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NATIONALITY LAW, SOVEREIGNTY, AND THE DOCTRINE OF EXCLUSIVE DOMESTIC JURISDICTION

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> There exist few, if any, general principles of law having specific regard to nationality. The development of such principles has been hampered by the great diversity of municipal nationality laws . . . by the frequently noticeable tendency of states to uphold, for political reasons, their own law even if it is at variance with that of the majority of states . . . .
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> P. Weis, NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW 88 (2d ed. 1979).

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I. INTRODUCTION

Does a State really have exclusive and unquestioned jurisdiction to determine its nationality? England has become so accustomed to the novelty of witnessing renewed excursions into immigration control, that the use of nationality law concepts to achieve such ends is no longer being questioned. Yet in most other countries it is the law of nationality that has shaped immigration law. By contrast, in England it is immigration control considerations in the post-war period that have determined the development of the modern nationality law. This is such an oddity that it is worth commenting upon in and of itself. Additionally, to the extent that the movement towards increased stringency in the law has been motivated by racial considerations, this process also is plainly of interest to lawyers, administrators, and policymakers who worry about the power of law as an instrument of discrimination.

Recently the problem has been thrown into yet sharper relief. On the one hand, in an era of rapid world changes, there has been the collapse of the Berlin Wall, the dismantling of apartheid in South Africa, and the restoration of self-rule on the West Bank — all of which were momentous and peaceful. On the other hand, there has been inter-ethnic genocidal warfare in both Bosnia and Rwanda, leading to an exodus of refugees on an unprecedented scale. Amid all this, the right of a State to control the movement of people within its borders is still ironically being regarded as axiomatic. For Britain the "new world order" has provided a problem which is once again quintessentially the product of its Empire and once again of principle and legality. This time it comes from Hong Kong, which will reach a head in 1999. This article takes this as a timely opportunity to discuss the importance of nationality law, both nationally and internationally, and argues for a more robust role to be played by international law.

II. BACKGROUND

By the Joint Declaration of 1984, Britain,[1] in anticipation of the expiry of its lease over Hong Kong in 1997, agreed with China to give up all its claims to sovereignty over Hong Kong in return for China's promise to retain capitalism there for at least fifty years. Not that China is likely, given present trends, to kill the goose that lays the golden egg. No agreement was reached between the two countries on nationality, but there was an exchange

1. Joint Declaration of the Govt. of the United Kingdom of Great Britain and Northern Ireland and the Govt. of the People's Republic of China on the Question of Hong Kong, Sept. 26, 1984, U.K.-P.R.C., 23 I.L.M. 1371 (1984).

of memoranda. Britain declared that all British Dependant Territories Citizens (BDTCs) in Hong Kong would lose their status in 1997, but that a new "appropriate status" would be created. This would be the British National Status (Overseas),[2] permitting requests for consular protection, which the BDTCs could apply for. No discussion has taken place in England about the status in law of this new form, or about the general wisdom of introducing it. However, some of the difficulties inherent therein took little time to surface.

On June 4, 1989, after the British Government had brought these changes about, the Chinese authorities brutally suppressed pro-democracy student demonstrations in Tiananmen Square in Beijing. This promptly raised doubts in the minds of the people of Hong Kong about Chinese guarantees in the settlement of 1984. An exodus began to take place from the colony at the rate of 55,000 people a year. The British Government retracted. It passed the British Nationality (Hong Kong) Act 1990[3] conferring upon a select minority an automatic right of abode in the UK because their presence was crucial to the continued prosperity of the colony. The Government, therefore, hoped that if this skilled and highly qualified minority were made secure in the belief that they could, if they wished, exercise their right of abode, they would not wish to leave for the time being. The retraction was, thus, one of form only, not of intent. By contrast, the Falkland Islanders were *all* given actual citizenship after Argentina invaded them in 1982 and, in any event, retrospectively to the commencement of the British Nationality Act 1981,[4] in the British Nationality (Falkland Islands) Act 1983.[5] The difference could not be more stark.[6]

Nationality law, therefore, continues to awkwardly intertwine itself with immigration law and vice-versa. But what will happen in 1999 when Hong Kong reverts back to China? What will happen if the right of abode is then actually exercised as it once was by the East African Asians? Then the Commonwealth Immigrants Act 1968[7] was rushed through Parliament to curb the exercise of legitimate legal rights by a State in respect of its own citizens. Could the same measure be repeated again for the people from Hong Kong, or would international law intervene to declare this illegal? These questions have not been faced. They should have been, for they will have to be at some time in one form or another.

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2. *See How the Special Administrative Region will be Organized*, THE FINANCIAL TIMES LTD., Sept. 27, 1984, at 4, *available in* LEXIS, Nexis Library, News File.
3. British Nationality (Hong Kong) Act 1990, ch. 34, Sched. 1 (Eng.)
4. British Nationality Act 1981, ch. 61 (Eng.)
5. British Nationality (Falkland Islands) Act 1983, ch. 6 (Eng.)
6. *See* SATVINDER S. JUSS, IMMIGRATION, NATIONALITY AND CITIZENSHIP 56-57 (1993).
7. Commonwealth Immigrants Act 1968, ch. 9 (Eng.)

Nationality has long been a concept in international law. It is high time that it was recognized that as such it is too important, especially in the changing conditions of the modern world, to be left to the mercy of nation States where today, in many cases, nation States themselves are undergoing fundamental change. Old national alliances are breaking down and new ones are springing up. In Europe, the notion of Community sovereignty has begun to replace national sovereignty, and it may well be all too easy for some governments in these circumstances to take maverick action and justify it as a manifestation of their statehood. This essay offers some tentative views on an area of law that has been neglected. It should also help to put the problems arising from Hong Kong into focus.

