Freedom of States to Regulate Nationality: European Versus International Court of Justice?

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1 The *Nottebohm* Judgment of the International Court of Justice

> (…) international law leaves to each State to lay down the rules governing the grant of its own nationality (…) a State cannot claim that the rules it has thus laid down are entitled to recognition by another State unless it has acted in conformity with this general aim of making the legal bond of nationality accord with the individual's genuine connection with the State.

These *dicta* were rendered by the International Court of Justice (ICJ) in its famous 1955 judgment in the *Nottebohm* case (second phase) (hereinafter *Nottebohm* judgment).[1] In these *dicta*, the ICJ primarily reaffirmed the discretion of States to prescribe the conditions for granting their nationality. However, in the same *dicta* the Court also emphasized the relevance of international law in this matter when other States are involved, especially in the field of diplomatic protection.

Almost 60 years have gone by from when this judgment was rendered. Leaving aside the inquiry into the current role of nationality in the field of diplomatic protection,[2] it may be wondered whether nationality is still part of domestic jurisdiction, and which is the role of the principle of effective nationality.

[1] ICJ: Nottebohm (Liechtenstein v. Guatemala), Judgment (6 April 1955), p. 23.

[2] The "standard" circumstances for the exercise of diplomatic protection in favour of stateless individuals, refugees and others persons are well known: see Bariatti 1993, p. 85 ff. In addition to these, an extension of the exercise of diplomatic protection has been maintained: see *ex multis* Koojmans 2004; Milano 2004; Pustorino 2006; Papa 2008; Gaja 2010.

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N. Boschiero et al. (eds.), *International Courts and the Development of International Law*, DOI: 10.1007/978-90-6704-894-1_59,

As for the latter issue, it must be borne in mind that the prerequisite for a genuine link between an individual and a State of which the individual is exclusively a national, as required in the *Nottebohm* judgment, has been strongly criticized in the literature and by subsequent judicial practice.[3] Pursuant to the prevailing opinion, in the *Nottebohm* judgment the Court was influenced by the factual context of the situation, given that Liechtenstein granted its nationality *mala fide*. In fact, the Court pointed out, on the one hand, Nottebohm's "extremely tenuous" connections with the Principality and, on the other, "the existence of a long-standing and close connection between him and Guatemala".

The peculiar nature of this part of the decision has recently been confirmed by the commentary to Article 4 of the Draft Articles on Diplomatic Protection, laid down by the International Law Commission of the United Nations.[4]

Article 4 does not require a State to prove an effective link with its national as an additional factor for the exercise of diplomatic protection, when a national possesses one nationality only.[5]

In any event, the issue of a necessary genuine link has been addressed also with reference to nationality of corporations[6] and of ships, albeit in different terms and sometimes with different solutions. As for ships, the interpretation of the necessary genuine link rendered in the judgment of the International Tribunal on the Law of

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[3] See primarily *Nottebohm*, supra n. 1, Dissenting Opinions of Judges Klaestad, Read and Judge *ad hoc* Guggenheim. The rich literature on this decision is referenced in Weis 1979, pp. 318–321. With a few exceptions, such as De Visscher 1956, Bastid 1956, and more recently Donner 1984, p. 94 ff., Panzera 1984, pp. 91 ff. and 251 ff., the majority of authors have criticised the *Nottebohm* judgment: v. *ex multis* Makarov 1956, Jones 1956, Maury 1958, Knapp 1960, Kunz 1960. These criticisms appear to have not changed with time, as confirmed by the broad survey carried out by Dugard in its First Report, infra n. 11, p. 37 ff. Furthermore, the "genuine link" principle has been expressly rejected in the *Flegenheimer* case (Conciliation Commission established pursuant to Article 83 of the Treaty of Peace with Italy of 10 February 1947: Flegenheimer (United States v. Italy), Decision (20 September 1958)). Like the *Nottebohm* case, the *Flegenheimer* case addressed the diplomatic protection of an individual with a single nationality.

[4] International Law Commission, Draft Articles on Diplomatic Protection with Commentaries, UN Doc. A/61/10 (2006), hereinafter Draft Articles on Diplomatic Protection. With the resolution 65/27 of 6 December 2010 this item was included in the provisional agenda of the fifty-eighth session of the General Assembly.

[5] See the wording in Draft Articles on Diplomatic Protection, supra n. 4, Article 4 and relating commentary.

[6] See the well-known debate concerning ICJ: Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (second phase), Judgment (5 February 1970) also pointed out in the Draft Articles on Diplomatic Protection, supra n. 4, Article 9 and relating commentary and notably in the ILC, Third Report on Diplomatic Protection by Mr. John Dugard, Special Rapporteur, UN Doc. A/CN.4/523 (7 March 2002), p. 2 ff. In its recent judgment in the *Diallo* case, the Court has further ruled out that shareholders injured by a wrong done to the company are entitled to compensation (ICJ: Ahmadou Sadio Diallo (Guinea v. Democratic Republic of the Congo), Judgment (30 November 2010), para 156). See also ICJ: Ahmadou Sadio Diallo (Guinea v. Democratic Republic of the Congo), Judgment (24 May 2007). Cf. Vermeer-Künzli 2007; Andenas 2011.

the Sea in the *Saiga (no. 2)* case[7] remains of paramount importance. As is well known, Tullio Treves relied upon his scholarship and the experience he has gained within the Third United Nations Conference on the Law of the Sea in the laying down of this judgment, as well as of subsequent decisions.[8] These pages are dedicated to him, with consideration and affection.

In spite of the foregoing, the principle of effective (or active) nationality has been evoked by judicial and arbitral courts in situations of the double or plural nationality of individuals, mainly for the aim of determining which State is entitled to the exercise of diplomatic protection against a third State.[9] The Draft Articles on Diplomatic Protection do not require such a prerequisite (see esp. Article 6).[10] On the contrary, recalling recent (although largely contested) case law, Article 7 of the Draft Articles allows the State of "predominant" nationality to bring a claim against a State of which the injured person is also a national.[11]

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[7] ITLOS: M/V "Saiga" (no. 2) (Saint Vincent and the Grenadines v. Guinea) Judgment (1 July 1999). Pursuant to the ITLOS, the purpose of the provisions of 1982 Montego Bay Convention on the Law of the Sea providing for the need for a genuine link between a ship and its flag State "is to secure more effective implementation of the duties of the flag State, and not to establish criteria by reference to which the validity of the registration of ships in a flag State may be challenged by other States" (para 83).

[8] I will here recall, for all, Tullio Treves' Separate Opinion in the Judgment to the "Grand Prince" judgment (ITLOS: "Grand Prince" (Belize v. France), Judgment (20 April 2001)). In examining the question of the relevant time for the status of the applicant State as the flag State of the vessel, Treves held that Article 292 of the Montego Bay Convention relating to proceedings of prompt release, if considered as a whole, "establishes, for limited purposes, a form of diplomatic protection". See also, in general, Treves 2004, p. 179 ff.

