

NATIONALITY AND CITIZENSHIP IN A DEVOLUTION CONTEXT: AUSTRALIAN AND NEW CALEDONIAN EXPERIENCES

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Unlike many Pacific Islands, which are of volcanic origin, New Caledonia is an ancient fragment of the Gondwana supercontinent which separated from Australia 85 million years ago. But Australia and New Caledonia have other common features, including the will to maintain a strong link with their respective motherland. Captain Cook himself personified this common European history: the rugged coastline of New Caledonia reminded him of Scotland, and he thus named it 'New Caledonia', which is the old Latin name for Scotland. The island became a French possession in late 1853, as a part of an attempt by Napoleon III to rival the British colonies in Australia and New Zealand. The island remained French with the consent of the British who needed a good relationship with France to stop the growth of Bismarck's Empire. Following the example set by the United Kingdom in Australia, France between 1864 and 1922 sent a total of 22,000 convicts to penal colonies along the south-western coast of New Caledonia. Towards the end of the penal colony period, free European settlers and Asian contract workers outnumbered the indigenous Kanak population, which was already declining drastically due to introduced diseases and violence. Today, the Kanak account for less than 45% of the population. In Australia too, the foundation of the colony of New South Wales marked by the landing of Captain Phillip in 1788 began a period of settlement by convicts that ended in 1868. Here, too, the indigenous population became vastly outnumbered.

Both Australia and New Caledonia were under the sway of a European imperial power and they both progressively gained autonomy. However, the process of devolution in both cases is not similar. The Australian colonies achieved self-government from the mid-19th century in a movement that led to the creation of the Commonwealth in 1901. Thereafter, the international personality of the federation solidified gradually towards sovereignty which was formally and symbolically recognised in 1986 with the visit of the Queen to Australia to sign the *Australia Act* in person.¹ The progressive devolution is characterized by a series of Imperial Conferences that connote the consensual attitude of the UK towards its Empire. In France, however, the agreements with New Caledonian representatives were the result of bitter tensions, revolts, and violence and this generally reflects the lack of vision that France showed in the (mis)management of its own Empire. The process of devolution of powers from France to New Caledonia is currently under the scrutiny of the international community represented by the United Nations and, naturally, this was not the case with Australia. Today, New Caledonia enjoys a large measure of internal self-government but has yet to finalize with France the ending of its status as non-self-governing territory, as foreseen in the Nouméa Agreement of 1998. Today, New Caledonia is an overseas territory of France. It is not officially called a 'territory': the Nouméa Agreement of 1998, known as the '*Accord*',² refers

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¹ See Patrick Parkinson, *Tradition and Change in Australian Law* (2005) 153.

² Accord sur la Nouvelle-Calédonie, JORF (27 May 1998), 8039.

to New Caledonia as '*le Pays*', that is, both a country and a nation.³ Its history is, assuredly, more chequered than that of Australia.⁴

The issue of citizenship and its relation to nationality for international law purposes is an important aspect of a devolution process, as it lies at the root of the sentiment of belonging to a body politic. While a New Caledonian citizenship was created in 1998 by agreement between the French and New Caledonian representatives, this local status is superimposed on the French citizenship that New Caledonians possess and therefore is concurrently held with their French nationality. The 1998 Agreement, however, acknowledges that the New Caledonian citizenship might form the basis for a New Caledonian nationality in the future and will reflect the international status of New Caledonia at that time. For the moment though, France has certain international responsibilities towards New Caledonian French nationals. In Australia, the common status of British subjecthood throughout the Empire preceded a local Australian citizenship which only existed *de facto* to distinguish between resident and non-resident British subjects. The progressive independence of Australia and the mutations of the British Commonwealth, however, meant that the common allegiance to the Crown, materialized in British subjecthood, became more relevant as internal status within the Commonwealth and less relevant as national status on the international plane: indeed, later on, British subjecthood, which became a Commonwealth citizenship, was conferred upon individuals by virtue of their Australian citizenship and, therefore, a British subject citizen of Australia was in reality an Australian national.

It is thus appropriate to define the role of nationality and citizenship from an international legal perspective and to assess the development of these concepts in Australia and in New Caledonia. These legal concepts, put in the perspective of Australia's accession to independence, allow one to assess what possible direction New Caledonia will take in its own decolonization process.

I NATIONALITY AND CITIZENSHIP IN INTERNATIONAL LAW

A Nationality Creates Personal Jurisdiction

Rosalyn Higgins, now President of the International Court of Justice, aptly considered that jurisdiction in international law is all about allocating competence, and there is no more important way to avoid conflict than by providing clear norms as to which State can exercise authority over whom, and in what circumstances.⁵ Jurisdiction has often been described as a power, the 'power of a sovereign to affect the rights of persons'⁶ or the 'legal power to exercise a legal activity'.⁷ From a more

³ Nouméa Agreement, point 1.5 '*Les symboles*'.

⁴ For the history of New Caledonia one can refer to Alain Christnacht, *La Nouvelle-Calédonie* (2003); François Garde, *Les institutions de la Nouvelle-Calédonie* (2001); Alban Bensa *La Nouvelle-Calédonie, vers l'émancipation* (1999).

⁵ Rosalyn Higgins, 'International Law and the Avoidance, Containment and Resolution of Disputes. General Course on Public International Law' (1991-V) 230 *Recueil des cours de l'Académie de droit international* 9, 89. 'Without that allocation of competences, all is rancour and chaos' at 89.

⁶ Joseph Beale, 'The Jurisdiction of a Sovereign State' (1922/1923) 36 *Harvard Law Review* 241.

⁷ Louis Cavaré, *Le droit international public positif* (3rd ed, 1951) 164. Authors' translation.

general perspective, State jurisdiction describes the conferral by international law upon a State of various rights and duties in relation to an individual, a given situation or any other material or immaterial entity with a view to maintaining or modifying the legal position of that object under international law towards other States. As a logical consequence of the juridical equality of States, international law postulates limits to jurisdiction.⁸ Hence it has been claimed that a State must be able to identify a sufficient nexus between itself and the object of its assertion of jurisdiction,⁹ that the jurisdiction of a State depends on the interests that the State, in view of its nature and purposes, may reasonably have in exercising the particular jurisdiction asserted, and on the need to reconcile that interest with the interests of other States,¹⁰ or that allocation of competence has to be just and reasonable.¹¹

Surely, the strongest interest that a State has in claiming jurisdiction has solidified around its territory, so much so that the World Court indicated: ‘Now, the first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State’.¹² Sovereignty in relation to territory has been described as the exercise by the State, in its territory, of the functions of a State to the exclusion of any other State.¹³ Therefore the territory has rightly been labelled by Rousseau a jurisdictional title.¹⁴ However, the territory is not the only jurisdictional title: the distinction between the territorial and the non-territorial jurisdiction of States is well enshrined in international law. Bynkershoek himself wrote: ‘The condition of being subject to authority is ... of two kinds: one is that of a person, the other is that of a thing that lies within the control of the authority which is under discussion’.¹⁵ That distinction is commonly made in writings.¹⁶ In that respect, ‘nationality’ too is a privileged link that, under international law,

⁸ The World Court in the *Lotus* case held that international law left States a wide measure of discretion in the exercise of their jurisdiction on their own territories, even in respect of acts which have taken place abroad. However, the Court also emphasized that a State should not overstep the limits which international law places upon its jurisdiction. *The Case of the S.S. ‘Lotus’ (France/Turkey) (Judgment)* [1927] PCIJ (ser A) No 10 4, 19.

⁹ Bernard H. Oxman, ‘Jurisdiction of States’ in Rudolf Bernhardt (ed), *Encyclopedia of Public International Law* (1997) vol 3, 56.

¹⁰ Lori F Damrosch *et al*, *International Law. Cases and Material* (4th ed, 2001) 1090.

¹¹ Francis A Mann, ‘The Doctrine of Jurisdiction in International Law’ (1964-I) 111 *Recueil des cours de l’Académie de droit international* 9, 44.

¹² *Lotus*, above n 8, 18. The equality of States has been taken to mean that ‘no State can claim jurisdiction over another’. Lassa Oppenheim, *International Law. A Treatise*, vol 1 (8th ed, 1955) 264.

¹³ *Island of Palmas (Netherlands / United States)* (arbitral award of 4 April 1928) 2 RIAA 828, 838. Territorial sovereignty describes ‘the plenitude of exclusive competences appertaining to a State under public international law within the boundaries of a definite portion of the globe’. Jan H W Verzijl, *International Law in Historical Perspective*, part II (1968) 12-13.

¹⁴ Charles Rousseau, ‘L’aménagement des compétences en droit international’ (1930) 37 *Revue générale de droit international public* 420, 430.

¹⁵ Cornelius van Bynkershoek, *De Foro Legatorum Liber Singularis. A Monograph on the Jurisdiction over Ambassadors in Both Civil and Criminal Cases* (Gordon J. Laing trans) (1946) 12-13.

¹⁶ See eg: Thomas J Lawrence, *The Principles of International Law* (3rd ed, 1908) 190, [113]; Georg Schwarzenberger, *International Law*, vol 1 (3rd ed, 1957) 183; Sir Gerald Fitzmaurice, ‘The General Principles of International Law Considered from the Standpoint of the Rule of Law’ (1957-II) 92 *Recueil des cours de l’Académie de droit international* 1, 167, 208.

confers jurisdiction.¹⁷ This has a logical foundation: whereas statehood in international law is generally accepted to be possessed by entities which have a defined territory and a permanent population, the strongest bases, or links, that allow or require the allocation of international rights and duties with respect to a given object of regulation crystallized around the State's foundational elements.¹⁸ Borchard aptly noted that, whereas the territoriality of the law was a matter of slow development, in tribal law the personal rights and acts of the individual and his legal status were regulated and judged according to the code of the tribe or nation to which he belonged.¹⁹ Later on, in the feudal system, the primary elements of the relation between the State and its citizens emerged, as feudalism 'embodied the notion of the territoriality of rights with the personal relation between lord and liegeman now known under modern transformations as sovereignty'.²⁰ While, in the later Middle Ages, various influences led to the transition from the personality to the territoriality of the law, nationality emerged at the Peace of Westphalia as a phenomenon distinct from religion.²¹ Things altered further when, with the French Revolution, the appearance of the 'citizen', fully conscious of his political rights and duties within his 'State', inaugurated a new era. It is not by chance that it was in this very period that States began to enact nationality laws in the modern sense of the word. These laws were not only the hallmark of an awakened consciousness of national solidarity but also of the rapid growth of international relations.²²

¹⁷ It should nevertheless be noted that, just as territorial jurisdiction obtains when links other than sovereignty apply to a territory, some forms of personal jurisdiction are recognized by international law to apply to relationships between States and individuals which differ from nationality. For instance, Akehurst noted: "Denmark, Iceland, Liberia, Norway, and Sweden claim jurisdiction over crimes committed abroad by their permanent residents. In a few cases the United Kingdom has also based jurisdiction on residence. States often claim extraterritorial jurisdiction over members of their armed forces and (in connection with crimes committed in the course of their duties) over their civilian officials. The United States and the United Kingdom also claim jurisdiction over crimes committed on foreign territory by members of the crews of their merchant vessels". Michael Akehurst, "Jurisdiction in International Law" (1972/73) 46 *British Year Book of International Law* 145, 156-157.