Nationality law, despite being a concept of international law, is a matter that traditionally individual States have decided for themselves. The concept of nationality concerns one of the elements of statehood, which is the definition and circumscription of the population of the State regarded as the aggregate of its subjects. On this point, the views of international lawyers provide some interesting insights. As James Crawford explains, "Nationality is thus dependent upon statehood, not the reverse."[8] Put in this way, its importance to sovereign States becomes crucial. A State is not sovereign if it does not have exclusive competence in respect to its own internal affairs and nationality is one of those affairs. Technically, a State may therefore exercise any power over its nationals, wherever they may be. It may delimit its group of nationals. It may determine their status by determining their rights and duties. As Paul Weis states, the determination of nationality by a State "is a concomitant of State sovereignty" because "sovereignty, in its modern conception, is described as the supreme and independent authority of States over all persons and things in that territory; independence and territorial and personal supremacy are considered as the elements of sovereignty."[9]

But what of immigration and expulsion of nationals and aliens by a State? This exercise of State power is obviously germane to the plight of the people from Hong Kong. The answer given by another international lawyer, Goodwin-Gill, is that "[i]t is still common to find expressed the view that such matters are for the local State alone to decide, in the plenitude of its sovereignty."[10] This is because the corollary of the independence and equality of States is the duty on the individual State not to interfere in the

8. James Crawford, *The Criteria for Statehood in International Law*, 48 BRIT. Y.B. INT'L L. 93, 114 (1978).

9. P. WEIS, NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW 65 (2d ed. 1979).

10. GUY S. GOODWIN-GILL, INTERNATIONAL LAW AND THE MOVEMENT OF PERSONS BETWEEN STATES 51 (1978).

internal affairs of other States. Those matters that fall within their internal affairs are said, as Brownlie observes, "to be within the *reserved* domain, the domestic jurisdiction, of states."[11] Brierly specifies these as such "non-controversial matters as a state's choice of constitution, its right to regulate immigration, tariffs, naturalization, and the like. . . ." He is quite emphatic in his view that "[t]hese are domestic questions which probably not even the most ardent internationalist, unless he were entirely devoid of a sense of the practicable, would propose to remove from the sole jurisdiction . . . ."[12]

These are sentiments, however, that were expressed a long time ago, and in any event before the Second World War and before the setting up of the most important of all international institutions, the United Nations, and the signing of the Universal Declaration of Human Rights. Moreover, these sentiments are qualified by the rider "non-controversial." What happens when these very matters that Brierly specifies become controversial?

One is bound to say either that the matters cease then to be purely the concern of national States, or that the traditional doctrines of statehood, sovereignty and domestic jurisdiction themselves admit of exceptions under international law as it would apply to the current conditions of the modern world. This is because, as we shall see, it is not the traditional view — certainly as far as nationality law is concerned. It is anathema to the notion of the independence of States and could be a recipe for disaster itself. Yet, at the same time, it must not go unrecognized that the concepts of sovereignty and domestic jurisdiction are themselves fluid and indeterminate. Goodwin-Gill puts it well when he stated that "it is practically impossible to define sovereignty in isolation from any particular context . . . ."[13] For his part Brierly wrote that "little seems to be generally known" about domestic jurisdiction "except its extreme sanctity."[14] Eduard Hambro was no less disparaging when, in linking the two concepts together, he referred to the doctrine of domestic jurisdiction as "one of the last refuges of the dogma of absolute sovereignty."[15] It is clear, therefore, that before we deal with the issue of nationality law in the modern world, we must dispose of the notions of sovereignty and domestic jurisdiction as obstacles in the attainment of a coherent set of generally agreed principles on nationality law.

11. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 291 (4th ed. 1990).
12. J.L. Brierly, *Matters of Domestic Jurisdiction*, 6 BRIT. Y.B. INT'L L. 8, 13-14 (1925).
13. GOODWIN-GILL, *supra* note 10, at 52-53.
14. Brierly, *supra* note 12, at 8.
15. M.S. RAJAN, UNITED NATIONS AND DOMESTIC JURISDICTION 1 (2d ed. 1961).

III. SOVEREIGNTY

Sovereignty, as every constitutional lawyer knows, is a vexatious dogma. It can mean any number of things in any number of different contexts. It first had its origins in the political developments of the Middle Ages in Europe when at the time the Pope was supreme in spiritual matters and the Emperor in temporal matters. At first, therefore, the concept could not flourish, but then in the sixteenth century individual States challenged the authority of the Pope and the Emperor, asserting "*independence* from their supremacy in spiritual and temporal matters."[16] Austin thus spoke of sovereignty as being the supreme authority in an independent political society that was essentially indivisible and illimitable. Yet, it is now clear that it is both divisible and limitable. Sovereignty is limited externally by the possibility of a general resistance, and internally it may be limited by the very nature of power itself.

