

Michigan Journal of International Law

Volume 19 | Issue 4

1998

State Successions and Statelessness: The Emerging Right to an Effective Nationality Under International Law

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STATE SUCCESSIONS AND STATELESSNESS: THE EMERGING RIGHT TO AN EFFECTIVE NATIONALITY UNDER INTERNATIONAL LAW

*Jeffrey L. Blackman**

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A. Introduction: The Legal and Human Challenge of State Successions

Throughout history the death and birth of states has been a bloody process, usually fuelled by ethnic hatred and often entailing the commission of mass atrocities against vulnerable minority groups. Perhaps because the most recent wave of state dismemberment has been the first to take place under the glare of global media, widespread revulsion at the human suffering has followed. A new term, “ethnic cleansing”, has been coined to describe an ancient practice, and public pressure has mounted on politicians and diplomats to do more than the traditional

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exchange of measured protests. As a result, governments and international organizations are grasping for mechanisms with which to redress the ethnic conflict that propelled the latest round of state collapses and to ameliorate the ethnic tensions that continue to bedevil many of the newly-emerged states.¹ Lawyers and legal scholars, for their part, are asked to take up the fragile tools of public international law in support of this effort.

Such is the context in which scholarly² and political³ interest in the international law of state succession has been rekindled. Partially as a result of this specific context, a general consensus has emerged that the law of state succession can no longer remain in its undeveloped condition, especially with respect to persons living on the territory affected by succession.⁴ Although previous efforts to codify and develop the law of state succession resulted in two international conventions, neither of these conventions has entered into force.⁵ Nor does either convention address the issue of the inhabitants of the affected territory—or the central question of what nationality to ascribe to these people. Even if these conventions were in force, moreover, and even if they addressed issues related to the affected inhabitants, they would not be binding on successor states, which as newly-created subjects of international law are not signatories to these (or most other) international instruments. Rather, new states are bound initially only by those norms that form part of customary international law, which does not include the provisions of

1. Such mechanisms include the creation, as a mechanism for conflict prevention, of the post of the High Commissioner for National Minorities of the Organization for Security and Cooperation in Europe ("OSCE") at the 1992 Helsinki Summit. See *Conference on Security and Co-operation in Europe: Declaration and Decisions from Helsinki Summit, 10 July 1992*, reprinted in 31 ILM 1385 (1992). Also see U.N. Security Council Resolution 808 establishing, as a measure to restore and maintain international peace and security, an International Criminal Tribunal for the Former Yugoslavia. U.N. Doc. S/RES/808 (1993).

2. See, for example, Rein Müllerson, *New Developments in the Former USSR and Yugoslavia*, 33 VA. J. INT'L L. 299 (1993), and related articles in the same volume as part of a symposium on state succession, especially Oscar Schachter, *State Succession: The Once and Future Law*, 33 VA. J. INT'L L. 253, 243 (1993), and Detlev Vagts, *State Succession: the Codifiers' View*, 33 VA. J. INT'L L. 275 (1993).

3. See, e.g., *State Succession and Relations with Federal States*, PROCEEDINGS OF THE 86TH ANNUAL MEETING OF THE ASIL 1 (1992) [hereinafter PROCEEDINGS OF THE ASIL].

4. The territory affected by state succession refers to the territory of predecessor and successor states.

5. *The Vienna Convention on Succession of States in Respect of Treaties*, U.N. Doc. A/Conf. 80/31 (1978), reprinted in BLACKSTONE'S INTERNATIONAL LAW DOCUMENTS 244 (Malcolm D. Evans ed., 3rd. ed. 1991); *The Vienna Convention on Succession of States in respect of State Property, Archives and Debts*, U.N. Doc. A/Conf. 117/14 (April 7, 1983), reprinted in 22 ILM 306 (1983).

the two Vienna Conventions.⁶ The international law of state succession is inadequate, especially with regard to the people who must live through these often tumultuous changes of sovereignty.

Efforts are currently underway to develop and codify the law in this area. The U.N. General Assembly, "in the light of the situation prevailing in Eastern Europe," placed on the agenda of the International Law Commission ("ILC" or "Commission") the issue of "state succession and its impact on the nationality of natural and legal persons."⁷ Four reports have been prepared (three by the Special Rapporteur and one by the Working Group) and discussed by the ILC and by the General Assembly's Sixth Committee (on Legal Matters).⁸ Recently, "Draft Articles on Nationality in relation to the succession of States"⁹ were prepared and submitted for discussion in the current session of the ILC. These draft articles are intended to take the form of a General Assembly declaration.¹⁰

What is most striking about the deliberations in the ILC and the Sixth Committee is the growing realization by delegates that the law of state succession with respect to the nationality of the affected inhabitants must take into account the evolving norms of international human rights law, particularly those pertaining to statelessness, the right to a nationality, and the principle of non-discrimination. Several members of the Commission, for example, have pointed out that only the development of international human rights law has placed any new restraints

6. Müllerson sums up the matter neatly: "Because of the . . . presence of some scarce but contrary practices, these norms [of the two Vienna Conventions] certainly have not since become norms of customary international law. . . . New states would be clean slates in relation to the treaty norms governing state succession, if there were such norms." Müllerson, *supra* note 2, at 301.

7. U.N. Doc A/RES/48/31 (1993). The ILC appointed Mr. Václav Mikulka as its Special Rapporteur on the topic and a Working Group chaired by Mr. Mikulka.

8. See Václav Mikulka, *First Report on State Succession and Its Impact on the Nationality of Natural and Legal Persons*, International Law Commission, Forty-seventh Session, U.N. Doc. A/CN.4/467 (1995) [hereinafter Mikulka, *First Report*]; Václav Mikulka *Report of the Working Group on State Succession and Its Impact on the Nationality of Natural and Legal Persons*, International Law Commission, Forty-seventh Session, U.N. Doc. A/CN.4/L.507 (1995) [hereinafter *Working Group Report*]; Václav Mikulka, *Second Report on State Succession and Its Impact on the Nationality of Natural and Legal Persons*, International Law Commission, Forty-eighth Session, U.N. Doc. A/CN.4/474 (1996) [hereinafter Mikulka, *Second Report*]; and Václav Mikulka, *Third Report on Nationality in Relation to the Succession of States*, International Law Commission, Forth-ninth Session, U.N. Doc. A/CN.4/480 (1997) [hereinafter Mikulka, *Third Report*].

9. These are contained in Mikulka, *Third Report*, *supra* note 8, at 9.

10. *Report of the International Law Commission On the Work of Its Forty-Eighth Session*, U.N. GAOR Supp. (No. 10), U.N. Doc. A/51/10, ¶ 88(b).

whatsoever on traditional state sovereignty over nationality matters.¹¹ The Working Group concluded that the topic under consideration “involved the basic human right to a nationality, so that obligations for States stemmed from the duty to respect that right”¹² Some members have even wondered whether it might be possible under international law to declare acts carried out under domestic law null and void in cases of extreme gravity, such as when a state divests certain persons of their nationality as an element in the persecution of an ethnic minority.¹³ Similarly, the General Assembly’s Sixth Committee has highlighted the human rights aspect of the topic and “strongly emphasized” that the ILC’s objective should be “the protection of the individual against any detrimental effects in the area of nationality resulting from State succession, especially statelessness.”¹⁴ As if recognizing that the legal ground has shifted beneath it, the ILC has renamed the topic under review from “State Succession and Its Impact on the Nationality of Natural and Legal Persons” to “Nationality in relation to the succession of States.”¹⁵ The Draft Articles presently under discussion in the ILC and the Sixth Committee reflect these human rights concerns. These Draft Articles mark a significant departure from the traditional view, which has prevailed until recently, that international law places few, if any, restraints on states’ discretion over nationality issues. Indeed, they mark significant progress from the positions taken in the first two reports of the Special Rapporteur.

The ILC’s shift in focus toward human rights principles in considering the law of state succession in this area accords with the approach of legal practitioners who have been addressing the difficult human consequences of state succession, especially the urgent issues of statelessness and the protection of ethnic minorities within successor states.¹⁶ The geographical area most recently affected by these problems

11. *Report of the International Law Commission On the Work of Its Forty-Seventh Session*, U.N. GAOR Supp. (No. 10), U.N. Doc. A/50/10, ¶ 188. See also Mikulka, *Second Report*, *supra* note 6, at 9 n.26.

12. U.N. GAOR Supp. (No. 10), *supra* note 10, ¶ 80.

13. U.N. GAOR Supp. (No. 10), *supra* note 11, ¶ 185.

14. As per the topical summary of discussions held in the Sixth Committee of the General Assembly during its fiftieth session, prepared by the Secretariat. U.N. Doc. A/CN.4/472/Add.1, ¶¶ 5–6.

15. U.N. GAOR Supp. (No. 10), *supra* note 10, ¶ 88.

16. See, e.g., Jeffrey L. Blackman, *Statelessness in the Czech Republic: The Czech Citizenship Law and its Application* (August 1996) (unpublished report to the United Nations High Commissioner for Refugees); Jeffrey L. Blackman, *Statelessness in Ukraine: The Ukraine Citizenship Law and Its Application to Formerly Deported Persons and Their Descendants* (unpublished report to the United Nations High Commissioner for Refugees) (August 1998); Office of the U.N. High Commissioner for Refugees, *The Czech and Slovak Citizenship Laws and the Problem of Statelessness* (February 1996) (unpublished legal

has been Central and Eastern Europe: the countries of the former Yugoslavia, the countries of the former Soviet Union, and the Czech Republic.¹⁷ But of course, the problems of statelessness and discrimination against ethnic minority groups are by no means confined to Europe, or for that matter to successor states. Experience gained in the latest round of European state successions may be relevant to other regions as well, perhaps starting with Africa, in which some states seem headed for collapse and division; hence, the timeliness and importance of the ILC's efforts in developing and codifying the law on this topic.¹⁸

This paper surveys some of the recent developments in international law relating to nationality and state succession, and suggests a growing convergence among several legal principles—specifically the principle of effective nationality, the individual right to a nationality and the corresponding duty of states to prevent statelessness, and the norm of non-discrimination. At some point this convergence of such diverse areas of law as nationality, diplomatic protection, and human rights will impose positive duties on successor states with respect to their inherited populations: namely the duty to secure effective nationality for persons affected by state succession.