¹⁸ See Montevideo Convention on Rights and Duties of States, 165 LNTS 19 (1933), Art 1.

¹⁹ Edwin M Borchard, *The Diplomatic Protection of Citizens Abroad* (1928) 3-4. See also, Haro F Van Panhuys, *The Rôle of Nationality in International Law* (1959) 31-32: 'Although in the days of ancient Greece and Rome citizenship, and not 'nationality', was the prevailing idea, it is wrong ... to pay attention only to the status of an individual within his own group. Account should also be taken of the way in which he is looked upon and treated in intercourse with other States'.

²⁰ Borchard, above n 19, 6.

²¹ *Ibid.*, 5-7.

²² Van Panhuys, above n 19, 33: 'In earlier times rules concerning nationality (if any) had often been confined to specific matters, especially in the field of municipal law (such as questions of inheritance), for which the distinction between national and foreigner was of particular importance ... Thus nationality was then mainly 'functional' ... In the absence of *general* statutory definitions, nationality was often deduced from domicile'.

B *Nationality as International Perspective; Citizenship as Domestic Perspective*

One of the terms frequently used synonymously with nationality is citizenship.²³ Conceptually and linguistically, the terms ‘nationality’ and ‘citizenship’ emphasize two different aspects of the same notion: State membership. ‘Nationality’ stresses the international, ‘citizenship’ the national, municipal aspect. Hence under the laws of most States citizenship connotes full membership, including the possession of political rights and some States distinguish between different classes of members. Therefore, while every citizen is a national, not every national is necessarily a citizen of the State concerned; the question is not relevant for international law.²⁴ In a famous *dictum* the International Court of Justice described nationality as a legal link between an individual and a national political community organized in a State: ‘According to the practice of States, to arbitral and judicial decisions and to the opinion of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties’.²⁵

The significance of nationality in the field of international jurisdiction cannot be emphasized enough. Nationality has been defined as ‘the principal link between individuals and the benefits of the Law of Nations’;²⁶ ‘essentially a legal relationship much more properly than a status, or membership, or a quality, which are only secondary reflexes of the juridical link that exists between a human being and a specific State’;²⁷ or even more simply ‘a legal tie between an individual and a State,

²³ ‘Historically, this is correct for States with the Roman conception of nationality, but not for States with the feudal conception of nationality, where citizenship is used to denote not political status but membership of a local community. It has, however, become usual to employ the term citizen instead of subject in republican States’ at *ibid* 4. Makarov reports that the historical basis of nationality as a status is traced back in Roman law which knew of *status civitatis*, that is, the degree of legal capacity of an individual, next to *status libertatis* and *status familiae*. Makarov, below n 27, 279.

²⁴ Weis, below n 30, 4-6. Vattel called all members of the civil society citizens or subjects. Emer de Vattel, *The Law of Nations or the Principles of Natural Law* (Charles G. Fenwick trans) (1916) 87. Lawrence distinguished between natural-born subjects and naturalized subjects: Thomas J. Lawrence, *The Principles of International Law* (3rd ed, 1908) 190-198. For an in-depth report of the various terms used, see Verzijl, above n 13, 7-18. Non-citizens can sometimes be given a political right of participation. Thus the only non-citizens granted the right to vote in Australia are British subjects who were enrolled in an electoral roll before 26 January 1984. See Suri Ratnapala, *Australian Constitutional Law* (2007) 77.

²⁵ *Nottebohm (Second Phase) (Liechtenstein v Guatemala) (Judgment)* [1955] ICJ Rep 4, 23. The Convention on Certain Questions Relating to the Conflict of Nationality Laws does not define nationality. See 179 LNTS 89, opened for signature 12 April 1930 (entered into force 1 July 1937). In its draft on the law of nationality, however, the Harvard Research had defined nationality as ‘the status of a natural person who is attached to a state by the tie of allegiance’. (1929) 23 (Supp) *American Journal of International Law* 1, 13. ‘Allegiance’ was meant to ‘denote the sum of the obligations of the natural person to the state to which he belongs’. *Ibid*, 23. Although the Court in *Nottebohm* insisted on the genuine character of the nationality, at least in a situation of naturalization, it was far less prescriptive when it dealt with the nationality of a corporation. See *Barcelona Traction, Light and Power Company, Limited (Second Phase) (Belgium v. Spain) (Judgment)* [1970] ICJ Rep 3, 43, [70].

²⁶ Oppenheim, above n 12, 645, [294].

²⁷ Verzijl, above n 13, part V (1972) 7. Makarov notes that nationality can be considered from the legal point of view as a legal *link* which creates a legal *status* of the individual.

by which the individual is under the personal jurisdiction of that State'.²⁸ Nationality as such is truly a problem of attribution and provides a normal (but not exclusive) basis for the exercise of jurisdiction, the so-called personal jurisdiction of the State.²⁹ Weis, in his classic work, defines nationality in international law as follows: 'Nationality in the sense of international law is a technical term denoting the allocation of individuals, termed nationals, to a specific State – the State of nationality – as members of that State, a relationship which confers upon the State of nationality ... rights and duties in relation to other States'.³⁰ Variations in terminology are disregarded for international law purposes.³¹ Hence Weis writes that 'nationality' is a politico-legal term denoting membership of a *State*. It must be distinguished from nationality as a historico-biological term denoting membership of a *nation*:

The indiscriminate use of the term is, however, apt to lead to dangerous confusion. The danger lies in the English language, where the word 'nationality' is less frequently used in its ethnical sense as denoting membership of a race. While the existence of an English or Welsh or Scottish nation is not in doubt, membership of such a nation is not usually described as English, Welsh or Scottish nationality; this term is used exclusively for British nationality meaning the quality of being a subject of Her Majesty, *i.e.*, a citizen of the United Kingdom and Colonies or – in so far as citizenship of a member of the Commonwealth confers British nationality – of the British Commonwealth of Nations.³²

He explains that the term 'nationality' is of Latin origin and that in English the term 'subject' is used as a synonym for national and is typical of the feudal concept of nationality prevailing in Anglo-Saxon law.

II THE ESTABLISHED AUSTRALIAN CITIZENSHIP

A *Mutations in Australia's International Status*

The *Commonwealth of Australia Constitution Act 1900 (Imp)*³³ had united the Colonies but they remained 'under the Crown of the United Kingdom of Great Britain and Ireland' (Preamble). Thus Crawford reports that it is generally accepted that the Dominions (Canada, Australia, South Africa, New Zealand and Newfoundland) had not attained before 1914 any substantial international status, though they were internally autonomous and exercised certain international

Alexandre N. Makarov, 'Règles générales du droit de la nationalité' (1949-I) 74 *Recueil des cours de l'Académie de droit international* 269, 279-281.

²⁸ Albrecht Randelzhofer, 'Nationality' in Rudolf Bernhardt (ed), *Encyclopedia of Public International Law* (1997) vol 3, 501, 502.

²⁹ See Ian Brownlie, 'The Relations of Nationality in Public International Law' (1963) 39 *British Year Book of International Law* 284, 290.

³⁰ Paul Weis, *Nationality and Statelessness in International Law* (2nd ed, 1979) 59.

³¹ Oppenheim wrote: 'In general, it matters not, as far as the Law of Nations is concerned, that Municipal Laws may distinguish between different kinds of subjects – for instance, those who enjoy full political rights, and are on that account named citizens, and those who are less favoured, and are on that account not named citizens' at Oppenheim, above n 12, 644, [293].

³² Weis, above n 30, 3. On these issues, see below.

³³ 63 & 64 *Vict. C.12*.

competences.³⁴ However, it cannot be said that their relation with the Crown was one purely of domestic law, for even colonies can be the addressees of international law in their own right.³⁵ Hence, while the position had been taken that there only existed one State for the purpose of international law, perhaps it being an unusual federation where one federated unit (the United Kingdom) possessed central authority over the entire Empire,³³ this view became progressively impossible to maintain. Indeed, already after 1880 the self-governing colonies asserted and obtained autonomy in commercial treaty relations;³⁴ the Dominions were accorded by Great Britain the right to separate diplomatic representation from 1920;³⁵ the 1923 Imperial Conference conferred on the Dominions a separate general treaty-making capacity, although any Government (whether British or Dominion) which desired to negotiate a treaty was to take care to inform any other Government which was likely to be interested, in order that it could consider what its attitude towards the negotiations should be.³⁶ The Inter-Imperial Relations Committee of the 1926 Imperial Conference defined the status of Great Britain and the Dominions as follows:

They are autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations ... The tendency towards equality of status was both right and inevitable. Geographical and other conditions made this impossible of attainment by the way of federation. The only alternative was by the way of autonomy; and along this road it has been steadily sought. Every self-governing member of the Empire is now the master of its destiny ... Equality of status, so far as Britain and the Dominions are concerned, is thus the root principle governing our Inter-Imperial Relations. But the principles of equality and similarity,

³⁴ James Crawford, *The Creation of States in International Law* (1979) 238. See also, Arthur B Keith, *The Sovereignty of the British Dominions* (1929) 2: 'Until the war of 1914-18 ...the sole external personality in the Empire rested with the Government and Parliament of the United Kingdom'. The term 'Dominion' was used at the 1907 Imperial Conference to designate Australia and Canada, formerly 'colonies'. Dominion status was later defined in the Balfour Declaration in 1926. See below n 37 and accompanying text.

³⁵ See Karl Strupp, *Eléments du droit international public universel, européen et américain* (2nd ed, 1930) 43. Fawcett explained that from the 1860s it was recognized that a treaty concluded by the UK might not be applicable *ipso facto* in its overseas territories. 'We find that there is an antinomy between the dependent status of the overseas territories and their capacity for self-government and it is in treaty relations that this antinomy shows itself' from, James E. S. Fawcett, 'Treaty Relations of British Overseas Territories' (1949) 26 *British Year Book of International Law* 86, 93-94, 96.

³³ See eg: Marcel Sibert, *Traité de droit international public*, vol 1 (1951) 119; William E Hall, *A Treatise on International Law* (8th ed, 1924) 35. The Covenant of the League of Nations expressly allowed participation by 'any fully self-governing State, Dominion or Colony' (Art 1). The British Empire, Canada, Australia, South Africa, New Zealand and India are listed in the annex to the Covenant as original members.

³⁴ Fawcett, above n 35, 100.

³⁵ Crawford, above n 34, 231.