[9] See for example the decision of the Yugoslav-Hungarian Mixed Arbitral Tribunal: Baron Frederic de Born v. Yugoslavia, Case no. 205 (12 July 1926) and, more recently, Marc Dallal v. Iran, 53-149-1, Award (10 June 1983). Comp. also Article 5 of the Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws (The Hague, 13 April 1930; entered into force on 1 July 1937, hereinafter 1930 Hague Convention) and Article 4.b of the "Resolution on The National Character of an International Claim Presented by a State for Injury Suffered by an Individual" adopted by the Institute of International Law at its Warsaw Session in 1965.

[10] Paragraph 1 allows a State of nationality to exercise diplomatic protection in respect of its national even where that person is a national of one or more other States. Like Draft Article 4, Article 6.1 does not require a genuine or effective link between the national and the State exercising diplomatic protection.

[11] As is well known, this rule stems from the renowned claim in the *Mergé* case (Conciliation Commissions established pursuant to Article 83 Treaty of Peace with Italy of 10 February 1947: Mergé (United States v. Italy), Decision (10 June 1955)), as well as from about fifty similar claims decided by the Italian-United States Conciliation Commission (reprinted in International Law Reports 1955, p. 455 ff.); this rule was reaffirmed by both the Iran-United States Claims Tribunal in the equally renowned case Nasser Esphahanian v. Bank Tejarat, 31-157-2, Award (29 March 1983), and in several other cases (see Bederman 1993, p. 129) and by the United Nations Compensation Commission established by the Security Council to provide for compensation for damages caused by Iraq's occupation of Kuwait (UN Doc. S/AC.26/1991/7/Rev.1, 17 March 1992, para 11). Nonetheless, the role of the effective or dominant nationality in this circumstance is very much debated, as shown by the broad and careful examination carried out in ILC, First Report on Diplomatic Protection by Mr. John Dugard, Special Rapporteur, UN Doc. A/CN.4/506

In any event, the principle of active nationality—which is often described in terms of the "most real connection"—occupies a strong position in the field of the Private International Law of several States, especially with reference to the application of national law to nationals of two or more States. It is true, however, that the *lex fori* is sometimes held to prevail when the forum State's nationality concurs with the nationality of another State.[12]

2 The State's Freedom to Regulate Nationality in the International Practice

The principle of effective nationality does not entail, *per se*, a real limitation on the sovereign prerogative of each State in determining, according to its municipal law, who its nationals are. It is well known that the principle of the "reserved domain" of States in that matter (i.e. States' freedom to regulate nationality) was assessed by the Permanent Court of International Justice in 1923 (albeit with some inherent limits).[13] The absolute character of the principle of "reserved domain" was immediately trimmed down by the 1930 Hague Convention on Nationality.[14] After having reassessed the freedom of each State in this matter, Article 1 of this Convention prescribes, in fact, that the law of the State "shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality".[15] The peculiar wording of this provision has been mirrored in Article 4 of the Draft Articles on Diplomatic Protection.[16]

(Footnote 11 continued)
(7 March 2000), hereinafter Dugard First Report, pp. 42–54, to which reference is here made also for further case law and doctrinal publications.

[12] See for example Article 9.1 of 1978 Austrian Law on Private International Law, Article 5.1 of 1986 German Law, Article 23.2 of 1987 Swiss Law, Article 19.2 of 1995 Italian Law, Article 3.2 of 2004 Belgian Law. The two latter laws, together with the German law, also provide that the nationality of the forum prevails. For further references, see Davì 1994, p. 88 ff.

[13] PCIJ: Nationality Decrees issued in Tunis and Morocco, Advisory Op. (7 February 1923), p. 23 ff. (see also infra n. 15). The advisory opinion was also rendered in light of the general provision on matters falling "solely" within the "domestic jurisdiction" of States under Article 15.8 of the Covenant of the League of Nations. Such a provision has been reassessed in Article 2.7 of the Charter of the United Nations. On the relevance of these provisions in the present context see Weis 1979, p. 68 ff.

[14] Supra n. 9.

[15] Actually the PCIJ, too, in its advisory opinion in the *Nationality Decrees* case, supra n. 13, had acknowledged as a limitation to the freedom of States the possible existence of international treaties on nationality. As is rather obvious, the provision in Article 1 of the 1930 Convention has a broader scope. Cf. Verwhilgen 1999, p. 122 ff.

[16] This rule also lists some modes of acquiring nationality, e.g. by birth, descent, naturalization, succession of States, or in any other manner, as long as this is "not inconsistent with international law".

Particular attention should be devoted to the substantially identical provision in Article 3 of the European Convention on Nationality (Strasbourg, 6 November 1997).[17] This Convention, just like the 1930 Hague Convention, aims explicitly at codifying the international law rules on the nationality of individuals, in spite of its regional level and of its few ratifications.[18] Regardless of the few ratifications, many domestic laws on nationality, as is the case with the Italian law, comply *per se* with what is prescribed in the European Convention on Nationality.[19]

In light of the foregoing, it is necessary to verify whether rules of international customary law actually impose limitations on the discretion of States concerning the acquisition, retention, loss, and recovery of their nationality.

It is not a matter of drawing a distinction between the validity of a conferment of nationality on the level of domestic law and its opposability at the international level, especially in the field of diplomatic protection.[20] It is, rather, a matter of inquiring into the possible existence of rules of international customary law, and of inquiring whether these rules are capable of imposing general limitations on States, and have an impact on States' discretion, even when the granting or withdrawal of nationality by the former State is not being challenged by another State.

Such an ascertainment is not easy, due to the persistent reluctance of States toward a common *opinio iuris ac necessitatis* in these matters. Such an approach may, on the other hand, be justified because "every State must consist of a collection of individual human beings" determined by the State itself.[21] On the other hand, the European Convention on Nationality could not but respect the different choices of States in granting their nationality, for instance, by birth or by descent; a flexible regulation has been provided by the European Convention on Nationality

[17] Entered into force on 1 March 2000. This provision, too, holds in fact that each State "shall determine under its own law who are its nationals" (para 1); furthermore, "This law shall be accepted by other States in so far as it is consistent with applicable international conventions, customary international law and the principles of law generally recognised with regard to nationality" (para 2).

[18] The Explanatory Report of the Convention underlines, in particular "a need to consolidate in a single text the new ideas which have emerged as a result of developments in internal law and in international law". Only "some provisions (…) aim to contribute to the progressive development of international law on nationality, for example Chapter VI on State succession and nationality" (para 11). On the other hand, this Convention has been ratified by 20 governments: thus, less than half of the States that are members of Council of Europe. Moreover, there have been no accessions by non-member States, although accession is made possible by Article 28 also for those States that have not partaken in the Convention's drafting.

[19] The substantial identity in the content of the rules is clearly shown in the rules on the acquisition, retention, loss, and recovery of nationality provided in the Italian Law on Nationality, Law no. 91 of 5 February 1992.

[20] This distinction is often made in the analysis of the role of nationality in international law and in the comments on the *Nottebohm* judgment: see e.g. Weis 1979, p. 89 ff.; Carreau 2004, p. 49 ff., 223 ff.; Combacau and Sur 2004, p. 328 f.

