OPPENHEIM'S INTERNATIONAL LAW

NINTH EDITION

Volume 1

PEACE

PARTS 2 TO 4

Edited by
SIR ROBERT JENNINGS QC
and
SIR ARTHUR WATTS KCMG QC

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LONGMAN
London and New York

that, apart from obligations undertaken by treaty, a state was entitled to treat both its own nationals and stateless persons at discretion and that the manner in which it treated them was not a matter with which international law, as a rule, concerned itself.

However, the need for international rules to protect individuals from inhuman treatment by states, even if the state is that state whose nationality the individual has or even if he is stateless, has been increasingly recognised. While the extent to which the rules which have grown up constitute customary international law is still open to question,[2] the present scope of rules of international law which serve to protect the individual from treatment which denies the basic rights of a human being has involved a fundamental change in this area of international law. Thus, first, a state is bound to respect certain fundamental rights of aliens resident within its territory[3] – although it might be said that the rights in question are not international rights of the aliens, but of their home state. Secondly, the various treaties for the protection of religious and linguistic minorities[4] signified the tendency to extend recognition, by means of international supervision and enforcement, to the elementary rights of at least some sections of the population of the state. Finally, the principle and practice of humanitarian intervention,[5] and, in more recent years, an imposing array of treaties of a humanitarian character, such as those for the abolition of slavery, of the slave trade, and of forced labour,[6] for the protection of stateless persons and refugees,[7] for safeguarding health and preventing abuses injurious to it,[8] for securing humane conditions of work,[9] and for the protection of human rights generally,[10] have testified to the intimate connection between the interests of the individual and international law. The Charter of the United Nations, with its repeated recognition of 'human rights and fundamental freedoms',[11] inaugurated a new and decisive departure with regard to this abiding problem of law and government. In some instances – as, for example, in the European Convention on Human Rights, and the two United Nations Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights – that development has assumed the complexion of explicit rules legally binding upon states.[12]

2 See § 436, n 11.
3 The somewhat paradoxical result of the existing position is that individuals, when residing as aliens in a foreign state, may enjoy a measure of protection which international law denies to the nationals of a state within its territory. But this result is diminished as the protection of human rights develops so as to embrace all individuals, irrespective of nationality. See also the Declaration on the Human Rights of Individuals who are not Nationals of the Country in which they Live: GA Res 40/144 (1985).
4 See §§ 425–8.
5 See § 131.
6 See §§ 429–30.
7 See §§ 396–9.
8 For example, within the framework of the WHO.
9 See § 432.
10 See §§ 431–44.
11 See § 433.
12 See §§ 439–44.

NATIONALITY

Zeballos, *La Nationalité au point de vue de la législation comparée*, etc, 5 vols (1914–19) Borchard, §§ 4, 5, 198–227 Bourbousson, *Traité général de la nationalité* (1931) Quadri, *La Sudditanza nel diritto internazionale* (1936) Mervyn Jones, *British Nationality Law and Practice* (1947) Jessup, *A Modern Law of Nations* (1948), pp 68–78 Isay, Hag R (1924), iv, pp 429–71 Report for League Codification Committee by Rundstein, de Magalhaes, and Schücking, AJ, 20 (1926), Special Suppl, pp 21–61, and comment by Hyde, AJ, 20 (1926), pp 726–35 McNair, LQR, 35 (1919), pp 213–25 Bles, RI, 3rd series, 2 (1921), pp 513–31 Lloyd Jacob, *Grotius Society*, 10 (1925), pp 89–114 Flournoy, *AS Proceedings* (1926), pp 59–66 Maury, *Répertoire*, ix, pp 238–319 Rauchberg, ZöR, 8 (1929), pp 405–509 Rundstein, ZV, 16 (1931–32), pp 26–45 Kelsen, Hag R, 42 (1932), iv, pp 242–8 Balladore Pallieri, *Rivista*, 28 (1936), pp 34–54 *Rechtsverfolgung im internationalen Verkehr*, vol vii; *Das Recht der Staatsangehörigkeit der europäischen Staaten* (1940) Bisschop, AJ, 37 (1943), pp 320–7 Hanna, Col Law Rev, 45 (1945), pp 301–44 Koessler, Yale LJ, 56 (1947), pp 58–76 Hudson, YBILC (1952), vol II, pp 5–13 Marinho, *Tratado sôbre a Nacionalidada* (3 vols, 1956–57) Giuliano, *Comunicationi e studi*, 8 (1957), pp 33–79 Fitzmaurice, Hag R, 92 (1957), ii, Ch 10 van Panhuys, *The Role of Nationality in International Law* (1959) Schätzel, *Internationales Staatsangehörigkeitsrecht* (1962) de Castro, Hag R, 102 (1962), i, pp 523–87 Brownlie, BY, 39 (1963), pp 284–364 Perrin, *Recueil d'etudes de droit international en hommage à Paul Guggenheim* (1968), pp 853–87 Goodwin-Gill, *International Law and the Movement of Persons between States* (1978), pp 3–21 Weis, *Nationality and Statelessness* Ko Swan Sik, Neth IL Rev, 29 (1982), pp 100–107 Donner, *The Regulation of Nationality in International Law* (1983) Rezek, Hag R, 198 (1986), iii, pp 333–400.

§ 378 Concept of nationality Nationality of an individual[1] is his quality of being a subject of a certain state.[2] It has its origins in the notion of allegiance[3]

1 As to the nationality of corporations see § 380.
2 As to nationality in the case of composite international persons, see Weis, *Nationality and Statelessness*, pp 13–20; and as to the Commonwealth, see § 385. Territories which are not fully independent may nevertheless have a nationality of their own, as did the Free City of Danzig (see Flournoy and Hudson, *Nationality Law* (1929), p 209; and above, § 83, n 1(2)), Syria, Lebanon, Iraq and Palestine when they were Mandated Territories (see Weis, *Nationality and Statelessness*, pp 20–25), Slovakia when created by Germany in 1939 (see *Slovak National Internment Case* (1970), ILR, 70, p 691) and Southern Rhodesia when still a colony (the Citizenship of Southern Rhodesia and British Nationality Act 1963: see Flansman, *British Nationality Law* (1989), p 873). See also n 14.

As to the nationality of the inhabitants of the former mandated areas see § 87; and as to protected states see Advisory Opinion of the Permanent Court on the *Nationality Decrees Issued in Tunis and Morocco (French Zone)* (1923), Series B, No 4 and also the relevant Acts and Documents; Ruzé, RI, 3rd series, 4 (1923), pp 597–627, and Winkler, *La nationalité dans les protectorats de Tunisie et du Maroc* (1926); and § 82. See also Parry, *Nationality and Citizenship*, pp 352–85, and Weis, *Nationality and Statelessness*, pp 18–20, on nationality provisions in various British protected states; and § 411. As to the use in the Treaty of St Germain and the Peace Treaties 1919, of the term 'ressortissant' in a sense wider than 'national', see *National Bank of Egypt v Austro-Hungarian Bank*, AD, 2 (1923–24), No 10; *Falla-Nataf and Brothers v Germany*, AD, 4 (1927–28), No 24; *Kahane v Parisi and the Austrian State*, AD, 5 (1929–30), No 131; Ralston, *The Law and Procedure of International Tribunals* (Suppl, 1936), pp 61–4; and Weis, *Nationality and Statelessness*, pp 7–9. As to the significance of allegiance even in the absence of nationality see also *Public Prosecutor v Oie Hee Koi* [1968] AC 829, and *Re Ho* (1975), ILR, 55, p 487.