³⁶ Keith, above n 34, 374. 'It is impossible to deny that the resolutions of the Conference of 1923 were sadly lacking in precision, and their operation in practice was not flawless'.

appropriate to *status*, do not universally extend to function. Here we require something more than immutable dogmas.³⁷

The 1926 Imperial Conference accepted the views of the Committee but the 1929 Conference of Experts which met in 1929 ignored in its report all the limitations suggested by the Conference of 1926, determining instead to establish absolute equality and similarity of function.³⁸ Nevertheless, while the idea of the Dominions as nation States was fast crystallizing and found formulation in the 1926 Declaration, it had not yet modified the formal law.³⁹ The Statute of Westminster 1931 changed this situation but there was at first no certainty as to just what had been accomplished.⁴⁰ The Statute is an Act of the British Parliament⁴¹ which gives effect to certain resolutions passed by the Imperial Conferences of 1926 and 1930. It declares that 'no law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule, or regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of the Dominion'. It also says: 'No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof'. On its face, the Statute terminates from 1931 the legal authority of the UK over the Dominions, an essential impediment to independence under international law.⁴² On a formal level though, the Statute emanated from the Imperial Parliament only, and was not simultaneously enacted by all the parliaments of the Dominions, preventing it from symbolizing clearly the equality it purported to establish.⁴³ While the Statute applied immediately to the Irish Free State, Canada and South Africa, it made its application in Australia, New Zealand and Newfoundland dependent upon parliamentary adoption there. In Australia, this only took place in 1942 with retroactive effect (as allowed by section 10 of the Statute) to the

³⁷ Imperial Conference 1926, Inter-Imperial Relations Committee, *Report, Proceedings and Memoranda*, Cmd. 2758. Emphasis in text. This is also known as the Balfour Declaration. With respect to Dominion legislation, the Report said: 'Consequently, it would not be in accordance with constitutional practice for advice to be tendered to His Majesty by His Majesty's Government in Great Britain in any matter appertaining to the affairs of a Dominion against the views of the Government of that Dominion'. On foreign policy the Report indicated: 'It was frankly recognised that in this sphere, as in the sphere of defence, the major share of responsibility rests now, and must for some time continue to rest, with His Majesty's Government in Great Britain. Nevertheless, practically all the Dominions are engaged to some extent, and some to a considerable extent, in the conduct of foreign relations, particularly those with foreign countries on their borders'.

³⁸ Arthur B Keith, *The Dominions as Sovereign States* (1938) 60.

³⁹ F R Scott, 'The End of Dominion Status' (1944) 38 *American Journal of International Law* 34, 37.

⁴⁰ *Ibid* 38.

⁴¹ 22 *George V, C. 4.*

⁴² See *Customs Regime between Germany and Austria (Advisory Opinion)* [1931] PCIJ (ser A/B) No 41 37, 58 (Sep Op Judge Anzilotti).

⁴³ Scott, above n 39, 38.

commencement of the war with Germany.⁴⁴ Therefore, after 1931 Australia found itself in the position in which it was after 1926; the Imperial Parliament in 1939 legislated to give Australian laws extraterritorial application for certain purposes⁴⁵ and Australia accepted as a matter of course its entry into the war as a result of the British declaration of war.⁴⁶ Furthermore, the Statute of Westminster expressly reserved the right of the UK Parliament to make laws with respect to any matter within the authority of the States of Australia, not being a matter within the authority of the Parliament or Government of the Commonwealth of Australia, in any case where it would have been in accordance with the constitutional practice existing before the commencement of the Statute that the Parliament of the UK should make that law without the concurrence of the Parliament or Government of the Commonwealth of Australia. This last remnant of legislative authority was abolished in 1986 by the UK Parliament itself at the request of the Government and Parliament of the Commonwealth,⁴⁷ and simultaneously enacted by the Australian Parliament to 'bring constitutional arrangements affecting the Commonwealth and the States into conformity with the status of the Commonwealth of Australia as a sovereign, independent and federal nation.'⁴⁸

While it is impossible to call the Dominions persons of international law of the same kind as sovereign States prior to a certain date,⁴⁹ it is also established that international law does not require complete independence before denominating governmental units as 'States': a devolving unit is to be considered independent when it possesses virtually complete internal autonomy and some substantial competences in international relations, which the metropolitan State is bound by law, convention or treaty to respect.⁵⁰ One would be hard-pressed to find a critical date for attributing Dominions independence under international law and Crawford

⁴⁴ *Statute of Westminster Adoption Act 1942 (Cth)*.

⁴⁵ *Emergency Powers (Defence) Act 1939*.

⁴⁶ See Robert B Stewart, 'The British Commonwealth Goes to War' (1939) 16 *Foreign Service Journal* 645.

⁴⁷ *Australia Act 1986 C.2 (UK)*: 'No Act of the Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to the Commonwealth, to a State or to a Territory as part of the law of the Commonwealth, of the State or of the Territory' (section 1); 'It is hereby further declared and enacted that the legislative powers of the Parliament of each State include all legislative powers that the Parliament of the United Kingdom might have exercised before the commencement of this Act for the peace, order and good government of that State' (section 2(2)); 'After the commencement of this Act Her Majesty's Government in the United Kingdom shall have no responsibility for the government of any State' (section 10); 'This Act or the Statute of Westminster 1931, as amended and in force from time to time, in so far as it is part of the law of the Commonwealth, of a State or of a Territory, may be repealed or amended by an Act of the Parliament of the Commonwealth passed at the request or with the concurrence of the Parliaments of all the States' (section 15(1)).

⁴⁸ *Australia Act 1986 (Cth)* (preamble).

⁴⁹ Philip J Noel-Baker, *The Present Juridical Status of the British Dominions in International Law* (1929) 356.

⁵⁰ Crawford, above n 34, 257. In 1938 Keith had this to write: 'Is there an international unit consisting of the whole of the Empire, the United Kingdom, the Dominions, the colonies, protectorates, mandated territories, India and Burma? It does not appear that it is worthwhile contending for its existence. All that seems necessary is to admit that there is one unit with complete international authority, and four Dominions with international status though not in such a plenary manner' from, Keith, above n 38, 36, 54-55. See also, Manfredi Siotto-Pintor, 'Les sujets de droit international autres que les Etats' (1932-III) 41 *Recueil des cours de l'Académie de droit international* 245, 319.

sensibly argues that, while independence was achieved within the Empire by 1939, the evolution had been a gradual one since 1919.⁵¹ For him, the Statute of Westminster neither established nor recognized Dominion independence in the international sense. The Statute was repealable at will by the Westminster Parliament as a matter of British law but not as a matter of convention with the Dominions; in addition, one cannot merely from the relinquishment of an authority infer that the relinquishing State in fact had the right to exercise that authority. Crawford claims that it is the Balfour Declaration and the 1926 Imperial Conference which can be taken as the critical date of the independence of the Dominions, for they reaffirmed the principle of Dominion equality of status in the form of a binding convention.⁵² The question of sovereignty then is one of degree of independence and, in the case of Australia, if it is the *Australia Act 1986* which marked its formal acknowledgement, that status had been achieved *de facto* long before.⁵³

B From Subject to Citizen

Between the foundation of the Commonwealth of Australia in 1901 and the proclamation of the *Nationality and Citizenship Act 1948* on Australia Day 1949, 'British subject' remained the only formal civic status in Australia.⁵⁴ Citizenship in Australia is not a constitutional concept, for although Australian citizenship was discussed during the drafting of the Constitution, the latter fails to mention the citizenship of Australia or the power to create a class of citizens.⁵⁵ In 1906 the High Court of Australia declared that it was not 'disposed to give any countenance to the novel doctrine that there is an Australian nationality as distinguished from a British nationality'.⁵⁶ This was based upon the common-law doctrine that every person born in the King's dominions (excluding protectorates and mandated territories) was a

⁵¹ Crawford, above n 34, 239-240.

⁵² Ibid 240-246.

⁵³ Already in 1957 O'Connell concluded: '[I]t is clear that any discussion is sterile which denies that the Dominions are independent and autonomous communities; autonomous in the sense of possessing unrestricted capacity in international law, and also in the sense of being no longer subordinate in any respect to the United Kingdom. It is true that the Westminster Parliament retains its power to legislate for certain of the Dominions, but *de facto* such legislation is operative only upon the request and consent of the Dominion in question. To this extent the United Kingdom Parliament must be deemed to be exercising a power derived from the sovereign *ordre juridique* of the Dominions. It is not above this *ordre juridique* because it cannot initiate legislation which modifies it and alters its content The *grundnorm* has in this sense shifted to the units of the Commonwealth'. Daniel P O'Connell, 'The Crown in the British Commonwealth' (1957) 6 *International and Comparative Law Quarterly* 103, 122. Emphasis in text.

⁵⁴ National Archives of Australia, Research Guide on Citizenship <http://www.naa.gov.au/naaresources/publications/research_guides/guides/ctznship/chapt1.htm> at 11th November 2008.

⁵⁵ Kim Rubenstein, 'Citizenship in Australia: Unscrambling Its Meaning' (1995-1996) 20 *Melbourne University Law Review* 503, 505. Citizenship of a foreign power is mentioned in s 44 and s 117 mentions a subject of the Queen. It is assumed that the Commonwealth has the power to naturalize aliens under s 51(xix) but it can be wondered whether this necessarily covers the citizenship of natural-born members of the community. Ibid. See also Cheryl Saunders, 'Citizenship under the Commonwealth Constitution' (1994) 3(3) *Constitutional Centenary Foundation Newsletter* 6.

⁵⁶ *Attorney-General (Cth) v Ah Sheung* [1906] HCA 44.

natural-born British subject.⁵⁷ Matters were different for naturalization: while imperial legislation in the UK created for the person concerned the status of British subject, valid throughout the Empire and, so far as international law provided, elsewhere, the effect of naturalization in a colony, on the other hand, was ruled to be absolutely local and such persons in the UK were merely aliens (and would thus need to be naturalized in the UK).⁵⁸ The Dominions subsequently gained the capacity to confer British nationality generally: the *British Nationality and Status of Aliens Act 1914 (UK)* recognised the capacity of the Parliaments of the Dominions to confer not only a local status but also to admit aliens into complete membership of the British Empire.⁵⁹ The Act of 1914 was divided into three parts. Parts I and III were intended to apply to all territories then forming part of the British Empire. Part II could be ‘adopted’ by the Dominions. Most of the Dominions, however, enacted their own version of the whole of the Act of 1914 but other Dominions left Parts I and III of the Act as part of their own law, adding their own legislation on naturalization.⁶⁰ Thus naturalization in Australia was governed by the *Naturalization Act 1903-1917 (Cth)* which mentions that ‘a person resident in the Commonwealth not being a British subject, and not being an aboriginal native of Asia, Africa, or the Islands of the Pacific, excepting New Zealand, who intends to settle in the Commonwealth, and who (a) has resided in Australia continuously for two years immediately preceding the application; or (b) has obtained in the United Kingdom a certificate of naturalization or letters of naturalization, may apply to the Governor-General for a certificate of naturalization’ (section 5). The Act defines ‘British subject’ as a natural-born British subject or a naturalized person. Australian Aborigines did not need to appear in this exclusionary clause since they were British subjects by birth and had nothing to gain from naturalization.⁶⁴ Subsequently, the *Nationality Act 1920 (Cth)* defined a natural-born British subject as any person born within his Majesty’s dominions and allegiances or born out of the dominions and allegiances of a father who was a British subject at the time of birth (section 6). The Governor-General could grant a certificate of naturalization to an alien who had resided in His Majesty’s dominions for a period of not less than five years, that is, residence in the Commonwealth for not less than one year preceding the application and previous residence either in the Commonwealth or in some other dominion for a period of four years within the last eight years before the application (section 7). The Act also recognises that the rights of naturalized British subjects may be different from those of natural-born British subjects.⁶¹ Therefore both UK and Dominion legislation, taken together, constituted a uniform common code of British nationality.⁶² A *de facto* administrative Australian citizenship operated prior to 1948 which arose from the necessity of distinguishing between those British subjects who were permanent residents and belonged to the Commonwealth (in the sense that they could not be deported), and those British subjects who were merely visitors or who were yet to reside in Australia long enough to be regarded as belonging.⁶³

⁵⁷ J Mervyn Jones, ‘British Nationality Act, 1948’ (1948) 25 *British Year Book of International Law* 158.