[21] See Shaw 2003, p. 584.

also with reference to the acquisition of nationality by naturalisation.[22] In fact, the existence of an international customary principle concerning States' freedom in these matters has been recently reasserted.[23]

Vice versa, possible limitations to States' freedom in granting their nationality may be found in the international rules on the protection of human rights. Such rules may become relevant from two standpoints: the right to have a nationality, and the prohibition against discriminate. As for the former right, the scope of Article 15 of the Universal Declaration of Human Rights (Paris, 10 December 1948), that provides the right of everyone to have a nationality (para 1), together with the prohibition on States arbitrarily depriving individuals of their nationality and denying them the right to change their nationality (para 2), has been downsized by Article 24.3 of the International Covenant on Civil and Political Rights (New York, 16 December 1966).[24] Article 24.3 simply provides the right for every "child" to acquire a nationality; this right was subsequently reaffirmed at Article 7 of the United Nations Convention on the Rights of the Child (New York, 20 November 1989).[25]

The impact of Article 20 of the American Convention on Human Rights (San José, Costa Rica, 22 November 1969)[26]—that recaptures and extends the provision of Article 15 of the Universal Declaration—is much stronger.[27] Starting from an advisory opinion delivered in 1984, the Inter-American Court of Human Rights has often grounded its decisions based upon Article 20 of the American Convention on Human Rights; the Court, in fact, proclaimed that the right to nationality is an "inherent human right recognised in international law".[28] As for the [European] Convention for the Protection of Human Rights and Fundamental

[22] See respectively, Article 6 para 1, 2 and para 3. This latter provision only determines, for naturalisation, a maximum period of residence (10 years before the lodging of an application) which "corresponds to a common standard, most countries of Europe requiring between five and ten years of residence" (Explanatory Report, para 51). Hence, a State Party may fix other justifiable conditions for naturalisation (for example, as regards integration). As to the original acquisition of nationality, it is clear that neither of the two different modes provided by internal laws (that often overlap) satisfies *per se* the "genuine link" requisite (Supra Section 1).

[23] See in this sense, after a thorough examination of State practice and the opinions of authors, Dugard First Report, supra n. 11, p. 35; see also *ex multis* Kelsen 1932, p. 244; Giuliano 1981, p. 358 ff.; Carreau 2004, p. 346 ff.

[24] Entered into force on 23 March 1976.

[25] In general, on these rules (with the exception, of course, of the 1989 Convention), see Donner 1983, p. 147 ff.

[26] Entered into force on 18 July 1978.

[27] Compared to Article 15 of the Universal Declaration of Human Rights, para 2 of Article 20 of the American Convention on Human Rights provides an additional provision on the right of every person to the nationality of the State in whose territory he was born "if he does not have the right to have a nationality". See again Donner 1983, p. 172 f.

[28] The Court also held that the powers of States to regulate matters relating to nationality are circumscribed by their obligations to ensure the full protection of human rights: v. IACtHR: Proposed Amendments to the Naturalisation Provisions of the Constitution of Costa Rica, Advisory Op. (19 January 1984); see also Girls Yean and Bosico v. Dominican Republic, Judgment (8 September 2005); for further references, see Pustorino 2006, pp. 76–77, n. 23.

Freedoms (Rome, 4 November 1950; hereinafter ECHR),[29] it is not intended to apply to issues of nationality.[30] Accordingly, the European Court of Human Rights refrains from examining claims or those parts of claims that address questions of the nationality of individuals.[31]

The existence of an international customary right to nationality could, rather, be inferred from the multilateral conventions on statelessness, and especially from the Convention on the Reduction of Statelessness (New York, 30 August 1961; hereinafter 1961 Convention).[32] This Convention contains many provisions which seek to prevent statelessness, and it is considered as an instrument which implements the customary international rule on the obligation to avoid statelessness.[33] Although the domestic laws on nationality of many States follow such a regulation, several of those same States (such as Italy) did not yet ratify the 1961 Convention.[34] It is, nevertheless, also worth mentioning that a large number of States have ratified the Convention in the past 5 years.

The European Convention on Nationality provides a general safeguard against statelessness, not only with reference to acquisition but especially with reference to the loss of nationality *ex lege* or at the initiative of a State Party or the individual. Article 7, which was moulded on the 1961 Convention, aims at the prevention of an arbitrary deprivation of nationality, and it provides for as many as

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[29] Entered into force on 3 September 1953, amended by Protocol No. 11 (Strasbourg, 11 May 1994), entered into force on 1 November 1998 and Protocol No. 14 (Strasbourg, 13 May 2004), entered into force on 1 June 2010.

[30] The ECHR does not contain any such provisions. Moreover, no relevance may be given to Article 3 of Protocol No. 4 to the [European] Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the First Protocol thereto (Strasbourg, 16 September 1963), entered into force on 2 May 1968, which includes the right of nationals to enter and not to be expelled from the territory of the State of which they are nationals. Accordingly, the broad relevance given in the Explanatory Report to the 1997 European Convention on Nationality to the relevance of the principal rules of the ECHR (paras 16–19) seemed to be excessive: consequently, such rules rather address the rights acknowledged to foreign nationals residing in a State Party to the ECHR.

[31] See, e.g., ECtHR: Riener v. Bulgaria, 46343/99, Judgment (23 May 2006) and Kurić and others v. Slovenia, 26828/06, Judgment (13 July 2010)—not final: case refereed to the Grand Chamber; however, in Tănase v. Moldova [GC], 7/08, Judgment (24 July 2010), the European Court addressed the obligations imposed on this State Party by Article 17 of the 1997 European Convention concerning multiple nationality (see also the Chamber Judgment (18 November 2008) paras 47, 106 ff.).

[32] Entered into force on 13 December 1975. See Weis 1979, pp. 124 ff., 163 ff.; Donner 1983, p. 150 ff.; Marescaux 1984, p. 52 ff. and recently Spiro 2011, p. 18 ff. On the other hand, the obligation imposed on Contracting States by Article 32 of the United Nations Convention on the Status of Stateless Persons (New York, 28 September 1954, entered into force on 6 June 1960) is weak, where it provides that they shall "as far as possible facilitate (…) the naturalisation of stateless persons".

[33] See in this sense Explanatory Report to the European Convention on Nationality, para 33.

[34] The rules on the acquisition and loss of nationality, Italian Law no. 91 of 1992, supra n. 19, are in fact largely inspired by the principle of avoiding statelessness: on this issue see Clerici 1993, pp. 309 ff. and 317 ff.

seven cases of legitimate withdrawal. Both Article 7.3 and Article 8.1 (concerning the voluntary renunciation to nationality) provide that the persons concerned do not thereby become stateless, with one main exception that will be addressed later in this chapter.[35]

It seems to be somewhat easier to demonstrate the existence of a rule of international customary law that proscribes any discrimination in the regulation of modes of the acquisition, loss and recovery of nationality. The limitation on the freedom of States in this case is, in fact, supported by several international treaties other than those addressing the protection of human rights. Concerning this aim, the United Nations Convention on the Nationality of Married Women (New York, 20 February 1957),[36] where for the first time the incidence of the husband's *status civitatis* on the wife's nationality was proscribed, must be borne in mind.[37] This Convention's inspiring principle was later transposed in Article 9 of the United Nations Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 December 1979).[38]

Nonetheless, the prohibition against discrimination based on nationality has acquired a broader scope compared to the prohibition based on gender. A general "right to nationality" is in fact laid down in Article 5.d.iii of the International Convention on the Elimination of All Forms of Racial Discrimination (New York, 7 March 1966).[39]

On the one hand, Article 5.1 of the 1997 European Convention on Nationality, that expressly proscribes discrimination in the field of nationality on the grounds of sex, religion, race, colour or national or ethnic origin, appears to have been drafted in a certainly more detailed fashion. On the other hand, Article 5.2 shows a more flexible nature where it simply provides that each State "shall be guided" by the principle of non-discrimination between its nationals, whether they are nationals by birth or have subsequently acquired its nationality. The wording of Article 5.2 shows a simple declaration of intent as opposed to a mandatory rule to be followed in all cases. In this case, too, exceptions are allowed.[40]

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[35] Article 7.1.b of the Convention provides an exception to this guiding principle in the case of naturalised persons having acquired their nationality by means of improper conduct (see infra Section 5). Cf. Hall 1999.