B. *The Concept and Function of Nationality*

The problem of state succession with respect to the inhabitants of territory is essentially a problem of nationality, of how to attribute the nationality of predecessor and successor states among those individuals affected by the change in sovereignty. Sharpening the concepts and functions of nationality under discussion is necessary at the outset because the subject of nationality is an aspect of several different areas of international law and differs among the various domestic legal systems of states.

opinion); Carol A. Batchelor, *UNHCR and Issues Related to Nationality*, 14 REFUGEE SURV. Q. 91 (1995); THE FOUNDATION ON INTER-ETHNIC RELATIONS, BIBLIOGRAPHY ON THE CSCE HIGH COMMISSIONER ON NATIONAL MINORITIES (1994); Erika B. Schlager, *The Rights to Have Rights: Citizenship in Newly Independent OSCE Countries*, 8 HELSINKI MONITOR 19 (1997); Andras Fehervary, *Citizenship, Statelessness and Human Rights: Recent Developments in the Baltic States*, 5 INT'L J. REFUGEE L. 392 (1993); Lowell Barrington, *The Domestic and International Consequences of Citizenship in the Soviet Successor States*, 47 EUROPE-ASIA STUD. 731 (1995); Jelena Pejic, *Citizenship and Statelessness in the Former Yugoslavia: The Legal Framework*, 14 REFUGEE SURV. Q. 1 (1995).

17. A former U.S. ambassador to Czechoslovakia aptly described Central Europe as "an area that produces more history than it can consume locally." PROCEEDINGS OF THE ASIL, *supra* note 3, at 11.

18. Recent state successions have also highlighted many interesting issues with respect to the human right of peoples to self-determination. See REIN MÜLLERSON, INTERNATIONAL LAW, RIGHTS AND POLITICS: DEVELOPMENTS IN EASTERN EUROPE AND THE CIS ch.2 (1994).

An initial distinction must be drawn between the nationality of natural persons and that of legal persons. The nationality of legal persons is hereby excluded from consideration. The discussion here concerns not the national identity of corporations but that of human beings. The reasons for this exclusion are both practical—a paper this length can cover only so many issues—and substantive—the body of law that has added the most substance to nationality issues is international human rights law, which pertains to people, not to corporations. Some might also add a moral dimension, that problems faced by human beings are more compelling than those faced by corporate entities and therefore deserve greater consideration.

A further distinction must be drawn between nationality as a legal term describing membership in a state, and nationality as an ethnological term connoting an historical relationship to a specific ethnic, linguistic, or racial group.¹⁹ These two concepts of nationality are sometimes coextensive and indistinguishable in practice, particularly in ethnically homogenous states. For purposes of clarity, however, keeping the concepts separate is important because one does not necessarily follow the other. For example, although most Irish nationals in the ethnic sense are also nationals of the Republic of Ireland in the legal sense, most Irish persons living in Northern Ireland have never been nationals of the Republic of Ireland; their families have been nationals of the United Kingdom for generations. Conversely, although most nationals of Malaysia in the legal sense are ethnic Malays, there is also a significant population of ethnic Chinese, some of whom are Malaysian nationals in the legal sense, but some of whom still carry the “overseas nationality” of the Republic of China or the People’s Republic of China (as the case may be).²⁰ That one of the two concepts of nationality may predominate over the other is also possible, as is the case in the United States, in which nationality does not rest significantly on a notion of a specific ethnic identity, or in Bosnia, in which ethnic nationality is far more important than nationality in the Bosnian Republic.

The interplay between the two concepts is perhaps most interesting in states which have internal administrative units based on ethnic or tribal lines (whether or not the states are federal structures). For example, nationals of the former Czechoslovak Socialist Republic never regarded themselves as “Czechoslovaks;” they were always either Czechs or Slovaks (and indeed, decided to dissolve their shared federation and

19. See PAUL WEIS, NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW 3 (2d. ed. 1979).

20. Carol A. Batchelor, *Stateless Persons: Some Gaps in International Protection*, 7 INT’L J. REFUGEE L. 232, 233 (1995).

form separate states along ethnic lines). On the other hand, the Czech Republic consists of ethnic Czechs, Moravians, and Silesians, with administrative units specific to Moravia, and with Silesia including a separate Polish-speaking linguistic community. Yet the large majority within each of the three groupings regard themselves as Czech, ethnically and politically, despite their separate characteristics. Similarly, nationals of the Democratic Republic of Congo (until recently the Republic of Zaire) appeared, at least until recently, to consider themselves Zairians, despite the presence of some two hundred historical, linguistic, and ethnic (or tribal) groupings, and despite Zaire's/Congo's heritage as a recent de-colonial creation.

Obviously, the ethnological concept of nationality blurs into the notion of distinct minority groups, and the process by which a given minority group develops a sense of shared identity as a separate people or nation is complex and fascinating. But that process and that ethnic concept of nationality must be kept separate from the process of creating a nation-state and the concept of nationality as legal membership therein. The subject under review—nationality as it relates to state succession—refers almost exclusively to this latter concept of nationality.²¹

Despite the necessity of distinguishing between the ethnological concept of nationality and the legal concept of nationality, for purposes of legal discussion, the two concepts are quite naturally related in practice. The International Court of Justice offered perhaps the most satisfying definition of nationality by acknowledging both its legal and political aspects as well as its social and cultural dimensions: “[N]ationality 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.”²²

The most important distinction for our purposes is that between nationality under domestic law and nationality as a matter of international law. Nationality is created under domestic law. Nationality is a legal relationship between an individual and a state, “conferring mutual rights

21. This conception of nationality as a legal relationship is admittedly an Anglo-Saxon perspective, drawn from Lockean traditions of the social contract among subjects and state. Weis also discusses the Roman conception of nationality, which posits nationality as a legal *status*, with rights and obligations following as a consequence of birth. WEIS, *supra* note 19, at 30. But this conception fails to take into account the process of naturalization or the process of option in the context of state succession, by which individuals and states form the bond of nationality by affirmative act of will. The better definition, therefore, is that of a legal relationship. Under either conception, however, nationality is essentially the *legal* manifestation of a bond between a state and an individual, whether acquired by birth, adoption, marriage, or affirmative choice.

22. Nottebohm, 1955 I.C.J. 23.

and duties on both.”²³ Nationality is the means by which an individual acquires and exercises the rights and responsibilities of membership within the state. As such, nationality is the prerequisite for the realization of other fundamental rights. Nationality has aptly been called “man’s basic right, for it is nothing less than the right to have rights.”²⁴

Because domestic law creates nationality, its specific form and substance varies from state to state. Membership in one state carries a different set of rights and obligations, within a different legal framework, than does membership in another state. Thus, for example, nationals of the Swiss Confederation have a different legal relationship to their federal state and local canton than do nationals of the People’s Republic of China, and the substantive rights and duties that flow from nationality in each state also differ greatly. The form and substance of domestic nationality may also vary within a given state, for example, within those states which allocate different bundles of rights and duties according to different categories of domestic nationality.²⁵ One example of this variance is the United States, in which “citizens” are accorded full political and civil rights, and “nationals” are inhabitants of U.S. territorial possessions (*e.g.*, Guam, Puerto Rico, Samoa) but have substantially reduced rights than do full citizens (*e.g.*, they cannot vote in national elections).

Traditionally, for purposes of international law, these internal nationality categories were not considered legally relevant.²⁶ International law governs the rights and duties of states; it is thus more concerned with the formal *designation* of state nationality for purposes of interstate relations, than with its internal functions. Or as Weis puts it, “[n]ationality 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.”²⁷ In other words, nationality in international law is the mechanism by which states designate individuals to themselves in

23. WEIS, *supra* note 19, at 59.

24. INDEPENDENT COMMISSION ON INTERNATIONAL HUMANITARIAN ISSUES, WINNING THE HUMAN RACE? 107 (1988) (quoting former Chief Justice of the U.S. Supreme Court Earl Warren).

25. See WEIS, *supra* note 19, at 4–9.

26. I OPPENHEIM’S INTERNATIONAL LAW, PEACE 851 (Robert Jennings & Arthur Watts eds., 9th ed. 1992).

27. WEIS, *supra* note 19, at 59.

dealing with other states; inquiring beyond this designation into possible internal categories of state nationality is not necessary.²⁸

The purpose served by the designation of nationality is to enable states to exercise clear jurisdiction over individuals. Nationality functions to indicate which states may exercise jurisdiction over which individuals. In O'Connell's words, "[t]he expression 'nationality' in international law is only shorthand for the ascription of individuals to specific States for the purpose either of jurisdiction or of diplomatic protection. In the sense that a person falls within the plenary jurisdiction of a State, and may be represented by it, such a person is said to be a national of that State."²⁹

From this definition it is clear that the function of nationality under international law—the legal and political ascription of individuals to states—is fundamentally an attribute of state sovereignty, closely analogous to the function of international borders as the legal ascription of territory to states. The state exercises its sovereignty over both its borders and its nationals, and other states which infringe upon either bear responsibility therefor. Thus if a state harms the national of another state, it has committed a delict against the other state by infringing upon its sovereignty, and bears responsibility to that state therefor. This is the principle of state responsibility, central to international law. Conversely, a state whose national has been harmed by another state acquires rights to assert against the other state arising from the infringement upon its sovereignty. These are the related principles of diplomatic protection and the nationality of claims, central to the place of individuals within public international law.³⁰

Because of its relationship to the basic principles of state responsibility, nationality of claims, and diplomatic protection, nationality also plays an important role in many substantive areas of international law. For example, in one of the oldest areas of international law, the law of armed conflict, nationality is a significant basis for determining the categories (*e.g.*, who are belligerents, who are neutrals) upon which turn some of the most important substantive law provisions (*e.g.*, the application of capital punishment, the treatment of prisoners of war, the

28. That is not to say that international law does not look behind the formal designation of nationality to assess the factual connection between the individual and the state. See the Nottebohm discussion, *infra* pp. 11–14.