⁵⁸ Keith, above n 34, 62-63. See *Naturalization Act 1870 (UK)*.

⁵⁹ Ibid 63. See *British Nationality and Status of Aliens Act 1914 (4 & 5 Geo., C. 17)*.

⁶⁰ Jones, above n 57, 158.

⁶⁴ John Chesterman and Brian Galligan, *Citizens Without Rights* (1997) 85.

⁶¹ Section 11. See also, *Naturalization Act 1903-1917 (Cth)* s 8.

⁶² Jones, above n 57, 158.

⁶³ Above n 54. There were three administrative civic categories of non-Aboriginal people in Australia before 1948: British subjects with permanent residence (including naturalized people), British subjects without permanent residence, and aliens. British

Nevertheless, the necessities required by local conditions in the Dominions, together with their improving international status, made the notion of a unified British nationality impossible to sustain. The 1929 Report of the Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation, which considered matters that the 1926 Imperial Conference had recommended to be referred to a technical conference, indicated: 'The status of the Dominions in international relations ... not merely involved the recognition of these communities as distinct juristic entities, but also compelled recognition of a particular status of membership of those communities for legal and political purposes'.⁶⁴ Already in 1910 Canada found it necessary to distinguish for immigration purposes between different classes of British subjects and to create Canadian citizens for these purposes.⁶⁵ Later, the *Canadian Nationals Act 1921* ascribed Canadian nationality to any British subject who was a Canadian citizen.⁶⁶ It is true that such enactments could only enjoy local validity, and their international effects had to be distinguished from the wider concept of British subjecthood which prevailed throughout the British Commonwealth, for the Dominions had no power to pass extraterritorial legislation as a general rule.⁶⁷ However this was addressed by the 1929 Conference which proposed that Dominion parliaments be allowed to make laws with extraterritorial operation.⁶⁸ Hence van Pittius sensibly writes that the term 'Canadian national' afforded an important clue as to what such person's rights, privileges and duties are in respect of Canada. For him, the term 'British subject' was too wide and not in accordance with the new status of the Dominions.⁶⁹ The consequences of Dominion nationality were those that generally attach to nationality in international law; Dominion nationality could be used as the basis for the exercise of Dominion diplomatic protection, treaty-making, and the exercise of extra-territorial jurisdiction.⁷⁰ It is thus difficult to determine when, if ever, Dominion nationals were considered under international law to have both British nationality (the common

subjects generally possessed full political rights, but only those with permanent residence were considered Australian citizens. Therefore the first category consisted solely of the Australian citizenry; the other two categories were outside the boundaries of the citizenry, although people within them nonetheless resided within the Commonwealth's geographic jurisdiction, and were subject to forms of state management.

⁶⁴ Cmd. 3479.

⁶⁵ Keith, above n 41, 187. Canadian citizens were persons born in Canada who had not become aliens, British subjects who had Canadian residence, and persons naturalized under the Laws of Canada who had not become an alien.

⁶⁶ Ibid 188. This was prompted by the election of judges at the Permanent Court of International Justice, where Canadian nationals had to be distinguished from British nationals. For the Union of South Africa's Act of 1927, see *ibid* 188.

⁶⁷ E F W Gey van Pittius, 'Dominion Nationality' (1931) 13 *Journal of Comparative Legislation and International Law* 199, 200-201: 'As soon as a person therefore passes the three-mile territorial limit of his Dominion, his Dominion nationality is in abeyance until he returns home'.

⁶⁸ Berriedale Keith, 'Notes on Imperial Constitutional Law' (1930) 12 *Journal of Comparative Legislation and International Law* 278, 279.

⁶⁹ Van Pittius, above n 67, 202: '[A] better description of a South African national would be "South African British subject"; the same epithet could be applied, *mutatis mutandis*, by the other Dominions ... [T]he quintessence of British nationality ... will remain as a cloak to denote the bonds which still unite the various autonomous parts of the Commonwealth'.

⁷⁰ Keith, above n 41, 192.

British Commonwealth nationality vindicated by Great Britain) and the local Dominion nationality.⁷¹ This argument could be sustained so long as the common nationality was conferred as a common status throughout the British Commonwealth while it was a unified subject of international law within which national communities could, at the same time, be attributable to territorial entities (the Dominions) endowed with their own ability to be the recipients of international norms and, hence, to confer a nationality. But the progressive demise of the Empire precisely corresponds to the process of independence of the Dominions.

It therefore appears that the development of Dominion nationality also concerns those Dominions with no formal Dominion citizenship, and an indication of this is given by the divergences in the laws of the different Dominions in the conferral of British nationality which had begun to appear before WWII, mainly in connection with the rules relating to the nationality of married women.⁷² Thus Australia (and New Zealand) gave within the limits of the Dominion to a woman, who had lost British nationality by marriage to an alien whose nationality she acquired thereby, the full privileges of a British subject in the Dominion (but she was no longer a British subject under UK law).⁷³ From the perspective of international law it is not determining that Australia did not have legislation on Australian nationality *per se*.⁷⁴ Australian citizenship is mentioned for the first time in the *Nationality and Citizenship Act 1948 (Cth)*. This Act created in Part III a class of Australian citizens by birth (persons born in Australia), descent (persons whose father is an Australian citizen or, in the case of a person born out of wedlock, his mother was an Australian citizen or a British subject resident in Australia or New Guinea), registration (by citizens of the UK and Colonies, Canada, New Zealand, the Union of South Africa, Newfoundland, India, Pakistan, Southern Rhodesia and Ceylon with residence requirements) and naturalization (residence requirements). Part II of the Act indicates that Australian citizens are British subjects. This legislation has to be read in the context of the revision of the conferral of the common British nationality prompted indirectly by the events reported above and directly by the adoption by Canada of the *Citizenship Act 1946*. This Act, while abandoning the common code, retained the common status. Thus a conference of legal experts representing the Commonwealth countries met in 1947 and accepted, for general application throughout the Commonwealth, the principles adopted in the Canadian Act that all Canadian citizens are British subjects and that Canadian citizens are a defined class.⁷⁵ This led, in the UK, to the adoption of the *British Nationality Act 1948*.⁷⁶ This legislation for the first time develops a concept of British nationality which depends, not upon the application to the individual of rules as to place of birth or naturalization and so forth, but is derived from the quality of being a citizen of either the UK and Colonies or of some other community of the Commonwealth.⁷⁷ Clearly, even though under the statute the distinction between UK

⁷¹ Siotto-Pinto, above n 50, 319.

⁷² Jones, above n 57, 158.

⁷³ Keith, above n 38, 192. See *Nationality Act 1936 (Cth)*.

⁷⁴ Brownlie, above n 29, 317.

⁷⁵ Jones, above n 57, 159.

⁷⁶ *11 & 12 Geo. 6, C. 56*.

⁷⁷ Clive Parry, 'Plural Nationality and Citizenship with Special Reference to the Commonwealth' (1953) 30 *British Year Book of International Law* 244, 276. Under s 1 (entitled 'British Nationality'), every person who under the Act is a citizen of the UK and Colonies or of Canada, Australia, New Zealand, the Union of South Africa, Newfoundland, India, Pakistan, Southern Rhodesia or Ceylon, has the status of a British subject. A British subject has the same meaning as a Commonwealth citizen. Under s 2

citizens and non-UK citizens British subjects is diminished because the right to become a UK citizen by registration is satisfied by minimal residence requirements,⁷⁸ the citizens of other countries of the Commonwealth could not be regarded as UK nationals for the purpose of international law despite the common British nationality, *i.e.* the Commonwealth citizenship.⁷⁹ Thus under both the UK Act of 1948 and the Australian Act of 1948, a citizen of either country was a British national but it is not possible to assert that dual nationality ensued. Under both Australian law and UK law, a citizen of the UK and Colonies could become an Australian citizen by registration and thus become a national of both Australia and the UK. British nationality, *i.e.* Commonwealth citizenship, did not alone confer dual citizenship.⁸⁰ This is the unavoidable consequence of the fact that, while Commonwealth citizenship established a common status throughout the British Commonwealth, in the field of nationality for international law purposes, nationality fell within the jurisdiction of the member States and thus became exclusively equated with citizenship there.⁸¹ The *Australian Citizenship (Amendment) Act 1984 (Cth)* repealed Part II of the 1948 Act which conferred British nationality on Australian citizens and citizenship of nine other Commonwealth countries. Thus, while it is true that prior to that date Australian citizens were formally British subjects, it is perhaps not correct that the Act of 1948 had created a legal status of Australian citizenship devoid of any new substance which meant no more than the *de facto* administrative concept that preceded it.⁸² For what preceded it was in effect a class of Australian British subjects and, thus, of Australian nationals.⁸³

Not all Australian nationals, however, enjoyed full rights of citizenship. Indeed, Australia had singled out Aboriginal Australians in the implementation of the right to vote. When the *Commonwealth Electoral Act* was passed in 1902, Aborigines not enrolled to vote in State elections could not vote in federal elections, whereas this right had been conferred upon women. It is only in 1962 that Aboriginal Australians received the right to vote in Commonwealth elections.⁸⁴

citizenship of the UK and Colonies is conferred by birth, descent, registration or naturalization. British protected persons are also British subjects under the *British Protectorates, Protected States and Protected Persons Order in Council 1949*.

⁷⁸ See section 6.

⁷⁹ Parry, above n 77, 281.

⁸⁰ On the other hand, under Australian law an Australian citizen acquiring UK citizenship lost his prior Australian nationality under s 17 of the *Nationality and Citizenship Act 1948 (Cth)*.

⁸¹ Weis, above n 30, 16.

⁸² Above n 54 and 63.

⁸³ The category 'British subject' was abolished in UK law in the *British Nationality Act 1981*. Jones aptly writes: 'The title 'British subject' is the common denomination of citizens of the Commonwealth, but the ties between the individual and a particular member-state is not defined thereby; it is necessary to ascertain his citizenship before he can be identified for the purposes of protection and for international purposes generally'. Jones, above n 57, 177.

⁸⁴ Chesterman and Galligan, above n 64, 88-89, 162.

