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INTRODUCTION

DUAL nationality is a legal status of vital significance to the individual and of importance to the State. It is possessed by countless numbers of individuals, many of whom are unaware of their position or of important and sometimes drastic, if not tragic, consequences. That the individual's status as a dual national may have dire consequences is attested to by the numerous pleas of assistance addressed to the Department of State by those American citizens who have felt the onus of obligations placed upon them by other countries also claiming them as nationals. The subject is little understood, and less analyzed, in the light of those consequences.

This article will examine the status of a typical dual national, the American citizen of Italian origin. In dealing with this specific type, the broad aspects of the problems of dual nationality will necessarily be covered, and, in general, the conclusions arrived at will be applicable to both. The ultimate aim is to clarify an uncertain status and to recommend specific action for its amelioration.

In the United States there are approximately four million American citizens of Italian origin. Of these, two and one half million are native born, and one and one half million are naturalized. All of them are potential dual nationals. Many of those native born are unaware of their possible dual nationality; those naturalized may or may not be. It is not surprising that this should be the case, for many of them have no occasion to question their nationality status. They are, and have always been, subject to American laws, American thinking, American customs. Italy is, at most, but a sentimental image at the back of their minds. Few have left the territorial confines of the United States, and even those that have done so may have been unmolested by the spectre of dual nationality. It is normal for them to think of themselves as Americans, just Americans. Yet, the dual status may be there, and the great increase in travel abroad by these individuals will only serve to accentuate its presence.

Essentially, dual nationality is caused by conflicting nationality laws among States. The most usual Italo-American dual nationality arises when an individual, at birth, acquires the nationality of the United

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States under its nationality laws based on *jus soli,* and the nationality of Italy under its nationality laws, essentially based on blood, or descent from an Italian father, regardless of the place of birth. Dual nationality may also arise subsequent to birth by virtue of the refusal of the State of origin to divest an individual of his nationality when the latter has been naturalized in the United States. This subsequent naturalization may occur through direct petition made by the individual himself to the proper agency, or by derivation, as in the case of a minor child through his father, or in the case of the married woman through her husband.

Two important questions arise with respect to the American citizen of Italian origin. First, is he, in all cases, a dual national? Secondly, if he is, what rights, if any, or duties, if any, does he have towards Italy; towards the United States? To answer these questions and to arrive at an evaluation and amelioration of the dual nationality problem, this article will first deal with the concept of nationality. It will show how dual nationality is created by the independent and conflicting municipal legislation of Italy and the United States, and how the same laws may provide for its extinguishment. Part two will consider the effects of the possession of nationality, with emphasis on the dual national. International law and the municipal laws of the United States and Italy will be examined to show what obligations are owed by the dual national to the States claiming him, and what rights he may possess, both domestically and abroad. The concluding part will evaluate the dual national's status and enumerate the proposals and attempts made either to prevent dual nationality from coming into existence, or to provide for its divestiture in the event it is created. There will follow the efforts undertaken to solve specific problems that arise; and finally, the author will make recommendations designed to ameliorate the situation, both with respect to dual nationality in general and the Italo-American in particular.

I. Nationality and Its Application to the Italo-American

Concepts and Bases of Nationality

Nationality always connotes some kind of membership in the society of a State or nation.[1] From the standpoint of international law, it has reference to the position of a natural person permanently attached to a State, whatever may be his particular rights and duties with regard to that State. This relation is based upon the allegiance owed by the natural person to the State. The "tie of allegiance" is a term in general

1. Harvard Research in International Law (hereinafter Harvard Research), Draft Convention on Nationality 21 (1929).

use to denote the sum of obligations of a natural person to the State to which he belongs. A Mixed Claims Commission gave the following definition of nationality:

"A man's nationality is a continuing legal relationship between the sovereign state on the one hand and the citizen on the other. The fundamental basis of a man's nationality is his membership of an independent political community. This legal relationship involves rights and corresponding duties upon both—on the part of the citizen no less than on the part of the state. If the citizen leaves the territory of this sovereign state and goes to live in another country, the duties and rights which his nationality involves do not cease to exist, although such rights and duties may change in their extent and character."[2]

Though nationality always connotes some kind of membership in the society of the State, it has varied significance, depending on the capacity of the person or body concerned and the purpose for which the concept is to be used. It may have one meaning for an international tribunal interpreting a treaty,[3] and another for the immigration official applying the McCarran Act.[4] A State Department officer thinks of nationality in terms of protection and espousal of claims; a judge in a civil law jurisdiction looks upon it as a possible basis for the application of a particular law. It has a different connotation with respect to the nature of its subject, and depending on whether it refers to a natural person, a juristic person, or a ship, the elements of nationality are more or less inclusive.

There is a constant interchangeable usage of the terms "national," "citizen" and "subject." For this reason it is necessary to point out the distinctions. The term "citizen," in its general acceptation, is applicable only to a person who is endowed with full political and civil rights in the body politic of the State.[5] When the word "subject" is used it has, in international law, the same meaning as "citizen." The latter is applied to members of a State having a republican form of government; the former to members of a State with monarchical institutions.[6] Thus, our Italo-American dual national, is a "citizen" of the United States and of Italy, now a republic, but was at birth a "subject" of the King-

2. R. J. Lynch Claim, Claims Commission Between Great Britain and Mexico, 25 Am. J. Int. L. 754, 755-756 (1931).

3. United States (Hilson) v. Germany, United States-German Mixed Claims Commission, Apr. 22, 1925, Decisions and Opinions 231, 19 Am. J. Int. L. 810 (1925).

4. 8 U.S.C.A. § 1101(a)(21) (Supp. 1953), "The term 'national' means a person owing a permanent allegiance to a state;" 8 U.S.C.A. 1101(a)(22) (Supp. 1953), "The term 'national of the United States' means (A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States."

5. 3 Hackworth, Digest of International Law 1 (1942).

6. Hershey, The Essentials of International Public Law 236 (1912).

dom of Italy. Use of the term "national" as a synonym for "subject" or "citizen," in a broad sense, is of comparatively recent origin. All it is meant to do is indicate the attachment to a State without unduly emphasizing the power of the State on the one hand and the civic rights of the individual on the other.[7]

What is the importance of nationality? Inasmuch as States are normally the only recognized subjects of international law,[8] nationality is the link between individuals and that law. If an individual is wronged abroad, it is, as a rule, only his home State which has the right to ask for redress. Conversely, an individual without nationality enjoys no protection, and if he is aggrieved, no State is competent, under the existing law of nations, to take his case in hand. Also, in the absence of moral or contractual restraint, nothing prevents a State from abusing and maltreating such an individual. It is for these reasons that the question of nationality assumes great importance in international law.[9]

Within the State, nationality assumes importance because of the vista of rights it opens up to its possessor. A national is usually a citizen, and as such is entitled to exercise a voice in the management of his government. He may own land, hold public office, receive appointment as an administrator of an estate, enjoy the privilege of practicing law, and countless other rights which are not always available to the alien. In addition, there is the psychological well-being which comes from belonging to a recognized political entity in association with other citizens. Where the national is not a citizen, his rights may be more limited, but they are still greater than the alien's.

Nationality may be acquired at birth or by naturalization. The former may result from birth in the territory of the State, *jure soli,* or from birth outside of the State territory to parents who are nationals, referred to as nationality by blood, or *jure sanguinis.* International law has long recognized both systems as legitimate grounds for the acquisition of nationality at birth. This is attested to by an examination of the nationality laws of various States, which shows that seventeen are based solely on *jus sanguinis,* two equally upon *jus soli* and *jus sanguinis,* twenty-five principally upon *jus sanguinis* but partly upon *jus soli,* and twenty-six principally upon *jus soli* and partly upon *jus sanguinis.*[10]

The nationality law of Italy, based principally on *jus sanguinis,*[11]

7. Harvard Research, op. cit. supra note 1, at 23.

8. 1 Oppenheim, International Law 584 (7th ed., Lauterpacht, 1948).

9. Ibid.

10. Harvard Research, op. cit. supra note 1, at 29.

11. Law of June 13, 1912, 1912 Raccolta Ufficiale Delle Leggi (hereinafter R.U.D.L.) II, 555; Flournoy and Hudson, Collection of Nationality Laws 363 (1929). As to the

follows an old Roman tradition. In Roman law the status of an individual was mainly hereditary, and membership in the Roman State depended upon parentage. As the early law of Rome was essentially personal and not territorial, the right of Roman citizenship at birth was acquired when the parents, whose condition the child followed, were Roman citizens. If the child was the issue of free parents united in lawful marriage, his condition was that of his father; if illegitimate, that of his mother. In either case, the important factor was descent or parentage, and not the place of birth. The whole trend of Roman thought favored the hereditary character of personal status, and for this reason allegiance *jure sanguinis, i.e.,* by descent or parentage, is often described as the Roman principle.[12]

While *jus sanguinis* is the older of the two principles, and while this principle is now the basis of the nationality laws of most countries of the continent of Europe as well as of Asia, it is probable that until the adoption and spread of the Napoleonic Code *jus soli* was the basis of nationality in all countries in which the feudal system flourished.[13]

Jus soli is the basis upon which the United States relies. In view of the fact that this system was inherited from England by the colonies, a brief historical sketch of its development is of interest.[14]

The common law of England followed the feudal principle, which was based on the territorial relation of a fief to its lord, and which, to some extent, regarded all inhabitants of the soil as appendages to it. Nationality was determined by the place of a man's birth; hence every person born within the realm was an English subject and every person born outside the realm was an alien, regardless of the nationality of his parents.[15]

Lord Chief Justice Cookburn stated the rule as follows:

"By the Common Law of England, every person born within the dominions of the Crown, no matter whether of English or foreign parents, and, in the latter case, whether the parents were settled, or merely temporarily sojourning, in the country,

history of jus sanguinis, see 1 Weiss, Droit International Prive, c. 1 and 2; Cogordan, La Nationalite au Point de vue des Rapports Internationaux 1-28 (2d ed. 1890); de Lapradelle, Nationalite D'Origine 1-28 (1893).

12. Morey, Outlines of Roman Law, bk. 1, c. 1 (1890); Muirhead, Historical Introduction to the Private Law of Rome, c. 3 (1891); 1 Westlake, International Law 212 et seq. (2d ed. 1910).

13. Cogordan, op. cit. supra note 11, at 1-28.

14. For a more comprehensive history of jus soli, see Calvin's Case, 7 Coke 1 (Eng. 1608); Lynch v. Clarke, 1 Sand. Ch. 583 (N.Y. 1844); United States v. Wong Kim Ark, 169 U.S. 649 (1898); Bl. Comm., bk. 1, c. 10; Van Dyne, Citizenship of the United States, c. 1 (1904); 1 Westlake, op. cit. supra note 12, at 213.

15. Calvin's Case, supra note 14.

was an English subject; save only the children of foreign ambassadors (who were excepted because their fathers carried their own nationality with them), or a child born to a foreigner during the hostile occupation of any part of the territories of England. No effect appears to have been given to descent as a source of nationality."[16]

It was not until the passage of the *Act of 25 Edward III* (1350), concerning the right of children born abroad to British fathers to inherit land in England, that the principle of *jus sanguinis* was introduced into the English law.[17] With the growth of commercial intercourse between States, a greater number of children of English parents were born in localities which were not destined to be their permanent home. This led to further use of descent or parentage as a source of nationality.[18]

In the United States, *jus soli* was retained as an inheritance from Great Britain.[19] The United States Supreme Court early assumed and recognized that all persons born within the United States were citizens,[20] and today it is unquestioned that all persons born within the United States and subject to the jurisdiction thereof are citizens.[21] Yet, *jus sanguinis* was embodied in the first nationality act passed by the Congress of the United States in 1790, which contained a provision to the effect that children born abroad of American parents were to be "considered as natural born citizens."[22]

International law has not adopted either system to the exclusion of the other. Nor does there seem to be any provision preferring one to the other as a basis of nationality at birth.[23]

Subsequent to birth, nationality is acquired through the process of naturalization, which has been defined as "the act of adopting a foreigner and clothing him with the privileges of a native citizen."[24]

Naturalization is a judicial process in some countries, including the

16. Cockburn, A Treatise On Nationality 7 (1869).

17. Harvard Research, op. cit. supra note 1, at 29.

18. 1 Westlake, op, cit. supra note 12, at 214-216.

19. Lynch v. Clarke, 1 Sand. Ch. 583 (N.Y. 1844); United States v. Wong Kim Ark, 169 U.S. 649 (1898). For an interesting anachronism, see Webster, Law of Citizenship 94-100 (1891), in which the author contends that jus soli was never adopted in the United States, that international law prescribes the jus sanguinis, and that the 14th Amendment to the Constitution of the United States applies only to negroes.

20. Murray v. The Charming Betsy, 2 Cranch. 64 (U.S. 1804). This recognition of the common law principle was followed in later cases: McCreary v. Somerville, 9 Wheat. 354 (U.S. 1824), United States v. Wong Kim Ark, supra note 19.

21. 8 U.S.C.A. § 1401(a)(1) (Supp. 1953).

22. 1 Stat. 104.

23. Harvard Research, op. cit. supra note 1, at 29.

24. Fuller, C. J., in Boyd v. Thayer, 143 U.S. 135, 162 (1892). Also, 2 Hyde, International Law 1087 (1945) defines naturalization as "the process by which a state adopts a foreigner and stamps upon him the impress of its own nationality."

United States,[25] a legislative process in others, and an executive function in still other countries, including Italy.[26]

There are several different methods of naturalization.[27] An individual may be directly naturalized, on his own right, under general naturalization laws. He may be derivatively naturalized, as, for example, a minor child through the naturalization of his parent or parents. Derivative naturalization is also available to a wife through the naturalization of her husband, or, in some cases, to an alien by marriage to a national. These last two methods are no longer recognized in the United States. In addition, adoption of a alien minor results in naturalization in a few countries.

Collective naturalization is possible in either of two ways: through the transfer of territory from one State to another, or through legislative enactments covering specific classes of persons. The former method provides the only case in which international law without an applicable provision of municipal law declares that a person has the nationality of the State. It might be said that international law assumes that the successor State confers its nationality upon the nationals of the predecessor State residing in the annexed territory at the time of annexation.[28]

Finally, naturalization may result from special legislation in individual cases. What a State has the power to do under its general laws it may also do under a special act, providing a treaty agreement or some constitutional limitation doesn't prohibit this procedure.

