## Table of Contents

| A  | ckno | rwledgements  | vii    |
|----|------|---|--------|
| Ir | troc | duction   | 1      |
|    | I.   | Two Communities   | 2      |
|    | II.  | Who is Stateless?   | 2<br>5 |
|    | III. | The Extent of Statelessness                                 | 7      |
|    | IV.  | Efforts to Eradicate Statelessness                          | 11     |
|    |      | A. The Ethnic Versus Civic State                            | 11     |
|    |      | B. Codification   | 12     |
|    |      | 1. A Coded Proscription against Withdrawal of               |        |
|    |      | Nationality   | 13     |
|    |      | 2. Presumption of Nationality in the Succession of States   | 14     |
|    |      | 3. Conflicts between Domestic Laws                          | 15     |
|    |      | 4. Stateless Condition as a Legal Status                    | 18     |
|    |      | 5. Nationality on Birth                                     | 18     |
|    |      | 6. Enforcement  | 18     |
|    |      | 7. The Problematic of the Codification Approach             | 19     |
|    | V.   | Legal Obligation and an International Community             | 20     |
|    |      | My Approach   | 25     |
|    | VII  | . Overview of the Book                                      | 27     |
| 1. | Two  | o International Communities                                 | 30     |
|    | I.   | What is an International Community?                         | 34     |
|    | II.  | The International Community as the Aggregate of the         |        |
|    |      | Wills of States   | 39     |
|    |      | A. The Source of a Discrete Content-Independent Law         | 41     |
|    |      | B. International Standards as Supplementary of the Internal |        |
|    |      | Domain  | 42     |
|    |      | C. The Circularity of International Standards               | 49     |
|    | III. | Destabilization of the International Community as the       |        |
|    |      | Aggregated Wills of State Members                           | 52     |
|    |      | A. Human Rights   | 53     |
|    |      | B. Jus Cogens   | 54     |
|    |      | C. The Humanitarian Law of Armed Conflict                   | 57     |
|    | IV.  | Legal Obligation and Statelessness                          | 58     |
|    | V.   | Conclusion  | 63     |

## x Table of Contents

| 2. | The       | Discursive Contingency of an International Community  | 65       |
|----|-----------|---|----------|
|    | I.<br>II. | The Emergence of an Early International Community of States<br>The Role of the Natural Person in the Early Modern | 66       |
|    |           | International Community   | 68       |
|    |           | A. The Protection of Nationals  | 69       |
|    |           | B. The Social Basis of the State's Authority  | 70       |
|    | 1111.     | The Bounded Residuary   | 73       |
|    |           | A. Title to Land  | 73       |
|    |           | <ul><li>B. The State as an End in Itself</li><li>C. The State as a Self-Creative Author</li></ul>                 | 76<br>77 |
|    |           | D. The Residuary  | 78       |
|    |           | E. Nationality  | 78       |
|    | IV.       | The Emergence of the Judicial Doctrine of Reserved Domain   | 79       |
|    |           | A. Post-World War I Legal Discourse   | 80       |
|    |           | B. Post-Second World War Legal Discourse  | 84       |
|    |           | i. The UN Charter   | 85       |
|    |           | ii. The Universal Declaration of Human Rights   | 85       |
|    |           | iii. The Reports of the International Law Commission  | 86       |
|    | V.        | The Content of the Reserved Domain  | 88       |
|    |           | A. The Role of the Executive Arm of the State   | 88       |
|    |           | B. State Immunity   | 92       |
|    |           | C. The Content of the Reserved Domain as 'Fact' Rather Than as 'Law'  | 93       |
|    | VI.       | Conclusion  | 94       |
| 3. | . The     | Consequences of Statelessness   | 96       |
| -  | 1.        | Consequences of the 'Operation' of Nationality Law  | 96       |
|    |           | A. The Administrative Process of Naturalization   | 100      |
|    |           | B. Admission to a State's Territory   | 101      |
|    |           | C. Withdrawal of Nationality  | 103      |
|    |           | i. Post-World War I   | 104      |
|    |           | ii. Post-World War II   | 108      |
|    |           | D. Expulsion  | 109      |
|    |           | E. Prolonged Detention  | 110      |
|    |           | <ol> <li>Prolonged Detention until State of Refuge Found</li> </ol>   | 111      |
|    |           | ii. Prolonged Detention for the State's Self-Protection   | 111      |
|    | II.       | The Absence of Legal Protection   | 113      |
|    | 111.      | The Consequences for Three Groups   | 117      |
|    |           | A. Women and Children   | 117      |
|    |           | B. Nomadic and Travelling Groups  | 121      |
|    |           | C. Indigenous Inhabitants   | 125      |

