nationality of a State, but live in foreign States where they are domiciled and where their family and business center is located, would be exposed to non-recognition, at the international level, of the nationality with which they are undeniably vested by virtue of the laws of their national State, if this doctrine were to be generalized.[143]

III. The Genuine Link Doctrine and the Nationality of Ships

The "genuine link" legislation of the *Nottebohm* Judgment may, by analogy, be extended to problems of the nationality of corporations and of the nationality of ships. The rule concerning the nationality of ships is that international law gives to each state the competence to attribute national character to a ship through registration and documentation; international law traditionally has left each state free to determine under what conditions it will register and thereby confer its nationality upon a ship.[144] There are, therefore, a great variety of criteria. While the legislation of some maritime states has required as conditions, *e.g.,* that the ship must have been built in the state, that all or a prescribed part of the crew must be nationals, that the ship must be wholly, or as to a prescribed part, owned by nationals and so on, there are states which make it extremely easy and inexpensive to get ships registered, to become national ships of the state in question and to acquire the right to fly the flag of that state. These are the so-called "flags of convenience." Among these

[141] Rivista di Diritto Internazionale, 1956, pp. 70–90; digested in 50 A.J.I.L. 154 (1956).

[142] It is interesting to note that the "Third Member," *i.e.,* the deciding judge, in this case was Professor Georges Sauser-Hall (Switzerland), who had also been Counsel to the Agent of Liechtenstein in the Nottebohm case.

[143] 53 A.J.I.L. 944 at 957 (1959).

[144] U.N. Laws concerning the Nationality of Ships, St./Leg./Ser./B/5 and Add. 1, 1956, I; Supp., St./Leg./Ser./B/8. 1959, pp. 113–134.

states Liberia and Panama are outstanding. It is certainly amazing that at the end of 1957 these two states had more than fifteen percent of world tonnage under their flag, that the United States flag-of-convenience fleet now has over six million gross tons, which correspond to thirty-six percent of all American privately-owned, or five percent of world merchant tonnage. But, in a similar way, a great many American corporations are incorporated in Delaware and are, therefore, Delaware corporations, although otherwise they have nothing to do with that State.

American high-cost producing shipping owners make use of "flags of convenience" primarily to cut their costs to about half, and thus to meet European competition. European shipowners attack "flags of convenience," because this system deprives them to a great extent of the economic advantage which they otherwise would have over their American competitors. This explains why the United States Government supports flag-of-convenience shipping, whereas European maritime nations file diplomatic protests against this practice; why American international lawyers are, generally speaking, in favor of, and European international lawyers against this practice. The states of the flag of convenience have, of course, a fiscal interest in the preservation of this practice; labor, on the other hand, combats it for its own reasons.[145]

International law gives to each state the competence to confer its nationality on a ship as it pleases. This nationality has to be recognized by other states. The state of the flag alone has competence to extend its protection to the ships of its flag, regardless of the nationality of its owners, and to control its movements and activities. Just as the enemies of flags of convenience charge that such states have no adequate laws and machinery to prescribe and control efficient building, safety, internal conditions, guarantees for employed personnel,[146] thus they say that these states, because of the extreme smallness of their consular corps, are unable to protect their ships adequately.

In this long-standing economic battle for and against the flags of convenience, the International Law Commission of the United Nations took a stand against the flag-of-convenience fleet, by introducing into the corresponding article of its Report on the High Seas in 1956—after the *Nottebohm* Judgment had been rendered—the "genuine link" doctrine as to nationality of ships in exactly the same fashion as the *Nottebohm* Judgment created it. After having stated that "Ships have the nationality of the state whose flag they are entitled to fly," the draft article continued: "Nevertheless, for purposes of recognition of the national character of the ship by other states, there must exist a genuine link between the state and the ship." [147] We have here the same dualistic conception of

[145] See "The Effect of U. S. Labor Legislation on the Flag of Convenience Fleet," 69 Yale Law J. 498–530 (1960).

[146] It is from this angle that the International Labor Organization was occupied with this problem.

[147] U.N. General Assembly, 11th Sess., Official Records, Supp. No. 9 (A/3159); 51 A.J.I.L. 154 at 168 (1957).

international law, the same distinction between municipal validity and recognition by other states, the same complete lack of definition of "genuine link," the same severance of nationality and protection.