In the United States the power to naturalize foreigners is vested in the federal government. Congress is not trammeled and it may grant or withhold the privilege upon any grounds or without any reason, as it sees fit.[29]

The development of international law has not been such as to prescribe for the States the conditions on which they may confer their nationality upon natural persons. Each State has the power to confer its nationality, and whether or not it has done so in a given case depends upon its own national law.[30] Further, ". . . in the present state of international law, questions of nationality are, in the opinion of the court, in principle within this reserved domain."[31]

25. 8 U.S.C.A. § 1421 (Supp. 1953).

26. Law of June 13, 1912, 1912 R.U.D.L. II, 555, art. 4; Flournoy and Hudson, op. cit. supra note 11, at 364.

27. 3 Hackworth, op. cit. supra note 5, at 3.

28. Harvard Research, op. cit. supra note 1, at 61.

29. Terrace et al. v. Thompson, Attorney General of the State of Washington, 263 U.S. 197, 220 (1923); 3 Hackworth, op. cit. supra note 5, at 33.

30. Harvard Research, op. cit. supra note 1, at 24; Tomassichio v. Acheson, 98 F. Supp. 166 (D.D.C. 1951).

31. Nationality Decrees in Tunis and Morocco, P.C.I.J., Ser. B. No. 4 (1923) 24; also

This situation poses two problems for the international community:

1. Is an international body ever competent, against the State's wishes, to assume jurisdiction over a nationality dispute? This is a procedural matter.

2. What limitations, if any, are there to this exclusive State power to impose nationality? The corollary question is to what extent must such domestic law be recognized by other States? These are substantive matters.

With respect to jurisdictional competence, it is clear that the right of a State to use its discretion in matters of nationality may be restricted by international obligations undertaken towards other States.[32] The Permanent Court of International Justice held that the Council of the League of Nations was competent, under the terms of the Covenant, to deal with a dispute arising out of nationality decrees. The decrees, by France, purported to confer French nationality upon all persons born in Tunisia or Morocco of a parent also born there. Great Britain objected to its application to children born of British nationals and brought the dispute before the League of Nations. France asserted that this was a domestic question and denied the League's competence to deal with it. The Court expressed the opinion that, since the power of the French Government to issue the decrees might be limited by treaties to which France and Great Britain were parties, the question was not purely domestic and could properly be brought before the Council. In addition, as the case concerned an international protectorate, the question of whether the exclusive jurisdiction possessed by a protecting State in regard to nationality questions in its own territory extends to the territory of the protected State depends, said the Court, ". . . upon an examination of the whole question as it appears from the standpoint of international law. The question, therefore, is no longer solely one of domestic jurisdiction."[33]

The same court felt itself competent to interpret a provision concerning the acquisition of Polish nationality under the Minorities Treaty signed at Versailles, June 28, 1919, between the principal Allied Powers and Poland.[34]

It is to be observed that in both these instances the facts showed the existence of factors other than nationality, and the latter may have been only incidental. It is widely recognized that disputes concerning the

Lord Finlay's dissenting opinion in the Case of the Acquisition of Polish Nationality, P.C.I.J., Ser. B. No. 7 (1923) 23, 26.

32. 1 Schwarzenberger, International Law 151 (1949).

33. Nationality Decrees in Tunis and Morocco, P.C.I.J., Ser. B, No. 4 (1923) 24.

34. Case of the Acquisition of Polish Nationality, P.C.I.J., Ser. B, No. 7 (1923).

interpretation or performance of treaties, as well as those involving international protectorates, are within the province of international law.

The creation of the United Nations Organization tends to limit the domestic nature of nationality. If nationality legislation is violative of human rights,[35] or tends to impair friendly relations among nations,[36] a dispute may, theoretically, come within the competence of this international body.[37] This would be true despite the prohibition, contained in Article 2, paragraph 7 of the Charter, against interference by the organization in domestic matters.[38] This observation includes both member and non-member States, the former because the Charter itself is considered a treaty obligation, and the latter because the organization has the duty to insure that they act in accordance with the principles of that Charter.[39]

With respect to the substantive problem, Article 1 of the Hague Convention of 1930 on Certain Questions Relating to the Conflict of Nationality Laws stated that municipal law must be recognized by other States only "insofar as it is consistent with international obligations, international custom, and the principles of law generally recognized with regard to nationality."[40]

Although it is difficult to pinpoint the international law limitations upon the State's power to confer its nationality, it is obvious that some limitations do exist. They are based upon the development of international law and upon the fact that different States may be interested in the allegiance of the same individual, and they have been often stated.[41]

No bases other than *jus soli* and *jus sanguinus* can properly be used by a State in conferring nationality at birth.[42] With respect to naturalization, there are also certain limits. For example, if Australia should attempt to naturalize our Italo-American dual national, who already possesses nationality, and who has never had any connection with that State either by way of physical presence in the State or action therein, or through any relation whatsoever with Australians, it would seem clear that the limits have been exceeded, and the United States, or Italy, or both, would have valid grounds for a protest against the Australian action.

35. U. N. Charter Art. 55

36. U. N. Charter Art. 14.

37. For a general discussion of this problem see Treatment of People of Indian Origin in South Africa, Yearbook of the United Nations 145 et seq. (1946-1947).

38. Jessup, A Modern Law of Nations 87 (1949).

39. U. N. Charter Art. 1, Par. 6; Kelsen, Law of the United Nations 19 (1950).

40. League of Nations, V. Legal (1930), Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, Art. 1.

41. Hall, International Law 267-268 (8th ed. 1924).

42. Harvard Research, op. cit. supra note 1, at 27.

Further clear violation of international law would be legislation by Australia which attempted to naturalize as Australian nationals all persons living outside its territory but within 500 miles of it, or all the Catholics, or Republicans, or members of the white race in the world. Nor may Australia confer its nationality upon an individual domiciled within its limits against the will of that individual. However, consent to the naturalization may be expressed, or it may be shown through an act which shows the desire and intention of a person to take the nationality of the State. The act in such a case must have a direct relation to nationality.[43]

Occasion for protest against violations have rarely arisen, but there are some specific instances recorded in diplomatic annals. The United States and certain European States have protested against the application, to their nationals, of laws and decrees of Peru, Spain (with reference to Cuba), Venezuela, Mexico and Brazil, under which it was attempted to impose the nationality of those countries upon aliens within their territory, without their consent, upon various grounds, such as marriage to native women, residence, and acquisition of real property.[44]

Of course, these cases should be differentiated from those in which the acquisition of nationality is made a condition precedent to the same aforementioned acts. In that event the requirement of consent by the alien is fulfilled.

Conversely, the question might arise whether the State which naturalizes the national of another State or an international tribunal has to pay attention either to prohibitions on the part of a State regarding the acquisition of another nationality by its citizen or to municipal legislation making such matters dependent on its consent. This was answered in the negative by the Franco-Turkish Mixed Arbitral Tribunal in the case of *Apostolidis v. Turkey* (1928).[45] The claimant, a Turkish subject, acquired French nationality by naturalization. Under Turkish law such a naturalization, if taking place without the previously obtained consent of the Turkish Government, was declared to be without any legal effect. Turkey, therefore, contended that, as in that case no such authorization had been given, the claimant continued to be a Turkish subject and consequently the Tribunal was incompetent to deal with his claim. The Tribunal overruled the objection and held

43. Hall, op. cit. supra note 41.

44. 3 Moore, Digest of International Law 302-311 (1906).

45. 2 Mixed Arbitral Tribunals (hereinafter M.A.T.) 71, 72 (1923). Also Baron Frederic de Born v. Yugoslavia, 6 M.A.T. 499 (1926); Barthez de Montford v. Treuhander Haupterwaltung, 6 M.A.T. 806 (1926), and the Pinson Case (1928) between France and Mexico, 39 Revue General de Droit International Public 230, 419 (1932).

that the Turkish law could only bind Turkish authorities and courts. The organs of other States and international courts had to recognize a naturalization carried out in accordance with the laws of the State which had granted naturalization. Hence it was the duty of the Tribunal under international law to consider the claimant as a French national.

Nationality Status of the American Citizen of Italian Origin

A person who is claimed as a subject or citizen by two States is said to possess dual nationality, which is not a theory or doctrine, but a legal condition which is an unavoidable result of the conflicting laws of different countries.[46] "Municipal law determines how citizenship may be acquired," so "it follows that persons may have a dual nationality."[47]

To find out whether an individual is an Italo-American dual national, it is necessary to examine the provisions of the municipal laws which deal with the acquisition and loss of nationality in the countries concerned. This section will begin with a brief discussion of the acquisition of nationality in both Italian and American law. It will then determine how these same laws provide for its loss. The section will end with an application of the laws to hypothetical cases, followed by what is believed to be an exhaustive summary of the possible ways of acquiring dual nationality as a result of Italo-American legislation.

All persons born in the United States, including Alaska, Hawaii, Puerto Rico, the Virgin Islands and Guam, and subject to the jurisdiction thereof are citizens at birth.[48] In this category is a child of unknown parentage found in the United States.[49]

Also classified as a citizen at birth is a child born in an outlying possession of one citizen parent and a parent who is a national.[50] So is a child born outside the United States to: a) citizen parents, one of whom has been physically present in the United States prior to the birth of the child;[51] b) a citizen parent who has been physically present in the United States for a period of ten years prior to the birth of the child.[52] In the last two cases, citizenship is conditional, and may be lost

46. Secretary Lansing to Senator Lodge, June 9, 1915, Ms. Dep't State, file 365. 117/106; 3 Hackworth, op. cit. supra note 5, at 352.
47. Perkins v. Elg, 307 U.S. 325, 329 (1939).
48. 8 U.S.C.A. § 1401(a)(1) (Supp. 1953).
49. 8 U.S.C.A. § 1401(a)(6) (Supp. 1953).
50. 8 U.S.C.A. § 1401(a)(4) (Supp. 1953).
51. 8 U.S.C.A. § 1401(a)(3) (Supp. 1953).
52. Ibid.

if the child does not attain five years of physical presence in the United States between the ages of fourteen and twenty-three.[53]

Finally, citizenship may be acquired by naturalization. A minor child under age 16 derives citizenship when both parents are naturalized,[54] or, in the event one parent is a citizen without ten years physical presence in the United States, when the other parent is naturalized.[55] This latter is also true of a child having only one custodial parent.[56] In all these cases, however, citizenship arises only if the child is residing in the United States at the time of naturalization, or takes up permanent residence before age sixteen.[57]

In Italy, citizenship arises at birth when the father is a citizen,[58] or when the mother is a citizen if the father is unknown, stateless, or unable to confer his citizenship on his child.[59] Also, citizens are those born in Italy who are unable to acquire their parents' citizenship.[60]

A child born in Italy, or born elsewhere of parents residing in Italy ten years prior to his birth, will become a citizen when he serves in the army or, when residing in Italy upon attaining his majority, he elects Italian citizenship.[61] Citizenship automatically arises if he himself resided in Italy ten years and doesn't express his desire to keep his original citizenship.[62]

Italian citizenship may also be conferred by executive decree.[63] This automatically results in citizenship for the wife and minor unemancipated children.[64]

Generally, nationality may be lost voluntarily, involuntarily, or derivatively. An individual loses nationality voluntarily through express

53. Ibid.

54. 8 U.S.C.A. § 1431(a) (Supp. 1953).

55. 8 U.S.C.A. § 1432 (a)(1) (Supp. 1953).

56. 8 U.S.C.A. § 1432 (a)(2)(3) (Supp. 1953).

57. 8 U.S.C.A. § 1432 (a)(4)(5) (Supp. 1953).

58. Law of June 13, 1912, 1912 R.U.D.L. II, 555, art. 1 (1); Flournoy and Hudson, op. cit. supra note 11, at 363.

59. Law of June 13, 1912, 1912 R.U.D.L. II, 555, art. 1 (2); Flournoy and Hudson, op. cit. supra note 11, at 363.

60. Law of June 13, 1912, 1912 R.U.D.L. II, 555, art. 1 (3); Flournoy and Hudson, op. cit. supra note 11, at 363.

61. Law of June 13, 1912, 1912 R.U.D.L. II, 555, art. 3 (1)(2); Flournoy and Hudson, op. cit. supra note 11, at 363.

62. Law of June 13, 1912, 1912 R.U.D.L. II, 555, art. 3 (3); Flournoy and Hudson, op. cit. supra note 11, at 363.

63. Law of June 13, 1912, 1912 R.U.D.L. II, 555, art. 4; Flournoy and Hudson, op. cit. supra note 11, at 364.

64. Law of June 13, 1912, 1912 R.U.D.L. II, 555, arts. 10 and 12; Flournoy and Hudson, op. cit. supra note 11, at 365, 366.

renunciation, naturalization in a foreign State, prolonged stay abroad, accepting public office or performing military service for a foreign State, and voting in a foreign election. Involuntarily it is lost by the action of the State through the process of denaturalization, i.e., revoking the naturalization of a naturalized citizen when procured by fraud, illegality, etc., or through denationalization, i.e., by stripping a citizen of his nationality as a punishment. It may also be involuntarily lost through cession of territory and imposition of the nationality of the acquiring State.

Finally, it may be lost through the action of another, as when the loss of nationality by the husband results in loss to the wife, and the loss of nationality by the parent results in loss to the child.

The most generally accepted way for an individual to lose his nationality is through voluntary naturalization in another State.[65] With respect to the efficacy of such action, the States of the world are divided into two groups: the countries of emigration, and the countries of immigration. It is in the interests of the former, the country of origin, to prevent certain of its nationals from renouncing their nationality in order to avoid certain obligations. Hence, in these cases, loss of nationality may not surely result from subsequent voluntary naturalization on the part of the individual concerned. In addition, certain conditions, possibly including the issuance of expatriation permits, are laid down before their nationals are allowed to lose their nationality.

On the other hand, the countries of immigration favor the principle that naturalization abroad necessarily involves the loss of previous nationality. They are of the opinion that the system of authorization for obtaining freedom from allegiance is antiquated, not taking into account the conditions of modern life or of the right which every person possesses to change his allegiance freely.

The right of expatriation has been asserted as a natural right of man,[66] but it has not yet become a part of the general practice.[67] In the United States, several of the early cases adhered to the view that there existed no right of expatriation.[68] However, since the enactment of the Statute of 1868,[69] the Government has unhesitatingly and un-

65. For a summary of the laws of various countries on the effect of naturalization on the prior nationality see Harvard Research, op. cit. supra note 1, at 45-51.