29. I D.P. O'CONNELL, STATE SUCCESSION IN MUNICIPAL LAW AND INTERNATIONAL LAW 498 (1967).

30. Ian Brownlie, *The Relations of Nationality in Public International Law*, 1963 BRIT. Y.B. INT'L L. 284, 290.

protection of non-combatants, state responsibility for war criminals).³¹ Similarly, in the area of international refugee law, nationality plays an important role in determining the country of origin, upon which refugee status is grounded and the central protections of asylum and non-refoulement operate.³²

Several observations arise from the foregoing discussion on the concept and function of nationality under international law. First and most significantly, it is clear that nationality is the individual's primary link to the operation of international law. In a state-centric international legal system, the state is still the primary vehicle by which the individual accesses the rights and protections available under international law; the individual's nationality in a state is the mechanism by which that state may exercise diplomatic protection on behalf of the individual under international law. Thus, just as domestic citizenship is the prerequisite for acquiring and exercising civil and political rights within a state—the right to have rights—so too nationality in a state is the *sine qua non* for exercising most rights the individual has under international law.

To be stateless, to be without the nationality of any state, is thus a particularly grave situation. Without the link of nationality, states may not effectively exercise diplomatic protection on behalf of an individual. Other than certain international organizations in limited circumstances (e.g., the U.N. High Commissioner for Refugees), the stateless person has no vehicle for exercising rights or obtaining protections available under international law. International law is essentially rendered inoperable for the stateless individual.

Finally, it is interesting to consider the reason for this "allocation" of individuals to states. Why is it that we individuals need to be nationals of a state, to be subject to a state's jurisdiction? If the answer is to enable the state to exercise protection on our behalf, then the question follows, why do we individuals need states to protect us? The answer appears to be this: without the protection of a state other states would seek to exercise their jurisdiction over us. To live without a nationality and go unmolested by one state or another seems not to be an option. One might therefore think of nationality as a global protection racket

31. See generally Regulations Respecting the Laws and Customs of War on Land, Annex to 1907 Hague Convention IV Respecting the Laws and Customs of War on Land; 1949 Geneva Convention III Relative to the Treatment of Prisoners of War; 1949 Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, all reprinted in DOCUMENTS ON THE LAWS OF WAR (Adam Roberts & Richard Guelff eds. 2nd ed. 1995).

32. See Convention Relating to the Status of Refugees, Articles 1(A)(2), 1(C)(1)–(3), and 33, reprinted in UNITED NATIONS, HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS 638 (1994) [hereinafter U.N. HUMAN RIGHTS INSTRUMENTS].

run by states. That kind of statement, while facetious, goes a long way toward explaining the continuing resistance by states to international restrictions on their freedom to define the rules of their own domestic nationality game.

Nationality questions lie at the moving fault line between domestic state sovereignty and the evolving international legal system. Within the latter, nationality straddles an intersection of several substantive bodies of law related to diplomatic protection, state responsibility, and international human rights. Unsurprisingly, states jealously guard their prerogatives over nationality issues.

C. *The Traditional View: State Discretion over Nationality Issues*

Given states' reluctance to cede sovereignty over nationality issues, it has long been axiomatic that under international law—a body of law created by states and for states—questions of nationality fall within the domestic jurisdiction of individual states. In part states retain this authority because nationality within a state is created as a function of domestic law. There is no such thing as international nationality.³³

Professor Brownlie finds evidence for the traditional view dating back to the 19th century,³⁴ although perhaps this view's most widely quoted expression is found in Oppenheim's *International Law*, which states that “[i]t 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.”³⁵

International instruments have reflected this view. For example, Article 1 of the Convention on Certain Questions relating to the Conflict of Nationality Laws³⁶ (“1930 Hague Convention”) provided, *inter alia*: “It is for each State to determine under its own laws who are its nationals.” Article 2 added that “[a]ny question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State.”

International judicial authorities have also affirmed this view, most famously in the oft-quoted dictum from the Permanent Court of

33. Although there is such a thing as citizenship in the European Union, citizenship is grounded on the individual's nationality within one of the member states, a question determined solely by the member states' domestic nationality legislation. See Article 8, Treaty on European Union 31 I.L.M. 259 (1992); Declaration on Nationality of a Member State, *id.* at 365.

34. See Brownlie, *supra* note 30, at 286 n.2.

35. OPPENHEIM'S INTERNATIONAL LAW, *supra* note 26, at 852. Brownlie conducts an interesting textual exegesis on this famous passage by comparing it with its original formulation in 1905 in the first edition of Oppenheim's. Brownlie, *supra* note 30, at 289.

36. 1930 Hague Convention, 179 L.N.T.S. 89 (1937).

International Justice ("PCIJ") in its advisory opinion concerning the *Tunis and Morocco Nationality Decrees*: "[I]n the present state of international law, questions of nationality are, in the opinion of the Court, in principle within this reserved domain [of domestic jurisdiction]."³⁷

In the context of state succession, the traditional view holds that the nationality of individuals affected by a change in sovereignty must be determined by the domestic law of the states concerned. O'Connell stated the principle as follows: "It is the municipal law of the predecessor State which is to determine which persons have lost their nationality as a result of the change [in sovereignty]; it is that of the successor State which is to determine which persons have acquired its nationality."³⁸

Article 13 of the Bustamante Code likewise sought to apply this principle to the specific contexts of state successions (sometimes referred to as "collective naturalizations"):

In collective naturalizations, in case of the independence of a State, the law of the acquiring or new State shall apply, if it has established in the territory an effective sovereignty which has been recognized by the State trying the issue, and in the absence thereof that of the old State, all without prejudice to the contractual stipulations between the two interested States, which shall always have preference.³⁹

Not surprisingly, international lawyers have bridled at the notion of state discretion over nationality matters. Brownlie, for example, has creatively searched out several areas of international law—including the delimitation by states of exclusive sea areas, as discussed in the *Norwegian Fisheries* case, automatic reservations of domestic jurisdiction to states' acceptances of the ICJ's compulsory jurisdiction, and derogation clauses in human rights instruments—to construct the following argument: "[T]o leave issues to the unilateral determination of States is to give them the power to contract out of the very system of legal obligation [N]one of the alternative systems of accommodating state policies is likely to be an adequate substitute for the use of limitations derivative from the existing rules of international law."⁴⁰ Thus,

37. 1923 P.C.I.J. (ser. B) No. 4, at 24; *see also* Acquisition of Polish Nationality, 1923 P.C.I.J. (ser. B) No. 7, at 16 ("[I]t is true that a sovereign State has the right to decide what persons shall be regarded as its nationals"); Exchange of Greek and Turkish Populations, 1923 P.C.I.J. (ser. B) No. 10, at 19.

38. O'CONNELL, *supra* note 29, at 501.

39. Code of Private International Law ("Code Bustamante"), *quoted in* Mikulka, *First Report*, *supra* note 8, at 21.

40. Brownlie, *supra* note 30, at 293-94.

he argues, exclusive domestic jurisdiction is incompatible with the international legal system and ought to be rejected as a matter of conception and policy.

Brownlie may well be correct, as he now appears to be on other points related to nationality in state succession.⁴¹ Unfortunately, scholarly arguments, while stimulating, are not frequently found persuasive by states when evaluating their freedom to act under international law. Fortunately, at least for those who support limitations on state sovereignty, the treaty and judicial authorities that affirmed state discretion over nationality issues also indicated the existence of limitations on that discretion.

Limits on state discretion over nationality matters were inherent as early as the *Tunis and Morocco Nationality Decrees* case. Although the PCIJ upheld the principle that nationality questions are reserved to states' domestic jurisdiction, the PCIJ also made clear that the question was a relative one, dependent on the development of international law:

The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations. Thus, in the present state of international law, questions of nationality are, in the opinion of this Court, in principle within this reserved domain.⁴²

The Court left open the possibility that in the future international law might evolve to impose restrictions on state discretion over nationality issues:

For the purpose of the present opinion, it is enough to observe that it may well happen that, in a matter which, like that of nationality, is not, in principle, regulated by international law, the right of a State to use its discretion is nevertheless restricted by obligations which it may have undertaken towards other States. In such a case, jurisdiction which, in principle, belongs solely to the State, is limited by rules of international law.⁴³

41. His argument that the principle of genuine effective link to the territory should oblige successor states to confer nationality on the territory's inhabitants appears to have come to fruition in the Draft Articles. See, e.g., The Draft Articles on Nationality in relation to the Succession of States, art. 17, 20(a), 23, in Mikulka, *Third Report, supra* note 8, at 9, 15-17. His position that the principle of effective nationality should be recognized as a general principle of international law has also received support in the current ILC deliberations.

42. 1923 P.C.I.J. (ser. B) No. 4, at 24.

43. *Id.*

Much commentary has been devoted to these passages of dictum and how they affect nationality law.⁴⁴ The PCIJ, however, was addressing a very specific question on the facts within the framework of the League of Nations system—namely whether a dispute between France and Great Britain over French nationality decrees in Tunis and Morocco was, to the extent these decrees affected British nationals, “solely a matter of domestic jurisdiction” of the state within the meaning of Article 15(8) of the Covenant of the League of Nations.⁴⁵ Because resolution of the dispute turned on the interpretation of several international treaties concerning the territories and population in question, the Court held that the decrees were not solely a matter of domestic jurisdiction. Despite these narrow grounds, the Court’s dictum in the case has been widely cited in the literature and in subsequent judicial opinions in support of two broader propositions: (i) that state discretion over nationality issues is subject to international limitations, and that (ii) these limitations evolve along with the development of international law.

