

# THE RELATIONS OF NATIONALITY IN PUBLIC INTERNATIONAL LAW\*

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## I. INTRODUCTION

THE object of the study presented here is to estimate the role which the concept of nationality, and the rules of municipal law in this sphere, have *de lege lata*. It is apparent that a high proportion of the literature on 'nationality' is concerned with municipal law rules (*simpliciter*, or in relation to questions in the conflict of laws) and the important issues of multiple nationality and statelessness arising from the operation of the separate systems of nationality laws. Comparatively small effort has been devoted to the public international law aspects of the subject<sup>1</sup> and in any case treatments in the context of public international law commonly have a rather tangential character. Thus the orthodox approach, which will be scrutinized later on, concentrates on elaboration of municipal rules and affirmation of the general absence of rules of public international law. This type of treatment regards acquisition and loss of nationality as the crux of the matter and fails to place the subject in the larger contexts of international law, for example, the law relating to neutral rights and duties in time of war or armed conflict. The essence of the matter may be expressed more simply. The specialist literature and many textbooks of international law are replete with statements that nationality is a question within the domestic jurisdiction of States, whilst throughout international law there are rules depending on the concept of nationality. What is, *prima facie*, a fundamental structural flaw may puzzle the thoughtful student and provide the cynic with capital. Moreover, recent concentration on the solution of the problems of multiple nationality and statelessness, and the

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<sup>1</sup> This is not to denigrate in any way the work of individual writers who have tackled the subject from this point of view. However, the leading works under the appropriate rubric are by no means wholly concerned with public international law as such. Makarov, *Allgemeine Lehren des Staatsangehörigkeitsrechts* (2nd ed., Stuttgart, 1962), is not primarily concerned with the international law aspects. Of considerable value, although conservative in their conclusions, are van Panhuys, *The Role of Nationality in International Law* (Leyden, 1959), and Weis, *Nationality and Statelessness in International Law* (London, 1956). See further, Weis, *Staatsangehörigkeit und Staatenlosigkeit im gegenwärtigen Völkerrecht* (Berlin, 1962), 28 pp., a lecture, and Schätzel, *Internationales Recht, III, Internationales Staatsangehörigkeitsrecht* (Bonn, 1962). Mention ought also to be made of Mervyn Jones, *British Nationality Law and Practice* (1st ed., 1947), pp. 1-26; (revised ed., 1956), pp. 1-50 (in this article references are to the revised edition).

spate of comment on the *Nottebohm* decision,<sup>1</sup> developments which are valuable in themselves, have further emphasized the perspective of the abnormal. Typically perhaps, the fact that general international law often fails to provide neat solutions to special problems is taken as evidence of a complete or nearly complete absence of rules. Peripheral (although in themselves important) difficulties are allowed to infect the whole subject. And, further, the variety and complexity of the problems are not always appreciated: a fact to be explained by the readiness of writers to lean on the ideogram 'nationality' in lieu of an examination of how particular rules work. It will be shown later just how much caution is necessary in deducing general rules from the *Nottebohm* decision.

The first task will be to examine the basis in authority of the doctrine of the freedom of States in matters of nationality. Having done this it will be necessary to consider the logical implications and general legal relations of the doctrine of autonomy, a proceeding which will include a brief examination of the role of nationality in international law, and consideration of questions of principle concerning freedom in applying rules of law, systems of accommodation resting on good faith and comity, the effect of certain general principles of international law and the content of the reserved domain of domestic jurisdiction. To complete the survey of the general relations of the principle of autonomy reference will be made to the opinions of governments (and in this connexion the Convention concerning Certain Questions Relating to the Conflict of Nationality Laws will receive consideration) and also to the opinions of jurists. There will then follow a survey, of modest proportions, of the nationality rules commonly adopted by States and an essay in evaluating the general principles to be found in State legislation, with particular reference to the concept of effective link. The next stage of the work involves an examination of a great variety of specific problems, including questions concerning States without nationality legislation, cases of State succession and the problem of diplomatic protection, with a view to establishing the logical necessity of having objective criteria in the field of nationality and the extent to which the principle of the effective link provides appropriate solutions on the international plane. The subsequent section, on presumptions and policy rules on the international plane, is concerned with certain difficult problems the solution of which has been made the more difficult by the introduction of general prescriptions and presumptions of doubtful legal status. However, it is thought that the doctrine of effective link provides some sensible results when applied to these problems. The next two sections are devoted to two general aspects of the subject-matter taken as a whole, viz., nationality considered as a status and the

<sup>1</sup> See below, pp. 313, 349-64.

functional approach to nationality. The final section consists of a study of the doctrine of effective link in the light of the Judgment in the *Nottebohm* case (Second Phase), and leads on to an examination of more recent developments relating to the effective link doctrine. The primary object of the study is to establish that, as a general principle, the effective link provides the only logical approach to many problems of nationality law and avoids the inconveniences and structural flaws in the system of law which flow from the principle of freedom in nationality matters.

## II. *The doctrine of the freedom of States in matters of nationality*

As special rapporteur of the International Law Commission,<sup>1</sup> the distinguished American jurist, Manley O. Hudson, expressed the view: 'In principle, questions of nationality fall within the domestic jurisdiction of each State.' This proposition already had high authority behind it and there is no doubt that it expresses the 'accepted view'. However, before its impressive antecedents and later repetitions are related, it is as well to notice that Hudson's proposition is inherently ambiguous.

Statements to the effect that municipal law governs nationality appear for the first time in the literature in the late nineteenth century,<sup>2</sup> but the significance of these is perhaps the less because the writers were still able to regard awkward conflicts of nationality laws as exceptional<sup>3</sup> and they were not concerned with the effect of what seemed a self-evident proposition, a description of the normal state of affairs, on the other institutions of the law. The impetus to the wide acceptance of the principle enunciated by Hudson was given by the dictum of the Permanent Court in the *Advisory Opinion concerning the Tunis and Morocco Nationality Decrees*:<sup>4</sup>

'The question whether a certain matter is or is not solely within the domestic jurisdiction of a State is an essentially relative question; it depends upon the development of international relations. Thus, in the present state of international law, questions of nationality are, in the opinion of this Court, in principle within this reserved domain.'

This statement appears in an Advisory Opinion concerned with the competence of the Council of the League of Nations and not with the relations of nationality in general international law. On the other hand, the dicta of the Court are no less influential than the *rationes decidendi*<sup>5</sup> of

<sup>1</sup> A/CN.4/50, *I.L.C. Yearbook* (1952-II), p. 3, at p. 7. See also Hudson, *Cases on International Law* (2nd ed., 1936), p. 201; (3rd ed., 1951), p. 138.

<sup>2</sup> Bluntschli, *Droit international codifié* (1874), sec. 364; Cogordan, *La Nationalité au point de vue des rapports internationaux* (2nd ed., 1890), pp. 7 et seq.; Rivier, *Principes du droit des gens* (1896), vol. 1, p. 303. See also Weiss, *Traité élémentaire de droit international privé* (2nd ed., 1890), pp. 7 et seq.

<sup>3</sup> Cf. the treatment in Westlake, *International Law, I, Peace* (1910), pp. 231-3.

<sup>4</sup> (1923), Series B, No. 4, p. 24.

<sup>5</sup> Strictly *state decisis* does not apply to the Court, but the relative strength of pronouncements must still vary considerably. It is inelegant of course to speak of *ratio decidendi* in respect of the advisory jurisdiction, but the logical effect is the same.

its pronouncements, and Article 15, paragraph 8, of the Covenant refers to 'a matter which by international law is solely within the domestic jurisdiction of' the party relying on the reservation and so relates the criterion of competence to general international law. Moreover, the passages before and after the statement quoted emphasize the concern with 'international law' as such.

Assuming that, *prima facie* and regarded in isolation, the dictum of the Court cannot be confined to the issue of constitutional competence of an organ of the League, inquiry into its intrinsic significance must be made. Two points arise. In the first place the passage states that questions of nationality are 'in principle within this reserved domain'. The passage which precedes the one usually quoted reads:

'The words "solely within the domestic jurisdiction" seem rather to contemplate certain matters which, though they may very closely concern the interests of more than one State are not, in principle, regulated by international law. As regards such matters, each State is sole judge.'

The passage which follows the *locus classicus* reads:

'For the purpose of the present opinion, it is enough to observe that it may well happen that, in a matter which, like that of nationality, is not, in principle, regulated by international law, the right of a State to use its discretion is nevertheless restricted by obligations which it may have undertaken towards other States. In such a case, jurisdiction which, in principle, belongs solely to the State, is limited by rules of international law. Article 15, paragraph 8, then ceases to apply as regards those States which are entitled to invoke such rules. . . .'

Further on the Opinion states that:

'Article 15, in effect, establishes the fundamental principle that any dispute likely to lead to a rupture which is not submitted to arbitration in accordance with Article 13 shall be laid before the Council.'

And a paragraph later<sup>1</sup> it continues:

'It must not, however, be forgotten that the provision contained in paragraph 8 . . . is an exception to the principles affirmed in the preceding paragraphs and does not therefore lend itself to an extensive interpretation. This consideration assumes especial importance in the case of a matter which, by international law, is, in principle, solely within the domestic jurisdiction of one Party, but in regard to which the other Party invokes international engagements which, in the opinion of that Party, are of a nature to preclude in the particular case such exclusive jurisdiction.'

Sufficiently obvious is the reiteration of the words 'in principle' and a question arises as to their precise effect. In at least one of the contexts quoted above it may mean simply that there is a position under general international law which may be modified by 'obligations . . . undertaken towards other States'. Presumably agreements are referred to here: but

<sup>1</sup> *P.C.I.J.*, 1923, Series B, No. 4, p. 25.

the formula can easily have a circular form since obligations may be undertaken or incurred in a number of ways, including acquiescence, or active participation, in the formation of rules of customary law. In several of the passages in question, the phrase 'in principle' seems to echo the theme of competence of an organ of the League within the Covenant and the application of Article 15, paragraph 8. A provisional conclusion (based on the assumption of principle) as to a category being within the reserved domain is displaced by the provisional conclusion<sup>1</sup> that the matter is not solely within the domestic jurisdiction of the State. As the Court says:<sup>2</sup>

'To hold that a State has not exclusive jurisdiction does not in any way prejudice the final decision as to whether that State has a right to adopt such measures.'

Later the point is made again:<sup>3</sup>

'If in order to reply to a question regarding exclusive jurisdiction, raised under paragraph 8, it were necessary to give an opinion upon the merits of the legal grounds—*titres*—invoked by the parties in this respect, this would hardly be in conformity with the system established by the Covenant for the pacific settlement of international disputes.'

Whatever the intrinsic meaning and value of the statement of the Permanent Court *as such*, its influence must be examined in terms of the constructions placed upon it by others.

In point of time the next development worth notice is the presentation of a report of a Sub-Committee on Nationality to the Committee of Experts for the Progressive Codification of International Law (an appendage of the League) at its second session. The report was by Rundstein and was approved by de Magalhaes. It contains the proposition:<sup>4</sup> 'There can be no doubt that nationality questions must be regarded as problems which are exclusively subject to the internal legislation of individual States.' Having stated that restrictions on the principle are only on the basis of special agreement, the report does refer to exceptions of a different type, resting on general principles, including ex-territoriality.<sup>5</sup>

In the quarter-century since then numerous textbooks and standard works have repeated the statement regarded as the *locus classicus* in the

<sup>1</sup> *P.C.I.J.*, 1923, Series B, No. 4, p. 26: '... when once it appears that the legal grounds (*titres*) relied on are such as to justify the provisional conclusion that they are of juridical importance for the dispute submitted to the Council, and that the question whether it is competent for one State to take certain measures is subordinated to the formation of an opinion with regard to the validity and construction of these legal grounds (*titres*), the provisions contained in paragraph 8 of Article 15 cease to apply and the matter, ceasing to be one solely within the domestic jurisdiction of the State, enters the domain governed by international law'.

<sup>2</sup> *Ibid.*, p. 24.

<sup>3</sup> *Ibid.*, p. 26.

<sup>4</sup> *American Journal of International Law*, 20 (1926), Spec. Suppl., p. 21 at p. 23. The third member, Schücking, does not dissent from this in his observations on the report by Rundstein: *ibid.*, p. 55. See also Hudson, Special Rapporteur, *I.L.C. Yearbook* (1952-II), p. 3 at p. 7.

<sup>5</sup> *Ibid.*, p. 27.

*Nationality Decrees* case, or have stated in their own words propositions obviously inspired by it.<sup>1</sup>

### III. *The principle as stated in Oppenheim*

The proposition as to the freedom of States in the matter of nationality receives support from the authoritative and influential pages of Oppenheim's *International Law*, the eighth edition<sup>2</sup> of which states: 'It is not for International Law but for Municipal Law to determine who is, and who is not, to be considered a subject.' In this edition this sentence is followed by a reference to Article 1 of the Hague Convention of 1930 on Certain Questions Relating to the Conflict of Nationality Laws<sup>3</sup> and this, together with the effect of the footnote appended,<sup>4</sup> gives the sentence quoted a very general significance.<sup>5</sup> However, in the first edition in 1905 this same proposition appears (with an unimportant variation in the wording) in a context which reduces its significance considerably and gives a quite different connotation. Editorial interpolation in later editions has destroyed the true context. The original thus reads:<sup>6</sup>

'Nationality of an individual is his quality of being a subject of a certain State and therefore its citizen. It is not for International but for Municipal Law to determine who is and who is not to be considered a subject. And therefore it matters not, as far as the Law of Nations is concerned, that Municipal Laws may distinguish between different kinds of subjects—for instance, those who enjoy full political rights and are on that account citizens, and those who are less favoured and are on that account not named citizens. Nor does it matter that according to the Municipal Laws a person may be a subject of a part of a State, for instance of a colony, but not a subject of the mother country, provided only such person appears as a subject of the mother country as far as the latter's international relations are concerned. Thus, a person naturalised in a British Colony is for all international purposes a British subject, although he may not have the right of a British Subject within the United Kingdom itself. For all international purposes, all distinctions made by Municipal Laws between subjects and citizens and between different kinds of subjects have neither theoretical nor practical value, and the terms "subject" and "citizen" are, therefore, synonymously made use of in the theory and practice of International Law.'

<sup>1</sup> See, for example, Ralston, *The Law and Procedure of International Tribunals* (1926), p. 160; *ibid.*, Suppl., p. 76; Brierly, *The Law of Nations* (6th ed., by Sir Humphrey Waldock), pp. 283, 357; Starke, *An Introduction to International Law* (5th ed.), p. 282. See further, Strupp, *Elements* (2nd ed.), vol. 1, p. 131; Rabel, *The Conflict of Laws*, vol. 1, pp. 136, 137; Bar-Yaacov, *Dual Nationality* (1961), pp. 1-3, 7 (but see pp. 210-11, 217-38 on the importance of effective nationality); Judge Klaestad, Dissenting Opinion, in the *Nottebohm* case, *I.C.J. Reports*, 1955, p. 4 at p. 28; Hudson, Special Rapporteur, *I.L.C. Yearbook* (1952-II), p. 3 at p. 7; *Survey of the Problem of Multiple Nationality Prepared by the Secretariat*, A/CN.4/84, 14 May 1954, *ibid.* (1954-II), p. 52, para. 34.

<sup>2</sup> Vol 1, p. 643. Published in 1955.

<sup>3</sup> See below, p. 299.

<sup>4</sup> At p. 644, n. 1.

<sup>5</sup> Cf. Weis, *op. cit.*, p. 66.

<sup>6</sup> Vol. 1, pp. 348-9, para. 293. Cf. p. 352, para. 297. See also Westlake, *International Law*, I, *Peace* (1910), pp. 231-3.

#### IV. *The role of nationality in international law*

The writer considers that there are compelling objections of principle to the doctrine of the freedom of States in the present context. However, before these are considered it is necessary to remind some readers of, and to emphasize to others, the high significance which the concept of nationality has in the law. Thus a State, a national of which has suffered a wrong at the hands of another State, has the right to exercise diplomatic protection. This, the principle of the nationality of claims, is all-important in spite of certain qualifications to it recognized lately.<sup>1</sup> In former times, and, in the opinion of some jurists, even in the period of the United Nations Charter, the law recognized a right of forcible intervention to protect the lives and property of nationals.<sup>2</sup> Numerous duties of States in relation to war and neutrality, resting for the most part on the customary law, are framed in terms of the acts or omissions by nationals which States should prevent and, in some cases, punish. Aliens on the territory of a State produce a complex of legal relations consequent on their status of non-nationals. Acts of sovereignty may give rise to questions of international responsibility when they affect aliens or their property; witness the problems considered under the rubrics 'denial of justice', 'expropriation' and the like. Aliens may be expelled for sufficient cause and their home State is bound to receive them. Nationals will not, whilst aliens may, be extradited. Nationality provides a normal (but not exclusive) basis for the exercise of civil and criminal jurisdiction and this even in respect of acts committed abroad. Numerous treaties dealing with a great variety of problems contain provisions which refer to 'nationals' of the parties or use equivalent terms.

#### V. *Some considerations of principle*

At the outset one might predicate a presumption of effectiveness and regularity which would abruptly resolve the apparent conflict between the reliance of so many institutions of the law on the concept of nationality, so far as applications and enforcement are concerned, and the alleged freedom of States in the conferment of nationality. Nationality is a problem, *inter alia*, of attribution, and regarded in this way resembles the law relating to territorial sovereignty.<sup>3</sup> National law prescribes the extent of the

<sup>1</sup> See below, p. 333.

<sup>2</sup> Generally see Brownlie, *International Law and the Use of Force by States* (1963), pp. 289-301; Bowett, *Self-defence in International Law* (1958), pp. 87-105. See also Waldock, *Recueil des cours*, 81 (1952-II), pp. 466-7, 503; Fitzmaurice, *ibid.*, 92 (1957-II), pp. 172-4.

<sup>3</sup> Parry, *Nationality and Citizenship Laws of the Commonwealth and the Republic of Ireland*, vol. 1, pp. 17-19, regards the analogy of territory as 'very attractive' but he also remarks that it should not be pushed too far (see p. 21). However, for the purpose of comment on the possible results of a certain type of doctrine the analogy would seem to be perfectly valid.

territory of a State, but this prescription does not preclude a forum which is applying international law from deciding questions of title in its own way, using criteria of international law. Sovereignty which is *ex hypothesi* unlimited, even by the existence of other States, is ridiculous, whether dominion is sought to be exercised over territory, sea, airspace or populations. In a related matter, the delimitation of the territorial sea, the Court in the *Norwegian Fisheries* case allowed that in regard to rugged coasts the coastal State would seem to be in the best position to appraise the local conditions dictating the selection of base lines, but the tenor of the Judgment was not in support of legal autonomy and the Court stated:<sup>1</sup>

'The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the delimitation with regard to other States depends upon international law.'

This passage is of considerable importance since the organic origins of nationality as a status are very similar to the process of delimitation here dealt with.

In another context altogether a doctrine of autonomy was propounded by the Foreign Relations Committee of the United States Senate in a report which recommended ratification of the General Treaty for the Renunciation of War:<sup>2</sup>

'The committee reports the above treaty with the understanding that the right of self-defence is in no way curtailed or impaired by the terms or conditions of the treaty. Each nation is free at all times and regardless of the treaty provisions to defend itself, and is sole judge of what constitutes the right of self-defence and the necessity and extent of the same.'

In a commentary on the General Treaty,<sup>3</sup> Lauterpacht stated that if the parties are free, not merely to make a provisional determination of the necessity to act but also to determine with conclusive finality the lawfulness of their own action, then the Treaty would not be a legal instrument. Without going into the issues of treaty interpretation involved it is worth noting that, in State practice subsequent to the General Treaty, Japanese and Italian pleas of defensive necessity were not regarded as conclusive.<sup>4</sup>

<sup>1</sup> *I.C.J. Reports*, 1951, p. 116 at p. 132; see also Judge McNair, pp. 160-1; and Judge Read, pp. 189-90; and further, Fitzmaurice, this *Year Book*, 30 (1953), p. 11. Cf. the *Asylum* case, *I.C.J. Reports*, 1950, p. 266 at pp. 273-5.

<sup>2</sup> 70th Congress, 2nd session, Ex. Rep. No. 1, *Congress Records* (15 January 1929), vol. 70, pp. 1930-1. See also, *ibid.* (3 January 1929), pp. 1063-134. See further, in the preceding correspondence, the French Note of 14 July and the Czechoslovak Note of 20 July 1928, in Miller, *The Peace Pact of Paris* (1928), pp. 224, 240 respectively.

<sup>3</sup> *Transactions of the Grotius Society*, 20 (1934), p. 178 at pp. 188-9, 198-201.

<sup>4</sup> See Brownlie, this *Year Book*, 37 (1961), p. 183 at pp. 211-12; *idem*, *International Law and the Use of Force by States*, pp. 77-78, 242-3 (and cf. generally pp. 74-80).



In its Judgment the International Military Tribunal at Nuremberg observed:<sup>1</sup>

'But whether action taken under the claim of self-defence was in fact aggressive or defensive must ultimately be subject to investigation and adjudication if international law is ever to be enforced.'

A similar question is raised by the 'peremptory' or 'automatic' reservation of domestic jurisdiction to acceptances of the compulsory jurisdiction of the International Court of Justice,<sup>2</sup> the model for which is to be found in the American Declaration of 26 August 1946, which excludes 'disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States'. Strong criticism of this formula and its consequences has come from jurists<sup>3</sup> and from certain judges of the Court. In the *Norwegian Loans* case Judges Lauterpacht and Guerrero rejected this type of reservation as invalid. Judge Lauterpacht<sup>4</sup> characterized it as being 'invalid for the double reason that it is contrary to the Statute of the Court and that it deprives the Acceptance of the indispensable element of legal obligation'. Judge Guerrero stated:<sup>5</sup>

'Such reservations must be regarded as devoid of all legal validity. It has rightly been said already that it is not possible to establish a system of law if each State reserves to itself the power to decide itself what the law is.'

In the *Norwegian Loans* case the Court avoided passing on the general issue of the validity of such reservations, but in fact treated the French declaration of this type as a valid acceptance of the compulsory jurisdiction. Later, in the *Interhandel* case, whilst the majority avoided the issue, Judges Spencer, Klaestad, Armand-Ugon and Lauterpacht,<sup>6</sup> regarded this type of reservation as invalid.

Finally, it may be recalled that a similar issue arose when the European Court of Human Rights was called upon to interpret Article 15 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>7</sup> Paragraph 1 of the Article provides:

'In time of war or other public emergency threatening the life of the nation any High

<sup>1</sup> *Judgment*, Cmd. 6964, p. 30. See also the Judgment of the International Military Tribunal for the Far East, Sohn, *Cases on United Nations Law*, p. 913.

<sup>2</sup> See generally Briggs, *Recueil des cours*, 93 (1958-I), p. 229 at pp. 328-63; and Gross, *American Journal*, 56 (1962), pp. 357-82.

<sup>3</sup> See, *inter alia*, Oppenheim, *International Law*, 7th ed., vol 2, pp. 62-63; Preuss, *American Journal*, 40 (1946), p. 720; Hudson, *ibid.* 41 (1947), pp. 9-14; Waldock, *this Year Book*, 31 (1954), pp. 131-7.

<sup>4</sup> *I.C.J. Reports*, 1957, p. 55. See generally pp. 48-55.

<sup>5</sup> *Ibid.*, pp. 69-70. See also Guerrero, 'La qualification unilatéral de la compétence nationale', in D. S. Constantopoulos *et al.* (eds.), *Grundprobleme des internationalen Rechts: Festschrift für Jean Spiropoulos* (1957), pp. 207-12.

<sup>6</sup> *I.C.J. Reports*, 1959, pp. 57, 78, 92-93, 101-16, respectively. It is not relevant to consider the question of severability here.

<sup>7</sup> 1950; Cmd. 8969, 1953; *United Kingdom Treaty Series*, No. 71 (1953).

Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.'

In its Judgment in the *Lawless* case (merits), 1961, the Court referred to this and the other provisions of Article 15 and stated that<sup>1</sup> 'it is for the Court to determine whether the conditions laid down in Article 15 for the exercise of the exceptional right of derogation have been fulfilled in the present case'.

Enough has been said to support the view that to leave issues to the unilateral determination of States is to give them the power to contract out of the very system of legal obligation. When governments are prepared to assert autonomy of decision they reinforce the argument advanced here by refuting their own assertions in contexts concerning the obligations of other governments. Thus, in the *Interhandel* case the United States Agent relied on the automatic reservation in the United States Declaration.<sup>2</sup> But in the *Peace Treaties* case the United States position was represented as follows:<sup>3</sup>

'Even if the Peace Treaties expressly provided that their provisions should not be construed to affect matters which are solely or essentially within the domestic jurisdiction of any State, these States could not by unilateral declaration determine for themselves what matters were solely within their domestic jurisdiction.'

In correspondence with Guatemala concerning expropriation of land belonging to the United Fruit Company<sup>4</sup> the United States Department of State replied that:

'... to state that no sovereign act of a Government affecting foreign States or their nationals is open to discussion, or question, as to its validity under international law, because it is a sovereign act, is to say that States are not subject to international law.'

## VI. *Systems of accommodation. Good faith and comity*

In principle, it would be possible to have a power, conferred by customary law or by treaty, to determine unilaterally the existence of a particular competence provided that the power were exercised 'in good faith' and, or, in accordance with international law.<sup>5</sup> Such a power would no doubt

<sup>1</sup> Text of Judgment, Council of Europe, Doc. A.63.550, at p. 35. Cf. the individual Opinion of G. Maridakis, *ibid.*, p. 46.

<sup>2</sup> *I.C.J. Pleadings, Interhandel case (Switzerland v. United States of America)*, p. 77.

<sup>3</sup> *Interpretation of Peace Treaties with Bulgaria, Hungary and Roumania, I.C.J. Pleadings*, pp. 277-8 (1 March 1950).

<sup>4</sup> *Department of State Bulletin*, vol. 29, No. 742, 14 September 1953, pp. 357-8, quoted by Briggs, *op. cit.*, p. 348, n. 2.

<sup>5</sup> Cf. the suggestions of certain jurists in connexion with the reservation of the right of self-defence and the General Treaty for the Renunciation of War: see Verdross, *Friedens-Warte*, 30

still be exercised under the law in spite of the weakness of the norm established. However, there is probably a presumption against an interpretation which gives a rule such an equivocal status. Moreover, to say, in the present context, that the State can make a non-justiciable determination, provided this is in accord with international law, is to produce a logical circle, since the rule of autonomy will mask the existence of such external limitations and discourage reference to general international law.

Apart from hybrid but nevertheless legal limitations, certain quasi-legal limits may be suggested. Westlake<sup>1</sup> calls upon the principles of comity. Others have referred to natural law, international public policy and the like.<sup>2</sup> Similarly, limitations may be derived from the doctrine of abuse of rights.<sup>3</sup> The broad point is that none of the alternative systems of accommodating state policies is likely to be an adequate substitute for the use of limitations derivative from the existing rules of international law.

### VII. *General principles of international law*

Article 38 (1) (c) of the Statute of the International Court of Justice, as commonly interpreted, has had the perverse effect of promoting the status of 'general principles of law' and, collaterally, of permitting jurists to underestimate the role of general principles of international law which do not historically or organically bear an exclusive relation to general principles of municipal law.<sup>4</sup> The principles of the equality of States and of the freedom of the seas provide obvious examples. It is at once apparent that the application of such principles will not necessarily provide precise solutions but, in cases in which more precise rules are lacking or are ill formed, these general principles assume considerable significance. The field of nationality would seem to offer scope for the operation of the more fundamental principles of the law. At the present juncture it is intended to use them with the object of making the crude point that the existence

(1930), p. 65; Descamps, *Revue de droit international et de législation comparée*, 10 (1929), p. 168; Gonsiorowski, *American Political Science Review*, 30 (1936), pp. 665-6. See the view of the Swiss Government in a message to Parliament of 9 November 1920: 'The competence of a State to legislate in the field of its nationality law at will is limited by one principle of international law only, which shall govern the relations both of public and of private law: "the principle of good faith" . . .' (quoted in translation by Weis, p. 85).

<sup>1</sup> *International Law, I, Peace*, p. 223. Cf. Belgian reply to Preparatory Committee, Hague Conference, 1930; quoted *I.L.C. Yearbook* (1954-II), p. 62.

<sup>2</sup> See Weiss, *Traité théorique et pratique de droit international privé* (1907), vol. 1, p. 11. Maury, *Répertoire de droit international*, vol. 9, No. 38, p. 266.

<sup>3</sup> *Nottebohm* case, Dissenting Opinion of Judge Read, *I.C.J. Reports*, 1955, p. 37; Lauterpacht, *Function*, pp. 300-1; Niboyet, *Traité de droit international privé français* (1943), vol. 1, p. 59; *I.L.C. Yearbook* (1954-II), p. 61, para. 36.

<sup>4</sup> Cf. Friedmann, *American Journal of International Law*, 57 (1963), p. 279 at p. 281; Fitzmaurice, *Recueil des cours*, 92 (1957-II), p. 5 at pp. 57-58. Such general, and generally accepted, principles may be related to State practice and precise norms of customary law but are not always *in pari materia*.

of limitations in the matter of the conferment and deprivation of nationality is a reasonable and entirely logical state of affairs and that therefore there is no presumption against the existence of limitations.

If the United Kingdom were to declare that all French nationals living in Brittany were henceforth to be United Kingdom nationals, either exclusively or in addition to their French nationality, then *prima facie* certain general principles of international law would have been violated. As there is no intention to do more than establish a general and, one might suggest, obvious point, it will be convenient to take the Draft Declaration on the Rights and Duties of States,<sup>1</sup> a memorandum submitted to the General Assembly of the United Nations by Dr. Alfaro, Minister for Foreign Affairs of the Republic of Panama, as a standard of reference. The first Article states that: 'Every State has the right to exist and the right to protect and preserve its existence . . . .' The mass appropriation of population to another political allegiance is obviously incompatible with the principle stated, and also with Article 4 which prescribes: 'The Right to Independence.' Article 5 provides: 'No State has the right to interfere in the internal or external affairs of another State.' Article 7 provides (in part): 'Every State is entitled to exercise exclusive jurisdiction over its territory and over all nationals and foreigners within that territory.' Of particular relevance are the following. Article 9 prescribes:

'Any State which has a right under international law is entitled to have this right respected and protected by all the other States, since rights and duties are correlative, and the right of one creates for the others the duty to respect it.'

Article 10 gives the corollary:

'No other limit is set to the exercise of the rights of a State than the exercise of the rights of other States, in accordance with international law. It is the duty of every State not to overstep this limit.'<sup>2</sup>

At its first session the International Law Commission adopted a 'Draft Declaration on Rights and Duties of States' the articles of which correspond to some of the articles of the Alfaro draft relating to the present subject-matter. In its report to the General Assembly<sup>3</sup> the Commission stated that the articles of the Draft 'enumerate general principles of international law, the extent and the modalities of the operation of which are to be determined by more precise rules'. Corresponding to Articles 3 and 4 of the Alfaro draft, Article 1 provides for a right to independence 'and hence

<sup>1</sup> See the *Preparatory Study Concerning a Draft Declaration on the Rights and Duties of States (Memo. submitted by the Secretary-General)*, I.L.C., 1948, A/CN.4/2.

<sup>2</sup> See also Articles 12 and 13.

<sup>3</sup> *Report*, 1949, para. 52; *I.L.C. Yearbook* (1949), p. 290. Text of the Draft: pp. 287-8. Cf. Rosenne, this *Year Book*, 36 (1960), p. 104 at pp. 143-4.

to exercise freely . . . all its legal powers . . .'. Article 2 repeats the substance of Article 7 of the Alfaro draft, and Article 3 repeats Article 5 thereof. Article 13 of the Commission's draft provides:

'Every State has the duty to carry out in good faith its obligations arising from treaties and other sources of international law, and it may not invoke provisions in its constitution or its laws as an excuse for failure to perform this duty.'

This principle has considerable authority behind it<sup>1</sup> and its relevance to a discussion of autonomy in matters of nationality is obvious enough.<sup>2</sup>

A selfish disregard of an allegiance and loyalty existing between individuals and a particular State, in spite of the absence of other points of contact, would involve a failure to respect the territorial sovereignty of the State the population of which it is sought to 'annex'. With reference to the mine-collecting action, 'Operation Retail', by the British Navy in the Corfu Channel in 1946, the International Court said:<sup>3</sup> 'Between independent States, respect for territorial sovereignty is an essential foundation of international relations.' In commenting on the grant of asylum in an embassy the Court observed:<sup>4</sup>

'It withdraws the offender from the jurisdiction of the territorial State and constitutes an intervention in matters which are exclusively within the competence of that State. Such a derogation from territorial sovereignty cannot be recognised unless its legal basis is established in each particular case.'