III THE EMERGENCE OF A NEW CALEDONIAN CITIZENSHIP

A *The Troubled History of New Caledonia*

The history of New Caledonia does not begin with the French claim over the territory by Admiral Fevrier-Despointes on September 24, 1853. But it is at this particular moment that the French history of New Caledonia began. It was first a part of the *Etablissements Français d'Océanie* (E.F.O.) – French Establishments of Oceania – with Papeete as capital. It then became a Colony in 1860. This is an important date because this marks the birth of the colony as a French statutory body which still exists to this day. The Head of the colony was the Governor who represented the French State and who was the executive of the colony as well. As in Australia,⁸⁹ government by prerogative rule was a necessity in the early years. At that time, there was nobody with whom the Governor shared responsibility. The first 'administration board', the members of which were chosen by the Governor, was created in 1868. Communications with France were too slow to make referral to French laws a viable option on a regular basis. In practice Governors did legislate, although the Conseil d'Etat (the highest French administrative Court) did not name their actions 'legislative'.⁹⁰ Only a few specific statutes were promulgated by the French Government for the colony.⁹¹

In 1885, a lasting status was conferred on the colony by the Third French Republic: a 'General Council' of the colony was created, elected by the French nationals, although convicts, women and the native inhabitants could not vote. The Governor remained the executive and wide powers were given to the colony which had to be financially self-sufficient at that time. In 1878, and then again in 1917, the Kanak (the indigenous population)⁸⁵ rebelled against the French domination in an effort to reclaim lands acquired by the French settlers. The Army crushed the revolts, without making any political reforms. The Second World War deeply shattered the status of the small colony of only 50,000 which saw the arrival of more US soldiers than there were inhabitants. At the end of the war, the Fourth French Republic adopted a new statute for New Caledonia and inaugurated a major change in the political history of the overseas possession: the General Council became a 'Territorial Assembly' which elected a government although the Governor remained the head of the executive; women and the natives were given the right to vote. After the tumultuous wars of independence in Indochina and Algeria, which put General De Gaulle back into power, the French Republic asked for the first time the Territorial Assembly its opinion on independence. However, the Assembly chose to stay French on December 17, 1958.

History then went backwards. In 1963, the local government became an advisory council to the Governor. Education, which was a local competence up to then, fell within the purview of the French Government. And above all, France

⁸⁹ Parkinson, above n 1, 121.

⁹⁰ Régis Fraisse, 'La hiérarchie des normes applicables en Nouvelle-Calédonie' (2000) *Revue Française de Droit Administratif* 89.

⁹¹ French laws did not apply unless made expressly enforceable for the colony concerned throughout the French Empire. The Governors' enactments had been designated 'administrative' by the Conseil d'Etat so that it could exercise judicial review, whereas it cannot review the legality of statutes.

⁸⁵ This invariable word comes from *kanaka*, meaning 'human being'. It became *Canaque* in French and its use was derogatory. In the 1970s, when the Melanesian native inhabitants started organising themselves into political parties and called for independence, the word became associated with political emancipation and pride.

withdrew from New Caledonia the right to manage nickel and other raw materials. This new French policy was both dangerous, because of the opposition from the locals, and counterproductive, because of the fall in nickel prices; not surprisingly, this policy failed. In 1975, after the end of the nickel boom, the main political debate in New Caledonia focused on *independence*. The most influential political party, the 'Union Calédonienne' which at that time was supported by Kanak and non-Kanak, expressly chose independence as the political future of New Caledonia. When the 'Front de Libération Nationale Kanak Socialiste' (FLNKS) was founded in 1975, it too began advocating independence. In 1976, the French Parliament passed a new statute which revamped the local government and changed the name 'Governor' to 'Haut-commissaire de la République' (High Commissioner of the Republic). Instability increased. The local government council was dissolved in 1979. François Mitterrand, then competing in the French presidential election, promised New Caledonia independence. The FLNKS, led by the late Jean-Marie Tjibaou (assassinated in 1989), asked for the creation of an independent State of 'Kanaky' and resumed Kanak agitation. On July 12, 1983, a Declaration was negotiated by the two main political parties and the French Government in the town of Nainville-les-Roches but the 'loyalist' party, the 'Rassemblement pour la Calédonie dans la République', disagreed. Nevertheless, a new status was voted by the French Parliament, called '*statut Lemoine*', named after the French Minister in charge of the overseas territories.⁸⁶ This created a local government, in which the High Commissioner did not take any part, and retroceded competencies that France had removed in the 1960s. The FLNKS protested against the new status because it gave all the French nationals the right to vote, not just the Kanak and those shamefully referred to as the 'victims of history', *i.e.* the first French settlers and convicts and their descendants. Instability increased further. The French Parliament, reacting to the serious disorder on the Island by implementing the law on the state of emergency,⁸⁷ adopted a few months later a new status called '*statut Pisani*', named after the new Socialist French Minister in charge of New Caledonia.⁸⁸ This new solution created four regional councils and gave representation to the Kanak traditional chiefs in a new council for the first time. Although this status could not really be implemented immediately because of the increasing violence and disorder, it anticipated some of the most important elements of the sharing of powers that was to take place.

Indeed, the socialist party lost the French parliamentary elections in 1988 and a new period of 'cohabitation' began between President Mitterrand and newly appointed right-wing Prime Minister Jacques Chirac. Although the President kept the control of the foreign policy and had a say in the internal affairs, the balance of powers shifted dramatically in favour of the Prime Minister. In this rather odd period of permanent conflict between the President and the Prime Minister, the latter could take over internal affairs because he had the support of the majority in the National

⁸⁶ Loi n° 84-821 du 6 septembre 1984 portant statut du Territoire de la Nouvelle-Calédonie et dépendances, JORF (7 September 1984), 2840.

⁸⁷ Loi n° 85-96 du 25 janvier 1985 relative à l'état d'urgence en Nouvelle-Calédonie et dépendances, JORF (26 January 1985), 1087. The law was originally passed to respond to the troubles before the independence of Algeria.

⁸⁸ Loi n° 85-892 du 23 août 1985 sur l'évolution de la Nouvelle-Calédonie, JORF (24 August 1985), 9775.

Assembly. This led to the adoption of two new statutes for New Caledonia.⁸⁹ In addition, an ineffective referendum on independence was held, defeated by 98.3% of the electorate, most of the Kanak not having taken part in the vote. Tremendous disorder ensued and these new changes remained dead letters. The troubles culminated in 1988 with a bloody hostage-taking in Ouvéa. That year, Francois Mitterrand won the presidential election for the second time and the new Prime Minister, Michel Rocard, immediately sent a negotiating team, known as '*mission du dialogue*', and the French Government tried to administer the territory directly.⁹⁰ This troubled period led to an agreement on increased autonomy: the Matignon Accord of 1988.⁹¹ On June 26, 1988, the French voters were asked by referendum to approve this new status and the right of the residents of New Caledonia to vote for self-determination.⁹² The referendum was marked by a high rate of abstention (63.11%) but yielded a strong 'yes' (80%) and, therefore, the new status was approved and received the support of the two main political forces in New Caledonia and of the French Government. This, surely, was not a bad result for an issue regarded as distant from the internal affairs of France. The referendum was in effect a guarantee given to the Kanak and it pressed France to stabilize the legislative process and to give New Caledonia a lasting autonomy. This status, embodied in a law of 1988,⁹³ became the basis on which the current position of New Caledonia is founded. It was explicitly a temporary status, which was scheduled to last only until 1998. Ironically, New Caledonia experienced eight successive statuses in ten years but it is the one which was deemed temporary which actually gave stability to the territory. Three 'Provinces' were established as regional councils, sharing powers on a territorial basis. The Matignon Accord follows the US and Australian federal models: it enumerates Caledonian powers (like the Commonwealth powers) and leaves all unlisted powers to the 'Provinces' (like the States in Australia). Kanak traditional chiefs formed a special council. The High Commissioner remained the Head of the Executive and France gave a large amount of competencies to New Caledonia. Ten years later, a new Agreement was signed between the two main political forces of New Caledonia and the French Government to avoid the troubles that could have been spurred by the vexing question of independence.

Thus the Nouméa Agreement of 5 May 1998 emerged through political negotiation and it has achieved a compromise between two competing and incompatible positions. The Agreement was approved by referendum in New Caledonia on 8 November 1998 (with 72% of the votes in favour) and it became Title XIII of the French Constitution, entitled '*transitional enactments concerning New Caledonia*'.⁹⁴ Internationally, New Caledonia has been on the United Nations

⁸⁹ Loi n°86-844 du 17 juillet 1986 relative à la Nouvelle-Calédonie, JORF (19 July 1986), 8927 ; Loi n°88-82 du 22 janvier 1988 portant statut du territoire de la Nouvelle-Calédonie, JORF (26 January 1988), 1231.

⁹⁰ Loi n°86-844 du 17 juillet 1986 relative à la Nouvelle-Calédonie, JORF (19 July 1986), 8927.

⁹¹ JORF (6 October 1988), 12568.

⁹² The question was: 'Do you approve the bill submitted to the French people by the President of the Republic on the statutory and preparatory provisions relating to the self-determination of New Caledonia in 1998?'

⁹³ Loi n° 88-1028 du 9 novembre 1988 portant dispositions statutaires et préparatoires à l'autodétermination de la Nouvelle-Calédonie en 1998, JORF (10 November 1988), 14087.

⁹⁴ Constitutional Law n° 98-610 of 20 July 1998, JORF (21 July 1998), 11146. Only those who could already vote in New Caledonia at the previous referendum in 1988 (and those under 18 years of age at the time and who already lived there in 1988) had the right to vote

list of non-self-governing territories since 1986.⁹⁵ The Nouméa Agreement provides two main guarantees to the United Nations: the first is to ensure a mechanism for the self-determination of New Caledonia. The second is that France plainly accepts that *'the way to emancipation (independence) shall be brought to the attention of the United Nations'*.⁹⁶ Many enactments from the Matignon Agreement have been maintained, especially the sharing of the political powers through the establishment of the Provinces. Furthermore, the powers inside the government itself are shared according to a system of checks and balances. The Congress (the successor of the Territorial Assembly which groups together the three provincial assemblies) is elected by proportional representation, which makes it very difficult to build a majority. This situation is not unusual, even in the Australian Senate. Furthermore, the Nouméa Agreement provides that the ministers themselves may be elected by the Congress by proportional representation. Hence, all the main political parties may join in the government. This is called a *'collégialité'* or *'collegial policy'*.⁹⁷ Based on a simplistic electoral mathematical rule, slightly limited by the possibility of choosing the number of ministers, this scheme deeply differs from the classical political system. The proportional representation gives the New Caledonian political system its exceptional characteristic. The Kanak customary council is also transformed into a customary *'Senate'* and the Congress has the right to pass effective statutes, which is a major change in a unitary State like France.⁹⁸

Pursuant to the Nouméa Agreement and the organic law which implements it,⁹⁹ both Congress and government are increasingly empowered *via* the gradual implementation of a transfer of powers from France to New Caledonia. Key areas (*e.g.* taxation, labour law, health, foreign trade) are already in the hands of the Congress and the government. Further authority will be given to the Congress in the near future in the areas, *e.g.*, of civil law, corporate law, high school education. Ultimately and before New Caledonia decides on its future, the French Republic should only remain in charge of foreign affairs, justice, defence, public order and the currency, often labelled the *'sovereign functions'*.¹⁰⁰ Under the Agreement, the Congress will have the right to call for a referendum on independence at any time after 2014. New Caledonia possesses almost complete internal autonomy and some important powers in international relations.¹⁰¹ Even the official name of the country, *Nouvelle-Calédonie*, could be changed in the near future in accordance

for the referendum of 1998. On the current status of New Caledonia, See Garde and Christnacht, above n **Error! Bookmark not defined.**; François Luchaire, *Le statut constitutionnel de la Nouvelle-Calédonie* (2000); Jean-Yves Faberon (ed), *Souveraineté partagée en Nouvelle-Calédonie et en droit comparé* (2000).

