Territorial Change and the Status of Inhabitants

by James Crawford*

I. Introduction

The law of State succession has customarily been, and is now conventionally, divided into two distinct fields, that of State succession with respect to international obligations of various kinds (especially treaties), and that of State succession with respect to what may be termed 'internal legal relations'—contract, the public debt, concessions etc. (1) Underlying each case of State succession there is always an issue of sovereignty, its transfer, restoration or creation. But these three areas, though perhaps distinct in principle, interact in various ways, and the relationship between them in particular fields is by no means clear. Nowhere is this more true than in the field of nationality, which in various aspects may be an internal legal creation, the subject of (and the foundation for) international obligations, and a basic aspect or constituent of sovereignty itself. Accordingly, determining the international law rules relating to territorial change and the status of inhabitants depends to a great degree on the theory of nationality held, and on the way in which aspects of nationality are attributed to one or other of these three fields.

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(1) From an early stage the International Law Commission's work on this topic drew a distinction between these two areas, leading to the preparation and eventual conclusion of two separate 'codifying' treaties, one of which deals only with some aspects of 'internal relations' (not including nationality): Vienna Convention on Succession of States in respect of Treaties, 1978; (1978) 17 ILM 1488; Vienna Convention on Succession of States in respect of State Property, Archives and Debts, 1983; (1983) 22 ILM 306. A similar distinction is drawn in D P O'Connell's leading text: State Succession in Municipal Law and International Law (1967) vol 1 ('Internal Relations'), vol 2 ('International Relations'). For an analysis of the development of both the Vienna Conventions and O'Connell's work see J Crawford, 'The Contribution of Professor D P O'Connell to the Discipline of International Law' (1980) 51 BYIL 1, 2-47.
In particular, the question is: what do we mean when we say that International law attributes, or recognizes, a particular nationality to certain persons (whether or not in the absence of any local State legislation)? There could be three different positions, depending to a great extent upon one's general view of nationality. The first could be that, in general, international law does not attribute nationality to persons, but merely allows it to be claimed or conferred by a particular State consistently with certain broad limitations based upon the 'effective link' doctrine, but that questions of State succession are an exception to this, where international law does in fact attribute nationality of its own force. A second possibility is that there is a general conception of nationality in international law (which might well be a functional concept, that is, differing for different purposes). This conception could be in principle independent of, though no doubt affected and supplemented by, municipal nationality rules. This conception would treat the 'effective link doctrine' as not merely a limitation upon State competence but as a key element in a set of criteria by which international law itself attributes persons to particular States for particular purposes. The third possibility would be that international law does not have a conception of nationality at all, but merely confers competence upon States to claim persons as their nationals for various purposes, within the broad limits of the effective link doctrine. Any argument about the 'automatic' effect of succession upon nationality must depend upon which one of these three views is adopted. Arguments for an 'automatic' rule of nationality after a territorial change seem hard to argue for in the context of the first of the three possibilities, because of the rather exceptional role that is being accorded to international law in the general theory of nationality underlying that position. On the other hand, the 'automatic' theory is almost obvious in relation to the second rule, since it is virtually axiomatic that if

(2) This question has been given added point by the failure of some States, sometimes for considerable periods of time, to enact their own nationality legislation: e.g. Israel (1948-1952), China (1949-1981).

(3) In particular, as stated in the Nottebohm Case ICJ Rep. 1955, 4.
international law has an autonomous conception of nationality it must have conception of new nationality upon a change of sovereignty.

On the third conception, the 'automatic' rule becomes almost trivial, being merely the acknowledgement of a right of the new States to claim certain persons as nationals. (4) (One could in the context of this third view argue that the right was not merely a right but also a duty, at least with respect to the bulk of person effected by a succession: whether the practice supports this contention is another matter.)

This paper analyzes the issue of territorial change and the status of inhabitants in the light of these different conceptions of nationality, and having regard to particular cases where conflicts have arisen (including the Korean residents in Japan, Bantustan citizens in South Africa, Western Samoans in, and out of, New Zealand, etc.). In particular it draws attention to the increasingly important role other principles of international law are having in this field, including rules (especially, but perhaps not exclusively treaty rules) about statelessness, and the developing body of human rights law (including especially rules about non-discrimination on grounds of race, national or ethnic origin, etc.). (5)

(4) P Weis, Nationality and Statelessness in International law (2nd edn, 1979), who adheres strongly to this 'third' view, takes the matter one step further. He states that:

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-a-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.

We are familiar with presumptions of municipal law as to its consistency with international law (though these are often weakly adhered to in nationality or immigration contexts e.g. R v Secretary of State for the Home Office, ex parte Thakrar [1974] 1 QB 684). But a presumption of international law as to the content of municipal law is a curious, and equivocal, beast. Why is there no equivalent presumption as to the successor State's municipal law?

II. The Character of the International Law of Nationality

1. Dogma and Doctrine

In discussing the three views or conceptions of nationality and state succession identified above, it is important to note one feature of the debate, that is to say, the prevalence, but irrelevance, of general positions—in some cases amounting to dogmas—about the relationship of general international law to municipal law. In this as in other fields, writers who adhere to monistic or alternatively to dualistic views of that relationship tend to adopt different positions. Those who think of sovereignty as prior to international law tend to adopt the third position described above, and to reject the second. Those who think of sovereignty as an aspect, however fundamental, of international law find the second position more congenial, and tend to reject the third. As usual, the considerable volume of state practice dealing with these questions tends to be interpreted, or reinterpreted, by proponents of these different underlying theories, in the light of those theories.\(^{(6)}\) This is, perhaps, not so much a criticism as a comment. If theories are ideological structures assisting in our understanding of the world and of human behaviour (including the behaviour of states), then it is impossible to escape having theories. Participants in international affairs, and especially diplomacy, cannot fail to be impressed by the underlying influence of theory, disparate and concealed as it may be.