|    | IV.  | Social, Economic and Psychological Consequences               | 126 |
|----|------|---|-----|
|    |      | A. Economic Harm  | 126 |
|    |      | B. Social Security and Public Education                       | 131 |
|    |      | C. Social Ostracism and Trauma                                | 131 |
|    | V.   | Conclusion  | 134 |
| 4. | The  | Reserved Domain for the Treaty Right to Nationality           | 136 |
| -  | 1.   | Introduction  | 136 |
|    | II.  | The Statelessness Treaties                                    | 138 |
|    | 11.  | A. The Convention Relating to the Status of Stateless Persons | 150 |
|    |      | (1954)  | 140 |
|    |      | B. The Convention on the Reduction of Statelessness (1961)    | 142 |
|    |      | C. The Convention Relating to the Status of Refugees (1951)   | 143 |
|    |      | D. The Common Problems  | 143 |
|    | III. | The Human Rights Treaties                                     | 147 |
|    |      | A. The Right to Nationality                                   | 148 |
|    |      | B. The Right to Legal Personhood                              | 150 |
|    | IV.  | The Priority of the Reserved Domain over the Right to         |     |
|    |      | Nationality   | 151 |
|    |      | A. Reservations   | 151 |
|    |      | B. Enforcement  | 154 |
|    |      | C. The Exclusion of Nationality from Non-discrimination       |     |
|    |      | Clauses   | 155 |
|    | V.   | The Limitations Clauses                                       | 157 |
|    |      | The Non-derogation Clauses                                    | 159 |
|    | VII. | Conclusion  | 160 |
| 5. | Cus  | tomary Norms and a Right to Nationality                       | 162 |
|    | I.   | A Sense of Obligation   | 163 |
|    | II.  | State Practices   | 164 |
|    |      | The Problem of an Empty International Community               | 168 |
|    |      | The International Community as a Whole                        | 172 |
|    | V.   | Conclusion  | 176 |
| 6. | The  | Legal Bond  | 177 |
|    | I.   | Legal Obligation  | 178 |
|    | II.  | The Discursive Struggle                                       | 181 |
|    |      | A. The State's Claim to Its Own Authority                     | 181 |
|    |      | B. The Undercurrent   | 184 |
|    | III. | The Legal Bond as a Social Bond: Nottebohm                    | 186 |
|    |      | A. The Three Choices  | 187 |
|    |      | B. The Legal Bond as a Social Bond                            | 190 |
|    |      | C. Allagianga Vargus Effectiva Nationality                    | 101 |