This suggests that sovereignty may have a national as well as an international dimension. Historically, the concept of national sovereignty has been important to England, particularly to the Tory Party which associated Parliamentary sovereignty — borne out of the "Glorious Revolution" and the English constitutional struggles of the seventeenth century — with English nationalism, both of which it combined together to pitch against Europe. After all, English identity had finally taken shape and come into its own only during this time, when after opposition to Catholic Spain, France, and Ireland in the sixteenth century, England finally, in this century, saw the triumphant emergence of Protestant Englishmen and Ulstermen. Roman authoritarianism, from anywhere in Europe, would no longer be tolerated. British national sovereignty, so hard won, was not, therefore, something that would be easily surrendered. This domestic conception of sovereignty is something that international law recognizes, but the problem that it may now pose in the twentieth century is also well recognized. In the words of Oppenheim:

> The question which is now confronting the science of law and politics is how far sovereignty as it presents itself from the point of view of the *internal law of the State*, namely, *as the highest underived power* and as the exclusive competence to determine its jurisdictional limits, is compatible with the normal functioning and development of International Law and organisation.[17]

16. *Id.* at 1-2.
17. L. OPPENHEIM, INTERNATIONAL LAW 122-23 (8th ed. 1955) (italics added).

Set against this there is, of course, the international conception of sovereignty. Kunz says this of sovereignty:

> Sovereignty, as a basic concept of present international law, as a legal concept, is a *bundle of competences conferred by international law*. Any *a priori* or unlimited political concept of sovereignty must, with inescapable logic, lead to the non-existence of international law as law. Sovereignty is, therefore, *essentially a relative notion*; its content depends on the stage of development of international law.[18]

For international law, therefore, sovereignty as an attribute of statehood is a quality which is both ascribed and delineated by the rules of international law and is wholly dependent on the development of international law. But for municipal law, sovereignty is directly linked to the independence of States and as such espouses the doctrine that it cannot be subject to any external interference. Yet a closer analysis still shows that there are in actual fact greater affinities between the two than is commonly assumed. For example, Jean Bodin, one of its earliest exponents, while defining sovereignty as "the absolute and perpetual power," nevertheless, held it to be bound by divine law, and others like Grotious, Vattel, Pufendorf, Hobbes, and Locke allowed for similar limitations.[19]

Once one accepts that sovereignty has limitations and that absolute sovereignty is a misnomer, the problem of sovereignty *vis-à-vis* international law disappears, provided that as Van Kleffens states it is not made extinct through integration with an international organization that is "(i) total or at least so extensive that such sovereign rights as the participants retain amount to very little; (ii) irrevocable; (iii) unconditional."[20] Subject to this there is as Brierly states, "no mystery about the source of the objection to obey international law," because "the same problem arises in any system of law and can never be solved by a merely juridical explanation." As he explains,

> The answer must be sought outside the law and it is for legal philosophy to provide it. The notion that the validity of international law raises some peculiar problem arises from the confusion which the doctrine of sovereignty has introduced into international legal theory. Even when we do not believe in the absoluteness of state sovereignty we have allowed ourselves to be persuaded that the fact

18. J.L. Kunz, *The Nottebohm Judgement*, 54 AM. J. INT'L L. 536, 545 (1960) (italics added).

19. RAJAN, *supra* note 15, at 1-20.

20. *Id.* at 26.

of their sovereignty makes it necessary to look for some specific quality . . . .[21]

If sovereignty can be so debunked, what about the doctrine of exclusive domestic jurisdiction?

IV. EXCLUSIVE DOMESTIC JURISDICTION

The expression "domestic jurisdiction" currently appears in Article 2(7) of the United Nations Charter but its original basis was in the League of Nations.[22] It was the Covenant of the League of Nations which permanently established the doctrine of domestic jurisdiction in international law as it is understood today and invoked by States.[23] It was the Covenant which in erecting a body such as the League of Nations, as a standing organization with compulsory jurisdiction for the conciliation of disputes, raised the compelling issue of the limits of international jurisdiction.[24] However, in view of the importance that has subsequently been attached to the doctrine of domestic jurisdiction, it is ironical that the issue was not a predominating one during the drafting of the Covenant. This was so, save in the case of the United States. Had it not been for the insistence on this matter by the United States, the Covenant might well have been signed without any reservations being made to the League's conciliation jurisdiction.

In the 1919 debates leading to the rejection of the Versailles Treaty, the Covenant was attacked continuously as a threat to national sovereignty. American leaders were less concerned with determining such abstract issues as the boundaries of national and international law than with securing a continuing guaranty for such delicate domestic interests as a restrictive immigration policy and a protective tariff.[25] Accordingly, the United States proposed that certain matters of domestic jurisdiction should be reserved from the conciliation jurisdiction of the League. A new clause, under paragraph 8 was attached to Article 15 which read:

> If the dispute between the parties is claimed by one of them, and is found by the council to arise out of a matter which by international law is *solely within the domestic jurisdiction* of the party, the Council may in any case under this article refer the dispute to the

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21. Brierly, *supra* note 12, at 14.

22. Helen Hart Jones, *Domestic Jurisdiction – From the Covenant to the Charter*, 46 ILL. L. REV. 219, 219 (1951-52).

23. *See, e.g.*, C.H.M. Waldock, *The Plea of Domestic Jurisdiction Before International Legal Tribunals*, 31 BRIT. Y.B. INT'L L. 96, 100 (1954).

24. *See* Jones, *supra* note 22, at 219-36.

25. *Id.* at 221-22.