But theories can be more or less subtle, more or less adapted to the complexities of events. My problem with adopting, as the key explaining feature of this aspect of international law, any one theory of the relationship between international law and municipal law, derives from the complexity and inter-

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(6) Compare Brownlie (1963) and Weis (1979) for discussion of the practice from the perspective of the second and third positions respectively.
relatedness of the issues. The law of nationality, and especially of nationality in the context of state succession, is indeed Janusfaced. It has, apparently inextricably or inescapably, both international and municipal aspects. Moreover, although there could have been movements in several directions, to disentangle the two, these have, as I will point out later in this paper, either not occurred, or have occurred only in marginal or peripheral ways. On the one hand, international law has not moved towards functional definitions of the various rules so far framed in terms of nationality, but has maintained a stubborn, if qualified, renvoi to municipal law to define apparently crucial or central aspects of international affairs (jurisdiction, international claims, and much of the law relating to the movement of persons between states). On the other hand the developing body of human rights law shows little or no tendency to make up for this apparent deficiency through establishing a human right to a nationality. There is thus the somewhat paradoxical situation that, in the field of basic international relations and obligations, functionalism is eschewed and international law appears incomplete, if not incoherent. (7) On the other hand, in that field of international law which appears capable of “squaring the circle”, that is human rights law, functionalism prevails and the notion of nationality plays a very subordinate role.

Before seeking to substantiate, and to illustrate by example, these observations, it is worth pointing out how the existing body of state practice in this field presents difficulties for adherents to any one of the three positions outlined above. It will be recalled that the second view or conception of the relationship between state succession and nationality, identified in this paper, was the “automatic” view, that international law attributes nationality to persons or at least to groups of persons, rather than merely qualifying, or disqualifying, attributions made by national law. It follows from the automatic view that nationality changes ipso facto on a change of sovereignty. But the existing state of international law presents difficulties for this view. First, and

perhaps most importantly, there are real uncertainties about the class of persons whose nationality changes on a change of sovereignty. These are variously described as "residents", "inhabitants", or persons "domiciled in" or "living in" the territory in question. But these are categories of indeterminate reference. Very different and often very technical definitions of "residence" or "domicile" adopted by various legal systems for various purposes. The tendency in international private law conventions is increasingly to use terms such as "permanent resident" or "habitual resident" to try to express the underlying idea of domicile while requiring closer and more permanent links to the state than mere residence. The problem is that, whatever phrase is chosen (and there appears to be no uniformity) definitional questions abound. What of the person ordinarily resident in the territory concerned but temporarily absent? Does it matter if the absence is voluntary, and relates to the circumstances in which the territory was transferred? Conversely, what of the person, as it were, accidentally resident in that territory?\(^{(8)}\)

At a more general level, there is the problem that international law appears to acknowledge a wide range of connections as sufficient to found a claim for nationality. Moreover there appears to be no rule of international law that, for a claim of nationality to be sustained over time, effective links with the state need to be sustained (let alone the effective link which was the foundation for an internationally recognised nationality in the first place). On the contrary the position appears to be that "once a national always a national", subject to loss of nationality under the relevant national law, and to the question of status following territorial change. But even in this case, many persons having some connection with the territory in question will have, and retain, significant links with the predecessor state. Whatever policy is adopted about dual nationality, plainly there is no rule of international law which treats the acquisition of a new nationality as automatically involving the deprivation or

\(^{(8)}\) Of course third state nationals may not be affected, but nationals of the predecessor state may also be temporarily in the territory concerned, as in a sense was the plaintiff in *Kanda v. The State* (1961) 32 ILR 170. But see fn. 45.
loss of the old.

A correlative difficulty, from the perspective of the second view about nationality and state succession, is the undoubted capacity of new states subsequently to define own nationality, and to do so in ways which embody, as it were *de novo*, a conception of relationship with that state which need not be expressed in terms of residence, domicile or whatever. It has not been suggested that such a definition constitutes a denationalisation of persons who might have had other links with the territory in question, though of course the problem of statelessness can arise. However, though it is possible to argue for general duties on the part of states to avoid statelessness as far as possible, it is conceded that this is a generic, not an individual obligation, that is to say, that it does not avoid loss of nationality in all cases.

In each of these three ways, the generality of the "effective link" doctrine presents problems for the automatic view of nationality. A fourth problem, less closely related to this issue, is the simple point that to attribute persons to an inimical or indifferent state may not be in their own interests. It is normal to describe refugees as "functionally stateless", whatever their technical status. Similarly, the strength of the dissenting views in the House of Lords decision, *Oppenheimer v. Cattermole*, (9) is the simple point that to treat German Jews as remaining German nationals notwithstanding the racially discriminatory denationalisation of the Nazi period may be to their disadvantage, however flagrant the breach of international law involved. For this reason also, there have been considerable inhibitions in the way of development of rules of international law attributing persons to states "automatically."

On the other hand the third position outlined above, under which international law either does not, or in its stronger versions cannot, attribute a nationality to persons, but can only disqualify claims made by states that particular persons are their nationals, (10) also has its weaknesses. In particular

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(9) [1976] AC 249.
(10) On this view, presumably one looks in the absence of a nationality law of the State to its administrative practice.
it tends to deny the reality of much state practice according to which certain persons are regarded as "naturally" belonging to the successor state rather than the predecessor state in at least some cases. International law rules of jurisdiction, of continuous nationality etc. assume that the notion "national" is defined. Especially where the state has no nationality laws for considerable periods, the dualistic assumptions of the third position are placed under considerable stress. The third position has some difficulty in coping with the attribution of nationality by treaty, a common phenomenon. This has to be treated either as a form of "deemed" nationality, or as a promise by the state in question to extend nationality to the persons in question under the relevant municipal law.