66. "It [the right of expatriation] is a principle of the rights of man and of the liberty of the human race:" Mr. Hunter Miller (Delegate of the United States), Acts of the Conference for the Codification of International Law, Meetings of the Committee 80. See also ibid., at 69 (Mr. Flournoy).

67. 1 Oppenheim, op. cit. supra note 8, at 591.

68. Shanks v. Dupont, 3 Pet. 242 (U.S. 1830); Ainslee v. Martin, 9 Mass. 454 (1813).

69. Rev. Stat. § 1999 (1875), as amended, 8 U.S.C.A. §§ 1482, 1483 (Supp. 1953).

compromisingly insisted on the right of the individual to lose his nationality by virtue of his voluntary act. The statute was originally aimed at establishing the right of immigrants to the United States to renounce their former nationality, but it also allowed the voluntary renunciation of American citizenship.[70]

Loss of nationality was further facilitated with the passage of the Nationality Act of 1940,[71] when the emphasis appeared to shift from the individual's right to choose nationality to the power of the Government to compel expatriation. This shift has continued in the Nationality Act of 1952.[72] Today it is relatively simple to lose American nationality.

Under existing American law, the first distinction to be made with respect to expatriatory acts is the character of the individual performing the act, i.e., a citizen at birth, or a naturalized citizen. Some of the acts apply to all citizens, others only to naturalized citizens. Those which apply to all citizens may be further subdivided into two categories: first, the acts inimical to allegiance to the United States and for which residence abroad, either at the time of the act or subsequently, is necessary; and second, those which are directly hostile to the Government and are punished by expatriation, regardless of where they occur.

In the first category, the most direct way of losing nationality is by making a formal renunciation before a diplomatic or consular officer of the United States in a foreign State in such a manner as prescribed by the Secretary of State.[73] Other acts inconsistent with allegiance to the United States include the obtaining of naturalization in a foreign State,[74] taking an oath or making any other formal declaration of allegiance to a foreign State,[75] or entering into the armed forces of a foreign State without the prior authorization in writing from the Secretary of State and the Secretary of Defense.[76] In addition, loss of nationality will result from accepting employment under the government of a foreign State,[77] or voting in a political election or participating in a plebiscite to determine sovereignty over foreign territory.[78] It must be remembered that these acts, committed in the United

70. Immigration and Nationality, 66 Harv. L. Rev. 643, 731 (1953).
71. 8 U.S.C.A. § 801, et seq. (1946).
72. 8 U.S.C.A. § 1401, et seq. (Supp. 1953).
73. 8 U.S.C.A. § 1481 (a)(6) (Supp. 1953).
74. 8 U.S.C.A. § 1481 (a)(1) (Supp. 1953).
75. 8 U.S.C.A. § 1481 (a)(2) (Supp. 1953).
76. 8 U.S.C.A. § 1481 (a)(3) (Supp. 1953).
77. 8 U.S.C.A. § 1481 (a)(4) (Supp. 1953).
78. 8 U.S.C.A. § 1481 (a((5) (Supp. 1953).

States, will not result in expatriation, but they will have that effect as soon as the individual takes up residence in a foreign State.[79]

Those acts in the second category, for which expatriation is a punishment, include deserting the military, air, or naval forces of the United States in time of war;[80] committing an act of treason, or attempting, by force, to overthrow, or bearing arms against, the United States;[81] departing from or remaining outside the territorial jurisdiction of the United States in time of war, or during a national emergency, for the purpose of avoiding military service.[82]

If the individual performing the above acts is also a national of the State wherein the acts are performed, and had lived therein the prior ten years, there is a conclusive presumption that the act is done voluntarily and without duress.[83] In all other cases, the individual may show that the act was not freely done.

An act within the United States which will cause loss of citizenship is the making of a formal renunciation therein while the country is at war, unless the Attorney General deems the attempted renunciation contrary to the national interest.[84] This latter represents the only limitation, in United States legislation, on the right of expatriation.

In addition to the aforementioned acts, there are others which result in loss of nationality only for the naturalized citizen. This occurs if the latter has a continuous residence for three years in the territory of a foreign State of which he was formerly a national, or in which the place of his birth is situated.[85] The term of continuous residence is extended to five years if the residence is in any other State.[86] Residence in such cases is considered continuous where there is a continuity of stay, but not necessarily an uninterrupted physical presence, in a foreign State or States outside the United States.[87] This continuity cannot be broken by short visits to the United States where there is actual residence abroad. There are exceptions[88] to these provisions, but they are generally of little importance.

Somewhat the same provision is made for divestiture of nationality of a dual national, but here there is loss only if the status arose at birth

79. 8 U.S.C.A. § 1483 (a) (Supp. 1953).
80. 8 U.S.C.A. § 1481 (a) (8) (Supp. 1953).
81. 8 U.S.C.A. § 1481 (a) (9) (Supp. 1953).
82. 8 U.S.C.A. § 1481 (a) (10) (Supp. 1953).
83. 8 U.S.C.A. § 1481 (b) (Supp. 1953).
84. 8 U.S.C.A. § 1481 (a) (7) (Supp. 1953).
85. 8 U.S.C.A. § 1484 (a) (1) (Supp. 1953).
86. 8 U.S.C.A. § 1484 (a) (2) (Supp. 1953).
87. 8 U.S.C.A. § 1101 (a) (33) (Supp. 1953).
88. 8 U.S.C.A. § 1485, 1486 (Supp. 1953).

and the individual has voluntarily sought the benefits of the nationality of the foreign State, and in addition, has lived continuously for three years in that State after the age of twenty-two.[89] However, within the three year period, loss may be avoided by taking an oath of allegiance to the United States before a diplomatic or consular officer.[90]

Nationality may also be derivatively lost, but only if such person has, or acquires the nationality of the other State. However, there is a limitation. It is not lost until the child attains the age of twenty-five years without having established his residence in the United States.[91]

It can be seen from a perusal of American nationality legislation that there are indeed many ways in which an individual may expatriate himself. The law seems designed for expatriation.

The Italian law specifically permits the loss of citizenship of an individual either through the direct action of the individual himself, or of the State, or derivatively. The latter category includes married women and minor, unemancipated children.

A female citizen who marries a foreigner loses Italian citizenship if her husband possesses a citizenship which may be communicated to her by the marriage;[92] if her husband, being a citizen, becomes a foreigner, his wife, having residence in common with him, loses Italian citizenship.[93]

Minor, non-emancipated children of those who lose citizenship become foreigners if they possess residence in common with the parent who is head of the household, and if they acquire the citizenship of the foreign country.[94]

Loss by direct action is provided for in Articles 7 and 8 of the Law of 13 June 1912.[95] Article 7 states that an Italian citizen born and residing in a foreign nation, which considers him a citizen of its own by birth, may abandon Italian citizenship when he becomes of age or is emancipated. The law provides elsewhere that the abandonment must be made in the form of an express renunciation before a diplomatic or

89. 8 U.S.C.A. § 1482 (Supp. 1953).

90. 8 U.S.C.A. § 1482 (1) (Supp. 1953).

91. 8 U.S.C.A. § 1487 (Supp. 1953).

92. Law of June 13, 1912, 1912 R.D.L.U. II, 555, art. 10; Flournoy and Hudson, op. cit. supra note 11, at 365.

93. Law of June 13, 1912, 1912 R.D.L.U. II, 555, art. 11; Flournoy and Hudson, op. cit. supra note 11, at 365.

94. Law of June 13, 1912, 1912 R.D.L.U. II, 555, art. 12; Flournoy and Hudson, op. cit. supra note 11, at 366.

95. 1912 R.D.L.U. II, 555; Flournoy and Hudson, op. cit. supra note 11, at 363 et seq.

consular agent at the place where the renouncing citizen resides.[96] Article 8 provides as follows:

"One loses citizenship:

"(1) When he of his own free will acquires a foreign citizenship and establishes or has established his residence abroad.

"(2) When, having acquired a foreign citizenship independently of his own will, one declares that he renounces Italian citizenship, and establishes or has established his residence abroad.

"In the cases contemplated in paragraphs 1 and 2, the government may except the transfer of the residence abroad.

"(3) When having accepted employment from a foreign government, or having assumed the military service of a foreign power, he persists in that position, in spite of the Italian Government's instruction to abandon within a fixed lapse of time the said employment or service."

With respect to loss of citizenship by virtue of Article 8, Italian legislation designates the form of the renunciation to be taken in the event of involuntary acquisition of foreign citizenship. It does not, however, specify whether express renunciation need be made if foreign citizenship is voluntarily acquired. This gap has been interpreted in various ways by the Italian courts. The earlier decisions state that to "lose citizenship it is not enough to acquire foreign citizenship; it is necessary to expressly renounce the citizenship of origin,"[97] whereas the later ones speak of "the spontaneous acquisition of foreign citizenship and the consequent loss of Italian citizenship."[98] Because of the not-binding-as-a-precedent status of Italian cases, it is difficult to state precisely whether in any given instance voluntary acquisition of foreign citizenship, *i.e.*, naturalization abroad, is effective without an express renunciation. Until the legislative branch of the government authoritatively interprets the citizenship law, or until constant jurisprudential interpretation is developed, the uncertainty will continue.

It is submitted, however, that the sounder view at the present time is that naturalization abroad will result in loss of Italian citizenship even though there is no express renunciation.

To complicate matters, however, the same Article 8 adds the proviso that loss of citizenship under that article does not absolve an individual from the obligation of military service. Thus, though it is unquestion-

96. Royal Decree of Aug. 2, 1912, 1912 R.D.L.U. II, 949, art. 6, Flournoy and Hudson, op. cit. supra note 11, at 368.

97. Reda v. Cassa, Court of Cassation, Feb. 11, 1943, 8 Foro Italiano (Repertorio) (hereinafter Foro It. (Rep.)) 281 (1943-1945); See also D'Amelio v. Saglietti, Court of Appeals Genova, July 15, 1940, 1943 Rivista Di Diritto Matrimoniale 33m.

98. Societa Officina Zanzi v. Zublena, Court of Cassation, Apr. 28, 1949, 1949 Giurisprudenza Cassazione Civile II, 320, 321.

ably true that the Italian citizen may lose his citizenship, it is equally certain that all ties with Italy are not severed.[99]

A further complication is to be noted. Military service subsequent to loss of citizenship will automatically result in the reacquisition of the lost citizenship.[100] Nothing has to be done by the individual. It has been argued that this is not so in the case of those who have voluntarily renounced citizenship because they are not worthy of being Italians,[101] but this position has not received official support.

In conclusion, on loss of Italian nationality, from a perusal of Italian legislation, commentary and case law, it is probable that a dual national at birth, born and residing abroad, may effectively renounce his Italian nationality (including citizenship), thus escaping the obligation of military service. All other male nationals will lose Italian nationality by acquisition of a foreign one. If the acquisition is voluntary, it is probably not necessary to expressly renounce Italian nationality. This, however, is uncertain, so it is advisable to take advantage of the prescribed form of renunciation. If the acquisition is involuntary, Italian nationality is lost only if there is an express renunciation. All these who have lost Italian nationality are still tied to Italy by the obligation of military service, which may restore their Italian nationality. Wives and minor, unemancipated children follow, respectively, the condition of the husband and the father.

To appreciate how these laws may conflict and thus give rise to dual nationality, let us apply them to assumed factual situations.

First, let us assume that a child, Joe, is born in New York City in 1920, the son of an Italian father. Having been born in the United States, Joe acquired American nationality at birth. In addition, he simultaneously acquired Italian nationality, *jure sanguinis*, through his Italian father. It is clear that he is a dual national birth. However, he may divest himself of his dual nationality when he comes of age by renouncing either nationality.

Second, let us assume that Tony is born in Italy in 1930, of Italian parents who subsequently emigrate to the United States in 1932, leaving the child with grandparents in Italy. The mother becomes independently naturalized in the United States in 1937, and Tony joins

99. This conclusion is partly based on the restrictive attitude of the present Italian Republic which is to be contrasted with the desire of the former Fascist Government to claim as Italian Nationals all those abroad. The present government, for the moment, does not so claim.

100. Law of June 13, 1912, 1912 R.D.L.U. II, 555, art. 9 (1); Flournoy and Hudson, op. cit. supra note 11, at 364.

101. Buzzati, La Legge Sulla Cittandinanza 13 Giugno 1912, 130 (1914).

the family in 1938. This situation is more complicated than the first one. Tony, like Joe, is an Italian citizen at birth. By American law, he did not become derivatively naturalized in 1937 since he lived in Italy. He acquired American citizenship in 1943 in accordance with the Act of May 24, 1934.[102]

Section 2 of that Act reads as follows:

"That a child born without the United States of alien parents shall be deemed a citizen of the United States by virtue of the naturalization of or resumption of American citizenship by the father or the mother; provided, That such naturalization or resumption shall take place during the minority of such child: And provided further, That the citizenship of such minor child shall begin five years after the time such minor child begins to reside permanently in the United States."

Italy would refuse to recognize such a derivative naturalization because it was obtained through the mother, hence Tony is a dual national. It seems, however, that he too may take advantage of expatriatory provisions in the laws of either country.

As a conclusion to this section, it may be helpful to give what is thought to be an exhaustive enumeration of the cases of dual nationality which may arise, at birth or subsequently, as a result of the conflicts in the present nationality legislation of the United States and Italy.

Those arising at birth are:

1. birth in the United States of Italian father;
2. birth in the United States of an unknown father and a mother who is an Italian citizen;
3. birth in Italy of an Italian father and an American mother who, prior to the birth of the child, was physically present in the United States for a period or periods totaling not less than ten years.

Those arising subsequent to birth are:

1. birth in Italy of American parents, one of whom has had, prior to the birth of the child, a residence in the United States or one of its outlying possessions, coupled with residence in Italy by the child for at least ten years and non-declaration of American citizenship by him before the age of twenty-two;
2. birth out of wedlock in the United States, of a American mother and an Italian father, with the subsequent legitimation through the Italian father;
3. birth out of wedlock, outside of the United States, of an American mother who had been physically present in the United States or its outlying possessions for one year before the child's birth, and legitimation through the Italian father;

102. 48 Stat. 797.