### VIII. *The meanings of 'domestic jurisdiction'*

The relevance of the question of the domestic jurisdiction or reserved domain of States to the present inquiry is obvious, and yet an extended discussion of the problems would be out of place. It is sufficient for the present purpose to make certain submissions as a caution against reliance on general statements purporting to establish *in abstracto* the boundaries of the reserved domain.<sup>5</sup> Everything depends on the way in which a particular issue arises. Nationality is not capable of performing a role confined to the reserved domain or the realm of State relations: in principle it has two aspects, either of which may be dominant, depending on the facts and type of dispute. The approach of the International Court in the *Nottebohm* case<sup>6</sup> would seem to be perfectly logical in this respect. The Court said:<sup>7</sup>

'It is for Liechtenstein, as it is for every sovereign State, to settle by its own legislation the rules relating to the acquisition of its nationality, and to confer that nationality

<sup>1</sup> See, for example, *Treatment of Polish Nationals in Danzig*, P.C.I.J., Series A/B, No. 44, p. 24; *Free Zones of Upper Savoy and the District of Gex*, *ibid.*, No. 46, p. 167.

<sup>2</sup> Cf. Córdova, Special Rapporteur, A/CN.4/64, *I.L.C. Yearbook* (1953-II), p. 167, para. 11 referring to Article 13.

<sup>3</sup> *I.C.J. Reports*, 1949, p. 35.

<sup>4</sup> *Ibid.*, 1950, p. 275.

<sup>5</sup> See de Visscher, *Theory and Reality in Public International Law* (1957), pp. 222-3.

<sup>6</sup> *I.C.J. Reports*, 1955, p. 4. See also van Panhuys, *op. cit.*, pp. 153-6.

<sup>7</sup> *I.C.J. Reports*, 1955, pp. 20-21.

by naturalisation granted by its own organs in accordance with that legislation.<sup>1</sup> It is not necessary to determine whether international law imposes any limitations on its freedom of decision in this domain.<sup>2</sup> . . . 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.

'But the issue which the Court must decide is not one which pertains to the legal system of Liechtenstein. It does not depend on the law or on the decision of Liechtenstein whether that State is entitled to exercise its protection. To exercise protection, to apply to the Court, is to place oneself on the plane of international law. It is international law which determines whether a State is entitled to exercise protection and to seize the Court.'<sup>3</sup>

In so far as the two problems are *in pari materia* it is believed that these observations are compatible with the view of the Court in the case of *Nationality Decrees in Tunis and Morocco*.<sup>4</sup>

#### IX. *Opinions of governments on the issue of autonomy*

The significance of the views of governments, expressed in replies to questions of the Preparatory Committee for the Hague Codification Conference, does not need emphasis. Incidentally, but usefully, these replies provide a commentary on the Advisory Opinion concerning the *Nationality Decrees in Tunis and Morocco*.<sup>5</sup> In its Reply the German Government stated:<sup>6</sup>

'The general principle that all questions relating to the acquisition or loss of a specific nationality shall be governed by the laws of the State whose nationality is claimed or tested should be admitted. The application of this principle, however, should not go beyond the limits at which the legislation of one State encroaches on the sovereignty of another. For example, a State has no power, by means of a law or administrative act, to confer its nationality on all the inhabitants of another State or on all foreigners entering its territory. Further, if the State confers its nationality on the subjects of other States without their request, when the persons concerned are not attached to it by any particular bond, as, for instance, origin, domicile or birth, the States concerned will not be bound to recognise such naturalisation.'

The British Reply<sup>7</sup> states the principle of exclusive jurisdiction and continues:

'The mere fact, however, that nationality falls in general within the domestic jurisdiction of a State does not exclude the possibility that the right of the State to use its

<sup>1</sup> Cf. *I.L.C. Yearbook* (1954-II), p. 164 (Belgian comment), p. 173 (United States comment).

<sup>2</sup> See below, p. 298.

<sup>3</sup> See also the *Norwegian Fisheries* case, *I.C.J. Reports*, 1951, p. 116, at p. 132, quoted above, p. 291.

<sup>4</sup> Above, pp. 286 et seq.

<sup>5</sup> *Ibid.*

<sup>6</sup> League of Nations, Conference for the Codification of International Law, *Bases of Discussion I, Nationality* (1929), V. 1, p. 13.

<sup>7</sup> *Ibid.*, pp. 17, 169. The replies of the Dominions and India are identical or substantially similar.

discretion in legislating with regard to nationality may be restricted by duties which it owes to other States (see *Tunis and Morocco Case* . . .). Legislation which is inconsistent with such duties is not legislation which there is any obligation upon a State whose rights are ignored to recognise. It follows that the right of a State to legislate with regard to the acquisition and loss of its nationality and the duty of another State to recognise the effects of such legislation are not necessarily coincident.

'Even if the discretion of the State in the former case may be unlimited, the duty of the State in the latter case is not unlimited. It may properly decline to recognise the effects of such legislation which is prejudicial to its own rights as a State.

'It is only in exceptional cases that this divergence between the right of a State to legislate at its discretion with regard to the enjoyment or non-enjoyment of its nationality and the duty of other States to recognise such legislation would occur. The criterion is that the legislation must infringe the *rights* of the State as apart from its interests.'

The last paragraph of this Reply confines the area of divergence to 'exceptional cases'. However, if exceptional cases are admitted to exist the force of emphasis on discretion in legislation is much diminished. Obviously there are limits to the discretion and these are not concealed by the device whereby the exercise of the discretion occurs but is not recognized by other States. *Qua* international law this would then seem to be a discretion within the limits set by the divergence referred to in the British Reply. In other words, the principle is admitted. Moreover, there is a general duty to bring international law into conformity with obligations under municipal law;<sup>1</sup> and in this connexion the opinion has been expressed<sup>2</sup> that where a State adopts legislation *ex facie* contrary to its obligations the legislation may itself constitute the breach of an obligation. In such a case, however, potential plaintiff States must await the occurrence of actual damage before presenting a claim. The contradiction and misconception inherent in the theory of divergence is to be found in the replies of other governments. Thus the majority relate the duty to recognize foreign nationality legislation to fulfilment of international obligations<sup>3</sup> but do not always place this in direct relation to the right to determine nationality. In view of the element of contradiction, and the rules noted above, the statements in the replies of governments to the effect that 'in principle' the question of nationality falls within the exclusive competence of States lose much of their effect:<sup>4</sup> at least they can no longer be regarded as presenting an absolute bar as a matter of principle. What is significant is that the majority of replies accepted the position that the right to determine nationality was not unlimited.

<sup>1</sup> *Exchange of Greek and Turkish Populations*, P.C.I.J., 1925, Ser. B, No. 10, p. 20; Oppenheim, *International Law* (8th ed.), vol. 1, pp. 44-45; Fitzmaurice, *Recueil des cours*, 92 (1957-II), p. 89; Guggenheim, *Traité*, vol. 1, pp. 31-33; McNair, *Law of Treaties* (1961), pp. 100-1.

<sup>2</sup> Fitzmaurice, *loc. cit.*

<sup>3</sup> *Bases of Discussion*, at pp. 13-20.

<sup>4</sup> Or, more precisely perhaps, they lose the effect with which they have been invested by writers.

### X. *The Convention concerning Certain Questions Relating to the Conflict of Nationality Laws*<sup>1</sup>

At the Hague Codification Conference of 1930 the First Committee stated in its report<sup>2</sup> that although nationality 'is primarily a matter for the municipal law of each State, it is nevertheless governed to a large extent by principles of international law'. In spite of the fact that the Committee could not agree on the principles to which they referred, the Conference did produce a Convention<sup>3</sup> of some interest, though of limited importance. Article 1 thereof provides:

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

This text was adopted by the First Committee by 38 votes to 2 and by the Conference by 40 votes to 1.<sup>4</sup> It will be at once apparent that the antithesis between autonomy in legislation and the limited duty of recognition, which is evident in the replies of governments, recurs. The antithesis, taken together with the independent force of the second part of the Article, deprives the principle of autonomy of its integrity. However, the antithesis might perhaps equally be said to make the provision a legal curiosity, of little strength, and not giving respectability to any proposition. Article 18, paragraph 2, provides in part that the inclusion of the principles and rules stated in the Convention 'shall in no way be deemed to prejudice the question whether they do or do not already form part of international law'. In relation to Article 1 this takes one neither forwards nor backwards.<sup>5</sup> But, with its limitations, Article 1 remains a useful authority for the view that international law sets limits to the power of a State to confer nationality.<sup>6</sup>

<sup>1</sup> *League of Nations Treaty Series*, vol. 179, p. 89; *Laws Concerning Nationality*, U.N. Legislative Series, ST/LEG/SER. B/4, July 1954, p. 567. In force 1 July 1937. Twenty-seven States signed but did not ratify. Thirteen States have ratified or acceded to the Convention.

<sup>2</sup> *League of Nations, Conference for the Codification of International Law, Acts of the Conference, II, Report of the 1st Committee* (1930), V. 8, pp. 2-3.

<sup>3</sup> And three Protocols: Protocol relating to Military Obligations in Certain Cases of Dual Nationality (in force 25 May 1937); Protocol relating to a Certain Case of Statelessness (in force 1 July 1937); Special Protocol Concerning Statelessness (not in force).

<sup>4</sup> *Acts of the Conference, II, Minutes of the 1st Committee* (1930), V. 15, pp. 19-36, 205-9; *ibid.*, I, Plenary Meetings (1930), V. 14, pp. 38-41. See also Weis, *Nationality and Statelessness*, p. 31.

<sup>5</sup> Cf. Weis, *op. cit.*, p. 30.

<sup>6</sup> Thus Córdova, Special Rapporteur, A/CN.4/64, *I.L.C. Yearbook* (1953-II), p. 167, paras. 13-15. See also van Panhuys, *The Role of Nationality in International Law*, pp. 158 et seq. For a different view: Rabel, *The Conflict of Laws*, Vol. 1, p. 136. de Castro, *Recueil des cours*, 102 (1961-I), p. 521, at pp. 574-5, is of the opinion that subsequent restrictive interpretation has rendered nugatory the influence of the provision; and cf. Maury, *Hommage d'une génération de juristes au Président Basdevant*, p. 360 at p. 378.



Though his thesis has no direct bearing on the present line of inquiry, it is worth recording the views of Dr. Parry on one aspect of Article 1. He has examined the impact of the duty to recognize the law of other States, prescribed therein, on the shape assumed by national legislation and the manner of dealing with nationality questions adopted in domestic courts. His conclusion is as follows:<sup>1</sup>

'There thus appears a situation which, though it may be obvious, is certainly striking. The law of nationality of one State need scarcely refer to that of any other. If it does it will do so only in order that it may provide that acquisition, possession or retention of the nationality of a foreign State shall or may constitute a circumstance occasioning or permitting the loss of domestic nationality, or—much more rarely—the non-acquisition of the latter. And in this very limited context the test of acquisition or possession of the nationality of a foreign State is, generally and subject only to relatively specific exceptions, exclusively the law of the latter State. Any duty of recognition of foreign nationality laws is thus an imperfect and eccentric one. In fact, it is a tenable thesis that it does not exist at all or that, insofar as it must be taken to have been imposed by the Hague Convention of 1930 upon the parties thereto, it has no meaning.'

However, in a different sense the Convention has been influential. Thus Lauterpacht has remarked:<sup>2</sup>

'Some of the ideas incorporated in The Hague Convention of 1930 on certain questions relating to the conflict of nationality laws had been widely followed both by States which had ratified it and by others. Doctrines such as the subordination of the nationality of married women to that of their husbands, which had previously been regarded by some States as fundamental and immutable principles of national law, had been changed by those States—in some cases with a thoroughness going beyond that of the measures contemplated in The Hague Convention. The same applied to the question of expatriation and loss of nationality of origin as the result of naturalization.'

### XI. *The opinions of jurists*

Whilst the counting of heads cannot solve issues of principle, it is excusable, in evaluating the orthodox view on the autonomy of States in the matter of nationality, to draw attention to the fact that a considerable body of expert opinion accepts the proposition that international law regulates the question. The Harvard Research draft on the Law of Nationality<sup>3</sup> provided in Article 2:

'Except as otherwise provided in this Convention each State may determine by its law who are its nationals, subject to the provisions of any special treaty to which the State may be a party; but under international law the power of a State to confer its nationality is not unlimited.'

<sup>1</sup> *Festgabe Makarov (Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, 1958)*, p. 337, at p. 360 (and see *ibid.*, p. 362. See also Giuliano, in *Comunicazioni e studi*, 8 (1957)).

<sup>2</sup> *I.L.C. Yearbook (1954-I)*, p. 22 (247th Meeting, para. 36; as reported in the *Summary Records*). Cf. *Surveys of the Problem of Multiple Nationality Prepared by the Secretariat*, A/CN.4/84, 14 May 1954, *ibid.* (1954-II), p. 52, paras. 269–311 and especially para. 311.

<sup>3</sup> *American Journal of International Law*, 23 (1929), Spec. Suppl., p. 24.

In the comment<sup>1</sup> on the provision it is stated:

'It may be difficult to precise [*sic*] the limitations which exist in international law upon the power of a State to confer its nationality. Yet it is obvious that some limitations do exist.'

A number of eminent jurists have expressed the opinion that international law does in fact regulate the question of nationality, among them Lauterpacht,<sup>2</sup> Guggenheim,<sup>3</sup> Redslob,<sup>4</sup> Fitzmaurice<sup>5</sup> and McNair.<sup>6</sup> The latter, in commenting on the material to be found in Reports by the Law Officers of the United Kingdom, remarks:

'Undoubtedly there are limits within which International Law can control the national regulation of nationality, its acquisition, loss etc.,<sup>7</sup> but it is rare to find a Report in which the matter is discussed from this angle. As an illustration, on 1 February 1881, James, Herschell and Deane reported that "the provision of the law in question, imposing the status of Hungarian subjects upon foreigners by reason of [apparently, five]<sup>8</sup> years' consecutive residence, is not open to objection in an international point of view".'

At the same time caution is necessary in seeking partisans against the theory of autonomy. Thus Makarov<sup>9</sup> confines the relevant rules or principles of international law to two. Rundstein<sup>10</sup> says that limitations exist but in substance his limitations are merely general principles, within the cadre of the concept of abuse of rights, to be applied empirically. Dr. Mervyn Jones<sup>11</sup> remarks that 'there are certain very limited, though perhaps ill defined, principles of international law which limit a State's right to frame its nationality law at will'. Furthermore, an excess of confidence in these matters is unrealistic in view of phenomena such as the reception given to a proposal by de Lapradelle at the Stockholm Conference of the *Institut de Droit International* in 1928. He had proposed the inclusion in the preamble of a resolution on nationality of a *considérant* as follows:

'L'institut, fidèle au principe que les questions de nationalité ne sont pas laissées à l'appréciation exclusive des différents Etats, mais soumises à la compétence croissante du droit international. . . .'

<sup>1</sup> Ibid., p. 26. See also Córdova, Special Rapporteur, A/CN.4/64, *I.L.C. Yearbook* (1953-II), p. 167, para. 12.

<sup>2</sup> *Jewish Yearbook of International Law*, vol. 1, p. 173.

<sup>3</sup> *Traité*, vol. 1, pp. 29, 314.

<sup>5</sup> *Recueil des cours*, 92 (1957-II), p. 194.

<sup>4</sup> *Traité*, pp. 184-5.

<sup>6</sup> *International Law Opinions*, vol. 2, p. 4. Further references are to be found in Weis, op. cit., p. 87.

<sup>7</sup> Citing the *Nottebohm* case, *I.C.J. Reports*, 1955, p. 4. See below, pp. 313, 349-64.

<sup>8</sup> As in McNair's text.

<sup>9</sup> *Recueil des cours*, 74 (1949), p. 269 at pp. 305-7. Makarov has been influential. Cf. the Survey of the problem of multiple nationality prepared by the Secretariat A/CN.4/84, *I.L.C. Yearbook* (1954-II), p. 52, para. 33.

<sup>10</sup> *Zeitschrift für Völkerrecht*, 16 (1932), pp. 14-71. Rundstein is cited as a partisan by Guggenheim. See also the Report of Rundstein quoted above, p. 288, n. 4.

<sup>11</sup> *British Nationality Law and Practice* (1956), p. 12.

In the face of opposition this was omitted.<sup>1</sup> Of course the climate of opinion may change and, in any case, many expressions of opinion commonly quoted or cited have been based on the absence (in general) of *precise* rules of *attribution* applying to individuals *ab origine* in international law, and this methodology is open to serious questioning. Significantly, Córdova, who succeeded Hudson as the special rapporteur for the International Law Commission on the question of nationality, has expressed the following view (in his first report<sup>2</sup>):

'It follows that international law sets forth the limits of the power of a State to confer its nationality. This power necessarily implies the right to deprive an individual of that nationality; consequently international law may also restrict the authority of the State to deprive a person of its own nationality. There are cases in which international law considers that a certain national legislation is not legal because it comes into conflict with the broader interests of the international community. Such was the case, for instance, with the so-called Delbrück Law, enacted by Germany, under which a German citizen could be nationalized [*sic*] in a foreign country without losing his original German nationality.

'In the present state of international law, it is not, therefore, unwarranted to affirm that the right of individual States to legislate in matters of nationality is dependent upon and subordinate to the rules of international law on the subject, and that, therefore, these questions of nationality are not, as has been argued, entirely reserved for the exclusive jurisdiction of the individual States themselves.'

## XII. Nationality rules commonly adopted by States

Certain principles concerning conferment of nationality are adopted in the legislation of States often enough to acquire the status of 'general principles'. It is proposed to give a relatively short exposition<sup>3</sup> of these principles while postponing a general consideration of their precise legal status. Without prejudging too much the question of their legal status, account will be taken of the existence of a sufficiency of adherence to a principle to establish the principle as 'normal' though not necessarily adopted generally in the sense of either a simple or absolute majority.

(a) *JUS SANGUINIS*. In his Report prepared for the International Law Commission Hudson stated:<sup>4</sup>

'The links of attribution of nationality at birth are, according to the municipal law, either descent (*jus sanguinis*) or birth on the territory (*jus soli*) or a combination of these links. . . . This uniformity of nationality laws seems to indicate a consensus of opinion

<sup>1</sup> *Annuaire de l'Institut* (1928), pp. 11, 12, 680-5, 706.

<sup>2</sup> A/CN.4/64; *I.L.C. Yearbook* (1963-II), p. 167, paras. 14, 15. See also *ibid.*, paras. 16, 17.

<sup>3</sup> For extended surveys see Córdova, Special Rapporteur, A/CN.4/64, *ibid.*, p. 167, pp. 170 et seq. (Part I); *Survey of the Problem of Multiple Nationality Prepared by the Secretariat*, A/CN.4/84, *ibid.* (1954-II), p. 52, at pp. 63 et seq. (Chapter I); Harvard Research, *American Journal of International Law*, 23 (1929), Spec. Suppl., p. 24; Sandifer, *ibid.* 29 (1935), p. 248; *Stateless Children* (rev. ed., 1950), a study by the International Union for Child Welfare.

<sup>4</sup> A/CN.4/50; *I.L.C. Yearbook* (1952-II), p. 3, at p. 7.

of States that conferment of nationality at birth has to be based on either, on *jus soli* or on *jus sanguinis*, or on a combination of these principles. It may be a moot question whether this rule merely constitutes usage or whether it imposes a duty on States under customary international law.'

In his excellent study, Weis<sup>1</sup> remarks that *jus sanguinis* and *jus soli* are 'the predominant modes of acquisition of nationality'. In 1935 Sandifer<sup>2</sup> concluded that legislation in forty-eight States followed the *jus sanguinis* principle and referred to 'the widespread extent of the rule of *jus sanguinis*, and its paramount influence upon the law of nationality throughout the world'. There is no reason to think that this assessment is out of place today.<sup>3</sup> The Harvard Research survey polled seventeen States with law based solely on *jus sanguinis*; two equally on *jus sanguinis* and *jus soli*; and twenty-six principally on *jus soli* and partly on *jus sanguinis*. Experts<sup>4</sup> commonly regard the two principles as permissible criteria but do not always indicate an opinion on their precise legal status. Van Panhuys<sup>5</sup> considers the two principles to be sanctioned by customary law.

In regard to the modalities of the *jus sanguinis*, Sandifer<sup>6</sup> calculated that forty-seven States had rules under which the status of the father governed (conditional in 14 cases); 35 had rules under which the status of either parent or both governed (conditional in 22 cases); and 29, including the United States, had rules under which the status of the unmarried mother governed.

(b) *JUS SOLI*. The role of *jus soli* will be evident from what has gone before. However, it may be remarked that, as a principle, it has a relative simplicity of outline, with fairly clear exceptions, when compared with *jus sanguinis*. Indeed, in terms of adherence to a particular system, with a minor degree of dilution, *jus soli* seems to have predominance in the world.<sup>7</sup> Except in so far as there may exist a presumption against statelessness,<sup>8</sup> it is probably incorrect to regard the two most important principles as mutually exclusive: in varying degrees the laws of a very large number of States rest on both, and recent legislation gives no sign of any

<sup>1</sup> Op. cit., p. 98.

<sup>2</sup> *American Journal of International Law*, 29 (1935), at pp. 256, 278.

<sup>3</sup> See new legislation in Parry, *Nationality and Citizenship Laws of the Commonwealth and the Republic of Ireland*, 2 vols.; and U.N. Legislative Series, *Supplement to the Volume on the Laws concerning Nationality* 1954, 1959, ST/LEG/SER. B/9.

<sup>4</sup> Preparatory Committee of the Hague Codification Conference, *Bases of Discussion*, p. 20 (excised in the Committee on Nationality of the Conference by eighteen votes to seventeen); Mervyn Jones, *British Nationality Law and Practice*, pp. 10-11; Guggenheim, *Traité* vol. 1, pp. 315-16; Makarov, *Recueil des cours*, 74 (1949-I), pp. 364-5; Redslob, *Traité*, pp. 184-5; de Visscher, *Theory and Reality in Public International Law* (1957), pp. 153, 175.

<sup>5</sup> Op. cit., pp. 160-1.

<sup>6</sup> Op. cit., pp. 254, 255, 258.

<sup>7</sup> According to Sandifer, p. 256, 29 States followed *jus soli*; and the study by the International Union for Child Welfare (1950) concluded that, of 49 States, 35 relied principally on the *jus soli*. See also *I.L.C. Yearbook* (1953-II), pp. 170-1; *ibid.* (1954-II), pp. 63 et seq.

<sup>8</sup> See below, p. 337.

change in the situation. However, the Harvard draft provided in Article 3 that States must choose between the two principles.<sup>1</sup>

Of particular interest are the special rules relating to the *jus soli*, appearing as exceptions to that principle, the effect of the exceptions being to remove the cases where its application is *ex facie* unjustifiable. A rule which has very considerable authority stipulated that children born to persons having diplomatic immunity shall not be nationals by birth of the State to which the diplomatic agent concerned is accredited. Thirteen governments stated the exception in the preliminaries of The Hague Codification Conference.<sup>2</sup> In a comment<sup>3</sup> on the relevant Article of the Harvard draft on diplomatic privileges and immunities it is stated: 'This article is believed to be declaratory of an established rule of international law.' The rule receives ample support from the legislation of States<sup>4</sup> and expert opinion.<sup>5</sup> The Convention on Certain Questions relating to the Conflict of Nationality Laws of 1930 provides in Article 12:

'Rules of law which confer nationality by reason of birth on the territory of a State shall not apply automatically to children born to persons enjoying diplomatic immunities, in the country where the birth occurs.'

In 1961 the United Nations Conference on Diplomatic Intercourse and Immunities<sup>6</sup> adopted an Optional Protocol concerning Acquisition of Nationality which provided in Article II:

'Members of the mission not being nationals of the receiving State, and members of their families forming part of their household, shall not, solely by the operation of the law of the receiving State, acquire the nationality of that State.'

Some States extend the rule to the children of consuls,<sup>7</sup> and there is some support for this from expert opinion.<sup>8</sup> In the draft articles on Con-

<sup>1</sup> Loc. cit., p. 27. See further, Weis, op. cit., pp. 97-98, where he states: 'In the absence of historical examples it is a matter of conjecture whether a nationality law based equally on *jus soli* and *jus sanguinis* would be regarded as inconsistent with international law or the general principles of law.'

<sup>2</sup> L.N., C. 73. M. 38. 1929. V, pp. 51-56; viz, Australia, Chile, Czechoslovakia, France, Great Britain, India, Japan, New Zealand, Norway, South Africa, Sweden, Switzerland and the United States.

<sup>3</sup> *American Journal of International Law*, 26 (1932), Suppl., p. 133. See also the Harvard draft on Nationality, *ibid.* 23 (1929), Spec. Suppl., p. 13, Article 5.

<sup>4</sup> U.N. Legislative Series, *Laws Concerning Nationality* (1954), pp. 1, 13, 49, 52, 69, 91, 108, 126, 152, 198, 201, 205, 214, 215, 238, 246, 288, 307, 337, 351, 361, 402, 418, 459, 468; *Supplementary Volume* (1959), pp. 17, 33, 37, 61, 128, 134, 150; Parry, *Nationality and Citizenship Laws of the Commonwealth and the Republic of Ireland*, pp. 153-7, 229, 231-5, 699-700, 757, 893-4, 946, 948, 1137; *I.L.C. Yearbook* (1953-II), p. 176. See also Rosenne, *Journal du droit international*, 81 (1954), p. 35, note.

<sup>5</sup> Córdova, *I.L.C. Yearbook* (1953-II), p. 166 at p. 176 (Article III); Guggenheim, *Traité*, vol. 1, 317; Batiffol, *Traité*, p. 76.

<sup>6</sup> See Johnson, *International and Comparative Law Quarterly*, 10 (1961), p. 597. The Protocol, in Article II, reproduces the text of Article 35 of the draft articles of the I.L.C.: *I.L.C. Yearbook* (1958-II), p. 89 at p. 101.

<sup>7</sup> See *Laws Concerning Nationality* (1954), pp. 1, 152, 248, 459; *Supplementary Volume* (1959), p. 15.

<sup>8</sup> *I.L.C. Yearbook* (1953-II), pp. 176-7.

sular Relations of the International Law Commission it was provided in Article 52<sup>1</sup> that:

'Members of the consulate and members of their families forming part of their households shall not, solely by the operation of the law of the receiving State, acquire the nationality of that State.'

In a few instances legislation<sup>2</sup> and other prescriptions<sup>3</sup> exclude the *jus soli* in respect of the children of persons exercising official duties on behalf of a foreign government. Another exception quite commonly adopted concerns the children of enemy alien fathers born in territory under enemy occupation.<sup>4</sup> And, further, a small number of States exclude the children of aliens passing through the country from the operation of *jus soli*.<sup>5</sup>

(c) EXTENSIONS OF THE *JUS SOLI*. The Harvard Research draft<sup>6</sup> refers to 'territory or a place assimilated thereto' and States have generally applied the principle of the *jus soli* to birth on ships<sup>7</sup> and aircraft<sup>8</sup> registered under the flag. Legislation formerly in force in Argentina<sup>9</sup> referred to birth in a 'legation or warship of the Republic', and the later legislation extends to birth 'in an international zone under the Argentine flag'.<sup>10</sup> Where apparent conflict may arise, as in the case of birth on a foreign ship in territorial waters, it is tolerably clear that the child does not in principle acquire *ipso facto* the nationality of the littoral State.<sup>11</sup> This is an obvious case where

<sup>1</sup> Ibid. (1961-II), p. 122. On 24 April 1963 an Optional Protocol Concerning Acquisition of Nationality was signed (U.N. Doc. A/Conf. 25/14, 23 April 1963), relating to a multilateral Convention on Consular Relations of the same date. Texts: *American Journal of International Law* 57 (1963), pp. 995, 1022. In Article II the Protocol applies an exemption in the form provided for in the Protocol concerning diplomatic missions of 1961 to 'members of the consular post not being nationals of the receiving state'. Article I defines 'members of the consular post' as 'consular officers, consular employees and members of the service staff'.

<sup>2</sup> For example, the Canadian Citizenship Act 1946, as amended, sec. 5 (2); Constitution of Bolivia, 23 November 1946, as amended; Constitution of Brazil, 18 September 1946.

<sup>3</sup> Article 2 of the draft convention prepared by the Committee of Experts of the League of Nations.

<sup>4</sup> Examples: *Laws Concerning Nationality, Supplementary Volume* (1959), pp. 37, 128, 134; Parry, *Nationality and Citizenship Laws*, pp. 154-7, 229, 235-8, 564, 630, 699, 701-2, 757, 759, 863, 893-4.

<sup>5</sup> *Laws Concerning Nationality* (1954), pp. 49, 91, 97 (condition of acquisition is domicile), 198 (and cf. p. 206), 214 (and cf. p. 216).

<sup>6</sup> *Ubi supra*. See generally Córdova, *I.L.C. Yearbook* (1953-II), pp. 177-9.

<sup>7</sup> Flournoy and Hudson, *A Collection of Nationality Laws* (1929), pp. 10, 11, 322, 334, 430, 519, 530, 531; *Laws Concerning Nationality* (1954), pp. 11, 71, 145, 201, 307, 400, 544, 595; Parry, *Nationality and Citizenship Laws of the Commonwealth*, pp. 148-50, 152, 230, 343, 412, 426, 468, 473, 475, 477, 478, 560, 627, 698, 754, 862, 907, 950, 960; *ibid.*, vol. 2, pp. 1099, 1196, 1250.

<sup>8</sup> *Laws Concerning Nationality* (1954), pp. 307, 400, 544, 595; *Supplementary Volume* (1959), pp. 126, 134; Parry, *op. cit.*, pp. 151, 230, 343, 473, 560, 627, 698, 754, 862, 907, 950, 960; *ibid.*, vol. 2, pp. 1099, 1196, 1250.

<sup>9</sup> *Laws Concerning Nationality* (1954), p. 11; cf. p. 595.

<sup>10</sup> *Ibid.*, p. 595; Act No. 14345 of 28 September 1954, Article 1(c). See also El Salvador, Aliens Act, 1886, Article 4. The countries taking this view include the U.K., Commonwealth States, Germany, Belgium and Norway.

<sup>11</sup> See Parry, *op. cit.*, pp. 151-3, 230, 412, 426, 537, 950, 960.

the matter is not one of exclusive jurisdiction. Moreover, the analogy is with the concept of aliens in transit, which appears in some laws, the presence being usually incidental and brief. However, certain States, including the United States, Italy and Japan, do at least claim the faculty of treating birth within their waters as productive of nationality.<sup>1</sup> Yet it would be strange if birth on a ship exercising the right of innocent passage had this consequence.<sup>2</sup> In an attempt to avoid statelessness, Córdova, as rapporteur of the International Law Commission, proposed an article which subjected those born on ships and aircraft to the law of the State in the territory (or waters) of which the ship or aircraft was situated at the time.<sup>3</sup> Obviously *de lege lata* these questions are not completely settled, but the available materials and the tone of discussion seem to justify the statement in the Norwegian answer to the League questionnaire<sup>4</sup> that

'the question of how far events that occur on board foreign merchant ships passing through territorial waters come within the legal jurisdiction of the coastal State requires to be settled from a general standpoint and not in relation to questions of nationality'.

In conclusion, the existence of extensions of the *jus soli* by treaty requires notice. In 1950 Nationality Laws in Denmark, Norway and Sweden provided for this by allowing birth and residence to the age of twelve in one country to be the equivalent of birth and residence in any of the other countries. The relevant agreements were concluded on 21 December 1950.<sup>5</sup>

(d) INVOLUNTARY NATURALIZATION OF INDIVIDUALS. As rapporteur for the International Law Commission, Hudson expressed the following opinion:<sup>6</sup>

'Under the law of some States nationality is conferred automatically by operation of law, as the effect of certain changes in civil status: adoption, legitimation, recognition by affiliation, marriage.

'Appointment as teacher at a university also involves conferment of nationality under some national laws.

<sup>1</sup> See *I.L.C. Yearbook* (1953-II), p. 178; Hackworth, *Digest*, vol. 3, p. 10. Also, *semble*, Saudi Arabia, *Laws Concerning Nationality* (1954), p. 400. Venezuelan law, *ibid.*, p. 544, refers ambiguously to birth 'on board Venezuelan vessels or aircraft outside the jurisdiction of any other State'.