Faced with these difficulties, it is tempting to support the first position, under which nationality is, in the current state of development of international law, primarily a matter for the national law of each state, with international law playing only a disqualifying role, but with the proviso that certain persons are attributed to the state as its nationals automatically upon a succession of states, so that in this exceptional situation international law has a qualifying as well as a disqualifying role. This first position is, however, not really available as a refuge to those who take the third position out of what might be described as a basic conviction as to the relative effect of international and national law with respect to nationality. Even an exceptional direct effect on the part of international law is, if this view is accepted, excluded.

2. Some Basic Propositions

Before reaching any definite conclusion on these different positions, it is necessary to look in a little more detail at the development of a right to nationality in international human rights law, and at a number of controversial cases which may shed light on the underlying problems. But some preliminary observations are called for.

1. We should reject the view that, a priori, international law can have no conception of nationality. It may well be, in most cases at least, an efficient method of giving content to the idea of the connection between persons and
states, to rely upon the nationality law of states. But this is certainly not a
necessary way of defining that connection. I am not, of course, suggesting that
international law can determine who are the nationals of a state for purely
domestic purposes. For example, if a state wishes to make eligibility for
social security benefits dependent upon nationality rather than upon some
other connection, it is in general free to do so. If the state is free to choose a
particular qualification for domestic purposes, it is free to determine what the
qualification means. International law’s concern is only with the identification
of nationals of a state for purposes for which international law rules are
relevant. But there are, as Brownlie has pointed out,\(^{(11)}\) many such purposes.
There is no reason why international law could not specify who are to be treated
as nationals for its purposes, either generally or in specific cases.

2. Accepting that this may be so, nonetheless it seems clear that in the
present state of development of international law, matters of nationality even
for international purposes are referred primarily to the relevant municipal law
(or, if there is more than one relevant municipal law, to each of them). For
most purposes this is an efficient way to determine connection with the state.
It is also, since the nationality laws of most states provide for elements of
choice or option at least in the acquisition, and sometimes also in the loss, of
nationality, a relatively humane way of doing so. In making a general renvoi
to municipal law on this question, international law operates rather like a
conflicts of law rule. But it follows that the often repeated assertion that
questions of nationality are matters of domestic jurisdiction\(^{(12)}\) is only true in a
rather qualified way.

3. That is to say, there are limits to the competence of states to claim
persons as their nationals, where that claim, or the status which flows from
it, is made the basis for an entitlement to act in international law. But these
limits may be of different kinds. In particular I would distinguish between what

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\(^{(11)}\) Brownlie (1963) 290.
\(^{(12)}\) See Weis (1979) 65-78 for a review of statements to this effect.
might be described as "extrinsic" limits to the capacity of states to claim persons as nationals (that is to say, limits which result from other areas of international law or from treaty obligations), and what might be described as intrinsic limits. So far as extrinsic limits are concerned, apart from particular treaties, the most important potential limits are to be found in the rules relating to the creation and transfer of sovereignty, and in the rules relating to human rights. These will be referred to later in this paper. More relevant for present purposes is the idea of "intrinsic" limits, that is to say limits imposed by international law rules having to do with nationality itself. Here again it is possible to distinguish two classes of limits that might exist. It may be that a requirement such as the "effective link" doctrine conditions not the capacity of a state to claim a person as a national, but the opposability of any such claim to other states, or to put in more orthodox terms, the duty of other states to recognise such a claim. Alternatively, that doctrine, or some other limits, might relate to the inherent validity of the claim to nationality in the first place. This distinction was drawn by the International Court in the Nottebohm Case (Second Phase). The Court said:

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 by naturalization granted by its own organs in accordance with that legislation. It is not necessary to determine whether international law imposes any limitations on its freedom of decision in this domain. Furthermore, nationality has its most immediate, its most far-reaching and, for most people, its only effects within the legal system of the State conferring it. Nationality serves above all to determine that the person upon whom it is conferred enjoys the rights and is bound by the obligations which the law of the State in question grants to or imposes on its nationals. This is implied in the wider concept that nationality is within the domestic jurisdiction of the State.

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, in the case under consideration. 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 naturalization of Nottebohm was an act performed by Liechtenstein in the exercise of its domestic jurisdiction. The question to be decided is whether that act has the international effect here under consideration.\(^{(13)}\)

This key passage has often been taken as stating that questions of the conferral of nationality are matters of domestic jurisdiction, and that the effective link doctrine operates only at the level of opposability or recognition. But the Court expressly declined to decide whether “international law imposes any limitations on” state freedom of decision in this respect. The Court’s subsequent reference to Nottebohm’s naturalisation as “an act performed by Liechtenstein in the exercise of its domestic jurisdiction” should not obscure the point that some basic limits on the capacity of a state to claim persons as its nationals must exist. Of course all acts performed by a state are in one sense acts performed by its domestic authorities and are therefore in that sense, within its domestic jurisdiction. But the relevant sense of “domestic jurisdiction” is the sense in which a matter is not within domestic jurisdiction if it is governed by international law.\(^{(14)}\)

The distinction between capacity and opposability might seem hypertechnical (though it was drawn by the Court in the Nottebohm Case). But there may well be situations in which the distinction matters. If state A is entitled to treat X as a national, then state A has rights and obligations with respect to X irrespective of whether X is also a national of state B. State A’s obligation to recognise that X is a national of state B is irrelevant for this purpose. For present purposes the question of the intrinsic limits upon a state’s capacity to claim persons as its nationals need not be pursued further. It is enough to say that, in a system which accepts the notion of *jus cogens*, it would not be surprising to find such limits.