4. birth in the United States, of American parents, with the subsequent naturalization of the father in Italy;

5. marriage of an American woman to an Italian citizen;

6. birth in Italy of Italian parents, emigration to the United States, and the subsequent naturalization, prior to 1940, of the mother.

With the exception of the last case, these are instances of dual nationality arising out of the existing nationality laws of the two countries. It can be seen that the primary cause of dual nationality is, at birth, the classical conflict between *jus soli* and *jus sanguinis,* and by naturalization, the refusal of the Italian Government to recognize the naturalization of an Italian woman when it produces a nationality different from that of her husband. Other cases of dual nationality have arisen in the past under then existing laws, but possibilities under these are not considered here.

II. The Legal Consequences of Dual Nationality

Introduction

Once it is established that the individual is a national of a State, certain consequences follow. Under existing international law, the rights of an individual in the international sphere are derived from those of the State, or States, of which he is a national, and it is normally only such State or States that may press his claim for injuries before international tribunals or through diplomatic channels. The rights are derived from the State in that they are based on the State's rights to claim redress for injury to its national. If the individual is given such rights under treaties, it is usually in his status as a national of one of the parties to the treaty. In addition, the State must protect the national and his property abroad; it must allow him to sojourn in its territory.

Conversely, nationality is recognized as a basis for the State's jurisdiction over the individual, affecting his rights under municipal law and subjecting him to diverse obligations. This jurisdiction, arising *ratione personae,* means that the State may exercise exclusive jurisdiction over its national within its borders and concurrent jurisdiction over its nationals abroad.[103] The national legislation of a State and its judicial jurisdiction may extend to persons, acts and property outside of its territory, so long as the application in the concrete case takes place within the State's own territory.[104] International law allows the State a wide measure of discretion, leaving it "free to adopt principles which it regards as best and most suitable"[105] for control over its national.

103. Schwarzenberger, op. cit. supra note 32, at 79.

104. Id. at 80.

105. The S. S. Lotus, P.C.I.J., Ser. A, No. 10 (1927) 18.

This means that a national is always subject to personal jurisdiction. This jurisdiction includes judicial and legislative control, *i.e.,* amenability to legal process, and civil and criminal liability for acts committed within and without the territorial limits of the State. The latter, when it deems it necessary for public interest and welfare, may exercise this jurisdiction through municipal legislation. International law does not ordinarily interfere, but some limitations on the State's freedom to exercise its legislative jurisdiction may arise from the duty of the State having personal supremacy, *i.e.,* claiming the individual as a national, to respect the territorial supremacy, *i.e.,* physical control of the individual, of the foreign State. Thus, for instance, a State is prevented from requiring such acts from its nationals abroad as are forbidden to them by the municipal law of the land in which they are physically present; nor may the State order its nationals not to commit such acts as they are bound to commit by the municipal law of the territorial State.[106]

This part will first discuss the substantive law obligations arising from the existence of the nationality relationship between the individual and the State. In this connection, such matters as military service, taxation and allegiance in time of war will be discussed. The chapter will then deal with the application of judicial jurisdiction vis-à-vis the national. It will end with a consideration of the State's duty to protect its national and espouse his claims.

The National's Responsibility Towards the State

The most severe obligation of citizenship, or nationality, and its permanent allegiance is military service.[107] Both the United States and Italy require military service of its nationals.

The Universal Military Training and Service Act provides for the registration for military service of every male between the ages of eighteen and twenty-six, who is a citizen of the United States, or an alien admitted for permanent residence.[108] Foreign nationals are entitled to certain dispensations from conscription for military service. They cannot be compelled to take part in war directed against their own country,[109] and they may enjoy particular treaty privileges.[110] The alien may also assert his alienage to prevent his induction into the armed forces. No such provision is made for a dual national; hence,

106. Oppenheim, op. cit. supra note 8, at 256-257.
107. In re Siem, 284 F. 868 (D. Mont. 1922).
108. 50 U.S.C.A. App. § 454 (a) (1951).
109. Harrisiades v. Shaughnessy, 342 U.S. 580 (1952).
110. Moser v. U.S., 341 U.S. 41 (1951).

he may not rely on his non-American nationality to escape the draft. Evasion of the obligation to perform military service carries penalties. In addition to the ordinary fine and imprisonment, it entails the loss of privileges.[111] For the citizen who evades the draft in time of war or national emergency there is loss of citizenship.[112]

According to Italian law, the following are subject to conscription: all male citizens to age fifty-five; those who lost citizenship but are still subject to military service; all stateless persons who reside in the Kingdom (Republic).[113] Not subject to the draft are those possessing citizenship without political rights or those who acquired citizenship by royal decree with express exemption from military service.[114] Aliens who can't become citizens through military service cannot enlist in the armed forces without authorization from the executive branch of the government.[115]

Special provision is made for citizens residing abroad.[116] They are exempt until they return to Italy. Those who return prior to the age of thirty-two will be called for military service with the next class drafted; those returning after the age of thirty-two will not be called unless there is a mobilization of their class. The Italian citizen born abroad and having the nationality of the place of birth will not be called at all, providing he proves service in the regular army of his country of birth. It is to be noted, however, that mere temporary return to Italy for the purpose of study or business, for periods of twelve, six, or three months, depending on the citizen's foreign residence, *i.e.*, respectively, transoceanic, Mediterranean or European, does not subject the returnee to military service.

All this is of particular concern to the American citizen of Italian origin. As we have already seen,[117] the Law of 13 June 1912 provides, in Article 8, for loss of citizenship in certain enumerated cases. The same Article adds, however, that "the loss of citizenship contemplated in this article does not exempt one from the obligations of military service, except as regards facilities granted by special laws." Thus, the Italian citizen who has lost his citizenship is still liable for the performance of military service.

That this law has been vigorously exercised in the past is evidenced

111.. For the alien who pleads alienage there is loss of the privilege of naturalization: 50 U.S.C.A. App. § 454 (a) (1951). Also 8 U.S.C.A. § 1426 (a) (Supp. 1953).

112. 8 U.S.C.A. § 1481 (a)(10) (Supp. 1953).

113. Law of Feb. 24, 1938, 1938 R.D.L.U. I 229, art. 1.

114. Ibid.

115. Law of Feb. 24, 1938, 1938 R.D.L.U. I 329, art. 135.

116. Law of Feb. 24, 1938, 1938 R.D.L.U. I 329, arts. 119-127.

117. See note 95 supra.

by numerous and repeated objections of the United States to the application of the Italian draft laws to American citizens. Shortly after the passage of the Law of 13 June 1912, many American citizens of Italian origin were impressed into Italian military service. The American ambassador protested, but to no avail, since the Italian Government took the position that by Italian Law these men were liable to military service. Despite this position, the Department of State continued to protest consistently and vigorously. The situation was summarized in a dispatch of April 1, 1915, from the Charge d'Affaires at Rome which read as follows:

"The phrases 'detained by military authorities,' or 'refused permission to return to the United States,' which are used by the applicants and in correspondence between the Department and the Embassy should perhaps be briefly explained.

"No Italian subject of military age, *i.e.*, under 39, is permitted to leave Italy without permission; and in consequence the steamship companies generally refuse to sell tickets to anyone not provided with such permission. Moreover, the ship is searched at the port of departure and those bearing an Italian name, even if furnished with a foreign passport are obliged to give proof that they are entitled to leave.

"It will be seen, therefore, that the military authorities are only indirectly detaining the applicants, except in those rare cases where he is actually under arms, either performing his regular military service or serving in one of the few classes of First Reserves now mobilized."[118]

During the progress of the First World War, the Italian Government went further and adopted the practice of detaining in Italy the wives and children of naturalized American citizens of Italian origin for the purpose of compelling the husbands and fathers to return to Italy for military service. After protests, however, Italy permitted the unrestricted departure of such wives and children.

With the coming into power of the Fascist Government, the situation became more acute. In answer to an inquiry by the American Embassy, the Italian Minister of Foreign Affairs issued the following statement:

"As is well known, the Fascist Government, which has bent every effort toward developing or creating the movement of the Italians residing abroad toward their mother country, announced some time ago that no question of citizenship would be raised against the travelers who, born abroad of Italian parents, might arrive in the Kingdom with a passport issued by the authorities of the country of their birth.

"Since that statement, however tranquilizing in respect to the question of citizenship, has left it open to doubt whether those citizens of Italian origin born abroad,

118. The Charge d'Affaires at Rome (Jay) to the Secretary of State (Bryan), No. 274, Apr. 1, 1915, Ms. Dep't State file 367.117/78; 1915 For. Rel. 556-557, quoted in 3 Hackworth, op. cit. supra note 5, at 187.

when subject to army obligations in Italy, might be exposed to difficulties, it is proper to elucidate that point, absolutely and finally, as follows:

"1. Citizens residing abroad are, by operation of Law No. 2959 of December 24, 1928, exempted from military service in the time of peace while living abroad.

"2. By the operation of the same law, when they come to Italy they may have a permit to remain there in time of peace for one year if residents of trans-oceanic countries, six months if residents of the Mediterranean basin and three months if residents of Europe, without their undergoing during those periods the obligations to report for duty in the army.

"3. Leaving aside the said provisions of law, the Fascist Government, taking into account the proportion between the members called into the army and the force appropriated for by the financial laws, would have no interest in subjecting to military service in time of peace the citizens who live in remote places, such as those that are beyond the ocean, in place of soldiers residing at nearer places, if not in Italy itself, and, therefore, under all circumstances, except those of war, the Italian citizens residing beyond the ocean with any passport with which they may present themselves in the Kingdom, whether issued by the Italian authorities or by the authorities of the foreign country where they were born, can only be considered as a 'surplus' ('esuberanti') in the military service in time of peace, and therefore exempt from any molestation in the matter of military obligations, even past ones, provided they are not wartime obligations."[119]

With the overthrow of the Fascist Government and the institution of the Republic, the situation may have eased. In a recent decision, an Italian Court indicated that the application of Article 8[120] has been restricted.[121] The court, in an action for draft evasion by the Ministry of War against a dual national born and residing abroad decided that the reservation in Article 8 regarding non-exemption from military service for all those who have lost citizenship is applicable only to those citizens who had been expatriated under the provisions of the same Article 8. Since in this case the defendant had lost his citizenship by express renunciation under the terms of Article 7, it was held that he was no longer an Italian citizen and consequently was not required to undergo military service.[122]

119. 3 Hackworth, op. cit. supra note 5, at 188-189. For the text of this statement as it appeared in the American press, see the N.Y. Times, Nov. 4, 1929, p. 1, col. 7.

120. See note 95 supra.

121. Ministero della Guerra v. Canessa, Court of Appeals Genova, Aug. 21, 1947, 3 Foro Padano 184 (1948).

122. Whether this case represents a true indication of the position of the Italian Government is debatable. In a note to the decision, the commentator suggested that the court had failed to mention the fact that the case could have been properly decided on the basis of the Law of July 17, 1933, 538, art. 3, which provides that "the Italian citizen, born and residing in a country where he is a citizen by birth, is exempt from the obligation of military service if he can prove that he has served in the regular armed forces of the country of his birth." 3 Foro Padano 183-184 (1948). Notwithstanding this apparent objection, and the fact that this is a lower court decision, it is the author's belief that it is a wedge in the hitherto adamant position of the Italian government, and that it is likely to be followed.

The most recent example of the dilemma produced by conflicting military obligations was reported in an American newspaper.[123] Alfonso Mazzarella, a 21 year old naturalized citizen of the United States, was scheduled for induction under the Universal Military Service and Training Act.[124] He decided to get married and went to Italy for that purpose, fully intending to return to the United States in time for induction. While on his honeymoon, he was arrested by the Italian police who charged him with being a compulsory military service evader. The Italian authorities, as reported by the paper, drafted him into the Italian Army for a period of twenty minutes,[125] gave him an honorable discharge, and returned his American passport.

This case, however, seems to be an anomaly[126] in view of the existence of the Treaty of Friendship, Commerce and Navigation between the United States and the Italian Republic, signed at Rome on February 2, 1948, and entering into force on July 26, 1949.[127] Article XIII, paragraph 1 of that treaty provides:

"The nationals of each High Contracting Party shall be exempt . . . from compulsory military training or service in the armed forces of the other High Contracting Party, and shall also be exempt from all contributions in money or in kind imposed in lieu thereof."

This has been interpreted, by the Italian Consulate, to mean that those former Italian citizens now naturalized in the United States but still owing military service to Italy may be exempt from those obligations.[128] All that is required of the former Italian citizen, in the event

123. N.Y. Times, Apr. 15, 1953, p. 4, col. 4.

124. See note 108 supra.

125. It is interesting to speculate what effect this will have on Mazzarella's American citizenship under the Nationality Act of 1952 (see note 75 supra). He could possibly resist expatriation on the ground that the act was involuntary.

126. There is no indication that the American Embassy intervened, and this leads to the conclusion that the facts as reported may have been incomplete, or that Mazzarella was not in possession of proper documentary evidence (see note 129 infra), or that the Italian officials concerned acted erroneously and subsequently corrected themselves.

127. U.S. Treaty Series No. 1965 (Dep't State 1948); Law of June 8, 1949, 1949 R.D.L.U. II 383.

128. It seems odd that the Department of State, in its booklet on Information for Bearers of Passports, issued Dec. 24, 1952, should have ignored the existence of the treaty. The following statement appears in the booklet: "There is no treaty between the United States and Italy defining the status while in Italy of former Italians who have become naturalized as American citizens nor of persons who were born in the United States of Italian parents. However, in view of the reduction of the Italian armed forces required by the Treaty of Peace with Italy dated at Paris February 10, 1947, which entered into force on September 15, 1947, it is not considered that American citizens of Italian origin who have maintained their principal place of abode in the United States

that he is going to Italy, is that he present himself to the consul and apply for examination.[129] The applicant must show his original naturalization certificate, and on this basis, the Italian Consul will give him a consular certification of the facts of his naturalization. This document may then be used by the former Italian citizen to prevent his being molested in Italy by the Italian authorities.

This treaty, however, is not considered applicable to dual nationals. A similar provision in a commerce and navigation treaty between Italy and San Salvador was so construed by an Italian court.[130]

Another burden imposed on the national is that of financially supporting his State through the payment of taxes. There is no doubt that a citizen may be taxed, even if he is outside the territorial jurisdiction of the State.[130a] A native citizen of the United States, who was a permanent resident of, and domiciled in, Mexico, and whose income was derived solely from property outside the limits of the United States and its possessions, was held liable to the United States for income tax payments.[131] Thus, in this instance, also, the dual national is in an unenviable position since he is exposed to tax claims by the two States claiming his allegiance.