<sup>2</sup> See Article 17 of the Convention on the Territorial Sea and Contiguous Zone: 'Foreign ships exercising the right of passage shall comply with the laws and regulations enacted by the coastal state in conformity with these articles and other rules of international law and, in particular, with such laws and regulations relating to transport and navigation.' See further, *I.L.C. Yearbook* (1956-II), pp. 273-4 (comment on identical text in *I.L.C.* draft articles).

<sup>3</sup> *I.L.C. Yearbook* (1953-II), p. 177. See now the United Nations Convention on the Reduction of Statelessness, signed 30 August 1961, Article 3 (test of flag or registration).

<sup>4</sup> L.N., V. Legal, 1929, V. 1, p. 78.

<sup>5</sup> In force 1 January 1951. Texts of the laws: *Laws Concerning Nationality* (1954), pp. 121, 352, 439 (Article or sec. 10 in each case).

<sup>6</sup> A/CN.4/50, *I.L.C. Yearbook* (1952-II), p. 8. The rubric employed is: 'Conferment of nationality by operation of law.'

'While these reasons for the conferment of nationality have been recognized by the consistent practice of States and may, therefore, be considered as consistent with international law, others have not been so recognized.'

Some of these categories may be considered briefly.

(e) MARRIAGE. A survey carried out by the Secretary-General of the United Nations in 1953 showed that a wife automatically acquired the nationality of her husband in twenty-two States, that in forty-four States acquisition was conditional, and that in four States there was no effect.<sup>1</sup> In some States the principle of family unity<sup>2</sup> has prevailed but the modern tendency is to favour sex equality.<sup>3</sup> The development of opinion has culminated in the Convention on the Nationality of Married Women opened for signature by the General Assembly of the United Nations on 29 January 1957.<sup>4</sup> The Hague Convention of 1930 merely provides that naturalization of the husband during marriage shall not involve a change in the nationality of the wife except with her consent. The Convention of 1957 favours the principle of the equality (and hence independence) of the wife but compromises to some extent. Thus each contracting State agrees that neither the celebration nor the dissolution of marriage between one of its nationals and an alien, nor change of nationality by the husband during marriage, shall affect the wife's nationality automatically. However, it is provided that the alien wife of a national of a contracting State may, at her request, acquire her husband's nationality by means of privileged naturalization procedures.

(f) LEGAL RECOGNITION OR LEGITIMATION. It is widely accepted in legislation that the child follows the father's nationality.<sup>5</sup> Weis<sup>6</sup> allows that the general mode of acquisition 'has been recognized by the practice

<sup>1</sup> See Weis, *op. cit.*, pp. 99-100; Oppenheim, *International Law*, vol. 1 (8th ed.), p. 654; Guggenheim, *Traité*, vol. 1, p. 316; Redslob, *Traité*, p. 185. On the effect of polygamous marriage, cf. Parry, *Nationality and Citizenship Laws of the Commonwealth*, vol. 1, pp. 748, 758, 771, 773 (Southern Rhodesian Citizenship); vol. 2, pp. 1187, 1204, 1212, 1213 (Fed. of Rhodesia and Nyasaland).

<sup>2</sup> See *Musiółek v. Governor of Kraków*, *Annual Digest*, 1933-4, No. 198; *Mansour v. Pirotte*, *ibid.*, 1946, No. 46; *Chavigny v. Fed. Dept. of Justice and Police*, *ibid.*, No. 55; *Ghattas v. Dame Ghattas*, *ibid.*, 1947, No. 43; *Fed. Dept. of Justice and Police v. Solothurn*, *I.L.R.*, 24 (1957), p. 473.

<sup>3</sup> See Soviet legislation of 1926 and 1938; the French Ordinance of 19 October 1945; British Nationality Act, 1948, sec. 6 (2); Polish Act of 8 January 1951; Libyan Law of 1954. See also The Hague Convention of 1930, Articles 10 and 11 (indirectly relevant); the Montevideo Convention on Nationality of Women, 26 December 1933; Hudson, *International Legislation*, vol. 6, p. 589; the Montevideo Convention on Nationality, *ibid.*, p. 593; the Italian Peace Treaty, 1947, Article 19 (2), Annex VI, Article 6 (2); and Hudson *I.L.C. Yearbook* (1952-II), p. 12. See also, *Annual Digest*, 1931-2, No. 130; *In re Astori*, *ibid.*, 1943-5, No. 52; *I.L.C. Yearbook* (1953-II), pp. 179-84.

<sup>4</sup> G. A. Resolution 1040 (XI). Text: *Laws Concerning Nationality, Supplementary Volume* (1959), p. 91. In force between twenty-two States; signed but not ratified by seven States.

<sup>5</sup> Sandifer, *American Journal*, 29 (1935), p. 259; *I.L.C. Yearbook* (1953-II), pp. 180-1. This is the American practice: *contra* Weis, p. 101. See the British Nationality Act, 1948, sec. 23 (1).

<sup>6</sup> *Op. cit.*, p. 114.



of States', but states<sup>1</sup> that there is no rule of international law limiting the freedom of States to grant or withhold nationality in case of legitimation.

(g) ADOPTION. That the minor acquires the nationality of the adoptive parent is also generally recognized in legislation, but there are considerable variations from the norm.<sup>2</sup>

(h) ACQUISITION OF DOMICILE OR ANALOGOUS LINKS. Hudson, rather curiously, refers<sup>3</sup> to appointment as a teacher at a university as a mode recognized by the law, but omits other important items to some extent, at least, *eiusdem generis*. Among the omissions are residence, domicile and immigration *animo manendi*.<sup>4</sup> Similarly, it is common to permit resumption of nationality, for example, where a marriage which changed the nationality of the *de cuius* is now dissolved, by a renewal of domicile in the State concerned.<sup>5</sup> Also akin to domicile is the conferment of nationality on members of particular ethnic or other defined groups belonging to the population of a State.<sup>6</sup> Indeed in a number of cases the type of administration, recent origin of registration of births, and so on, make it necessary to adopt the test of domicile.<sup>7</sup> In many States nationals, or certain categories such as naturalized citizens, citizens by registration (in Commonwealth countries) and analogous instances, may by acquisition of domicile abroad lose their nationality.<sup>8</sup> In some cases it is provided that if a national acquires a second nationality he shall lose his first nationality if his residence and domicile are outside the State of his first nationality.<sup>9</sup>

<sup>1</sup> p. 100. Cf. Mervyn Jones, *British Nationality Law and Practice*, pp. 11-12; Oppenheim, vol. 1, p. 656.

<sup>2</sup> Weis, p. 114; Redslob, *Traité*, p. 185; Guggenheim, *Traité*, vol. 1, p. 316; Mervyn Jones, pp. 11-12; *I.L.C. Yearbook* (1953-II), p. 181; United Kingdom, Adoption Act, 1950, sec. 16 (1). See also the draft Convention on Nationality and Statelessness of the Inter-American Juridical Committee, 1952, Article 16: 'Adoption does not affect the nationality of the person adopted. The law of the country in which the adoption takes place may establish special provisions to facilitate the naturalization of adopted persons, especially in the case of minors.'

<sup>3</sup> Loc. cit. Cf. Austria, Citizenship Act, 1949, Articles 2 (4), 6.

<sup>4</sup> See Weis, op. cit., p. 101; Oppenheim, vol. 1, p. 656; Redslob, op. cit., p. 185. Legislation: *Laws Concerning Nationality* (1954), pp. 68, 71, 72, 97, 112, 115, 136-7, 143, 153, 157, 173, 188, 197, 198, 202, 206, 217, 224, 225, 229, 230, 242, 263, 268, 274, 278, 284, 293, 320, 351, 353, 361, 368-9, 370, 376, 387, 388, 395, 398, 400, 464, 466, 498-9, 542. See further I.L.R. 26 (1958-II), p. 375. See *ibid.*, p. 162, for an interesting definition of residence.

<sup>5</sup> *Laws Concerning Nationality* (1954), pp. 50, 68, 88, 122, 130, 136, 139, 144, 149, 161, 176, 189, 200, 201, 227, 244, 269, 275, 283, 287, 296, 303, 319, 320, 352, 391, 411, 438, 440, 446, 541. Cf. British Nationality Act, 1964, ch. 22.

<sup>6</sup> *Ibid.*, pp. 68, 110, 115, 121, 151, 197, 230, 235, 370, 387, 463, 466, 496, 559; *Supplementary Volume* (1959), pp. 10, 165. Cf. the *Cayuga Indians* arbitration, below, p. 319.

<sup>7</sup> Possible examples: Nepal, Afghanistan, Yemen, Iran.

<sup>8</sup> *Laws Concerning Nationality* (1954), pp. 86, 103, 104, 109, 123, 140, 144, 146, 164, 200, 204, 206, 228, 252, 265-6, 268, 287, 289, 308, 354, 385, 387, 428, 441, 457, 459, 523, 531, 553, 557. See also Weis, op. cit., p. 123. See also the United Nations Convention on the Reduction of Statelessness, Article 7.

<sup>9</sup> For example: Finland, Act of 9 May 1941, Article 10; *Laws Concerning Nationality* (1954), p. 151. See also *ibid.*, Article 11; German Federal Republic, Nationality Act, 22 July 1913, sec. 25; *ibid.*, p. 183.

It may be remarked further that criteria such as holding a post in a university<sup>1</sup> and entry into the service of the State<sup>2</sup> are cognates of domicile and residence, providing as it were the best evidence of domicile. In this context also one may wish to place the general rule that a Head of State has the nationality of the State represented.<sup>3</sup>

In certain cases States have protested against legislation permitting involuntary naturalization of foreigners resident for a certain period on national territory or acquiring real estate in the territory.<sup>4</sup> However, it is important to determine the exact bases of such protests. Thus the United States was concerned to a great extent with the principle of voluntary expatriation, the legal status of which will be examined later.<sup>5</sup> Other States, without being very articulate as to the reasons justifying their protests, were in substance reserving their rights and at the same time intimating that these matters were not within the discretion of the territorial sovereign.<sup>6</sup> The British view seems to have been that conferment of nationality on the basis of a number of years' residence, provided that due notice is given and a declaration of a contrary intention may be made, was lawful.<sup>7</sup> The available evidence does not indicate that States are hostile to domicile as a basis for conferment of nationality (as opposed to a temporary residence without *animus manendi*). In reply to the Preparatory Committee for the Hague Conference, the German Government stated:<sup>8</sup>

'... if a State confers its nationality on the subjects of other States without their request, when the persons in question are not attached to it by any particular bond, as, for instance, origin, domicile or birth, the State concerned will not be bound to recognise such naturalisation'.

(i) 'VOLUNTARY' NATURALIZATION. The position is stated as follows by Weis:<sup>9</sup>

'Naturalisation in the narrower sense may be defined as the grant of nationality to an alien by a formal act, on the application of the *de cujus*. It is generally recognised as a mode of acquiring nationality. The conditions to be complied with for the grant of

<sup>1</sup> See the Austrian Citizenship Act, 1949, Articles 2 (4) and 7; *ibid.*, pp. 34, 35.

<sup>2</sup> See *Oppenheim*, vol. 1, p. 656; Redslob, *op. cit.*, p. 185; Weis, *op. cit.*, pp. 101, 114; *Laws Concerning Nationality* (1954), pp. 181, 207, 268. According to the law of the Vatican City, citizenship depends (with some exceptions) on having a fixed residence there by reason of some dignity, appointment, office or employment (*ibid.*, p. 542). In the legislation of many States public office in a foreign State results in loss of nationality: see Weis, *op. cit.*, p. 123.

<sup>3</sup> Hudson, *Cases on International Law* (2nd ed., 1936), p. 201, remarks: 'Perhaps it may be said that international law invests a Head of State with the nationality of the State of which he is Head.' See the 3rd ed. (1951), p. 138. See further, the Rumanian decision *In re Princess Sophia of Albania*, *Journal du droit international*, 54 (1927), p. 505, *Annual Digest*, 1925-6, No. 351. Cf. *Duke of Brunswick v. King of Hanover* (1844), 6 Beav. 1, 2 H.L.C. 1.

<sup>4</sup> Reliance is placed on the materials set out in Weis, *op. cit.*, pp. 105 et seq.

<sup>5</sup> Below, p. 343.

<sup>6</sup> See the Law Officers' Opinion quoted by Weis, *op. cit.*, p. 106.

<sup>7</sup> See *ibid.*, p. 107. However, the British view may well have been that in appropriate circumstances what occurred was a voluntary naturalization.

<sup>8</sup> *Bases of Discussion*, p. 13; quoted above, p. 297.

<sup>9</sup> *Op. cit.*, p. 101.

naturalisation vary from country to country, but residence for a certain period of time would seem to be a fairly universal<sup>1</sup> requisite.'

Hudson remarks:<sup>2</sup>

'Naturalization must be based on an explicit voluntary act of the individual or of a person acting on his behalf.'

Lessing,<sup>3</sup> among others, has concluded that prolonged residence is a precondition for a naturalization which conforms with international law. Such a conclusion is probably sound, but in regard to *voluntary*<sup>4</sup> naturalization two points must be borne in mind. First, the voluntary nature of the act supplements other social and residential links. Not only is the act voluntary but, in regard to obtaining nationality, it is specific: it has that very objective. The element of deliberate association of individual and State is surely important and should rank with birth and descent, not to mention marriage, legitimation and adoption. Secondly, whilst it is true that a considerable number of States allow naturalization on easy terms, the form of the legislation quite often presents the relaxed conditions as available exceptionally.<sup>5</sup> Possibilities of abuse exist where powers are discretionary, but regularity is to be presumed and the peripheral exotics should not be allowed to dominate any assessment: naturalization commonly depends on quite sensible links. Furthermore, in many cases the individual seeking naturalization is in reality often seeking to establish a link *in futuro*, in a situation in which his existing links are equivocal or abhorrent to him: *relatively speaking* the decision to get a new link in social terms may be an attempt to establish roots rather than to change old ties, which in fact may have long ceased to matter. Such is the condition of the refugee, stateless or not. Similar considerations apply when a right of option is exercised by an individual.

(j) NATIONALITY *ex necessitate juris*. The rubric is convenient, but not in all respects satisfactory, since acquisition by marriage, legitimation and

<sup>1</sup> See Harvard Research, *American Journal of International Law*, 23 (1929), Spec. Suppl., pp. 89-91.

<sup>2</sup> A/CN.4/50; *I.L.C. Yearbook* (1952-II), p. 8. His rubric is: 'Naturalization in the narrower sense. Option.' In his terminology naturalization means every nationality acquired subsequent to birth. See also Preparatory Committee of the Hague Conference, Basis of Discussion No. 1 (*Bases of Discussion*, p. 20), which lists, among 'generally recognized principles', 'naturalization on application by or on behalf of the person concerned'.

<sup>3</sup> *Das Recht der Staatsangehörigkeit* . . . (1937), *Bibliotheca Visseriana*, vol. 12, p. 191, contradicted by Weis, *op. cit.*, pp. 101-2; Judge Klaestad, Dissenting Opinion, *I.C.J. Reports*, 1955, p. 29; Judge Read, Dissenting Opinion, *ibid.*, pp. 43, 45. Cf. *ibid.*, pp. 56-57 (Guggenheim, *Judge ad hoc*), and see below, pp. 349-64, on the whole question of the effective link.

<sup>4</sup> Voluntary *sub modo*, since the individual does not have any control over the conditions under which naturalization may occur or under which it may be revoked. There is no right to naturalization unless this is conferred by treaty.

<sup>5</sup> See for example, the Dominican Republic, Naturalization Act No. 1683 of 16 April 1948; *Laws Concerning Nationality* (1954), p. 126, Article 18: 'The President of the Republic may, as a special privilege, grant Dominican nationality by decree to such aliens as he considers worthy of exemption from the usual Dominican naturalization formalities because of services rendered to the Republic.'

adoption might be so described. However, the cases to be mentioned are sufficiently clear to justify the somewhat question-begging heading. The first group of generally recognized rules consists in modalities of the *jus soli*. There is in the legislation of many countries a provision that a child of parents unknown is presumed to have the nationality of the State on the territory of which it is found until the contrary is proved.<sup>1</sup> Also in a great many instances it is provided that the rule applies to children born of parents of unknown nationality<sup>2</sup> or who are stateless.<sup>3</sup> The principal rule, as to foundlings, appears in the Hague Convention on Certain Questions relating to the Conflict of Nationality Law, which provides in Article 14: 'A foundling is, until the contrary is proved, presumed to have been born on the territory of the State in which it was found.'<sup>4</sup> Draft proposals by Hudson<sup>5</sup> and Córdova,<sup>6</sup> Rapporteurs of the International Law Commission, contained provisions of this nature. Quite apart from the evidence of general acceptance *qua* customary law, or any question of a presumption against statelessness,<sup>7</sup> the rule, at least in the case of children of unknown parents, has a strong claim to recognition as a general principle of law according to Article 38 of the Statute of the Court.

As a matter of policy and common sense, it is provided in the great majority of States that minor children are naturalized together with the father, or responsible parent.<sup>8</sup> In many cases the minor is given an option when he reaches majority, or within a short period afterwards. The position in the cases where the father loses nationality is much less clear. Five States appear to give no effect, so far as the minor is concerned, to the father's loss; some fourteen States provide for loss of nationality only if another nationality is held or obtained; and eleven States have legislation which permits loss regardless of consequence.<sup>9</sup>

<sup>1</sup> *Ibid.*, pp. 1, 5, 37, 60, 71, 84, 94, 103, 117, 121, 132-3, 137, 143, 149, 155, 179, 188, 198, 207, 226, 230, 238, 267, 271, 280, 285, 298, 314, 315, 318, 322, 327, 335, 351, 352, 370, 376 (minor who resides in the national territory and whose parents are unknown), 387, 390, 439, 444, 452, 459, 496, 549, 550, 552, 554; *Supplementary Volume* (1959), pp. 10, 18, 71, 151, 155; *I.L.C. Yearbook* (1953-II), p. 175. See also the Irish Nationality and Citizenship Act, 1956, sec. 10 (Parry, *op. cit.*, p. 959); Mervyn Jones, *British Nationality Law and Practice*, p. 10; and Hall, *International Law*, 8th ed., p. 276.

<sup>2</sup> *Laws Concerning Nationality* (1954), pp. 5, 60, 179, 188, 198, 207, 230, 285, 315, 327, 387, 390, 452, 549, 550, 552, 554.

<sup>3</sup> *Ibid.*, pp. 5, 60, 94, 267, 271, 280, 327, 459, 554.

<sup>4</sup> See also the United Nations Convention on the Reduction of Statelessness, 1961, Article 2: 'A foundling found in the territory of a Contracting State shall, in the absence of proof to the contrary, be considered to have been born within that territory of parents possessing the nationality of that State.'

<sup>5</sup> *I.L.C. Yearbook* (1952-II), p. 24 (para. 14); text approved by the I.L.C. at its fourth session, 162nd meeting, para. 14.

<sup>6</sup> *Ibid.* (1953-II), p. 175. See also Sandifer, *op. cit.*, pp. 252, 253; and the Harvard Draft, Article 7 (but this does not make the presumption rebuttable).

<sup>7</sup> *Below*, p. 337.

<sup>8</sup> Survey of legislation: *I.L.C. Yearbook* (1953-II), p. 181. Only one State (Brazil) specifically denied this effect.

<sup>9</sup> See *I.L.C. Yearbook* (1953-II), pp. 181-2.

XIII. *Legal status of the 'general principles'*

A proportion, if not perhaps all, of the principles considered above are generally recognized principles as far as municipal law of the various States is concerned. Weis is very cautious in assessing such material in terms of State practice. He says:<sup>1</sup>

'Concordance of municipal law does not yet create customary international law; a universal consensus of opinion of States is equally necessary. It is erroneous to attempt to establish rules of international law by methods of comparative law, or even to declare that rules of municipal law of different States which show a certain degree of uniformity are rules of international law.'

This statement of principle is unexceptionable in so far as the reversal of the statement would result in a proposition obviously much too dogmatic. However, in substance, Weis is thought to underestimate the significance of legislation as evidence of the opinion of States,<sup>2</sup> particularly in view of the facts that it is impossible to expect all areas of law to be covered by the diplomatic correspondence of each State and that, even where issues have been on the diplomatic agenda, the correspondence may remain unpublished. In the case of the territorial sea, the evidence of State practice available to the International Law Commission was chiefly in the form of legislation, and the comments of governments received by the Commission concentrated to some extent on the nature of their own legislation.

It may be said that, particularly in the field of nationality, the necessary *opinio juris et necessitatis* is lacking; but insistence on clear evidence of this may well produce capricious results. The fact is that municipal law overwhelmingly rests on significant links between the *de cujus* and the State. Justifiable concern at the incidence of multiple nationality and statelessness has led to emphasis on the abnormal and, relatively speaking, exceptional cases. Two points stand out. First, there is something strange in an analysis which remains firmly sceptical about the value of legislation on nationality as evidence of international custom, when many writers commonly assert the existence of rules on the basis of a practice much less consistent and uniform than many of the rules considered above.<sup>3</sup> Secondly, such lack of uniformity as there is in nationality laws is explicable not in terms of a lack of *opinio juris*, but by reference to the fact that inevitably municipal law makes the attribution in the first place, and also to the occurrence of numerous permutations<sup>4</sup> and hence possible points of conflict in legislation on a subject-matter so mobile and complex. There is no evidence that

<sup>1</sup> Op. cit., p. 98; see also p. 101. Similar views in Makarov, *Recueil des cours*, 74 (1949-I), p. 304. Cf. *Oppenheim*, vol. 1, pp. 651 et seq.

<sup>2</sup> Cf. the *United Nations Legislative Series*; and see *The Scotia* (1871), 14 Wallace 170.

<sup>3</sup> This is particularly the case with regard to the Law of the Sea and State Responsibility.

<sup>4</sup> Cf. the synoptic chart of possible sources of statelessness, *I.L.C. Yearbook* (1953-II), p. 195.

there is an absence of *opinio juris* and, on the contrary, in spheres where conflict on the international plane is easily foreseeable, the rules are there to meet the case; witness the rules relating to children of diplomats and birth on ships and aircraft.

In view of considerations of this sort, the conclusions of the Court on the *Nottebohm* case are not particularly novel.<sup>1</sup> After considering the evidence<sup>2</sup> for the doctrine of the real or effective link favoured by the Court, the Judgment proceeds:<sup>3</sup>

'The character thus recognized on the international level as pertaining to nationality is in no way inconsistent with the fact that international law leaves it to each State to lay down the rules governing the grant of its own nationality. The reason for this is that the diversity of demographic conditions has thus far made it impossible for any general agreement to be reached on the rules relating to nationality, although the latter by its very nature affects international relations. It has been considered that the best way of making such rules accord with the varying demographic conditions in different countries is to leave the fixing of such rules to the competence of each State. On the other hand, 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 which assumes the defence of its citizens by means of protection as against other States.

'... According to the practice of States, to arbitral and judicial decisions and to the opinions of writers, 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. Conferred by a State, it only entitles that State to exercise protection *vis-à-vis* another State, if it constitutes a translation into juridical terms of the individual's connection with the State which has made him its national.'

This important statement of principle and policy was supported by eleven members of the Court, there being only three Dissenting Opinions.<sup>4</sup>

<sup>1</sup> The more precise implications of the decision are examined below.

<sup>2</sup> See below, pp. 353-5. The Court says, *I.C.J. Reports*, 1955, p. 22: 'National laws reflect this tendency when, *inter alia*, they make naturalization dependent on conditions indicating the existence of a link, which may vary in their purpose or in their nature but which are essentially concerned with this idea. The Liechtenstein Law of 4 January 1934 is a good example.' For the Liechtenstein Law see *ibid.*, pp. 13-14.

<sup>3</sup> *Ibid.*, p. 23.

<sup>4</sup> Compare also the view of Dr. Lushington on the conditions under which nationality can be changed, in *The Johann Christoph* (1854), Sp. Ecc. and Ad. 2, 6: 'He must have actually abandoned his previous national character and not be merely in the course of abandonment: he must have taken up his abode with his wife and family with the intention of remaining in the country of which he claimed to be a subject.' The Federal Constitutional Court of the German Federal Republic, I.L.R. 19 (1952), No. 56, p. 320, after referring to the discretion of States in matters of nationality, has observed: 'This discretion is circumscribed by the general rules of international law according to which a State may confer its nationality only upon persons who have some close factual connection with it. The practice of States and the jurisprudence of arbitral tribunals recognize, *inter alia*, descent from a national or birth in the territory of a State as a close connection of this kind.' See further, Hackworth, *Digest*, vol. 5, p. 713.

The doctrine of the effective link may be classified either as a rule of customary law or as a general principle of (international) law. However, apart from this particular question, the consequences of Article 38 (1) (c) of the Statute of the Court<sup>1</sup> are too often ignored by writers on nationality. It is submitted that the rule as to the nationality of foundlings<sup>2</sup> has an excellent claim to be considered as a general principle of law.

#### XIV. *The logical application of rules of international law*

The manner in which rules of international law often make use of the terms 'national' or 'nationality' has been noticed previously.<sup>3</sup> If these rules are to work effectively, or at all, there must be important limitations on the powers of individual States in the matter of attribution of persons for purposes of international law. Some of these limitations are already well recognized and, whilst they must be included in the discussion, they do not in every case call for extended treatment.

(a) THE AREA OF ATTRIBUTION MUST HAVE LEGAL PERSONALITY. There must exist a State, recognized as such by the forum, or other international person having the capacity to create a law of attribution on the basis of nationality.<sup>4</sup> The Free City of Danzig was an international person and Article 105 of the Treaty of Versailles gave Danzig citizens a nationality *qua* Danzig. Courts have recognized this Danzig citizenship or nationality and its existence and reality were not diminished by the fact that Danzig did not have the normal capacities of a sovereign State.<sup>5</sup> Article 6 of Annex VI to the Italian Peace Treaty of 1947 provided for 'citizenship' of Trieste. Experience shows that, since nationality is a principle of attribution, it will not be helpful to confine it to a single type of 'nation State'. Thus the Vatican City has a nationality law the effects of which are unchallenged. However, if the entity concerned has not developed any stable personality it may not be possible to regard its citizens as having nationality.<sup>6</sup>

<sup>1</sup> See Bowett, in *Report of International Law Conference* (July 1960), David Davies Memorial Inst. of Int. Studies, p. 30 at p. 35, where he says that the general principles of law rank equally with conventions, treaties and custom. Is he correct in saying that these principles can *only* be deduced by a comparative approach to the national systems of law?

<sup>2</sup> Above, p. 311.

<sup>3</sup> Above, p. 290.

<sup>4</sup> See Makarov, *Recueil des cours*, 74 (1949-I), pp. 322-3; and see also *Jawdat Badawi Sha'ban v. Commissioner for Migration and Statistics*, *Annual Digest*, 1943-5, No. 5 (loss of Palestine citizenship by naturalization in a foreign State; Trans-Jordan regarded as an independent State). In *Hunt v. Gordon* (1884), 2 N.Z.L.R. 160, acquisition of Samoan nationality was not recognized as the Imperial Government regarded Samoa as *terra nullius*: see Nygh, *International and Comparative Law Quarterly*, 12 (1963), pp. 178-9. See below, p. 326, on non-recognition.

<sup>5</sup> See *In re Krüger*, I.L.R. 18 (1951), No. 68; *In re Nix*, *ibid.*, No. 69; *In re Wetzel*, *ibid.*, 24 (1957), p. 434. Van Panhuys, *The Role of Nationality in International Law*, p. 34, states that the 'Danzig nationality' cannot be regarded as a 'nationality proper'. *Sed quaere?* On the Saar territory after the First World War: Makarov, *Recueil des cours*, 74 (1949-I), p. 287.

<sup>6</sup> See the Italian *Corte di Cassazione* in *Società di Navigazione Adria v. Feher*, *Annual Digest*, 1935-7, No. 205, with regard to Fiume, 1919-24. The Province of Carnaro was held to be *res*

(b) RÉGIMES OF DIVIDED SOVEREIGNTY OR INDETERMINATE STATUS. In the cases of the international lease,<sup>1</sup> 'protected States',<sup>2</sup> *condominia* and the like, it is obvious that the status of the populations concerned must be regulated by international law. In practice these questions may arise even when a treaty exists. In the case of the Ryukyus, the Peace Treaty with Japan confers 'powers of administration, legislation and jurisdiction' on the United States. The United States courts have defined the Japanese interest in the islands as 'residual' or '*de jure* sovereignty', and have held that their inhabitants were not nationals of the United States, and that they were a 'foreign country' for purposes of applying various statutes.<sup>3</sup> Recent history provides examples of territory, not a *res nullius*, which has no determinate sovereign. For example, in the Peace Treaty of 1951 Japan renounced all right to Formosa, but as yet Formosa has not been the subject of any act of disposition. In the view of the British Government, Formosa and the Pescadores are territory 'the *de jure* sovereignty over which is uncertain or undetermined'.<sup>4</sup> Assuming for the purpose of argument that this view is correct, what is the status of an inhabitant of Formosa, to the authorities of which the British Government accords only *de facto* recognition in respect of the island and its dependencies? The point of the question for the present purpose is to indicate the need to recognize that nationality on the international plane is an instrument of attribution. If nationality fails to provide an answer,<sup>5</sup> a reasonable substitute must be found and, in the instant case, residence or domicile must provide the answer as it does in cases of state succession.<sup>6</sup> The principle of effectiveness<sup>7</sup> may be thought to justify giving capacity of a certain kind to a *de facto* régime.

(c) MANDATED AND TRUST TERRITORIES.<sup>8</sup> *Ex hypothesi* the status of the inhabitants of Mandated and Trust Territories cannot be a domestic question. The Mandatory does not have sovereignty over territory,<sup>9</sup> nor does the administering authority over a Trust Territory.<sup>10</sup> It would seem

*nullius* at the relevant times. The non-recognition of a government may influence the Court: *Ichlenedjian v. Gregorian*, *ibid.*, 1931-2, No. 27 (Imperial Law of Russia applied).

<sup>1</sup> See McNair, *International Law Opinions*, vol. 2, p. 26.

<sup>2</sup> *Ibid.*, pp. 39-61.

<sup>3</sup> *Brewer v. United States*, *Annual Digest*, 1948, No. 169; *Cobb v. United States*, I.L.R. 18 (1951), No. 173; *United States v. Ushi Shiroma*, *ibid.* 21 (1954), p. 82; *Burna v. United States*, *ibid.* 24 (1957), p. 89. See also Kuwada, *Japanese Annual of International Law* (1959), pp. 87-91, and Kotani, *ibid.*, pp. 75-79. Cf. *Lighthouses in Crete and Samos*, P.C.I.J., 1937, Series A/B, No. 71.

<sup>4</sup> Written answer by the Secretary of State, 4 February 1955, in *International and Comparative Law Quarterly*, 5 (1956), pp. 413-14; cf. *ibid.* 8 (1959), p. 166.

<sup>5</sup> In the case of Formosa it begs the question, which is, whose nationality law? On the view of the British Government, Formosa itself is not a sovereign entity and can have no nationality *eo nomine*, *qua* Formosa.

<sup>6</sup> Below, pp. 319 et seq.

<sup>7</sup> Below, pp. 327, 338, 339.

<sup>8</sup> See, in particular, Weis, *op. cit.*, pp. 22-28; van Panhuys, *op. cit.*, pp. 65-68.

<sup>9</sup> Judge McNair, *I.C.J. Reports*, 1950, p. 128, at p. 150; Article 22 of the League Covenant.

<sup>10</sup> United Nations Charter, Chapter XII.



that in principle the inhabitants cannot be nationals of the administering power and thus, *in one sense*, they have no nationality. Weis had observed:<sup>1</sup> 'The position of these persons is somewhat anomalous since they have, in consequence, no nationality in the sense of international law'. With respect this seems to be a *petitio principii*, since the absence of nationality *qua* internal law of the administering power, and the absence of nationality *eo nomine* conferred by some other source, does not render the inhabitants stateless. For various purposes of the law they are attributable to the territory itself: if they were not the sacred trust and attendant obligations would be easily avoided. The fact that the attribution or belonging is not readily ascribed to a 'citizenship' or 'nationality' is a source of confusion but hardly a reason for decision.