However, it does not follow that the “effective link” doctrine, at least in the form in which it was applied in the Nottebohm Case, is one of them. The

Court did not deny that Nottebohm should be treated as a national of Liechtenstein. It simply denied that that nationality was opposable to Liechtenstein at the relevant time for want of a sufficient factual link between Nottebohm and Liechtenstein. But Nottebohm sought Liechtenstein’s nationality, and subsequently established residence there. It was certainly not an excess of jurisdiction in any basic sense for Liechtenstein to naturalise him, whatever the status of that act vis-a-vis Liechtenstein.

4. It is clear that a new state’s sovereignty is not contingent upon its enactment of nationality legislation. It might be thought that, until nationality legislation is enacted or at least a regime for the handling of nationality questions is established, the state’s sovereignty is territorial sovereignty only, and is therefore restricted to persons on the territory of the state. In practice, however, a new state’s sovereignty is not treated as so limited. In any event, some rules of international law operate by reference to nationality rather than territoriality. For example, one might postulate an international claim arising shortly after the creation of a new state (or the transfer of territory to an existing state) involving a person within that territory who possesses no closer links with any other state. To disqualify the new state from bringing a diplomatic claim on behalf of that individual, on the ground of its failure to enact nationality legislation, would be strange, and I know of no case where this has occurred.

5. To this extent there seems to be, at least in such situations, something approaching an autonomous conception of nationality in international law. It should be noted that it is not enough to treat this, as Weis does, as merely a presumption of international law as to the content of municipal law.\(^{15}\) It is better to face the reality that in this situation there is, or may be, no municipal law.\(^{15}\) A more promising line of argument, from the perspective of the third view on nationality, would be to say not that international law attributes

\(^{15}\) In some states, the courts may have power to determine nationality by applying a ‘common law’ in the absence of legislation. But there is no reason why they should not draw from international law in doing so, if local law generally allows this.
nationality to a certain class of persons in such cases, but to say that the continuous nationalous nationality rule is subject to an exception in the case of new states where no nationality legislation exists, and that in such cases it is satisfied by an effective link at the time when claim arose, or alternatively that a state is accorded a special capacity to extend nationality retrospectively in such cases. To a degree the difference between such formulations and that suggested above is verbal: in each case the effect is that international law is creating a form of deemed nationality for a particular purpose. But the reality is that international law seems to have dealt with this situation rather by treating these persons as nationals, than by creating functional exceptions to rules otherwise dependent upon nationality. And, once the a priori reasons for denying such competence are excluded, there is no reason to reject that way of stating the position.

6. However this may be, it does appear to be the case that once a state does enact a nationality law, that law is taken to define the nationality of the state for all purposes, including international purposes, subject to disqualification under the effective link doctrine (and subject to any underlying limits on capacity, to the extent that these exist). In other words, once the state pro- pounds a nationality law, this appears to operate to define not merely those who are, but those who are not its nationals, and this is so even though the class of nationals is more restrictive than the class of persons who could properly have been treated as nationals, e.g. for the purposes of nationality of claims. Once a defined state nationality law exists, the general renvoi to national law operates, in the case of new states as much as existing ones. Thereafter, a claim by the state on behalf of a person who does not qualify as a national under the law of that state would presumably be barred by the nationality of claims rule, even if that person could have been claimed as a national. (16) For these reasons the better way of stating the position is that,

(16) There may be exceptions for territories not included in the legislation, or situations entirely outside its scope.
in the absence of treaty provision to the contrary, persons ordinarily resident in the territory of a new state automatically acquire the nationality of that state, for all international purposes, and lose their former nationality, but this is subject to a right in the new state to delimit more particularly the persons it will regard as its nationals. This view is consistent with the judgment of the Permanent Court of International Justice in the Case Concerning Acquisition of Polish Nationality:

...the Minorities Treaty in general, and the Polish Treaty in particular, have been concluded with new States, or with States which, as a result of the war, have had their territories considerably enlarged, and whose population was not therefore clearly defined from the standpoint of political allegiance. One of the first problems which presented itself in connection with the protection of the minorities was that of preventing these States from refusing their nationality, on racial, religious or linguistic grounds, to certain categories of persons, in spite of the link which effectively attached them to the territory allocated to one or other of these States.\(^{(17)}\)

7. Against this perspective, questions of denationalisation emerge more clearly. The point is that the opposability of state B's claim of nationality as against state A would not, if the effective link doctrine was the only issue at stake, require state A to withdraw its nationality from those persons (or to treat that nationality as withdrawn). Only if the persons are the nationals of state B in a strong sense could such a claim be made. But it is precisely in the situation where international law treats certain persons as nationals that such an obligation of denationalisation could arise. It should be noted that it would only arise with respect to persons most closely connected with the territory in question, who were not nationals of any third state. In the absence of any international law right on the part of individuals to a nationality, questions of denationalisation in other respects are dealt with only by the rules relating to statelessness, which are, it seems, either of a very general character, or are conventional or treaty rules only.

\(^{(17)}\) PCIJ Ser B No 7 (1923) 15.
III. The Role of Human Rights Law in Nationality Matters

So far in this paper I have assumed that is no "right to a nationality" under international human rights law.\(^{(18)}\) In view of the terms of Article 15 of the Universal Declaration of Human Rights of 1948, this might be thought a surprising assertion. Article 15 provides:

15(1) Everyone has the right to a nationality.
(2) None shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

However this resounding statement has not so far been reflected in international instruments of universal scope, or even, for that matter, in most of the regional human rights instruments. The International Covenant on Civil and Political Rights of 1966, the basic universal human rights instrument, provides in Article 24(3) only that:

Every child has the right to acquire a nationality.

In its context it is plain that Article 24(3) is concerned primarily, if not exclusively, with the initial acquisition of a nationality on the part of children. It is not concerned with general questions of change of nationality and denationalisation of persons (including children) as a result of territorial or other changes.