Assembly.[26]

It was the reference in this paragraph to matters of domestic jurisdiction which gave credence to the belief in 1919 that there was, in international law, a reserved domain of domestic jurisdiction. But the effect, in practical terms, of this new theory differed little from the old habit of States to rely upon matters which affected vital interests, honor, independence and so forth. For the pre-1918 tendency among States to include under such formulas those matters which, by their very nature, required domestic control, was merely perpetrated under the new guise. In practice such phrases as "vital interests and honor" which precluded States from renouncing their exclusive jurisdiction over certain matters persisted in the new form. There was, however, a major difference in the formulation of the new phrase. This is explained by P. Weis who wrote that "Article 15(8) of the Covenant constituted . . . a highly important step forward in so far as it made the determination of matters of domestic jurisdiction subject to the criterion of international law, whereas previously each State used to consider itself the sole arbiter as to what matters were to be regarded as affecting its honor and vital interests."[27]

Indeed, as a direct result of the historical background of these provisions, Article 15(8) in terms emphasizes a concept of domestic jurisdiction in international law, but it does not give a list of matters to be so regarded. As a result, as Lawrence Preuss noted,

> Matters of domestic jurisdiction do not qualify themselves. Their boundaries are traced by international law, and it is surely a preeminently legal question whether, in any given case, a matter which belongs in principle to the reserved domain has, as a result of the development of international relations . . . entered the domain guaranteed *au fond* by international law. This is a legal question to which a tribunal, if given the power under a system of compulsory adjudication, can always find a legal answer.[28]

James Garner stated it even more succinctly when he declared that "[i]t is one thing to recognize . . . the right of every sovereign state to determine freely its own domestic policies; it is a wholly different proposition to maintain that a state is the sole and exclusive judge of whether a particular

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26. LEAGUE OF NATIONS COVENANT art. 15, ¶ 8 (italics added).

27. WEIS, *supra* note 9, at 67.

28. L. Preuss, *The International Court of Justice, the Senate, and Matters of Domestic Jurisdiction*, 40 AM. J. INT'L L. 720, 726-27 (1946).

policy or question is purely domestic . . . ."[29]

The conclusion that is, therefore, inexorably reached by Waldock is that:

> In general, it seems that the doctrine of the reserved domain, as a limit upon the jurisdiction of legal tribunals, is *both artificial and destructive* of the avowed object of the acceptance of their jurisdiction . . . . It tends to give an *air of respectability* to what is nothing more than a refusal to allow international obligations to be judicially enforced by a *spurious appeal to constitutional doctrine.* If given wide scope it tends to emasculate the vital principles of international law that a state may not plead its own domestic law — including its constitutional law — as an excuse for not performing its international obligations.[30]

This must mean that the exchange of memoranda between Britain and China, whereby all BDTCs in Hong Kong would lose that particular nationality status after 1999 and have no right to travel to the UK must be highly questionable in international law.[31] Like its precursor, the British Nationality Act 1981, which in Section 1(i) abandoned the *jus soli* rule, which contains the basic principle of nationality that birth within the territory of a State makes one a national of that State,[32] this law also encourages statelessness and denies an individual the essential benefits of nationality to a State. Likewise, this too can be ill-defended by any plea of domestic jurisdiction, and this is so even if a particular right is not included in the Charter of Human Rights.

For example, Article 11 of the International Bill of the Rights of Man states that "[e]very person shall be entitled to the nationality of the State where he is born unless and until on attaining majority he declares for the nationality open to him by virtue of descent."[33] Lauterpacht says that this is binding on the laws of municipal States, because "[a]lthough an International Bill of the Rights of Man is not specifically referred to in the Charter, it has been treated as inherent in it. In fact, the proposal for an International Bill of Rights was put forward already in the course of the drafting of the Charter."[34]

Clearly, therefore, like municipal State *sovereignty*, the doctrine of *exclusive* domestic jurisdiction is also a misnomer, given the expanding

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29. James W. Garner, *The New Arbitration Treaties of the United States*, 23 AM. J. INT'L L. 595, 598 (1929).
30. Waldock, *supra* note 23, at 142 (italics added).
31. *See supra* note 2 and accompanying text.
32. British Nationality Act 1981, ch. 61, § 1(i).
33. HERSCH LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 315 (1950).
34. *Id.* at 273.

canvas of international law. Any matter is only within the purview of municipal State jurisdiction, because international law allows it to be. But if this is so, is that not just the case with the determination of nationality law, and if so, cannot Britain decide just as it will in relation to its Chinese nationals in Hong Kong?

V. NATIONALITY LAW

The proposition that municipal law governs nationality appears for the first time around the end of the nineteenth century in the works of such writers as Blunschli,[35] Cogordan,[36] Rivier,[37] and Weis.[38] The full implications of this view were not, however, explored by these writers — the conflicts between the various nationality laws being regarded as exceptional.[39] The disparity in nationality laws between States reflected the *de facto* position in law which emphasized the fact that the determination of nationality was a matter for individual States alone. Thus, Weis wrote in 1890 that "[t]he State is the master, and has the absolute right to decide by law the rules which it intends to apply to the acquisition and to the loss of nationality."[40] Despite Article 15(8) of the Covenant of the League of Nations recognizing the role of international law, this view persisted in the writing of eminent international lawyers well into this century.