Judicial decisions, such as *R. v. Ketter*,<sup>2</sup> do not take the matter very far since they merely establish that the *de cuius* is not a national of the administering power without deciding what his status is otherwise. The decisions, and particularly those concerning South-West Africa,<sup>3</sup> often turn on questions of State succession. However, there is some good evidence for the existence of rules of attribution operating on the international plane which give inhabitants of such territories a legal status as such. This status necessarily concerns the relation with the administering power for particular purposes. Thus in the law of war the control which the administering power has justifies extension of the rules on the assumption that the status, as neutral or belligerent, of the territory follows that of the administering power.<sup>4</sup> In a case before the Court of Restitution Appeals of the German Federal Republic,<sup>5</sup> a Czechoslovak by origin had acquired Palestinian citizenship in 1943: German legislation conferred certain benefits on persons who, on 8 May 1945, were 'nationals of the United Nations'. The Court was unable to establish whether the *de cuius* was Czechoslovak but decided that he was a 'national of the United Nations'. The Court was aided by a Law of 1951 which defined

<sup>1</sup> Op. cit., p. 27.

<sup>2</sup> [1940] 1 K.B. 787; *Annual Digest*, 1938-40, No. 21. Cf. Mervyn Jones, this *Year Book*, 22 (1945), p. 127, n. 2; Schwarzenberger, *Modern Law Review*, 3 (1939-40), pp. 164-5. See also *A.-G. v. Goralschwili*, *Annual Digest*, 1925-6, p. 47; High Court of Palestine (term 'British Subject' in an Extradition Treaty); *Klausner v. Levy*, *ibid.*, 1949, No. 17; *Annandale v. Collector of Customs*, [1955] N.Z.L.R. 168; I.L.R. 22 (1955), p. 87. See also Weis, op. cit., p. 24.

<sup>3</sup> *Rimpelt v. Clarkson*, *Annual Digest*, 1947, No. 12; *Westphal et Uxor v. Conducting Officer of Southern Rhodesia* (1948), 2 S.A.L.R. 18; *Annual Digest*, 1948, No. 54. See also, on the 'C' class mandates, *Wong Man On v. The Commonwealth and Others* (1952), 86 C.L.R. 125; I.L.R. 19 (1952), No. 58, on which see O'Connell, this *Year Book*, 31 (1954), p. 458; *Tagaloo v. Inspector of Police*, [1927] N.Z.L.R. 883; *In re Tamasese*, [1929] N.Z.L.R. 209; *Nelson v. Braisby* (No. 2), [1934] N.Z.L.R. 559.

<sup>4</sup> For analogous cases concerning protectorates and the like see *Katrantsios v. The Bulgarian State*, *Annual Digest*, 1925-6, No. 27; *van Hoogstraten v. Low Lum Seng*, *ibid.*, 1938-40, No. 16; *Oppenheim*, vol. 1, pp. 191, 193, 196 (note 1), 206-7 (notes); and McNair, *International Law Opinions*, vol. 1, p. 39.

<sup>5</sup> 15 November 1951; I.L.R. 18 (1951), No. 25.

'United Nations' as including, *inter alia*, territories under the administration or control of countries formerly at war with Germany, where such territories had taken part in the war against that country by virtue of the Mandatory having been engaged in that war. Palestine came within this definition in the view of the Court.

The existence of some system of attribution is recognized by the admission that the administering power may exercise the right of diplomatic protection in respect of the population of the territories. Moreover, where residents of foreign origin are to be found, some criteria must be employed to divide aliens from the population of the territory. Looked at in another way the inhabitants share the status *in rem* which a mandated or trust territory has.<sup>1</sup> The tests available would seem to be residence and domicile. In the case of double nationality (to use a convenient term), it is doubtful if the 'State nationality' should prevail *ipso facto* over the 'trust protected status'. Indeed, there are obvious reasons for requiring substantial grounds before allowing the 'state nationality' to prevail.

(d) CHAPTER XI OF THE UNITED NATIONS CHARTER. This chapter is the 'Declaration regarding non-self-governing territories' and under Article 73 thereof Members

'recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost... the well-being of the inhabitants of these territories...'

The more specific obligations<sup>2</sup> include ensuring the 'just treatment' and 'protection against abuses' of the peoples concerned. Limitations on the conferment of nationality must arise here, for example, if naturalization were used as a weapon in favour of one political or racial group at the expense of the people as a whole. So also, denationalization would be curbed if it were used in certain ways.

(e) STATES WITHOUT NATIONALITY LEGISLATION. It may happen that a State has not adopted any nationality laws on the modern pattern. Such cases are increasingly rare, but the Yemen probably constitutes a recent example.<sup>3</sup> Historically, before the existence of general statutory definitions, nationality was related to domicile (to some extent it still is<sup>4</sup>) and in fact the two concepts were not differentiated.<sup>5</sup> The very interesting compilation of Aitchison<sup>6</sup> contains a considerable quantity of State practice relating

<sup>1</sup> See Judge McNair, *I.C.J. Reports*, 1950, pp. 156-7; and Parry, *this Year Book*, 30 (1953), p. 265.

<sup>2</sup> The wording of Article 73 *prima facie* connotes legal obligation. See Waldock, *Recueil des cours*, 106 (1962-II), pp. 29-30.

<sup>3</sup> Nepal adopted a Citizenship Act in 1952. Cf. Parry, *Nationality and Citizenship Laws of the Commonwealth*, pp. 355 et seq.

<sup>4</sup> Above, p. 308.

<sup>5</sup> See van Panhuys, *op. cit.*, pp. 33, 36.

<sup>6</sup> *A Collection of Treaties, Engagements, and Sunnuds, Relating to India and Neighbouring Countries*. Compiled by C. U. Aitchison (4th ed., Calcutta, 1909; 5th ed., 1929, revised and continued up to 1929).

to States and other political units which almost certainly lacked any formal nationality laws. With reference to obligations of non-interference, extradition and responsibility for border raiding the various agreements refer to 'subjects', 'their tribes', 'tribes settled in their territories', and the like.<sup>1</sup>

Recurrent examples of the absence of nationality legislation arise from the creation of new States. *Ex hypothesi*—if they are States—they must possess a population which is their own.<sup>2</sup> From the point of view of international law new States must possess nationals *ab initio*.<sup>3</sup> In a decision on the status of former Palestine citizens<sup>4</sup> prior to the enactment of the Israeli Nationality Law of 1952, a judge of the District Court of Tel-Aviv observed:<sup>5</sup>

'So long as no law has been enacted providing otherwise, my view is that every individual who, on the date of the establishment of the State of Israel was resident in the territory which to-day constitutes the State of Israel, is also a national of Israel. Any other view must lead to the absurd result of a State without nationals—a phenomenon the existence of which has not yet been observed.'

If a new State, relying on the absence of a municipal law, tried to deport a part of its permanent population, it would be acting in clear breach of its legal duties and might even involve its government in acts punishable as genocide. The position is, however, complicated by the operation of the law of State succession<sup>6</sup> and the implications of the doctrine of estoppel.<sup>7</sup>

(f) PERSONS OUTSIDE NATIONAL LEGISLATION. The legislation of a number of States has categorized the population concerned into those who had a higher status, usually designated 'citizens', and others. Thus, in the case of the United Kingdom, the class of British protected persons is not regarded as consisting of 'British Subjects': but, with some significant exceptions,<sup>8</sup> such persons were and are considered to have the status of

<sup>1</sup> It is not, of course, the case that responsibility for the activities of armed bands necessarily depends on the nationality of the individuals involved. Cf. Brownlie, *International and Comparative Law Quarterly*, 7 (1958), p. 712. See also the Agreement with Regard to Certain Angolan and Northern Rhodesian Natives Living on the Kwando River, 18 November 1954, *British and Foreign State Papers*, vol. 161, p. 167.

<sup>2</sup> On conditions of Statehood: Briggs, *Law of Nations* (2nd ed.), pp. 69 et seq.

<sup>3</sup> Subject to qualifications which may arise from the right of option: below, p. 341. See van Panhuys, *op. cit.*, pp. 29–30. For a different view: Quadri, *La sudditanza nel diritto internazionale* (1936), p. 294 n.

<sup>4</sup> Palestine citizenship had ceased to exist: *Hussein v. Inspector of Prisons*, 6 November 1952; see I.L.R. 17 (1950), p. 112.

<sup>5</sup> *A.B. v. M.B.*, *ibid.*, p. 110. However, the same court in another case assumed the absence of nationality until the Nationality Law: *Oseri v. Oseri*, *ibid.*, p. 111 (and cf. the *Shifris* case, *ibid.*). See also Weis, *op. cit.*, p. 145 n., van Panhuys, *op. cit.*, p. 30; Rosenne, *Journal du droit international*, 81 (1954), p. 4, n. 3, and cf. p. 6. See further, *Malapa v. Public Prosecutor*, I.L.R. 28, p. 80.

<sup>6</sup> See below, p. 319.

<sup>7</sup> See below, p. 335.

<sup>8</sup> Where the protected State may be considered to have separate international personality and to have a nationality of its own; and when the individual derives the status from connexion with a British Mandated or Trust Territory.

national for purposes of international law.<sup>1</sup> In the past Italian law knew a distinction between citizens and colonial subjects, and in substance the latter were regarded as nationals in the international sphere.<sup>2</sup> American law has the category 'non-citizen' nationals.<sup>3</sup>

The legal necessity<sup>4</sup> for making attribution in the absence of any internal provisions governing the status of a group, and also in cases where a deliberate denial of citizenship occurs, is apparent from two international cases. In an arbitral award of 22 January 1926 the status of Cayuga Indians, who had migrated from the United States to Canada, was established on the basis of factual connexion. They were held to have become British nationals and the assumption was that, for purposes of international law, they had previously been attached to the United States.<sup>5</sup> In *Kahane (Successor) v. Parisi and Austrian State*<sup>6</sup> the Tribunal in substance regarded Rumanian Jews as Rumanian nationals since Rumania, whilst withholding citizenship, did not consider them to be stateless. However, the main point of the decision was to establish the meaning of the term 'ressortissant' in the Treaty of St. Germain.<sup>7</sup>

Although at first sight similar in effect, 'denationalization' is to be considered separately. Exclusion from citizenship in laws creating what is *prima facie* an internal régime of status is to be distinguished from acts of deprivation of nationality which are intended to have international effect.

(g) CASES OF STATE SUCCESSION. The rubric is to be regarded as one of convenience and a matter of convention. The problem involved is that of the nationality of inhabitants of territory which is the subject of a change of sovereignty.<sup>8</sup> If assumptions as to matters of principle may be made at

<sup>1</sup> See the British Nationality Act, 1948, sec. 32 (i); Parry, *op. cit.*, pp. 12-13, 91, 95, 97-98, 116, 220, 352-63; Weis, *op. cit.*, pp. 20-22; Mervyn Jones, this *Year Book*, 22 (1945), pp. 122-9. 'British protected persons' may exist under the law of other Commonwealth members: see Parry, *op. cit.*, p. 98. At least since 1948, British protected persons are not considered to be aliens for purposes of internal law. See further, *National Bank of Egypt v. Austro-Hungarian Bank*, *Annual Digest*, 1923-4, No. 10, and the Allied Powers (Maritime Courts) Act, 1941, 4 & 5 Geo. 6, c. 21, Articles 4 and 17 (1). And cf. the definition of 'British nationals' in the U.K.-Rumanian Financial Settlement Agreement, 1960, Cmnd. 1232, Article 3, viz. 'physical persons who on the date of the signature of the present Agreement are citizens of the United Kingdom and colonies, citizens of Rhodesia and Nyasaland, citizens of the State of Singapore, British subjects without citizenship or British protected persons belonging to any of the territories for whose international relations the United Kingdom Government are responsible'.

On the present relevance of the *inter se* doctrine for nationality law see Fawcett, *The British Commonwealth in International Law* (1963), pp. 182-6; Parry, *op. cit.*, pp. 116-23.

<sup>2</sup> *Annual Digest*, 1935-7, No. 120 (Italian *Corte di Cassazione*).

<sup>3</sup> See, for example, *Cabebe v. Acheson*, *ibid.*, 1949, No. 62, at pp. 209-10. For Netherlands law see van Panhuys, *op. cit.*, p. 29. See also Makarov, *Recueil des cours*, 74 (1949-I), pp. 288-90.

<sup>4</sup> See *Oppenheim*, p. 644; and see above, p. 318.

<sup>5</sup> Award: *American Journal of International Law*, 20 (1926), p. 574; *Reports of International Arbitral Awards*, vol. 6, p. 173.

<sup>6</sup> *Recueil des décisions des tribunaux arbitraux mixtes*, vol. 8, p. 943; *Annual Digest*, 1929-30, No. 131.

<sup>7</sup> Articles 249, 256.

<sup>8</sup> See the rubrics employed by Weis, *op. cit.*, p. 139, and Hudson, A/CN.4/50, *I.L.C. Yearbook* (1952-II), p. 8.

the outset, the writer's opinion is that no help is to be derived from the categories of the law of State succession.<sup>1</sup> Indeed, in view of the rule that every State must have a determinate population (as an element of its statehood), and therefore nationality always has an international aspect, there is no very fundamental distinction between the issue of statehood and that of transfer of territory. This is obvious in the case of 'universal succession'. Furthermore, the distinction between original and derivative modes of acquiring territory is unhelpful in this and in other contexts.<sup>2</sup>

In the submission of the present writer, the evidence is overwhelmingly in support of the view that the population follows the change of sovereignty in matters of nationality. At the end of the First World War the Versailles and associated treaties contained a number of provisions, more or less uniform in content, relating to changes of sovereignty which exhibited all the variations of State succession.<sup>3</sup> Thus the Minorities Treaty signed at Versailles provided as follows:

'Article 4. Poland admits and declares to be Polish nationals *ipso facto* and without the requirements of any formality persons of German, Austrian, Hungarian or Russian nationality who were born in the said territory of parents habitually resident there, even if at the date of the coming into force of the present Treaty they are not themselves habitually resident there.

'Nevertheless, within two years after the coming into force of the present Treaty, these persons may make a declaration before the competent Polish authorities in the country in which they are resident stating that they abandon Polish nationality, and they will then cease to be considered as Polish nationals. In this connexion a declaration by a husband will cover his wife and a declaration by parents will cover their children under 18 years of age.

'Article 6. All persons born in Polish territory who are not born nationals of another State shall *ipso facto* become Polish nationals.'

The Treaties of St. Germain, Trianon and Paris<sup>4</sup> have similar provisions except that the Treaties of St. Germain and Trianon refer to persons born of parents 'habitually resident or possessing rights of citizenship (*pertinenza* — *heimatrecht*) as the case may be there'. It is thought that the precedent value of such provisions is considerable in view of their unifor-

<sup>1</sup> Cf. Weis, *op. cit.*, pp. 140, 150. At p. 150 he observes: 'Most of the principles referred to in connection with universal succession apply, *mutatis mutandis*, to the effects of partial succession on nationality. This is, however, subject to two qualifications: (a) questions of nationality will, in cases of partial succession, more frequently be regulated by treaty; and (b) since the predecessor State continues to exist, two nationalities, the nationality of the predecessor and that of the successor State, are involved. There thus arises not only the question of acquisition of the new nationality, but also that of the loss of the old nationality.' These qualifications hardly raise serious issues of principle.

<sup>2</sup> But cf. Hudson, *loc. cit.*

<sup>3</sup> See *Laws Concerning Nationality* (1954), pp. 586 et seq. See also the Treaty of Neuilly-sur-Seine, Articles 51 and 52, *ibid.*, p. 587; and the Treaty of Lausanne, Articles 30-36, *ibid.*

<sup>4</sup> Article 4. The Treaty of Paris concerned Rumania. See also *Markt v. Prefect of Trent*, *Annual Digest*, 1941-2, No. 76.

mity and the international character of the deliberations preceding the signature of these treaties. The objection that they give a right of option does not go very far since the option is a later and additional procedure.<sup>1</sup> Only if and when the choice is made does the nationality of the successor State terminate: there is no statelessness before then. The Treaty of Peace with Italy of 1947 provided in Article 19 that Italian citizens domiciled, in the sense of habitual residence, in territory transferred, shall become citizens of the transferee; and a right of option is given. A similar provision (Annex IV, Article 6) relates to acquisition of nationality of the Free Territory of Trieste. Bilateral treaties between the U.S.S.R. and its neighbours, Poland and Czechoslovakia,<sup>2</sup> have provided for rights of option by ethnic minorities living in ceded territory and the assumption underlying these and other treaties would seem to be that, subject to and until the exercise of such rights, nationality followed the transfer of sovereignty.

State practice evidenced by the provisions of internal law is to the same effect. The law of the United Kingdom has been expressed as follows by Lord McNair:<sup>3</sup>

'The normal effect of the annexation of territory by the British Crown, whatever may be the source or cause of the annexation, for instance, a treaty of cession, or subjugation by war, is that the nationals of the State whose territory is annexed, if resident thereon, become British subjects; in practice, however, it is becoming increasingly common to give such nationals an option, either by the treaty of cession or by an Act of Parliament, to leave the territory and retain their nationality.'

The present law is represented by section 11 of the British Nationality Act, 1948, which provides as follows:

'If any territory becomes a part of the United Kingdom and colonies, His Majesty may by Order in Council specify the persons who shall be citizens of the United Kingdom and Colonies by reason of their connection with that territory; and those persons shall be citizens of the United Kingdom and Colonies as from a date to be specified in the Order.'

There is no reason to believe that this provision has altered the principle as it was assumed to be before 1948.<sup>4</sup> The change is really one of procedure:

<sup>1</sup> On the right of option see below, p. 341.

<sup>2</sup> Agreement of 6 July 1945, Poland and U.S.S.R.; Protocol of 29 June 1945, Czechoslovakia and U.S.S.R., *British and Foreign State Papers*, 145, p. 1096. Other treaties: United Kingdom and Siam, *Treaty Series*, 1934, No. 19; Agreement of 1949, Netherlands and Indonesia, *Laws Concerning Nationality*, 1954, p. 234; Treaty of Cession, 1954, France and India, Basu, *Commentary on the Constitution of India* (3rd ed.), vol. 2, p. 631. See further, Weis, *op. cit.*, pp. 159-62; and Ginsburgs, *American Journal of International Law*, 55 (1961), pp. 919-46.

<sup>3</sup> *International Law Opinions*, vol. 2, p. 24. See also Mervyn Jones, *British Nationality Law* (1956), pp. 58, 98, 140. Dicey, *Conflict of Laws* (5th ed., 1932), p. 159, Rule 26; Parry, *British Nationality* (1951), p. 32; *id.*, *Nationality and Citizenship Laws of the Commonwealth*, pp. 72-73, 163-5, 431-7, 659-65; Weis, *op. cit.*, pp. 143-4; O'Connell, *The Law of State Succession*, p. 248.

<sup>4</sup> Parry, *Nationality and Citizenship Laws of the Commonwealth*, pp. 274-5. The Act, he says, 'merely enacts the principle explained, that the matter is one for regulation in its discretion by

there is now a prescribed mode for settlement of the precise categories of persons who are to acquire British citizenship. Previously (and even now before the Order in Council is in force) it was not clear in all cases who automatically acquired citizenship. Two other points may be made here. First, the important fact is to be noticed that section 11 applies to 'citizenship by incorporation of territory' and not to 'annexation'. This underlines the general irrelevance of the categories both of State succession and of the acquisition of territory. It is also the case that the mode of acquiring citizenship by incorporation of territory appears in the legislation of the Commonwealth countries.<sup>1</sup> Secondly, it might appear that under section 11 acquisition does not take place automatically;<sup>2</sup> however, if the precise object of the provision is to settle a procedure for determining the issue of nationality for internal purposes, it does not follow that the change is not 'automatic'. The fact is that there will usually be an internal procedure for regulating these questions, and the application of rules to facts is not 'automatic' in a narrow, mechanical sense.

The practice of the United States is to confer nationality on nationals of the predecessor State resident in the territory,<sup>3</sup> although on occasion persons who were 'citizens' of the territory annexed acquired citizenship.<sup>4</sup> Soviet practice has been similar.<sup>5</sup> The French Law of 1945<sup>6</sup> provides as follows:

'Article 12. Dans le cas où le traité ne contient pas de telles dispositions les personnes qui demeurent domiciliées dans les territoires rattachés à la France acquièrent la nationalité française.

'Article 13. Dans la même hypothèse, les personnes domiciliées dans les territoires cédés perdent la nationalité française, à moins qu'elles n'établissent effectivement leur domicile hors de ces territoires.'

Other States do not have general provisions on incorporation but have laws to deal with the situation as it arises.<sup>7</sup> The absence of general pro-

the Crown'. Before 1949 there was no statutory provision expressly regulating annexation as a mode of acquiring the status of British subject: in other words, section 11 is concerned with a matter of internal competence. See also Weis, *op. cit.*, pp. 144-5; Mervyn Jones, *op. cit.*, p. 166.

<sup>1</sup> Parry, *Nationality and Citizenship Laws of the Commonwealth*, pp. 519-20 (admission of Newfoundland as a province of Canada), 595 (Australia), 638-40 (New Zealand), 764-5 (Southern Rhodesia), 871 (India), 883-4 (accession of Bahawalpur *et al.* to Pakistan), 901 (Pakistan), II, 1148, 1168 (Fed. of Malaya), 1212 (Fed. of Rhodesia and Nyasaland).

<sup>2</sup> See Weis, *op. cit.*, p. 145. It would be surprising if the consequence of the rule of internal competence were to make the population concerned stateless, or to cause them to remain aliens.

<sup>3</sup> Moore, *Digest*, vol. 3, pp. 311 *et seq.*; Hackworth, *Digest*, vol. 3, pp. 116 *et seq.*

<sup>4</sup> Annexations of Hawaii and Texas: see *ibid.*, p. 119; and Moore, *Digest*, vol. 3, p. 314.

<sup>5</sup> *Laws Concerning Nationality* (1954), pp. 463, 464 (Decrees relating to Lithuania, Estonia, Latvia, Bessarabia and Northern Bukovina).

<sup>6</sup> *Ibid.*, p. 152.

<sup>7</sup> *Ibid.*, pp. 197 (Greek Act *re* the Dodecanese); 230 (Indonesia); 263 (Israel: for the views of Israeli Courts, see above, p. 318); 274 (Trans-Jordan); 284 (Lebanon); 293 (Libya); 378 (Philippines); 386 (Poland, 1951, Article 2 (3)); 399 (Saudi Arabia).

Many of these enactments concern the creation of new States, but the operative principle is the same. More examples are to be found in the compilation of Flournoy and Hudson of the first nationality laws of certain States, e.g. Albania, Panama, Poland, Turkey, Yugoslavia.

visions in many nationality laws is almost certainly of little significance: legislation does not concern itself with the exceptional or unlikely event.

In view of the State practice it is hardly surprising to find works of authority stating that persons attached to territory change their nationality when the sovereignty changes.<sup>1</sup> The Harvard Draft provides as follows:<sup>2</sup>

'Article 18, para. 1. When the entire territory of a State is acquired by another State, those persons who were nationals of the first State become nationals of the successor State, unless in accordance with the provisions of its law they decline the nationality of the successor State.

'Para. 2. When a part of the territory of a State is acquired by another State or becomes the territory of a new State, the nationals of the first State who continue their habitual residence in such territory lose the nationality of that State and become nationals of the successor State, in the absence of treaty provisions to the contrary, unless in accordance with the law of the successor State they decline the nationality thereof.'

Somewhat surprising is the caution of Dr. Weis in his conclusion on these issues. In his view:<sup>3</sup>

'To sum up, it may be said that there is no rule of international law under which the nationals of the predecessor State acquire the nationality of the successor State. International law cannot have such a direct effect, and the practice of States does not bear out the contention that this is inevitably the result of the change of sovereignty. As a rule, however, States have conferred their nationality on the former nationals of the predecessor State, and in this regard one may say that there is, in the absence of statutory provisions of municipal law, a *presumption* of international law that municipal law has this effect.'

The caution is surprising since his own survey of State practice, though not perhaps comprehensive, would seem to make his restraint unnecessary. It may be doubted if the International Court would require greater

<sup>1</sup> See Oppenheim, *op. cit.*, pp. 551, 571, 656-7; Rousseau, *Droit international public*, p. 267; Moore, *Digest*, vol. 3, pp. 311 et seq; Hyde, *International Law*, vol. 2, p. 1090; Briggs, *Law of Nations* (2nd ed.), p. 503. See also *Peinitzsch v. German State and Others* (German-Yugoslav Mixed Arbitral Tribunal), *Annual Digest*, 1923-4, No. 121; Jellinek, *Der automatische Erwerb und Verlust der Staatsangehörigkeit durch völkerrechtliche Vorgänge* (Berlin, 1951); Mann, *Modern Law Review*, 5 (1941-2), p. 218 at p. 221. See further the Opinion of the U.S. Attorney-General quoted by Briggs, p. 503.

<sup>2</sup> *American Journal of International Law*, 23 (1929), Spec. Suppl., p. 61. And see the comment thereon.

<sup>3</sup> *Op. cit.*, p. 149. Under the rubric 'Partial succession' he concludes (pp. 153-4) '... one may speak of a positive rule of international law on nationality to the effect that, under international law and provided the territorial transfer is based on a valid title, the predecessor State is under an obligation *vis-à-vis* the successor State to withdraw its nationality from the inhabitants of the transferred territory if they acquire the nationality of the successor State. In the absence of explicit provisions of municipal law there exists a presumption of international law that the municipal law of the predecessor State has this effect.' A formula involving a presumption as to the effect of municipal law is infelicitous. Other authors are of similarly cautious opinions: see O'Connell, *op. cit.*, p. 249; Graupner, *Transactions of the Grotius Society*, 32 (1946), p. 87 at p. 92; Mervyn Jones, *British Nationality Law* (1956), pp. 20-26; Parry, *this Year Book*, 28 (1951), pp. 426-7; and Giuliano, in *Comunicazioni e studi*, 8 (1957).



consistency. Moreover, Dr. Weis has little to offer in the way of contrary practice. He does, however, refer<sup>1</sup> to the eviction of ethnic Germans from the Polish Western Territories and the Sudetenland in accordance with the Potsdam Agreement, but one may doubt the relevance of the expulsions. Expulsion and exchange of populations may occur by agreement and are lawful provided certain conditions are observed:<sup>2</sup> such incidents have no impact on the general law of nationality. Variations of practice, and areas of doubt, certainly exist, but by their nature they are hardly inimical to the general rule. Some difficulties merely concern modalities of the general rule itself.<sup>3</sup> Thus the position of nationals of the predecessor State who are resident outside the territory the sovereignty of which changes at the time of the transfer is unsettled. The rule probably is that, unless they have or acquire a domicile in the transferred territory, they do not acquire the nationality of the successor State.<sup>4</sup> This, it seems, is the British doctrine.<sup>5</sup> Again, aliens resident in the territory do not by that fact alone acquire the nationality of the successor State.<sup>6</sup> It is not necessary to examine all the possible ramifications here:<sup>7</sup> the fact is that many well settled rules have a penumbra of uncertainty. Provisions for rights of option, as has been suggested earlier, do not alter things very much since, in general, the option is to throw off a nationality acquired, or assumed to exist or be about to exist, as a result of the transfer of sovereignty. In certain cases the picture is blurred by the intrusion of factors such as non-recognition,<sup>8</sup> and many of the municipal decisions often cited in the present connexion rest on very narrow grounds, and are not uncommonly focused on aspects other than those concerning international law.

The general principle is that of a substantial connexion with the territory concerned by citizenship or residence or family relation to a qualified person. This principle is perhaps merely a special aspect of the general

<sup>1</sup> At p. 146.

<sup>2</sup> One may recall the Greco-Turkish exchange agreement; the Hungarian-Czechoslovak exchange in 1946; and the provisions of the Potsdam Agreement. On the expulsions under the Potsdam Agreement, see the present writer, *International Law and the Use of Force by States*, pp. 408-9.

<sup>3</sup> By analogy, the validity of the baseline principle in the law of the territorial sea was not thought to be affected by the absence (at least before 1958) of clear evidence as to its application to all permutations arising in coastal formations and relations.

<sup>4</sup> See Oppenheim, op. cit., p. 572; Weis, op. cit., pp. 145-8, 155-8, 159; O'Connell, op. cit., p. 253; Mervyn Jones, op. cit., pp. 23-24; *Slouzak Minority in Teschen (Nationality) case*, *Annual Digest*, 1919-42, No. 93. Cf. *In re Andries*, I.L.R. 17 (1950), No. 26 (dual nationality arising).

<sup>5</sup> McNair, *International Law Opinions*, vol. 2, pp. 21-26; Weis, op. cit., p. 145. Parry, loc. cit., pp. 163-4, 275, is of opinion that the rule was uncertain. See also *Murray v. Parkes*, [1942], 2 K.B. 123.

<sup>6</sup> *Masson v. Mexico* (1876), U.S.-Mex. Claims Commission; Moore, *Arbitrations*, p. 2542; McNair, op. cit., p. 26 (Law Officers, 2 February 1900); *In re Wolff*, I.L.R., 18 (1951), No. 125; Hudson, A/CN.4/50, *I.L.C. Yearbook* (1952-II), p. 9; Weis, op. cit., p. 148; O'Connell, op. cit., p. 257; Briggs, *Law of Nations* (2nd ed.), p. 502.

<sup>7</sup> See O'Connell, op. cit., pp. 251-8; Briggs, op. cit., pp. 503-4.

<sup>8</sup> See below, p. 326. See also below, pp. 340-2, on compulsory acquisition of nationality.

principle of the effective link.<sup>1</sup> However, it could be argued that for the individuals concerned, at the moment of transfer, the connexion with the successor State is fortuitous. Whatever the merits of this, the link, in cases of territorial transfer, has special characteristics. Territory, both socially and legally, is not to be regarded as an empty plot: territory (with obvious geographical exceptions) connotes population, ethnic groupings, loyalty patterns, national aspirations, a part of humanity, or, if one is tolerant of the metaphor, an organism.<sup>2</sup> To regard a population, in the normal case, as related to particular areas of territory, is not to revert to forms of feudalism but to recognize a human and political reality, which underlies modern territorial settlements. Modern thinking on human rights and the principle of self-determination has the same basis, and the latter has tended to create demands for changes in territorial sovereignty. If these assumptions are justifiable, it may be worth while to draw on the ideas inherent in the concepts of Mandated and Trust Territories, and the principles of Chapter XI of the United Nations Charter.<sup>3</sup> Sovereignty denotes responsibility, and a change of sovereignty does not give the new sovereign the right to dispose of the population concerned at the discretion of the government. The population goes with the territory: on the one hand, it would be illegal, and a derogation from the grant, for the transferor to try to retain the population as its own nationals, and, on the other hand, it would be illegal for the successor to take any steps which involved attempts to avoid responsibility for conditions on the territory, for example, by treating the population as *de facto* stateless or by failing to maintain order in the area.<sup>4</sup> The position is that the population has a 'territorial' or local status,<sup>5</sup> and this is unaffected whether there is a universal or partial

<sup>1</sup> Above, p. 313; below, pp. 349-64. See also the Secretariat Survey of 14 May 1954, A/CN.4/84; *I.L.C. Yearbook* (1954-II), p. 61, para. 39: 'The opinion is widely held that, in case of change of sovereignty over a territory by annexation, or its voluntary cession by one State to another, the annexing State is obliged to grant its nationality to the inhabitants of the territory concerned who were citizens of the ceding State, at least if they have, at the time of annexation, their permanent residence in the ceded territory. In most instances these questions are settled by treaty . . . .'. And cf. the United Nations Convention on the Reduction of Statelessness, 1961, Article 10: '1. Every treaty between Contracting States providing for the transfer of territory shall include provisions designed to secure that no person shall become stateless as a result of the transfer. A Contracting State shall use its best endeavours to secure that any such treaty made by it with a State which is not a party to this Convention includes such provisions. 2. In the absence of such provisions a Contracting State to which territory is transferred or which otherwise acquires territory shall confer its nationality on such persons as would otherwise become stateless as a result of the transfer or acquisition.'

<sup>2</sup> See the treatment in Vattel, *Le Droit des gens*, vol. 1, chap. xix.

<sup>3</sup> See further the *South-West Africa* cases, *I.C.J. Reports*, 1962, p. 319 at pp. 354-7; pp. 374, 378, 380 (Judge Bustamante, Separate Opinion), pp. 422, 429-32 (Judge Jessup, Individual Opinion), pp. 479-82, 541 et seq. (Judges Spender and Fitzmaurice, Joint Dissenting Opinion).