However, a number of other provisions of the Covenant either touch on or assume that a person’s national status exists, as it were, objectively and independently of the power of the state to deprive a person of nationality as a means of denying the rights specified. For example Article 12(4) provides that:

\(^{(18)}\) The phrase ‘international human rights law’ is used without prejudice to the question of the status of particular human rights rules in international law. It may be that the international obligation is one of ‘respect’ for human rights as defined, rather than that of a specific obligation. Of course, there may be exceptions, especially in the area of apartheid and racial discrimination. ‘International human rights law’ may also inform other areas of international law (e.g. state responsibility for treatment of aliens). It is not possible, or necessary, to discuss these questions within the confines of this Paper.
No one shall be arbitrarily deprived of the right to enter his own country.  

A common method of depriving persons of such a right is through denationalisation. There is no reason to believe that arbitrary denationalisation could be used as a vehicle for avoiding the obligation in Article 12(4). Article 25 of the Covenant guarantees rights to “every citizen” to participate in public affairs, to vote at elections, and to have access to the public service. Plainly these obligations apply only to persons classified as citizens. On the other hand the avoidance of the word “national” is significant here as in Article 12(4) and each of the purposes listed in Article 25 can be said to be internal rather than international. Where the Covenant wishes to use the term “national”, it does so (e.g. in Part IV).

Similarly in Article 26, the basic equality provision, there is in terms no prohibition on discrimination against persons on grounds of their nationality, as distinct from their “national or social origin.” National origin is not the same thing as nationality, though the two often coincide. This might be thought to be of limited significance, in that the specified grounds in Article 26 are, and are stated to be, merely elaborations of the basic principle of non-discrimination. But there is no violation of the international law principle of non-discrimination if the law or other state act involved draws a reasonable and proportionate distinction between persons. National origin as such would rarely, if ever, be a reasonable classification. Nationality might well be, and indeed the Covenant distinguishes itself between nationals and non-nationals (aliens) in terms of the right to enter the national territory (Article 12(4)) and the right to participate in public affairs (Article 25). This interpretation

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(19) Cf. also ICCPR Art 13, dealing with the rights of aliens, which is a correlative of Art 12(1) & (4).
(21) However this may be because the term ‘his own country’ in Art 12(4) is a reference to factual attachment, not legal status.
(22) W. McKean, Equality and Discrimination under International Law (1983) ch. 15 and authorities there cited.
is confirmed by the provisions in the International Convention on all Forms of Racial Discrimination of 1966. Article 1 prohibits discrimination based among other things on "national or ethnic origin", but Article 1 paragraph 2 then goes on to provide specifically that:

This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a state party to this Convention between citizens and non-citizens.

Moreover Article 1 paragraph 3 provides that:

Nothing in this Convention may be interpreted as effecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalisation, provided that such provisions do not discriminate between and particular nationality.

There are no equivalent savings clauses in the Civil and Political Rights Covenant but the two instruments need to be read together, and it is clear that relevant distinctions between nationals and non-nationals can be drawn. (23)

The limited scope even of Article 24(3) of the International Covenant on Civil and Political Rights, the only provision which specifically deals with rights to nationality, can be seen from the fact that Article 24(3) does not specify which nationality the child has the right to acquire. Clearly it does not settle the old dispute between nationality based on jus soli and on jus sanguinis. In this respect Article 24(3) is rather a pale reflection on provisions in the statelessness conventions. Not merely is it not comprehensive; it is not even specific.

In this respect there is a clear contrast with Article 20 of the American Convention on Human Rights of 1969, which provides that:

20(1) Every person has the right to a nationality.

(2) Every person has the right to the nationality of the state in whose territory he was born if he does not have the right to any other nationality.

(3) No one shall be arbitrarily deprived of his nationality or of the right to change it. (24)

(23) id, ch 11.

(24) Cf. however the American Declaration of the Rights and Duties of Man of 1948, Art XIX of which stated tautologically that 'every person has the right to the nationality to which he is entitled by law...'
However, Article 20 of the American Convention is very much the exception amongst the regional human rights instruments in providing explicitly for a right to a nationality in certain circumstances. The African Charter on Human and Peoples' Rights of 1981\(^{(25)}\) makes no provision at all on the matter. Even the European Convention on Human Rights is extremely reticent. For example, Protocol 4 of 1963, in Articles 2 and 3, makes provision for the rights to enter and remain in the territory of states parties, rights which are broadly equivalent to those contained in Articles 12 and 13 of the Civil and Political Rights Covenant. In some respects Protocol 4 of the European Convention goes further than Articles 12 and 13 of the Covenant. For example Article 2(1) deals with the question of expulsion of nationals, an issue evaded rather than dealt with by Article 12(4) of the Civil and Political Rights Covenant, which is in terms concerned only with "right to enter his own country." Article 3 of Protocol 4 provides:

1. No one shall be expelled, by means either of an individual or a collective measure, from the territory of the state of which he is a national.

2. No one shall be deprived of the right to enter the territory of the state of which he is a national.

This does not of course create a right to a nationality, but it does in terms secure one of the valuable rights contingent upon nationality. It is significant that, in drafting Protocol 4, the Committee of Experts declined to insert a provision which would have prevented denationalisation as a means of achieving expulsion. (Article 4 of Protocol 4 prohibits only collective expulsion of aliens.) In dealing with "the hypothesis of a state expelling one of its nationals after first depriving him of his nationality," the Committee considered a proposal:

...to insert in Article 3 a provision to the effect that "a State would be forbidden to deprive a national of his nationality for the purpose of expelling him." Although the principle which inspired the proposal was approved of by the Committee, the majority of the experts thought that it was inadvisable in Article 3 to touch on the delicate question

of the legitimacy of measures depriving individuals of nationality. It was also noted that it would be very difficult to prove, when a State deprived a national of his nationality and expelled him immediately afterwards, whether or not the deprivation of nationality had been ordered with the intention of expelling the person concerned.\(^{(26)}\)

Since then, the Council of Europe has concluded Protocol 7 to the European Convention, which spells out in more detail the rights of aliens with respect to expulsion from the territory of a state,\(^{(27)}\) so that loophole apparently left by Protocol 4 with respect to individual expulsion of persons denationalised for the purpose is partly and indirectly closed by Protocol 7. But the fact remains that the degree of human rights protection the regional human rights instruments (with the sole exception of the American Convention) is very limited, and is mostly not conditioned upon the status of nationality.