owed by the subject to his king, and traces of that underlying notion remain. In principle, and subject to any particular international obligations which might apply,[4] it is not for international law but for the internal law of each state to determine who is, and who is not, to be considered its national.[5] However, in its Advisory Opinion in the case concerning *Nationality Decrees Issued in Tunis and Morocco*[6] the Permanent Court of International Justice emphasised that the question whether a matter was solely within the jurisdiction of a state was essentially a relative question, depending on the development of international relations, and it held that 'in the present state of international law questions of nationality are . . ., in principle, within this reserved domain'. The Court added that even in respect of matters which in principle were not regulated by international law, the right of a state to use its discretion may be restricted by obligations which it may have undertaken towards other states,[7] so that its jurisdiction becomes limited by rules of international law. Further, as stated in Art 1 of the Hague Convention of 1930 on Certain Questions Relating to the Conflict of Nationality Laws (see § 395), while it is for each state to determine under its own law who are its nationals, such law must be recognised by other states only 'in so

[3] For the conclusion that accepting the protection of a state involves owing allegiance to it, and thus becoming a subject of it, see *Logan v Styres* (1959), ILR, 27, p 239. See also §§ 78, n 12 and 385, n 7, as to common allegiance to the Crown in Commonwealth countries, and § 404, n 4, as to an alien's local allegiance; and, for an earlier consideration of the role of allegiance in relation to nationality in English law, Fraser, *Grotius Society*, 16 (1930), pp 73–86.

[4] States may agree that for the purposes of a particular treaty the term 'national' is to be given a special meaning. Thus in certain British extradition treaties the term is defined, in relation to the UK, as including not only citizens of the UK and Colonies but also citizens of independent Commonwealth countries (see § 418, n 2); and in certain extradition treaties entered into by Denmark the term 'national' in relation to Denmark is defined as including certain nationals of Norway and Sweden (see § 418, n 2). This practice has been followed by other Nordic States, eg Art 2 of the Sweden–Israel Extradition Treaty 1963 (UNTS, 516, p 16); and see also the declaration of Nordic States to the European Convention on Extradition 1957 (§ 418, n 2).

For the meaning of the term 'nationals' when used in relation to the UK in the European Community Treaties see the declaration made by the UK Government on signature of the Treaty of Accession 1972 (TS No 1 (1973), p 282); the declaration was replaced by an amended text in 1982: see TS No 67 (1983), and Simmonds, CML Rev, 21 (1984), pp 675–86. See also as to the term 'German national', § 383, n 3. Many agreements for the settlement of claims contain special definitions of the nationals whose claims are being settled.

[5] See the Advisory Opinion of the PCIJ in 1923 on the *Nationality Decrees Issued in Tunis and Morocco (French Zone)*, Series B, No 4, at p 24; the *Nottebohm* case, ICJ Rep (1955), at p 20 (and note the passage from the judgment quoted at n 12 of this §); *Stoeck v Public Trustee* [1921] 2 Ch 67; *Re Chamberlain's Settlement* [1921] 2 Ch 533; *Oppenheimer v Cattermole* [1976] AC 249. Articles 1 and 2 of the Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws 1930, provides that 'it is for each State to determine under its own law who are its nationals' and 'Any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State'.

[6] PCIJ, Series B, No. 4.

[7] As an example of treaty obligations conferring on questions of nationality an international character so as not to be exclusively a matter for the state concerned, see the arbitration between Germany and Poland concerning the *Acquisition of Polish Nationality* (1924), RIAA, 1, p 401. Note also the decision of the Inter-American Court of Human Rights that while the conferment and regulation of nationality fell within the jurisdiction of the state, this principle was limited by the requirements imposed by international law for the protection of human rights: *Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica* (1984), ILR, 79, p 283.

far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality'.[8] This permits of some control of exorbitant attributions by states of their nationality, by depriving them of much of their international effect. Such control is needed since, although the grant of nationality is for each state to decide for itself in accordance with its own laws, the consequences as against other states of this unilateral act occur on the international plane and are to be determined by international law.

Thus, although nationality is essentially an institution of the internal laws of states,[9] and the international application of the notion of nationality in any particular case must be based on the nationality law of the state in question,[10] the determination by each state of the grant of its own nationality is not necessarily to be accepted internationally without question. In the *Nottebohm* case the International Court of Justice said that:

> 'a State cannot claim that the rules [pertaining to the acquisition of nationality] which it has thus laid down are entitled to recognition by another State unless it has acted in conformity with this general aim of making the legal bond of nationality accord with the individual's genuine connection[11] with the State which assumes the defence of its citizens by means of protection as against other States.'[12]

[8] See for comment thereon Rundstein in ZV, 16 (1931–32), pp 26–45, and Parry, in *Festgabe für Alexander N Makarov; Abhandlungen zum Völkerrecht* (1958), pp 337–68. Thus it is clear that a state is not entitled to impose its nationality upon aliens residing for a brief period in its territory or upon persons resident abroad. See, eg the statement of the USA in connection with the Hague Codification Conference of 1930: 'The scope of municipal law governing nationality must be regarded as limited by consideration of the rights and obligations of individuals and other States' (*Bases of Discussion*, vol i, *Nationality*, 1929, p 16). It is not open to a state which has deprived a person of his nationality to reimpose its nationality upon that person against his will, especially if he resides abroad. It does not matter whether such reimposition of nationality is attempted by way of cancellation of the original deprivation of nationality or by other means. See H Lauterpacht, JYBIL (1948), pp 164–85. See also the Dissenting Opinion of Judge Guggenheim in the *Nottebohm* case, ICJ Rep (1955), at p 54. On the right to refuse recognition to fraudulent naturalisation see § 387, n 4. In the *Nottebohm* case the ICJ did not exclude the possibility that international law might impose limitations upon a state's freedom of decision in granting its own nationality in accordance with its own laws, but it was not necessary to decide the point in that particular case: ICJ Rep (1955) at p 20.

[9] Cf the observations of the ICJ in the *Barcelona Traction* case (ICJ Rep (1970, p 4, at pp 33, 34, 37; and § 21) on the relationship between international law and institutions of municipal law which it is called upon to recognise.

[10] See *Exchange of Greek and Turkish Populations* (1925), PCIJ, Series B, No 10, p 19; *Flegenheimer Claim*, ILR, 25 (1958–I), pp 91, 153. However, note certain, perhaps exceptional, cases where individuals may possess a nationality for international purposes in the absence of any applicable nationality law: see the *Cayuga Indians claim* (1926), RIAA, 6, p 173; and § 383, n 1.

[11] The Court indicated considerations which have been regarded as relevant in establishing a genuine connection, in the following passage (p 22): 'International arbitrators have decided in the same way numerous cases of dual nationality, where the question arose with regard to the exercise of protection. They have given their preference to the real and effective nationality, that which accorded with the facts, that based on stronger factual ties between the person concerned and one of the States whose nationality is involved. Different factors are taken into consideration, and their importance will vary from one case to the next: the habitual residence of the individual concerned is an important factor, but there are other factors such as the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children, etc'.