## xii Table of Contents

|    |      | D. Legal Obligation  | 193  |
|----|------|--|------|
|    |      | E. The Discursive Struggle over a Legal Bond                     | 194  |
|    | IV.  | The Discursive Tradition of Effective Nationality                | 196  |
|    |      | A. The Early Modern Tradition                                    | 196  |
|    |      | B. Post-Nottebohm  | 199  |
|    | V.   | Evidence of Social Bonds as Legal Bond                           | 202  |
|    |      | A. Personal and Collective Memories                              | 205  |
|    |      | B. Statistical Evidence  | 206  |
|    |      | C. The Social Biographies of Applicants                          | 207  |
|    |      | D. Context-Specific Experiences of Group Members                 | 208  |
|    |      | E. Expectations  | 209  |
|    | VI.  | The Judicial Scrutiny of Social Relationships                    | 210  |
|    |      | A. Judicial Scrutiny of Executive Action during Alleged          | 210  |
|    |      | Emergencies  B. Prolonged Detention                              | 210  |
|    |      | <ul><li>B. Prolonged Detention</li><li>C. Expulsion</li></ul>    | 214  |
|    |      | D. Denial of Entry and Restriction of Internal Movement          | 214  |
|    |      | E. Restrictions on Political Participation                       | 216  |
|    | VII. | Conclusion   | 216  |
| 7. | Doe  | es a Stateless Person have a Country?                            | 220  |
|    | I.   | Habitual Residence   | 223  |
|    | II.  | One's Own Country as the Place of One's Social Bonding           | 224  |
|    | III. | Conclusion   | 232  |
| 8. | The  | State Obligation to Protect Stateless Persons                    | 235  |
|    | I.   | Legal Obligation and the Aggregated International                |      |
|    |      | Community  | 236  |
|    | II.  | The Displacement of the Boundary                                 | 240  |
|    |      | A. The Displacement of Territorial Jurisdiction in Armed         | - 44 |
|    |      | Conflict Law   | 241  |
|    |      | B. The Displacement of Boundary in International Legal Discourse | 246  |
|    |      | i. Non-arbitrariness   | 246  |
|    |      | ii. Good Faith   | 249  |
|    |      | iii. Proportionality   | 251  |
|    |      | iv. Self-Executory Norms   | 253  |
|    | III. | The Role of the Courts with Regard to Stateless Persons          | 256  |
|    | IV.  | What is 'the Operation of Its Law'?                              | 260  |
|    | V.   | The Legal Obligation to Protect Stateless Persons                | 264  |
|    |      | A. Legal Obligation as the Social Bonding of Effective           |      |
|    |      | Nationality  | 264  |

|              | <ul><li>B. An Idealized International Community</li><li>C. The Shift in Focus</li></ul>                                     | 265<br>266 |
|--------------|---|------------|
|              | D. The Break from the Traditional Theory of International   |            |
|              | Law   | 267        |
| <b>3</b> 7 T | E. Pre-legality   | 268        |
| VI.          | Conclusion  | 270        |
| 9. The       | e International Community as a Whole  | 271        |
| I.           | The Character of the International Community as a Whole A. The International Community as the Common Interest               | 272        |
|              | of State Members  The International Community as a Mihala   | 272<br>276 |
|              | <ul><li>B. The International Community as a Whole</li><li>C. What Grounds the International Community as a Whole?</li></ul> | 270        |
| II.          | A Community   | 279        |
|              | The Existence Conditions of the International Community as a  | 1          |
| TS 7         | Whole   | 282        |
| 1V.<br>V.    | Legal Objectivity Legal Subjectivity  | 285<br>288 |
| ٧.           | A. A Stateless Person as a Subject of a Legal Order   | 289        |
|              | i. The Fusion of Subject and Object   | 289        |
|              | ii. The Stateless Person as a Subject of the International  | 209        |
|              | Legal Order   | 290        |
|              | B. The Protection of Stateless Persons as an Existence  |            |
|              | Condition of an International Community   | 291        |
| VI.          | Harm to Stateless Persons as Harm to the International Community as a Whole   | 295        |
|              | A. Harm to the International Community as a Whole   | 296        |
|              | B. Harm to Stateless Persons as Harm to the International   |            |
|              | Community   | 298        |
| VII          | . Conclusion  | 301        |
| Coı          | nclusion  | 302        |
| I.           | The Territorial Knowledge of Legal Space  | 306        |
|              | A. The Legal Space of the Residuary   | 306        |
|              | B. The Boundary of the Protected Legal Space  | 308        |
|              | C. Nationality as Entitlement to Membership in the Legal  |            |
|              | Space   | 308        |
|              | D. Nationality as the Sign of Legal Knowledge   | 310        |
| II.          | The Obligatory Character of Nationality Law   | 310        |
| III.         | The International Community as a Whole  | 315        |
|              | Bibliography  | 321        |
| Index        |   | 359        |