⁹⁵ See below n 120 and accompanying text.

⁹⁶ Nouméa Agreement, point 5 and point 3.2.1.

⁹⁷ Mathias Chauchat, *Vers un développement citoyen ; perspectives d'émancipation pour la Nouvelle-Calédonie* (2006) 16.

⁹⁸ Laure Bausinger-Garnier, preface to Yves Gauthier, *La loi du pays en Nouvelle-Calédonie* (2001).

⁹⁹ Organic Law n° 99-209 of 19 March 1999, JORF (21 March 1999), 4197.

¹⁰⁰ Mathias Chauchat, 'Transferts de compétences et avenir de la Nouvelle-Calédonie' (2007) *Actualité Juridique du Droit Administratif* 2243; Olivier Gohin, 'Comment dépanner l'accord de Nouméa ?' (2008) *Actualité Juridique du Droit Administratif* 291.

¹⁰¹ New Caledonia can join an international organization as a member or an associate member; the president of the government can negotiate international agreements and can sign them after receiving the authorization of the French government; New Caledonia can have its own diplomatic representation in the States and organizations of the Pacific region.

with the Nouméa Agreement which states that ‘*a name, a flag, an anthem, a motto, and the design of banknotes will have to be sought by all parties together, to express the Kanak identity and the future shared by all parties*’. So far, however, there has been no consensus on a new name, even for ‘*Kanaky-New-Caledonia*’ which would be similar to Papua-New Guinea.

The Nouméa Agreement also describes the process of transfer of powers as ‘*irreversible*’¹⁰² and provides for a ‘*Caledonian citizenship*’.¹⁰³ This is the most important innovation of the current status.

B *A Distinctive New Caledonian Citizenship*

In the specific context of a European history marked by conflicts among nations, ‘citizenship’ appears more neutral than ‘nationality’. Today, it connotes a more positive link with the community. Hence it is no accident that the Treaty of Maastricht of 1992, which purports to create an ‘ever closer union among the peoples of Europe’, created a European Union and a citizenship of the Union, which gives rights with respect to the member States but also with regard to organs of the Union, as part of a broader process of involvement of the peoples of Europe in their own destiny manifested in the Union.¹⁰⁴ Union citizenship has no effects internationally and does not purport to replace the nationality of member States: it complements national citizenship (Article 8). Reference to the European evolution could not have been ignored by the negotiators of the Nouméa Agreement which proceeds in the same manner but which also goes further.¹⁰⁵

In the political history of New Caledonia, the French Republic distinguished carefully between Man and Citizen. The Kanak were considered non-citizen indigenous people and, as such, had no political rights. A *Code de l'Indigénat* (Code for the Indigenous) imposed severe restrictions on the livelihood of the Kanak, on their freedom of movement and on their ability to own land. The Kanak were not conscripted for the Great War but they sometimes joined the French forces as volunteers as was sometimes promoted by priests. Beyond the Island’s borders, they were regarded as French nationals wearing French uniforms. A decree of 1933 granted French citizenship to the indigenous diggers of the French Empire but this remained almost ineffective in New Caledonia.¹⁰⁶ The Kanak received the right to vote on 7 May 1946 only.

Today, the Nouméa Agreement recognises a specific Caledonian citizenship. This citizenship is distinct from the French one, which the French and the Caledonians (Kanak included) have in common. The Caledonian citizenship in essence gives certain rights of political participation to the locals. But the Nouméa

¹⁰² Nouméa Agreement, point 5.

¹⁰³ Nouméa Agreement, point 2 and preamble.

¹⁰⁴ The Treaty defines both the criteria for the eligibility of EU citizenship and the rights attached thereto. A citizen of the Union is ‘every person holding the nationality of a Member State’ (Art 8). Citizens of the Union have the right to move and reside freely within the territory of the Member States, the right to vote and stand as candidates in municipal elections in the Member State of which he is not a national but in which he resides; the right to vote and stand for election to the European Parliament in the Member State of residence; the right to receive protection from the diplomatic or consular authorities of any Member State, and the right to petition the EP and to apply to the Ombudsman. Ibid.

¹⁰⁵ See below n 107.

¹⁰⁶ Sylvette Boubin-Boyer et Paul de Deckker, *De la Première Guerre mondiale en Océanie – Les guerres de tous les Calédoniens* (2003).

Agreement expressly acknowledges that it might be changed into a nationality if New Caledonia chooses to become independent.¹⁰⁷ For the moment the Caledonian citizenship remains an internal affair but this does not mean that Caledonians are regarded as only French nationals under the applicable provisions of international law.¹⁰⁸ The introduction of this citizenship has been criticised because it limits the franchise and creates what is regarded as a second-class status for French nationals living in New Caledonia who are not Caledonian citizens.

The creation of a Caledonian citizenship had led to three separate electorates in New Caledonia; the issue is particularly sensitive because it is necessary to know who will be allowed to participate in the poll on independence.

The first electorate aggregates all those who will have the right to express their opinion in the final referendum on independence.¹⁰⁹ Under international law, a State engaged in a decolonisation process must discourage immigration from the metropolitan territory;¹¹⁰ the Kanak are still extremely concerned about a new French settlement in New Caledonia. Thus a tough political compromise was achieved in 1988 in the Matignon Agreement and carried over into the Nouméa Agreement of 1998: those taking up residence in New Caledonia after 1988 will not be able to vote in the future constitutional referendum except if, by the year 2014, they can prove that they have been resident in New Caledonia continuously for the previous twenty years. Therefore voters must have moved to New Caledonia by 1994 at the latest. The rules are clearly known to everybody.

The second electorate is made up of the New Caledonian citizens.¹¹¹ This comprises certain French nationals only and designates all those who have the right to vote in the election of the Congress of New Caledonia. The original rule was that the individuals concerned had to prove that they had been resident continuously for ten years before the date of the election. However, this solution did not satisfy the independence movements which denounced what they called a 'democratic drowning'. This situation, known as 'the sliding electorate', led to demonstrations and violence. President Jacques Chirac himself recognised that the rule was arguably not in conformity with the terms of the Nouméa Agreement. Hence, in 2007, he proposed to change the French Constitution and to 'freeze' the Caledonian electorate.¹¹² Under the new rule, only those residing in New Caledonia before the

¹⁰⁷ Preamble of the Nouméa Agreement: 'During this period, signs will be given of the gradual recognition of a citizenship of New Caledonia, which must express the chosen common destiny and be able, after the end of the period, to become a nationality, should it be so decided'.

¹⁰⁸ See below section C.

¹⁰⁹ Organic Law n° 99-209 of 19 March 1999, JORF (21 March 1999), 4197. Art 218 determines the conditions for participation in ballots as from 2014.

¹¹⁰ UN General Assembly Resolution 35/118 of 11 December 1980, Plan of Action for the Full Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples. Annex 8 says: 'Members States shall adopt the necessary measures to discourage or prevent the systematic influx of outside immigrants and settlers into Territories under colonial domination, which disrupts the demographic composition of those Territories and may constitute a major obstacle to the genuine exercise of the right to self-determination and independence by the people of those Territories'.

¹¹¹ Organic Law n° 99-209, above n 109, art 188. Art 4 of the Organic Law says: 'A citizenship of New Caledonia is hereby established and benefits those French nationals who fulfil the conditions in article 188'. The first electorate is thus included in the second electorate.

¹¹² Constitutional Law n° 2007-237 of 23 February 2007, JORF (24 February 2007), 3354.

Nouméa Agreement was accepted (thus, before November 8, 1998) will be allowed to prove that they have been resident continuously for ten years. A French national who moved to New Caledonia after November 8 will never be able to become a Caledonian citizen, at least as long as the Constitution remains unchanged.¹¹³

The third electorate is composed of all the French nationals living in New Caledonia and therefore includes the Caledonian citizens.¹¹⁴ This broad electorate is simply called ‘additional board’, because of the addition of the non-citizen French nationals to the Caledonian citizens. Together, they take part in the legislative French elections by sending two representatives to the French National Assembly, in the French presidential election, as well as in the national referendums, the election of the European Parliament and of the local town councils.

These limitations of the right to vote have created severe political and judicial quarrels. Does the current situation, which deprives the French nationals in New Caledonia of a right to vote, violate a fundamental right? Or, on the other hand, may the French who are not Caledonian citizens only vote for the elections that they may be affected by? Because the French Constitution was expressly changed, no appeal before the Constitutional Council (the French Constitutional High Court) could be launched. But the issue has been referred to the European Court of Human Rights and before the Human Rights Committee by political ‘loyalist’ opponents.

Firstly, the Human Rights Committee. This is a treaty-based mechanism where a group of experts examines reports on individual communications pertaining only to the 1966 International Covenant on Civil and Political Rights. It remains disputed whether the Human Rights Committee’s final views (which are formally not binding) qualify as decisions of a quasi-judicial body or simply constitute authoritative interpretations on the merits of the case. The Committee submitted its report on 15 July 2002.¹¹⁵ It considered that the Caledonian citizenship requirements were reasonable because they applied to a historical decolonisation process. Secondly, a complaint against France was filed in the European Court of Human Rights, established under the European Convention on Human Rights of 1950 to monitor compliance by 47 European member States. A decision of the Court is binding on the member State concerned and must be complied with. On 11 January 2005, the Court ruled that the limitations on the right to vote were also acceptable in a process of self-determination.¹¹⁶ No decision has since been rendered on the constitutional change in 2007 which ‘froze’ the electorate but the issue is pending before the European Court of Human Rights.¹¹⁷

¹¹³ A very controversial issue was whether a non-resident New Caledonian (whether Kanak or not) could still be regarded as a citizen. The answer was clearly no, since the legislation considers the length of residency. But this proved too outrageous to be sustained: therefore, the French *Cour de Cassation* (the Supreme Court in civil, commercial and criminal matters) developed a new interpretation which confers to a large extent the right to vote upon those who already had the right to vote before leaving New Caledonia and who were not residing in New Caledonia in 1998. See Carine David, ‘Commentaire sous l’arrêt *Kilikili*’ (2005) *Actualité Juridique du Droit Administratif*, 2014.

¹¹⁴ Organic Law n° 99-209, above n 109, art 189.

¹¹⁵ Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, Seventy-fifth session (meeting of 15 July 2002), UN Doc CCPR/C/75/D/932/2000 (6/07/2002).

¹¹⁶ European Court of Human Rights, *Py v France*, Case n° 66289/01 of 11 January 2005.

¹¹⁷ *X and Others v France*, Case n° 165121/07, lodged onto the docket of the Court on 20 July 2007.

A related problem is this: should the Caledonian citizenship be the basis for an affirmative action program along the lines conducted by President Kennedy in the USA to enhance racial equality? A provision of the Nouméa Agreement authorises the implementation of safeguards for local workers. This safeguard addresses protection from overseas workers, namely French nationals, and is established in favour of 'residents' and 'inhabitants'.¹¹⁸ However, the Nouméa Agreement itself also indicates that New Caledonian citizenship is a reference in the adoption of provisions to be implemented to preserve local employment.¹¹⁹ This issue strikes deeply both into the Kanak independence movements and the European presence in New Caledonia. Nothing has yet been implemented to establish these safeguards. The French can freely continue to move to, and find a job in, New Caledonia, although they are not entitled to New Caledonian citizenship. The New Caledonian citizenship issue will remain a major bone of contention in the forthcoming years because it foreshadows a prospective nationality in the eyes of the Kanak.