The Court’s approach was echoed by the 1929 Draft Convention on Nationality prepared by Harvard Law School’s Research on International Law, Article 2 of which provided that “each State may determine by its law who are its nationals, subject to the provisions of any special treaty to which the State may be a party; but under international law the power of a State to confer its nationality is not unlimited.”⁴⁶

The existence of limitations on state discretion over nationality issues was also acknowledged in the 1930 Hague Convention. Although Article 1 reaffirmed that “[i]t is for each state to determine under its own law who are its nationals”, it immediately qualified this by adding that each state’s nationality law “shall be recognized by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality.”⁴⁷ Article 1 thus simultaneously asserts the principle of state discretion over nationality questions and the principle of international limitations on state discretion—without specifying what those limitations might be. What is clear is the *form* international limitations will take: non-recognition by other states. And from the *Tunis and Morocco*

44. See generally OPPENHEIM’S INTERNATIONAL LAW, *supra* note 26, at 852; Brownlie, *supra* note 30, at 285–89; Johannes M.M. Chan, *The Right to a Nationality as a Human Right*, 12 HUM. RTS. L.J. 1, 1–2 (1991); Weis, *supra* note 19.

45. A good discussion of the Tunis and Morocco Nationality Decrees case can be found in WEIS, *supra* note 19, at 71–75.

46. *Draft Conventions and Comments Prepared by the Research in International Law of the Harvard Law School on: The Law of Nationality*, 23 AM. J. INT’L. L. 11, 13 (1929) [hereinafter *Draft Conventions and Comments*].

47. League of Nations Treaty Series, *supra* note 36, at 99.

Nationality Decrees case it could be deduced that one of the substantive limitations was on a state's ability to impose its nationality on another state's nationals, a limitation that was discussed in the Preparatory Committee of The Hague Codification Conference, but not made explicit in Article 1 of the Convention.⁴⁸

D. *Nottebohm and the Principle of Effective Nationality*

An additional substantive limitation, again taking the form of non-recognition by other states, was elaborated by the ICJ in its *Nottebohm* decision.⁴⁹ That case involved proceedings by Liechtenstein on behalf of Nottebohm, a naturalized citizen of Liechtenstein, for damages arising from the acts of Guatemala. The Court ruled the claim inadmissible, holding that Nottebohm lacked the real and effective links with Liechtenstein on which Liechtenstein could exercise diplomatic protection on his behalf:

Naturalization was asked for not so much for the purpose of obtaining a legal recognition of Nottebohm's membership in fact in the population of Liechtenstein, as it was to enable him to substitute for his status as a national of the belligerent State [of Germany] that of a national of a neutral State, with the sole aim of thus coming within the protection of Liechtenstein but not of becoming wedded to its traditions, its interests, its way of life, or of assuming its obligations. . . . Guatemala is under no obligation to recognize a nationality granted in such circumstances.⁵⁰

In effect, the Court held that under international law the objective legal status of nationality, *by itself*, no longer conferred sufficient title on which a state could exercise diplomatic protection in respect of its nationals. Instead, the Court looked beyond objective nationality to ascertain whether there was also an *effective* nationality—whether the

48. The reply of the German Government of 1929 to the Preparatory Committee:

[A] state has no power . . . to confer its nationality on all the inhabitants of another State or on all foreigners entering its territory . . . if the State confers its nationality on the subjects of other States without their request, when the persons concerned are not attached to it by any particular bond, as, for instance, origin, domicile or birth, the States concerned will not be bound to recognize such naturalisation.

Conference for the Codification of International Law: Bases of Discussion I, Nationality, League of Nations Doc. C.73.M.38 1929 V, at 13 (1929), quoted in Brownlie, *supra* note 30, at 350.

49. Nottebohm, 1955 I.C.J. 23. An excellent discussion of the *Nottebohm* case can be found in BROWNIE, *supra* note 30, at 349–364.

50. Nottebohm, 1955 I.C.J. 23, 26.

legal status as national accorded with the factual ties between the person and the state concerned:

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.⁵¹

Where the requisite factual ties were lacking between an individual and a state, as was the case between *Nottebohm* and Liechtenstein, the Court held that the state had no right, under international law, to exercise diplomatic protection in respect of the person concerned—or more precisely, that other states had no obligation to recognize the nationality conferred in the absence of such ties: “[a] State cannot claim that the rules it has thus laid down are entitled to recognition by another State unless it has acted in conformity with this general aim of making the legal bond of nationality accord with the individual’s genuine connection with the State.”⁵²

Several observations on the *Nottebohm* decision are worth making here. First, it is useful to bear in mind how the effective nationality principle discussed above applies in the specific context of state succession. O’Connell, in a widely cited passage, put it this way:

There must be a sufficient link between the successor State and the persons it claims as its nationals in virtue of the succession, and the sufficiency of the link might be tested if the successor State attempted to exercise a jurisdiction over those persons in circumstances disapproved of by international law, or attempted

51. *Id.* at 22. Note the Court’s use in this passage of arbitral awards in the context of dual nationality, in a case in which only one nationality was involved. This aspect of the Court’s reasoning, along with its cavalier survey of state practice, has been rightly criticized in the dissenting opinions and in the literature. *See, id.* at 41–42 (Judge Read’s dissent opinion); BROWNLEE, *supra* note 30, at 353–358.

52. *Nottebohm*, 1955 I.C.J. 23.

to represent them diplomatically; provided, that is, there is some State competent to protest on behalf of the persons concerned.⁵³

Mikulka's summary of the law in this area nicely illustrates the interplay between a state's legitimate exercise of domestic jurisdiction over nationality issues and that state's assertion of that exercise *viz.* other states:

One of the functions of international law in respect of nationality is to delimit the competence of States in this field. In situations of State succession, this means the delimitation of the competence of the predecessor State to retain certain persons as its nationals and the competence of the successor State to grant its nationality to certain persons. Thus international law permits a certain degree of control over unreasonable attribution by States of their nationality. . . . This is achieved by depriving an abusive exercise by a State of its legislative competence with respect to nationality of much of its international effect, or in other words, by eliminating its consequences as regards third States.⁵⁴

Second, the validity of Nottebohm's nationality under Liechtenstein's domestic legal system was not at issue in the case and was not affected by the Court's judgment. Nor was the validity of Liechtenstein's nationality legislation directly in dispute.⁵⁵ What was in dispute was Liechtenstein's claim to represent Nottebohm under the international law of diplomatic protection, specifically before the ICJ, on the basis of Nottebohm's status as a Liechtenstein national. Liechtenstein was free to treat Nottebohm as its national for domestic law purposes; Liechtenstein could not expect other states do so for purposes of international law.⁵⁶

53. O'CONNELL, *supra* note 29, at 499.

54. Mikulka, *Third Report*, *supra* note 8, at 98-99.

55. Indeed, the Court affirmed that

[i]t is for Liechtenstein, as it is for every sovereign State, to settle by its own legislation the rules relating to the acquisition of its nationality, and to confer that nationality in . . . accordance with that legislation. . . . Furthermore, nationality has its most immediate . . . and, for most people its only[,] effects within the legal system of the State conferring it. . . . The naturalization of Nottebohm was an act performed by Liechtenstein in the exercise of its domestic jurisdiction.

Nottebohm, 1955 I.C.J. 20-21.

56.

But the issue which the Court must decide is not one which pertains to the legal system of Liechtenstein. It does not depend on the law or on the decision of Liechtenstein whether that State is entitled to exercise its protection. . . . To exercise protection, to apply to the Court, is to place oneself on the plane of

In relation to nationality law, then, the international limitations on state discretion affirmed in *Nottebohm* remained negative in character, taking the form of non-recognition by other international subjects. The Court did not introduce obligations on states regarding their exercise of domestic jurisdiction over nationality issues; nor did the Court assert any dramatic positive rights of individuals with respect to nationality claims *viz.* states—such as that an individual with genuine effective links to a state has a right to the nationality of that state. The nature of the limitations remained negative and tied to the specific context of diplomatic protection. For all the criticism directed at the Court's reasoning in *Nottebohm*—its reliance on arbitral tribunal decisions, its scant reference to state practice, its importing of principles governing dual nationality into a case of single nationality, its failure to further elaborate the criteria of effective nationality—the result was very much in keeping with the PCIJ's opinion in *Tunis and Morocco Decrees* (albeit with a far different procedural posture) and with the 1930 Hague Convention.⁵⁷ Although *Nottebohm* did expand the scope in which international law refused to give effect to a state's attribution of nationality—from cases in which states imposed nationality on the nationals of other states (as in the *Tunis and Morocco Decrees* case) to cases in which states conferred nationality on willing individuals who lacked a sufficient connection to that state—the expansion was incremental. It was a matter of degree rather than a dramatic reach into the domestic jurisdiction of states over nationality issues.

Nevertheless, *Nottebohm* marked a significant break with precedent in relation to the law of diplomatic protection, severing diplomatic protection from nationality without pausing a great deal to consider state practice. The decision has been criticized in this regard for introducing uncertainty into diplomatic protection and for doing so on the basis of indefinite criteria:

international law. It is international law which determines whether a State is entitled to exercise protection and to seize the Court.

Id. at 20–21.

57. Article 5 of the Hague Convention applied the principle of effective link to the context of multiple nationality, although confining its effects to a state's domestic legal system:

Within a third State, a person having more than one nationality shall be treated as if he had only one. . . . [A] third State shall, of the nationalities which any such person possesses, recognise exclusively *in its territory* either the nationality of the country in which he is habitually and principally resident, or the nationality of the country with which in the circumstances he appears to be in fact most closely connected.

League of Nations Treaty Series, *supra* note 36 (emphasis added).