[36] Entered into force on 11 August 1958.

[37] The impact of the 1957 Convention on the evolution of municipal laws in this field has been examined by Donner 1983, p. 159 ff.

[38] Entered into force on 3 September 1981. On this provision and on the measures provided by the Convention, see Marescaux 1984, p. 62 ff. The relevance of Article 9 of the Convention as a requirement for States to comply with international standards in the granting of nationality is also pointed out in Draft Articles on Diplomatic Protection, supra n. 4, Commentary to Article 4, pp. 12 and 14, see supra Section 1.

[39] Entered into force on 4 January 1969. Donner 1983, p. 153 ff., points out the broad scope of this provision.

[40] Cf. also para 46 of the Explanatory Report to the European Convention on Nationality that recalls Article 7.1.b of the Convention, supra n. 35.

Both these exceptions and the effort expended by the drafters of the Convention in listing examples of legitimate "distinctions"[41] also show how strong the sovereign prerogatives of the States still are in this matter.

3 The ECJ Facing the Positive Conflicts of Nationalities

As we will see,[42] in the European Union, too, Member States assert their own exclusive competence in regulating nationality. Such an autonomy has been repeatedly acknowledged by the European Union Court of Justice (ECJ).[43]

It is needless to underline here the peculiar nature of EU Law compared to that of other international organizations, especially with regard to the wide range of "freedoms" that EU Law guarantees to Member State citizens, as well as with regard to the "judicial activism" of the ECJ.[44] Suffice it to recall here that the sources of EU Law can be traced back to a series of international treaties and that EU Law has multiple interactions with international law.[45]

As for the criterion of effective nationality, the ECJ case law moves totally away from the case law of international courts. Unlike The Hague Court, the Luxembourg Court has tackled several "preliminary rulings" on the application of EU Law to individuals with two nationalities.

When facing positive conflicts of nationalities, the ECJ constantly refuses to apply the principle of effective nationality, although it is aware that this principle prevails both in international law and in the private international law of its Member States. Even back in the 1980s, when addressing claims for the payment of expatriation allowances filed by officials of the European Communities, the Court held that the concept of effective nationality, "mainly used in private international law", cannot be transferred to a quite different sphere, such as the Staff Regulations, for these officials.[46] Rather surprisingly, though, the same negative judgment was rendered 30 years afterwards in the field of private

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[41] Ibidem, para 42.

[42] Infra, Sections 4 and 5.

[43] As is well known, the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (Lisbon, 13 December 2007; hereinafter Lisbon Treaty), entered into force on 1 December 2009, changed many terms of the EU legal order. In directly quoting ECJ case law, it will, however, be necessary to use the previous terms.

[44] A rich and thorough examination of the different aspects is offered by the different contributions collected in Craig and De Búrca 2011.

[45] On such issues see recently Bergé and Forteau 2010.

[46] ECJ: Devred, née Kenny Levick, 257/78, Judgment (14 December 1979), para 14. This dictum was recently reiterated by the EU CST: Jessica Blais v. European Central Bank (ECB), F-06/08, Judgment (4 December 2008), para 108. On the ECJ case law on female officials who used to acquire *ipso iure* their husband's nationality, at times without being allowed to renounce it, cf. infra, Section 5.

international law. In the *Hadadi* judgment, the Court in fact underlined "the imprecise nature" of the concept of effective nationality, due to which "a whole set of factors would have to be taken into consideration, not always leading to a clear result".[47] As for the field of international law, Advocate General Tesauro, in the *Micheletti* case, has strongly pointed out that the origin of the problems relating to effective nationality lies in "a romantic period" of international relations and, in particular, in the concept of diplomatic protection.[48]

Nonetheless, if we consider the peculiar nature of primary and secondary EU Law, these rulings are substantially irrefutable. Leaving aside the specific rulings concerning the officials of the European Communities, it appears clear that the intent of the ECJ is to privilege, concerning individual nationals of both a Member State and a non-member country, the *status civitatis* of the former State. Such a status is in fact apt to ensure the different freedoms granted by the Treaty even in those cases where the status does not overlap with the effective nationality. The leading case in this matter is still the ECJ judgment in *Micheletti*, concerning the right of establishment (now Article 49 Consolidated Version of the Treaty on the Functioning of the European Union, 9 May 2008, entered into force the 1 December 2009; hereinafter TFEU) denied by the Spanish authorities to an Italian national *iure sanguinis* on the ground that this person also held the nationality of Argentina *iure soli* and was last resident in this non-member country. In the opinion of the Luxembourg judges, it is not permissible to interpret EC Law to the effect that, where a national of a Member State is also national of a non-member country, the other Member States may make the recognition of the status of the Community national subject to an additional condition.[49] A similar reasoning was given by the Court in the *Saldanha* judgment on the obligation of lodging a *cautio iudicatum solvi* imposed by the Austrian authorities on a national of both the United States of America and the United Kingdom, living in Florida.[50]

Moreover, the Court cannot avoid extending its preference for the "more favourable" nationality also in favour of nationals of both Member States, e.g.

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[47] ECJ: Laszlo Hadadi (Hadady) v. Csilla Marta Mesko, épouse Hadadi (Hadady), C-168/08, Judgment (16 July 2009), relating to nationality as a connecting factor in jurisdiction pursuant to Regulation (EC) No. 2201/2003 on the jurisdiction, recognition and enforcement of decisions in matrimonial matters and matters of parental responsibility. In this case, the Court correctly considered as equivalent the two Member State nationalities of both spouses. See Lagarde 2010a; Chalas 2010 and, excessively critical, D'Avout 2010.

[48] ECJ: Mario Vicente Micheletti and others v. Delegación del Gobierno en Cantabria, C-369/90 Op. of Adv. Gen. Tesauro (30 January 1992), p. 4255 f.

[49] ECJ: Mario Vicente Micheletti and others v. Delegación del Gobierno en Cantabria, C-369/90, Judgment (7 July 1992), para 11. See *ex multis* Jessurun d'Oliveira 1993, Iglesias Buhigues 1993 and, especially critical, Ruzié 1993.