C Towards a Prospective Nationality

New Caledonia was re-listed as a non-self-governing territory by the United Nations in 1986.¹²⁰ The UN list of non-self-governing territories comprises those that, according to the United Nations, are not decolonised yet. The list was initially prepared in 1946 pursuant to Chapter XI of the United Nations Charter and has since been updated by the General Assembly.¹²¹ In 1960, the General Assembly adopted Resolution 1514, the Declaration on the Granting of Independence to Colonial Countries and Peoples. This determined that all remaining non-self-governing territories and trust territories were entitled to self-determination.¹²² The following year, the General Assembly established the Special Committee on the Situation with Regard to the Implementation of the Declaration, sometimes referred to as the Special Committee on Decolonisation or Committee of 24 (because for much of its history the Committee was composed of 24 members). The Committee reviews the situation in each non-self-governing territory and reports to the General

¹¹⁸ Nouméa Agreement, Point 3.1.1 and preamble; Organic Law n° 99-209, art 24.

¹¹⁹ *Nouméa Agreement, Point 2. Art 24 of Organic Law 99-209 deals with local employment 'to the benefit of the citizens' but also addresses 'persons able to justify a sufficient period of residency'. See also, LARJE, Portail des sciences juridiques et économiques* <http://larje.univ-nc.nc/index.php?option=com_content&task=view&id=79&Itemid=51>.

¹²⁰ UN General Assembly Resolution 41/41 of 2 December 1986, Implementation on the Declaration on the Granting of Independence to Colonial Countries and Peoples.

¹²¹ In 1946 France submitted to the General Assembly information on New Caledonia and Dependencies and the French Establishments in Oceania, pursuant to art 73e of the UN Charter which concerns territories whose peoples have not yet attained a full measure of self-government. See UN GA Res 66(1) of 14 Dec 1946. At the request of France, New Caledonia was removed from consideration in 1949. Indeed, it was then up to the members of the UN to decide which territories would come under the ambit of art 73e. New Caledonia could not qualify as a non-self-governing territory as it was simply assimilated to the French territory by France itself: France explained that all the locals were French citizens, they elected the French National Assembly and New Caledonia was given a Territorial Assembly.

¹²² Resolution 1514 (XV) of 14 December 1960. Art 73 of the UN Charter did not mention the right to self-determination of the inhabitants of non-self-governing territories but only that their interests are paramount. Resolution 1514, however, declares that immediate steps shall be taken to transfer *all* powers to the peoples of these territories.

Assembly.¹²³ As was explained above, the Nouméa Agreement provides guarantees to the United Nations.¹²⁴

The Nouméa Agreement provides for a poll to address devolution to New Caledonia of the reserved powers, access to international full responsibility status, and conversion of citizenship into nationality. This poll will be held during the fourth mandate of the Congress only, that is, from 2014 to 2019. The electorate will vote for these proposals three times if necessary, that is, if a majority votes against.¹²⁵ If the citizens' answer is negative for the third time, the Agreement requires that the political partners meet to consider the situation. Until a solution is found, however, the status of New Caledonia must remain unchanged, at its latest stage of evolution.¹²⁶ The French Constitution defines this 'irreversibility rule' as a constitutional principle. UN General Assembly Resolution 1541 (XV) of 15 December 1960 defined the methods of realising a full measure of self-government of territories which are non-self-governing under article 73 of the UN Charter.¹²⁷ Principle VI of the Resolution declares that a non-self-governing territory can be said to have reached a full measure of self-government by emergence as a sovereign independent State, free association with an independent State, or integration with an independent State. The principle of irreversibility in the Nouméa Agreement clearly ruled out the possibility of integration.¹²⁸ The Congress of New Caledonia will choose both the date of referendum and the formulation of the question. This hard task must be achieved by a majority of three-fifths of the members of Congress. If that majority can be achieved, it will be the French State itself, not the Congress, which will submit the question for referendum.¹²⁹

As was seen before, the Nouméa Agreement foresees the emergence of a New Caledonian nationality out of the current New Caledonian citizenship. But it is important to note that the issue of a New Caledonian nationality is not necessarily related to the emergence of New Caledonia as a sovereign State. Indeed, it has to be determined whether the kind of personal jurisdiction that under international law is inherent in the link of nationality can only be exercised by a sovereign State. This

¹²³ After the creation of the Special Committee on Decolonization, France continued to refuse to send any information on New Caledonia: the reason was that the Territorial Assembly had chosen to stay French on 17 December 1958. UN GA Res 41/41 of 2 December 1986, however, affirmed the 'inalienable right of the people of New Caledonia to self-determination and independence in accordance with resolution 1514'. The latest report on New Caledonia can be found in General Assembly Resolution 62/117 of 17 December 2007.

¹²⁴ See above n 96 and accompanying text.

¹²⁵ Nouméa Agreement, point 5.

¹²⁶ Point 5 of the Nouméa Agreement ('à son dernier stade d'évolution').

¹²⁷ Art 73e requires that the administering State transmit to the UN information of a technical nature relating to the economic, social and educational conditions of non-self-governing territories. Principle IV of Res 1541 establishes that there is *prima facie* an obligation to transmit information in respect of a territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it.

¹²⁸ The Nouméa Agreement was approved by referendum in New Caledonia, hence it can be considered that an early referendum on self-determination, for the purpose of Res 1541, rejected integration. However, the electorate in 1998 and the electorate that will decide on the final status of New Caledonia are not the same. The slight difference is that those who were inhabitants in New Caledonia from 1988 until 1994 (and stayed there continuously for 20 years) will have the right to vote in the final referendum. This was a political concession from the FLNKS in the 1998 Agreement given to the 'Loyalists'. Res 1541 merely refers to the wish of the people of the territory concerned.

¹²⁹ Point 5 of the Nouméa Agreement.

has been claimed.¹³⁰ However, this is not a correct assumption, either from the theoretical point of view of international jurisdiction, or from a practical perspective. With respect to the former, it must be noted that, although a general framework for international legal personality had remained elusive so long as sovereign States were the chief players in the international society, the existence of related territorial combinations¹³¹ implied an enquiry into their competences on the international plane and, therefore, announced the perception of a disjunction between sovereignty and international personality.¹³² Thus if sovereignty designates the natural condition of States in international law, that is, their ability to enter into any legal dealing or to perform any legal act under international law, international personality can be considered a basic capacity of an independent will that allows it to be the recipient of rights and duties under international law and to operate directly at the level of international law.¹³³ From that perspective, although it is generally considered that the problem of international jurisdiction relates to the activities of a State (that is, a sovereign State),¹³⁴ the allocation of rights and duties among subjects of international law, precisely because international law recognizes subjects different from sovereign States, does not generally put sovereign States in a more favourable position and leaves it to each rule of international law to determine its applicability.¹³⁵ Hence, from a practical perspective, when it comes to allocation of nationality, there is thus much force in Brownlie's position that 'there must exist a State ... or other international person having the capacity to create a law of attribution on the basis of nationality'.¹³⁶ He mentions the case of the Free City of Danzig which was an international person and article 105 of the Treaty of Versailles gave Danzig citizens a nationality *qua* Danzig.¹³⁷ In the case of mandated and trust territories he writes:

¹³⁰ See eg, José Francisco Rezek, 'Le droit international de la nationalité' (1986-III) 198 *Recueil des cours de l'Académie de droit international* 333, 345.

¹³¹ Such as the dependent State, the State 'mi-souverain', the Vassal State, the protectorate, unions like the Commonwealth, federations and confederations, etc.

¹³² Mosler reports that German legal theory developed the distinction between capacity to enjoy and capacity to exercise to explain the legal personality of dependent States. Hermann Mosler, 'Réflexions sur la personnalité juridique en droit international public' in Jean Bagniet *et al*, *Mélanges offerts à Henri Rolin. Problèmes de droit des gens* (1964) 231-232.

¹³³ No doubt, it is the development of international organizations which prompted the emergence of a general framework for international legal personality. Prior to that, non-territorial entities, such as bureaus and administrative unions, generally attracted the suspicion of writers. In 1949 the ICJ declared: 'The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights'. *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* [1949] ICJ Rep 174, 178.

¹³⁴ See eg, Mann, above n 11, 9.

¹³⁵ See also: Gerald G. Fitzmaurice, 'The Law and Procedure of the International Court of Justice, 1951-1954: General Principles and Sources of Law' (1953) 30 *British Year Book of International Law* 1, 12; Ian Brownlie, *Principles of Public International Law* (5th ed, 1998) 292; *Competence of the ILO in Regard to International Regulation of the Conditions of Labour of Persons Employed in Agriculture (Advisory Opinion)* [1922] PCIJ (ser B) No. 2 9, 23; Dan Sarooshi, *International Organizations and Their Exercise of Sovereign Powers* (2005) 18.

¹³⁶ Brownlie, above n 29, 314. Emphasis added.

¹³⁷ *Ibid.* The PCIJ considered that the legal status of the Free City was *sui generis*. *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory (Advisory Opinion)* [1932] PCIJ (ser A/B) No. 44 3, 23.

Ex hypothesi the status of the inhabitants of Mandated and Trust Territories cannot be a domestic question. The Mandatory does not have sovereignty over territory, nor does the administering authority over a trust Territory. It would seem that in principle the inhabitants cannot be nationals of the administering power and thus, *in one sense*, they have no nationality. Weis had observed: 'The position of these persons is somewhat anomalous since they have, in consequence, no nationality in the sense of international law'. With respect this seems to be a *petitio principii*, since the absence of nationality *qua* internal law of the administering power, and the absence of nationality *eo nomine* conferred by some other source, does not render the inhabitants stateless. For various purposes of the law they are attributable to the territory itself: if they were not the sacred trust and attendant obligations would be easily avoided. The fact that the attribution or belonging is not readily ascribed to a 'citizenship' or 'nationality' is a source of confusion but hardly a reason for decision.¹³⁸

The same clearly goes for associated States, and associated statehood is not a status that can be rejected for New Caledonia. Actually, Pascal Naouna, president of the *Union calédonienne*, a component of the FLNKS, suggested in 2006 during the 37th congress of the FLNKS that New Caledonia could become a State associated with France to take account of the realities of globalisation.¹³⁹ The relations between the two States would be determined by agreement and would include a permanent financial assistance from France, the exercise by France of certain sovereign powers, and dual nationality for the New Caledonian citizens.¹⁴⁰ Association with an independent State is foreseen in Resolution 1541 as one of the methods of realising a full measure of self-government of territories which are non-self-governing. Indeed, principle VI of the Resolution notably declares that a non-self-governing territory can be said to have reached a full measure of self-government by free association with an independent State. Principle VII stresses that free association should be the result of a free and voluntary choice by the people of the territory concerned and that the people should retain the freedom to modify the status of the territory through the expression of their will by democratic means; the associated territory should have the right to determine its internal constitution without outside interference. An associated State is clearly not a sovereign State, and the concept of association here has to be distinguished from close 'associations' between sovereign States. On the other hand it cannot be denied that associated States are subjects of international law, being the recipients of international norms the scope of which is regulated by the compact of association. It is hard to generalize, as each compact of association has its own peculiarities, but one can consider that an associated State 'describes a system between a metropolitan country and its dependency as determined by the will of the peoples concerned'.¹⁴¹ Many examples are known where the metropolitan government had given over to the dependent island government jurisdiction, *e.g.*, to

¹³⁸ Brownlie, above n 29, 315-316 (citing Paul Weis, *Nationality and Statelessness in International Law* (1956) 27; UN Charter, Chapter XII; League of Nations Covenant, Art 22; *International Status of South-West Africa (Advisory Opinion)* [1950] ICJ Rep 128, 150 (Sep Op Judge MacNair referring to the sovereignty over a mandated territory as being 'in abeyance')).