[12] ICJ Rep, (1955), at p 23. The adoption by the Court of the principle of a 'genuine link' has evoked

The Court regarded nationality (at least as a concept applicable on the international plane) as:

> 'a legal bond having as its basis a social fact of attachment, a genuine connection of existence and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute a juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as a result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State.'[13]

The Court found that there was no bond of attachment between Nottebohm and Liechtenstein, and that there was a long-standing and close connection between him and Guatemala, a link which his naturalisation in Liechtenstein had in no way weakened; that naturalisation had been 'granted without regard to the concept of nationality adopted in international law'.[14] Accordingly, the Court held that Guatemala was under no obligation to recognise Nottebohm's Liechtenstein nationality, and that Liechtenstein could not institute proceedings against Guatemala in respect of damage suffered by him.[15]

Similarly, notwithstanding the general principle that it is for each state to determine who are its nationals, a state's assertion that in accordance with its laws a person possesses its nationality is not conclusive evidence of that fact for

considerable discussion, much of it critical. The general lines of criticism have included one or more of the following arguments: (i) the 'link' theory was not argued by the parties before the Court; (ii) the Court transferred the requirement of an 'effective connection' from the context of dual nationality to a situation involving only one nationality; (iii) the Court did not in its judgment adequately consider the implications of its adoption of the 'link' theory in matters of diplomatic protection (eg to what extent can the state of which a person possesses purely formal nationality protect him as against a state other than that of which he enjoys effective nationality) or in other matters (eg can the state of formal nationality exercise jurisdiction on the basis of that nationality, is it obliged to receive back the person concerned if he is expelled from other countries, and does the 'link' principle apply only to the acquisition of nationality by naturalisation?). In the *Flegenheimer Claim*, ILR, 25 (1958–I), pp 91, 147–50, it was considered that a person who had only one nationality was not to be regarded as disentitled to rely on it against another state because he had no effective link with the state of nationality but only with a third state. See also § 395, n 2. On the *Nottebohm* case see Brownlie, BY, 39 (1963), at pp 349–63; Parry, Hag R, 90 (1956), ii, pp 704–12; Makarov, ZöV, 16 (1956), pp 407–26; de Visscher, RG, 60 (1956), pp 238–66; Loewenfeld, *Grotius Society*, 42 (1956), pp 5–22; M Jones, ICLQ, 5 (1956), pp 230–44; Kunz, AJ, 54 (1960), pp 536–71; Knapp, *Ann Suisse* (1960), pp 147–78; Perrin, *Recueil d'études de droit international en hommage à Paul Guggenheim* (1968), pp 853–87; Judge Fitzmaurice (Separate Opinion) in *Barcelona Traction Case*, ICJ Rep (1970), p 79ff.; Donner, *The Regulation of Nationality in International Law* (1983), Ch III; Weis, *Nationality and Statelessness*, pp 176–81 (with a comprehensive bibliography of literature on the *Nottebohm* case at pp 318–20). See also § 150.

13 ICJ Rep, 1955, p 4, at p 23. The last part of this passage does not entirely reflect the situation which exists in cases of dual nationality: see § 392ff. Cf the definition in the Harvard Draft Convention on Nationality, that nationality is 'the status of a natural person who is attached to a State by the tie of allegiance' (AJ, 23 (1929), Special Suppl, p 22).

14 ICJ Rep, 1955, p 26. A nationality which is that of an unrecognised 'state' is not a true nationality in the international sense, and need not be recognised in other countries: *Hunt v Gordon* (1884) 2 NZLR 160 (concerning Samoan nationality).

15 See also on the *Nottebohm* case, §§ 150 and 387.

international purposes.[16] An international tribunal called upon to apply rules of international law based upon the concept of nationality has the power to investigate the state's claim that a person has its nationality.[17] However, this power of investigation is one which is only to be exercised if the doubts cast on the alleged nationality are not only not manifestly groundless but are also of such gravity as to cause serious doubts with regard to the truth and reality of that nationality.[18]

Furthermore, it is not only international tribunals which may question the grant of nationality by a state to an individual. Even the national courts of other states may, although usually reluctant to do so,[19] in certain circumstances feel it right to inquire into the justification and lawfulness of a state's grant of its

16 See § 150, n 9. In particular, the issue of a passport does not conclusively establish as against other states that the person to whom it is issued has the nationality of the issuing state. It constitutes merely *prima facie* evidence of nationality, which is normally accepted for the usual immigration and police purposes: see Weis, *Nationality and Statelessness*, pp 222–30; Turack, *The Passport in International Law* (1972), pp 230–33. But a state may for purposes of its own law make the possession of a foreign passport conclusive proof of the holder's nationality of that foreign state: see *Dawood Ali Arif v Deputy Commissioner of Police*, ILR, 26 (1958–II), p 364; *State v Sharifbhai*, ILR, 27 (1958), p 234; but cf *State of Andhra Pradesh v Abdul Khader* (1961), ILR, 45, p 340; *James Thomas Reffell v R* (1963), ILR, 55, p 485. But a dual national applying for a passport to the authorities of one of those states does not thereby necessarily renounce the nationality of the other: *Re Bulla*, AD, 7 (1933–34), No 111. A state which has issued a passport to a person may be estopped from denying that that person is its national, at least as against another state which has acted on the basis of the passport; on the other hand, in the *Nottebohm* case the International Court of Justice rejected the contention that by entering a visa on Nottebohm's Liechtenstein passport Guatemala had recognised his Liechtenstein nationality so as to be precluded from denying Liechtenstein's right to protect him: ICJ Rep (1955), pp 17–18. A person who uses a passport of a state whose nationality he does not possess does not entitle another state to regard him as possessed of the first state's nationality: *Flegenheimer Claim*, ILR, 25 (1958–I), pp 91, 150–53; *Wildermann v Stinnes*, AD, 2 (1923–24), No 120. But it may establish a link with that first state which is significant for purposes of its laws: *Joyce v DPP* [1946] AC 347. As to 'nationality by estoppel' see Brownlie, *Principles of International Law*, (4th ed, 1990), pp 403–5.

As to proof of foreign nationality for purposes of a municipal court by means of consular certificates see *Murarka v Bachrack Bros*, ILR, 20 (1953), p 52, and *Blair Holdings Corpn v Rubinstein*, ILR, 22 (1955), p 422. See also Whiteman, *Digest*, 8, pp 43–7; Weis, *Nationality and Statelessness*, pp 230–36. And see the *Lynch Claim* (UK v Mexico) (1931), for a critical examination of a consular certificate by an international tribunal: RIAA, v, p 169.

See also § 381, n 7, as to the relationship between passports and freedom to travel.

17 See *Flutie Claim* (USA v Venezuela) (1903), RIAA, ix, p 148; *Flegenheimer Claim* ILR, 25 (1958–I), pp 91, 96–112. In the latter case the Commission noted that from the point of view of international law an assertion by a state as to the possession of nationality according to its internal law was a fact to be proved like any other fact (at para 25); and see § 21. In *Jeanne Airola v Commission* (Case 21/74) [1975] ECR 221, a married woman's Italian nationality, acquired on marriage automatically and without the possibility of avoiding it, was disregarded because it resulted from unwarranted discrimination on grounds of sex (cf *Chantal van den Broeck v Commission* (Case 37/1974) [1975] ECR 235).

18 *Flegenheimer Claim* ILR, 25 (1958–I), p 91.