After military service, that which causes the most concern to the dual national is the existence of a state of war between the countries of which he is a national. Many restrictions are placed on the enemy, and as a consequence, the dual national is likely to suffer.

An American statute authorizes the restraint and detention in war-

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will be required to perform military service while in Italy. This applies to persons born in Italy who became naturalized in the United States, persons born in Italy of American parents and persons born in the United States of Italian parents. It is pointed out, however, that this government cannot properly protest against punishment for any infraction of military service or other laws committed prior to a naturalized American's entry into the United States."

This seems completely erroneous, and should be brought to the attention of the Department.

129. The following form is suggested by the Consulate: "The undersigned....., son of..... and of....., born at .....on....., respectfully requests exemption from Italian military service in conformity with Article XIII of the Treaty of Friendship, Commerce and Navigation between the United States of America and the Italian Republic signed on February 2, 1948, and entering into force on July 26, 1949, because the undersigned acquires American citizenship by naturalization on....., at ....., certificate no. .....

"The undersigned left the mother country for the United States on....., and is domiciled and resident in....."

130. See note 121 supra.

130a. But see Int. Rev. Code § 911 (1954).

131. Cook v. Tait, 265 U.S. 47 (1924).

time of "all natives, citizens, denizens, or subjects of the hostile nation or government . . . who shall be within the United States and not actually naturalized."[132] Fortunately for the dual national, the Department of Justice did not interpret this as authorizing the detention of American citizens who also possess enemy citizenship.[133]

Difficult questions may arise as to the right of one of dual nationality of the two hostile countries to the return of property seized by the Alien Property Custodian under the authority of the Trading with the Enemy Act.[134] It has been held that a native born American citizen, stranded in Germany upon the outbreak of hostilities in 1939, and thereafter marrying a German citizen, thus acquiring German citizenship, could, on her return to the United States, properly apply for and obtain a return of her seized property since under the law of the United States, she had continued to be a citizen thereof.[135]

However, it is interesting to note that under the same act, the term "enemy" residing within enemy territory may include citizens of the United States.[136] Thus, a native born citizen of the United States, living in Germany, could not for the reason of citizenship alone maintain an action for the return of property from the Alien Property Custodian.[137] The citizen must, in addition, show that the residence was not acquired voluntarily and that it was not a permanent place of abode.[138]

The same would seem applicable to a dual national who also possesses the nationality of the enemy and that of a neutral or friendly State. A naturalized American citizen born of German parents in Switzerland, hence a dual national, who acted as agent of the German Government after Germany and the United States were at war, was considered an "enemy" or "ally of the enemy." His executor was consequently precluded from recovering the citizen's property seized in California.[139]

Nor will mere declaration of intention to select the neutral nationality remove the disability. Mere declaration of intention by German nationals to assume the character or citizenship of Czechoslovakia was insufficient as a substitute for removal, or bona fide intention to return to that State. It was held proper for the courts of a belligerent nation

132. 50 U.S.C.A. App. § 21 (1946).
133. Sen. Rep. No. 1496, 78th Cong., 2d Sess. 2 (1942); 34 A.B.A.J. 321 (1948).
134. 50 U.S.C.A. App. § 1 (1951).
135. McGrath v. Zander, 177 F. 2d 649 (D.C. Cir. 1949).
136. Salvoni v. Pilson, 181 F. 2d 615 (D.C. Cir. 1950), cert. denied, 339 U.S. 981 (1950); U.S. v. Krepper, 159 F. 2d 958 (3rd Cir. 1946), cert. denied, 330 U.S. 824 (1947).
137. Feyerabend v. McGrath, 189 F. 2d 694 (D.C. Cir. 1951).
138. Sarthou v. Clark, 78 F. Supp. 139 (S.D. Cal. 1948).
139. Ibid.

to deny an individual the right to claim either nationality whenever it may best suit his purpose.[140]

The greatest wartime hazard faced by the dual national is that of refusing to assist the State in which he finds himself and be shot for desertion, or to aid that State and be considered a traitor by the other State of which he is also a national.

There is no doubt that anyone owing allegiance to the United States may be guilty of treason for aiding the enemy in time of war.[141] Who are those considered to owe allegiance to the United States? They include an American citizen domiciled in an enemy country,[142] and even an enemy alien residing in enemy occupied American territory.[143] Nor is this allegiance easily cast off. Revocation of an American passport by a consular agent did not show loss of citizenship or dissolve an individual's obligation of allegiance arising from that citizenship;[144] neither did loss of protection.[145] In another case, an American citizen signed, before the war, a paper in the nature of an oath or affirmation of allegiance to Germany, and relied on this as bearing on the work in which she was tried. Yet, she was declared to be still a citizen of the United States, owing allegiance to her native land.[146]

If the above individuals owe allegiance, and that allegiance is so difficult to shed, can this be less true with respect to the dual national? A dual national of Japanese ancestry was convicted of treason by an American court. In the course of instructing the jury, the trial judge pointed out that "under our law an American citizen cannot owe 'permanent allegiance' to more than one country at any given time; that is to say, it is legally impossible for any American citizen to owe conflicting allegiance to any other country so long as he or she remains a citizen of the United States." He added, however, that the law allows expatriation. This was not found to have resulted in the instant case even though the dual national himself believed that by registering his name

140. Waldes v. Basch, 109 Misc. 306, 179 N.Y.S. 713 (Sup. Ct. 1919), aff'd, 181 N.Y.S. 958 (App. Div. 1st Dep't 1920).

141. 18 U.S.C.A. § 2381 (1951) provides "Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason. . . ."

142. Chandler v. United States, 171 F. 2d 921 (1st Cir. 1948), cert. denied, 336 U.S. 918 (1949); Burgman v. United States, 188 F. 2d 637 (D.C. Cir. 1951), cert. denied, 342 U.S. 838 (1951).

143. Office of the Judge Advocate of the Navy, Advance Copy Court-Martial Orders No. 19, Sep. 8, 1948, at 4.

144. Gillars v. United States, 182 F. 2d 962 (D.C. Cir. 1950).

145. Burgman v. United States, 188 F. 2d 637 (D.C. Cir. 1951).

146. See note 144 supra.

in the civil status registry in Japan he had renounced his allegiance to the United States.[147]

A more sensible result was achieved in a court martial of a dual national by a Belgian military tribunal.[148] The accused was held not to have renounced Belgian nationality by the mere fact of having joined the German Army, but the fact that he was regarded by the German authorities as a German national, and his own belief that on joining the German Army he renounced Belgian nationality, eliminated the intent necessary to prove him guilty of treason. It is interesting to note that though born in Germany, the accused had lived in Belgium from early childhood until the time of the war, had tried to enlist in the Belgian Army but was turned down, and finally ended up by joining the notorious SS troops. In view of the latter fact, this decision is to be commended for its unusual emotional restraint.

It is not unreasonable to conclude, from a study of the American practice described, that the threat of treason is omnipresent in the case of a dual national, especially in view of the emotive reaction evoked by the very nature of treason.

Assuming that Joe, our dual national in case number one, enlisted in the American Army in 1942 and fought on the Italian front, what would be the consequences from the standpoint of Italian law?

To the Italian, bearing arms against the State is the gravest violation of the duty of allegiance.[149] The citizen who takes up arms against the State, or serves in the armed forces of the enemy is punished by life imprisonment. If he exercises a command function, he is sentenced to death.

However, he is excused if he can show that he was obliged so to act by the laws of the State in which he was present. As a volunteer, Joe could not take advantage of this exculpatory provision. Further, the fact that he may have lost his citizenship through renunciation would not alter the situation, for the law specifically states that for the purpose of this crime, anyone who has ever been a citizen, regardless of the cause of loss, is punishable.[150]

Temporarily, the effect of this has been vitiated by Article 16 of the Treaty of Peace between Italy and the Allied Powers, which expressly provides that Italy will not indict nor prosecute any Italian citizen

147. Tomoya Kawakita v. United States, 343 U.S. 717 (1952).

148. Von Berge Case, Military Tribunal Turnout, March 3, 1947 Pasicrisic Belge III, 35 (1947); Lauterpacht, Annual Digest and Reports of Public International Law Cases, Case no. 56 (1947).

149. Valentino, Codice Penale, Esposizone e Commento Pratico 243 (1949).

150. Italy: Codice Penale, art. 242 (Franchi, Feroci 1949).

for the sole reason that he had expressed sympathy for, and had acted in favor of, the Allied Powers from June 10, 1940 to the effective date of the Treaty.[151]

The jurisdiction referred to herein included judicial and legislative control, *i.e.*, amenability to legal process, and civil and criminal liability for acts committed within and without the territorial limits. Although it is unquestioned that the State may exercise this jurisdiction with respect to nationals, it may not have done so. For this reason, the municipal legislation of Italy and the United States will be cursorily examined to determine generally to what personal jurisdiction the national is subject. This assumes relevance for the dual national inasmuch as it is conceivable that compliance with the laws of both States will be exacted from him.

In the United States, it is generally true that the physical presence within the State is usually required for the American courts to assume jurisdiction over an individual, whether national or alien, and that liability depends on the law of the locality in which the act took place.

The Congress of the United States has the power to regulate the actions of the United States citizens outside the territorial jurisdiction of the United States, regardless of whether the act involved occurred within the territory of a foreign nation.[152] This power has been exercised so as to require a citizen abroad to return to the United States to testify in a criminal case.[153] In upholding a conviction of contempt based on ignoring a subpoena served upon the citizen in France, the Supreme Court said, "With respect to the exercise of authority, there is no question of international law, but solely of the purport of the municipal law which establishes the duties of the citizen in relation to his government."[154] Thus far, however, no attempt has been made by the United States to confer personal jurisdiction over its citizens on the courts so that these will be enabled to render valid in personam judgments in ordinary civil cases.

Unlike the United States practice, it is a principle of Italian law that all the laws which regulate the legal status of the national in his relationships with his family and other persons, follow him wherever he may go.[155] The alien sojourning in Italy remains subject to the laws of his country. This is known as the nationality principle, and, in Italy, it is

151. U.S. Treaty Series No. 1648, art. 16 (Dep't State 1947); 1948 Giurisprudenza Italiana 1802 cites the Aug. 12, 1948 decision of the Court of Assizes at Genova to that effect.

152. Vermilyea-Brown Co. v. Connell, 335 U.S. 377 (1948).

153. Blackmer v. United States, 284 U.S. 421 (1932).

154. Id. at 432.

155. 2 Fiore, Diritto Civile Italiano 21 (1893).

based on the belief that "it would be an abdication of sovereignty if a State renounced its right to govern its national who has emigrated; conversely, it would be a violation of the sovereignty of the émigré's nation if the receiving nation should apply to the émigré laws not made for him; finally, legal ties of the émigré with his fatherland contribute to his fidelity to national institutions."[156]

The Italian legislator, in writing the new code of 1942, chose the nationality theory to determine the law which governs an individual's life.[157] This is probably the rule in most civil law countries.[158]

This principle is most often applied to the personal relations of the individual. For example, personal relationships between spouses of different citizenships are governed by the last national law which has been theirs in communion, or, if there was no such common citizenship, by the national law of the husband at the time of the celebration of the marriage.[159] As a result, a French court was held competent by an Italian tribunal to determine a French husband's request for divorce because, though the marriage was performed in Italy, it was a controversy between French citizens, the wife having acquired French citizenship by marriage.[160]

The relationship between parents and children are governed by the national law of the father, or by the national law of the mother if only maternity is ascertained, or if only the mother has legitimized the child. Relationships between adopting parents and adopted children are governed by the national law of the adopting parent at the time of adoption.[161] Thus, it was not only held that the adoption of a French minor by an Italian citizen was regulated by the municipal law of the adopter,[162] but an Italian court gave no efficacy to an adoption contract entered into in Switzerland by Italian citizens and authorized by a Swiss judge.[163] In another adoption case, the dual nationality, Italo-American, of the adopter was held not an obstacle to adoption where either of

156. McCusker, Italian Conflict of Laws, 25 Tulane L. Rev. 70, 72 (1950).

157. Ibid.

158. Ibid.

159. Italy: Codice Civile, Disposizioni sulla Legge in Generale, art. 19 (Franchi, Feroci 1949).

160. Crovetto v. Guillemin, Court of Appeals Genova, Aug. 26, 1948, 72 Foro Italiano 1084 (1949).

161. See note 159 supra, art. 20.

162. ———, Court of Appeals Firenze, June 12, 1950, 1950 Giurisprudenza Toscana 171; 73 Foro Italiano 27, note 6 (1950).

163. ———, Court of Appeals Milano, Feb. 6, 1950, cited in 73 Foro Italiano 27, note 7 (1950).

the municipal laws consented to an adoption.[164] In this instance dual nationality may have been a benefit.

To show the extent of this nationality principle, gifts are regulated by the law of the donor; so are successions.[166] Even contractual obligations may be if both parties are of the same nationailty.[167]

The conflict of the two principles, *i.e.*, nationality and physical presence, assumes importance in a third State when that State is called upon to determine the nationality status of a dual national so that a particular law may be applied, and must also be considered with respect to civil matters. In such cases, account is usually taken by the third State of all the "individual's relations to the State whose nationality is in question: of the degree of his attachment to that State as it may be concluded from his condition of life, from spiritual as well as material circumstances, such as loyalty and interests on the one hand, residence on the other."[168] This means that in third States the dual national is deemed to possess the nationality of that State with which he is in fact most closely connected.

Would the United States, as the third State, make use of this principle, i.e., effective nationality, in applying a statute requiring a determination of the individual's nationality status? For example, the Refugee Relief Act of 1953[168a] provides, *inter alia*, for the adjustment of non-immigrant status of certain aliens within the United States to a status as permanent immigrants. The essential requirement is that the applicant be unable, for fear of persecution, to return to the country of his birth, nationality or last residence. Assume that the applicant is a national of both Great Britain, with which he has had no connection, and of China, with which he is in fact most closely associated, and that he can show that he is unable to return to China for fear of persecution though he can be sent to Great Britain. Is he entitled to relief under the Act? The answer depends on the construction of the word "nationality."