¹³⁹ Les Nouvelles calédoniennes (9 November 2006).

¹⁴⁰ See also, the views of Paul Néaoutyine, representing the PALIKA, another component of the FLNKS, in *L'indépendance au présent; identité kanak et destin commun* 2006) 68, 74.

¹⁴¹ Masahiro Igarashi, *Associated Statehood in International Law* (2002), 5.

declare and implement an exclusive economic zone in its vicinity.¹⁴² For instance, when the UN Convention on the Law of the Sea was signed, the Cook Islands and Niue identified themselves under Article 305(1)(c), and the Trust Territory of the Pacific Islands identified itself under Article 305(1)(d).¹⁴³ The same pragmatic approach is taken on issues of nationality. As was seen above, it cannot be disputed that nationality can be attributed by entities other than a sovereign State. The international effects of such nationality will be conditioned by the very status of the relevant unit and, therefore, it was usual for a protecting State to carry out the diplomatic protection of the nationals of its protectorates or of the inhabitants of its mandates or trust territory.¹⁴⁴ It is established that the powers of the protecting State depended upon the treaty establishing the protectorate and its recognition by third States.¹⁴⁵ While the vindication of the rights encompassed in the nationality of the individuals concerned may thus have been performed by the protecting State because of the lack of international capacity of the dependent entity in the field, the class of individuals concerned could not have been merely subsumed into the class of the nationals of the protecting State itself. The fact that they may have had the *status* of the nationals of the protecting State for international law purposes is one thing; but it is not correct to assume that they *were* nationals of the protecting State. Similarly, while New Caledonian citizens enjoy the status of French nationals, the responsibility that France owes to the international community with respect to this non-self-governing territory makes it impossible to simply assimilate these individuals to the French nationals of metropolitan France.¹⁴⁶ Thus the experience

¹⁴² Thomas M. Franck, *Control of Sea Resources by Semi-Autonomous States* (1978), 27.

¹⁴³ 1833 UNTS 396 (opened for signature 10 December 1982, entered into force 16 November 1994). Art 305(1)(c) refers to '[a]ll self-governing associated States which have chosen that status in an act of self-determination supervised and approved by the United Nations in accordance with General Assembly resolution 1514 (XV) and which have competence over the matters governed by this Convention, including the competence to enter into treaties in respect of those matters'. Art 305 (1)(d) refers to 'all self-governing associated States which, in accordance with their respective instruments of association, have competence over the matters governed by this Convention, including the competence to enter into treaties in respect of those matters'. The US Trust Territory of the Pacific Islands was ended in 1994 when Palau acceded to independence.

¹⁴⁴ Oppenheim, above n 12, 646-647, para 295; Art 3 of the Mandates for Syria and Lebanon, Art 2 of the Annex to the Trusteeship Agreement regarding Italian Somaliland, quoted in Van Panhuys, above n 19, 65.

¹⁴⁵ *Nationality Decrees Issued in Tunis and Morocco (Advisory Opinion)* [1923] PCIJ (ser B) No. 4, 27.

¹⁴⁶ On April 22, 1923 the Council of the League of Nations determined: '(1) The status of the native inhabitants of a mandated territory is distinct from that of the Mandatory Power and cannot be identified therewith by any process having general application. (2) The native inhabitants of a mandated territory are not invested with the nationality of the Mandatory Power by reason of the protection extended to them. (3) It is not inconsistent with (1) and (2) above that individual inhabitants of the mandated territory should voluntarily obtain naturalization from the Mandatory Power in accordance with arrangements which it is open to such power to make'. League of Nations, *Official Journal* (1923) 604. See also, Institut de droit international, Resolution on Mandates, Art VI. *Annuaire de l'Institut* (1931-1932) 234. The status of British Protected Persons within the meaning of the British Protectorates, Protected States and Protected Persons Order in Council 1969, in relation to the Protectorate or Protected State to which they belong, is the same as that of nationals in relation to their State of nationality. Weis, above n 30, 19. For the status of the natives of a condominium territory, see Vincent P

of the Cook Islands as an associated State reveals that a common citizenship with the metropolitan country may be an important factor in the determination of the statehood of an associate State¹⁴⁷ but the existence of common citizenship in situations where a State comes into existence by gradual devolution does not necessarily prejudice formal independence.¹⁴⁸ The act of association between the Cook Islands and New Zealand is the *Cook Islands Constitution Act 1964* passed by the New Zealand legislature which came into force in the Cook Islands on 4 August 1965, as requested by the Legislative Assembly of the Cook Islands following general elections there. The whole process was supervised by the UN and the General Assembly considered that the Cook Islands had reached full internal self-government.¹⁴⁹ While the *Cook Islands Constitution Act 1964* indicates in section 5 that nothing in the Act shall affect the responsibilities of Her Majesty the Queen in right of New Zealand for the external affairs and defence of the Cook Islands, those responsibilities to be discharged after consultation by the Prime Minister of New Zealand with the Premier of the Cook Islands, practice reveals that New Zealand does not control the foreign affairs of the Cooks Islands.¹⁵⁰ Cook Islanders, however, are New Zealand citizens by virtue of the *Cook Islands Constitution Act 1964* which preserves for their benefit the status of a British subject or New Zealand citizen by virtue of the *British Nationality and New Zealand Citizenship Act 1948* (section 6). This was fundamental to Cook Islanders who wished to continue to enjoy the benefit of free access to New Zealand,¹⁵¹ and this was not changed by the *New Zealand Citizenship Act 1977* which ceases to extend British subjecthood to New Zealand citizens. Under the Act, New Zealand includes the Cook Islands (section 2(1)) by request of the Cook Islands (section 29) and, therefore New Zealand nationality extends to Cook Islanders. However, while Cook Islanders enjoy in New Zealand all the rights that any other New Zealand citizen has, a Cook Islander is defined under the laws of the Cook Islands as ‘a person belonging to the part of the Polynesian race indigenous to the Cook Islands, and includes any person descended from a Cook

Bantz, ‘The International Legal Status of Condominia’ (1998-2000) 12 *Florida Journal of International Law* 77, 133.

¹⁴⁷ Igarashi, above n 141, 253.

¹⁴⁸ Crawford, above n 34, 55.

¹⁴⁹ Resolution 2064(XX) of 16 December 1965.

¹⁵⁰ The nature of the relationship was defined in an Exchange of Letters of 1973 between the Government of New Zealand and the Government of the Cook Islands on the Constitutional Relationship between the Two Countries, in which the then Prime Minister of New Zealand indicated that ‘there are no legal fetters of any kind upon freedom of the Cook Islands, which make their own laws and control of the Cook Islands’. Several courts in New Zealand defined the Cook Islands as a ‘fully sovereign independent State’. Igarashi, above n 141, 259-263. Henderson writes: ‘The Cooks Islands’ inability to gain membership of the UN seems unjust, given that, in practice, it can be argued that it exercises considerably more independence in its defence and foreign policy than both the FSM [Federated States of Micronesia] and RMI [Republic of Marshall Islands] ... The compact [with the USA] affirms that the RMI and the FSM ‘have the capacity to conduct foreign affairs’. On the other hand, the Cook Islands and Niue constitutions give the responsibility for foreign affairs and defence to New Zealand ... But in practice the situation is reversed’. John Henderson, ‘The Politics of Association: A Comparative Analysis of New Zealand and United States Approaches to Free Association with Pacific Island States’ (2002-Hors Serie) 2 *Revue juridique polynésienne* 77, 83. In UN parlance, the Cook Islands is designated as a non-member State of the UN.

¹⁵¹ About four times more Cook Islanders (60,000) live in New Zealand than in the home islands. Henderson, above n 150, 82.

Islander'.¹⁵² A person qualifying as a Cook Islander under that legislation may enter, leave and reside in the Cook Islands as a matter of right, work in any occupation without restriction, lease land and receive free education and health services. Moreover, the law establishes 'permanent residents' of the Cook Islands who effectively acquire the same status as the Cook Islanders.¹⁵³ Hence, while it is clear that Cook Islanders have a distinct status (a Cook Islands citizenship) which is additional to their New Zealand citizenship, there is no distinctive Cook Islands nationality as such for the purpose of international law. But this in itself does not mean that a Cook Islander is regarded as any other New Zealand national, for the status of associated State implies a distinctive population. New Zealand itself considered that it had 'extended its citizenship to people living in areas beyond the reach of its own laws'.¹⁵⁴ It should thus be considered that Cook Islanders possess New Zealand nationality at the request of the Cook Islands and, if they are to be regarded as joint nationals of the Cook Islands and New Zealand, the exercise by New Zealand of the rights in regard to Cook Islanders is to be performed in accordance with the regime of association.¹⁵⁵ Only time will tell whether this kind of solution will be adopted by New Caledonia.

The immediate issues relating to the transformations of the status of New Caledonia are these: Will New Caledonia be able to afford independence? If not, how can an independent New Caledonian retain financial aid from France? How will New Caledonia be able to discharge its sovereign functions, if it ever has to? Can New Caledonia afford a local currency or should it keep the fixed exchange rate between the Pacific Franc and the Euro? How will it control the influx of migrant workers from metropolitan France to New Caledonia? Will the Caledonian citizens be able to keep their French nationality when they acquire the New Caledonia nationality? All these questions may receive various answers over time, but the process of formulating answers may itself also take various forms. The history of the emergence of a distinctive Australian nationality shows that it is possible to formulate sensible responses to the relations between a devolving unit and the metropolitan country without a violent break in continuity.

¹⁵² *Entry, Residence and Departure Act 1971-72*, s 2. Quoted in Igarashi, above n 141, 248.

¹⁵³ *Ibid* 249.

¹⁵⁴ Exchange of Letters of 1973, quoted in Henderson, above n 150, 81.

¹⁵⁵ A Cook Islands nationality can always be created by revision of the regime of association. See Tony Angelo, 'To Be or Not To Be ... Integrated, That Is The Problem of Islands' (2002-Hors Serie) 2 *Revue juridique polynésienne* 87, 91. The solution adopted was different for the regime of association between the US and the Federated States of Micronesia and the Marshall Islands, which established their own citizenship. Such persons are not *ipso facto* US citizens but may enter into, lawfully engage in occupations, and establish residence as non-immigrants in the United States. Pub Law 99-239, *Compact of Free Association Act 1985*, s 141.