[W]hen a person is vested with only one nationality, which is attributed to him or her either *jure sanguinis* or *jure soli*, or by a valid naturalization entailing the positive loss of the former nationality, the theory of effective nationality cannot be applied without the risk of causing confusion. It lacks a sufficiently positive basis to be applied to a nationality which finds support in a state law. There does not in fact exist any criterion of proven effectiveness for disclosing the persons by the thousands who, because of the facility of travel in the modern world, possess the positive legal nationality of a State, but live in foreign States where they are domiciled and where their family and business centre is located, would be exposed to non-recognition, at the international level, of the nationality with which they are undeniably vested by virtue of the laws of their national State.⁵⁸

Thus could Judge Read, writing in dissent, state that "apart from the cases of double nationality, no instance has been cited to the Court in which a State has successfully refused to recognize that nationality, lawfully conferred and maintained, did not give rise to a right of diplomatic protection."⁵⁹ But as Brownlie rightly notes,⁶⁰ Judge Read's qualifying phrase, "lawfully conferred and maintained," begs the question: What if nationality had *not* been lawfully conferred and maintained? Would states not then be justified in refusing to recognize a state's right of diplomatic protection on the basis of that unlawful conferral of nationality? And would not an international tribunal likewise be justified in so refusing a state's claim on the basis of that nationality? Reasoning from *Tunis and Morocco Decrees* and the 1930 Hague Convention, it would be difficult to deny, for example, that the imposition of nationality on aliens in transit through national territory is unlawful, or that it would be subject to the non-recognition of other states and international tribunals, at least in the face of a state's effort to base a claim of diplomatic protection on such nationality.

Moreover, the Court was careful to confine its decision in this regard to the non-recognition by Guatemala of Nottebohm's Liechtenstein nationality.⁶¹ The Court did not extend its reasoning to non-recognition by all states, and the decision did not extend to purposes beyond the

58. Flegenheimer Case, Decision No. 182 of the Italian-United States Conciliation Commission (September 20, 1958), *reprinted in* 14 UNITED NATIONS, REPORTS OF INTERNATIONAL ARBITRAL AWARDS 327, 377 [hereinafter R.I.A.A.].

59. WEIS, *supra* note 19, at 42.

60. Brownlie, *supra* note 30, at 355.

61. Nottebohm, 1955 I.C.J. at 23.

admissibility of a claim before the ICJ.⁶² From a common law perspective, *Nottebohm* can be viewed as a quite reasonable judgment about legal standing: that under international law the formal legal status of nationality, in the absence of genuine effective links between a state and an individual, is not sufficient to confer standing on a petitioner before the ICJ.

*E. The Principle of Effective Nationality and the Trend
toward Positive Law Obligations*

Worth considering is whether the principle of effective nationality has more than the negative function assigned to it by *Nottebohm* for the context of diplomatic protection—specifically, whether the principle of effective nationality entails positive legal obligations on states in the context of state succession.

The principle of effective link has long been a part of the discussion on state succession. Reviewing the early literature on this topic, O'Connell concluded that

[t]he majority of writers have asserted that upon change of sovereignty the inhabitants of the territory concerned lose the nationality of the predecessor State and become *ipso facto* nationals of the successor. There is a collective naturalization which takes place the moment ratifications of a treaty of cession are exchanged, or, if there is no treaty, upon the declaration of annexation or independence.⁶³

O'Connell dismissed this position, however, by noting that “[t]hese opinions were based upon generally accepted English municipal law, and they are no authority whatever in international law.”⁶⁴

As early as 1929 the Harvard Draft Convention on Nationality supported the position taken by those O'Connell dismissed. Article 18 of the convention provided that:

When a part of the territory of a State is acquired by another State . . . the nationals of the first State who continue their habitual residence in such territory lose the nationality of that State and become nationals of the successor State, in the ab-

62. Indeed, in refusing to apply the effective nationality principle of *Nottebohm* three years later in *Flegenheimer*, the Italian-United States Conciliation Commission held that it was not in its power to deny the effects at the international level of a nationality conferred by a State, even without the support of effectivity, except in cases of frauds, negligence or serious error. See 25 I.L.R. 91, 153 (Italian-U.S. Conciliation Commission 1958).

63. O'CONNELL, *supra* note 29, at 498–501.

64. *Id.* at 501.

sence of treaty provisions to the contrary, unless in accordance with the law of the successor State they decline the nationality thereof.⁶⁵

According to the commentary on article 18, This provision was “believed to express a rule of international law which is generally recognized, although there might be differences of opinion with regard to its application under particular conditions.”⁶⁶

In 1964 Brownlie took up the argument that successor states have an obligation to confer nationality on nationals of the predecessor state who have effective links to the territory concerned—in effect, that the population must go with the territory: “The general principle is that of a substantial connexion with the territory concerned by citizenship or residence or family relation to a qualified person. This principle is perhaps merely a special aspect of the general principle of the effective link.”⁶⁷ He argued in particular that domicile in the territory is the primary criterion for effective nationality in the context of state succession:

[T]he link, in cases of territorial transfer, has special characteristics. Territory, both socially and legally, is not to be regarded as an empty plot: territory . . . connotes population, ethnic groupings, loyalty patterns, national aspirations, a part of humanity, or, if one is tolerant of the metaphor, an organism. . . . The population goes with the territory: on the one hand, it would be illegal, and a derogation from the grant [of territory], for the transferor to try to retain the population as its own nationals, and, on the other hand, it would be illegal for the successor to take any steps which involved attempts to avoid responsibility for conditions on the territory, for example, by treating the population as *de facto* stateless or by failing to maintain order in the area. The position is that the population has a ‘territorial’ or local status, and this is unaffected whether there is a universal or partial successor and whether there is a cession, i.e. a ‘transfer’ of sovereignty, or a relinquishment by one State followed by a disposition by international authority.⁶⁸

65. *Draft Conventions and Comments*, *supra* note 46. See also Mikulka, *Third Report*, *supra* note 8, at 18.

66. Mikulka, *Third Report*, *supra* note 8, at 18.

67. Brownlie, *supra* note 30, at 324–25.

68. *Id.* at 325–26. Brownlie’s argument here emphasizes domicile as the effective link to the territory, but it should perhaps not be read to mean that domicile, or habitual residence, is the sole criterion for evaluating effective nationality. He later expands the concept beyond domicile, albeit in passing, by noting that “[t]he general principle is that of a substantial connexion with the territory concerned by citizenship or residence or family relation to a

Professor O'Connell, one of the most respected writers on matters of state succession, did not agree that there were any such positive obligations on states: "Undesirable as it may be that any persons become stateless as a result of a change of sovereignty, it cannot be asserted with any measure of confidence that international law, at least in its present stage of development, imposes any duty on the successor State to grant nationality."⁶⁹ He argued that the traditional negative restrictions on state discretion over nationality issues, as enunciated in *Nottebohm*, were all that applied in the context of state succession: "The function of international law is at the most to delimit the competence of the [predecessor State] to retain certain persons as its nationals, and of the [successor State] to claim them as its own. It cannot prescribe that such persons change their nationality, either automatically or by submission."⁷⁰

Undertaking an in-depth examination of state practice, Dr. Weis likewise found no evidence of a positive rule of international law, merely a presumption to that effect:

[T]here is no rule of international law under which the nationals of the predecessor State acquire the nationality of the successor State. International law cannot have such a direct effect, and the practice of States does not bear out the contention that this is inevitably the result of the change of sovereignty. As a rule, however, States have conferred their nationality on the former nationals of the predecessor State, and in this regard one may say that there is, in the absence of statutory provisions of municipal law, a *presumption* of international law that municipal law has this effect.⁷¹

Brownlie disagreed with Weis' assessment of state practice: "Somewhat surprising is the caution of Dr. Weis in his conclusion on these issues. . . . [H]is own survey of State practice, though not perhaps comprehensive, would seem to make his restraint unnecessary. . . . Moreover, Dr. Weis has little to offer in the way of contrary practice."⁷² In Brownlie's opinion "the evidence is overwhelmingly in support of the view that the population follows the change of sovereignty in matters of nationality."⁷³

qualified person." *Id.* at 324. Thus, Brownlie appears to include additional criteria other than habitual residence to evaluate effective nationality, namely prior nationality and principles of *jus sanguinis*.

69. O'CONNELL, *supra* note 29, at 503.

70. *Id.* at 501-02 (citing *Nottebohm*, 1955 I.C.J. at 4).

71. WEIS, *supra* note 19, at 143-144.

72. Brownlie, *supra* note 30, at 323-324.

73. *Id.* at 320.

There is ample room for argument. But whatever the uniformity of state practice, it lacks the essential element under international law of *opinio juris*. Weis' fine survey of state practice, for example, does not indicate the existence of *opinio juris*. Brownlie himself makes no effort to uncover evidence of *opinio juris*, despite his sharp disagreement with Weis' reading of state practice and his broad conclusions grounded on state practice. Nor is there evidence of *opinio juris* in the Special Rapporteur's extensive examination of state practice in this area.⁷⁴ Although the overwhelming weight of state practice has been for a successor state to confer nationality on the nationals of the predecessor state domiciled on the territory concerned,⁷⁵ no evidence demonstrates that states have conferred nationality in compliance with perceived international legal obligations to that effect. Moreover, because the conferral of nationality is accomplished through domestic legislation, indications of uniform state practice are particularly unreliable. They are nothing more than snapshots of similar domestic nationality laws in operation. As the Special Rapporteur stated, "[t]he observation that the transfer of sovereignty to the successor State entailed an automatic and collective change in nationality for persons residing in its territory and possessing the nationality of the predecessor State seems to address the issue of the legislative technique used by the State concerned."⁷⁶ Seen in this light, uniform legislative techniques for the conferral of nationality are, in the absence of *opinio juris*, no more indicative of international law than are uniform legislative techniques for the issuance of drivers licenses. Uniformity alone is not sufficient to establish a rule of international law.

Nevertheless, the trend in international law, at least in the context of state succession, is moving in the direction of imposing positive legal obligations on states deriving from the principle of effective nationality enunciated in *Nottebohm*.