<sup>4</sup> Apart from the familiar rules on international responsibility, one has to bear in mind the human rights provisions of the United Nations Charter (Articles 1, 55, 73) and elementary considerations of humanity (cf. the *Corfu Channel* case (merits), *I.C.J. Reports*, 1949, p. 22).

<sup>5</sup> Cf. van Panhuys, *op. cit.*, pp. 36-37.

successor and whether there is a cession, i.e. a 'transfer' of sovereignty, or a relinquishment by one State followed by a disposition by international authority.<sup>1</sup> In certain cases other considerations arise. Where there is a question of the continuity of States difficulties will arise which do not depend on nationality law and in principle the result will be as in other cases of State succession.<sup>2</sup> When a new status is created by international quasi-legislative acts, as in the case of the creation of a Mandate régime or Trust Territory, there may be no automatic change.<sup>3</sup> Lastly, though it cannot be dealt with here, the question of the legality of population transfer (apart from voluntary exercise of rights of option) arises.

(h) ILLEGAL ACTS AND NON-RECOGNITION. Nationality conferred in consequence of illegal acts may arise either by acts which are *ultra vires* in that, in the absence of an effective link, a State purports to give extra-territorial effect to its laws by conferring nationality, or by acts of conferring the territorial effectiveness of which rests on illegal annexation of territory or the abduction or detention of aliens within State territory. Municipal decisions are not always directly in point as they may turn on interpretation of municipal law in narrow contexts,<sup>4</sup> or depend on recognition policies of the executive dictated by politics rather than legal considerations, or rest on an assumption of incompetence to go behind foreign acts of State.<sup>5</sup>

<sup>1</sup> It may happen that title is renounced without the territory becoming a *res nullius*. Relinquishment is thus distinct from abandonment, and is usually accompanied by recognition of title in another State, or recognition of a power of disposition to be exercised by another State or group of States. See, for example, the Treaty of St. Germain, 10 September 1919, Articles 36, 43, 46, 47, 53, 54, 59, 89-91.

<sup>2</sup> See *Costa v. Military Service Commission of Genoa*, *Annual Digest*, 1938-40, No. 13; *United States, Ex. rel. Reichel v. Carusi*, *ibid.*, 1946, No. 49; *Re Tancredi*, I.L.R., 17 (1950), No. 50; Austrian Supreme Court, *ibid.* 26 (1958-II), p. 40 at p. 42; German Federal Republic, Supreme Administrative Court, *ibid.* 21 (1954), p. 175; Federal Constitutional Court, *ibid.* 22 (1955), p. 430 (cf. Weis, *op. cit.*, pp. 156-8); Federal Supreme Court, in *In re Feiner*, *ibid.* 23 (1956), p. 367, and in the *Austro-German Extradition* case, *ibid.*, p. 364. In the last two cases the Court observed: 'Nor are there any binding rules of international law governing the question of acquisition and loss of nationality in the event of State succession.' However, decisions permitting German nationality arising from the *Anschluss* to subsist after the re-establishment of Austria in 1945 seem to rest on the rule that extra-territorial residence avoids the result of the change of sovereignty. Cf. *Austrian Nationality* case, I.L.R. 20 (1953), p. 250. On 17 May 1956 the German Federal Republic enacted a law under which those who were German nationals by virtue of the *Anschluss* ceased to be such on 26 April 1945. However, such persons were entitled to regain German nationality by declaration with retroactive effect to the date of loss, provided that they had had 'permanent residence' since 26 April 1945 'within the territory of the German Reich as constituted on 31 December 1937 (Germany)': *Laws Concerning Nationality, Supplementary Volume* (1959), p. 122.

<sup>3</sup> See *Westphal et Uxor v. Conducting Officer of Southern Rhodesia*, *Annual Digest*, 1948, No. 54; *Parry, Nationality and Citizenship Laws of the Commonwealth*, p. 668.

<sup>4</sup> Cf. *In re Mangold's Patent* (1950), 68 R.P.C. 1. American courts have operated a doctrine of choice of allegiance in relation to cases raising the question whether a person is an enemy alien. A court will often apply the public policy of the forum: see *Weber and Weber v. Nederlands Beheers-Instituut*, I.L.R. 24 (1957), p. 431.

<sup>5</sup> See *Lesser v. Rotterdamsche Bank and Kling and Others*, *ibid.* 20 (1953), p. 57; *Latvian State Cargo and Passenger Line v. United States*, *ibid.*, p. 193; *In re Mangold's Patent* (1950), 68 R.P.C. 1.

Assuming that a government or court are willing to advert to norms of international law, two approaches are permissible and appear in existing practice. In the first place a government or court may refuse to give effect to change of nationality because it regards the origin of the change—the forcible occupation of the area—to be contrary to international law.<sup>1</sup> Secondly, governments and courts may admit the illegality of the territorial change but express the view that grants of nationality consequent on the annexations are not void.<sup>2</sup> One of the influences here is that of the principle of effectiveness. In addition it is to be noted that a number of decisions rest on a dislike of compulsory or collective naturalization.<sup>3</sup>

Where a State has been entirely incorporated and there is no likelihood of reversal of the change, some courts have been prepared to apply a rule of effectiveness. If a change is decisive in fact then its origins are ignored and the change alone operates in law: 'Annexation and incorporation bring about a change of nationality.'<sup>4</sup> Nor is this attitude confined to cases of extinction of a State.<sup>5</sup>

On occasion the court concerned will justify its decision, in part at least, by reference to the rule of international law (as it is assumed to be) that every State is entitled to provide in its own discretion how its nationality shall be acquired and lost.<sup>6</sup>

(i) STATE RESPONSIBILITY AND THE DOCTRINE OF THE GENUINE LINK. States cannot plead provisions of internal law in justification of international wrongs and they are responsible for conditions on their territory which lead to the infliction of harm on other States. Delictual responsibility for damage arising from activities of persons on State territory will exist whether the delinquents are nationals or not.<sup>7</sup> However, many important

<sup>1</sup> *In re Krüger*, I.L.R. 18 (1951), No. 68 (cf. *In re Wetzel*, *ibid.* 24 (1957), p. 434); *Établissements Forir S.A. v. Belgian State, Minister of Finance*, *ibid.*, p. 439. Some courts refused effect to the German-Czechoslovak Treaty of 20 November 1938 as having been concluded under duress: *ibid.*, p. 435; *Ratz-Lienert and Klein v. Nederlands Beheers-Instituut*, *ibid.*, p. 536 (additional ground: the treaty was inconsistent with the Munich Agreement). See also Hudson, A/CN.4/50, *I.L.C. Yearbook* (1952-II), p. 11.

<sup>2</sup> G.F.R., Federal Constitutional Court, I.L.R. 19 (1952), No. 56; *Kozuh v. Uff. Stato Civile di Milano*, *ibid.*, No. 57. Soviet non-recognition of Rumanian title to Bessarabia did not extend to citizenship: see the decree in *Laws Concerning Nationality* (1954), p. 464. See further, Brownlie, *International Law and the Use of Force by States* (1963), pp. 414-16, on U.K. and U.S. practice.

<sup>3</sup> *United States, Ex rel. Schwarzkopf v. Uhl*, *Annual Digest*, 1943-5, No. 54; criticized by Mervyn Jones, *British Nationality Law* (1956), pp. 19-20. The *de cuius* was an Austrian resident in the United States for two years and resident there at the time of the *Anschluss*. The decision did not rest on absence of American recognition of the annexation. See also below, p. 340.

<sup>4</sup> *Vasservogel v. Federal Department of Justice and Police*, *Annual Digest*, 1949, No. 52; *Pulenciks v. Augustovskis*, I.L.R. 18 (1951), No. 20 (Latvia after 1940) (but cf. *Gerbaud v. Meden*, *ibid.*, No. 82); *In re Nix et al.*, *ibid.*, No. 69 (Danzig after 1 September 1939); G.F.R., Federal Constitutional Court, *ibid.* 19 (1952), No. 56.

<sup>5</sup> *Nederlands Beheers-Instituut v. Nimwegen and Männer*, *ibid.* 18 (1951), No. 63; *In re Baroness von Scharberg*, *ibid.*, No. 67; Austria, Administrative Court, *ibid.* 19 (1952), No. 61.

<sup>6</sup> G.F.R., Federal Constitutional Court, *ibid.*, No. 56.

<sup>7</sup> Cf. *Corfu Channel* case (merits), *I.C.J. Reports*, 1949, p. 4. As to activities outside State territory see McNair, *Opinions*, vol. 2, pp. 288-9.

duties of a specific nature are prescribed by reference to nationals of a State. Thus Oppenheim<sup>1</sup> states the existence of a duty to admit nationals expelled from other States and, the corollary, the duty not to expel nationals. Yet obviously *ad hoc* denationalization would provide a ready means of evading these duties. In appropriate circumstances responsibility would be created for the breach of duty if it were shown that the withdrawal of nationality was itself a part of the delictual conduct, facilitating the result.<sup>2</sup> Again, States could avoid rules governing the treatment of aliens if they could *at their discretion* impose nationality on aliens resident in or passing through State territory, however brief the sojourn.<sup>3</sup> Similar considerations apply to the law of belligerent occupation<sup>4</sup> and the law of neutrality.<sup>5</sup>

The principles needed to solve this type of problem are simple enough if, on the facts of the case, the manipulation of the law of nationality was part and parcel of the delictual conduct. It is significant that some States take the view that jurisdiction over their nationals is not affected by the fact that their criminal activities *per se* resulted in expatriation.<sup>6</sup> However, it is possible to postulate a general principle of *genuine* link relating to the *causa* for conferment of nationality (and the converse for deprivation), a principle distinguishable from that of effective link. Significantly enough, authors,<sup>7</sup> with support from practice<sup>8</sup> and the jurisprudence of international

<sup>1</sup> Op. cit., pp. 646, 695. See also Weis, op. cit., pp. 49-60 (very helpful); and *Co-operative Committee on Japanese Canadians v. A.-G. for Canada*, *Annual Digest*, 1946, at p. 26.

<sup>2</sup> See Weis, op. cit., pp. 58-59, 127; J. Fischer Williams, this *Year Book*, 8 (1927), pp. 55-60; Guggenheim, *Traité*, vol. 1, p. 318; Jennings, this *Year Book*, 20 (1939), p. 98 at pp. 112-13. Generally on denationalization see below, p. 339.

<sup>3</sup> Equally, it is doubtful whether confiscation of private property as a war measure (assuming that it can be lawful) is justified on the basis of a mere paper declaration of war. On the latter, see Grob, *The Relativity of War and Peace* (1949), pp. 293 et seq.

<sup>4</sup> Thus the German Ordinance of 1942, which authorized the grant of nationality to certain classes of the population in territories not subject to German sovereignty but occupied by Germany, was not bound to be recognized by third States as it was contrary to international law: see Guggenheim, *I.C.J. Reports*, 1955, p. 54.

<sup>5</sup> In the *Nottebohm* case, the Guatemalan argument, *per Rolin*, was that, because the motive of Nottebohm, a German national, was to acquire neutral status by his naturalization, there was no genuine link. This point was taken by the Court at the end of its judgment, *I.C.J. Reports*, 1955, p. 26: See below, p. 329, and also Loewenfeld, *Transactions of the Grotius Society*, 42 (1956), p. 20, and Verzijl, *Nederlands Tijdschrift voor Internationaal Recht*, 3 (1956), p. 37. The dissenting Judges regarded the question as a part of the issues concerning abuse of rights and fraud: *I.C.J. Reports*, 1955, pp. 32 (Klaestad), 48-49 (Read), 64-65 (Guggenheim). However, there was little or no evidence that Liechtenstein was attempting to avoid her neutral duties or that damage had been caused to Guatemala as a result of the naturalization. Nottebohm's motives could not easily be imputed to Liechtenstein.

<sup>6</sup> See, for example, *Laws Concerning Nationality* (1954), p. 553. Cf. *In re Kloot*, *Annual Digest*, 1947, pp. 200-1 (punishment of former national for wartime activities; *de cuius* stateless and resident in the forum, Holland).

<sup>7</sup> See Weis, op. cit., pp. 214-17, 219, 246; Borchard, *Annuaire de l'Institut de Droit International* (1931-I), pp. 277-8; Hyde, *International Law* (2nd rev. ed.), vol. 2, pp. 1130-1; Makarov, *Recueil des cours*, 74 (1949-I), pp. 331-4.

<sup>8</sup> For American practice: Moore, *Digest*, vol. 2, p. 735, vol. 3, pp. 501 et seq.; Hackworth, *Digest*, vol. 2, pp. 89, 93-105, 113; I.L.R. 25 (1958-I), pp. 105-6.

tribunals,<sup>1</sup> have often stated the rule that a diplomatic claim cannot be validly presented if it is based on a nationality which has been fraudulently acquired. Admittedly the rule is often formulated with the acts of the *de cuius* in mind, but in principle it is applicable to fraud on the part of the administration of a State. In the *Nottebohm* case<sup>2</sup> Guatemala contended that Liechtenstein had acted fraudulently in granting nationality to Nottebohm and, further, that Nottebohm himself had acted fraudulently in applying for and obtaining the certificate of naturalization. The Court did not concern itself with these arguments explicitly but, in adverting to Nottebohm's motive of acquiring neutral status at the end of the Judgment,<sup>3</sup> the Court accepted the substance of the argument: in this context the doctrine of genuine link, in the narrow sense, and the broad concept of effective link, were brought into close relation.<sup>4</sup> In a Dissenting Opinion, Judge Klaestad considered that as regards fraud by Nottebohm the issue could not be decided apart from the merits.<sup>5</sup> Judge Read, also dissenting, considered that he could not, in dealing with a plea in bar, look at the evidence as to fraud, but he did not regard the motive of avoiding belligerent status (if this were the case) as amounting to fraud.<sup>6</sup> Guggenheim, Judge *ad hoc*, expresses views similar to those of Read.<sup>7</sup>

In applying the principle of genuine link, two considerations are relevant. In the first place, there is a presumption of the validity of an act of naturalization since the acts of governments are presumed to be in good faith. Secondly, this is reinforced by the concept of nationality as a status since a conferment of nationality which is acted upon ought not to be invalidated except in very clear cases.

However, it is not entirely clear that the rule as to inquiry into fraudulent naturalization can be used to support a general principle of genuine link. The Conciliation Commission in the *Flegenheimer* claim justified the rule in terms of procedure and judicial necessity:<sup>8</sup>

'The profound reason for these broad powers of appreciation which are guaranteed to an international court for resolving questions of nationality, even though coming

<sup>1</sup> See the *Salem* case, *Annual Digest*, 1931-2, No. 98; *Flegenheimer* claim, I.L.R. 25 (1958-I), p. 91 at pp. 98-101; *In re Del Porto*, *Annual Digest*, 1931-2, No. 167 (see p. 308); *Taamy v. Taamy*, *ibid.* 1935-7, No. 128. Cf. *In re Van A.*, *ibid.*, No. 126; *Pastore Stocchi v. Sasco*, *ibid.*, p. 304; *Procurador Fiscal v. Rosenblatt*, *ibid.* 1933-4, No. 108; *In re Cywiac*, *ibid.*, No. 109; *In re Dain*, *ibid.* 1938-40, No. 112; *Fontanals v. Herrera*, *ibid.* 1941-2, No. 79.

<sup>2</sup> *I.C.J. Reports*, 1955, p. 4.

<sup>4</sup> See further below, p. 361.

<sup>3</sup> *Ibid.*, p. 26; see above, p. 328, n. 5.

<sup>5</sup> *I.C.J. Reports*, 1955, pp. 31-33.

<sup>6</sup> *Ibid.*, pp. 48-49. Read points out that at the time of the naturalization Guatemala was making every effort to maintain neutrality. At p. 26, the Judgment of the Court refers to 'his status as a national of a belligerent State' and, earlier, at p. 25, states that, when he applied for naturalization, Nottebohm had been a German national from the time of his birth. It would seem that the Court indirectly admits the fact that Nottebohm felt bound by his German ties. Cf. Read at p. 47 (surely he is inconsistent: cf. his views at pp. 48-49); and Guggenheim, at pp. 64-65.

<sup>7</sup> *Ibid.*, pp. 64-65. However, he regards the German nationality as the basis for 'belligerent status'.

<sup>8</sup> I.L.R. 25 (1958-I), p. 91 at p. 98. See also Guggenheim, Dissenting Opinion, *I.C.J. Reports*, 1955, pp. 50-51; Mervyn Jones, *International and Comparative Law Quarterly*, 5 (1956),

within the reserved domain of States, is based on the principle, undenied in matters of arbitration, that complete equality must be enjoyed by both parties to an international dispute. If it were to be ignored, one of the parties would be placed in a state of inferiority *vis-à-vis* the other, because it would then suffice for the Plaintiff State to affirm that any given person is vested with its nationality for the Defendant State to be powerless to prevent an abusive practice of diplomatic protection by its Opponent.<sup>1</sup>

'The right of challenge of the international court authorizing it to determine whether, behind the nationality certificate or the acts of naturalization produced, the right to citizenship was regularly acquired, is in conformity with the very broad rule of effectivity which dominates the Law of Nations entirely and allows the court to fulfil its legal function and remove the inconveniences specified.'

(j) NATIONALITY OF CLAIMS. When a government or court is concerned with the principle of diplomatic protection,<sup>2</sup> which rests primarily on the fact that the nationality of the claimant State existed in the individual or corporation concerned both at the time of the alleged breach of duty<sup>3</sup> and the time when the claim was presented, the issue is clearly placed on the international plane.<sup>4</sup> Situations will arise in which reference to the relevant national rules cannot give a solution.

In many cases the *de cuius* has nationality in both the claimant and defendant States. The discussions of this problem are generally presented by assigning the available evidence to two propositions, which are assumed to be incompatible. The first rule<sup>5</sup> is to be found in Article 4 of The Hague Convention of 1930: 'A State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses.' The other rule is that the effective nationality governs the question<sup>6</sup> and this rule was applied by the Permanent Court of Arbitration in the *Canevaro* case<sup>7</sup> and the Italian-United States Conciliation Commission in the *Mergé*

pp. 242-3. Cf. comment on *Nottebohm* by Loewenfeld, *Transactions of the Grotius Society* (1956), p. 22, and Grawitz, *Annuaire français de droit international* (1955), p. 275.

<sup>1</sup> However, the general policy implicit in the first paragraph quoted cannot be readily confined to questions of fraud and its analogues.

<sup>2</sup> See further below, p. 333.

<sup>3</sup> The right of protection may extend to instances in which harm is merely apprehended.

<sup>4</sup> *Nottebohm* case, *I.C.J. Reports*, 1955, p. 4 at pp. 20-21. See also P. de Visser, *Revue générale de droit international public*, 60 (1956), pp. 254 et seq.

<sup>5</sup> Proponents: van Panhuys, *op. cit.*, pp. 73-81; Guggenheim, *Traité*, vol. 1, p. 312; Kunz, *American Journal of International Law*, 54 (1960), p. 558; Batifol, *Droit international privé* (2nd ed.), p. 87. However, van Panhuys, Briggs, *Law of Nations* (2nd ed.), p. 516 and Weis, *op. cit.*, pp. 180, 196, *inter alios*, point to the confusion in the materials they survey. See also Borchard, *Diplomatic Protection of Citizens Abroad*, pp. 580-90.

<sup>6</sup> See Weis, *op. cit.*, pp. 191-2, for the continental literature; I.L.R. 22 (1955), pp. 452-4; Ralston, *The Law and Procedure of International Tribunals* (1926), pp. 169 et seq.; *ibid.*, Supplement, p. 81; and Bar-Yaacov, *Dual Nationality* (1961), pp. 217-25.

<sup>7</sup> Scott, *Hague Court Reports* (1916), p. 284; *Reports of International Arbitral Awards*, vol. 11, p. 405. See also the *Drummond* case (1834), 2 Knapp, P.C. 295: 'Drummond was technically a British subject, but in substance, a French subject, domiciled . . . in France, with all the marks and attributes of French character.'

claim.<sup>1</sup> In the *Nottebohm* case the International Court stated,<sup>2</sup> with reference to 'the real and effective nationality': 'International arbitrators have decided in the same way numerous cases of dual nationality, where the question arose with regard to the exercise of protection.'

Two points may be made. First, the principle of effective link is not to be regarded as forcing a choice. If the facts are consistent with a substantial connexion with both States<sup>3</sup> then the individual cannot expect international law to give him a privileged position as against other nationals of the two States—as would happen if he has a remedy in the international forum against his own government. Where, however, a choice can be made, then the principle of equality is not necessarily infringed, although it might be if tenuous links acknowledged by a municipal law were allowed to render the claim inadmissible.<sup>4</sup> As a matter of principle the two rules usually cited in opposition are not incompatible.<sup>5</sup> The second point is that latitude may be allowed in this and other situations where the question is that of admissibility and the outcome does not directly affect the status of the individual.<sup>6</sup>

A different case of dual nationality is presented when one of two States of a dual national claims against a third State and the latter pleads that the other nationality of the *de cujus* is the effective or dominant nationality. A substantial jurisprudence supports the principle of the inopposability of the nationality of a third State in an international claim. In the *Salem* case<sup>7</sup> the Tribunal found that Salem was a Persian national at the time of his American naturalization and held that it was not open to Egypt to invoke the Persian nationality against the United States:

'The rule of International Law being that in a case of dual nationality a third Power is not entitled to contest the claim of one of the two Powers whose national is interested in the case by referring to the nationality of the other Power.'

<sup>1</sup> I.L.R. 22 (1955), p. 443 at pp. 449-57 (the international jurisprudence is collected here). See also the cases set out *ibid.* 24 (1957), pp. 452 et seq.; *Flegenheimer* claim, *ibid.* 25 (1958-1), at pp. 147-50; and the *Mathison* case, *Reports of International Arbitral Awards*, vol. 9, p. 485; further: José de Yanguas Messia, in *Hommage d'une génération de juristes au Président Basdevant*, (1960), pp. 547-58 (sets out findings in the *Mergé* claim). Cf. American decisions: *Mandoli v. Acheson*, I.L.R. 18 (1951), No. 64; *Kawahita v. U.S.*, *ibid.*, No. 73. See Rode, *American Journal of International Law*, 53 (1959), p. 139, for some infelicitous political comment.

<sup>2</sup> *I.C.J. Reports*, 1955, p. 22. Cf. the *Reparations* case, *ibid.* 1949, p. 186.

<sup>3</sup> See below, p. 360.

<sup>4</sup> See Schwarzenberger, *International Law* (3rd ed.), vol. 1, pp. 363-6. P. de Visscher considers that the orthodox rule amounts to a denial of justice: *Revue générale de droit international public*, 60 (1956), p. 261.

<sup>5</sup> Cf. Hyde, *op. cit.*, vol. 2, p. 1131; Briggs, *op. cit.*, p. 516; and Verzijl, in the *Georges Pinson* case, *Annual Digest*, 1927-8, Nos. 194, 195, quoted in I.L.R. 22 (1955), at p. 451. See also the *Spaulding* claim, *ibid.* 24 (1957), at pp. 454-5.

<sup>6</sup> See further below, pp. 344-7, and cf. the nature of the relation between diplomatic protection and nationality, pp. 333-5.

<sup>7</sup> *Annual Digest*, 1931-2, No. 98; *Reports of International Arbitral Awards*, vol. 2, p. 1161 at p. 1188. See also Schwarzenberger, *op. cit.*, p. 366; and Ralston, *Law and Procedure of International Tribunals* (Supplement, 1936), p. 80.



The Tribunal referred to *Mackenzie v. Germany*<sup>1</sup> but that case depended on a strict application of American law relating to expatriation and is not entirely in point. The same rule has been affirmed by the Italian-United States Conciliation Commission in its decision in the *Flegenheimer* claim.<sup>2</sup> However, in the *Mergé* claim the same Commission made it clear that for the Commission it was a question of treaty interpretation, and the working rule laid down was:<sup>3</sup>

'United States nationals who did not possess Italian nationality but the nationality of a third State can be considered "United States nationals" under the Treaty, even if their prevalent nationality was the nationality of the third State.'

The rule of inopposability invites some comment. In the *Salem* case the Tribunal disapproved of the principle of effectiveness, whereas in the *Mergé* claim the Commission approved of the principle where the dual nationality was that of the two States in dispute. One may ask whether and on what basis the principle is to be confined to certain permutations only. The short answer probably is, as it was in *Nottebohm*, that the issue is that of opposability as between the two parties. However, in treating the issue thus it must surely be relevant, on some facts at least, to point to the dominant nationality of a third State.<sup>4</sup> This precise issue was not before the Court in *Nottebohm*, but the general principles propounded there extend logically to the present problem. The formulations of the Court refer in general terms to 'the courts of third States'.<sup>5</sup> However, it must be emphasized that the existence of a 'third nationality' will not be an automatic bar.

The last situation to consider is one in which *prima facie* the *de cujus* has one nationality or none. This was the problem in *Nottebohm*<sup>6</sup> and the

<sup>1</sup> German-U.S. Mixed Claims Commission; *Reports of International Arbitral Awards*, vol. 7, p. 288; *American Journal of International Law*, 20 (1926), p. 595. See Schwarzenberger, *op. cit.*, p. 366. The Umpire declared that 'while the American Department of State may in the exercise of its sound discretion well decline to issue a passport to, or intervene on behalf of, or otherwise extend diplomatic protection to an American by birth of foreign parents so long as he resides in the country of the nationality of his parents, it is not believed that it has, by departmental rule or otherwise, asserted the power to strip of American citizenship one so born': *Reports of International Arbitral Awards*, vol. 7, at p. 290. Emphasis supplied.

<sup>2</sup> I.L.R. 25 (1958-I), at pp. 149-50.

<sup>3</sup> *Ibid.* 122 (1955), at p. 456. See also the *Vereano* claim, *ibid.* 24 (1957), p. 464, and *Flegenheimer* claim, *ibid.*, at p. 150.

<sup>4</sup> Cf. the problems of *jus tertii* in the law of conversion: see Atiyah, *Modern Law Review*, 18 (1955), p. 97.

<sup>5</sup> *I.C.J. Reports*, 1955, p. 22. Cf. *ibid.*, p. 21. However, on p. 22 there are two such references and the latter reference is: 'the courts of third States, when they have before them an individual whom two other States hold to be their national. . . .' But the passages on pp. 22 and 23, taken as a whole, are general in effect: see below, pp. 356-7. See also the *Laurent* case, Anglo-American Claims Commission, 1853, Hornby's *Report*, p. 299, where Mexican domicile of British subjects was a bar to claims against the United States, a view repudiated by the Commission in 1871: see Sinclair, this *Year Book*, 27 (1950), pp. 134-7.

<sup>6</sup> *Nottebohm* had lost his German nationality as a consequence of the acquisition of Liechtenstein nationality in 1939. See Loewenfeld, *Transactions of the Grotius Society* (1956), p. 13; Guggenheim, *I.C.J. Reports*, 1955, p. 55.

Court, by a large majority, stated and applied the principle of the real or effective link. In the *Flegenheimer* claim the Italian-United States Conciliation Commission distinguished *Nottebohm* on the ground that the case concerned opposability for the purposes of admitting the claim against Guatemala, but in substance the Commission disapproved of the principle of effective nationality as it was formulated by the Court in *Nottebohm*.<sup>1</sup> Any conclusion on the question obviously depends on the view held about the principle of effective nationality.<sup>2</sup>

(k) DIPLOMATIC PROTECTION. It is trite learning that, with some exceptions,<sup>3</sup> States may only exercise diplomatic protection in respect of their nationals. The issue here is on the international plane and cannot be resolved by simple reference to the internal law of the States involved. A number of the problems have been discussed in terms of the question of the nationality of claims which is, of course, *in pari materia*; and, subsequently,<sup>4</sup> some comment will be made on the consequences of *Nottebohm* from the point of view of the effectiveness and availability of diplomatic protection. The assumption, or more correctly, the effect of the way in which the law is generally expressed, is that diplomatic protection depends on nationality; but in reality the relation of the two is more complex. In the absence of formal evidence of ties with a particular State, the interest of a government in an individual, and especially the exercise of or attempt to exercise protection in respect of that individual, may provide cogent evidence of nationality.<sup>5</sup> Moreover, if a right of protection arises by virtue of lawful administration of territory, then it would seem that nationality may be said to arise from the fact of the right of protection.<sup>6</sup> This is, in part at least, the justification for treating British Protected Persons and similar categories of persons<sup>7</sup> in other systems as nationals of the administering power on the international plane. In a case before the High Court

<sup>1</sup> On the general significance of *Nottebohm* see below, pp. 349-64.

<sup>2</sup> See *ibid.*

<sup>3</sup> Under a treaty or *ad hoc* arrangement for the exercise of protection in respect of non-nationals; alien seamen on ships flying the flag. Cf. the *Reparations* case, *I.C.J. Reports*, 1949, p. 174. See also Parry, this *Year Book*, 30 (1953), p. 257; *id.*, *Nationality and Citizenship Laws of the Commonwealth*, p. 12.

<sup>4</sup> Below, pp. 361-2.

<sup>5</sup> See also below, pp. 335-7, on the question of estoppel.

<sup>6</sup> In the *Cayuga Indians* case, the Tribunal said, with reference to the Cayuga Indians in Canada: 'These Indians are British Nationals. They have been settled in Canada, under the protection of Great Britain and, subsequently, of the Dominion of Canada, since the end of the eighteenth or early years of the nineteenth century.' (*Reports of International Arbitral Awards*, vol. 6, p. 173 at p. 177). See also *Rothmann v. Austria and Hungary*, *ibid.*, p. 253; *Margulies v. Austria and Hungary*, *ibid.*, p. 279. Both these cases turn on the interpretation of an American Statute, however. See further the *Mathison* case, *ibid.*, vol. 9, p. 485 at pp. 490, 491-2; *Valeriani v. Amuna Bekri Sichera*, *Annual Digest*, 1935-7, No. 120; *Logan v. Styres et al.* 20 D.L.R. (2d.) (1959), p. 416, I.L.R. 27, p. 239 (as to the Six Nations Indians of Ontario); *Thakur Amar Singhji v. Rajasthan*, I.L.R. 22 (1955), p. 127. And cf. the Aliens Order, 1920, S.R. 20, No. 448, as amended by No. 2262, Article 21 (1).

<sup>7</sup> See Parry, this *Year Book*, 30 (1953), pp. 256-9; *id.*, *Nationality and Citizenship Laws of the Commonwealth*, pp. 11-15.

of Punjab<sup>1</sup> the issue was the existence of criminal jurisdiction over areas which came within the territory of Pakistan but were administered by India under an agreement between the Governments of the Punjab (India) and Punjab (Pakistan). In deciding that jurisdiction existed, the Court stated that the inhabitants of the areas were Indian by nationality on the basis of the right to exercise authority necessary to maintain order<sup>2</sup> and also that the inhabitants 'had accepted Indian nationality and the protection of the Indian Union'. For purposes of the Swedish Law of 8 July 1904 relating, *inter alia*, to jurisdiction over petitions for divorce and separation between aliens, the Swedish Supreme Court has found that persons who are stateless or do not enjoy the protection of their home country, are not necessarily 'aliens'.<sup>3</sup> Persons not enjoying the protection of the State of their nationality (by internal law) are known as '*de facto* stateless' and the International Law Commission has considered means of alleviating their position.<sup>4</sup> If the effective link test were applied, then it might be that a refusal to give diplomatic protection would be regarded *on the international plane* as a severing of the more important links with the given State. In American doctrine and practice loss of diplomatic protection is not given the consequence of 'permanent loss' of citizenship, but this is for constitutional reasons.<sup>5</sup>

Three further observations are called for. First, it is important to notice, though it may seem obvious, that there is an element of circularity in much that is said about this subject. In the absence of any internal law provisions<sup>6</sup> or evidence of facts giving nationality by birth and other titles under internal provisions, a State may still claim to protect its population by virtue of its international competence, its sovereignty and its very statehood (these three qualities being identical for the present purpose).<sup>7</sup> If one accepts the existence of rules of attribution set by international law then it is inelegant and illogical to say that diplomatic protection depends

<sup>1</sup> *Gudder Singh and Another v. The State*, I.L.R. 20 (1953), p. 145.

<sup>2</sup> The Court stated that this right was based either on customary law in respect of the rights of the grantor pending actual transfer (quoting Hyde, *International Law*, vol. 1, p. 396), or on the existence of the inter-governmental agreement.