By far the most significant protections in terms of acquisition and loss of nationality are contained in the Convention on the Reduction of Statelessness of 1961, and the Convention on the Nationality of Married Women of 1957. These instruments have been extensively discussed elsewhere.\(^{(28)}\) For present purposes it is sufficient to note that neither Convention creates unqualified rights to nationality, and that circumstances can still arise, even as between parties to the Convention complying with provisions, where statelessness can occur. However, the 1961 Convention does regulate loss of nationality in some detail, and it is significant that it provides, in Article 9, that:

A contracting state may not deprive any person or group of persons of their nationality on racial, ethnic, religious or political grounds.

Collective deprivation of nationality, except in circumstances such as transfer of territory where nationality is to be regarded as changing, would almost invariably be inconsistent with the Convention. Although the Convention is

\(^{(27)}\) Council of Europe, H(84)5, 8 October 1984, Art 1.
not framed in terms of individual rights, it does considerably more to secure those rights than do the universal or regional human rights instruments.

IV. Some Disputed Cases

Earlier in this paper I distinguished between a number of "extrinsic" limitations on a state's capacity to confer, maintain or withdraw nationality as a matter of international law. As we have seen, international human rights law, with two or perhaps three exceptions, provides only limited support for such extrinsic limitations. The exceptions relate to denationalisation which is discriminatory, especially on grounds of race or ethnic origin, to a developing principle about equality and non-discrimination on grounds of sex, and a vaguer but still important principle about denationalisation leading to statelessness. Whether the third constitutes a "human rights obligation" may be doubtful, but there is, as Dr. Chee has observed, undoubtedly an international public policy against statelessness which is capable of having indirect but important effects on the status of individuals.\(^{(29)}\) On the other, international human rights law contains no principle preventing states from distinguishing between persons on the grounds of nationality: it would be remarkable if it did, given the underlying conception of discrimination to which I have already referred. Nationality, or citizenship, continues to be a major classification used by states in qualifying persons for advantages of various kinds, especially in the context of political rights. It is also, of course, a key qualifying factor in a number of international law protections. The importance of nationality for these purposes means that there is a continuing pressure to manipulate the notion to achieve goals which ought otherwise to be improper or unlawful. At the individual level, a good example is the exclusion of undesirables. At the collective level, there is the maintenance of minority political control through qualifying large numbers

\(^{(29)}\) Choung-il Chee, "Japan's Post-War Denationalization of the Korean Minority in International Law" (1982) 10 Korean JCL 19, 46.
of the majority population as aliens.\(^{(30)}\)

Alongside, and connected with, this possibility is the pervasive influence of rules and considerations relating to territorial status itself in controversies involving nationality. Indeed it says a lot about the present state of international law in this area that considerations about territorial status are more pervasive than those about human rights.\(^{(31)}\) But it is the very inter-relatedness of questions of state succession, nationality and territorial status (including self-determination) which produce the combined effect of rendering these problems unavoidably international in character (and therefore not to be solved by the domestic law of any one country) while on the other hand complicating them to a great degree. These two related, apparently contradictory, effects can be seen from a brief survey of four disputes about nationality consequent upon territorial change which have occurred in the post-war period. Each of these has been the subject of considerable study elsewhere, so that I do not propose to discuss them in detail. However, a brief summary of each may be helpful both in discussion and to illustrate points already made in this paper.

(a) **Illegal Annexation: Germany and Austria, 1938~1955\(^{(32)}\)**

It is well known that the German annexation of Austria in 1938 was, despite some initial recognition, subsequently regarded as illegal and void, so that Austriani was not (at least in retrospect) deemed to have been extinguished, and was not treated as an enemy state by the allied powers after World War II. But from 1938~1945 there were of course many links between Austrian residents and Germany, and many of them acquired German nationality. Under Austrian legislation enacted in 1945, many formally reacquired Austrian nationality. This presented difficult problems for the German courts in the period

\(^{(30)}\) i.e. South Africa's Bantustan policy.

\(^{(31)}\) As Professor Onuma has observed: Onuma (1983) 3 (self-determination a matter of 'great significance' in this context; human rights law 'implicitly taken into consideration'). It should be said that, on one view at least, self-determination is a human right, though a collective one: ICCPR 1966, Art 1.

between 1945 and 1956 when the matter was resolved, from the standpoint at least of West German nationality law, by legislation of the Federal Republic. (33) So far as persons resident in Austria were concerned, the German courts had no difficulty in deciding that they lost German nationality as a result of the separation of Austria from Germany in 1945. (34) The position of persons of Austrian origin resident in Germany itself at this time was more difficult, and led to conflicting decisions of the Federal Supreme Administrative Court and of the Federal Constitutional Court. The Federal Supreme Administrative Court held that persons of Austrian origin who had acquired German nationality under the law of 1938 did not lose that nationality if they were resident in Germany itself in 1945, at the date of the administrative separation of Austria. The court denied that there was a rule of international law requiring renunciation of nationality in such circumstances, this being one of “the marginal questions which had been settled in different ways in the case of past territorial transfers and which, therefore, required special legislation”. (35) By contrast the Federal Constitutional Court emphasised the special circumstances of the reconstitution of Austria as an independent state. This was not merely a case of the victors imposing their will; they also imposed their law. In the court’s view the re-establishment of Austria was a “special case of state succession, an act to restore the status quo ante”. (36) The German legislation enacted in 1956 took essentially the same approach, requiring persons of Austrian origin who acquired German nationality as a result of the Anschluss to apply to reacquire that nationality: an application once made then had retrospective effect.