International organizations involved in recent state successions have on several occasions expressed legal opinions to the effect that a successor state is obliged to extend nationality to individuals with a genuine

74. See Mikulka, *Second Report*, *supra* note 8, at 19–38 (reviewing 31 instances of state successions on this point, ranging from the territorial transfers from Mexico to the United States in 1848 to the secession of Eritrea in 1992).

75. The notable exceptions to this are all quite recent: the Czech Republic and the republics of the former Yugoslavia—all of which used the internal citizenship of the constituent territory of the dissolved federal state as the criterion for conferring nationality—and the three Baltic republics, which conferred nationality on the basis of retroactive application of nationality legislation in force prior to their forcible incorporation into the former USSR. The case of the Baltic States, however, involves a restoration of legitimate state sovereignty, not technically a state succession, so practice by these states may not necessarily be instructive.

76. Mikulka, *Second Report*, *supra* note 8, at 18–19.

effective link to the territory in question. The OSCE Parliamentary Assembly, for example, issued a resolution which “urges that, upon a change in sovereignty, all persons who have a genuine and effective link with a new State should acquire the citizenship of that State.”⁷⁷ The UNHCR also issued a legal opinion “that residence and the genuine effective link [are] the key factors for determination of nationality in the context of State succession.”⁷⁸ In addition, the Committee of Experts on Nationality of the Council of Europe has incorporated the principle of effective nationality into its European Convention on Nationality. Article 18(2) of the Convention requires states involved in a succession to take the following factors into account in determining the nationality of the individuals concerned:

- (a) the genuine and effective link of the person concerned with the State;
- (b) the habitual residence of the person concerned at the time of State succession;
- (c) the will of the person concerned;
- (d) the territorial origin of the person concerned.⁷⁹

A second body of the Council of Europe, the European Commission for Democracy through Law, has likewise affirmed obligations on successor states based on the principle of effective nationality. The Declaration on the Consequences of State Succession for the Nationality of Natural Persons (“Venice Declaration”), adopted in September 1996, provides in Article 8 that “the successor State shall grant its nationality to all nationals of the predecessor State residing permanently on the transferred territory.”⁸⁰

The International Law Commission’s current efforts in this area also point in the direction of positive obligations on states based on the principle of effective nationality, albeit by way of progressive development of the law rather than codification of *lex lata*. On the one hand, the ILC has supported the notion that there are indeed positive obligations on states:

The fundamental assumption that the successor State is under an obligation to grant its nationality to a core body of its population

77. The Ottawa Declaration of the OSCE Parliamentary Assembly (July 8, 1995), quoted in Schlager, *supra* note 16, at 23.

78. *The Czech and Slovak Citizenship Laws and the Problem of Statelessness*, *supra* note 16, at 12.

79. Document DIR/JUR (96), quoted in Mikulka, *Third Report*, *supra* note 8, at 20.

80. Document CDL-NAT (96) 7 rev, cited in Mikulka, *Third Report*, *supra* note 8, n.43.

has been supported both explicitly and implicitly by some representatives in the Sixth Committee [of the General Assembly]. This obligation was considered to be a logical consequence of the fact that every entity claiming statehood must have a population.⁸¹

On the other hand, the ILC has not come to a consensus on precisely what those obligations might be: "[T]he comments of delegations were inconclusive as to the existence of an international obligation binding upon the successor State regarding the granting of its nationality following State succession."⁸² In the views of some representatives, the principle of effective nationality was irrelevant outside the context of diplomatic protection.⁸³ Other representatives emphasized the importance of effective nationality and proposed that criteria for establishing a genuine effective link for each category of state succession should be studied.⁸⁴ Despite the lack of agreement, the Special Rapporteur has drawn up Draft Articles, based on the deliberations of the Working Group, which do foresee specific obligations on successor states based on the principle of effective nationality: "The identification of the rules governing the distribution of individuals among the States involved in a succession derives in large part from the application of the principle of effective nationality to a specific case of State succession."⁸⁵

The Draft Articles delineate four categories of state succession and propose specific obligations on successor states which vary by category, based on varying criteria for establishing a genuine effective link. The four categories of state succession covered are: (1) the transfer of part of the territory of a state, (2) the unification of a state, (3) the dissolution of a state, and (4) the separation of part of the territory.⁸⁶ Article 17, covering the first type of state succession above, provides that "[w]hen part of the territory of a State is transferred by that State to another State, the successor State shall grant its nationality to the persons concerned who have their habitual residence in the transferred territory. . . ."⁸⁷ Article 18, covering the unification of states, provides

81. Mikulka, *Second Report*, *supra* note 8, at 18.

82. *Id.* at 19.

83. *See Report of the International Law Commission On the Work of Its Forty-Seventh Session*, *supra* note 11, ¶ 187.

84. *See id.* ¶ 186 (suggesting that the Commission be guided by the concept of "rules of attachment" or "criteria of attachment").

85. Mikulka, *Third Report*, *supra* note 8, at 3.

86. This categorization reflects the ILC's decision to follow the categories set forth in the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts rather than that in the 1978 Vienna Convention on Succession of States in respect of Treaties. *Id.* at 7.

87. *Id.* at 15.

that “when two or more States unite and so form one successor State, . . . the successor State shall grant its nationality to all persons who, on the date of the succession of States, had the nationality of at least one of the predecessor States.”⁸⁸ Articles 19 and 20, covering state dissolutions, provide that:

“when a State dissolves and ceases to exist and the various parts of the territory of the predecessor State form two or more successor States, . . . each of the successor States shall grant its nationality to . . . (a) [p]ersons having their habitual residence in its territory; and . . . (b)(ii) where the predecessor State was a State in which the category of secondary nationality of constituent entities existed, persons not covered by paragraph (a) who had the secondary nationality of an entity that has become part of that successor State, irrespective of the place of their habitual residence.”⁸⁹

Finally, articles 22 and 23, covering the fourth category above, provide that:

“when part or parts of the territory of a State separate from that State and form one or more successor States while the predecessor State continues to exist. . . . the successor State shall grant its nationality to . . . (a) persons having their habitual residence in its territory; and (b) . . . where the predecessor State is a State in which the category of secondary nationality of constituent entities existed, persons not covered by paragraph (a) who had the secondary nationality of an entity that has become part of that successor State, irrespective of the place of their habitual residence.”⁹⁰

Hence, the ILC Draft Articles develop positive obligations on successor states based on the principle of effective nationality. The criteria used for evaluating effective nationality are interesting. Domicile, or habitual residence, is the predominant criterion used in the Draft Articles. Where, for example, a transfer of part of the territory occurs, domicile is the criterion used. Only those habitually resident on the transferred territory are entitled to the nationality of the successor state; those who are residents abroad, including those who obtained their nationality overseas through principles of *jus sanguinis*, do not take the nationality of the successor state. Domicile is used again where a separation of part of

88. *Id.* at 16.

89. *Id.*

90. *Id.* at 17.

the territory exists; successor states must confer nationality on persons having habitual residence on the territory. Domicile is also used in the context of state dissolution, in which the predecessor state ceases to exist—those persons resident on the territory of the successor state take the nationality of that state. The Commission thus supports Brownlie's early contention that the population goes with the territory, that habitual residence entails obligations on successor states to confer nationality: "[H]abitual residence is the test that has most often been used in practice for defining the basic body of nationals of the successor State, even if it was not the only one. It is explained by the fact that 'the population has a territorial or local status. . . .'"⁹¹

But the ILC has also endorsed other criteria for evaluating effective nationality in state successions. In the context of the unification of states, for example, the ILC has dispensed with the domicile criterion altogether, and has used prior nationality as the criterion for allocating nationality. Thus, Article 18 would oblige successor states to grant nationality to all former nationals of the predecessor state, whether or not those nationals are habitually resident on the territory concerned.⁹² This obligation responds to some of the concerns voiced about the habitual residence test in the past, for example that it "renders only a limited category of persons susceptible of being invested with the nationality of the successor State", or that "[p]ersons habitually resident outside the territory of a State which is totally extinguished become stateless."⁹³ Article 18 resolves this problem in the context of state unifications by scrapping habitual residence in favor of prior nationality.

In the context of state dissolution, moreover, the habitual residence test is supplemented by the criterion of prior internal (or secondary) nationality, which often exists in some federal states, prior legal residence, as well as prior nationality obtained through principles of *jus sanguinis*. Article 22(b) thus seeks to require a state successor in a dissolution to grant nationality not only to those domiciled on their territory, but also to "persons . . . who had the secondary nationality of an entity that has

91. *Id.* at 4 (quoting Brownlie, *supra* note 30, at 325).

92. *Id.* at 16. This follows the approach of Article 18 of the 1929 Harvard Draft Convention on Nationality, which adopted prior nationality as the criterion for attributing nationality. *Draft Conventions and Comments*, *supra* note 46.