<sup>3</sup> Decision of 16 December 1948; see also *Chruszcz v. Chruszcz*, I.L.R. 22 (1955), p. 419. Cf. *Perkins v. Elg*, *Annual Digest*, 1938-40, No. 116, at p. 353 n.; and *Grundul v. Bryner*, I.L.R. 24 (1957), p. 483 at p. 485.

<sup>4</sup> See, for example, *I.L.C. Yearbook* (1954-I), p. 18 (246th Meeting); *ibid.* (1954-II), p. 38.

<sup>5</sup> See *ibid.* (1954-I), p. 9, para. 32; Parker, Umpire, in the *Mackenzie* claim, *Reports of International Arbitral Awards*, vol. 7, p. 288 at p. 290. The Umpire applied American municipal law. However, the statement is not entirely clear. First, a discretion in exercise of protection is not incompatible with the *power* to exercise diplomatic protection. Secondly, the reference to 'permanent loss' of citizenship has an interesting implication. Nevertheless, withdrawal of protection by the executive in the United States depends on residence abroad *animo manendi*: See Paone, *Cornell Law Quarterly*, 49 (1963), pp. 52-80 at p. 58. But see now *Schneider v. Rusk*, *Supreme Court Reporter*, 84 (1964), No. 14, p. 1187.

<sup>6</sup> See above, pp. 317-18.

<sup>7</sup> See the cases above, p. 333, n. 6, and note the significance of the phrase, 'under the protection of the Crown', e.g. in *Logan v. Styres*.

on 'nationality' especially when from the context the writer appears to refer to internal law. Secondly, what has been said is subject to the possible existence of the rule that neither State of a dual national may exercise diplomatic protection against the other.<sup>1</sup> Thirdly, diplomatic protection does not depend on nationality in either the internal or international sense in certain cases because the right to protect may arise from a process of delegation by one sovereign to another or in other cases of representation in international relations.<sup>2</sup>

(I) NATIONALITY BY ESTOPPEL. For the purpose of the discussion it is assumed, and the assumption is surely correct, that estoppel or preclusion is a principle of international law.<sup>3</sup> It seems that the principle can be applied to cases involving sovereignty over territory and there is no reason why it should not be applied to the status of individuals. Indeed, in many cases where the basic facts concerning the individual are ambiguous,<sup>4</sup> the conduct of governments will provide the answer. Express declarations and admissions by diplomatic representatives may create an estoppel in the view of a court.<sup>5</sup> However, acts of administration of an incidental or routine nature, and in the absence of any dispute or apprehension thereof, may not have this effect. Thus in the *Nottebohm* case<sup>6</sup> Liechtenstein argued that Guatemala had recognized the naturalization in Liechtenstein on the basis of the entry of a visa in the Liechtenstein passport and official acts relating to the control of aliens. The Court observed:<sup>7</sup>

'All of these acts have reference to the control of aliens in Guatemala and not to the exercise of diplomatic protection. When Nottebohm thus presented himself before the Guatemalan authorities, the latter had before them a private individual: there did not thus come into being any relationship between governments. There was nothing in all this to show that Guatemala thus recognized that the naturalization conferred upon Nottebohm gave Liechtenstein any title to the exercise of protection.'

Admissions and absence of dispute by the parties in the face of a court will normally<sup>8</sup> be relied upon by a tribunal in matters of nationality.<sup>9</sup> In some

<sup>1</sup> Above, p. 330.

<sup>2</sup> Poland conducted the external relations of Danzig by virtue of the treaty of 9 November 1920. The whole question of protected States and criteria of statehood comes up. So also the diplomatic protection of the inhabitants of Mandates arises from a concept akin to representation: cf. *Malapa v. Public Prosecutor*, I.L.R. 28, p. 80. See further the *Pugh* claim, *Annual Digest*, 1933-4, No. 97; Parry, *Nationality and Citizenship Laws of the Commonwealth*, pp. 122-3.

<sup>3</sup> See Bowett, this *Year Book*, 33 (1957), pp. 176-202; MacGibbon, *International and Comparative Law Quarterly*, 7 (1958), p. 468.

<sup>4</sup> Cf. in a different sphere the *Temple* case, *I.C.J. Reports*, 1961, p. 17; and see Jennings, *Acquisition of Territory*, pp. 41-51.

<sup>5</sup> *Société de Bienfaisance v. Siag*, *Annual Digest*, 1931-2, No. 122; *Taamy v. Taamy*, *ibid.* 1935-7, No. 128. Cf. the *Nottebohm* case, *I.C.J. Reports*, 1955, p. 4 at pp. 17-20.

<sup>6</sup> *Ibid.*, at pp. 17-19. For a different conclusion see Judge Read's Dissenting Opinion at pp. 47-48, and cf. Guggenheim, Judge 'ad hoc', *ibid.*, p. 53.

<sup>7</sup> At p. 18.  
<sup>8</sup> But see below, pp. 344-7, on nationality as a status. Presumably the doctrine of effective link would justify a court in refusing to rely on admissions (if it were free to do so under the terms of the *compromis*).

<sup>9</sup> *Expropriated Religious Properties* case, *Reports of International Arbitral Awards*, vol. 1, p. 7 at p. 46.

cases the tribunal has been prepared to rely on the conduct of governments in the absence of any declaration directly alluding to the issue.<sup>1</sup> In the *Hendry* claim<sup>2</sup> the Mexican–United States General Claims Commission held that Mexico, the respondent State, was estopped from denying the American nationality of the deceased, Hendry, by reason of its having discharged him from employment because he was an American.

In the *Flegenheimer* claim<sup>3</sup> the Italian–United States Conciliation Commission considered an Italian argument that the claim was inadmissible because at the date of the acts complained of Flegenheimer's apparent nationality (in their phrase) was German, because he had used a German passport in dealings with the Italian authorities. This argument failed on the facts but the Commission noted 'that the doctrine of apparent nationality cannot be considered as accepted by the Law of Nations'.<sup>4</sup> They went on to refer to the case of *Rothmann*<sup>5</sup> cited by the respondent, Italy. There the claimant was a former Austrian national, naturalized in the United States, who had returned to Austria. Residing there, he was called to military service in the Austrian army after the American mission in Austria had informed the Austrian authorities that he had lost his American nationality. After the war Rothmann was reintegrated in his American nationality by rebutting the statutory presumption of voluntary expatriation. The petition of the United States was rejected because when the claim arose—the time of the call to military service—the claimant was not entitled to recognition as an American citizen. It is clear that the two emergency American passports he obtained while in Austria were conditional and of limited effect, and the latter of the two was obtained by misrepresentation. When the facts were known to them the United States expressly declined to recognize him as an American citizen or to interpose to obtain his release from service in the Austro-Hungarian army. At the end of the decision, the Commission hints at estoppel arising from the refusal to interpose and thus justifying Austrian refusal to recognize the claimant

<sup>1</sup> The Turkish Council of State has repeatedly applied estoppel in respect of acts of organs of the Turkish Government: see İlhan Unat, in *Turkish Yearbook of International Relations*, 1 (1960), pp. 121–3 (article in French); reference, *American Journal of International Law*, 57 (1963), p. 465.

<sup>2</sup> *Reports of International Arbitral Awards*, vol. 4, p. 616. Cf. the *Kelley* claim, *ibid.*, p. 608.

<sup>3</sup> I.L.R. 25 (1958–I), p. 91.

<sup>4</sup> *Ibid.*, p. 151. However, the Commission went on: 'In international jurisprudence one finds decisions based on the "non concedit venire contra factum proprium" principle which . . . allows a Respondent State to object to the admissibility of a legal action directed against it by the national State of the allegedly injured party, when the latter has neglected to indicate his true nationality, or has concealed it, or has invoked another nationality at the time the fact giving rise to the dispute occurred, or when the national State has made erroneous communications to another State thus fixing the conduct to be followed by the latter.'

<sup>5</sup> *Rothmann v. Austria and Hungary*, *Reports of International Arbitral Awards*, vol. 6, p. 253; *Annual Digest*, 1927–8, No. 168.

as an American citizen. The decision does not go far, but this is because the facts did not raise a clear case of estoppel. Thus the Commission in *Flegenheimer* is incorrect when it says<sup>1</sup> that the Commissioner in *Rothmann* could have relied on the American statement to the Austrian authorities as to the loss of American nationality, had he wished to adopt the principle of apparent nationality.

The Commission in *Flegenheimer* cites *Wildermann v. Stinnes*,<sup>2</sup> where it was decided that the petitioner had retained Rumanian nationality in spite of the use of a Russian passport. He was in fact of Bessarabian origin and his Rumanian citizenship stemmed from the annexation of the Russian province. Here, again, estoppel was not placed as an issue before the Tribunal in the arguments, and in any case the decision was simply that on those facts the claimant had not lost his Rumanian nationality.<sup>3</sup> It may be justifiable to treat the case as one in which the effective nationality was in opposition to the one which rested on the mere use of a passport. The decision hardly rules out estoppel as a principle applicable in more appropriate circumstances. Estoppel is not to be used to create nominal status in opposition to one based on relatively effective links. However, where the facts are very confused estoppel may provide a way out.

#### XV. *Presumptions and policy rules on the international plane*

The principles which are considered in this section are in the main no more than rules of policy applicable whether it is appropriate in the particular context to apply internal or international law. As such they may be used to resolve doubts, to determine questions where an element of appreciation is involved, but, in some cases, they create definable substantive exceptions. In each case the strength of the principle will vary according to its subject-matter (which determines its importance) and the frequency with which it is recognized to exist and is applied.

(a) THE PRESUMPTION AGAINST STATELESSNESS. There is some reason to believe that there is a presumption against statelessness. The unfortunate consequences of statelessness are well known,<sup>4</sup> and the Universal Declaration of Human Rights<sup>5</sup> provides, in Article 15, paragraph 1, that 'everyone

<sup>1</sup> I.L.R. 25 (1958-I), at p. 152.

<sup>2</sup> Mixed German-Rumanian Tribunal, 8 June 1926; *Recueil des décisions des tribunaux arbitraux mixtes*, vol. 6, p. 485; *Annual Digest*, 1923-4, No. 120 (brief report).

<sup>3</sup> If the decision is read it is apparent that the issue was the significance of Rumanian official acts according to Rumanian law and practice: estoppel on the international plane was not involved.

<sup>4</sup> *A Study of Statelessness*, U.N. public., Sales No.: 1949, XIV, 2. See also Córdova, A/CN.4/64, *I.L.C. Yearbook* (1953-II), pp. 170 et seq. (includes draft Conventions on the elimination and reduction of Statelessness), and *Re Immigration Act and Hanna*, I.L.R. 24 (1957), p. 465; *Perez v. Brownell*, *ibid.* 26 (1958-II).

<sup>5</sup> This is declaratory, but see Waldock, *Recueil des cours*, 106 (1962-II), pp. 32-33, 199; see also Economic and Social Council Resolution 116 L(VI) of 1 and 2 March 1948; and *I.L.C.*

has the right to a nationality'. At the very least, in matters of proof, statelessness will not be presumed, for example, from the issue of a Nansen Passport<sup>1</sup> to the *de cuius*.<sup>2</sup> Municipal laws frequently provide that a woman shall only lose her nationality upon marriage with a foreigner when she acquires at the same time the nationality of the husband as a consequence of the marriage.<sup>3</sup> If statelessness may result (as a result of non-recognition policies of the forum) from acceptance of the permanence of an annexation, a court may lean against acceptance of the annexation as a permanent state.<sup>4</sup>

However, the evidence is not overwhelming and in some jurisdictions, for example, France, the rule which prevails is that nationality laws should be interpreted strictly.<sup>5</sup> Moreover, in many cases it is clear that a presumption against statelessness would work mischief. It will not help the individual to attribute a nationality which will be nominal and leave him *de facto* stateless.<sup>6</sup> Moreover, factors of stability and effectiveness must be considered in relation to any question of status.<sup>7</sup> Thus domestic courts have generally refused to recognize<sup>8</sup> the effect of decrees by the Occupation Powers in Germany revoking Nazi decrees which deprived Jews of German nationality.<sup>9</sup> Although it is reasonable to seek justifications for not recognizing such decrees, the principles of effectiveness and that of effective or real link may justify an attribution on the basis of the lack of links with Germany and the going abroad, and residence elsewhere, of the *de cuius*. The change may thus be validated without relying on such decrees, except in so far as they are negative proof of the predominant links. In many situations revocation of denationalization will be an act as arbitrary as the original act of

*Yearbook* (1953-II), pp. 170, 187 (draft preambles). See also the United Nations Convention on the Reduction of Statelessness, 1961; *International and Comparative Law Quarterly*, 11 (1962), p. 1090.

<sup>1</sup> See *A Study of Statelessness*, p. 41.

<sup>2</sup> *Von Flidner v. Beringen*, *Annual Digest*, 1933-4, No. 113. See also *Hirschenhorn v. Attorney-General*, I.L.R. 21 (1954), p. 198.

<sup>3</sup> Swiss practice and jurisprudence since 1848: see *Lempert v. Bonfol*, *Annual Digest*, 1933-4, No. 115 at p. 292; *Dame Menge v. Commune of Oranges*, *ibid.*, 1935-7, No. 135. Cf. *Carmine v. Federal Department of Justice and Police*, *ibid.*, 1946, No. 54.

<sup>4</sup> *Lithuanian Nationals (Germany)* case, *ibid.*, 1948, No. 17; *Gerbaud v. Meden*, I.L.R. 18 (1951), No. 82. But see above, p. 327.

<sup>5</sup> *In re Antonowicz*, *Annual Digest*, 1938-40, No. 118 at p. 363; *In re Zaidner*, *ibid.*, 1948, No. 52.

<sup>6</sup> See *Levin v. Levin*, *ibid.*, 1949, No. 66. *De cuius* left Russia in 1912 and never returned: no presumption of continuance of Russian nationality of origin.

<sup>7</sup> The principle of validation in English law comes to mind. See also below, pp. 340, 345.

<sup>8</sup> *Terhoch v. Daudin*, *Annual Digest*, 1947, No. 54; *Rosenthal v. Eidgenössisches Justiz- und Polizeidepartement*, *ibid.*, 1948, No. 73 (overruling *Levita-Mühlstein*, below); *Lennhof v. Brach*, *ibid.*, No. 74; *In re Samoye*, *ibid.*, No. 76; *Guinguéné v. Falk*, *ibid.*, 1949, No. 68; *Bertolo v. Alexander*, *ibid.*, No. 69; *Casperius v. Casperius*, I.L.R. 21 (1954), p. 197; and see *Journal du droit international*, 81 (1954), p. 421 at p. 435. *Contra*, *Levita-Mühlstein v. Département fédéral de Justice et Police*, *Annual Digest*, 1946, No. 58; *Kurzmann v. O'Rea*, *ibid.*, No. 59; *Goldström v. Société La Foncia*, *ibid.*, No. 62. And cf. *Fürth-Perl and Fürth-Strasser v. German Federal Republic*, I.L.R. 25 (1958-I), p. 357 at pp. 359-60. Generally: Lauterpacht, *Jewish Yearbook of International Law* (1948), p. 164.

<sup>9</sup> See further below, p. 340. These decrees were not intended to have retroactive effect.

deprivation.<sup>1</sup> Courts have often applied the substance of the effective nationality doctrine in this class of case.<sup>2</sup>

(b) PRESUMPTION OF CONTINUANCE. If it is accepted that there is no generally applicable presumption against statelessness, it follows that there is no general presumption of continuance of nationality. Indeed, in the case of continuance the usefulness of such a presumption is, if anything, less obvious. The policy of avoiding statelessness is not necessarily involved and continuance may result in multiple nationality. In any case the general principles of effectiveness and the doctrine of effective link militate against such a presumption and it should not be used to bestow a nominal status.<sup>3</sup> Probably the correct view is that there is a presumption of fact on the subject, as a principle of the law of evidence but, being one of fact, the presumption can be easily rebutted.<sup>4</sup> The question of continuance (of the same nationality) is, of course, to be distinguished from the principle sometimes advocated of 'continuity of nationality' according to which loss of nationality is admissible only if another nationality is acquired simultaneously.<sup>5</sup>

(c) DEPRIVATION OF NATIONALITY. In relation to the present subject-matter, writers have sometimes declared deprivation of nationality, particularly group denationalization, to be illegal.<sup>6</sup> The subject is to be approached with caution and it abounds with general formulations which are obviously not in accord with practice or good policy. At the two extremes of opinion one finds the view that denationalization is illegal *tout court* and the view that denationalization is within the discretion which States have in the matter of nationality and is therefore lawful. Much will depend on the context in which the issue arises and even those alleging a rule of illegality differ as to the reasons for the rule. However, principle and existing practice give some support to and, at the least, do not contradict certain positions. If the deprivation is part and parcel of a breach of an international duty then the act of deprivation will be illegal.<sup>7</sup> If the deprivation

<sup>1</sup> In the absence of real links compulsory reintegration is illegal: see Guggenheim, *Traité*, vol. 1, p. 317; Oppenheim, *op. cit.*, p. 587. See also Guggenheim, *I.C.J. Reports*, 1955, p. 54. See the Court of Appeal of Paris in *Terhoch* (above, p. 338, n. 8), at p. 123: 'It cannot have been the intention of the Control Council to impose German nationality on persons who have fled abroad from the persecutions of that nation and have not returned to a country to which they have ceased to owe allegiance'; and see *Casperius v. Casperius*, above, p. 338, n. 8.

<sup>2</sup> See, for example, *Blair Holdings Corporation v. Rubinstein*, I.L.R. 22 (1955), p. 422.

<sup>3</sup> See *Levin v. Levin*, *Annual Digest*, 1949, No. 66.

<sup>4</sup> *Blair Holdings Corporation v. Rubinstein*, I.L.R. 22 (1955), p. 422.

<sup>5</sup> Weis, *op. cit.*, p. 127.

<sup>6</sup> Generally see Weis, *op. cit.*, pp. 122-31; van Panhuys, *op. cit.*, p. 163. Cf. Parry, *Nationality and Citizenship Laws of the Commonwealth*, pp. 9, 22, 132. This was the view of de Lapradelle, *Revue de droit international privé* (1929), p. 308 at p. 311. See also the Universal Declaration of Human Rights, Article 15, paragraph 2: 'No person may be arbitrarily deprived of his nationality nor of the right to change his nationality.'

<sup>7</sup> See above, p. 328, and Hudson, *I.L.C. Yearbook* (1952-II), p. 10: 'The extent to which mass denationalization is prohibited by international law is not clear. A distinction has to be



is not a part of a delictual act but merely involves denationalization of groups of citizens domiciled within the frontiers of a State, who lack any other links, then there is no delict—as there would be, for example, if they were forced to try to gain admission illegally in neighbouring States—but the deprivation is not entitled to recognition by others because it disregards the doctrine of effective link<sup>1</sup> and represents an attempt to avoid the responsibilities of territorial sovereignty and statehood.<sup>2</sup> However, if denationalized persons do go abroad and establish strong links with other States it may be justifiable to accept the loss of the nationality of their former home. This is not to recognize illegality but to accept the effect of changes of fact.<sup>3</sup> It is perhaps not surprising that existing practice and jurisprudence do not support a general rule of illegality.<sup>4</sup>

(d) COMPULSORY CHANGE OF NATIONALITY. The analogue of deprivation of nationality is provided by the cases described as compulsory change of nationality and, 'collective naturalization'. The latter is associated primarily with territorial changes and may be left on one side for the moment. Concern for the position of the individual has led some jurists to state that international law does not permit compulsory changes of nationality<sup>5</sup> but the situation must be approached in a manner similar to that adopted toward denationalization.<sup>6</sup> The whole pattern of rules and the practice of States is based on the assumption that in terms of administration States set the conditions under which nationality is acquired and lost. The law concerned may call for expressions of will on the part of individuals directly, or indirectly, by their establishing residence or service in the armed forces, but the conditions are set by the law.<sup>7</sup> Nevertheless, tribunals have occasionally stated in terms that international law does not permit compulsory

drawn between the power of States to withdraw nationality and the effect of withdrawal on the duty of a State to grant its nationals a right of residence and to receive them back in its territory. It has been contended that this duty persists after the withdrawal of nationality.<sup>7</sup> See also the Protocol to the European Convention on Human Rights, 1963, in Robertson, *Human Rights in Europe*, p. 265, Article 3.

<sup>1</sup> Above, p. 313, and see Wolff, op. cit. (2nd ed.), pp. 129–30. Article 15, para. 2, of the Universal Declaration stated that no one shall be *arbitrarily* deprived of his nationality.

<sup>2</sup> See above, pp. 327–8, and Hudson, *I.L.C. Yearbook* (1952–II), p. 7; and Makarov, *Recueil des cours*, 74 (1949–I), p. 302.

<sup>3</sup> See the cases on German anti-Jewish measures, above, p. 338, n. 8.

<sup>4</sup> See the conclusions of Hudson, *I.L.C. Yearbook* (1952–II), p. 10, and Weis, op. cit., pp. 126, 127, 242–3. Standard works on international law do not state such a rule, but this is in some cases a consequence of their general position on the freedom of States in matters of nationality. See Oppenheim, op. cit., pp. 657–8, Guggenheim, op. cit., p. 318, Fauchille, *Droit international public*, vol. 1, pt. 1, p. 878. See also *Lempert v. Bonfol*, *Annual Digest*, 1933–4, No. 115 at pp. 293–4; *U.S. Ex rel. Steinvorth v. Watkins*, *ibid.*, 1947, No. 41. An important fact, generally ignored by writers, is that municipal laws providing for deprivation normally provide for this in cases where residence and acts of allegiance have occurred abroad. See further, A/CN.4/84, *I.L.C. Yearbook* (1954–II), p. 61, para 38 and the note in *Journal du droit international*, 78 (1951), pp. 182 et seq. See the United Nations Convention on the Reduction of Statelessness, 1961, Art. 8.

<sup>5</sup> Makarov, *Recueil des cours*, 74 (1949–I), p. 301.

<sup>6</sup> Above, p. 339.

<sup>7</sup> Cf. the American doctrine of expatriation. See in this connexion, *Schneider v. Rusk*, *Supreme Court Reporter*, 84 (1964), No. 14, p. 1187.

change of nationality.<sup>1</sup> The United States, the United Kingdom, France and the other States have often protested against 'forced naturalization provisions', as they are sometimes called, in the laws of various Latin-American States.<sup>2</sup> This practice is bound up with the rule that international law does not permit States to impose their nationality on aliens resident abroad.<sup>3</sup> It is to be doubted whether this rule is correctly stated thus. The present writer would submit that the rule, and the practice referred to above, represents yet another aspect of the principle of effective link,<sup>4</sup> and is not to be stated unconditionally. The objective principle to emerge from the practice concerned<sup>5</sup> is simply that nationality is not to be conferred on those already having a nationality without adequate links existing.<sup>6</sup>

Two issues related to the problem of compulsory change remain. First, duress applied to the individual, for example, on signing a declaration of intent concerning nationality, invalidates the act concerned.<sup>7</sup> This is an application of the principle of genuine link noticed in regard to fraudulent naturalization. Secondly, territorial change normally results in automatic change of nationality,<sup>8</sup> although in treaties relating to territorial changes rights of option are frequently created.<sup>9</sup> Moreover, in cases of universal succession, citizens of the State extinguished, resident abroad, may escape acquisition of the nationality of the successor State by remaining abroad.<sup>10</sup> Developments in the field of human rights, and dislike of compulsory acquisition, has led some jurists to refer to a right of option.<sup>11</sup> It is doubtful if this represents the *lex lata*.<sup>12</sup> However, in the case of ethnic minorities the

<sup>1</sup> *In re Rau*, *Annual Digest*, 1931-2, No. 124; decisions referred to *ibid.*, p. 251, note (*Occelli and Barcena*, decisions of the Italian-Mexican and Spanish-Mexican Claims Commissions). Cf. *Weber and Weber v. Nederlands Beheers-Instituut*, I.L.R. 24 (1957), p. 431 (Dutch public policy).

<sup>2</sup> E.g. laws referring to the purchase of land. For references: Briggs, *Law of Nations* (2nd ed.), pp. 461-2; and cf. Hudson, *I.L.C. Yearbook* (1952-II), p. 8.

<sup>3</sup> See Morgenstern, note in *Annual Digest*, 1948, p. 211; and *In re Krüger*, I.L.R. 18 (1951), No. 68 at p. 259 (referring to the Universal Declaration of Human Rights, Art. 15, para. 2). See also above, p. 309.

<sup>4</sup> Cf. Guggenheim, *Traité*, vol. 1, p. 317; Makarov, *Recueil des cours*, 74 (1949-I), p. 305.

<sup>5</sup> At a time of large-scale *de jure* and *de facto* annexations in the nineteenth century concern at compulsory naturalization may not strike everyone as being genuine. Moreover, it is reasonable to expect allegiance from a resident who has acquired a large stake in a country's economy. Concern for 'individuals' sounds altruistic, but in practice the individuals represent a considerable quantum of economic power and influence and at one time might be backed by threats of possible intervention.

<sup>6</sup> Voluntary naturalization might, of course, compensate for absence of other 'objective' links. See Makarov, *loc. cit.*, p. 305 and above, p. 309.

<sup>7</sup> See *Frantz v. Procureur de la République*, *Annual Digest*, 1948, No. 70; *Dorean v. Marshall*, *ibid.*, No. 64; *Acheson v. Murakami*, *ibid.*, 1949, No. 60; *Fujizawa v. Acheson*, *ibid.*, No. 61; *Journal du droit international*, 77 (1950), p. 158.

<sup>8</sup> Above, pp. 319 et seq. See also Ralston, *Law and Procedure of International Tribunals* (1926), p. 187, using the term 'collective naturalization'.

<sup>9</sup> Above, pp. 320-1.

<sup>10</sup> See Oppenheim, *op. cit.*, pp. 571-3 and see above, p. 324.

<sup>11</sup> Fauchille, *Droit international public*, vol. 1 pt. i, p. 857; Kaufmann, *Recueil des cours*, 54 (1935-IV), p. 373. See also *U.S. Ex. rel. Schwarzkopf v. Uhl*, *Annual Digest*, 12 (1943-5), No. 54.

<sup>12</sup> See Weis, pp. 159-64; Kunz, *Recueil des cours*, 31 (1930-I), pp. 111 et seq.

principle of self-determination<sup>1</sup> may have created such a right in the event of territorial change. Naturally the plebiscite may be regarded as a prior and collective exercise of a right of option.<sup>2</sup> Furthermore, it may be observed that the act of taking up residence is often described as a form of option and certainly the individual can create his own effective links.<sup>3</sup> In general, apart from the influence of the principle of self-determination in regard to the fate of ethnic groups, the right of option in general international law has little support in practice<sup>4</sup> and it is illogical to have a rule against compulsory naturalization alongside the usually accepted propositions concerning State succession. However, it is probable that the principle that the right of option is to be favoured will be applied by some courts in cases where a law or treaty is ambiguous.<sup>5</sup>

(e) SUBSTITUTION OF NATIONALITY. Many States provide for withdrawal of nationality *ipso facto* upon the acquisition of a foreign nationality, and the principle of automatic substitution is favoured generally on the grounds that it avoids statelessness and dual nationality. However, the practice is far from uniform and no duty to withdraw nationality exists *de lege lata*. A number of States make authorization a condition for acquisition of a foreign nationality.<sup>6</sup> However, bilateral treaties are often concluded which provide for mutual recognition of naturalization.<sup>7</sup> Draft articles on the elimination and reduction of future statelessness considered by the International Law Commission<sup>8</sup> and the United Nations Convention on the Reduction of Statelessness<sup>9</sup> contain fairly detailed provisions on the subject. It will be noticed that a rule for automatic substitution conflicts with liberal tendencies to rely on the choice of individuals since it would not permit renunciation where this resulted in statelessness.

While there is no rule relating to automatic substitution of nationality, the logical and effective application of rules of international law requires

<sup>1</sup> The principle has legal aspects and this view is supported by the United Nations Charter as interpreted by jurists and its principal organs. See Waldock, *Recueil des cours*, 106 (1962-II), pp. 31-34, and Schücking, *American Journal of International Law*, 20 (1926), Spec. Suppl., p. 56.

<sup>2</sup> Though not as common as they were in the period after 1919, plebiscites have been employed by the United Nations on a number of occasions.

<sup>3</sup> See *Austro-German Extradition case*, I.L.R. 23 (1956), p. 364 at p. 366.

<sup>4</sup> See the *Austrian Nationality case*, *ibid.*, 22 (1955), p. 430; Hudson, *I.L.C. Yearbook*, (1952-II), pp. 9-10; Oppenheim, *op. cit.*, p. 552; Weis, *op. cit.*, pp. 159-64.

<sup>5</sup> *In re Hehanussa*, I.L.R. 19 (1952), No. 62. '[The appellant] had put forward as a modern conception of international law that on a transfer of territory the population of the territory concerned has a right of option as to nationality. The conception was a reasonable one and could perhaps be successfully invoked in case of silence on the point, or of obscurity in the terms of the relevant agreement. . . .'

<sup>6</sup> Generally, Hudson, A/CN.4/50, *I.L.C. Yearbook* (1952-II), pp. 10-11.

<sup>7</sup> For example, the so-called Bancroft treaties on which see below, p. 354. See also the Inter-American Convention on Nationality, signed at Montevideo, 26 December 1933, Art. 1.

<sup>8</sup> See *I.L.C. Yearbook* (1953-II), pp. 179-84, 192 (Art. VI). See also Judge Read, *I.C.J. Reports*, 1955, pp. 42-43, where he remarks that the present trend in State practice is toward double nationality, which necessarily permits maintenance of the ties with the country of origin.

<sup>9</sup> Articles 5-8.

that, on the international plane, the new nationality is recognized where there is a sufficiency of links established. In *Apostolidis v. Turkish Government*<sup>1</sup> the respondent pleaded that the claimant's French naturalization was void because the requirement of authorization in Turkish law had not been complied with. The argument failed and the Tribunal stated the principles as follows:

'Attendu que, d'après les principes du droit international public, les effets de la naturalisation doivent être reconnus non seulement par les autorités de l'État qui a accordé cette naturalisation, mais également par les autorités judiciaires et administratives de tous les autres États;

'Attendu que, dans le cas où exceptionnellement la législation d'un État exige pour la validité de la naturalisation de ses nationaux une autorisation gouvernementale préalable, une telle disposition ne saurait lier que les autorités dudit État;

'Attendu qu'il s'en suit que, si dans l'espèce les autorités administratives et judiciaires turques pourront refuser de reconnaître les effets de la naturalisation de l'auteur des demandeurs, toutes les autres autorités judiciaires, et parmi elles le Tribunal arbitral mixte qui, en ce qui concerne le droit international public, n'est pas lié par la législation intérieure de l'un des États contractants, sont tenues d'admettre la validité du changement de nationalité et de reconnaître les demandeurs comme ressortissants français.'

The reasoning here is close to that in the *Nottebohm* decision<sup>2</sup> and the doctrine of effective link by-passes the whole issue of substitution since there cannot be an automatic rule and the new nationality may or may not be based on genuine and effective links.

(f) THE RIGHT OF EXPATRIATION. Connected with the topics of substitution is the question whether there is a right of expatriation. The Universal Declaration of Human Rights prescribes, in Article 15, paragraph 2, that 'No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.' However, it is not the case, in the light of existing practice, that the *individual* has such a right,<sup>3</sup> although no doubt this provision may influence the interpretation of internal laws and treaty rules.<sup>4</sup> Once again, the principles of the logical and effective application of international law, and of effective link, provide a solution which fits into the *lex lata*. The change of nationality may, depending on the facts,<sup>5</sup> place other States, including the 'losing' State, under a duty to

<sup>1</sup> Franco-Turkish Mixed Arbitral Tribunal; *Recueil des décisions des tribunaux arbitraux mixtes*, vol. 8, p. 373; *Annual Digest*, 1927-8, No. 207.

<sup>2</sup> See below, p. 352. In terms, however, the *Apostolidis* decision is not concerned with effective link.

<sup>3</sup> Oppenheim, op. cit., pp. 648-9; the United States doctrine supports the right of expatriation 'of all people': U.S. Stat. sec. 1999. There are exceptions in actual practice. See also the views of Fiore and Fauchille, discussed in this *Year Book*, 8 (1927), pp. 52-53, and Maury, *Hommage d'une génération de juristes au Président Basdevant*, pp. 378-82. Cf. A/CN.4/84, I.L.C. Yearbook (1954-II), p. 61, para. 37.

<sup>4</sup> Also dislike of dual nationality may lead a court to presume the loss of the former nationality: *Greenbaum v. Oizerman*, *Annual Digest*, 1949, No. 51.

