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PART VII
STATE RESPONSIBILITY

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I TREATMENT OF PERSONS

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CHAPTER I

IN RE FRIEDRICH NOTTEBOHM

Editor's note The *Nottebohm* case between Liechtenstein and Guatemala (*I.C.J. Reports* 1955, p. 4) is best known as the case in which the International Court of Justice developed the concept of 'genuine connection' as a factor affecting the obligation of one State to recognize the validity of a naturalization granted by another. Though the reasoning of the Court's approach was criticized at the time (e.g. by Mervyn Jones in the *I.C.L.Q.* 5 (1956)), the concept has commended itself to the international community in the context, for example, of the nationality of ships. See, especially, the separate opinion of Judge Jessup in the *Barcelona Traction* case: *second phase*, *I.C.J. Reports* 1970, pp. 186–8.

The fact remains, however, that the extension by the Court of the notion of the genuine link to naturalization, as opposed to the determination of effective nationality in cases of dual nationality, represented an unexpected development in the law. This is to some extent illustrated by the present chapter, which consists of an opinion on the position of Mr Nottebohm which Lauterpacht prepared for the Government of Liechtenstein. The opinion contains no suggestion that the concept of the genuine link might be relevant in a case of naturalization. The thought clearly did not occur to Lauterpacht, who carefully canvassed other possible grounds on which the effectiveness of Mr Nottebohm's nationality might in theory be challenged.

Lauterpacht made no public comment on the case. The last edition which he prepared of volume 1 of Oppenheim's *International Law* was completed before the date of the Court's judgment. And the other work of Lauterpacht in which one might have expected to find some reference to the decision, namely, *The Development of International Law by the International Court*, which was published in 1958, contains in its preface the statement that: '... I have considered it proper not to comment upon or refer to any of the judgements . . . given by the Court since I became one of its members.' Though Lauterpacht did not sit in the second phase of the *Nottebohm* case, in which the judgment was rendered on 6 April 1955, he had been elected to the Court in the preceding September and had assumed his duties in February 1955.

The opinion is undated. In the last paragraph, however, there is a suggestion that if the Government of Guatemala fails to give satisfaction to the Government of Liechtenstein, proceedings should be commenced before the International Court of Justice 'not later than 1 May 1950'. As

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the opinion also refers to a Guatemalan Law of 25 May 1949, it is clear that it must have been written between those two dates – probably in the early months of 1950.

Lauterpacht prepared the Application instituting proceedings in the case, which was dated 20 December 1951. Thereafter, he did not participate in the case, as he retired from the Bar early in 1952.

Permission to print the opinion has kindly been given on behalf of the Principality of Liechtenstein by Dr E. H. Loewenfeld, who acted as solicitor and agent for the Principality in the *Nottebohm* case.

I

1 I have been asked for an opinion on the legal issues arising from the detention and internment in Guatemala of Mr Friedrich Nottebohm, a national of Liechtenstein, and from the attempted confiscation of his property by the Guatemalan Government. I am also requested to advise on the remedies open to the Government of Liechtenstein.

2. There has been no previous correspondence on this subject between the Governments of Liechtenstein and Guatemala and the present opinion is accordingly based on the statement of facts as suggested to me on behalf of Mr Friedrich Nottebohm.

II THE FACTS

3 Mr Friedrich Nottebohm is a national of Liechtenstein at present resident in Vaduz, in the Principality of Liechtenstein. He became a national of Liechtenstein on 13 October 1939 in accordance with the Liechtenstein Law of 10 January 1934 concerning acquisition of nationality. Although he was associated with Liechtenstein in various ways and although he appears to have, prior to his naturalization, paid frequent visits to Liechtenstein, he was at the time of his naturalization domiciled in Guatemala where he had resided since 1906. He was a German national by birth. In the special circumstances of the case the Liechtenstein Government, in granting his naturalization, applied section 6(d) of the Law of 1934 which, while providing that a person seeking naturalization must have resided at least three years in Liechtenstein, permitted of exceptions to be made from that requirement of residence in special cases.