[50] ECJ: Stephen Austin Saldanha and MTS Securities Corporation v. Hiross Holding AG, C-122/96, Judgment (2 October 1997); see Ackermann 1998.

with regard to the right to establishment and the freedom of movement for workers.[51]

Still with reference to the possession of the dual nationality of Member States, in the well-known case of *Garcia Avello*[52] the ECJ refused to evoke both the principle of effective nationality and the opposite principle of the prevalence of the nationality of the *forum*. The utilization of one or the other principle would in any case have led to the application of the Belgian rules on the surnames to two children having both Spanish and Belgian nationalities but residing in Belgium since their birth. The Court seemed to be aware of the provisions imposed by international law, and notably by Article 3 of the 1930 Hague Convention, under which a person having two or more nationalities may be regarded as a national by each of the States whose nationality he possesses. Nevertheless, in the ECJ's opinion, this rule does not impose an obligation, and rather simply provides an option for the Contracting Parties to give priority to the forum's nationality.[53] As usual, the Court seemed to favour the nationality that ensures the freedoms granted by the Treaty. In fact, the enjoyment of the right to bear only the surname which results from the application of the legislation of Spain—whose legislation was the first to determine the children's surname—avoids "serious inconvenience for those concerned at both professional and private levels" in the future.[54]

On the contrary, the ECJ tends to refrain from giving any indications as to the relevant nationality when it considers that the legal situation brought to its attention does not affect any fundamental freedoms of movement under the Treaty[55]; or again, as in *McCarthy* judgment, when the Court notices that the situation of a person "has no factor linking it with any of the other situations governed by European law and the situation is confined in all relevant respects within a single Member State".[56]

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[51] ECJ: Claude Gullung v. Conseil de l'ordre des avocats du barreau de Colmar et de Saverne, 292/86, Judgment (19 January 1988); Mr and Mrs Robert Gilly v. Dir. Services fiscaux Bas-Rhin, C-336/96, Judgment (12 May 1998), both quite interestingly concerning two individuals having dual French and Spanish nationality.

[52] ECJ: Carlos Garcia Avello v. État belge, C-148/02, Judgment (2 October 2003).

[53] Ibidem, para 28.

[54] Ibidem, paras 35–36. This judgment has been criticized by Lagarde 2004, although it is a leading case in the area of EU Law on the right to a name. See *ex multis* Quiñones Escámez 2004, De Groot 2004, Poillot-Peruzzetto 2004 and, recently, Honorati 2010.

[55] ECJ: Belgium v. Fatna Mesbah, C-179/98, Judgment (11 November 1999), concerning the application of the Cooperation Agreement between the European Economic Community and the Kingdom of Morocco (Rabat, 27 April 1976) to a migrant worker having both Moroccan and Belgian nationalities. The ECJ confirmed that the purpose of this Agreement "is not to enable Moroccan nationals to move freely within the Community" (para 36). See also, by analogy, ECJ: Mamate El Youssfi v. Office National des Pensions (ONP), C-276/06, Judgment (17 April 2007).

[56] ECJ: Shirley McCarthy v. Secretary of State for the Home Department, C-434/09, Judgment (5 May 2011). The Court rejected the application of Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States to a female EU citizen who had never exercised her right of free

4 The State's Freedom to Regulate Nationality in EU Law

The *Garcia Avello* judgment is grounded either on the prohibition of any discrimination on the ground of nationality (now Article 18 TFEU) or on the enjoyment of the status of Union citizen (now Article 20 TFEU) which is "destined to be the fundamental status of nationals of the Member States".[57] In the past, the ECJ had already characterized in the same manner the situation of some European citizens with the aim of acknowledging some of their liberties granted by EC Law, such as the right of free movement and residence within the territory of the Member States.[58] The same reference to this fundamental status, in support of the same liberties, was confirmed in the subsequent *Zhu and Chen* case.[59]

Nonetheless, in the recent *Ruiz Zambrano* case, the Luxembourg judges have reached the point of granting a primary and exclusive role to European citizenship.[60] In this decision, the ECJ only recalled the basic rule that grounds such *status* (Article 20 TFEU), with the aim of imposing on a Member State the obligation of granting the right of residence to a third-country national with minor EU citizens children who are dependant upon him, i.e. the obligation to grant him the right of residence within the territory of the Member State of residence and of nationality *iure soli* of his children. In the Court's opinion, Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of "the genuine enjoyment of the substance of the rights conferred by virtue of their status" as citizens of the Union.[61]

Although two subsequent judgments have narrowed the extent of this ruling,[62] it remains evident that European citizenship is now capable of a much broader

(Footnote 56 continued)
movement and who had always resided in a Member State of which she was a national and who was also a national of another Member State. Corneloup 2011, p. 499, correctly observes that this case does not address "une situation authentique de circulation", but rather "une situation purement interne déguisée". See also infra n. 62.

[57] Supra n. 49, para 22.

[58] ECJ: Rudy Grzelczyk v. Centre Public d'Aide Sociale d'Ottignies-Louvain-la-Neuve (CPAS), C–184/99, Judgment (20 September 2001), para 31, confirmed *inter alia* in ECJ: Baumbast and R v. Secretary of State for the Home Department, C–413/99, Judgment (17 September 2002), para 82. See recently *ex multis* Dougan 2012, p. 123 ff.

[59] ECJ: Kunqian Catherine Zhu and Man Lavette Chen v. Secretary of State for the Home Department, C-2000/02, Judgment (19 October 2004), para 25. Also Recital no. 3 of Directive 2004/38/EC, supra n. 56, provides: "Union citizenship should be the fundamental status of nationals of the Member States when they exercise their right of free movement and residence".

[60] ECJ: Gerardo Ruiz Zambrano v. Office national de l'emploi, C-34/09, Judgment (8 March 2011).

[61] Ibidem, para 42. See *ex multis* Mengozzi 2011; Hailbronner and Thym 2011; Van Eijken and De Vries 2011; Houser 2011.

[62] McCarthy, supra n. 56 and ECJ: Murat Dereci and others v. Bundesministerium für Inneres, C-256/11, Judgment (15 November 2011), in which the ECJ ruled out the potential deprivation of the enjoyment of the substance of the rights conferred by virtue of European citizenship: in the

scope compared to the one established by the Treaty on European Union (Maastricht, 7 February 1992; hereinafter TEU).[63] Here, we cannot spend time on the extra rights granted to nationals of Member States compared to the rights that those same States grant to their own nationals,[64] nor on the nature of this nationality defined as a "miracle" in light of its peculiar effects.[65]

It is however important to recall that, regardless of the amendments (at times considered as symbolic) introduced by the Lisbon Treaty,[66] "every national of a Member State" is considered as a citizen of the Union, and that the citizenship of the Union shall "not replace national citizenship".[67] Accordingly, the autonomy of the Member States in the matter of nationality seems to be intact.