<sup>5</sup> Weis, op. cit., p. 138, comes to a substantially similar conclusion, although he does not use the principle of effective nationality. In his view: 'Under present international law a State should

recognize the new nationality. One other point to be noticed is that from what has been said above it follows that there is no reason for the application of a rule that the nationality of origin has more strength than a naturalization.<sup>1</sup> The settlement of questions on the international plane cannot depend on municipal categories and it is obvious that in many cases the nationality of origin is no more than nominal.<sup>2</sup>

(g) RACIAL LAWS. In respect of denationalization it might be suggested that deprivation on grounds of a policy of racial inequality or persecution is contrary to international law (including the United Nations Charter) and elementary principles of humanity.<sup>3</sup> If the deprivation is followed by a severance of links on the part of those affected, it may be unwise to make questions of status depend on the legal nature of the act of deprivation since this may connect refugees who have settled elsewhere with the former sovereign.<sup>4</sup> Moreover, if persecution involves virtual expulsion of the groups concerned, then a breach of international law will certainly have occurred.<sup>5</sup> The act of denationalization may not *per se* have delictual consequences but it is probable that it would be a breach of the provisions of the United Nations Charter concerning equality of peoples and human rights,<sup>6</sup> and might involve a threat to the peace within the meaning of Article 39 of the Charter.

### XVI. *Nationality as a status*

To say that nationality involves a question of status is perhaps to state the obvious<sup>7</sup> but it is necessary to draw attention to the part which this

not withhold discharge from its nationality if: (a) the acquisition of the new nationality is not inconsistent with international law and has been sought by the person concerned in good faith; (b) the person concerned has his ordinary residence abroad; (c) he is of full age and not under a disability; (d) the discharge would not result in failure to perform specific obligations towards the State (national, military or civil service) to which the person was liable at the time of the acquisition of the new nationality; (e) the State is not at war', see also above, p. 308, n. 9. The United States and the United Kingdom, among others, do not permit expatriation in time of war. See further Fischer Williams, this *Year Book*, 8 (1927), pp. 48-49; and the United Nations Convention on the Reduction of Statelessness, 1961, Article 8, paras. 2 and 3.

<sup>1</sup> De Castro has suggested this as the *ratio decidendi* of *Nottebohm: Recueil des cours*, 102 (1961-I), p. 583.

<sup>2</sup> See *Levin v. Levin*, *Annual Digest*, 1949, No. 66. And see above, p. 338. See further the *Salem case*, *Reports of International Arbitral Awards*, vol. 2, p. 1187; and *Apostolidis v. Turkish Government*, above, p. 343.

<sup>3</sup> Cf. Wolff, *op. cit.*, pp. 129-30. See also van Panhuys, *op. cit.*, p. 163; Weis, *op. cit.*, p. 124; and *Journal du droit international*, 81 (1954), pp. 421-35. Cf. *I.L.C. Yearbook*, (1954-I), pp. 10-12 (debate on Article 8) and pp. 228-30 (draft conventions). See further, *Hollart v. Moravia*, *Annual Digest*, 1949, No. 7; *Revue critique de droit international privé*, 38 (1949), p. 650.

<sup>4</sup> See above, p. 338, and cf. *Levita-Muhlstein v. Département fédéral de Justice et de Police*, *Annual Digest*, 1946, No. 58. <sup>5</sup> This is the precise burden of Wolff, *op. cit.*, pp. 129-30.

<sup>6</sup> Articles 1, para. 2, 55 and 56. See also the United Nations Convention on the Reduction of Statelessness, Article 9: 'A contracting State may not deprive any person or group of persons of their nationality on racial, ethnic, religious or political grounds.'

<sup>7</sup> See, however, *Messih v. Minister of the Interior*, *I.L.R.* 28, p. 291, where the *Conseil d'État* of Egypt stated: 'Now, the State is composed of subjects and, nationality being the link which

consideration may play in decisions which permit an area of appreciation, including judicial reasoning. Various equities flow from the concept of nationality as a status, and if more precise categories are required one may invoke general principles of law and elementary considerations of humanity. Certain principles may be said to reflect a notion of status. Thus some national laws, in varying degrees, have favoured the principle that, if a person loses his nationality as a consequence of a change of personal status (marriage, termination of marriage, legitimation, recognition, adoption), such loss shall be conditional upon the acquisition of another nationality in consequence of the change of personal status.<sup>1</sup> The principle of avoiding loss of status, if no substitution of nationality occurs, may conflict with the idea of family unity. Thus if *A* is legitimated he should follow the nationality of the legitimating father but, under the principle of substitution, *A* will not lose his previously held nationality if under the law of his father's country he does not acquire the latter's nationality.<sup>2</sup> More substantial is the recognition, in the doctrines of effective link and dominant nationality, that establishment in a community gives status; and there is then the corollary that arbitrary deprivation of nationality may not be recognized by other States.

The notion of status connotes stability and effectiveness as factors relevant to decision. Correlative legal factors should not intervene against the facts. Thus the illegality of the act of taking possession of territory should not affect the acceptance of realities.<sup>3</sup> The abrogation of a treaty on the outbreak of war should not have contingent effects on national status derived from the treaty before its lapse.<sup>4</sup> It is also desirable that courts should not deal with these questions on the basis of political policies of non-recognition. In accordance with the principles of stability instruments affecting nationality should not be retroactive.<sup>5</sup> Thus the Allied revocation of German denationalization decrees aimed at Jews was not given retroactive effect.<sup>6</sup> In establishing the admissibility of a claim on behalf of a national, acts of conferment or deprivation will not be given retroactive effect.<sup>7</sup> In this type of case the principle of non-retroactivity may also

unites them to it, the rules of nationality form part of public law and do not concern personal status.<sup>8</sup> But this was with reference to the issue as to jurisdiction of the Administrative Court.

<sup>1</sup> See *I.L.C. Yearbook* (1953-II), 179, draft article and comment. See also above, p. 342.

<sup>2</sup> *Ibid.*, p. 184.

<sup>3</sup> See above, p. 327. But see *Ratz-Lienert and Klein v. Nederlands Beheers-Instituut*, I.L.R. 24 (1957), p. 536; *Hollart v. Moravia*, *Annual Digest*, 1949, No. 7.

<sup>4</sup> *In re Barrabini*, I.L.R. 18 (1951), No. 156.

<sup>5</sup> Cf. German Supreme Court, *Annual Digest*, 1935-7, No. 153; *In re Ernst*, *ibid.*, 1948, No. 53.

<sup>6</sup> See decisions of the Allied Control Council of 14 July 1946 and 30 July 1947. See further, *Journal du droit international*, 81 (1954), p. 435, and above, p. 338, on the attitude of courts in other jurisdictions. In 1945 Czechoslovakia retroactively deprived Sudeten Germans of Czechoslovak nationality.

<sup>7</sup> Cf. *Rothmann v. Austria and Hungary*, above, p. 336. For a case arising under an extradition treaty, see *In re D.G.D.*, *Annual Digest*, 1933-4, No. 141.

rest on the procedural necessity for equality, as one Mixed Arbitral Tribunal<sup>1</sup> expressed itself:

'It is inadmissible for one of the contracting parties to extend unilaterally the sphere of application of a special rule of jurisdiction laid down in a treaty, by means of conferring citizenship upon the population of a territory to which the treaty did not apply at the time of its conclusion.'

In normal cases the principle of non-retroactivity has an intimate connexion with that of effective nationality. Thus Lauterpacht<sup>2</sup> has said:

'The question of prohibition of retroactivity in the matter of nationality legislation seems to be of considerable importance, inasmuch as in cases such as the present the enactment of retroactive legislation may be tantamount to the imposition of nationality upon persons resident abroad who had lost the nationality of the legislating State under an earlier law and had severed all connection with it. International law does not permit States to impose their nationality on aliens resident abroad.'

Even where the question of the continuity of States was involved, as in the case of Austria and Czechoslovakia in 1945, the nationality law of the usurping German administration was not revoked retroactively.<sup>3</sup> However, where no such period of usurpation has occurred and continuity exists through successive absorptions of new territory the 'successor' government will apply nationality law retroactively. Thus birth in the former Sardinian kingdom has been held to be birth in Italy under Italian nationality law.<sup>4</sup> Nationality law is introduced by the successor State into areas ceded or annexed with retroactive effect, but very generally there are qualifications as to residence abroad, the existence of a domicile in the area, and so on, which satisfy the principles of effectiveness and of effective or real link.<sup>5</sup>

Certain relations of the notion of status require brief comment. The device of functional nationality, shortly to be noticed, has the quality that it leaves the essential bases of the status intact whilst going beyond the formal aspects of the status for particular purposes. However, it is probable that in large areas of activity functionalism is so prominent that the notion

<sup>1</sup> *Società di Navigazione Adria v. Feher*, *Annual Digest*, 1935-7, No. 205, where it was held that the Italian Decree Law of 1927, changing citizenship in Fiume into Italian nationality, did not have retroactive effect *vis-à-vis* Hungary for the purposes of provisions on jurisdiction of the M.A.T. in the Treaty of Peace.

<sup>2</sup> *Ibid.*, 1948, p. 211. The note on this page is presumably by the editor.

<sup>3</sup> As to Austria: *Austro-German Extradition case*, I.L.R. 23 (1956), p. 364; *In re Feiner*, *ibid.*, p. 367; *Austrian Nationality case*, *ibid.* 22 (1955), p. 430; *R. v. Provincial Gov. of Upper Austria*, *ibid.* 19 (1952), No. 61. As to Czechoslovakia: *Confiscation of German Property case*, *ibid.*, 20 (1953), p. 31; *German Nationality (Annexation of Czechoslovakia) case*, *ibid.* 19 (1952), No. 56; *Nederlands Beheers-Instituut v. Nimwegen and Männer*, *ibid.* 18 (1951), No. 63. Cf. *In re Rebholz*, *ibid.* 18 (1951), No. 65.

<sup>4</sup> *Costa v. Military Service Commission of Genoa*, *Annual Digest*, 1938-40, No. 13.

<sup>5</sup> See *Pubblico Ministero v. Benedetti*, *ibid.* 1946, No. 48; *Bürkle v. Ministère public*, *ibid.* 1947, No. 49. See also above, p. 324.

of status becomes irrelevant. In the important field of diplomatic protection, the effective link doctrine may well provide a more stable basis for attribution of a status than the doctrine of autonomy, although much will depend on the manner of application of the former doctrine.<sup>1</sup>

### XVII. *The functional approach to nationality*

In spite of the reiteration from time to time of the principle that nationality depends on municipal law, it is common for legislation and judicial decisions to create functional nationality<sup>2</sup> whereby parts of national law are applied to aliens on the basis of allegiance, residence and other connexions. There seems to be general acquiescence in this splitting up of the legal content of nationality for particular purposes. Thus legislation in many countries has defined the enemy alien in functional terms and without dependence on the 'technical' nationality of the country in question.<sup>3</sup> The control test has been widely applied to corporations<sup>4</sup> and goods in determining enemy character. Moreover, the use of factual tests occurs equally widely when the issue is one of the law of war and neutrality, for example, taking under the law of prize.<sup>5</sup> However, France,<sup>6</sup> Germany, Italy and Japan, among others, refer to formal nationality of individuals and the flag of vessels. From the functional approach it follows that stateless persons may be classified as 'neutrals',<sup>7</sup> and, further, that a dual national may be

<sup>1</sup> See below, pp. 349 et seq.

<sup>2</sup> A different type of functionalism may occur when a forum is prepared to disregard dual nationality where policy demands a choice. Examples have already been supplied (see above, p. 330). Note also the provision in the Staff Regulations and Rules of the United Nations which makes it mandatory for the Secretary-General to select a single nationality for the purposes of the Staff Rules: see *Julhiard v. Secretary-General of the United Nations*, I.L.R. 22 (1955), p. 809. As to whether the effective link principle requires a choice see below, p. 360.

<sup>3</sup> See *Kühn v. Custodian of Enemy Property*, *ibid.* 18 (1951), p. 262 (Norway); *Vamvakas v. Custodian of Enemy Property*, *ibid.* 19 (1952), No. 122 (U.K.); *Guessefeldt v. McGrath*, *ibid.*, No. 124 (U.S.); *Hakim v. Minister of the Interior*, *ibid.*, No. 125 (Israel); However, extreme caution may result in hard decisions in respect to refugees from enemy States: see *R. v. Home Secretary, Ex parte L. and Another*, [1945] 1 K.B. 7, and see *I.C.J. Reports*, 1955, at p. 62. Cf. *C<sup>16</sup> d'Assurances la Populaire v. Claas*, *Annual Digest*, 1948, No. 148; *Cohen-Klarsfeld v. Pouchard-Stopt*, I.L.R. 23 (1956), p. 758. See also Parry, *Nationality and Citizenship Laws of the Commonwealth*, p. 132.

<sup>4</sup> *Daimler v. Continental Tyre Co.*, [1916] 2 A.C. 307; *Contomichalos v. Drossos* (1937), *Gazette des Tribunaux mixtes d'Égypte*, 28 (1937-8), p. 49. See further, Watts, this *Year Book*, 33 (1957), pp. 78-83.

<sup>5</sup> *The Arsia*, *Annual Digest*, 1949, No. 206; *The Nyugat*, I.L.R. 24 (1957), p. 916; *The S.S. Lea Lott*, *ibid.*, 28, p. 652; *The Inginer N. Vlassopol*, *ibid.* 18 (1951), No. 223; *The Nordmeer*, *Annual Digest*, 1946, No. 172; *The Athinai*, *ibid.*, 1943-1945, No. 128. Cf. *The Unitas*, [1950] A.C. 536 on the conclusiveness of a vessel's flag and limitations thereon. See also Rowson, this *Year Book*, 23 (1946), p. 293; Colombos, *Law of Prize* (3rd ed.), pp. 67 et seq.; Garner, *Prize Law during the World War* (1927), pp. 362 et seq., 443 et seq.; Lewis, this *Year Book*, 4 (1923-4), p. 60; Verzijl, *Le Droit des prises de la Grande Guerre*, pp. 336 et seq.

<sup>6</sup> However, by legislation and administrative action France has modified her position and introduced residence as an additional test.

<sup>7</sup> *Marquet v. Office des Séquestres*, I.L.R. 22 (1955), p. 921. Some States, e.g. Italy, use the test of commercial domicile.



held by one of the States concerned to be an enemy.<sup>1</sup> In relation to vessels and aircraft the functional approach is influenced by the need for a *system* of attribution and appropriate means of effectively and easily verifying the nationality. Hence the emphasis on the law of the flag State and, in the case of aircraft<sup>2</sup> and, perhaps, space vehicles,<sup>3</sup> on registration. Hence functional rules may concentrate on a system of evidence and not primarily on 'effectiveness.' In time of war any link may give cause for concern and quantum of links is less important. Moreover, in the context of treaties rules are often functional, rather than declaratory as to general status. Thus in the *I.M.C.O.* case<sup>4</sup> the issue was the interpretation of the phrase 'the largest ship-owning nations' in Article 28 of the Convention for the Establishment of the Inter-Governmental Maritime Consultative Organization, and the Advisory Opinion delivered rested on an inquiry into the legislative history of the provision and usage in other maritime conventions. In construing the phrase 'nationals of the United Nations' in the peace treaties after the Second World War, a court is likely to adopt an approach which will give effect to the intentions of the parties.<sup>5</sup> In the Geneva Convention on the Status of Refugees of 1951, Article 16, paragraph 3, provides that a refugee must be treated, in States parties to the Convention in which he is not habitually resident, on the same footing as a national of the State in which he is resident for certain purposes including access to the courts.<sup>6</sup> Moreover Article 44 of the Civilians Convention of 1949 provides that, in applying measures of control permitted by the Convention, the belligerent should not treat as enemy aliens, exclusively on the basis of their nationality *de jure* of an enemy State, refugees who do not in fact enjoy the protection of any government.<sup>7</sup> The Vienna Convention on Diplomatic Relations<sup>8</sup> restricts the conferment of privileges and immunities in the case of members of the mission if they are nationals of the receiving State or 'permanently resident' therein.

<sup>1</sup> *Miyuki Okihara v. Clark*, 71 F. Supp. 319; *Annual Digest*, 1947, No. 90. However, the enemy nationality may not be the effective nationality: *Mrs. Boske-Loze v. Nederlands Beheers-Instituut*, *ibid.*, No. 55. In respect to dual nationals Japan uses a domicile test: Colombos, *op. cit.*, p. 91. See also *Kramer v. A.-G.*, [1923] A.C. 528.

<sup>2</sup> See, *inter alia*, Convention for the Regulation of Aerial Navigation, 1919, Arts. 5-10.

<sup>3</sup> But see the drafts placed before the Legal Sub-Committee of the Committee on the Peaceful Uses of Outer Space: *Report of the Sub-Committee*, A/AC.105/12, 6 May 1963. See further, McDougal, Lasswell and Vlasic, *Law and Public Order in Space* (1963), pp. 513-87.

<sup>4</sup> *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization*, I.C.J. Reports, 1960, p. 23; and see Simmonds, *International and Comparative Law Quarterly*, 12 (1963), p. 56.

<sup>5</sup> Cf. *Palestinian Nationality case*, I.L.R. 18 (1951), No. 25; and see the *Mergé* claim, *ibid.* 22 (1955), p. 456. Cf. the instruments relating to the trial of war criminals, on which see *Law Reports of Trials of War Criminals* (United Nations War Crimes Commission), vol. 15, pp. 43-45, 85, 87 note; and *In re Gerbsch*, *Annual Digest*, 1948, p. 491. *Inter alia*, French and Chinese laws referred to crimes against persons under the protection of the State.

<sup>6</sup> See *Grundul v. Bryner*, I.L.R. 24 (1957), p. 483.

<sup>7</sup> U.K. *Manual of Military Law* (1958), Part III, para. 52.

<sup>8</sup> *American Journal of International Law*, 55 (1961), p. 1064; Articles. 29 et seq.

Enough has been said to indicate the common specialization of rules of attribution and the tendency to bypass the nationality criterion for purposes either related to national security or to international public policy. If one may anticipate a little, it may be said that the *modus operandi* adopted by the Court in the *Nottebohm* case was not in this respect particularly novel. Thus it is inappropriate to criticize<sup>1</sup> the Court for having torn apart the 'unity of the institution of nationality'. The 'unity' of concepts only causes confusion, as analytical jurists have been pointing out for some time.

### XVIII. *The principle of effective link and the judgment in the Nottebohm case*

#### *Prologue*

A consideration of the general significance of the *Nottebohm* case is a necessary part of any treatment of nationality in the context of international law and the decision has not appeared as a central feature of the discussion so far. The relatively late introduction of the topic in this article is determined by considerations of substance and perspective and not by the chronology of the legal development. Much of the literature on nationality tends to take *Nottebohm* as a point of departure and, since a number of jurists regard the principle of effective nationality as the result of judicial legislation in that case, the overall impression conveyed, particularly by the literature in English, is of innovation and rash intrusion. The thesis of the present writer is that, seen in a proper perspective, the decision, by a large majority of the Judges,<sup>2</sup> is a natural reflection of a fundamental concept which has long been inherent in the materials concerning nationality on the international plane. The doctrine of the effective link has been recognized for some time in continental literature<sup>3</sup> and the decisions of some municipal courts.<sup>4</sup> The recognition is commonly in connexion with dual nationality, but the particular context of origin does not obscure its role as a general principle with a variety of possible applications. Several members

<sup>1</sup> See Kunz, *ibid.* 54 (1960), p. 536 at pp. 564-5.

<sup>2</sup> Hackworth, Badawi, Basdevant, Zoričić, Hsu Mo, Armand-Ugon, Kojevnikov, Zafrulla Khan, Moreno Quintana and Córdova. The latter had been Rapporteur on nationality and statelessness for the International Law Commission.

<sup>3</sup> See Weis, *op. cit.*, pp. 191-2; I.L.R. 22 (1955), pp. 452-4; Batiffol, *Droit international privé* (2nd ed.), p. 92; Makarov, *Recueil des cours*, 74 (1949-I), pp. 355-6 (for multiple nationality cases). Cf. Rabel, *The Conflict of Laws*, vol. 1, p. 121. See further the trend of thought in Hall, *International Law* (8th ed., 1924), pp. 275-6, 293, 298-9. At p. 299 there is an anticipation of the Convention on the Reduction of Statelessness of 1961.

<sup>4</sup> *Magalhães v. Fernandes*, *Annual Digest*, 1941-2, No. 83; *In re Heinz S.*, *ibid.*, 1942, No. 98. See also *The Johann Christoph* (1854), 2 Sp. Ecc. and Ad. 2; and the German Federal Constitutional Court, I.L.R. 19 (1952), No. 56, p. 320; and see above, p. 313. For a pronouncement to the contrary see *The King v. Burgess, Ex parte Henry*, *Annual Digest*, 1935-7, No. 19 at p. 67; here the High Court of Australia relies on the statement in Oppenheim considered above, p. 289. See also Article 21 (2) of the Aliens Order, 1920, S.R. & O. (1920), No. 448, as amended by No. 2262. (No comparable provision appears in the Aliens Order, 1953.)

of the International Law Commission were proponents of the principle (out of the context of dual nationality) during the fifth session.<sup>1</sup>

The reply of the German Government of 1929<sup>2</sup> to the Preparatory Committee of The Hague Codification Conference declared that

'a State has no power . . . to confer its nationality on all the inhabitants of another State or on all foreigners entering its territory . . . if the State confers its nationality on the subjects of other States without their request, when the persons concerned are not attached to it by any particular bond, as, for instance, origin, domicile or birth, the States concerned will not be bound to recognize such naturalisation'.

The internal legislation of States makes general use of residence, domicile, immigration *animo manendi* and membership of ethnic groups associated with the State territory as connecting factors.<sup>3</sup> International law has rested on the same principles in dealing with the situations where a State has no nationality legislation<sup>4</sup> and when certain parts of the population are outside nationality legislation.<sup>5</sup> There is interesting evidence of reliance on settlement together with the existence of the political and diplomatic protection of a particular sovereign.<sup>6</sup> The principle of effective link is considered to underlie much of the State practice on State succession and the continuity of States,<sup>7</sup> and to support the concept of *ressortissant* found frequently in treaties.<sup>8</sup> The familiar propositions that international law does not permit compulsory change of nationality or imposition of nationality on aliens, and the practice cited in support, are probably best explained by the need for a real link.<sup>9</sup> Furthermore, the doctrine in question conduces to a better analysis of the principles governing retroactivity,<sup>10</sup> deprivation of nationality,<sup>11</sup> substitution of nationality,<sup>12</sup> and the effect of the revocation of denationalization measures.<sup>13</sup> Finally, in the context of functional rules, the doctrine of effective link has appeared in highly specialized forms accommodated to each particular rule.<sup>14</sup> In this respect, its role has been masked by the adaptation involved<sup>15</sup> and the fact that the term nationality may be avoided though the legal aspect, that of attribution, is the same as that of a nationality rule.

<sup>1</sup> *I.L.C. Yearbook*, (1953-I), p. 180, para. 24; p. 186, paras. 5, 7; p. 239, paras. 45, 46 (Yepes); p. 121, paras. 32, 33; p. 218, para. 63 (Zourek); p. 184, para. 57; p. 237, para. 24 (François); p. 239, para. 50 (Amado).

<sup>2</sup> Above, p. 297.

<sup>3</sup> Above, pp. 308-9.

<sup>4</sup> Above, pp. 317-18.

<sup>5</sup> Above, pp. 318-19.

<sup>6</sup> Above, pp. 319, 333-5. Much more evidence no doubt exists, in the printed volumes of diplomatic documents available, on the concept of 'protection' as an aspect of territorial sovereignty. On mandated and trust territory in this respect, see above, pp. 315-17.

<sup>7</sup> Above, pp. 319-26.

<sup>8</sup> See Weis, *op. cit.*, pp. 8-10; and *Kahane (Successor) v. Parisi and Austrian State*, above, p. 319.

<sup>9</sup> See above, pp. 340-2. In particular see Lauterpacht, *Annual Digest*, 1948, p. 11 note, quoted above, p. 346.

<sup>10</sup> Above, pp. 345-6.

<sup>11</sup> Above, pp. 339-40.

<sup>12</sup> Above, pp. 342-3.

<sup>13</sup> Above, pp. 338, 344.

<sup>14</sup> Above, pp. 347-9.

<sup>15</sup> Above, p. 349.

In the year before the appearance of the decision in the Second Phase of *Nottebohm*, a Nationality Agreement between the Arab League States was opened for signature at Cairo on 5 April 1954.<sup>1</sup> Article 8 provides:

'A person possessing the nationality of more than one of the member States of the Arab League may opt for one or the other within two years from the date of the coming into force of this Agreement. Where the two years elapse within such option taking place, he shall be deemed to have opted for the nationality most recently acquired, provided that where there is more than one nationality acquired at one and the same time, he shall be deemed to have opted for the nationality of the country in which he has ordinarily resided; whereupon all other nationalities shall abate.'

(a) THE ISSUES IN THE *NOTTEBOHM* CASE (*Second Phase*).<sup>2</sup> In this case Liechtenstein claimed damages in respect of the acts of the Government of Guatemala in arresting, detaining, expelling and refusing to readmit Nottebohm and in seizing and retaining his property without compensation. In the Counter-Memorial, Guatemala asked the Court to declare the claim of Liechtenstein inadmissible, *inter alia*, 'because Liechtenstein had failed to prove that M. Nottebohm, for whose protection it was acting, properly acquired Liechtenstein nationality in accordance with the law of that Principality; because even if such proof were provided, the legal provisions which would have been applied cannot be regarded as in conformity with international law; and because M. Nottebohm appears in any event not to have lost, or not validly to have lost, his German nationality'. In the final Submissions, the third point was developed and the inadmissibility was contended for 'on the ground that M. 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'.

In its Judgment the Court regarded the plea relating to Nottebohm's

<sup>1</sup> *British and Foreign State Papers*, vol. 161, p. 635. Signed by Egypt, Iraq and Jordan; ratified by Egypt and Jordan. Not yet in force. Cf. the Convention concerning the Settlement of Certain Questions of Citizenship between the Czechoslovak S.R. and Hungarian P.R., signed 4 November 1960, *United Nations Treaty Series*, vol. 397, No. 5708, Articles 4, 6 (3), and 8 (2); and the Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality, signed 6 May 1963, *European Treaty Series*, No. 43; *American Journal of International Law*, 58 (1964), p. 573, Articles 2 and 6.

<sup>2</sup> *I.C.J. Reports*, 1955, p. 4. Literature: Kunz, *American Journal of International Law*, 54 (1960), pp. 536-71; Mervyn Jones, *International and Comparative Law Quarterly*, 5 (1956), pp. 230-44; Loewenfeld, *Transactions of the Grotius Society*, 42 (1956), pp. 5-22; idem, *Archiv des Völkerrechts*, 5 (1956), pp. 387-410; Paul de Visscher, *Revue générale de droit international public*, 60 (1956), pp. 238-66; Makarov, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 16 (1956), pp. 407-26; idem, *Revista española de derecho internacional*, 8 (1955), pp. 519-24; Bastid, *Revue critique de droit international privé*, 45 (1956), pp. 607-33; Verzijl, *Nederlands Tijdschrift voor Internationaal Recht*, 3 (1956), pp. 33 et seq.; Glazer, *Georgetown Law Journal*, 44 (1955-6), pp. 313-23; Migliazza, *Comunicazioni e studi*, 7 (1955), pp. 582-94; Grawitz, *Annuaire français de droit international*, 1955, 262; Navarro, *Revista española*, 10 (1957), pp. 333-72; Blaser, *La Nationalité et la protection juridique internationale de l'individu* (1962).

nationality as fundamental. The issue was one of admissibility, and the Court observed:<sup>1</sup>

'In order to decide upon the admissibility of the Application, the Court must ascertain whether the nationality conferred on Nottebohm by Liechtenstein by means of a naturalisation which took place in the circumstances which have been described, can be validly invoked as against Guatemala, whether it bestows upon Liechtenstein a sufficient title to the exercise of protection in respect of Nottebohm as against Guatemala . . . what is involved is not recognition [of acquisition of Liechtenstein nationality]<sup>2</sup> for all purposes but merely for the purposes of the admissibility of the Application, and, secondly, that what is involved is not recognition by all States but only by Guatemala.'

In the event, having applied the doctrine of the effective link to the facts, the Court held the claim to be inadmissible. Critics of the decision<sup>3</sup> and the dissenting Judges<sup>4</sup> have pointed out that Guatemala had not argued the case on the basis that there was no effective link, and also that the precise *ratio* of the decision was the question of opposability as against Guatemala. The truth of this is obvious, but the effect of such formal arguments in limiting the significance of the Judgment is negligible. The tendency to look for very precise grounds for decision is a common characteristic of judicial technique and few jurists seriously believe that, apart from cases of treaty interpretation, the pronouncements of the Court can be placed in quarantine by formal devices.<sup>5</sup> Furthermore, the Court develops its views on the social bases of and legal policy concerning nationality in a manner which indicates the importance of the pronouncements on the genuine or effective link.<sup>6</sup> In any case, the fact that admissibility was involved was only a detour in the argument. As the Court said:<sup>7</sup> 'To exercise protection, to apply to the Court, is to place oneself on the plane of international law. It is international law which determines whether a State is entitled to exercise protection and to seise the Court.' The Court did not base its decision on estoppels as against Liechtenstein, but rested on the existence or not of a right of protection, an issue the outcome of which would logically affect States in general and not just the parties.<sup>8</sup> In view of all this it is not surprising to find authoritative acknowledgements of the general significance of the decision in the work of the International Law Commission.<sup>9</sup>

<sup>1</sup> *I.C.J. Reports*, 1955, pp. 16-17. See also pp. 20, 21.

<sup>2</sup> The writer's parenthesis.

<sup>3</sup> e.g. Mervyn Jones, *op. cit.*, pp. 238-9; Kunz, *op. cit.*, pp. 541, 552.

<sup>4</sup> See Judge Klaestad, *I.C.J. Reports*, 1955, p. 30; Judge Read, *ibid.*, pp. 35, 38, 39-40; Guggenheim, Judge *ad hoc*, p. 53 (cf. p. 62). See further the decision of the Italian-United States Conciliation Commission in the *Flegenheimer* claim, *I.L.R.* 25 (1958-1), p. 91, at pp. 148-50.

<sup>5</sup> Cf. the effect of the *Fisheries* case, *I.C.J. Reports*, 1951, p. 116. <sup>6</sup> See above, p. 313.

<sup>7</sup> At p. 20.

<sup>8</sup> Cf. Guggenheim at pp. 60, 63, and Kunz, *op. cit.*, p. 564.

<sup>9</sup> *I.L.C. Yearbook* (1956-II), pp. 278-9 (draft article on nationality of ships and comment); *ibid.* (1956-I), pp. 36, 66-67, 70-72 (p. 72, the genuine link test adopted by 9 votes to 3, with 3 abstentions). *Nottebohm* is not referred to expressly in these materials, but the terminology used, and the existence of a general problem beyond that of dual nationality, make the connection

(b) EVIDENCE OF THE 'LINK' DOCTRINE RELIED ON BY THE COURT. Commentators who are unsympathetic to the conclusions of the Court on questions of principle commonly emphasize the generality of the passages dealing with the preceding practice on which the Court purported to rely.<sup>1</sup> The survey is, in the view of the present writer, unsatisfactory if it is regarded in isolation and weighed simply as a material assessment of practice and jurisprudence. Moreover, to those who *ab initio* regard the approach of the Court as a novelty,<sup>2</sup> the inadequacy of exposition in this connexion is a particular source of disquiet. Three points would seem to be worth consideration here. First, to those who felt that the 'link' theory was self-evident, and well supported in the legal materials, it would not be apparent that a very full *exposé* was necessary. Secondly, the somewhat varied collection of propositions and references to previous practice reads not as a survey but more as an attempt at further and better particulars as to the logical necessity of the *general principle* for which the Court was contending. The relevant section of the Judgment commences<sup>3</sup> well before the 'survey of materials', and the logical burden of the section as a whole is that, to settle issues on the plane of international law, principles have to be applied apart from the rules of national laws. The major point is made on the basis of a 'general principle of international law' and not on the basis of a rule which could be classified as a customary rule of the usual sort. Thirdly, the critics of the Judgment are probably seeking materials which support the 'link' theory as such, as a specific rule *eo nomine*. Not all the materials support any rule in this way, but there is much material, surveyed earlier in this article, which supports the general principle. There was very little on the international plane which expressly *denied* the effective link doctrine, and the incidental rejection of it in the *Salem* case<sup>4</sup> was regarded by contemporaries as a novelty.<sup>5</sup>

At any rate, it is true that, taken individually, the pieces of evidence deployed by the Court are not completely cogent. Thus it is plausible for Judge Read<sup>6</sup> to say that the provision on dual nationality in the Statute of the Court<sup>7</sup> has nothing to do with diplomatic protection. The Court was

clear. For the replies of governments on the nationality of ships, see *I.L.C. Yearbook* (1956-II), pp. 14-16.