4 It appears from Article 25 of the German Nationality Law of 22 July 1913 that as the result of the acquisition of Liechtenstein nationality Mr Friedrich Nottebohm lost his German nationality. It

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appears also from the documents submitted to me that after the acquisition of Liechtenstein nationality he was constantly treated both by Liechtenstein and by Switzerland, through which he repeatedly passed, as a Liechtenstein national. On 5 February 1940 he was duly registered by the Guatemalan authorities as a national of Liechtenstein. He continued to reside in Guatemala until 20 November 1943 when, after having been arrested on the previous day, he was taken on board an American vessel to the United States and interned there. Guatemala entered the war at the end of 1941.

5 Some time after the beginning of his internment – apparently at the beginning of 1944 – the property, moveable and immovable, of Mr Friedrich Nottebohm was sequestrated. In so far as the Guatemalan authorities supplied an explanation of the measures taken against Mr Friedrich Nottebohm, they referred to the fact that he had been put on the British and American black list. It may be noted in this connection that on 7 March 1944 the following document was issued by the civil attaché to the British legations in Central America:

As civil attaché to His Britannic Majesty's legations in Central America, I conducted a thorough investigation into the firm of Nottebohm Hermanos and its directors. The business transactions of the firm since August 1939 up to September 1943 were scrutinized by myself and by a chartered accountant, and we were unable to find any instance of the firm having aided the enemy. As the result of the investigation I was satisfied that the charges made against Nottebohm Hermanos, which resulted in its being placed on the Statutory List in 1939, were based on erroneous evidence or on confused statements given in good faith. – At the same time I conducted an investigation into the life of the partners, Frederico Nottebohm and Karl Heinz Nottebohm, and came to the conclusion that neither had aided the Nazis in a business or private capacity. From the investigations and from personal knowledge of the partners I am of opinion that they should not be considered Nazi sympathizers.

Signed Arthur Neale.

About the same time, on 7 March 1944, a document to similar effect was issued by the Swiss consul in Guatemala.

6 On 26 January 1946 the legal representatives of Mr Friedrich Nottebohm were informed that his registration as Liechtenstein national was cancelled by the Foreign Ministry of Guatemala apparently in pursuance of a provision of a Guatemalan law which provides that registered aliens whose absence from the country

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exceeds two years must re-register. While this aspect of the factual situation – in particular the relevant dates – is not quite clear, it appears that as the result of the cancellation of his registration as a national of Liechtenstein Mr Friedrich Nottebohm was subsequently refused permission to re-enter Guatemala.

7 During all this period he was deprived of his property. A list of these assets, as submitted to me, shows that their total value is estimated at \$1,509,566 (or Swiss Francs 6,491,133). It is also estimated that the normal annual income from these assets is in the neighbourhood of \$70,000.

8 Some time in 1948 the Guatemalan Government published a draft of a law providing, in effect, for the confiscation of the property of aliens who on 7 October 1938 were nationals of a State which subsequently was engaged in war against the Allies or who were placed on the American black list. That draft, which in its original form was apparently vetoed by the President of Guatemala, became subsequently law on 25 May 1949 (*Ley de Liquidacion Asuntos de Guerra*). The law apparently provides for the possibility of recourse to judicial and other organs with the view to proving that a person *prima facie* affected by its operation falls within some of the complicated exceptions exempting his property from confiscation. It is understood that the legal representatives of Mr Friedrich Nottebohm in Guatemala have been pursuing, so far without success, the remedies nominally open to them under the Confiscation Law of 1949.

9 It is not clear whether the continued sequestration of the property of Mr Friedrich Nottebohm is now taking place by virtue of the provisions of the Confiscation Law of 1949 or of previous war-time legislation affecting alien enemies.

10 The above exposition of facts is based on statements supplied to me on behalf of Mr Friedrich Nottebohm. No authoritative statement on behalf of the Guatemalan Government has been laid before me and I am therefore unable to judge to what extent the position as recounted by Mr Friedrich Nottebohm and by his representative corresponds to fact. The present opinion is based on the assumption that the statements supplied to me are substantially correct. They involve, on the face of it, the question of the treatment by Guatemala of a national of Liechtenstein, an independent sovereign State.