(b) Postliminium or Decolonisation: the Koreans in Japan (37)

The dispute over the status of persons of Korean origin in Japan at the end

(34) id., 150 n64.
(36) Austrian Nationality (No 2) Case (1955) 22 ILR 430.
of the Second World War presents interesting comparison, or perhaps I should say contrast, with the situation of the German-Austrians. The solution arrived at by the German Federal Constitutional Court in 1955, of reversion to the status quo ante, with the effect that all German Austrians lost their nationality at the time of separation, was in effect achieved by a combination of Japanese administrative action and a decision of the Japanese Supreme Court in 1961. (38) There were, however, important differences between the two cases. In the Austrian case, Austria had in 1945 extended its own nationality to those who had become German nationals as a result of the Anschluss, so that there was no question of persons losing German nationality thereby becoming stateless. Secondly, no facility retrospectively to reacquire Japanese nationality was accorded to the Korean Japanese, either then or later, though more limited provision for rights of permanent residence was extended under a subsequent agreement. (39) Thirdly, there is no question that Japan, under the international law of the time, validly the acquired sovereignty over Korea in 1910. Indeed this was effectively recognised by the Japanese Peace Treaty itself, which was a renunciation of that sovereignty. The language of Article 2 of the Peace Treaty ("renounces all rights, title and claim to Korea") is admittedly couched as much in terms of retrocession as of transfer of sovereignty. But this is to be explained by the fact that Korea was already independent, as a result of what I have described elsewhere as "a successon under international auspices from Japan". (40)

These differences are not fully reflected in the majority judgment of the Supreme Court of Japan in Kanda v. The State. (41) The court relied upon two basic propositions to reach the conclusion that all persons registered as "Koreans" under Japanese law validly lost their Japanese nationality as the


(39) Agreement on the Legal Status and the Treatment of the Nationals of the Republic of Korea Residing in Japan, 22 June 1965, 584 UNTS 3.


(41) (1961) 32 ILR 170.
result of the administrative action taken in 1952. The first proposition was that "there is no room to doubt that a change in nationality results from an alteration in territory", (42) and that in international practice such an alteration was either expressed in or to be implied from the treaty or other instrument bringing about the territorial change. (43) This was combined with the proposition that under the Japanese Peace Treaty, because a state includes both territory and persons, Japan had "renounced sovereignty over the people belonging to Korea", a people to be identified with persons registered as Koreans on the relevant Japanese domestic register. (44)

The reasoning is manifestly incomplete. The proposition that the recognition or acknowledgement of the sovereignty of another state involves recognising its sovereignty over its own people does not lead to the conclusion that the domestic law of the recognising state defines who those people are. As was pointed out earlier, the category of persons whose nationality is regarded as changing "automatically" on a succession remains unclear, and in a sense the Supreme Court took advantage of this lack of clarity. But it has never been suggested that, in the absence of special circumstances, the category is as wide as it would have to be to encompass all the persons on the Korean family register under Japanese law. These included people born in Japan who had never lived in Korea, and were not resident or domiciled there at the relevant time. (44) This lacuna in the Court's reasoning was, however, supplemented in several of the "Supplementary Opinions". In particular, Justice Toshio Irie, in a most interesting judgment, treated the re-establishment of Korea (achieved before the Peace Treaty and merely recognised by it) as a form of "restitution

(42) id, 173.
(43) The reference to regulation by treaty was necessary to comply with Art 10 of the Japanese Constitution, requiring the conditions necessary for being a Japanese national to be 'determined by law'. As noted, the Japanese Peace Treaty made no express reference to the matter.
(44) It should be pointed out that, due to an unfortunate combination of circumstances, Ms. Kanda herself was at the relevant time in Korea and was legally married to a Korean who was himself in Korea, although she was Japanese and was trying to return to Japan and to terminate her marriage.
of the original condition”, placing Korea in the same position as it would have been had the union of Korea and Japan never occurred.\(^{(46)}\)

The analogy with Austria is attractive, but misleading. International law came to settle on the view that Austria as a legal entity (some would say a legal fiction) never ceased to exist. The situation of Korea after 1910 was clearly and explicitly different. Curiously, international law does contain some trace of the notion of the reconstitution or revival of a state after its distinction, in the old notion of postliminium, and claims to postliminium are occasionally made. For example in the Right of Passage Case, Judge Moreno Quintana (dissenting) commented that:

> We must not forget that India, as the territorial successor, was not acquiring the territory for the first time, but was acquiring an independence lost long since. Its legal position at once reverted to what it had been more than a hundred years before, as though the British occupation had made no difference...\(^{(47)}\)

However, this was a dissenting opinion, and none of the other judges took the same view. The notion of reversion to sovereignty or postliminium also has no place in the Vienna Convention on State Succession in respect of State Property, Archives and Debts of 1983.\(^{(48)}\) My own view is that, whatever the usefulness of reversion as a political claim, there is little authority and even less utility for its existence as a legal claim.\(^{(49)}\) It follows that it would not be justified to read into the Japanese Peace Treaty, Article 2, a requirement, or indeed a permission, to regulate nationality on the basis of reversion to sovereignty or postliminium.