19 See eg *MacKay v McAlexander* (1959), ILR, 28, p 275; *Joppi v Canton of Lucerne* (1960), ILR, 27, p 236. See also §§ 386, nn 10–14 and 391, nn 14, 15, for cases in which courts have had to consider the effects of forced naturalisations or mass denationalisations. This reluctance owes much to the consideration that in principle it is for each state to determine who is and who is not its national: see n 2 of this §.

nationality. This is likely particularly to be the case where the grant of nationality is questioned because of alleged non-conformity with international law.[20]

Despite such limitations on the international effects of nationality granted by a state to an individual, a state's own determination that an individual possesses its nationality is not lightly to be questioned. It creates a very strong presumption both that the individual possesses that state's nationality as a matter of its internal law and that that nationality is to be acknowledged for international purposes. Furthermore, even where the effects in international law of a state's grant of nationality are limited, the individual will still be a national of that state for purposes of its own laws.[21]

In general, it matters not, as far as international law is concerned,[22] that a state's internal laws may distinguish between different kinds of nationals – for instance, those who enjoy full political rights, and are on that account named citizens,[23] and those who are less favoured, and are on that account not named citizens. In some Latin-American countries, for example, the expression 'citizenship' has been used to denote the sum total of political rights of which a person may be deprived, by way of punishment or otherwise, and thus lose citizenship, without being divested of nationality as understood in international law.[24] In the United States, while the expressions 'citizenship' and nationality are

[20] The matter arose in several courts in connection with the imposition of German nationality (under a law made in 1938 pursuant to the German–Czech Agreement of 1938) on certain inhabitants of the Sudetenland, in violation of the provisions of the Munich Agreement of 1938: see *Ratz-Lienert and Klein v Nederlands Beheers-Instituut*, ILR, 24 (1957), p 536; *Weber and Weber v Nederlands Beheers-Instituut, ibid*, p 431. Other courts have regarded that law and the two treaties as invalid and, for that reason, as not giving rise to a conferment of German nationality which had to be recognised: eg *Amato Narodni Podnik v Julius Keilwerth Musikinstrumentenfabrik, ibid*, p 435. Yet others regarded the German law of 1938 as effective to confer German nationality: *Nederlands Beheers-Instituut v Nimwegen and Männer*, ILR, 18 (1951), No 63; *In re Baroness von Scharberg, ibid*, No 67; *German Nationality (Annexation of Czechoslovakia) Case*, ILR, 19 (1952), No. 56. In the last case the Federal German Constitutional Court accepted that while as a rule every state was entitled to provide in its own discretion how its nationality was acquired and lost, that discretion was circumscribed by the general rules of international law according to which a state may confer its nationality only upon persons who have some close factual connection with it. See also *North Transylvania Nationality Case* (1965), ILR, 43, p 191. See also § 386, nn 10–14 as to forced naturalisations.

[21] Thus in the *Nottebohm* case the ICJ did not question that Nottebohm was, as a matter of the law of Liechtenstein, a national of that country.

[22] Unless the state concerned has restricted its liberty of action with regard to these questions by treaty with another state. See also two Advisory Opinions of the Permanent Court, Series B, No 4 (*Nationality Decrees in Tunis and Morocco*) and No 7 (*Acquisition of Polish Nationality*), and the ensuing arbitration between Germany and Poland (noted by Garner, AJ, 20 (1926), pp 130–35), RIAA, 1, p 401.

[23] Note the use, in this context, of the term 'citizen' in Art 25 of the Covenant on Civil and Political Rights 1966 (on which, see generally § 440).

[24] See, for instance, Arts 39 and 42 of the Constitution of Bolivia 1967; Arts 19 and 22 of the Constitution of Ecuador 1967, which provides for loss of nationality in some cases and suspension of rights of citizenship in other cases; Arts 30 and 34–6 of the Mexican Constitution 1917 (as amended in 1966), and note also Art 37(B), which provides for loss of citizenship (as distinguished from loss of nationality) for such causes as accepting or using titles of nobility which imply submission to a foreign government, for voluntarily serving a foreign government or accepting foreign decorations without permission of Congress, and for rendering assistance to a foreigner or to a foreign country against the nation in any diplomatic claim or before an international tribunal. The distinction between nationality and citizenship was also referred to in

often used interchangeably, the term 'citizen' is, as a rule, employed to designate persons endowed with full political and personal rights within the United States, while some persons – such as those belonging to territories and possessions which are not among the states forming the Union – are described as 'nationals'. They owe allegiance to the United States and are United States nationals in the contemplation of international law; they do not possess full rights of citizenship in the United States.[25] It is their nationality in the wider sense, not their citizenship, which is internationally relevant. In the Commonwealth it is the citizenship of the individual states of the Commonwealth which is primarily of importance for international law, while the quality of a 'British subject' or 'Commonwealth citizen' is primarily relevant only as a matter of the internal law of the countries concerned.[26]

'Nationality', in the sense of citizenship of a certain state, must not be confused with 'nationality' as meaning membership of a certain nation in the sense of race.[27]

§ 379 Function of nationality Nationality is the principal link between individuals and international law. This function of nationality becomes apparent with regard to individuals abroad, or to property abroad belonging to individuals who are themselves within the territory of their home state, especially on account of one particular right and one particular duty of every state towards all other states. The right is that of protection over its nationals abroad which every state holds, and occasionally vigorously exercises, as against other states; it will be discussed in detail below.[1] The duty is that of receiving on its territory such of its nationals as are not allowed to remain[2] on the territory of other states.[3] Since

Romano v Comma, AD, 3 (1925–26), No 195, at p 266. In *Procureur de la République v Gova* (1972), ILR, 73, p 565, a French court noted that nationality represented the link between an individual from a particular territory and the international person exercising exclusive authority over it, even though that state accords a special status to inhabitants of certain of its possessions.

[25] See s204 of the Nationality Act 1940, where some persons were described as 'nationals but not [as] citizens'. See also McGovney, in *Legal Essays* (eds Radin and Kidd, 1935), pp 333–74, and in Calif Law Rev, 22 (1933–34), pp 593–635. and Hyde, iii, § 342. The Nationality and Immigration Act 1952 substantially reduced the numbers of nationals who were not citizens, but, in s308, retained that status for certain limited categories of persons born 'in an outlying possession of the United States'. For an illustration of the distinction between citizenship and nationality in the law of the USA, see *Re Bautista* (1960), ILR, 31, p 323; see also *Van Der Schelling v US News and World Report, Inc* (1963), ILR, 34, p 99. As to the limited status of persons who were formerly 'Italian Libyan citizens', as opposed to full Italian citizens, see *Minister of Home Affairs v Kemali* (1962), ILR, 40, p 191. See also on the distinction between nationality and citizenship, UN Juridical YB (1980), pp 189–91.

[26] See § 385.

[27] See *Ealing London Borough Council v Race Relations Board* [1972] AC 342, in which the House of Lords distinguished 'national origin' from 'nationality': on which case see Hucker, ICLQ, 24 (1975), pp 284–304. And see Lustgarten, ICLQ, 23 (1970), pp 221–40.

[1] § 410. There are exceptional cases in which individuals may be internationally protected otherwise than by the state of which they are nationals: see § 411.

[2] See §§ 413–14.

[3] See generally Weis, *Nationality and Statelessness*, pp 45–59; Plender, *International Migration Law* (1972), Ch 2; Higgins, *International Affairs*, 49 (1973), pp 344–50; Lung-Chu Chen, *AS Proceedings*, 67 (1973), pp 127–32; Lapidoth, *Israel Year Book on Human Rights*, 16 (1986), pp

no state is obliged by international law to allow foreigners to remain within its boundaries, it may, for many reasons, happen that certain individuals are expelled from all foreign countries. The state of nationality of expelled persons is bound to receive them on its territory.[4] Article 12.4 of the International Covenant on Civil and Political Rights 1966 provides that 'No one shall be arbitrarily deprived of the right to enter his own country'.[5]

This duty played an important part in the reception by the United Kingdom of

103–25. '[It] is a principle of international law, which the EEC Treaty cannot be assumed to disregard in the relations between Member States, that a State is precluded from refusing its own nationals the right of entry or residence': *van Duyn v Home Office* (Case 41/74) [1974] ECR 1337, 1351. See also § 413, on the right to expel aliens.