IN RE *FRIEDRICH NOTTEBOHM*

III. THE LAW

(a) The question of nationality

11 It is not clear from the documents as submitted whether the measures taken by the Government of Guatemala against Mr Friedrich Nottebohm were taken and are being taken against him notwithstanding his Liechtenstein nationality or whether the Government denies that he now possesses or ever validly acquired the nationality of Liechtenstein. Whatever may be the attitude of the Guatemalan Government in the matter, it is of importance to ascertain whether, as a matter of international law, Guatemala is under an obligation to consider and to treat Mr Friedrich Nottebohm as a national of Liechtenstein.

12 I am of the opinion that, on the facts as submitted to me, Mr Friedrich Nottebohm must be considered as being a national of Liechtenstein and as not being a national of any other State. He seems to have validly acquired the nationality of Liechtenstein. As the result of the acquisition of the nationality of Liechtenstein he seems to have effectively lost his German nationality by virtue of German law. There is no evidence to show that, having once become a national of Liechtenstein, he has done anything to divest himself of it or to retain German nationality.

13 The question must now be considered whether Guatemala is under an obligation to recognize the change, which took place in October 1939, in the nationality of Mr Friedrich Nottebohm and, in particular, whether Guatemala is bound to recognize and treat Mr Friedrich Nottebohm as a national of Liechtenstein. In general, there ought to be little doubt that Guatemala is under an obligation of that nature. It is an accepted rule of international law that the conferment of nationality is a matter within the exclusive competence of the State concerned subject to such limitations as may follow from customary international law, from treaties, and from general principles of law. Unless Guatemala is in the position to show that the conferment of Liechtenstein nationality upon Mr Friedrich Nottebohm was at variance with the restrictions thus imposed by international law, she is bound to treat him as a Liechtenstein national. The fact that by registering him as a Liechtenstein national she did in fact recognize him as such is directly relevant to the matter. I am not expressing an opinion on the question whether by thus recognizing Mr Friedrich Nottebohm as a Liechtenstein

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national Guatemala is irrevocably estopped from challenging his Liechtenstein nationality or whether she may be permitted to do so on the ground of evidence, subsequently discovered, that the conferment of Liechtenstein nationality upon Mr Friedrich Nottebohm was contrary to customary international law or to any treaties existing between the two countries or to general principles of law. It does not appear that, so far, Guatemala has relied on any such evidence.

14 In this connection reference may be made to the question whether Guatemala is entitled to refuse to recognize the Liechtenstein nationality of Mr Friedrich Nottebohm on the ground that it was acquired at a time when Germany, of which he had been a national, was at war. There is clearly no rule of international law which prohibits the renunciation of nationality at a time when the State of origin of the person concerned is at war. Undoubtedly the law of some States – such as Great Britain – prohibits the subject of the State to assume, during the war, the nationality of the enemy. (Although it will be noted that even in such cases English courts have refused to recognize the change of nationality thus effected only so far as English law is concerned. They have acted on the view that for other purposes – in particular in connection with international treaties – the change thus effected must be treated as valid.) Also, a State which is a belligerent, does not act contrary to international law if it refuses to recognize the right of alien enemies to change their nationality during the war either by their own action or as the result of the action of their State. None of these circumstances existed in connection with the assumption of Liechtenstein nationality by Mr Friedrich Nottebohm. Guatemala was not a belligerent at the time of the naturalization of Mr Friedrich Nottebohm. She did not become so for another two years.

15 Undoubtedly, although, with the possible exception of its own nationals, a State is bound to recognize the nationality conferred by another State – this does not mean that it is not entitled to deny that the person in question is in fact and law the national of that State. It is, for instance, not sufficient for Liechtenstein to say that Mr Friedrich Nottebohm is a Liechtenstein national and that Mr Friedrich Nottebohm has validly acquired Liechtenstein nationality. It is open to Guatemala to maintain that according to Liechtenstein law Mr Friedrich Nottebohm never acquired Liechtenstein nationality or that, after having acquired it, he lost it as the result of Liechtenstein law. If the assertion of a State that a person is its national and