If "nationality" is construed to mean all the nationalities the individual possesses, he is not eligible; if it is construed to embody the principle of effective nationality, he is. The first alternative emphasizes the unenviable position of the dual national and the importance of solving the dual nationality problem; the second alternative represents the

164. Daniele v. Venezia, Court of Appeals Napoli, Jan. 13, 1949, 1949 Giurisprudenza Italiano I, 2, 428.

165. See note 159 supra, art. 24.

166. Id. art. 23.

167. Id. art. 25.

168. 89 Sol. J. 205, 206 (1945).

168a. 67 Stat. 400, § 6.

solution suggested in similar situations by all civilized states and which this year was recommended by the United Nations to all its members as the solution least open to objections and which "would facilitate equitable decisions."[168b] In addition, in this particular instance, application of the principle of effective nationality is in accord with the remedial nature[168c] of the statute and with legislative antagonism[168d] towards dual nationality.

The competence of the State to prosecute and punish its nationals on the sole basis of their nationality is conceded.[169] By virtue of such jurisdiction, the State is enabled to prosecute its nationals for acts done abroad and to execute judgments upon their property within the State, or upon them personally when they return. The Constitution of the United States does not forbid the application of criminal laws to acts committed by its citizens abroad.[170] However, the United States has, in general, exercised limited jurisdiction over the national for such crimes. Only those crimes affecting the Government,[171] or murder committed on a ship[172] or plane flying the American flag are punishable in an American court.

Once again, in contrast to the American practice, the general rule in Italian law is that crimes committed abroad are punishable. These crimes are of two kinds, those that are possible of commission only by the citizen, and those both by the citizen and the alien. Among the latter are included crimes against the personality of the State, counterfeiting and using the seal of the State, counterfeiting legal tender, crimes committed by a public official in the service of the State, and every other crime punishable by international law.[173] Also punishable are political crimes committed abroad.[174] By political crimes are meant those which offend the political interests of the State or a political right of a citizen, similar to our offenses against civil rights.[175]

As mentioned, for the majority of crimes against the State, it is not

168b. Survey of the Problem of Multiple Nationality Prepared by the Secretariat for the International Law Commission. U.N. Doc. A/CN. 4/84. 14 May 1954. Par. 232, p. 91.

168c. A similar statute, the Displaced Persons Act of 1948, was considered remedial in the Case of J.L., File No. A 6662089, 1949 Interpreter Releases 236.

168d. It was and still is the intention of Congress that the plague of dual nationality be eliminated to every degree possible." Gaudio v. Dulles, 110 F. Supp. 705, 709 (D.C.D.C. 1953).

169. Harvard Research, Jurisdiction Over Crime, art. 5 (1929).

170. See note 144 supra.

171. United States v. Bowman, 260 U.S. 94 (1922).

172. United States v. Flores, 289 U.S. 137 (1933).

173. Italy: Codice Penale, art. 7 (Franchi, Feroci 1949).

174. Id. art. 8.

175. Id. art. 294.

necessary that the criminal be a citizen. However, citizenship is required in the following crimes: bearing arms against the State;[176] corruption of a citizen by a stranger;[177] trading with the enemy (here the resident alien is also included);[178] activity against Italian nationality by the citizen abroad;[179] accepting honors from an enemy State.[180] It is believed that "citizens" in these cases includes those who have lost their citizenship for whatever cause.[181]

For ordinary crimes, only citizens may be punished if the crime is committed abroad.[182] A serious crime, *i.e.*, one which is punishable by death, life imprisonment or a sentence of not less than three years, is punishable in accordance with the Italian law covering the crime. If it is merely an offense, there is the further requirement that it be punished at the request of the Minister of Justice or on the complaint of the person injured.

Oddly enough, an individual's dual nationality was used against him to make him liable for a crime he couldn't otherwise have committed as a national of the State trying him. An Italian citizen who had opted for German citizenship and served in the German Army was accused of mistreating Italian prisoners of war, a crime for which he could not have been guilty as an Italian. The military court rejected the defense of Italian citizenship, stating that as the accused was a German national, he could be tried, notwithstanding his possible Italian citizenship.[183]

In our conclusion on criminal jurisdiction, it must be noted that the nationality principle is so predominant in Italian law that, in opposition to American practice, the Italian national may be tried in absentia for his crimes.[184]

The State's Duty Towards the National

Nationality is the all important criterion in presenting a State claim. Generally, it is the right of every sovereign State to protect its national who is injured, contrary to international law, by the acts of another

176. Id. art. 242.

177. Id. art. 246.

178. Id. art. 250.

179. Id. art. 269.

180. Id. art. 275.

181. Manzini, Gabrieli and Cosentino, Codice Penale Illustrato Con I Lavori Preparatori 217 (2d Ed. 1947).

182. Italy: Codice Penale, art. 9, (Franchi, Feroci, 1949).

183. Webhofer Case, Supreme Military Tribunal, May 30, 1947, 1948 Giustrizia Penale II, 375, with a note by Galasso, La Legge Penale di Guerra e la Perdita della Cittadinanza Italiana.

184. "Trial of Lo Dolce and Icardi in Absentia is Considered" N.Y. Times, Aug. 13, 1952, p. 3, col. 8.

State, and is unable to obtain satisfaction through municipal law remedies.[185] In taking up the case "by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right, the right to ensure in the person of its nationals respect for the rules of international law."[186]

Assuming that Joe, our hypothetical dual national, is injured by an act of the German State, there seems to be no reason why either the United States or Italy could not present a claim. So long as Joe is not also considered a national by the State proceeded against, Germany, each of the two States can take up his case.

A case of this kind is the *William McKenzie Claim* between Germany and the United States brought before the Mixed Claims Commission established between these two countries under a treaty of 1922.[187] The individual concerned possessed the nationality of the United States, having been born therein, and that of Britain, by reason of his English parentage. To defeat this claim, the German agent did not allege the possession of dual nationality, but he did contend that the national, after attaining his majority, had continually resided in England and Canada, and that this amounted to an election of British nationality and to a renunciation and forfeiture of United States nationality.

The Commission correctly stated that the doctrine of election was not the law in the United States, and added that this international tribunal was not competent "to consider what the municipal law of the United States with respect to its citizenship should be, but only to find and declare the law as it is, to the extent necessary to determine the jurisdiction of this Commission and the liability of Germany under the Treaty of Berlin."[188] It was accordingly found that the individual was still an American national and that Germany was liable.

More complicated is the position when the individual possessed of dual nationality is the object of a dispute between the two States claiming him as a national.

In the *Canevaro Case* (1912)[189] between Italy and Peru, the Permanent Court of Arbitration was faced with this problem. Canevaro was born on Peruvian territory and therefore, according to Peruvian law, was a Peruvian by birth; as he was born of an Italian father, under Italian law he was considered an Italian by birth. The Court pointed out that "Rafael Canevaro has on several occasions acted as a

185. Mavrommatis Palestine Concessions, P.C.I.J., Ser. A, No. 2 (1924) 12.
186. Panezevys-Saldutiskis Railway, P.C.I.J., Ser. A/B No. 75 (1939) 16.
187. 20 Am. J. Int. L. 595 (1926).
188. Id. at 597.
189. Canevaro Case, Scott, Hague Court Reports 285, 287 (1916).

Peruvian citizen, both by running as a candidate for the Senate, where none are admitted except Peruvian citizens . . . and, particularly, by accepting the office of Counsel General for the Netherlands, after having secured the authorization of both the Peruvian Government and the Peruvian Congress. . . . Under these circumstances, whatever Rafael Canevaro's status as a national may be in Italy, the Government of Peru has a right to consider him a Peruvian citizen and to deny his status as an Italian claimant."[190]

This decision has been interpreted to mean that the Court did not accept the view, amounting to a denial of justice, that, in such a case, neither of the two countries could exercise its diplomatic protection over the individual concerned, but applied the reasonable test of active or overriding nationality.[191]

In support of this interpretation there may be cited several decisions of the Mixed Arbitral Tribunals established under the Peace Treaties of 1919. The case of *George S. Hein v. Hildesheimer Bank,* decided by the British-German Mixed Arbitral Tribunal is of special interest. The claimant was born in Germany. By naturalization he became a British subject, but his naturalization certificate contained an express reservation to the effect that within the limits of the foreign country of his State of origin, the holder of the certificate was not to be deemed a British subject. Under German law, Hein remained a German national. Despite these facts, the Tribunal held: "The creditor has become a British national, and, as he was residing in Great Britain on January 10th, 1920, he has acquired the right to claim under Article 296 (of the Peace Treaty of Versailles) through the British Clearing Office."[192]

In the *Mathison Case,* the claimant against the Venezuelan Government was born in Venezuela, had always lived there, and resided therein at the time of the claim. His father was a British subject; hence the claimant was a dual national. It was admitted that if the claimant was a Venezuelan by the laws of Venezuela, then the law of the domicile prevailed and the claimant had no standing before the Mixed Commission. The umpire so found him to be, saying, in curious language, that "Mathison is a Venezuelan and not a British subject, and this tribunal has no jurisdiction over his claim."[193]

In the *Tellech Case,* a claimant born in the United States of Austrian parents, hence a dual national, went to Austria at the age of five to reside. He was impressed into Austrian military service despite his

190. Id. at 287.

191. Schwarzenberger, op. cit. supra note 32, at 164.

192. See note 45 supra.

193. British-Venezuelan Arbitration, 1903; Ralston's Report 429.

protestations and those of the United States, and subsequently suffered injury thereby. In denying his claim against Austria, the Claims Commission said, "The action taken by the Austrian civil authorities in the exercise of their police power . . . was taken in Austria, where claimant was voluntarily residing, against claimant as an Austrian citizen. . . . Possessing as he did dual nationality, he voluntarily took the risk incident to residing in Austrian territory and subjecting himself to the duties and obligations of an Austrian citizen aising under the municipal laws of Austria."[194]

From these decisions it is not clear whether the claim is rejected because the claimant has elected the nationality of the respondent State or because he is most closely identified with that State. Nor do they clearly indicate that a claim may never be brought on behalf of a dual national by either State of which he is a national against the other State of which he is also a national. However, instances may be presented to show that this type of claim may not be brought.

For example, it is the policy of the United States not to present such a claim. In connection with two individuals who wished to have their claim against the Dominican Republic espoused by the United States, the department of State took the position that since the two claimants had the nationality of the Dominican Republic as well as the nationality of the United States, it could not espouse their claim.[195]

A more forceful, though older, decision may be cited. The case of *Alexander v. United States,* before the American and British Claims Commission under the Treaty of Washington of 1871, was an action for damages to real property in Kentucky by the Union forces during the Civil War. The national concerned was born in Kentucky of British parents, had lived both in Kentucky and in Scotland and had died in Kentucky. He was clearly a dual national. The claim was rejected, the Commission stating:

"The practice of nations in such cases is believed to be for their sovereign to leave the person who has embarrassed himself by assuming a double allegiance to the protection which he may find provided for him by the municipal laws of that other sovereign to whom he thus also owes allegiance. To treat his grievances against that other sovereign as subjects of international concern would be to claim a jurisdiction paramount to that of the other nation of which he is also a subject. Complications would inevitably result, for no government would recognize the right of another to interfere thus in behalf of one whom it regarded as a subject of its own."[196]

194. Tripartite Claims Commission, 1928; Decisions of Tripartite Claims Commission 71.

195. 3 Hackworth, op. cit. supra note 5, at 354.

196. 3 Moore, International Arbitrations 2529, 2531 (1898).

An occasional case may be found to the contrary, such as *Arata (Italy) v. Peru,* where a claim was allowed on behalf of native born Peruvians, children of an Italian national, who were citizens of both States. The arbitrator said that in such circumstances the courts of each of the two States would apply its own law, but that an arbitral tribunal will decide according to the principles of international law. Among these principles, he added, was that the legitimate child acquires at birth the nationality which the father then possesses, so the claim by Italy was sustained.[197]

The conflict in cases leads to the conclusion that since most claims are brought under specific treaty provisions or arbitration agreements, it is important to realize that the controlling factor is often the wording of the agreement rather than the dual nationality of the person injured. This agreement establishes the jurisdiction of the Claims Commission, hence no clear conclusion can be deduced from it with regard to the effect of dual nationality on the outcome of the claim. In the absence of an agreement to the contrary, the rule at present seems to be that a dual national may not have his claim espoused by either State against the other.

Another function of nationality in the international sphere is evidenced by the State's duty to protect its national and his property when both are abroad.[198] It thus seems that the dual national may be protected by either State claiming him.

The Department of State, however, uses its discretion and will not grant diplomatic protection to an American so long as he has his residence in, and is most closely connected with, that State which has also conferred its nationality upon him. During the Spanish Civil War in 1937, the consular offices were instructed that "protection should not be extended to persons having both Spanish and American nationalities unless such persons habitually reside in the United States, are in fact most closely connected with this country and are in Spain only temporarily. Doubtful cases should be fully reported to Department."[199]

An instance in which the third State tried to dispute such protection of a dual national arose during the First World War, prior to the entry of America into that war. Germany attempted to mistreat an individual, who was a national of both England and the United States, on

197. Descamps and Renault, Recueil International des Traites du XXe Siecle 709 (1901). See also Chopin (France v. United States) before the commission under the convention of 1880; 3 Moore, International Arbitrations 2506 (1898).

198. 1 Oppenheim, op. cit. supra note 8, at 588.

199. Secretary Hull to all American consular offices in Spain except Vigo, Dec. 21, 1937, Ms. Dep't State, file 352.11/271 A, quoted in 3 Hackworth, op. cit. supra note 5, at 354.

the ground that he was an enemy national. The Foreign Office asserted in its note that "in accordance with the general principles of international law, an enemy alien possessing a neutral nationality at the same time, can be treated as a person of enemy nationality, and no regard need be paid to his neutral nationality." It added that there was no cause for complaint in the individual's detention and expulsion by the German authorities. The Department of State rejected this sweeping contention, replying as follows:

". . . it may be said that Highsmith was born of American parents, that he claims to have a domicile in the United States, and that the United States Government has recognized his American citizenship and has presented him with a passport. In view of these facts, the United States Government does not recognize the right in the German Government to set up an adverse claim to Highsmith's citizenship on behalf of Great Britain."[200]

In addition to espousing claims and protecting its national abroad, a State also has the duty of receiving on its territory such of its nationals who are not allowed to remain on the territory of other States.[201] Since no State is obliged by international law to allow foreigners to remain within its boundaries, it may, for many reasons, happen that certain individuals are expelled from foreign countries. The home State of the expelled persons cannot refuse to receive them on the home territory, the expelling State having a right to insist upon this. In former times it was the practice for States to banish nationals whom they considered undesirable for political reasons. A State of which the banished person is not and never was a national may refuse to receive such person,[202] but if the banished person gains admission to the territory of another State, the latter may deport him to the State from which he is banished.[203] Hence, a dual national has greater possibility of finding a home than the person with a single nationality.