In *R v Home Secretary, ex-parte Thakrar* [1974] 2 All ER 261, the Court of Appeal held that the obligation to receive nationals into the state's territory was an obligation in international law and therefore an obligation owed by the state to other states, and not to its nationals; and see n 6. It is doubtful whether a state is under a duty to another state to take back nationals of the former state who have been expelled from the latter in circumstances involving it in a breach of its international obligations owed to the former state: see Higgins, *International Affairs*, 49 (1973), at p 346.

There is probably no duty on a state to take back its former nationals: see the special Protocol Concerning Statelessness 1938 (see n 5, and § 398, n 7) and Weis, *Nationality and Statelessness*, p 53ff. But a state may do so, if it wishes: see, eg the announcement by the US State Department in 1987: AJ, 82 (1988), pp 336–7.

4 In a state composed of different territorial units it is uncertain whether that state is under an international obligation to receive one of its nationals back into whichever part of the national territory an expelling state sends him, or whether (as is probable) it complies with its international obligations if it refuses to receive him back into one part of the national territory but is willing to receive him back into another part with which he has stronger connections. By virtue of the Immigration Act 1971 and subsequent Acts, certain British nationals had no right of entry into the UK unless they also were 'patrials' having a right of abode there, a right determined on the basis of certain specified close links with the UK. See also § 385, n 5, for the position as between different territories of the Commonwealth. The distinction between a *right* of entry into the UK possessed by patrials, and the need to seek *leave* to enter in the case of others, is reflected in many cases: see, eg *R v Secretary of State for the Home Department, ex parte Phansopkar* [1976] 1 QB 606, and compare *R v Secretary of State for the Home Department, ex parte Akhtar* [1975] 1 WLR 1717.

5 And note that this provision is not subject to the exception in respect of national security, public order or public health which is provided by Art 12.3 in respect of the other paragraphs of Art 12. See generally on the Covenant, § 440. To similar effect as Art 12.4 of the Covenant is Art 13.2 of the Universal Declaration of Human Rights 1948 (Art 9 of which also prohibits subjection to arbitrary exile), Art 3.2 of the Fourth Protocol (of 1963) to the European Convention on Human Rights 1950, and Art 22.5 of the American Convention on Human Rights 1969. The Special Protocol concerning Statelessness 1930 (TS No 112 (1973)) provided that in certain circumstances a person who loses his nationality after entering a foreign country without acquiring another nationality is to be allowed to return to the country of his former nationality. Article 5(d) of the Convention on the Elimination of All Forms of Racial Discrimination 1965 (GA Res 2106 A (XX)) prohibits any discrimination of the kind covered by the Convention in respect of the right of return to one's own country; and see the study by Ingles on 'Discrimination in respect of the right of everyone to leave any country, including his own, and return to his country', UN Doc E/CN/4/Sub 2/220 (1962). Article 28 of both the Convention on the Status of Refugees 1951 and the Convention on the Status of Stateless Persons, read with para 13 of the Schedules to those Conventions, provide that a refugee or stateless person who has had a travel document issued to him under the Convention is entitled to re-enter the territory of the issuing state, subject to conditions allowed for in those provisions.

The right to return to one's own country is closely related to the right to leave it, on which see § 381 and works there cited, many of which deal with both aspects of the matter.

many thousands of persons of Asian origin expelled from Uganda in 1972: these persons, while in many cases having lived in Uganda most of their lives and having little or no substantive connection with the United Kingdom, had retained British nationality after the independence of Uganda and, no other state being willing to receive them, the British government felt obliged to do so.[6]

In addition to its functions in connection with individuals abroad, nationality is important as a basis of jurisdiction.[7]

§ 380 Corporations Just as international law can normally only apply in relation to an individual by virtue of his bond of nationality linking him with a particular state, so too it is often necessary, in order that international law can apply in relation to a corporation, to attribute it to a state.[1] It is usual to attribute a corporation to the state under the laws of which it has been incorporated and to which consequently it owes its legal existence;[2] to this initial condition is often

6 Thus the Lord Chancellor said, in the House of Lords, that the Attorney-General advised the UK Government that 'in International Law a State is under a duty as between other States to accept in its territories those of its nationals who have nowhere else to go. If a citizen of the United Kingdom is expelled, as I think illegally from Uganda, and is not accepted for settlement elsewhere, we could be required by any State where he then was to accept him': *Parliamentary Debates (Lords)*, vol 335, col 497 (14 September 1972). But when one of those expelled from Uganda was, under the Immigration Act 1971, refused leave to enter the UK, and the lawfulness of that refusal was tested before the Court of Appeal, doubt was cast by the Court on the scope of the alleged rule of international law, at least in its application to situations involving very large numbers of people: *Re Home Secretary, ex parte Thakrar* [1974] 2 All ER 261, on which see White, ICLQ, 23 (1974), pp 866–73; Crawford, BY, 47 (1974–75), pp 352–6; Akehurst, MLR, 38 (1975), pp 72–7. For comment on the expulsions from Uganda and the question of the right of entry into the UK, see Plender, *New Community*, 1 (1972), pp 420–47, and in *Review of the International Commission of Jurists*, Dec 1972, pp 19–32; various contributors in *AS Proceedings*, 1973, pp 122–40; and Sharma and Wooldridge, ICLQ, 23 (1974), pp 397–425. See also the statements made by UK representatives at the 27th Session of the UN General Assembly (Cmnd 5236, pp 7–8, 60–61), and UNYB, 1972, pp 142–4. See also § 413, n 19. In 1970 certain citizens of the UK and colonies who had been resident in some East African countries but who had left in order to come to the UK instituted proceedings before the European Commission of Human Rights arising out of the refusal of the UK authorities to allow them to enter the UK. In 1973 the Commission found the applications admissible (*East African Asians v United Kingdom*): the matter was eventually settled between the applicants and the UK Government.

7 See §§ 118, 138.

1 In addition to earlier works cited in Vol I of 8th ed of this work, p 642, n 3, see M Jones, *British Nationality Law* (1956), pp 195–9; Parry, *Nationality and Citizenship*, pp 133–42; P de Visscher, Hag R, 102 (1961), i, pp 446–62; van Hecke, Neth IL Rev (1961), pp 223–39; Ginther, ÖZöR, 16 (1966), pp 27–83; Caflisch, *Ann Suisse*, 24 (1967), pp 119–60; Marques dos Santos, *Algumas Reflexões sobre a nacionalidade das sociedades em direito internacional privado e em direito internacional publico* (1985); Rules IV–VI of the UK Government's Rules Applying to International Claims, cited in Warbrick, ICLQ, 37 (1988), p 1007. See also § 152, n 2, for literature on the diplomatic protection of companies, and § 152, n 12, on the protection of shareholders.

2 It is the law of this state which will determine whether an entity has (as a matter of municipal law) legal personality at all, and if so what incidents attach to it. That law will also govern the company's internal management, and is the law to which the company is in general subject. Articles 1 and 2 of the Hague Convention 1956 concerning the Recognition of the Legal Personality of Foreign Corporations, Partnerships and Foundations provides, as a general rule, that the possession of legal personality is determined by the law of the state under which the entity in question was established, or, by way of exception to the general rule, by the law of the

added the need for the corporation's head office, registered office, or its *siège social* to be in the same state.[3] By way of analogy with the position of individuals, a corporation is referred to as having the 'nationality' of the state to which it is thus attributed.[4]

The analogy between the nationality of individuals and the nationality of corporations, while sometimes convenient, may often be misleading: those rules of international law which are based upon the nationality of individuals are not always to be applied without modification in relation to corporations.[5] Various considerations militate against attributing to the nationality of corporations the same consequences as attach to the nationality of individuals: these include the manner in which corporations are created, operate and are brought to an end,[6]

place where the entity has its real seat (*siège réel*). See also the Convention on the Mutual Recognition of Companies and other Bodies Corporate concluded in 1968 between the original six members of the EEC: it provides for the recognition of companies and bodies corporate established in accordance with the law of one of the contracting states and having their statutory registered office in any of the territories to which the Convention applies; but it permits a contracting state to derogate from this obligation if the central administration of the company is in its own territory, or if it is outside the territories to which the Convention applies and the company has no genuine link with the economy of one of those territories.