Manley O. Hudson remarked that "[i]n principle, questions of nationality fall within the domestic jurisdiction of each State."[41] Oppenheim noted that "[i]t is not for International Law but for Municipal Law to determine who is, and who is not, to be considered a subject."[42] On the other hand, Schwerzenberger observed that "[i]n principle, every Sovereign State is free to determine for itself to whom it wishes to grant nationality."[43] W.E. Hall wrote: "It follows from the independence of a state that it may grant or refuse the privileges of political membership . . . . Primarily therefore it is a question for municipal law to decide whether a given individual is to be considered a subject or a citizen of a particular state."[44] J.H. Ralston also

35. BLUNTSCHLI, DROIT INTERNATIONAL CODIFIÉ 364 (1874).
36. COGORDAN, LA NATIONALITÉ AU POINT DES RAPPORTS INTERNATIONEAUX 7 (2d ed. 1890).
37. 1 RIVIER, PRINCIPES DU DROIT 303 (1896).
38. WEIS, TRAITÉ ELEMENTAIRE DE DROIT INTERNATIONAL PRIVÉ 7 (2d ed. 1980).
39. *See* part 1 SIR JOHN WESTLAKE, INTERNATIONAL LAW 230 (1910).
40. WEIS, *supra* note 38, at 7.
41. *Documents of the Fourth Session including the Report of the Commission to the General Assembly*, [1952] 2 Y.B. Int'l L. Comm'n 7, U.N. Doc. A/CN.4/SER.A/1952; *see also* HUDSON, CASES ON INTERNATIONAL LAW 138 (3d ed. 1951).
42. OPPENHEIM, *supra* note 17, at 643.
43. 1 GEORG SCHWERZENBERGER, INTERNATIONAL LAW 163 (1949).
44. WILLIAM EDWARD HALL, A TREATISE ON INTERNATIONAL LAW 275 (8th ed. 1924).

acceded to the fact that "citizenship" is "not a question of international law."[45] G.H. Hackworth in his phenomenal work on nationality began by saying that "[n]ationality is a subject primarily of municipal as distinguished from international law."[46] In the preface to his first edition, P. Weis noted that "[a]ccording to the unanimously accepted view, the determination of nationality is a matter which falls within the domestic jurisdiction of each State and is regulated by its municipal law."[47] Parry likewise stated that "the principal, if not the only rule of international law respecting nationality is frequently, though perhaps erroneously, understood to be that the determination as to who are and who are not its nationals is a question exclusively within the domestic jurisdiction of a State."[48]

This last designation by Parry, amongst the myriad of others quoted above, is however, far more revealing than the others in its accuracy to the true position. Parry recognized that the traditional view, cited "frequently" is held "erroneously," and thus effectively refuted the notion of jurisdictional exclusivity over matters of nationality law. Even the other observers are inclined to speak of municipal States as "primarily" having jurisdiction in nationality matters. Parry's view is closer to that of Lauterpacht who wrote that "matters of nationality are, subject to the international obligations of the State, left to its municipal law."[49] But the point was even more robustly made in the Editorial of the *New York University Law Review* in 1956 which asserted: "That all matters pertaining to nationality are not matters of domestic law is well settled."[50] Also, in 1927 Fischer Williams argued — what must be an unassailable point — that "it is just as much an international question to what state a man belongs as to what state a territory belongs."[51]

Thus we come full circle. The same point made repeatedly, repetitively, and persistently soon leads one to wonder whether the same notion can become so denuded as to have any meaning at all. If there is no consensus as to whether jurisdiction over nationality law is *exclusive*, then what is the theoretical basis of the doctrine of exclusive domestic jurisdiction, and what is its relevance here? The answer is that the doctrine was not created specifically to provide for individual States to acquire jurisdiction over their

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45. JACKSON H. RALSTON, THE LAW AND PROCEDURE OF INTERNATIONAL TRIBUNALS 160 (rev. ed. 1926).

46. 3 GREEN HAYWOOD HACKWORTH, DIGEST OF INTERNATIONAL LAW § 220, 1 (1942).

47. WEIS, *supra* note 9, at preface to the first edition.

48. CLIVE PARRY, NATIONALITY AND CITIZENSHIP LAWS OF THE COMMONWEALTH AND OF THE REPUBLIC OF IRELAND 10 (1977).

49. HERSCH LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY 300 (1933).

50. *See* Cecil J. Olmstead, *1955 Annual Survey of American Law — International Law*, 31 N.Y.U. L. REV. 1, 10 (1956).

51. John Fisher Williams, *Denationalization*, 8 BRIT. Y.B. INT'L L. 45, 51 (1927).

nationality laws, but rather, the jurisdiction already existed by virtue of the sovereignty of States in matters integral to their statehood, and nationality. Therefore, defining and circumscribing the population of a State was felt to be one matter that was within that reserved domain. This can be demonstrated by a historical analysis which shows that nationality was not a *sine qua non* for the existence of an area of domestic jurisdiction.

Thus prior to the construction of the doctrine of exclusive domestic jurisdiction as a distinct doctrine of international constitutional law in article 15(8) of the Covenant of the League of Nations,[52] the idea of an international jurisdiction in the affairs of States had little significance, because the international community existed under a decentralised constitution. If there was any jurisdiction exercised by international organs it merely took the form of diplomatic exchanges between the States concerned, in which each State was its own judge. In such a situation, a plea of domestic jurisdiction was not really a jurisdictional plea. It was effectively a denial of the admissibility of one's opponent's claim. In this pre-League era, international law did, however, play a regular part in one particular field. This was in the matter of arbitration.

In theory, the principle of obligatory legal settlement of disputes was accepted and endorsed by States. However, in practice the role of international law remained restricted even in this field. States did not commit themselves in advance to submit their disputes to arbitration or, if they did in a treaty on arbitration, they added reservations which left them free, when a dispute arose, to arbitrate or not, depending on whichever of the two suited them.