III. Towards a Solution to Dual Nationality

Evaluation of The Dual National's Status

This concluding chapter will first evaluate dual nationality, discussing its advantages and disadvantages. It will then outline the proposals designed to eliminate its creation or to divest the individual of one nationality, and the efforts to alleviate certain specific areas of friction. It will end with a list of recommendations by the writer.

The existence of dual nationality may have some advantages for the

200. 3 Hackworth, op. cit. supra note 5, at 355.

201. 1 Oppenheim, op. cit. supra note 8, at 588.

202. Bouve, Exclusion and Expulsion of Aliens c. 1 (1912).

203. Harvard Research, Draft Convention on Nationality, art. 20 (1929).

individual concerned. Within certain limitations, a dual national may select which of the two nationalities he will assume and take advantage of, something which the ordinary national may not do. Because of his dual nationality, it is conceivable that this individual may benefit from those same municipal laws which can impose undue burdens upon him.

It is not necessarily true that a dual national wishes to discard one of his nationalities. So long as he does not feel its ill effects, there is no reason for him to do so. In many instances the dual national has ties with both States, and he often finds it necessary to leave the State in which he has his habitual residence to visit the other State of which he is also a national in order to attend to family matters, or to study, or to carry on an intercountry business, or for other purposes. He may be loath to sever relations, particularly the tie of allegiance, with either country, and in the absence of the onerous facets of dual nationality, he is content to maintain the status quo.

The above is especially true of the individual who becomes a dual national through naturalization, direct or derivative. Some of those directly naturalized become nationals for practical purposes, and continue to think of themselves, in spirit, as owing allegiance to their country of origin rather than to their country of adoption. For them dual nationality is not unpleasant, for it enables them conveniently to shift the emphasis on their allegiance to suit their purpose. An example of this was the attitude of many Italo-Americans who felt themselves strongly Italian during the 1930s when the Italian star was in the ascendance, and who solemnly adhered to their American allegiance in the later years when the star waned.

These advantages, however, are for very few individuals. Most dual nationals have strong, steadfast preference for one state, and for them the disadvantages of dual nationality outweigh the dubious advantages.

We have already seen what burdens may be placed on the dual national. To recapitulate, he may be required to serve in the military forces of two States, to face double taxation, to incur twice the unenviable risk of treason because of his unique position. In addition, he is subject to the judicial and legislative jurisdiction of two States, and he is legally answerable to both of them for his private affairs and for his criminal actions. In the realm of international affairs, he is unable to have a claim presented in his behalf against either of the States of which he is a national, and this often imposes a pecuniary, if not physical, hardship upon him. Further, he may legally be deprived of protection if he is within the territory of a State claiming him as a national. If dual nationality has not been his deliberate choice, it seems equitable that some relief should be provided.

The existence of dual nationality may cause friction between the claiming States, and this sometimes results in the impairment of friendly relations between those same States. The situation then becomes a matter of vital concern to the international community, and, for this reason, in addition to the personal discomfiture of the individual, a solution is mandatory.

This was recognized by the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws when it stated in its preamble that it was in the "general interest of the international community to secure that all its members should recognize that every person should have a nationality and should have one nationality only." The ideal towards which the Hague Convention aimed was "the abolition of all cases, both of statelessness and of double nationality." It nonetheless realized that the question of nationality was a political question, and came to the conclusion that "under the economic and social conditions which at present exist in the various countries, it is not possible to reach immediately a uniform solution."[204] In this respect the situation has not changed. This has not, however, prevented efforts seeking either the elimination of the entire problem of dual nationality, or the amelioration of some of the particular areas of friction.

Elimination of Dual Nationality

Inevitably, dual nationality will continue to exist unless all the States agree to adopt a uniform rule for nationality at birth, and a rule as to the effect of naturalization, thus doing away with the cause of the problem in conflicting legislation.

Under present nationality legislation only two principles, *jus soli* and *jus sanguinis,* are used in determining nationality at birth. Because of the equal attachment by the States of the world to these two rules, it is unlikely that in the foreseeable future either of them will be adopted by all States to the exclusion of the other. Though each of the principles has been acclaimed the better,[205] there is little to choose between them. Universal adoption of either would certainly eliminate dual nationality arising at birth, but neither subsequent dual nationality nor other diffi-

204. League of Nations, V. Legal, supra note 40, preamble.

205. Favoring jus sanguinis as opposed to de Lapradelle, op. cit. supra note 11, see Scott, Nationality: Jus Soli or Jus Sanguinis, 24 Am. J. Int. L. 59 (1930) who states: "The principle of birth within a country conferring its nationality is a natural principle, because resulting from birth, itself a natural process, and applying alike to all persons born in the country, without reference to the nationality of their parents. It is an objective principle; it is relentless, and without a remnant of consent on the part of the person born. It is universal, as law should be, making the test one of fact; that of birth within the country in question."

culties would disappear. For instance, if *jus soli* is adopted, it would be manifestly unfair to impose nationality on transient individuals belonging in every respect, except that of accidental birth, to another State; if *jus sanguinis* prevails, nationality may be equally unrealistically imposed on individuals who are residing in, most closely connected with, and partaking of the community life of, a foreign State. Additional provisions would have to be made to obviate such undesirable results.

A compromise was suggested by Vattel. After expressing the opinion that "by the law of nature alone, children follow the condition of their fathers" with regard to nationality, he adds, "But I suppose that the father has not entirely quitted his country in order to settle elsewhere. If he has fixed abode in a foreign country, he has become a member of another society, at least as a perpetual inhabitant, and children will be members of it also."[206]

Though Vattel's compromise suggestion is a good one and is, perhaps, the most suitable for conferring nationality at birth, any rule, whether it be based on *jus sanguinis, jus soli,* a mixture of both, domicile or residence of the parents, etc., would result in the elimination of dual nationality at birth if it were adopted by all States. To prevent dual nationality from arising at birth, the most important consideration is the universal acceptance of a uniform rule, and not its quality or merits.

Dual nationality arising subsequent to birth may be eliminated by the adherence of the States to the principle that naturalization divests an individual of his original nationality. In order to avoid confusion, however, certain limitations should be imposed on conferring nationality by naturalization. Each State should refrain from naturalizing an alien who has his habitual residence within the territory of another State,[207] and it should not naturalize an individual without his consent.[208] Neither of these restrictions is applicable to derivative naturalization.

To prevent the creation of dual nationality for married women, the States must universally recognize either the traditional principle that the condition of the wife follows that of her husband, or the modern one, evidencing the strong trend towards emancipation of women, that the married woman keeps her own status. In view of the equal dissemination of both principles, the adoption of either is unlikely at the present time.

As has already been stated, there is little objection to the existence

206. Vattel, Law of Nations 102 (Chitty's ed. 1849).

207. Harvard Research, Draft Convention on Nationality, art. 14 (1929).

208. Id. art. 15.

of dual nationality in the minor. The only concern is with his being able to divest himself of one nationality when he comes of age.

The suggestions made above are not necessarily complete and exclusive. Others undoubtedly may be made. It is important only that the nations of the world agree on one rule for the conferring of nationality at birth and through naturalization, no matter what form it takes, in order to eliminate dual nationality.

In the event that a compromise rule for conferring nationality at birth does not prevail, Flournoy suggests a uniform rule of election following minority to be adopted only by international convention, supplemented by uniform legislation in the several States.[209] Rather than permit choice by the individual, he proposed that election be based on facts, specifically, the domicile of the dual national on attaining majority. Domicile is not explained, but Flournoy admits that it would have to be arbitrarily defined before this test could be applied.[210] When this suggestion was made, Flournoy was not concerned with dual nationality arising through naturalization because it was the unwavering position of the United States that dual nationality could not result from naturalization inasmuch as the voluntary act divested the person of his nationality of origin. It seems, however, that this proposal could be put to use in both cases of dual nationality, *i.e.*, that acquired at birth, and that acquired subsequently.

The same solution, with the use of the term "habitual residence"[211] in place of "domicile," was advocated by the Harvard Research in International Law, Draft Convention on Nationality, which proposed in Article 12 that:

> "A person who has at birth the nationality of two or more states shall, upon his attaining the age of twenty-three years, retain the nationality only of that one of those states in the territory of which he has his habitual residence; if at that time his habitual residence is in the territory of a State of which he is not a national, such person shall retain the nationality of that one of those states of which he is a national within the territory of which he last had his habitual residence."

The dual nationality of the married woman, in the event she acquired a second nationality through her marriage, might be terminated by requiring her to make a choice within a certain period of time after the marriage, say two years. Divorce should not divest her of her remaining nationality, and in the event that she returned to her State of origin

209. Flournoy, Dual Nationality and Election, 30 Yale L. J. 693, 705-709 (1921).

210. Id. at 708.

211. Since Flournoy was the Reporter for the Harvard Research, Draft Convention on Nationality, it may be that he meant habitual residence as defined by that convention when he spoke of domicile.

and wished to reacquire her original nationality, provision might be made for her expeditious naturalization which would divest her of her unwanted nationality. A child acquiring dual nationality through the naturalization of his parents should also have to make a compulsory election within two years after coming of age.

For these situations the Hague Codification Conference provided that if a person, without any voluntary act of his own, possesses dual nationality, he may renounce one of them with the permission of the State whose nationality he wishes to surrender, but that, subject to the laws of the State concerned, such permission shall not be refused if that person has his habitual residence abroad.[212]

The emphasis on domicile or residence has been prevalent in all proposals made for the solution of nationality problems. A distinguished English lawyer and author has suggested that those "who are permanently settled in its territory with no definite intention of departing therefrom be treated as nationals of such State."[213] "A year's residence would not be too much to exact."[214]

Wigmore states that "citizenship should be identified with domicile (or residence, as distinguished from place of nativity or parental nationality); *i.e.*, it should be territorialized or localized,"[215] both with respect to the State's rights over its citizens and the State's rights vis-à-vis another State. For him, citizenship would be "compulsory," and he would require the new resident to elect within two years of his arrival into the State.[216] This two year's residence should be enough to entitle the individual to citizenship, and such citizenship would necessarily be "exclusive and single." He is not clear as to whether he would substitute domicile for nationality or merely base nationality on domicile, but in any event, "Every resident domiciled in the United States becomes a citizen."[217]

There are others who are of the opinion that it is no "unreasonable guess that domicile rather than birthplace or filiation may in the future be the favorite fact of attachment for the acquisition of nationali-

212. League of Nations, V. Legal (1930), Convention on Certain Questions Relating to the Conflict of Nationality Laws, art. 6.

213. Baty, The Interconnection of Nationality and Domicile, 13 Ill. L. Rev. 363, 373 (1919).

214. Id. at 374.

215. Wigmore, Domicile, Double Allegiance, and World Citizenship, 21 Ill. L. Rev. 761, 762 (1927).

216. Id. at 763 states: "If he elects not to do so, then he must go back to his own country. He cannot live here and obtain protection and a livelihood from our resources, and yet not share the burdens of citizenship."

217. Id. at 764.

ty."[218] Flournoy, however, rejects domicile as the basis of nationality, stating that "because of its vagueness and uncertainty, it would lead to more confusion than the present clash of nationality laws."[219] As Cheshire says, "Nationality and domicile are two different conceptions, and a man may change his domicile without divesting himself of his nationality. 'A change of domicile is not a condition of naturalization, and naturalization does not necessarily involve a change of domicile'."[220] Flournoy's view is supported by many conflicts of law cases in American courts.[221] Lending further support to his contention is the practical problem, at least in the United States, of overcoming the Constitutional embodiment of the rule of *jus soli* as a basis for conferring nationality at birth.

So long as constitutional prohibitions exist, and the international community is not organized in a federal system in which each State is subject to federal authority and each individual possessed of dual citizenship, *i.e.*, that of the State in which he resides and that of the world community, it is unlikely that the rule of nationality based on domicile will be adopted. Should such an international federal system, patterned after the one in use in the United States, be established, domicile might well play the same role in international affairs that it now does in interstate matters within the United States. It may then serve the function of conferring an additional citizenship, that of the State in a world union, to an individual who already possesses the federal, or world, citizenship. Mere change of domicile and meeting residence requirements in another State will result in loss of one citizenship and the acquisition of another. Citizenship thus becomes important only as a means for obtaining certain political and judicial rights. The term "nationality" may then become juridically insignificant and be reserved for use only with respect to the racial, linguistic, or cultural origin of an individual.

Amelioration of Specific Difficulties

Regardless of the eventual success of the adoption of universal rules, efforts have been made, and should continue to be made, to avoid certain specific areas of friction, *e.g.*, military service, determination of which nationality is to be given effect in a third State, protection abroad

218. Koessler, "Subject," "Citizen," "National," and "Permanent Allegiance," 56 Yale L. J. 58, 76 (1946).

219. Flournoy, op. cit. supra note 209, at 705.

220. Cheshire, Private International Law 176 (2d ed. 1938).

221. In re Dorrance's Estate, 115 N.J. Eq. 268 (Prerog. Ct. 1934), aff'd mem., Dorrance v. Thayer Martin, 13 N.J. Misc. 168 (Prerog. Ct. 1935), cert. denied, 298 U.S. 678 (1936).

and the espousal of a national's claim,[222] and the need for expatriation permits from the country of origin.

Certainly, it is unreasonable that a person should be subject to equal claims by two States to his military services as a national, and for this reason the Draft Convention on Nationality proposed that "a person who has the nationality of two or more States shall not be subject to the obligation of military or other national service in one of these States while he has his habitual residence in the territory of another of these States."[223]

In a Special Protocol Relating to Military Obligations in Certain Cases of Double Nationality, signed or ratified among others, by the United States, Great Britain and Brazil, it was agreed that if a person of two or more nationalities possesses the effective[224] nationality of one country, he shall be exempted from all military obligations in the other country or countries subject to the possible loss of nationality in those countries. Further, if a minor could, on coming of age, renounce the nationality of a State, he is exempt, during his minority, from military service in that State, and if under the law of the State he loses its nationality when he has acquired another, he is exempted from military obligations in the State whose nationality he has lost.[225]

In addition, some States have concluded bilateral agreements concerning military service in cases of persons having the nationality of two or more States.[226] These treaties usually provide that a person who has done military service in a country of which he is a national shall be exempt from the requirement of military service in the other country of which he is a national.