3 Thus in the context of determining the national state of a company (for purposes of diplomatic protection) the ICJ said: 'The traditional rule attributes the right of diplomatic protection of a corporate entity to the State under the laws of which it is incorporated and in whose territory it has its registered office. These two criteria have been confirmed by long practice and by numerous international instruments. This notwithstanding, further or different links are at times said to be required in order that a right of diplomatic protection should exist'. (ICJ Rep, 1970, p 42). See also *Société de Transports Fluviaux en Orient v Société Impériale Ottomane du Chemin de Fer de Baghdad*, AD, 5 (1929–30), No 151; *Flack Claim* (1929), RIAA, 5, p 61; *Re Mexico Plantagen GmbH*, AD, 6 (1931–32), No 135.

4 As to the attribution of 'nationality' to certain kinds of chattel, such as ships and aircraft, see § 287.

The situation of other forms of association in which the association has a separate legal personality from that of its members is broadly similar to that of corporations; but the position is different where the association has no legal personality of its own, since in such cases it is the members alone who have legal personality. As to international associations, see n 8.

5 Thus in the *Barcelona Traction* case the ICJ observed: 'In allocating corporate entities to States for purposes of diplomatic protection, international law is based, but only to a limited extent, on an analogy with the rules governing the nationality of individuals'. (ICJ Rep (1970), p 42).

6 Although in principle a company's continued existence will depend on the law of the state in which it was originally incorporated, where the state has brought the company's existence to an end, particularly in circumstances amounting to expropriation without compensation, the company may nevertheless be regarded by other states as continuing to exist, at least for purposes connected with the company's property outside the territory of its state of incorporation. This practice of recognising the continued existence of 'split', or 'remainder', companies has in particular been developed in the Federal Republic of Germany: see decision of the Supreme Court of the Federal Republic of Germany of 5 May 1960, AJ, 55 (1961), p 997; *K eGmbH v DZGK, ibid*, p 1003; *Hungarian Aricraft Company Case* (1971), ILR, 72, p 82; *Sociedad Minera el Teniente SA v Norddeutsche Affinerie AG* (1973), ILR, 73, p 230, and (1974), ILM, 13 (1974), p 1115 (with comment by Seidl-Hohenveldern, AJ, 69, (1975), pp 110–19). See also the decision of a US Court of Appeals in *Maltina Corp v Cawy Bottling Co* (1972), ILR, 66, p 92; and, generally, Seidl-Hohenveldern, *Corporations in and under International Law* (1987), pp 29–38, 51–4. For certain limited purposes a foreign corporation may continue to have a legal existence in English law even if already dissolved under the law of its place of incorporation: see *Russian and English Bank v Baring Bros* [1936] AC 405 (liquidation of UK branch of dissolved foreign company), and generally Dicey and Morris, pp 1128–30. And see §§ 112 and 113 as to the recognition of

their development as legal entities distinct from their shareholders, the inapplicability to companies of the essentially personal conception of allegiance which underlies the development of much of the present law regarding nationality, the general absence in relation to companies of any nationality legislation[7] to provide a basis in municipal law for the operation of rules of international law, the great variety of forms of company organisation,[8] and the possibilities for contriving an artificial and purely formal relationship with the state of 'nationality'.

A particular question which sometimes arises concerns the position of companies which are subsidiaries of other companies, in which the majority or whole ownership of the subsidiary is vested. Such subsidiaries are themselves separate legal persons, with their own nationality distinct from that of the parent company; and if a company incorporated under the laws of one state establishes a subsidiary under the laws of another, in principle the two companies will have different nationalities for purposes of international law.[9]

In many situations, however, it is permissible to look behind the formal nationality of a company, as evidenced primarily by its place of incorporation and registered office, so as to determine the reality of its relationship to a state, as demonstrated by the national location of the control and ownership of the company. The concept of nationality in relation to companies does not have the legislative basis in national laws which exists in the case of individuals, and is thus much more open to a pragmatic assessment on the basis of the extent of a company's attachment to a state. While the traditional rule is still to regard the state of incorporation as the state whose nationality the company has, there is

foreign laws, particularly where they may be contrary to international law, and § 144ff as to foreign confiscatory laws.

Note also the extensive litigation in several states relating to the competing claims of Carl Zeiss Heidenheim (in the Federal Republic of Germany) and Carl Zeiss Jena (in the German Democratic Republic), both claiming trademark rights of the former Carl Zeiss Foundation (see § 407, n 21). However, this litigation can be distinguished from that relating to 'split' or 'remainder' companies in that the competing companies each had been separately established under the law of two different states, rather than being two manifestations of a single company, one of them claiming a residual existence in relation to foreign assets. The issues raised by the litigation concerned primarily the effect at certain material times of non-recognition (followed later by the recognition) of the German Democratic Republic, and the effect to be given to foreign expropriatory laws.

7 It is not usual for a state's internal law expressly to provide that a corporation has that state's nationality, but sometimes this is done, as in Art 5 of the Mexican Nationality Law 1934.

8 In addition to the numerous forms which a company may take within the various national legal systems, mention should also be made of the varying degrees of possible state involvement in a company, extending to the creation of public corporations which are agencies of the state (many examples of this are referred to at § 109, n 18ff, in connection with claims to sovereign immunity), and of those bodies set up pursuant to a treaty but nevertheless operating as bodies subject to municipal law, eg Eurofima, set up by treaty, UNTS, 378, p 159; and the Channel Tunnel Companies, operating under a treaty between the UK and France concluded in 1986 (Cmnd 9745): see § 314, n 7. See F A Mann, *Studies in International Law* (1973), pp 553–90, as to corporations set up by treaty and operating under international law; and Seidl-Hohenveldern, *Corporations in and under International Law* (1987), pp 109–22, as to common inter-state enterprises. See also n 15, as to multinational companies.

9 See, eg *Spiess v C Itoh & Co (America) Inc*, AJ, 74 (1980), p 195; *Sumitomo Shoii America Inc v Avagliano*, ILM, 21 (1982), p 790. As to the impact of the relationship between a company and its subsidiaries, for purposes of jurisdiction, see § 137, n 10, and as to the right to protect companies and their subsidiaries, see § 152.

now little hesitation in looking behind the fact of incorporation in order to determine the substantive national connection of a company. In matters of diplomatic protection and international claims, the right of an international tribunal to investigate the realities of national control and ownership of a company is now well established.[10] However, such inquiries usually have as their purpose the need to support a claim to nationality based on incorporation, rather than to elevate some alternative criterion to the position where it could be relied on in the absence of incorporation in the claimant states. States have also tended to restrict the exercise of their discretion in taking up claims of companies to cases in which there is some substantial connection with the state over and above the mere fact of incorporation. Because of the difficulties and uncertainties in this area it is increasingly the practice of states, when negotiating claims settlement agreements, to define the eligible claimants in such a way as to clarify by agreement the position of companies, and in doing so they sometimes adopt definitions which require the corporate veil to be pierced in order to establish the existence of a substantial connection with the state in addition to the fact of incorporation.[11]

Similarly, in other fields in which the rights and obligations of 'nationals' have to be laid down, it is now usual to make express provision for the position of companies, in order to determine whether they may enjoy the benefits of treaty provisions conferring, for example, rights of establishment, fiscal advantages, or various commercial rights. It is not unusual in such treaties so to define 'national companies' that an element of connection with the state in addition to mere incorporation is required.[12] Such definitions, while they may be indicative of

[10] See generally § 152.