93. O'CONNELL, *supra* note 29, at 514. Brownlie acknowledged that "[s]ome difficulties merely concern modalities of the general rule itself. Thus the position of nationals of the predecessor State who are resident outside the territory the sovereignty of which changes at the time of the transfer is unsettled." He maintained, nevertheless, that the test of domicile applied: "The rule probably is that, unless they have or acquire a domicile in the transferred territory, they do not acquire the nationality of the successor State." Brownlie, *supra* note 30, at 324. The ILC has resolved this problem by using a more flexible set of criteria, one that includes prior nationality and prior secondary nationality.

become part of that successor State, *irrespective of the place of their habitual residence.*"⁹⁴ The article would also oblige states to confer nationality on "persons having their habitual residence in a third State, who were born in or, before leaving the predecessor State, had their last permanent residence in what has become the territory of that particular successor State."⁹⁵ This obligation includes persons who acquired the nationality of the predecessor state through principles of *jus sanguinis*, either by birth in the predecessor state or birth overseas to a national of the predecessor state.⁹⁶ Similarly, in the context of the separation and independence of a part of the territory the habitual residence test is supplemented by the criterion of prior secondary nationality, "persons . . . who had the secondary nationality of an entity that has become part of that successor State, *irrespective of the place of their habitual residence.*"⁹⁷

In addition, nationality of the predecessor state is a criterion used in all four categories of state succession, as is clear from the definition of "person concerned," which means "every individual who, on the date of the succession of States, had the nationality of the predecessor State, or was entitled to acquire such nationality in accordance with the provisions of the internal law of the predecessor State . . ."⁹⁸ This criterion is in keeping with the principle that aliens resident in the territory do not acquire the nationality of the successor state. As stated by O'Connell, "[p]ersons habitually resident in the absorbed territory who are nationals of foreign States and at the same time not nationals of the predecessor State cannot be invested with the successor's nationality."⁹⁹ But note the interesting twist given this concept by the ILC: aliens who were *entitled* to acquire the nationality of the predecessor state on the date of succession are included in the definition of "persons concerned." Thus, in the provisions relating to the four categories of succession, when a state is obliged to grant nationality to all "persons having their habitual residence in its

94. Mikulka, *Third Report*, *supra* note 8, at 17 (emphasis added).

95. *Id.*

96. The requirement that persons living overseas "had their last permanent residence in what has become the territory of that particular successor state" before leaving the predecessor state simply refers to the fact that a state dissolution involves more than one state. The provision assures that overseas nationals accede to the nationality of the particular successor state with which they have effective nationality, as determined by where their last habitual residence was in the home country.

97. *Id.* (emphasis added). Note that none of the provisions relating to persons with habitual residence overseas requires states to grant their nationality to such persons "if they have their habitual residence in another State and also have the nationality of that State." *Id.* at 11.

98. *Id.* at 9 n. (h).

99. O'CONNELL, *supra* note 29, at 517.

territory," this includes aliens who qualified for, but did not possess, the nationality of the predecessor state. This element applies to the provisions relating to transfer of part of the territory (article 17), dissolution of a state (article 20), and separation of part of the territory (article 22). The inclusion of aliens in the category of persons whose nationality is affected by state succession appears to be a novelization on the part of the ILC. The provision certainly represents an expanded application of the principle of effective nationality. The issue of proof would be problematic in practice. The commentary to the draft article, which is exhaustive on most points, is silent on this one.

Finally, the Draft Articles would require successor states to make liberal use of the right of option, which further serves the principle of effective nationality by ensuring that all persons with effective links to the territory of the successor state may opt for the nationality of that state—whether those links consist of domicile, nationality, familial, or secondary nationality. In the context of state dissolution, for example, the states concerned would be required to provide a right of option for those people "who would be entitled to acquire the nationality of two or more successor States."¹⁰⁰ This requirement ensures that an individual may obtain the effective nationality of the successor state with which that individual has the most effective links. In state successions involving the separation of part of the territory, the Draft Articles would require both the successor state and the predecessor state to grant a right of option to all persons concerned.¹⁰¹ This provision also helps ensure that those persons who qualify for the nationality of both the predecessor and successor states obtain the nationality which most closely accords with their genuine effective links.¹⁰²

100. Mikulka, *Third Report*, *supra* note 8, at 17. The right of option in state dissolution must also be granted to "persons concerned who have their habitual residence in a third State and who are not covered by the provisions of article 20, paragraph (b), irrespective of the mode of acquisition of the nationality of the predecessor State." Mikulka, *Third Report*, *supra*, at 9. This right essentially covers persons who obtained nationality of the predecessor state but who have never lived in the predecessor state, for example children or spouses of overseas nationals.

101. *See id.* art. 25, at 18.

102. Brownlie wrongly minimized the importance of the right of option in state successions: "Provisions for rights of option, as has been suggested earlier, do not alter things very much since, in general, the option is to throw off a nationality acquired, or assumed to exist or be about to exist, as a result of the transfer of sovereignty." Brownlie, *supra* note 30, at 324. As noted above, for individuals who qualify for the nationality of more than one state concerned in a succession, the right of option is a very useful tool for enabling those persons to obtain nationality in the state with which it has the closer and more effective links. The failure of the post-Soviet Republics to introduce a coordinated right of option into their respective nationality legislation, or through international instruments, has created ongoing problems of statelessness—particularly among ethnic groups who had been deported from

The Draft Articles thus utilize a mix of criteria for states to use in determining effective nationality, emphasizing domicile as the predominant criterion, but also including prior nationality, prior secondary nationality,¹⁰³ and familial links in which nationality is obtained through principles of *jus sanguinis*. And they provide in some contexts for the right of option, which enables individuals to obtain the nationality of the state with which they have the strongest and most effective links.

From some of the detailed obligations on states proposed in the Draft Articles on Nationality in relation to the Succession of States,¹⁰⁴ and from the legal opinions, declarations, and draft instruments of international organizations,¹⁰⁵ the clear trend in international law is toward the imposition of positive obligations on states deriving from the principle of effective nationality enunciated in *Nottebohm*, at least in the context of state successions. But the principles set forth in the Draft Articles or these other instruments are not yet descriptive of the *lex lata*. Reference has already been made to the absence of state practice evincing *opinio juris*. Reference has also been made to the lack of consensus among delegations to the ILC and in the Sixth Committee as to the existence of international obligations binding upon states regarding the conferral of nationality following state successions. Nevertheless, the body of principles contained in the Draft Articles illustrate the rapid development of international law in this area.

one part of the Soviet Union to another, such as the Crimean Tatars. See, e.g., Blackman, *Statelessness in Ukraine*, *supra* note 16.

103. In defending the utility of using secondary nationality as a criterion in state succession, Mikulka has made a serious factual error: "As . . . the practice of the Czech Republic shows, nearly all persons concerned [who were] habitually resident in its territory who did not acquire Czech nationality by virtue of the . . . *ex lege* criterion, acquired Czech nationality via optional application under the Czech legislation. Thus, the outcome of the application of this criterion was not substantially different from the situation which would have resulted from the use of the criterion of permanent residence." Mikulka, *Third Report*, *supra* note 8, at 32. This is simply not true. The legislative restrictions placed on the right of option disqualified from Czech citizenship a substantial number of persons who had habitual residence in the Czech Republic at the time of the dissolution of Czechoslovakia—most of whom were ethnic Roma, a population widely disliked by the ethnic majority. See Blackman, *supra* note 16; *The Czech and Slovak Citizenship Laws and the Problem of Statelessness*, *supra* note 16; *Report of the Experts of the Council of Europe on the Citizenship Laws of the Czech Republic and Slovakia and their Implementation* (April 2, 1996). Mikulka, who lives in the Czech Republic and is an expert on nationality issues, is surely aware of the well-publicized international controversy surrounding the fate of the country's Roma under his own country's nationality legislation.

104. There are a number of provisions further illustrative of the point under discussion that have been omitted for the sake of brevity.

105. See discussion *supra* pp. 15–16.

F. Human Rights Obligations

Although the law of diplomatic protection has been the context in which restrictions on state discretion over nationality legislation have emerged, and although the *Nottebohm* case gave impetus to the principle of effective nationality, the law of human rights has fueled the rapid development toward positive obligations on states with respect to nationality. In developing and codifying the law pertaining to nationality as it relates to state successions, the International Law Commission has had to confront a rapidly evolving body of international human rights principles. As the Special Rapporteur explained:

Aside from its traditional role of delimiting the competence of States in the area of nationality, international law imposes yet another, long-recognized, limitation on their freedom, which derives from principles concerning the protection of human rights. . . . The importance of this second type of limitation increased considerably after the Second World War. . . . By virtue of these norms and principles, some of the processes of internal law, such as those leading to statelessness or any type of discrimination, have become questionable at the international level. This is true for nationality laws in general, as well as in the particular context of State succession. It is one of the most remarkable attributes of the developing legal framework in which recent cases of succession have taken place."¹⁰⁶

In the absence of these animating human rights principles, the detailed Draft Articles related to nationality in state successions could be viewed as nothing more than the technical delimitation of the competence of respective predecessor and successor states, with legal grounding in the fields of diplomatic protection and state succession. Only through the incorporation of human rights principles does the principle of effective nationality discussed above take on a positive function with respect to states' obligations beyond the field of diplomatic protection: "[T]he legal grounds for the obligation of the successor State to grant its nationality are . . . to be found among the rules concerning the protection of human rights, the rules regarding the delimitation of competences between the different successor States are of a rather different order."¹⁰⁷ This incorporation is particularly true with respect to the emerging right to nationality, the corresponding duty to prevent statelessness, and the norm of non-discrimination.

106. Mikulka, *Third Report*, *supra* note 8, at 30.

107. Mikulka, *Second Report*, *supra* note 8, at 18.

1. The Right to a Nationality

The right to a nationality is the most obvious human rights principle bearing on cases of state succession. With respect to the persons concerned, state succession primarily involves the allocation of nationality among the predecessor state and successor state(s). Any rights under international law that relate to nationality thus impinge directly on the freedom of the states involved in a state succession.

Article 15 of the Universal Declaration of Human Rights set out for the first time the individual right to a nationality:

1. Everyone has the right to a nationality.
2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.¹⁰⁸

Although Article 15 was a groundbreaking provision in international law,¹⁰⁹ the article's vagueness has robbed it of any immediate force. Most significantly, Article 15 does not carry a specific corresponding obligation on states to confer nationality. In other words the article fails to indicate precisely to *which* nationality one has the right and under *what* circumstances that right arises.

The International Covenant on Civil and Political Rights ("ICCPR"), one of the two covenants intended to give more detailed legal effect to the Universal Declaration, curiously omits reference to the right to nationality in Article 15 of the Declaration. The only mention of nationality at all is in Article 24, which provides that "[e]very child has the right to acquire a nationality."¹¹⁰ Again, the provision is undermined by the failure to specify upon whom a corresponding obligation to grant nationality falls. Johannes Chan, in his examination of the *travaux préparatoires* to the ICCPR, concluded that the complexity of this problem resulted in this Covenant's exclusion of a general right to nationality.¹¹¹ Agreeing with that assessment is not difficult, judging by the volume of documentation and deliberation in connection with the current ILC efforts to codify and develop nationality principles even in the narrow context of state succession.