The question often arises as to which of the nationalities possessed by the individual the third State should give effect to. The types of situations envisioned are these: if war breaks out between two States, and nationals of the enemy State are deported, may the deporting State also deport one who is a national of a third State as well as of the enemy State? If goods of a dual national, one of whose nationalities is that of the enemy States, are seized on ships at sea, are they to be returned? If a certain nationality is excluded from a State, may a State exclude

222. Even in these cases it is to be noted that residence has played an important part.

223. Harvard Research, Draft Convention on Nationality, art. 11 (1929).

224. Effective nationality represents the taking into account of all the relations of the person concerned to the State whose nationality is in question, i.e., of the degree of his attachment as it may be concluded from his conditions of life, from spiritual as well as material circumstances, such as loyalty and interests on the one hand, residence on the other.

225. 24 Am. J. Int. L. Supp. 201 (1930.

226. Harvard Research, supra note 223, art. 40.

an individual who is also a national of an admitted nationality? If extradition of a dual national is sought, must the third State ever comply? If so, when?

The Hague Codification Conference attempted to solve these questions by providing that if a person has more than one nationality, he shall, within a third State, be treated as if he had only one. In particular, it is laid down that the third State shall recognize exclusively either the nationality of the State in which he is habitually and principally resident, or the nationality of the State with which he appears in fact to be most closely connected. The convention thus gives effect to the principle of effective nationality.[227]

This principle has been defined many times, most recently by the special reporter to the International Law Commission of the United Nations who said:

"To determine the effective nationality account will be taken of the following circumstances, either jointly or separately;
a. Residence in the territory of one of the States of which the individual concerned is a national, for a period of not less than fifteen years;
b. Knowledge of the language of the State of residence;
c. Ownership of immovable property in State of residence."[227a]

The use of habitual residence as a test of the nationality to be given effect by a third State has been objected to. A reason given is that it does not take the individual himself into consideration. He may have chosen his residence within a State for reasons of health or money, and this may not necessarily indicate his true allegiance. The only feasible solution, according to this view, would be the free choice of the person concerned. As expressed by its proponent:

"This solution of choice is . . . the common denominator of all other solutions; because habitual choice, habitual residence, or the nationality last acquired, etc., all contain more or less the idea underlying the choice of the person concerned. Instead of adopting, however, what I might call a presumptive choice, instead of setting up arbitrary rules to decide what a person's choice should be, why not let him have his free choice, his declared choice?"[228]

This solution does not seem feasible in view of the inherent possibilities for fraudulent practices on the part of the person who is allowed to choose his nationality in a third State.

The rule of habitual residence has also been advocated as a solution to injustices arising from failure to protect nationals abroad and to

227. See note 225 supra.

227a. U.N. Doc. A/CN. 4/83, 22 April 1954.

228. League of Nations, V. Legal, Acts of the Conference for Codification of International Law, Meetings of the Committees, Vol. II, Minutes of the First Committee 63.

espouse their claims.[229] Under this view, the only State which could protect the dual national or espouse his claim would be that State with which he is most closely connected. However, a simpler solution has been proposed. Assuming there is sufficient development in international law in the near future so that there is adopted a binding international bill of rights, whereby the individual is given a right, when he is maltreated, to appear in his own behalf before an international tribunal, this problem will be greatly alleviated. As stated by an authority on the subject:

"Assuming the acceptance of the hypothesis that the right to fair treatment is a right of the individual and not merely of a State with which he is connected, the cases of dual nationality offer an illuminating picture of the change that would take place in international law. If X is a national of both States, A and B, and is mistreated in B, A could make legal representations on his behalf and B could not offer as a defense that X was at the same time its national, since B would owe a duty to X, not as a national of A, but as an individual. Granted appropriate procedural developments in international relations, such as the establishment of special claims commissions to which the individual would have the right of direct access, X himself could present his claim and the question of nationality would clearly become irrelevant and immaterial."[230]

The problem will continue to exist, however, until as a corollary to allowing the individual to present a claim in his own behalf, the State is prevented from asserting its right "to ensure in the persons of its nationals respect for the rules of international law."[231] This right is in reality based on the injury to the individual, and if the individual can obtain proper redress, there seems to be no sufficient basis for the State's right.

To minimize friction arising as a result of naturalization it has been suggested that the naturalizing State require the prospective national to secure an expatriation permit from the country of origin.[232] If this is refused by that country, it does not prevent the naturalizing country from conferring its nationality on the individual. It does, however, put the parties on notice of the position of the country of origin.

According to the same suggestion, the adopting country should further require the individual, as a condition subsequent, to effectively

229. Schwarzenberger, op. cit. supra note 32, at 152.

230. Jessup, op. cit. supra note 38, at 100-101. See also Wigmore, op. cit. supra note 215, at 769, who would solve this problem by basing citizenship on domicile, and as an example states that "when an American leaves America and goes to Farland to live he would equally come under Farland, with all its residents, in citizenship and loyalty and local duty. So that our state would have no further duty or right to protect him."

231. Panezevys-Saldutiskis Railway, P.C.I.J., Sec. A. No. 2 (1939) at 16.

232. League of Nations, V. Legal, Acts of the Conference for the Codification of International Law, Meetings of the Committees, Vol. II, Minutes of the First Committee 73.

renounce his old allegiance in the manner prescribed by the laws of the country of origin. Even if that country considers its former national expatriated by the very act of naturalization, a report of the fact of naturalization to the country of origin would serve to clarify the status of the individual. Should the country of origin refuse to accept the renunciation, the individual is made aware of the risks he may run should he ever return within the territorial jurisdiction of that country.

To require an expatriation permit might prevent some prospective citizens from applying for naturalization when that application is made for reasons of convenience. Often in such cases the individual has no idea of renouncing his old allegiance, and to require the permission of his country of origin may have a deterrent effect.

The United States, was, at one time, strongly against the use of expatriation permits, but that was when America was in need of a large body of citizens. Now that American citizenship is at a premium and is becoming increasingly difficult to acquire and easier to lose, it is likely that this additional condition on naturalization might well be favorably considered.

The Author's Recommendations

The recommendations to be made by the author are of two kinds, those applicable to dual nationality in general, and those applicable to the American citizen of Italian origin. They express the personal views of the author, and especially with respect to the solution of the general problem, are based on the assumption that greater and more widespread knowledge of nationality laws will lessen the existing difficulties.

The author is in accord with the prevailing opinion that the eventual solution to dual nationality lies in the universal adoption of a uniform rule for the acquisition of nationality at birth and through naturalization. He feels, however, that too much emphasis has been placed on theory and not enough on the ground-work necessary to bring about acceptance of the universal rule. For that reason he will limit himself to recommending what he believes are practical, everyday methods for the dissemination of information on nationality. This step will attune the international community and the individual States to the possibility and desirability of change, and may eventually lead to the *desideratum, i.e.*, a uniform nationality law. It may also encourage the individual to participate in collective action to bring about this end.

The recommendations are directed towards three entities, the international community, the State, and the individual. A division in that order will be made in the following presentation of these recommendations, but it is important for the reader to realize that all three entities are neces-

sarily involved to some degree in all the recommendations made. The division is only for the purpose of emphasizing which entity has the major responsibility for fulfilling the task involved.

It is recommended that a registry of nationality laws be established, and kept current, by the international community, or by private agencies interested in the development of international law. This would eliminate some of the confusion that now exists with respect to nationality laws and their authoritative interpretations. Those compilations presently in use are outdated and practically valueless, except possibly as background material. An up-to-date registry would be a reliable source of information which would be available to those interested in the problem, thus enabling them to make concrete and specific recommendations. Under this recommendation, it would be incumbent upon the states to cooperate by supplying, as soon as possible, all revisions of law, and the newest interpretations thereof, to the central agency.

First, it is recommended that the States take into account that matters of nationality are not exclusively within their domestic jurisdiction. When dual nationality exists, it is a source of conflict between the interests of several States, which may lead to friction and impaired relations. This necessarily is of concern to the international community. However, so long as the emphasis is on the domestic nature of nationality, States are likely to remain adamant in asserting their independence in these matters and in seeking solutions which are beneficial principally to themselves. Once the emphasis is shifted the States will likely be more cooperative in their efforts to solve existing difficulties, and their activities may then be directed towards the interest of the world community. Thus, should the States be impressed with the fact that nationality is of international concern, great progress will already have been made in the solution of the problem of dual nationality.

Second, it is recommended that every effort be made by the State to compile a nationality census. This normally would be subsequent to the compilation of the registry of laws indicated above, but need not be so. Detailed questions would have to be asked, and the answers would have to be analyzed by experts in the nationality laws of the several States. It is realized by the author that this may not be feasible, so it is alternately suggested that at least a careful examination of those traveling abroad be made. This recommendation would be useful to point out the difficulties involved at present in determining nationality, and might result in specific suggestions for amelioration. In addition to highlighting existing inconsistencies, this would enable State agencies to adequately counsel travelers on their nationality status and ex-

plain to them the risk that might be incurred by dual nationals in going to those nationalities that claim them as nationals, as well as to third nations.

In conjunction with the above recommendation, it is also suggested that more rigorous attention be paid by the State in selecting personnel informed on nationality laws for service in State agencies concerned with citizenship matters. A minimum requirement for employment would be a knowledge of the conditions and procedure for expatriation laid down by other countries. This would enable these agencies to counsel dual nationals on how to divest themselves of an unwanted nationality.

It is further recommended that information be freely accessible as to the possible dual nationality status of an individual so that he may take steps to avoid undesirable consequences. Written brochures may be used for this purpose, but it is essential that some system be devised not only to bring their contents to the attention of the individual concerned, but also to ensure that he understands them. This should be especially emphasized at times when, and places where, citizenship assumes great importance, *i.e.*, petition for naturalization, application for a passport, etc.

It is recommended that naturalization agencies require individuals to possess expatriation permits, or at least evidence of refusal, before naturalization is granted. The burden of following the procedure involved would be on the prospective citizen. If the permit is received, nationality is lost, and all concerned are made aware of that fact; if it is refused, the critical situation is exposed before it has had an adverse effect on the individual and on the relations between the States. This recommendation would emphasize the disparity in nationality laws, and would lead to negotiations between the States before harm has been caused to the individual, or to the relations between the States.

To further lessen the possibility of unpleasant consequences, it is recommended that the dual national, when he is appraised of his status, be required to make, and aided in making, an attempt to divest himself on an unwanted nationality prior to his leaving the territorial jurisdiction of a State of which he is a national for the territorial limits of the other State of which he is also a national.

If all the above recommendations are followed, it is felt by the author that there would be substantial amelioration both in the position of the dual national and in relations between the States in matters concerning nationality. Further, once the recommendations are put into practice, a solid foundation will have been laid on which to build an equitable universal nationality law which could be adopted in the municipal legislation of all nations of the world community.

The American citizen of Italian origin has been the author's main concern in this thesis. The treatment of recommendations with regard to the Italo-American will be divided into two parts, one dealing with the elimination of dual nationality, and the other with amelioration in specific areas of hardship resulting from his status.

We have seen that Italo-American dual nationality arises at birth because of the conflict of the principles of *jus soli* and *jus sanguinis,* and subsequent to birth because of the refusal of Italy to recognize the independent naturalization of a married woman. In either case it is possible for the individual to elect and thereby divest himself of one of his nationalities. It is therefore recommended that the Italo-American dual national be compelled, when he comes of age, to take advantage of the expatriatory provisions in the nationality laws of both the United States and Italy, and further, that he register his choice with the proper authorities.

Many of the situations which could produce, and in many instances did produce, friction between the United States and Italy, and hardship on the American citizen of Italian origin have been eliminated.

We have seen that the onerous provision in the Italian citizenship law regarding the remaining obligation of military service for those who had lost Italian citizenship is no longer applicable by virtue of the Treaty of Friendship, Commerce and Navigation between the United States and the Italian Republic. This treaty, however, is not applicable to the dual national, and it is recommended that the Italo-American dual national, if he wishes to protect himself against military service in Italy, divest himself of Italian citizenship by express renunciation. A further recommendation is made to the Italian Government that the provision with which we are here concerned be repealed. It is an anachronism and has in the past been a great source of friction between Italy and other countries. In the interests of Italy, as well as of the world community it should be abolished.

The liability of all Italian citizens, former and present, for bearing arms against the State was settled by the Treaty of Peace between Italy and the Allied Powers, and the Italo-American who fought against Italy is thus protected. However, it is recommended that the provision as to former citizens being considered citizens for the purpose of the penal law here dealt with be repealed. It, too, is an anachronism and does not take into consideration the realities of the situation, *i.e.,* the former Italian citizen, residing elsewhere and a citizen of the place where he lies, owes a greater allegiance to his present State than he does to his former one.

In connection with prosecution for treason, it is recommended that

the United States take a more realistic attitude. The United States should realize that allegiance to more than one State may be exacted from a dual national, and, if the latter is in enemy territory, it is not inconsistent with general conceptions of loyalty for him to aid a nation of which he is a national against the other nation of which he is also a national. The treason provision in the United States Code should be held inapplicable to the dual national. It is sufficient in the situation here envisioned, for the dual national automatically to lose his American citizenship, and retribution should not be a part of his punishment. It is therefore recommended that the section of the Code relating to treason be amended to specifically exempt dual nationals from its provisions.

Obligations arising from the application of municipal law in civil matters, and other criminal cases not discussed herein, are not applicable to the former national who has renounced his nationality of origin. It is therefore recommended that the dual national divest himself of the nationality under whose jurisdiction he does not want to come. This may be done in accordance with the applicable provisions of both Italian and American nationality legislation.

In conclusion, it is safe to say that, at present, the problem of dual nationality causes little friction between the United States and Italy. If the dual national divests himself of one nationality, and if the treaty provisions now in effect are made permanent through change in municipal legislation, there will be no need for future concern over the nationality status of the American citizen of Italian origin.