[11] See § 152, nn 21, 25.

[12] The general practice of the UK is represented by the UK–Grenada Agreement for the Promotion and Protection of Investments 1988 (TS No 33(1988)), in which companies, in respect of the UK, are defined as meaning corporations, firms and associations incorporated or constituted under the law in force in any part of the UK or in any British territory to which the Agreement has been extended (Art 1(d)). Other investment promotion and protection agreements concluded by the UK contain broadly similar provisions. But treaties for other specialised purposes adopt other definitions more suited to the particular purpose of the treaty. Thus in the UK–Yugoslavia Debt Agreement 1987 (TS No 35(1988)) the relevant criterion for a corporation is that it should be 'resident or carrying on business in the United Kingdom' (Art 1(f)).

For a general survey of the practice of the USA see Walker, AJ, 50 (1956), pp 373–93; Wilson, *US Commerical Treaties and International Law* (1960). For judicial consideration of the phrase 'substantial ownership and effective control' in determining who may benefit under the US–Peru Air Transport Agreements of 1946 and 1958, see *Aerolineas Peruanas, SA, Foreign Permit Case* (1960), ILR, 31, p 416. For purposes of the 'freedom of establishment' provisions of the EEC Treaty, Art 58 of that Treaty provides that: 'companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community shall . . . be treated in the same way as natural persons who are nationals of Member States'. For similar purposes the Convention Establishing the EFTA, 960 (TS No 30 (1960)) defines 'nationals' in relation to a member state as meaning, in addition to individuals: 'companies and other legal persons constituted in the territory of that Member State in conformity with the law of that State and which that State regards as having its nationality, provided that they have been formed for gainful purposes and that they have their registered office and central administration, and carry on substantial activity, within the Area of the Association'. See also the European Convention on Establishment of Companies 1966 (European TS No 57), Art 1.1 of which requires only that companies be constituted under the law of the state in question and have their registered offices in that state's territory. The Convention for

certain trends, are nevertheless strictly only relevant for the purposes of the treaties in which they are included.

For purposes of the operation of their own national laws, states frequently attribute to companies a national character which is determined not solely on the basis of their place of incorporation. Thus, for purposes of laws restricting trading with the enemy, many states attribute enemy character to a company even if it is not incorporated under the laws of the enemy state, as where a company incorporated in a non-enemy state is controlled by enemy nationals.[13] There is nothing contrary to international law in such a practice. Also, for taxation and other similar purposes, states often adopt particular definitions determining the attribution of a national character to a company for those particular purposes. The tests of nationality of corporations for purposes of private international law may again be different.[14]

This diversity of practice underlines the absence for international purposes of any rigid notion of a company's nationality. In many cases a company will have considerable links with several states,[15] and any attempt to assess with which of

the Settlement of Investment Disputes between States and Nationals of Other States 1965 (see § 407, n 49) covers disputes between a state and a company incorporated in its own territory if the parties have agreed that it should be treated as a foreign national for purposes of the Convention: see Art 25(2)(b), and *Liberian Eastern Timber Corp v Government of the Republic of Liberia*, ILM 26 (1987), pp 647, 652–4. See also § 152, n 25.

But where a treaty simply uses the term 'nationals' in relation to each contracting party, without further specification as to the position of companies, a court will have little guidance in how to apply the treaty to a company. So, in applying the Franco-Spanish Consular Convention of 1862, a French court regarded as not being a Spanish 'national' a company set up under French law and operating in France, but 95 per cent owned by a Spanish national: *Re Société Mayol, Arbona et Cie* (1960), ILR 39, p 430.

[13] See vol II of 7th ed of this work, §88*a*; Parry, *Nationality and Citizenship*, pp 135–8; McNair and Watts, *Legal Effects of War* (4th ed), 1966), pp 102–4, 236–47. But enemy character of companies is often not a matter strictly of nationality but of residence or control. See also *Bonnar v United States* (1971), ILR, 54, p 550; *United Oriental Steamship Co Karachi v Starbac Co* (1972), ILR, 52, p 487.

[14] See Caflish, *Ann Suisse*, 24 (1967), p 119; van Boxsom, *Rechtsvergelijkende Studie over de Nationaliteit der Vennootschapen* (1964).

Examples are many, and turn on questions of municipal law. By way of illustration one may compare the decisions of two French courts, in *Société Biro Patente AG v Laforest*, ILR, 19 (1952), No 63 and *Administration d'Enregistrement v Société M*, ILR, 20 (1953), p 263, both holding nationality (for purposes of, respectively, security for costs and fiscal law) to be determined by the company's place of incorporation and seat, with the decisions of two US courts, in *Re Peninsular and Occidental Steamship Co*, ILR, 26 (1958–II), p 222 and *Bobolakis v Compania Panamena Maritima San Gerassimo, ibid*, p 236, both holding nationality (for purposes of labour law) to be determined by looking behind the formal foreign incorporation of the company and having regard to the reality of the company's ownership and operation for the benefit of nationals of the forum state. See also *Caisse Centrale de Réassurance des Mutuelles Agricoles v Mutuelle Centrale d'Assurance et de Réassurance* (1971), ILR, 72, p 565; *SA Marbrerie Focart v SA Bacci* (1971), ILR, 73, p 571; *Epelbaum v Société Shell Berre* (1972), *ibid*, p 576; *Société de Noter v Overseas Apeco Ltd* (1972), *ibid*, p 578.

[15] The position of so-called 'multinational companies' has been much considered in recent years. See Lados-Lederer, *International Non-Governmental Organisations and Economic Entities* (1963); Mann, BY, 42 (1967), pp 145–74; Angelo, Hag R, 125 (1968), iii, pp 443–600; Rolfe and Damm, *The Multinational Corp* (1970); Jenks, in *Transnational Law in a Changing Society* (eds Friedmann et al, 1972), pp 70–83; Rubin, AJ, 68 (1974), pp 475–88; Seidl-Hohenveldern, YB of World Affairs, 29 (1975), pp 301–12. The position and impact of multinational corporations has

those states the company has sufficient links to be able to be treated as a national of that state for a particular purpose will involve a balancing of the various factors. Although the attribution of nationality to a company on the basis of its place of incorporation and location of its registered office may well be regarded as the traditional rule, it is perhaps no more than a *prima facie* presumption which affords a convenient starting point for inquiry in any particular case.

§ 381 Nationality and emigration Emigration involves the voluntary removal of an individual from his home state with the intention of residing abroad, but not necessarily with the intention of renouncing his nationality, which he may well therefore retain. Emigration is in principle entirely a matter of internal legislation of the different states.[1] Every state can fix for itself the conditions

been considered by the UN, especially the Economic and Social Council: see the Report of the Secretary-General, 14 June 1974 (UN Doc E/5500; ILM, 13 (1974), p 791), and the work of the Commission on Transnational Corporations set up by the Economic and Social Council in 1974 (Res 1913 (LVII) (1974)). The Commission has elaborated a Draft Code of Conduct on Transnational Corporations, which is still under consideration. For drafts see ILM, 22 (1983), pp 177, 190, 203, and 23 (1984), p 636. See Francioni, Ital YBIL, 3 (1977), pp 143–70; Baade, Germ YBIL, 22 (1979), pp 11–52; Horn (ed), *Legal Problems of Codes of Conduct for Multinational Enterprises* (1980); Rahman, Indian JIL, 28 (1988), pp 222–35. As to the protection of multinational companies, see § 152, n 16.