Indeed, the German delegate at the Hague Peace Conference of 1907 expressed the view that treaties of arbitration were obligatory as long as there was no dispute, but became optional as soon as one arose. It was standard practice with regard to arbitration treaties to exclude from the obligation of arbitration any matters which affected vital interests, independence, and honor, and so forth. A reservation in these terms had two effects. It was broad enough to embrace what States regarded as being matters of domestic jurisdiction, and equally importantly, it left the decision as to what matters fell within this domain entirely in the hands of individual States. The result was that a State that wished to avoid arbitral proceedings could simply invoke its reservation of vital interests, honor, and so forth, and refuse to arbitrate, without relying specifically on a domain of matters of domestic jurisdiction.

The reason for the reservation clauses being shackled in subjective

52. LEAGUE OF NATIONS COVENANT art. 15, ¶ 8; *see also supra* note 26 and accompanying text.

language was that in the 19th and early 20th century there was a conception of arbitration which asserted the absolute rights of States.[53] For voluntary arbitration to work, a theory of sovereignty was necessary, for only then could it be argued that there existed a community of independent and legally equal members. Yet sovereignty also meant retaining an ultimate choice of action and refusing, if a particular State thought fit, to become bound in advance to follow a designated course of action. How could the idea of obligatory arbitration be reconciled with the possession of inalienable sovereign rights? The answer lay in the notion of implied reservations discussed above.

Nevertheless, one area where the doctrine of reserved domain did establish itself was in respect of claims before arbitral tribunals for injuries to aliens. A number of the early treaties on arbitration were concluded specifically for the settlement of claims for injuries suffered by nationals of one of the contracting States for which the other State was allegedly responsible. By the time that the Covenant of the League of Nations was signed in 1919 the doctrine of domestic jurisdiction had become permanently established in international law as it is understood and invoked by States today. States still acted in ways that best protected and promoted their interests, but this was now reflected in the language of the Covenant. A despatch sent in 1925 by the Government of New Zealand to the Home Government contained the following extract indicating their fear of being deprived of their ultimate choice of action, but couched this time in more modern language. Once again, the subject was immigration and nationality:

> Whatever the jurists of Geneva may think, the law advisors of the crown in New Zealand believe that there is grave danger that the Court of International Justice at the Hague, consisting mainly of foreigners, might hold that the New Zealand law is contrary to the comity of nations, and that the New Zealand system is not a *question of merely domestic jurisdiction*. And our law advisors believe that, if a question arose for determination under the protocol, the permanent court might decide: firstly, that the right of foreigners to reside in New Zealand was not a matter exclusively within the jurisdiction of New Zealand, and secondly, that as a matter of international law we must admit them or reduce the restrictions on their admission.[54]

53. Robert R. Wilson, *Reservation Clauses in Agreements for Obligatory Arbitration*, 23 AM. J. INT'L L. 68, 71-72 (1929).

54. *Quoted in* LAUTERPACHT, *supra* note 49, at 150-51 (italics added).

It can be seen from this that there is, therefore, no inherent mystique about domestic jurisdiction, and still less so about nationality law being a matter that inherently falls under such jurisdiction. To demonstrate this point further we must look at some examples.

VI. THE TUNIS AND MOROCCO NATIONALITY DECREES AND THE NOTTEBOHM CASE

The *cause célèbre* on the relativity of so-called jurisdictional exclusivity is the Advisory Opinion of the Permanent Court of International Justice in the Tunis and Morocco Nationality Decrees in 1923.[55] This concerned a dispute between Great Britain and France over a provision in the French Decrees that were promulgated in 1921 in Tunis and the French zone of Morocco.

Britain objected to these Decrees, because Britain said that their effect was to convert certain British subjects, namely, the children of British subjects born in the zones and who were resident in Tunis and Morocco, into French nationals. Britain felt that both Tunis and Morocco were territories where His Majesty exercised jurisdiction, so the action by France was in violation of international law and comity. France's view was that questions of nationality were too intimately connected with the constitution of a State and that if Britain insisted on referring the dispute to the Council of the League, France would rely on the reservation of domestic jurisdiction in Article 15(8) of the Covenant.

After further discussions, it was decided to ask the Council to request the Court for an Advisory Opinion on the question of whether the dispute was or was not by international law solely a matter of domestic jurisdiction. In answering this question the Court drew the distinction between the accepted and acknowledged competence of a State in a certain field, with the question as to whether in exercising her competence the State was bound to have regard to extraneous matters. In a revealing statement, the Court declared:

> The question whether a certain matter is or is not *solely* within the 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 the Court, in principle within this reserved domain.
>
> 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

55. Tunis and Morocco Nationality Decrees (U.K. v. Fr.), 1923 P.C.I.J., Ser. B, No. 4 (Feb. 7).

> 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 . . . . 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.[56]

Waldock considers that "the conclusion was really inevitable that the boundary of the reserved domain of each State both changes with any development in general international law and is affected by the particular theory of law of that State."[57] But the ruling had important implications.