As this draft was the principal basis of discussion at the 1958 Geneva Conference on the Law of the Sea, it was exactly this requirement of the genuine link which led to lengthy debates at Geneva. Finally, Article 5 of the 1958 Convention on the High Seas states, according to traditional international law, that

> Each state shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the state whose flag they are entitled to fly. There must exist a genuine link between the state and the ship; in particular, the state must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.[148]

As in the debates of the International Labor Organization, and at the Geneva Conference, Europeans spoke mostly in favor of, Americans against, this "genuine link" requirement. In this respect it is particularly interesting that Mr. Van Panhuys, so sharp a critic of the *Nottebohm* Judgment, at Geneva was emphatically in favor of the genuine link theory as applied to the problem of the nationality of ships. In the scientific evaluation of the 1958 Geneva Convention we see Europeans[149] defending the genuine link theory, whereas we now have the massive attack by Professor Myres McDougal and his associates,[150] who see in the genuine link requirement an "ill-conceived innovation," creating "dangers for the free and ordered use of a great common resource on the basis of equality and certainty of expectations, which [dangers] can hardly be exaggerated,"[151] and who ask for the deletion of the last sentence of Article 5 of the 1958 Geneva Convention on the Law of the Sea.

The same issue, as Professor Jessup states,[152] "nearly disrupted the inaugural meeting of the U.N. Inter-Governmental Maritime Consultative Organization in London, January, 1959," because Liberia and Panama were not elected to the Maritime Safety Committee, where certain places were reserved for "the largest ship-owning nations." The Assembly has asked the International Court of Justice for an Advisory Opinion on the question whether the committee was constituted in accordance with the Convention for the Establishment of the Organization.[153]

[148] U.N. Doc. A/CONF. 13/L. 53; 52 A.J.I.L. 842 at 843 (1958).

[149] Max Sørensen, The Law of the Sea (International Conciliation, No. 520, 1958); see also Philip C. Jessup, "The United Nations Conference on the Law of the Sea," 59 Columbia Law Rev. 234–268 at 255–257 (1959).

[150] Myres S. McDougal, William T. Burke and Ivan A. Vlasic, "The Maintenance of Public Order at Sea and the Nationality of Ships," 54 A.J.I.L. 25–116 (1960).

[151] *Ibid.* 41.

[152] *Loc. cit.* above, note 149.

[153] On June 8, 1960, the Court handed down its Advisory Opinion, in which it held that the Maritime Safety Committee was not constituted in accordance with the Convention establishing the Inter-Governmental Maritime Consultative Organization, and that, under Article 28(a) of that convention relating to the constitution of the Committee, the largest ship-owning nations were those having the largest registered ship tonnage.

The international law of nationality and the international law concerning the nationality of ships could certainly bear improvements. But the adoption of the "genuine link" requirement is undesirable and does not constitute progress. For, as far as individuals are concerned, this requirement separates nationality from its recognition by other states, replaces a clear and objective criterion by vague and subjective criteria, severs nationality from diplomatic protection, dilutes diplomatic protection, contains no definition, makes it possible to deprive an individual of the only legal remedy he has, threatens millions of persons with statelessness, makes the diplomatic protection of nationals domiciled abroad for business activities questionable, and thus endangers business and investment activity abroad, tears apart the unity of the institution of nationality and separates the different aspects of diplomatic protection. Its over-all effect would, therefore, be international uncertainty and insecurity. The *Nottebohm* Judgment's judicial legislation *stricto sensu* has, up to now, no chance of becoming international law; the municipal legislation and practice of many states is opposed to it, writers continue to attack it, and a recent international decision has expressly rejected it.

The problem of nationality of ships is, at the best, analogous to, but by no means identical with, that of the nationality of individuals from many points of view. They differ legally also in this important aspect: whereas international law knows dual or multiple nationality of individuals, every ship must have one nationality. Positive international law knows no genuine link theory; but it has evolved the test of the relatively stronger ties between two states exclusively in the situation of dual nationality, where a choice between two nationalities has to be made. Such a problem cannot arise with regard to the nationality of ships. The genuine link requirement here is also undesirable: it replaces a clear and objective criterion by vague and subjective criteria, severs nationality of a ship from recognition by other states, severs granting of nationality to a ship from protection, contains no definition, gives third states a seeming right to determine subjectively and unilaterally whether the genuine link requirement is fulfilled, threatens thereby to make ships stateless and unprotected and endangers international certainty in the use of the high seas. But, contrary to the *Nottebohm* Judgment's judicial legislation *stricto sensu*, the genuine link theory with regard to the nationality of ships has found entrance into the practice of states (International Law Commission, 1958 Geneva Convention on the Law of the Sea, the U.N. Inter-Governmental Consultative Maritime Organization, acceptance by a number of governments and writers). But here it also remains controversial: contrary views of governments, the Advisory Opinion of the International Court, adverse comments by writers. Professor McDougal's frontal attack is, of course, at the same time, a strong attack on the *Nottebohm* Judgment.