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that therefore it is entitled to protect him diplomatically and before international tribunals were conclusive, the rule of nationality of claims – which is still a rule of international law – would be of very limited importance. It would be sufficient for a State to assert that a person is its national and thus to acquire absolutely the right to protect him regardless of the rule of nationality of claims. International arbitral practice provides sufficient authority in support of the view that a State is entitled to challenge the acquired foreign nationality of a person on the ground that such nationality was not in fact acquired in accordance with the law of the naturalizing State or that it was lost subsequently to it. It does not appear that, so far, Guatemala has put forward or substantiated any contention to that effect. So long as she has not done so, she is under a legal duty to treat Mr Friedrich Nottebohm as a national of Liechtenstein.

16 For these reasons – as already stated – I am not decisively impressed by the possible argument that as the Guatemalan Government recognized Mr Friedrich Nottebohm as a Liechtenstein national by entering him in the list of foreigners in his capacity as a Liechtenstein national it was at any subsequent date estopped from denying his Liechtenstein nationality. In my opinion if the Guatemalan Government had rightly come to the conclusion that Mr Friedrich Nottebohm never in fact acquired Liechtenstein nationality according to Liechtenstein law or that he subsequently lost it according to Liechtenstein law then it would not have been bound to continue to regard him as such. The legal position is, in this respect, the same as with regard to any evidence, subsequently discovered, that the conferment of Liechtenstein nationality upon Mr Friedrich Nottebohm was contrary to international law. However, the burden of proof of substantiating any such assertion would rest upon the Guatemalan Government.

17 Occasionally – though not frequently – the courts of some States have refused to recognize a change of nationality if it was effected *in fraudem legis* as, for instance, in order to circumvent the law of the State in the matter of divorce. There are also indications that some mixed arbitral tribunals after the First World War were inclined to disregard a change of nationality effected with the view to escape the operation of the clauses of the Peace Treaties. None of these circumstances appears in the present case.

18 I am not of the opinion that an international tribunal would regard a change of nationality on the part of Mr Friedrich Nottebohm as being *in fraudem legis* on the ground that he apprehended the

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possibility – which did not materialize till 1941 – of Guatemala becoming a belligerent on the side of the United States (which latter country was in 1939 emphatic in its declarations of the resolve to continue a policy of neutrality). It is possible – although there is no proof of that – that Mr Friedrich Nottebohm apprehended that possibility and that by acquiring Liechtenstein nationality in accordance with Liechtenstein law he intended to avoid the disabilities resulting from his German nationality. This would have constituted the legitimate exercise of foresight on the part of a businessman and no international tribunal could properly regard it as a naturalization *in fraudem legis*. It will be noted, on the other hand, that that renunciation of German nationality in October 1939 could have implied an act of deliberate dissociation from the National-Socialist régime. In any case no such charge of naturalization *in fraudem legis* occurred to the Guatemalan Government when she recognized in 1939 the change of nationality on the part of Mr Friedrich Nottebohm.

19 The preceding observations lead me to the conclusion that since October 1939 Mr Friedrich Nottebohm was a Liechtenstein national according to the law both of Liechtenstein and Guatemala as well as according to international law, and that when in 1941 Guatemala entered the war he became the national of a neutral State, and that he was entitled to be treated as such. There is no evidence to show that facts occurred which gave the Government of Guatemala the right to discontinue to regard him as a national of Liechtenstein and of a neutral State.

20 It must now be considered whether the conduct of the Guatemalan Government towards Mr Friedrich Nottebohm as an alien and neutral subject has been in accordance with international law. This question may be considered under four heads: (i) the treatment of Mr Friedrich Nottebohm and his internment during the time of Guatemalan belligerency; (ii) the refusal of the Government of Guatemala to allow him to return to Guatemala subsequent to his internment in the United States; (iii) the sequestration; and (iv) the attempted confiscation of his property. These questions will now be treated in turn.

(b) Liability for the internment of a neutral subject

21 On the facts as submitted to me I am of the opinion that the conduct of the Guatemalan Government in interning a neutral national, in deporting him to a foreign country and in permitting his