The problems of ascribing to a company which has many international ramifications a single nationality is illustrated by the position of the Ottoman Bank, which has been held in France to be a Turkish national and subject to Turkish law as regards its operations (see *Bakalian and Hadjithomas v Ottoman Bank* (1965), ILR, 47, p 216), but was treated as a British national for purposes of the Anglo-Egyptian Agreement on Commercial and Financial Relations 1959 (TS No 35 (1959)): see Annex E of the Agreement, and Art 1(2) of the Foreign Compensation (Egypt) (Determination and Registration of Claims) Order 1962 (SI 1962 No 2187). See also *Compagnie Financière de Suez et de L'Union Parisienne v United States* (1974), ILR, 61, p 408, as to the Suez Canal Company.

A distinction may need to be made between a multinational company (involving, essentially, a single legal person in which there is a broad spread of different national interests) and a consortium, or joint venture, involving two or more corporations in a collaborative enterprise regulated by agreement between them but with each retaining its distinct legal character and not attributing any separate legal personality to the consortium itself. For an example of an international claim involving a consortium see *Morrison-Knudsen Pacific Ltd v Ministry of Roads and Transportation*, AJ, 79 (1985), p 146.

1 See the 'Vœux relatifs à la matière de l'émigration' *Annuaire*, 16 (1897), p 276. See also Gargas, ZV, 5 (1911), pp 278–316, 478–509; Schätzel, *Internationale Arbeiterwanderungen* (1919); Saavedra Lamas, *Traités internationnaux de type social* (1924), pp 93–445; Plender, *International Migration Law* (1972); various contributors in *AS Proceedings* (1973), pp 122–40; Dowty, *Closed Borders: The Contemporary Assault on Freedom of Movement* (1987); Hannum, *The Right to Leave and Return in International Law and Practice* (1987); International Institute of Human Rights, 'Strasbourg Declaration on the Right to Leave and Return', with comment by Hannum, AJ, 18 (1987), pp 432–8. See also the study on current trends on the right to leave and return and related issues being undertaken by the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities pursuant to ECOSOC Res 1984/29. As to the immigration of workers into France, see Palewski, RG, 34 (1927), pp 58–84. See also the valuable survey in three volumes published by the International Labour Office and entitled *Migrations Laws and Treaties* (1928); and see Thibert, *Répertoire*, vii, pp 543–80. For the International Agreement of 14 June 1929, concerning the preparation of a transit card for emigrants, concluded in order to simplify transit formalities for emigrants crossing the territories of the contracting parties, see TS No 27 (1929), Cmd 3402. On the 'dictation test' in Australia see Charteris in *Proceedings of the Australian and New Zealand Society of International Law*, 1 (1935), pp 174–81. See §§ 400–2, as to the reception of aliens.

under which emigrants may leave,[2] and under which they lose or retain their nationality, as it can also prohibit emigration altogether, or can at any moment request those who have emigrated to return, provided the emigrants have retained their former nationality. Customary international law does not, as yet, require a right of emigration to be granted to every individual, although it has been frequently maintained[3] that it is a 'natural' right of every individual to emigrate from his own state. However, a right of emigration has been recognised in a number of general[4] international instruments. Thus Art 13.2 of the Universal Declaration of Human Rights, 1948,[5] provided that 'Everyone has the right to leave any country, including his own, and to return to his country'. A fully legally binding provision is included in the International Covenant on Civil and Political Rights 1966,[6] Art 12(2) of which provides that 'Everyone shall be free to

2 Thus in 1972 and the next following two years measures were taken by the Soviet Union having the effect of making difficult the emigration from the Soviet Union of Soviet citizens of the Jewish faith: these measures included the requirement that they should pay considerable sums to the Soviet Government (see ILM, 12 (1973), pp 427–8). Although these measures attracted critical comment in other countries and led to the enactment of retaliatory legislation (see s 402 of the Trade Act 1974, enacted in the USA: ILM, 14 (1975), pp 181, 220, and see also pp 248–50), the fact that the persons affected were Soviet citizens prevented direct and formal approaches to the Soviet Government on the matter: see, eg *Parliamentary Debates (Commons)*, vol 843, cols 773–4 (23 October 1972): informal representations were however made. See also Mehl and Rapoport, ICLQ, 27 (1978), pp 876–89. For the Soviet Union's law on entry into and exit from the USSR see ILM, 26 (1987), p 425. For a Romanian Decree of 1982 laying down financial conditions for and consequences of emigration see ILM, 22 (1983), p 667.

3 Especially by American writers. On the American standpoint concerning emigration see Borchard, §§ 315–31, and in AJ, 25 (1931), pp 312–16; Hackworth, iii, § 242; Sibert, pp 527–34. See also Morrow AJ, 26 (1932), pp 552–64, and Fields, *ibid*, pp 671–99; I-Mien Tsang, *The Question of Expatriation in America Prior to 1907* (1907). As to expatriation in the early law of the UK see Fraser, *Grotius Society*, 16 (1930), pp 73–89.

4 For treaties of more limited scope see, eg Art 48ff of the Treaty Establishing the EEC, providing for free movement within the territory of the member states (see further § 400, n 4); and the Convention of 27 November 1919 between Greece and Bulgaria providing that the subjects of each Party belonging to racial, religious or linguistic minorities might freely emigrate to the territory of the other: Misc No 3 (1920), Cmd 589. See also the Advisory Opinion of the PCIJ on the *Exchange of Greek and Turkish Populations* (1925), Series B, No 10.

5 See § 437.

6 See § 440. See also Art 2.2 of Protocol No 4 of 1963 to the European Convention on Human Rights; Art 5(d)(ii) of the International Convention on the Elimination of All Forms of Racial Discrimination 1966 (see § 439); and the provisions of the Final Act of the Conference on Security and Co-operation in Europe 1975 (see § 442) concerning Human Contacts, in which the participating states made it 'their aim to facilitate freer movement and contacts ... among persons ... of the participating States'.

The right of emigration was considered by a sub-commission of the UN Commission of Human Rights. In 1963 the sub-commission, in its Res 2 (XV), adopted draft principles on freedom and non-discrimination in respect of the right of everyone to leave any country, including his own, and to return to his country. In 1973 the Economic and Social Council formally drew these principles to the attention of governments: Res 1788 (LIV); UNYB, 1973, pp 567, 578–9. The comments of governments and non-governmental organisations on the draft principles (UN Docs E/CN 4/869, and Add 1–5, of 1963–70; E/CN 4/1042, and Add 1, of 1970–71) showed a tendency to accept in principle a freedom to emigrate, although subject in practice to some restrictions. States have a legitimate interest in preventing, eg fugitives from justice or people who constitute a danger to their security or public order from leaving their territory: see, eg *Raparison* (1970), ILR, 73, p 391; *Venturi*, RG, 92 (1988), p 740. See also *Public Prosecutor v Ernst M and Hildegard S* (1970), ILR, 71, pp 251, 257; *Public Prosecutor v Janos V* (1972), ILR, 71, pp 229, 230 ('there is absolutely no right to freedom of emigration protected by