<sup>1</sup> At pp. 21-23. However, the Court does not, as a general rule, seem ready to undertake an examination of the details of practice and jurisprudence in its Judgments; see the *Fisheries* case. The Judgments seem to present the conclusions on these matters in summary form.

<sup>2</sup> See Mervyn Jones, *op. cit.*, pp. 240-2; Kunz, *op. cit.*, pp. 552, 555; Judge Read, *I.C.J. Reports*, 1955, pp. 39-40.

<sup>3</sup> At p. 20.

<sup>4</sup> Above, p. 331.

<sup>5</sup> See the *Annual Digest*, 1931-2, No. 98, at p. 192, note by Lauterpacht, and Mervyn Jones, *op. cit.*, p. 242, n. 14.

<sup>6</sup> *I.C.J. Reports*, 1955, p. 40.

<sup>7</sup> Article 3 provides: '1. The Court shall consist of fifteen members, no two of whom may be nationals of the same State. 2. A person who for the purposes of membership in the Court could be regarded as a national of more than one State shall be deemed to be a national of the one in which he ordinarily exercises civil and political rights.' See the Judgment of the Court at p. 22.

obviously as aware of this as he was, but the majority Judges were concerned with a general principle. Again, the references by the Court<sup>1</sup> to bilateral treaties concluded by the United States with other States since 1868, the so-called Bancroft Treaties, and to the Pan-American Convention of 13 August 1906, do not provide unequivocal evidence on the effective link as a part of general international law. As Judge Read points out,<sup>2</sup> the treaty restrictions on the power to protect naturalized persons who return to their country of origin may indicate a lack of reliance on a rule of positive law.

Judge Read<sup>3</sup> and others<sup>4</sup> have also contended that the Court<sup>5</sup> relied irrelevantly on the principles adopted by arbitral tribunals in dealing with cases of double nationality,<sup>6</sup> since in the *Nottebohm* case the facts did not present this problem. Nottebohm either had Liechtenstein nationality or none. However, in establishing logical positions it may be that the critics have the onus of proving why the doctrine of effectiveness only applies to certain permutations of fact.<sup>7</sup> Commentators who regard the rejection of the doctrine of effective link in the *Salem* case as odd do not explain the oddity by saying that in that case Egypt was pleading the nationality of a third State.<sup>8</sup> The principle of effectiveness is thus not restricted to dual nationality of the two parties to the dispute. If the principle exists it applies to the *Nottebohm* permutation also: and, from the point of view of the Court regarding the *principle*, the dissenting Judges were guilty of a *petitio principii*.

Both the majority and the minority opinions of the Court almost completely neglect the State practice apart from conventions.<sup>9</sup> The Judgment of the Court merely states:<sup>10</sup>

'The practice of certain States which refrain from exercising protection in favour of a naturalised person when the latter has in fact, by his prolonged absence, severed his links with what is no longer for him anything but his nominal country, manifests the view of these States that, in order to be capable of being invoked against another State, nationality must correspond with the factual situation.'

This consideration is far from conclusive.<sup>11</sup> Both sides seem to ignore the cumulative effect of the evidence set out earlier.<sup>12</sup> However, Guggenheim,

<sup>1</sup> At pp. 22-23.

<sup>2</sup> At p. 41. He also says 'even within that part of the Western hemisphere which is South of the 49th Parallel, the ratifications of the multilateral Convention were not sufficiently general to indicate consensus of the countries concerned'. See also Guggenheim, pp. 59-60; and Kunz, *op. cit.*, p. 557.

<sup>3</sup> At pp. 41-42.

<sup>4</sup> See Kunz, *op. cit.*, pp. 556-9; Guggenheim, *I.C.J. Reports*, 1955, p. 59.

<sup>5</sup> At p. 22.

<sup>6</sup> See above, p. 330, and the *Mergé* claim, *I.L.R.* 22 (1955), p. 443, at pp. 450-2.

<sup>7</sup> See above, pp. 331-2.

<sup>8</sup> See Mervyn Jones, *op. cit.*, p. 242, n. 14.

<sup>9</sup> There is a reference by the Court to national laws on naturalization: 'National laws reflect this tendency when, *inter alia*, they make naturalisation dependent on conditions indicating the existence of a link . . .' (p. 22). Kunz (p. 553) and Mervyn Jones (p. 236) are much too grudging in their assessment of national legislation; see above, pp. 302 et seq., and below, p. 363.

<sup>10</sup> At p. 22.

<sup>11</sup> See above, p. 334.

<sup>12</sup> Above, pp. 297 et seq., 349-51.

Judge *ad hoc*, reviews a number of issues, including the proposition that ownership of land is not by itself a sufficient legal title for the grant of nationality, and remarks<sup>1</sup> 'all these situations are, however, somewhat exceptional'. One may doubt if they are exceptional, but the point is that the *principle* of unopposability is accepted by him in this passage.

Judge Read completes his review of the evidence relied on by the majority with the statement:<sup>2</sup> 'It is noteworthy that, apart from the cases of double nationality, no instance has been cited to the Court in which a State has successfully refused to recognize that nationality, lawfully conferred and maintained, did not give rise to a right of diplomatic protection.' Here the phrase 'lawfully conferred' takes much force away from the proposition: no doubt Judge Read would agree that the imposition of nationality on aliens in transit through national territory is unlawful or, at least, unopposable. Thus, the question is begged. The non-opposability of nationality in internal law is obscured in the law of war and neutrality by the use of other or of supplementary connecting factors, but the effect is the same.<sup>3</sup> Enemy control may displace the 'nationality' of a person or goods or vessels for purposes of international law. Moreover, State practice has for long recognized the converse of Read's statement: absence of internal conferment does not lead to absence of a power of diplomatic protection.<sup>4</sup>

(c) THE PRINCIPLE APPLIED TO THE FACTS. Nottebohm was German by birth and was still a German national when he applied for naturalization in Liechtenstein in October 1939. He had left Germany in 1905 but maintained business connexions with that country. As a consequence of naturalization in Liechtenstein he lost his German nationality.<sup>5</sup> The Court decided that the effective nationality was that of Guatemala:<sup>6</sup>

'He had been settled in Guatemala for 34 years. He had carried on his activities there. It was the main seat of his interests. He returned there shortly after his naturalisation, and it remained the centre of his interests and business activities. He stayed there until his removal as a result of war measures in 1943. He subsequently attempted to return there, and he now complains of Guatemala's refusal to admit him. . . . In contrast his actual connections with Liechtenstein were extremely tenuous. . . . If Nottebohm went to Liechtenstein in 1946, this was because of the refusal of Guatemala to admit him. . . . These facts clearly establish, on the one hand, the absence of any bond of attachment

<sup>1</sup> At p. 54.

<sup>2</sup> At p. 42.

<sup>3</sup> Significantly, the Court states at the end of the Judgment: 'Naturalisation was asked for not so much for the purpose of obtaining a legal recognition of Nottebohm's membership in fact in the population of Liechtenstein, as it was to enable him to substitute for his status as a national of the belligerent State that of a national of a neutral State, with the sole aim of thus coming within the protection of Liechtenstein. . . . Guatemala is under no obligation to recognise a nationality granted in such circumstances.' See also Hudson, *American Journal of International Law*, 50 (1956), at p. 5. For the seeker after the narrowest *ratio decidendi* this would seem to be the answer. See further, *Schulte-Malbn v. Les Domaines de la Seine*, I.L.R. 26 (1958-II), p. 401.

<sup>4</sup> Above, p. 319.

<sup>5</sup> See Guggenheim, *I.C.J. Reports*, 1955, p. 55.

<sup>6</sup> At pp. 25-26.



between Nottebohm and Liechtenstein and, on the other hand, the existence of a long-standing and close connection between him and Guatemala, a link which his naturalisation in no way weakened.'

The Court went on to consider the motive for and circumstances of the naturalization.<sup>1</sup>

The application of the principle of the link or *rattachement* to the facts of this case has been criticized from two points of view. The first approach deals with the alleged subjectivity of the test and is bound up with consideration of its attributes from the point of view of policy. The second approach is to say that *at the material time* the effective nationality was that of Liechtenstein. The question whether an absence of connexion when the nationality was originally acquired can be cured by later events<sup>2</sup> was not considered by the Court. As a question of principle it is surely consonant with the doctrine of effective link to permit curing by subsequent changes. In its Judgment the Court approves the view 'that, in order to be capable of being invoked against another State, nationality must correspond with the factual situation'. The events which related to the merits of the dispute occurred between 1943 and 1949, and for nine years, between 1946 and the beginning of the case, Nottebohm had resided in Liechtenstein. His attempts to return to Guatemala in 1945 could perhaps be explained by the necessity to protect his interests and property there.<sup>3</sup> However, while it might be argued that in 1955 his effective nationality was that of Liechtenstein, when the losses and acts complained of occurred, it was not: it is doubtful, to say the least, if after receiving a wrong a national can then take on another nationality and, after a lapse of time, *retroactively* acquire a champion in the form of a 'foreign' State against the State of his former nationality.

(d) THE CRITERIA OF EFFECTIVENESS. The principle of real and effective nationality applied by the Court is one of relatively close factual connexion. The Court said:<sup>4</sup>

'International arbitrators have decided in the same way numerous cases of dual nationality. . . . They have given their preference to the real and effective nationality,<sup>5</sup> 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. 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,<sup>6</sup> 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.'

<sup>1</sup> Above, p. 355, n. 3.

<sup>2</sup> Mervyn Jones, *op. cit.*, p. 241, n. 8, thinks not.

<sup>3</sup> See Judge Read, *I.C.J. Reports*, 1955, p. 44.

<sup>4</sup> *Ibid.*, p. 22. See also Córdova, A/CN.4/83, *I.L.C. Yearbook* (1954-II), p. 42, at p. 50; the Secretariat Survey, A/CN.4/84, *ibid.*, p. 52, at p. 108, paras. 365-6.

<sup>5</sup> The phrase recurs later on the same page of the Judgment and twice on p. 24.

<sup>6</sup> See Córdova, *ubi supra*, for the precedents.

Further on,<sup>1</sup> the Court refers to practice of certain States which 'manifests the view of these States that . . . nationality must correspond with the factual situation'. On the next page<sup>2</sup> of the Judgment, in the same general context, there are references to the individual's 'genuine connection' and 'genuine connections' with the State, to nationality as based upon 'a social fact of attachment',<sup>3</sup> a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties', and to nationality as 'the juridical expression of the fact that the individual . . . is in fact more closely connected<sup>4</sup> with the population of the State conferring nationality than with that of any other State'.

In discussion of the Draft Conventions on the Elimination, and the Reduction, of Future Statelessness at its fifth session, the International Law Commission was concerned to discover the criteria which States would accept as creating a sufficient link between individual and State. Criticism, in relation to the reduction of future statelessness, was directed at a draft article which in part provided that<sup>5</sup> 'if a person does not acquire any nationality at birth, either *jure soli* or *jure sanguinis*, he shall subsequently acquire the nationality of the State in whose territory he is born'. As a result of the criticism the final draft<sup>6</sup> contained the provision (in paragraph 2): 'The national law of the Party may make preservation of such nationality dependent on the person being normally resident in its territory until the age of eighteen, and provide that to retain nationality he must comply with such other conditions as are required from all persons born in the Party's territory.' Whilst the provision is rather tangential, it reflects the concern of the Commission to provide for the establishment of sufficiently close links. Yepes pointed out in discussion that *jus soli* countries made acquisition by birth conditional: the place of birth was a matter of chance and nationality could not be left to chance.<sup>7</sup> In his phrase,<sup>8</sup> 'there must be a genuine relation between the individual and the nation', and he proposed habitual residence, the domicile of the parents and option as links.<sup>9</sup> Zourek spoke of the need to prove the 'solidity' of the individual's link with the State, and suggested that this was not provided by 'a mere formality—the place of birth and the fact of residence'.<sup>10</sup> François stated<sup>11</sup> that the draft

<sup>1</sup> At p. 22. Cf. Makarov, *Recueil des cours*, 74 (1949-I), p. 356, who refers to acceptance of public office, military service, &c., but emphasizes that the question is one of fact.

<sup>2</sup> At p. 23.

<sup>3</sup> Cf. p. 26, reference to 'bond of attachment'.

<sup>4</sup> See also, on p. 24 of the Judgment, the references to 'factual connection between Nottebohm and Liechtenstein', and the 'social fact of a connection'. Pp. 22 et seq., contain several other references to 'connection' and 'link'.

<sup>5</sup> See *I.L.C. Yearbook* (1953-II), p. 187.

<sup>6</sup> *Ibid.*, p. 228.

<sup>7</sup> *Ibid.* (1953-I), p. 180, para. 24.

<sup>8</sup> *Ibid.*, p. 186, para. 7 (and see para. 5).

<sup>9</sup> *Ibid.*, p. 239, para. 45. See the draft proposals at pp. 215, 220.

<sup>10</sup> *Ibid.*, p. 218, para. 63. Cf. *ibid.*, p. 181, paras. 32, 33. Cf. Amado, p. 239, para. 50, where he speaks of 'a sufficient link'.

<sup>11</sup> *Ibid.*, p. 184, para. 57.

article<sup>1</sup> resting on an unconditional *jus soli* 'was contrary to a basic principle of law to which the Netherlands attached great importance, namely, that there should be a link between countries and the individuals to whom they granted their nationality'. In general the discussion showed the difficulty of codifying the factual criteria. Thus Córdova's draft on the reduction of future statelessness<sup>2</sup> set out the links sufficient to support nationality of the country of birth, viz., residence until military age, option for that nationality on reaching military age and service in the armed forces of that State. These criteria received considerable criticism.<sup>3</sup>

The principle, as expounded by the Court in *Nottebohm*, rests on all relevant facts in the given case, although habitual residence is an important element. Three questions as to its application require immediate notice. First, it is said by Judge Read<sup>4</sup> that the criteria on which it rests are vague and subjective, and he states: 'Nationality, and the relation between a citizen and the State to which he owes allegiance, are of such a character that they demand certainty. . . . There must be objective tests, readily established, for the existence and recognition of the status.' The form which such comment takes has certain flaws. The object of the test—to discover the effective nationality—is neither vague nor subjective. The 'tests' referred to are merely the relevant facts, which are 'objective'. It is true that there is the element of appreciation, of assessing facts, and this may lead to subjectivity. Yet if the difficulties of applying rules to facts were a bar to useful application of rules many significant outcrops of jurisprudence would stand as monuments to futility. Moreover, Judge Read himself applies the tests<sup>5</sup> and reaches a conclusion which he clearly regards as logical and definite.<sup>6</sup> Ignoring the fundamental incongruity of the principle of autonomy on the international plane, one may question the assumption that reference to national laws gives certain and objective criteria. In the *Nottebohm* situation this was hardly the case; even after investigation of the facts on the issue of admissibility by the Court, not all was clear: the obvious point surely is that in regard to cosmopolitans like *Nottebohm* no test is going to lead to perfect results. A second question arising from the decision is whether an effective nationality can exist in the absence of a formal status in the internal law of the State concerned.<sup>7</sup> The statements of principle in the Judgment and the finding<sup>8</sup> that *Nottebohm's* close con-

<sup>1</sup> See *I.L.C. Yearbook* (1953-II), p. 170. See Córdova's justification for this form in the draft on elimination of future statelessness, *ibid.*, pp. 174-5.

<sup>2</sup> *Ibid.*, p. 187 (and see the Comment by the Rapporteur at pp. 188-9).

<sup>3</sup> *Ibid.* (1953-I), pp. 213 et seq.

<sup>4</sup> *I.C.J. Reports*, 1955, p. 46. See also Guggenheim, *ibid.*, pp. 55-57.

<sup>5</sup> However, he uses his own terminology, referring to 'the establishment of legal relationships', and 'a series of legal relationships, rights and duties'.

<sup>6</sup> *Ibid.*, pp. 46-48.

<sup>7</sup> Reuter, *Recueil des cours*, 103 (1961-II), p. 612, thinks not.

<sup>8</sup> *I.C.J. Reports*, 1955, p. 26.

nexion was with Guatemala lead to the conclusion that it can so exist. Of course, in many of the cases which lead to disputes, the facts on which internal law depends for its determination may not be established, or it may not be possible to establish the fact of the act of government creating the formal link. In many cases it will not be clear whether expatriation occurred *ipso facto* or only from the date of the issue of a certificate or other declaration of status by the State concerned.<sup>1</sup> Thirdly, it may be asked whether naturalization has certain special features in the context of effective nationality: this leads on to the next rubric, and will be dealt with thereunder.

(e) EFFECTIVE LINKS AND THE INTERESTS OF GOVERNMENTS. The Judgment in *Nottebohm* presents the principle of effective nationality in terms of the links between the life of the *de cuius* and the population or community of a State and of a 'social fact of attachment'.<sup>2</sup> However, members of the International Law Commission who espoused the same principle (admittedly in a different context) during its fifth session were prone to stress the duality of relevant links, and to show concern for the loyalty of the individual towards the State, which on the international plane had the responsibility for protection of the individual. Thus Yepes<sup>3</sup> referred to 'a genuine relationship between the individual and the nation'. In his Dissenting Opinion Judge Read in effect provided his own interpretation of the principle of effective link, although he opposed the principle *eo nomine*. In his words,<sup>4</sup>

'the State is a concept broad enough to include not merely the territory and its inhabitants but also those of its citizens who are resident abroad but linked to it by allegiance. . . . 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.'

In his view *Nottebohm* by his own conduct and that of Liechtenstein became a member of that body politic, 'the country of his allegiance'. These considerations would seem to be perfectly valid, and the general formulations of the Court could accommodate the more 'political' factors.<sup>5</sup> Certainly the reference by the Court to interests and intentions of the *de cuius* could include questions of allegiance. In a case where a businessman has international connexions and social mobility, residence and interests may provide no choice and political ties may then take on particular significance.

<sup>1</sup> Cf. Guggenheim, *ibid.*, p. 55, on *Nottebohm*'s loss of German nationality.

<sup>2</sup> See especially, p. 23; quoted above, p. 313. But at p. 24 the Court uses the phrase 'bond of allegiance'.

<sup>3</sup> *I.L.C. Yearbook* (1953-1), p. 186, para. 7. And see above, p. 357.

<sup>4</sup> *I.C.J. Reports*, 1955, pp. 44-45. Cf. p. 46 for a further reference to allegiance.

<sup>5</sup> The Court includes, in a list of relevant factors, 'attachment shown by him for a given country and inculcated in his children'; Judgment, *ibid.*, at p. 22. See also the *Canevaro* case, in which exercise of political rights and request to hold public office were important factors. Cf. the form of certain provisions in the United Nations Convention on Reduction of Statelessness, 1961, esp. Article 8. Cf. *Zadeh v. United States*, I.L.R. 22 (1955), p. 336.

In connexion with political ties it is perhaps justifiable to regard the voluntary creation of such ties between individual and State by naturalization as a link of special strength. This consideration appears to have weighed with Judge Read,<sup>1</sup> and the Judgment of the Court is not really inimical to such a view. On the facts *as the Court saw them* the naturalization was not a real attempt to join Liechtenstein as a community and, by reason of the motive involved, 'it was lacking in the genuineness requisite to an act of such importance'.<sup>2</sup> The matter of political ties may also arise in a rather different light when acts of protection and 'holding out' as a national have occurred. Where the facts of the individual connexions are ambiguous the conduct of a government may provide a determinant.<sup>3</sup> Here, however, we approach the realm of estoppel<sup>4</sup> and, in principle, estoppel properly so-called could produce a result incompatible with the principle of effective link.

(f) *NOTTEBOHM AND THE INCIDENCE OF DUAL NATIONALITY*. The terms of the Judgment in the *Nottebohm* case and the fact that one of the pieces of experience relied on was the practice of tribunals in resolving cases of dual nationality, lead easily to the conclusion that the decision is exclusive of dual nationality. Judge Read in his Dissenting Opinion takes this point<sup>5</sup> and states that 'international law recognises double nationality and the present trend in State practice is towards double nationality . . .'. On the other hand there is a considerable body of opinion in favour of the elimination of double and multiple nationality.<sup>6</sup> It is not possible to pursue the broad issues of policy here but it is probable that principles of stability and effectiveness militate against dual nationality. However, there is no reason why it should not be recognized in an appropriate case on the international plane, as being compatible with the principle of the effective link. For example, the complainant in *Julhiard v. Secretary-General of the United Nations*,<sup>7</sup> a decision of the Administrative Tribunal of the United Nations, had quite genuine and adequate links with both the United States and France. She was a typist in a French typing pool in the United Nations, French being her mother tongue<sup>8</sup> and she being a French national *jure sanguinis*.

<sup>1</sup> *I.C.J. Reports*, 1955, p. 44. See also above, p. 309, and cf. Córdova, *I.L.C. Yearbook* (1953-II), p. 189, para. J.

<sup>2</sup> *I.C.J. Reports*, 1955, p. 26.

<sup>3</sup> Cf. Judge Read, *ibid.*, pp. 44-45, referring *inter alia* to Nottebohm's obtaining the diplomatic protection of Liechtenstein in October 1943, and on commencement of the confiscation of his properties.

<sup>4</sup> Above, p. 335.

<sup>5</sup> *I.C.J. Reports*, 1955, pp. 42-43. See also de Castro, *Recueil des cours*, 102 (1961-I), pp. 588 et seq.

<sup>6</sup> See the Report by Córdova, A/CN.4/83, *I.L.C. Yearbook* (1954-II), p. 42; Secretariat Survey, A/CN.4/84, *ibid.*, p. 52.

<sup>7</sup> *I.L.R.* 22 (1955), p. 809. See also *Perkins v. Elg*, *Annual Digest*, 1938-40, No. 116, and *Doyle v. Ries*, *ibid.*, No. 117.

<sup>8</sup> The complainant stressed the language element: *I.L.R.* 22 (1955), p. 812.

She maintained links with France and had married a Frenchman. On the other hand, she was born in the United States, lived there until the age of six and also from 1941 onwards, applied for a United States passport on attaining her majority and still held such a passport. The Staff Rules required the Secretary-General, in the exercise of a discretionary power, to make a choice which, in the event, was of United States nationality.

If dual nationality may exist under the régime of effective nationality on the international plane then the rule, that diplomatic protection cannot be invoked against a State of which the *de cujus* is also a national, will survive. However, it will operate exceptionally in this régime as compared with its operation in a régime of conflict of internal laws. Moreover, if the existence of 'effective' dual nationality were tolerated, the individual of double nationality could invoke the protection of either of two governments against third States.<sup>1</sup>

(g) THE RELATION OF GENUINE AND EFFECTIVE LINKS. There is general agreement that naturalization on the basis of fraud or duress is voidable, and this rule relates to the question of genuine link in a narrow context.<sup>2</sup> In the *Nottebohm* judgment a broader doctrine of 'genuine connection'<sup>3</sup> appears in intimate relation with the more frequent references to 'real and effective nationality' and the like. It is probably correct to treat the two elements as aspects of the same thing, the references to genuineness being intended to emphasize that the quality and significance of factual relations with a given country are to be taken into account. Where the *de cujus* has material and family connections in several States, inquiry into motive and intention may become important. In the *Nottebohm* decision itself the Court gives some prominence at the end of its Judgment to the purpose for which, in its view, *Nottebohm* sought naturalization in a neutral State.<sup>4</sup> As a general principle 'genuine connection' is valuable, but in relation to special problems the principle may beg too many questions, presenting issues rather than providing solutions.<sup>5</sup> Genuineness is a very relative concept.

(h) THE EFFECT OF *NOTTEBOHM* ON DIPLOMATIC PROTECTION. Of the implications of the *Nottebohm* judgment in the realm of policy, critics have concentrated on what is, in their view, a very unfortunate severance of diplomatic protection and nationality.<sup>6</sup> The practical result of the decision is seen to be a narrowing of the ambit of diplomatic protection,<sup>7</sup> and Makarov<sup>8</sup> has pointed out that a person, whose existing nationality is held not to

<sup>1</sup> See above, p. 331.

<sup>2</sup> *I.C.J. Reports*, 1955, p. 23 (phrase used twice).

<sup>2</sup> Above, pp. 328-9.

<sup>4</sup> See above, p. 355, n. 3.

<sup>3</sup> See the *IMCO* case, *I.C.J. Pleadings*, 1960, pp. 364-6 (Seyersted); 383 (Vallat). The whole question of registration of ships remains delicate, but see below, p. 368, for the provision in Article 5 of the Convention on the High Seas.

<sup>6</sup> See Judge Read, *I.C.J. Reports*, 1955, p. 46.

<sup>7</sup> See Mervyn Jones, *International and Comparative Law Quarterly*, 5 (1956), p. 244.

<sup>8</sup> *Allgemeine Lehren* (2nd ed., 1962), p. 19.

be effective and who is denied diplomatic protection as a consequence, is in a worse position than a stateless person because he is not within the terms of conventions providing protection for stateless persons. Paul de Visser,<sup>1</sup> on the other hand, takes the view that the field of diplomatic protection seems to have been extended by the principle of effective nationality. Before commenting on these opinions it may be remarked that the consequences of an affirmation of the principle of effective nationality are unlikely to be radical because in a vast number of cases the effective nationality matches the formal nationality. In difficult cases like that of *Nottebohm*<sup>2</sup> it will be the case that the approach on the basis of national rules will produce results no more certain than the 'real link' method. In many of these cases the national law or laws do not stand in isolation but are overlaid by many other equally relevant facts, presumptions and evidence of official acts and declarations: in establishing a proper basis for protection the 'real link' method probably gives reasonably satisfactory answers. Furthermore, if the exercise of diplomatic protection ignores the requirement of genuine connexion, the State which it is sought to hold to account may refuse to recognize the right of protection. Long-resident refugees are an important source of problems and it would seem likely that the link doctrine is potentially more helpful here than reference to national laws. The latter method leaves the refugee stateless or links him to a community which he has tried to quit permanently in many cases.<sup>3</sup> Dogmatic adherence to municipal law may result either in failure to reach any solution or in absurd conclusions in the case of States without nationality laws (often the case after the emergence of a new international person or territorial status such as a Mandate), or of groups left outside a nationality régime of internal law.

Fears that effective nationality produces a narrow régime will be the less justified if the doctrine is applied in a liberal way. There is probably nothing in *Nottebohm* or the other sources of principle to prevent an approach which is not too exacting in the matter of effectiveness. The application of the principle in *Nottebohm* appeared to be strict because of the factors involved: the *de cuius* had a variety of links with two States, the issue was between the two best candidates, and on the Court's view of the facts the question of *genuine* attachment was prominent.<sup>4</sup> If the principle were applied relatively, on an *inter se* basis, *Nottebohm* and others like him would be protected as against most States by one of their 'adopted States': it is only when the two or more 'adopted States' are at issue that the facts will be

<sup>1</sup> *Revue générale de droit international public*, 60 (1956), pp. 263-4. See also Watts, this *Year Book*, 33 (1957), p. 53.

<sup>2</sup> See also Rothmann, above, p. 336.

<sup>3</sup> See above, p. 338, on the position of Jews outside Germany after 1941.

<sup>4</sup> Above, p. 355.

weighed very carefully. In the absence of suspicion as to the occasion for a speedy naturalization and similar devices for easy links, a connexion may be 'genuine' and 'real' although the *quantum* of links is none too large.

(i) RECENT PROJECTIONS OF THE GENUINE OR EFFECTIVE LINK. It is of course true that the doctrines of effective or real link provide but a general *modus operandi*, and their particular application will require much working-out and refinement, and yet the evidence is that the general principle is very influential and criticism of it, whilst having a useful function, should not create the impression that the effective nationality is not a permanent feature of the landscape. Evidence of the durability of the principle is not far to seek. The Convention on the High Seas of 1958,<sup>1</sup> now in force, provides in Article 5, paragraph 1:

'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.'

The generality of this provision and the effect of the Advisory Opinion in the *IMCO* case<sup>2</sup> provide a cautionary note: in some fields the question of genuine link opens up issues and reveals the need for further development of the rules. A functional approach, particularly on the basis of a treaty text, may produce results other than those directly deducible from the general principle of genuine or effective link.

Two other recent pieces of evidence for the influence of *Nottebohm* and the affirmation of principles in the judgment may be mentioned. On 30 August 1961 there was signed the United Nations Convention on the Reduction of Statelessness,<sup>3</sup> the detailed provisions of which rely on various criteria of factual connexion and evidences of allegiance. The United Nations Conference which gave rise to the Convention also adopted a resolution<sup>4</sup> recommending 'that persons who are stateless *de facto* should as far as possible be treated as stateless *de jure* to enable them to acquire an effective nationality'. Dr. Weis remarks<sup>5</sup> that the Convention and recommendation 'clearly reflect the importance which is attached to an increasing degree to effectiveness of nationality'. Recently, in commenting on Portuguese action in arresting and handing over Dennis Brutus to the South

<sup>1</sup> See also *I.L.C. Yearbook* (1956-II), pp. 278-9; *Report on the First United Nations Conference on the Law of the Sea*, Cmnd. 584, para. 16; and *IMCO* case, *I.C.J. Pleadings*, 1960, pp. 366-8 (Seyersted).

<sup>2</sup> Above, p. 348.

<sup>3</sup> Text: *International and Comparative Law Quarterly*, 11 (1962), p. 1090. See the British Nationality (No. 2) Act, 1964, ch. 54.

<sup>4</sup> *Ibid.*, p. 1096.

<sup>5</sup> *Ibid.*, p. 1087. He points out that delegates at the Conference tended to speak in terms of effective links: references, *ibid.*, n. 38.



African authorities, the Rhodesian Federal Prime Minister took the view that although Mr. Brutus possessed a Federal passport he could not claim Federal diplomatic protection.<sup>1</sup> As to the action of Portugal:

'It is a well-established practice for third States involved in situations of this kind to recognise exclusively either the nationality of the State in which the person concerned habitually and principally resides or with which in the circumstances he appears in fact to be most closely connected. In the case of Brutus, it is clearly the Republic of South Africa which answers this definition.'

CONCLUSION. The existing experience would seem to support the view that the effective link doctrine is an inevitable product of the process whereby nationality is placed in a proper relation to international law as a general system. There must be a system of attribution for individuals and populations on the international plane, and the consequences of wide reliance on nationality as a reference in various parts of international law, coupled with a conferment of State freedom in the matter of attribution, would be subversive of the legal order. The effective link provides sensible solutions to many of the problems surrounding the right of expatriation, the presumption against statelessness and the like, and constitutes a reasonable foundation for otherwise too ambitious prescriptions, such as the rule that resident aliens cannot be naturalized. Confusion has arisen in part from attempts by autonomists to reduce the weaknesses in their position by admitting exceptions which are not too well defined or which are given semi-legal status. The other source of confusion has been the failure on the part of many jurists to appreciate the proper relation between the reserved domain of domestic jurisdiction and the international plane. The logic of the judgment in *Nottebohm* in regard to the fundamental aspects of nationality is unimpeachable and the reasoning reflects tendencies long prevalent in various aspects of the practice of States. The evidence of practice both before and since *Nottebohm*, as well as the logical force of other principles of international law, justify the conclusion that the principle of effective nationality is a general principle of international law and should be recognized as such.<sup>2</sup>

<sup>1</sup> *The Guardian*, 25 September 1963, p. 11. Brutus was travelling on a Federal passport when arrested in Mozambique. In the statement by Sir Roy Welensky it is said: 'he is a South African national, has previously held a South African passport, has permanently resided in South Africa from a very early age, and has consistently laid claim to South African nationality and to no other in all his dealings with the South African authorities'. Brutus was president of the South African Non-racial Olympics Committee and after his arrest was shot whilst allegedly escaping from custody in Johannesburg.

<sup>2</sup> See the views of Weis, *International and Comparative Law Quarterly*, 11 (1961), p. 1073 at p. 1087; and cf. de Visscher, *Theory and Reality in Public International Law* (1957, based on the 2nd French ed.), pp. 174-6 and especially p. 174, n. 16.