The Advisory Opinion by the Permanent Court brought the problem of domestic jurisdiction into its proper perspective as never before. The result was that when the Charter of the United Nations was drafted in 1948, Article 2(7), which replaced Article 15(8) of the Covenant of the League of Nations, omitted any reference to international law and replaced the word "solely" with "essentially" in respect of jurisdiction. Article 2(7) of the Charter reads: "*Nothing* contained in the present Charter shall authorize the United Nations to intervene in matters which are *essentially* within the domestic jurisdiction of any State or shall require the members to submit such matters to settlement under the present Charter . . . ."[58]

The question that now arises is whether this new provision materially affects the relationship between the sphere of domestic jurisdiction with international law as laid down in 1923. Most modern writers do not think so. Waldock believes that "[t]he criterion of the scope of the reserved domain under the Charter must still be found in international law and the only relevant inquiry . . . is whether international law contains any criterion determining the matters which are *in essence* matters of domestic jurisdiction."[59]

Waldock next makes the important point, however, that the Charter provisions on human rights are treaty provisions, thus the treatment by member States of individuals, whether nationals or aliens, within that jurisdiction is a matter of United Nations concern.[60] So what are these provisions that have such an impact on domestic jurisdiction? Chief amongst

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56. *Id.* at 24.
57. Waldock, *supra* note 23, at 110-11.
58. U.N. CHARTER art. 2, ¶ 7 (italics added).
59. Waldock, *supra* note 23, at 129.
60. *Id.* at 129-31.

them is Article 55 which reads:

> With a view to the creation of conditions of stability and well being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the U.N. shall promise:
> a) higher standards of living, full employment, and conditions of economic and social progress and development;
> b) solutions of international, economic, social, health and related problems; and international, cultural and educational co-operation; and
> c) universal respect for an observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.[61]

This is followed by Article 56 which solemnly adds that "all *members* pledge themselves to take joint *and separate action*, in co-operation with the organisation, for the achievement of the purposes set forth in Article 55."[62] This direct terminology places a clear and undoubted obligation on every country that is a member of the U.N. to abide by and uphold the standards specified in Article 55. The effect of this terminology on exclusive domestic jurisdiction is that, as Brownlie states, Article 2(7) of the U.N. Charter "is probably in substance a restatement of the classical rule."[63] Brownlie also feels that "the Liberal practice under Article 55 and 56 of the Charter could drastically change the concept of domestic jurisdiction. The extent to which 'defendant' states can now rely on some type of formal interpretation of Article 2, paragraph 7, is in doubt."[64] Professor Higgins goes further still and states that "the claim . . . that human-rights questions cannot be essentially within the domestic jurisdiction . . . seems justified, for Articles 55 and 56 impose specific legal obligations by which all states are bound, Article 2(7) notwithstanding."[65] In the same way, O'Connell considers that Article 2(7) has, in practice, been emasculated, because member States have been induced to conform to the United Nations' policies when they are not, in strict law, required to conform.[66]

The human rights limitation, however, is not the only limitation that States need now concern themselves with. We have so far only looked at the

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61. U.N. CHARTER art. 55.
62. *Id.* art. 56 (italics added).
63. BROWNLIE, *supra* note 11, at 552.
64. *Id.* at 553-54.
65. ROSALYN HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED STATES 128 (1963).
66. D.P. O'CONNELL, INTERNATIONAL LAW 308 (2d. ed. 1970).

constraints existing within the notion of domestic jurisdiction. However, there also is a constraint inherent in a conception of nationality law itself as propounded by international law. Despite the Advisory Opinion in the *Tunis and Morocco Decrees* case that "in the present state of international law, questions of nationality are . . . in principle within this reserved domain,"[67] it appears that international law does *have* a view as to how and to what end the concept of nationality law may be employed. This is seen in the *Nottebohm Case*[68] in 1955, where the Court first defined nationality and then proceeded to prescribe a limitation to it. The Court defined nationality as "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."[69]

This would surely mean that the Hong Kong Chinese have a "genuine connection of existence" with Britain in the same way as the Falkland Islanders do. The Court then correspondingly prescribed a limitation by saying that States are under no duty to recognize a nationality acquired by a person who has no genuine link or connection with the naturalising State – although this has been criticized.

Nottebohm was a German businessman living in Guatemala for thirty-four years. When the Second World War broke out, Guatemala sided with the Allies and Nottebohm applied for the nationality of Liechtenstein, a neutral country. This could not be granted unless an applicant was resident in Liechtenstein for at least three years. However, this condition was waived under a provision of the Liechtenstein Nationality Law of 1934. Nottebohm paid substantial fees for a Liechtenstein passport. Nevertheless, when Nottebohm returned to Guatemala in 1940 to resume his business activities, he was interred as an enemy alien and his property expropriated under a retroactive Guatemalan enactment. When the war ended, Liechtenstein demanded that Guatemala provide restitution and compensation for all the unlawful measures taken against its national. However, the Court held that the unilateral act performed by Liechtenstein did not warrant recognition. Yet the irony was that under German law Nottebohm lost his German nationality when he applied to be naturalized in Liechtenstein. The decision has been criticised on the grounds that:

> Until now, it had been sufficient for the claimant state to prove that nationality had been conferred by means of a valid act in accordance with municipal law. The existence of a bond between the state and

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67. Tunis and Morocco Nationality Decrees, *supra* note 55, at 24; *see also supra* note 56 and accompanying text.

68. Nottebohm Case (Liechtenstein v. Guatemala), 1955 I.C.J. 4 (Apr. 6).

69. *Id.* at 23.