Moreover, Declaration No. 2 on nationality of a Member State, annexed by the Member States to the final act of the Maastricht Treaty on European Union, and the decision of the Heads of State and Government, meeting within the European Council at Edinburgh on 11 and 12 December 1992, concerning the definition of the scope *ratione personae* of the provisions of European Union Law referring to the concept of a national, remain in force. More recently, as stated in Article 7.1 of Directive 2004/38/EC on the right of the citizens of the Union and their family members to move and reside freely within the territory of Member States, "Union citizen" means any person having the nationality of a Member State.[68]

Due to the Member States' persistent autonomy in regulating their nationalities, the recommendations of the European Parliament inviting Member States to adopt uniform rules on the attribution of nationality to the nationals of non-member countries resident in the Member States, have gone unheeded.[69]

(Footnote 62 continued)
first case rightly so, in the second, perhaps wrongly. See Rigaux 2012. In the *Murat Dereci* judgment the Court limited itself to examining the situation of the claimants in light of Article 7 of the Charter of Fundamental Rights of the European Union or of Article 8.1 of the ECHR, both concerning respect for private and family life. See a comparison between these two judgments and the *Ruiz Zambrano* case by Benlolo Carabot 2011; Rigaux 2012.

[63] Entered into force on 1 November 1999.

[64] Amid the vast literature on European citizenship, see recently Benlolo Carabot 2007, Morviducci 2010 and Shaw 2011. In particular, these two latter authors stress the value added of this citizenship: Morviducci 2010, p. 7 ff., Shaw 2011, p. 578 f.

[65] In this sense see the opinion of Adv. Gen. Poiares Maduro in the *Rottmann* case, who emphazises: "it strengthens the ties between us and our States (in so far as we are European citizens precisely because we are nationals of our States) and, at the same time, it emancipates us from them (in so far as we are now citizens beyond our States)" (ECJ: Janko Rottmann v. Freistaat Bayern, C-135/08, Op. of Adv. Gen. Poiares Maduro (30 September 2009), para 23).

[66] Article 9 TEU and Article 20 TFEU stipulate: "Citizenship of the Union shall be additional to national citizenship". The "symbolic importance" of this mutation is stressed by Morviducci 2010, pp. 19 ff. and Shaw 2011, p. 599, who point out its potential effects.

[67] See again Arts 9 EU Treaty and 20 TFEU.

[68] Generally, on reassessing the place and scope of the provisions on the free movement of persons and Union citizenship, see O'Leary 2011, p. 534 ff.

[69] European Parliament Resolution 2005/2058 (INI), 27 October 2005 and the motion in European Parliament resolution on problems and prospects concerning European Citizenship

As for the *Micheletti* judgment, the ECJ has constantly reaffirmed that "under international law, it is for each State Member to lay down the conditions for the acquisition and loss of nationality"[70]; such *dictum* makes use of the same wording used in the ICJ's reasoning in the *Nottebohm* judgment.[71] Nevertheless, the *dictum* extends the ICJ's reasoning by adding a reference to the withdrawal of nationality.

To this extent, the ECJ has respected this principle; the Luxembourg judges have in fact stringently applied the Member States' provisions on nationality for determining the scope of the EC Treaty *ratione personae*. In the *Kaur* case, the ECJ accurately followed the indications provided in the 1972 and 1982 Declarations by the Government of the United Kingdom on the definition of the term nationals. As a result, the right to enter or remain in the territory of this State has been denied to a citizen of the United Kingdom and Colonies who had become a British Overseas Citizen under the terms of the British Nationality Act 1981.[72]

The national rules on nationality have also been rigidly applied in situations where they produced the acquisition of nationality *iure soli*, thus potentially resulting in being unwelcome in other Member States or in the same Member State that had adopted them. As for the former case, in the *Zhu and Chen* the United Kingdom claimed that Mrs. Chen's move from the UK to Northern Ireland, with the aim of having her child acquire *iure soli* the nationality of another Member State, constitutes an attempt to improperly exploit the provisions of Community law.[73]

As for the latter case, in the *Ruiz Zambrano*[74] the Belgian government claimed that Mr. Ruiz Zambrano could not rely on the Belgian Law on nationality because he had disregarded the laws of his country. Mr. Ruiz Zambrano (a Colombian national to whom Belgian authorities refused asylum) had not in fact registered his child with the diplomatic or consular authorities, and he had rather followed the procedures available to him for acquiring Belgian nationality *iure soli* for his child and then tried, on that basis, to legalise his own residence. It does not come as a surprise that both the Irish and the Belgian law on nationality have been subsequently amended.[75] In the *Eman and Sevinger* case, the ECJ also considered the

(Footnote 69 continued)
2008/2234(INI), 2 April 2009. This aspect and the implications entailed by the concept of "nationality of residence" (i.e. the possible enjoyment of the European citizens' rights by nationals of non-members countries resident within the territory of EU) are stressed by Morviducci 2010, pp. 19 ff., 22 ff. and Nascimbene 2011.

[70] Micheletti, supra n. 49, para 10. See also Mesbah, supra n. 55, para 29; ECJ: The Queen v. Secretary of State for the Home Department ex parte Kaur, C-192/99, Judgment (20 February 2001), para 19; Zhu and Chen, supra n. 59, para 37.

[71] Supra Section 1.

[72] Supra n. 69. See Hall 2001, p. 355 ff. and, especially critical, Jessurun d'Oliveira 2011, p. 143.

[73] Zhu and Chen, supra n. 59, para 34.

[74] Ruiz Zambrano, supra n. 60.

[75] After all, in his opinion in the *Ruiz Zambrano* case, Adv. Gen. Sharpston acknowledged that "if particular rules on the acquisition of its nationality are—or appear to be—liable to lead to 'unmanageable' results, it is open to the Member State concerned to amend them so as to address

Dutch rules on nationality to prevail over the will of the Dutch government to exclude from elections for members of the European Parliament Dutch nationals resident in overseas countries and territories as referred to in Article 299.3 EC.[76]

Finally, it is worth pointing out that Member States almost always agree on the unilateral nature either of these rules or of these Declarations both when these rules are drafted by other States and when governments partake in the proceedings of preliminary rulings.[77] Consequently, the disapproval expressed by the Italian government towards the government of Romania, concerning the provisions that made it possible for several former nationals of Moldavia and other adjoining States to recover their Romanian nationality, comes as an exception to the general acknowledgement of the other Member States' sovereignty in this matter.[78] Such an approach mirrors the Member States' concern to limit the number of individuals who, by unexpectedly acquiring a Member State's nationality and consequently EU nationality, are granted the right of free movement and residence within the territory of the European Union, and as such within the territories of single Member States.

5 The *Rottmann* Judgment of the ECJ

The *dictum* concerning the exclusive competence of the Member States in regulating their nationalities, as asserted by the ECJ on several occasions starting with the *Micheletti* judgment, is however always stated together with the proviso "having due regard to Community law".[79] The sense of this proviso was originally considered as obscure or concerning respect for the individual's fundamental rights, which had become part of the principles of EU Law under Article 6 of the TEU.[80]

(Footnote 75 continued)
the problem" (Ruiz Zambrano v. Office national de l'emploi, C-34/09, Op. of Adv. Gen. Sharpston (30 September 2010), para 114).

[76] ECJ: Eman and Sevinger v. College Van Burgemeester en Wethouders van Den Haag, C-300/04, Judgment (12 September 2006). On decisions concerning the right to vote for the European Parliament, see Besselink 2008.

[77] See for example the *Kaur* judgment, supra n. 70, para 18. On the lack of objections concerning the attribution of British nationality to Hong Kong residents and of Spanish nationality to the citizens of some Latin America States pursuant to bilateral conventions, cf. Corneloup 2011, p. 515, n. 80.