(c) Decolonisation and the Attraction of Metropolis: Western Samoans in New Zealand

A rather different case, although one raising interesting issues for present purposes, was the dispute about the New Zealand citizenship of a number of

\(^{(46)}\) id., 179.
\(^{(47)}\) ICJ Rep 1960, 6, 95.
\(^{(48)}\) (1983) 22 ILM 306. For the ILC discussion on this point see Crawford (1979) 415.
\(^{(49)}\) cf. l.d., 412-15 where the limited materials on postliminium and reversion are discussed.
Western Samoans. This arose from the complicated legislative history of nationality matters during New Zealand's administration of Western Samoa (1920~1962). The question was whether certain New Zealand legislation, enacted in 1923 and 1928, had the effect of making a large number of Western Samoans automatically New Zealand nationals. If so, those persons had not ceased to be New Zealand nationals as a result of the independence of Western Samoa in 1962. Indeed, it was estimated that as many as 60% of Western Samoans in 1982 would have continued to be New Zealand citizens on this basis, notwithstanding the lack, in many cases, of any effective link between those persons and New Zealand since independence. The reason for this state of affairs was that those drawing up the various national and international instruments by which Western Samoa achieved independence in 1962 did not believe that the New Zealand legislation of the 1920s would be interpreted in this way. But this shared assumption turned out to be wrong. In Falema'i Lesa v. Attorney General of New Zealand the Privy Council held that the applicant, and others in her situation, were still New Zealand national as a result of the legislation of the 1920s, and despite independence. That decision came as a considerable surprise to the countries concerned, and it had serious implications for New Zealand's immigration policy, amongst other things. The situation so created was dealt with rapidly by legislation, pursuant to an agreement between New Zealand and Western Samoa, whereby most of the persons involved (all those not present in New Zealand when the legislation came into force) lost their New Zealand nationality.  

For present purposes the controversy is perhaps of limited significance, as yet another chapter in the long-standing controversy about nationality under the mandate and trusteeship systems, a controversy apparently of purely histo-

tical significance. Moreover all the persons concerned were, after 1962, accepted as Western Samoans nationals, so that the effect of the Privy Council's decision was to recognise an additional New Zealand nationality, and the effect of the New Zealand legislation merely to withdraw that nationality in some cases. No question of statelessness arose. Nonetheless it seems clear that the United Nations General Assembly would not, in 1961, have accepted arrangements for the independence of Western Samoa on the basis that a majority of Western Samoans would retain New Zealand citizenship without the option, as was in effect the case. It is clear that a former administering power could not with one hand confer independence on a dependent territory, but with the other hand continue to claim most of the inhabitants of the territory (irrespective of their wishes or of their contact with the metropolitan state) as its nationals, with corresponding consequences for jurisdiction and diplomatic protection. Moreover the local self-governing administration of Western Samoa before 1962 had already shown its strong opposition to dual nationality, and plainly would not have accepted independence on these terms. Though undoubtedly much affected by its special circumstances, the Western Samoan case clearly demonstrates the need for a distinction to be drawn between the residents of territory which is transferred or which becomes independent and persons outside that territory. The general retention by the predecessor state of a claim to nationality over the residents of the territory concerned must be unacceptable, whatever precise line is drawn between persons who do, and who do not, retain the predecessor state's nationality.

(d) Manipulating Independence for Other Ends: The Bantustans

Finally, some brief reference should be made to the nationality aspects of the South African Bantustan or homeland policy, which is by far the most significant example of the manipulation of nationality rules to achieve illicit international purposes. As is well known, South Africa has purported to confer independence on a number of homeland areas, and in addition to transferring large numbers of blacks to those areas, has attributed nationality on a tribal
or racial basis to much of its population in order in effect to denationalise them as South Africans. Two distinct questions arise. The first involves the question whether the Bantustans themselves are, or can become, independent states in international law. Plainly if they do not, no question of a separate nationality can arise. However there is the additional question whether the denationalisation of groups of South African nationals on a racial basis, and independently of any actual connection with the territory of the Bantustans, is effective to bring about the loss of South African nationality which is the basic point of the whole process. As pointed out above, it is legitimate to draw distinctions between one's own nationals and aliens for various purposes, including work permits, residence etc. However the international community has consistently taken the position, both generally and in the context of the Bantustan policy, that racially discriminatory denationalisation of this kind is ineffective. Indeed the general strength of the opposition to the South African policy is a reflection of the aridity of earlier views denying the capacity of international law to limit state competence in these respects. It also powerfully reinforces provisions such as Article 9 of the Convention on the Reduction of Statelessness of 1961, prohibiting the deprivation of nationality on racial, or ethnic grounds.

V. Conclusions

The cases surveyed in the previous section, together with other similar instances since 1945, demonstrate two things, if they demonstrate nothing else. The first is the interrelatedness of issues of territorial and personal status in practice. (This makes even more curious the pervasive claim that one of these is peculiarly a matter of domestic jurisdiction.) Secondly, they demonstrate the particularity of issues that tend to arise in any one case, a particularity which bedevils the whole "field" of state succession, and which is the cardinal factor militating against the acceptance of general principles or rules in this field.
Modern state practice as revealed in cases such as these is, at least, not inconsistent with the tentative conclusions expressed earlier in this paper and (especially having regard to the principle of the intertemporal law, that is the problem of evolving standards during the postwar period and the requirement to judge transactions in accordance with the law applicable at the time) may be thought to support them. In particular it is suggested that international law can and does set limits to the competence of states in nationality matters, quite apart from any non-possibility of particular claims to nationality on the grounds of the lack of an effective link with the state. These limits are set in particular in cases where transfers of territory are affected by basic principles of international law, especially non-aggression and self-determination. A second category involves attempts to naturalise or de-nationalise persons—especially by way of collective measures—which discriminate on ethnic or racial grounds. In this and in other areas, the development of peremptory norms of international law (*jus cogens*) can be seen to be having its pervasive, often unsettling, effects.