> the individual was required only when a person concerned possessed a second nationality, or when the state asserting the claim made someone its national without his consent, or when the circumstances under which the nationality was granted violated settled usage on the international level, accepted as law.[70]

Yet the Court reached the decision that it did because, as we have seen, it did not feel that naturalization was granted to Nottebohm in accordance with the generally recognized principles of international law regarding nationality. Rightly or wrongly, therefore, international law had a conception of nationality which it applied in this case. It had a view as to the basic purposes that a law on nationality should serve. The matter has been expressed more clearly by P. Weis:

> Once municipal law . . . takes away from the meaning given to nationality, according to municipal law elements which are essential under international law, such municipal law is inconsistent with international law: its definitions of nationals must be disregarded when the nationality status of an individual has to be determined for the purpose of international law.[71]

In this sense international law has a primacy and pre-eminence that overrides the exclusive domestic jurisdiction of a State to determine its nationality. This primacy was recognized most clearly by Oppenheim in the first edition of his book on international law in 1905: "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."[72]

This is especially apt because this, after all, is what will happen to the Hong Kong Chinese. Yet as Oppenheim explains, for all international purposes all distinctions "between different kinds of subjects have neither theoretical nor practical value."[73] Except, of course, where a change is made pursuant to a treaty obligation. For it must be true that just as the Court in *Nottebohm* held that a unilateral act in the grant of nationality could not be valid, so also must a unilateral withdrawal of nationality be invalid. Indeed, Cordova, who succeeded Manley O. Hudson as special rapporteur for the International Law Commission on Nationality, made the following observations in his first report which are worth quoting at length:

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70. *See International Law – Limitation on the Right of a State to Claim Diplomatic Protection for Naturalized Citizens*, 31 N.Y.U. L. REV. 1135, 1137 (1956).

71. WEIS, *supra* note 9, at 6-7.

72. L. OPPENHEIM, INTERNATIONAL LAW 348-49 (1905) (italics added).

73. *Id.* at 349.

> 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.
>
> In the present state of international law it is not, therefore, unwarranted to affirm that the right of an individual State 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.[74]

The Hong Kong Chinese are having their status of nationality withdrawn or altered for the worse in a way that cannot be valid under international law.

VII. CONCLUSIONS

This is an area of much ambivalence and antithetical doctrines. International law must make its position abundantly clear. It must forge ahead. It must not hold back. It must be enforced. The problem of statelessness has been such in the modern world that its "very urgency and acuteness"[75] prompted the early insertion of Article 15 into the Universal Declaration of Human Rights of December 1948 that states that "everyone has the right to a nationality," and that "no one shall be arbitrarily deprived of his nationality."[76]

International law has tried to make some progress through treaty provisions adopted at the Hague Codification Conference in 1930, in Articles 13 and 15 of the Convention on the Conflict of Nationality Laws,[77] and in the Protocol Relating to a Certain Case of Statelessness.[78] Also, in New

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74. *Documents of the Fifteenth Session including the Report of the Commission to the General Assembly*, [1963] 2 Y.B. Int'l L. Comm'n 162, U.N. Doc. A/CN.4/SER.A/1963/ADD1.

75. J.G. STARKE, INTRODUCTION TO INTERNATIONAL LAW 6-7, 27 (1950).

76. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810, art. 15 (1948).

77. Convention on Certain Questions Relating to the Conflict of Nationality Laws, Apr. 12, 1930, arts. 13, 15, 179 L.N.T.S. 89.

78. Protocol Relating to a Certain Case of Statelessness, *opened for* signature Apr. 12, 1930, 179 L.N.T.S. 130.

York on August 30, 1961, a Convention on the Reduction of Statelessness[79] was adopted. But these provisions have not had an impact on the reduction of statelessness or on the observance of international law norms, because the prevailing view – born out of the history of an absolute right of States – has given primacy to the doctrine of exclusive domestic jurisdiction.

That is a conception the literal meaning of which is ill-suited to this jurisdiction. As a concept, the notion of exclusivity ought to be formally abandoned in international law if it has not – as the Nottebohm Case demonstrates – already been in practice. It is in truth only so-called. It is as well to recognize, as Brownlie does, the fact that domestic jurisdiction is not very fruitful and that as a notion in international law the "reserved domain is mysterious only because many have failed to see that it really stands for a tautology."[80] In reality, it is "a source of confusion" and as such "it deserves some consideration"[81] which it is hoped this article has given. But it is quite inconsistent with the view of the individual in international law.

The individual is now the subject of international law and not merely its object. The orthodox positivist doctrine that only States are subjects of international law is outdated.[82] As Lauterpacht explains, the modern position has "been obscured by the failure to observe the distinction between the recognition, in an international instrument, of rights enuring to the benefit of the individual and the enforceability of these rights at his instance."[83] One has only to look at Article 55(c) of the U.N. Charter and the requirement therein of a "universal respect for an observance of human rights and fundamental freedoms for all"[84] to see how true this is.

In the conditions of the modern world, where large parts are in upheaval and where so much is uncertain, this can have very real consequences. As Brierly stated: "Australian immigration is a matter of domestic jurisdiction, but so too were the Armenian massacres; and it is preposterous to speak as though these two matters must necessarily both be dealt with on the same principle . . . ."[85] Writing before the Second World War and before the U.N. Charter he accepted that even questions of immigration, tariffs, and naturalization can "shade off into others of a more contentious kind, such as the treatment of racial or linguistic or religious minorities, misgovernment producing repercussions in other states, selfish exploitation of undeveloped

79. Convention on the Reduction of Statelessness, Aug. 30, 1961, 360 U.N.T.S. 117.
80. BROWNLIE, *supra* note 11 at 293.
81. *Id.* at 292.
82. LAUTERPACHT, *supra* note 33, at 6-7.
83. *Id.* at 27.
84. U.N. Charter art. 55(c); *see also supra* note 61 and accompanying text.
85. Brierly, *supra* note 12, at 18.

countries, . . . and innumerable others."[86] In the "new world order" that has followed the collapse of the Berlin Wall, the transfiguration of nation States and the wholesale movements of populations across frontiers demands a renewed response from international law — not a reassertion of age-old doctrines of State sovereignty.

86. *Id.* at 14.