[78] Cf. Margiotta and Vonk 2010, p. 26–27, 34. In his opinion in the *Rottmann* case, Adv. Gen. Poiares Maduro points out that the Community principle of sincere cooperation laid down by Article 10 EC could be affected if a Member State were to carry out, without consulting the Commission or its partners, an unjustified mass naturalisation of nationals of non-member States (Rottmann, Op. of Adv. Gen. Poiares Maduro, supra n. 65, para 30).

[79] Micheletti, supra n. 49.

[80] See for example Condinanzi et al. 2006, p. 14 ff.; and formerly Closa 1995.

If the truth were to be told, the Court had only once previously scrutinized and set aside the application of some norms on the nationality of a Member state, and notably the Italian provisions (now repealed) that attributed *ipso iure* to a foreign woman this *status civitatis* by virtue of her marriage, making it impossible for the woman to renounce such a status. In the judges' opinion, the EC rules concerning the payment of expatriation allowances to officials of the European Communities must be interpreted in such a way as to avoid any unwarranted difference of treatment between male and female officials who are, in fact, placed in comparable situations.[81] Even though the ECJ had implicitly given a negative appraisal of the Italian provisions, it must be pointed out that the Court was nevertheless addressing a case of dual nationality, i.e. a case regarding the choice between a person's two *status civitatis*.[82]

On the other hand, the status of EU nationals has, over time, acquired a scope and a role which are progressively more relevant to the point of being qualified as a "fundamental status". In the light of the Member States' approach to this matter, it was not easy to foresee control by the ECJ on the requisites to this status, i.e. on the manner of acquisition and withdrawal of their nationalities.

Nonetheless, the judicial activism of the Court reached this goal in the renowned *Rottmann* case.[83] Going beyond the self-restraint shown by the Advocate General in his detailed and at times emphatic opinion, the ECJ has brought clarity concerning the way in which Member States must have due regard, in exercising their powers within the sphere of nationality, to European Union Law.

In the case in point, Mr Rottmann, an Austrian national by birth, had acquired German nationality by naturalisation. However, the authorities of the Land of Bavaria decided to withdraw this naturalisation with retroactive effect on the ground that it had been obtained fraudulently, since Rottmann had not disclosed the fact that he was the subject of a judicial investigation in Austria.

According to Austrian law, Rottmann's naturalisation in Germany had the effect of losing his Austrian nationality, without the withdrawal of his naturalisation in Germany implying that he automatically recovered his nationality of origin. On final appeal against the judgments issued by the Bavarian courts, the German Federal Administrative Court (*Bundesverwaltungsgericht*) referred some questions to the Court of Justice on the application of European Union Law. The German Court wanted in particular to ascertain whether Article 17 EC Treaty (now Article 20 TFEU) allows a decision to withdraw naturalisation, the effect of which would entail the loss of Union citizenship for the person concerned who would thereby be rendered stateless.

The ECJ first reaffirmed once again that the conditions for the acquisition and loss of nationality fall within the competence of each Member State "under

[81] ECJ: Jeanne Airola v. Commission of the European Communities, C-21/74, Judgment (20 February 1975), paras 10–11. V. Corneloup 2011, p. 501 ff.

[82] Supra Section 3.

[83] ECJ: Janko Rottmann v. Freistaat Bayern, C-135/08, Judgment (2 March 2010).

international law".[84] Moreover, the Court recalled either Declaration No. 2 on nationality of a Member State, annexed to the final act of the EU Treaty, or the decision of the Heads of State and Government, meeting within the European Council at Edinburgh on 11 and 12 December 1992.[85] Nevertheless, on such an occasion such acts are considered as simple instruments for the interpretation of the EC Treaty with no other effects.[86]

The ECJ further specified peremptorily that the situation of a citizen of the Union becoming stateless as a result of the withdrawal of his nationality falls, "by reason of its nature and its consequences", within the ambit of European Union Law.[87] In fact, the person concerned loses the status of a citizen of the Union conferred by Article 17 EC, which is "intended" (and not "destined", as it had been in previous rulings)[88] to be the fundamental status of nationals of the Member States. Consequently, such a decision to withdraw nationality is amenable to judicial review carried out in the light of European Union Law. Under this review, it should be checked whether the decision in question is justified by a reason relating to public interest and whether it respects the principle of proportionality.[89]

The Court considers that withdrawing naturalisation because of deception corresponds to a reason relating to public interest based both on the protection of the special relationship of solidarity and good faith between the Member State concerned and its nationals, and on the reciprocity of rights and duties. That decision is, moreover, in keeping with the rules of international law. The ECJ is in fact aware that Article 8.2 of the 1961 Convention on the Reduction of Statelessness provides for the deprivation of nationality if it is acquired by means of misrepresentation or by any other act of fraud. The ECJ is also aware that Article 7.1.b and 7.3 of the 1997 European Convention on Nationality does not prohibit a State Party from depriving a person of his nationality, even if he thus becomes stateless, when that nationality was acquired by means of fraudulent conduct, false information or the concealment of any relevant fact attributable to that person.[90]

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[84] Ibidem, para 39. The English version has a different wording. Nevertheless, the difference can be considered to be the result of an oversight, in light of the fact that the other versions of this ruling (like the previous judgments cited by the Court) provide this significant indication.

[85] Supra Section 4.

[86] Rottmann, supra n. 83, para 40. On the contrary, Adv. Gen. Poiares Maduro held, in his opinion, that these declarations share the same legal status as the EU treaties. As pointed out (supra Section 4), in the *Kaur* judgment, supra n. 70, also the ECJ had assigned meaningful relevance to these instruments.

[87] Ibidem, para 42.

[88] Ibidem, para 39. Interestingly, the different wording does not seem to be apparent in the Italian version of the judgment. In any event, the new wording has been used in the subsequent judgments of *Ruiz Zambrano*, *McCarthy* and *Dereci* (supra Sections 3 and 4).

[89] Rottmann, supra n. 83, paras 43, 48, 55.

[90] Ibidem, paras 51–52. Moreover, in the Court's opinion, that conclusion is in keeping with the general principle of international law that no one can be arbitrarily deprived of his nationality, that principle being reproduced in Article 15.2 of the Universal Declaration of Human Rights and in Article 4.c of the European Convention on Nationality. Indeed, when a State deprives a person

Once it assessed the legitimacy, in principle, of the German decision withdrawing naturalisation on account of deception, the ECJ held that it is, nevertheless, for the national court to ascertain whether the decision to withdraw nationality observes the principle of proportionality so far as concerns the consequences it entails for the person concerned in the light of European Union Law, "in addition, where appropriate, to examination of the proportionality of the decision in the light of national law".[91]

Eventually, the Court (seemingly) refrained from ruling on the question concerning the recovery of nationality by Rottmann's birth because, on the one hand, the withdrawal of naturalisation had not become definitive and, on the other, no decision concerning his status had been taken by Austria. However, the ECJ warned that the duty of the Member States to exercise those powers having due regard to European Union Law (i.e. with regard to the principle of proportionality) applies "both to the Member State of naturalisation and to the Member State of the original nationality".[92]

The holding in this judgment is clearly ground-breaking on a number of issues. First, the Luxembourg Court carried out its controlling function in a matter which seemingly belongs to the internal competence of the Member States, not only from the standpoint of international law, but also from the standpoint of the EU legal order. It is no coincidence that eight Member State governments, supported by the Commission, submitted observations to the Court in this case.[93] It also seems redundant to recall that the matter of nationality touches upon the very core of each State.

Second, the Court's *dicta* addressed not only national provisions on the withdrawal of nationality, but also the provisions on the recovery of Member States' nationality, and are as such capable of affecting the acquisition of the *status civitatis*. Finally, the ECJ introduced, in such a delicate matter, the principle of proportionality, and most of all it enjoined national courts to apply the rules on nationality of their States (which doubtlessly have constitutional relevance) under the EU Law criteria indicated by the Court itself.[94]

(Footnote 90 continued)
of his nationality because of his legally established acts of deception, such deprivation cannot be considered to be an arbitrary act (para 53). The provisions herein cited have been examined supra, Section 2. According to the Explanatory Report to the 1997 European Convention on Nationality, Article 7.3 constitutes "one limited exception" to the aim of protecting the right to a nationality by preventing a stateless status (para 34).

[91] Rottmann, supra n. 83, para 55.

[92] Ibidem, para 62. The ECJ added that when a decision on the recovery of the nationality of origin has been adopted by Austrian authorities, the Austrian courts will, if necessary, have to determine whether it is valid in the light of the principles referred to in this judgment (para 63).

[93] Ibidem, paras 37–38.

[94] In the Court's opinion that it is for the national court to take into consideration the potential consequences that such a decision entails for the person concerned and, if relevant, for his family, with regard to the loss of rights inherent in citizenship of the Union. In this respect, it is necessary to establish, in particular, whether this decision is justified in relation to the gravity of the offence

As is foreseeable, this ground-breaking decision has given rise to strong doctrinal reactions in the opposite direction.;[95] Some authors have strongly criticised the Court's invasion in a field that is still imbued with the principle of "reserved domain";[96] others have approved the ECJ's orientation,[97] at times sensing in the relationship between European citizenship and nationality the confirmation of a "pluralism of citizenship" or the beginning of a "relative autonomy" of European citizenship[98] or, again, an "embryon de fédéralisation du droit de la nationalité des Etats membres".[99]

Regardless of the fact that the Court's attitude has often been considered (at times in a critical way) to be prudent,[100] the preoccupation with verifying the compatibility of some State provisions on nationality with the holding in the *Rottmann* judgment has also been raised.[101] It seems to be too early to predict what the Member States' reactions will be, however,[102] although an increase in challenges to domestic decisions in the field of nationality can be foreseen.[103]

On the other hand, it would be naïve to underestimate the peculiarity and the potential of EU Law compared to other examples of international regional cooperation.

(Footnote 94 continued)
committed, to the lapse of time between the naturalisation decision and the withdrawal decision, and to whether it is possible for that person to recover his original nationality (ibidem, para 56).

[95] As usual, the majority of these comments are available on the ECJ's website, next to the text of the decision.

[96] Jessurun d'Oliveira 2011, p. 149, observes that the "creeping usurpation of competences" by the Court leads to a decoupling of nationality and Union citizenship. More cautious, but still negative, is the evaluation by Corneloup 2011, p. 506 ff.

[97] E.g. De Groot and Seling 2011, p. 150, consider this ruling "a *milestone* in the sphere of nationality law".

[98] In the former sense Davies 2011, p. 9; in the latter sense Kostakopoulou 2011.

[99] Lagarde 2010b, p. 555; the federal model is also recalled by Heymann 2010, p. 6 and Kochenov 2010, p. 1831.

[100] Pataut 2010, p. 620, considers this decision "prudent et lourd des potentialités". On the contrary, in the opinion of Kochenov 2010, p. 1843, the application of proportionality in cases of statelessness indicates "the dangerous limitations" of thinking about fundamental rights in Europe.

[101] French, Dutch and German provisions are addressed, respectively, by Lagarde 2010b, p. 556; De Groot and Seling 2011, p. 155 ff. and Davies 2011, p. 8; Shaw 2011, p. 595 ff.

[102] For example, Davies 2011, p. 6, considers an instrument stronger than a declaration to be necessary if the Member States intend to protect their competence; Golynker 2011, p. 20, wishes to see a harmonisation of nationality laws, but fears a stricter stance by Member States. In the correct opinion of Corneloup 2011, p. 516, having regard to the lack of EU specific competence, some limitations to the freedom of Member States can only be introduced by means of an international treaty.

[103] Shaw 2011, p. 595 ff.

However, here we simply want to address the specific attitude of the ECJ towards some consolidated principles of international law. We have already assessed that the Luxembourg judges, unlike international courts, expressly and repeatedly avoid applying the principle of effective nationality to positive conflicts of nationality.[104]

Moreover, comparing the ICJ's *Nottebohm* judgment[105] with the ECJ's *Rottmann* judgment, it may be stressed that, although both decisions are grounded on the international principle concerning States' freedom to regulate nationality, the effects that these two decisions have are visibly different.

As we have pointed out, the *Nottebohm* judgment only states the ineffectiveness in international law—i.e., concerning diplomatic protection—of a person's *status civitatis* when such a status lacks the prerequisite of effectiveness. However, this ruling remained isolated in the following international practice, both legislative and judicial. *Vice versa*, a careful look at the *Rottmann* judgment shows that the ECJ has not simply scrutinized in which manner the Member States exercise their exclusive competence in this field, but it has also enjoined precise limitations to this competence.

In fact, the Court's invitation to national judges to ensure a higher level of guarantees for the individual can be valued when the national rules already provide for judicial control on the loss (or acquisition) of respective nationalities.[106] However, the ECJ seems to impose such a scrutiny also when this is not provided by the Member States' legal order, and it seems to enjoin domestic courts to state the reacquisition of nationality when such a recovery is not provided by their laws.[107]

This entails that the Luxembourg Court disregards the Hague Court. After all, unlike the Advocate General, in the *Rottmann* Judgment (as in its previous rulings) the ECJ refrained from referring to the *Nottebohm* judgment.[108] Hence, although the specific wording of the two Courts on a State's sovereign prerogative to regulate nationality by respective municipal law might suggest the idea of a "cross-fertilization", such a consonance is merely an apparition. The *Rottman* case might stand as an example of the "fragmentation of international law": two perspectives the content of which has been widely analysed by my friend Tullio, with his usual lucid thoughts.[109]

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[104] As shown by the different reasoning in the decisions mentioned above, supra Sections 1 and 3.

[105] Supra Section 1.

[106] Such a positive consequence has also been underlined by Savino 2011, p. 9.

[107] As pointed out by the ECJ as regards the position of the Austrian judges, supra n. 92. On the contrary, the Adv. Gen. stressed in his opinion that "Community law does not impose any such obligation, even though, failing such restoration, the applicant in the main proceedings remains stateless and, therefore, deprived of Union citizenship" (para 34).

[108] Either the *Nottebohm* judgment, supra n. 1, or the advisory opinion in the Nationality Decrees case, supra n. 13 are, however, recalled by the Adv. Gen. in his opinion (para 18).

[109] Treves 1999, 2007, 2012.

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