108. Universal Declaration of Human Rights, *reprinted in* U.N. HUMAN RIGHTS INSTRUMENTS, *supra* note 32, at 4.

109. Article 15 does have antecedents in the 1930 Hague Convention, which laid out principles for avoiding the negative conflicts of law, particularly among *jus soli* states and *jus sanguinis* states, that sometimes result in statelessness for expatriated or naturalized persons, spouses of foreign nationals, children of mixed nationals, and adopted children.

110. International Covenant on Civil and Political Rights, *reprinted in* U.N. HUMAN RIGHTS INSTRUMENTS, *supra* note 32, at 29.

111. Chan, *supra* note 44, at 4–5.

The 1961 Convention on the Reduction of Statelessness sets forth principles which bear on the right to a nationality. Article 1(1), for example, provides that “[a] Contracting State shall grant its nationality to a person born in its territory who would otherwise be stateless.”¹¹² This Convention also sets out the specific manner and timing of the conferral. The convention establishes further affirmative obligations on states to confer nationality in Article 1(3), 1(4) and 4, which specify the procedural manner in which the obligation operates.¹¹³ The Convention is cited here because for many years it contained among the very few substantive provisions in international law related to the right to a nationality, scant though those cited provisions may be. Such was the neglect of the right to a nationality in general international law.

The Inter-American Convention on Human Rights reiterates the right to a nationality found in the Declaration on Human Rights and expands it significantly. Article 20 provides that “[e]very person has the right to the nationality of the State in whose territory he was born if he does not have the right to any other nationality.”¹¹⁴ This article is a simpler, unqualified application of the principle set forth in Article 4 of the 1961 Convention on the Reduction of Statelessness.

The Draft Articles on Nationality in Relation to the Succession of States currently under consideration by the ILC is without doubt the most significant general elaboration of the right to nationality since the right was introduced in Article 15 of the Declaration on Human Rights. Article 1 of the Draft Articles provides:

1. Every individual who, on the date of the succession of States, had the nationality of the predecessor State, irrespective of the mode of acquisition of that nationality, or was entitled to acquire such nationality in accordance with the provisions of the internal law of the predecessor State, has the right to the nationality of at least one of the States concerned.

Here is a clear definition of precisely who has the right to a nationality, in exactly what circumstances, and specifically which states carry the corresponding obligation to confer nationality. Article 1 is that rarity in international human rights instruments relating to nationality. The reason for this clear elaboration, however, is unexceptional. As the

112. Convention on the Reduction of Statelessness *reprinted in* U.N. HUMAN RIGHTS INSTRUMENTS, *supra* note 32, at 616.

113. *See infra* text accompanying notes 128–130.

114. Inter-American Convention on Human Rights, *reprinted in* London School of Economics, Masters of Laws Programme, International Protection of Human Rights: International Human Rights Texts.

comment to the article shows, the right is being applied to a narrowed range of state actors:

Paragraph 1 can be viewed as an application of the general concept of the right to a nationality. . . . Despite the fact that the provisions of the Universal Declaration of Human Rights have given rise to different interpretations in the Commission, it seems that the existence of the right to a nationality is accepted in situations where it is possible to determine the State vis-a-vis which the person concerned would be entitled to present a claim for nationality. . . . In the context of State succession, such determination is feasible.¹¹⁵

Yet on closer reading, Article 1 does not precisely identify the specific state in which an obligation to confer nationality arises from the right to a nationality. State successions vary too much in form for a general article to apply in this manner. Although the unification of states results in only one state actor—and as such the obligation to confer nationality may be isolated in one state—in other types of state succession more than one state are involved, and the right to a nationality implicates corresponding obligations in more than one state. The person with a right to a nationality under Article 1 may have the right to obtain nationality from any number of successor states, or of the predecessor state, or conceivably, from some combination thereof.

Accordingly, the right embodied in paragraph 1 in the most general terms has to be given more concrete form The identification of the State which is under the obligation to grant such right depends upon the type of succession of States and the nature of the links that persons concerned may have with one or more States concerned.¹¹⁶

More precise identification is undertaken in the articles which correspond to the four categories of state succession, discussed above in greater detail,¹¹⁷ as well as to the related provisions for the right of option. The provisions applying the principle of effective link to the specific categories of state succession—although using terminology borrowed from the area of diplomatic protection—are in fact an application of concepts found in human rights law, namely the right to a nationality:

This approach is in harmony with the opinion voiced by some members of the [International Law] Commission that, if a right

115. Mikulka, *Third Report*, *supra* note 8, at 35–36 (citations omitted).

116. *Id.* at 36.

117. *See supra* text accompanying notes 33–41.

to nationality were recognized, there was first a need to identify a genuine link between the person and the State obligated to grant its nationality. In other words, the concept of an individual's right to a nationality within the context of State succession could be better pinpointed through the application of the criterion of genuine link."¹¹⁸

The human rights basis for the principle of effective nationality is thus made clearer.

One may wonder why the Commission's approach to the right of nationality in the context of state succession cannot be generalized beyond state successions to encompass all states. The individual right to a nationality does not implicate a greater number of states generally than it does in the specific context of state successions. The vast majority of people on this planet have effective links with only one state, and the individual right to nationality for such people can only give rise to a corresponding obligation of but one state to confer nationality. For most of humanity the right to a nationality and its corollary state obligation should be easy to pinpoint. It is true in an age of global travel many people have effective links to more than one state, many people are domiciled for long periods overseas, and the right to nationality for these individuals could involve the corollary obligations of more than one state. But rarely would the right to nationality involve more states than does the context of state successions. These state successions inherently involve more than one state, sometimes several states.

If the Commission has been able to develop techniques for identifying which of several states in a succession has the obligation to give effect to an individual's right of nationality, then no logical reason exists as to why the same techniques cannot be extended to states generally. The Special Rapporteur's following comment with regard to state succession can apply just as easily to all nationality cases:

[T]here is no reason to deny the 'right to a nationality' to most individuals just because for some others the identification of the State upon which [the corollary obligation to grant nationality] falls is more difficult. . . . [E]ven for those individuals who may have links to two or more States concerned, the identification of the above State need not be a real problem, provided that a right of choice (option) is recognized for such persons as part of their right to a nationality.¹¹⁹

118. Mikulka, *Third Report*, *supra* note 8, at 36.

119. *Id.* at 37.

Rather, the question is one of political will, not of undue legal or factual complexity.

Finally, paragraph 2 of Draft Article 1 applies the principle of Article 24 of the ICCPR, the right of every child to a nationality, and of Article 1 of the 1961 Convention on the Reduction of Statelessness. Paragraph 2 provides that:

2. If a child born after the date of the succession of States whose parent is [an individual who, on the date of the succession of States, had the nationality of the predecessor State] has not acquired the nationality of at least one of the States concerned, or that of a third State, such child has the right to acquire the nationality of the State concerned on whose territory . . . he or she was born.¹²⁰

The Special Rapporteur, in his comments to this article, indicated that this provision followed from an application of the ICCPR, the Declaration of the Rights of the Child, and Article 7 of the Convention on the Rights of the Child. The comments seem to imply that he views this particular provision as a declaration of *lex lata*, rather than an effort to develop *lex ferenda*. This is a significant marker in the evolution of the right to a nationality.

Paragraph 1 of Draft Article 1, however, setting forth the general right to a nationality, should probably not be viewed as declarative of existing law. The right to nationality is probably not part of customary international law, given the few international instruments which mention the right and the absence of uniform state practice and *opinio juris*. It is, nevertheless, one of many strands in international law bearing on the emerging right to an effective nationality, at least in the context of state succession.

2. The Duty to Avoid Statelessness

Closely related to the right of nationality is the duty to prevent statelessness. This duty may be conceived of as a negative duty arising from the right to nationality—although provisions aimed at reducing statelessness existed in international instruments prior to the introduction of the right to nationality in the Universal Declaration of Human Rights.

Statelessness is, simply put, the legal condition of being without a nationality.¹²¹ Given the importance that attaches to nationality, both

120. *Id.* at 10.

121. Article 1 of the 1954 Convention relating to the Status of Stateless Persons defines "stateless person" simply as someone "who is not considered as a national by any State un-

under international law and national law, being stateless effectively renders the individual concerned unable to enjoy the rights and protections afforded by law. The stateless person has therefore been referred to as a non-entity.¹²²

Statelessness is caused by the loss of nationality without the acquisition of another nationality, whether by deprivation or by the negative conflict of laws. Statelessness may also result at birth when the child fails to qualify for the nationality of any particular state. These two basic causes have been regulated differently by international law, with statelessness at birth receiving far more sympathy.

The 1930 Hague Convention was the first attempt to impose obligations on states with respect to statelessness under international law. It regulated a range of issues that frequently caused (and still cause) statelessness resulting from the negative conflict of law, including technical matters such as the issuance of expatriation permits (Article 7), matters related to marriage and divorce (Articles 8–11), matters related to the effect of naturalization on dependent children (Article 13), the birth of a child to unknown or stateless parents (Articles 14–15), the legitimization of “illegitimate” children (Article 16), and the adoption of children (Article 17). Most of these provisions stipulated that if the national laws of a state provided for the automatic loss of nationality upon, for example, expatriation, or marriage, such loss would be deemed conditional on the acquisition of an alternative nationality. In this regard, the Convention was very useful in harmonizing a great deal of conflicting nationality legislation, and its provisions are echoed today in the nationality acts of many countries,¹²³ which has no doubt contributed to the reduction of statelessness.

The Convention did set out two independent obligations on states which did not relate to technical conflicts of law. The first involved the obligation of a state to confer nationality on a child born on its territory whose parents were unknown.¹²⁴ The second, permissive in nature, related to children born to stateless parents: “Where the nationality of a State is not acquired automatically by reason of birth on its territory, a child born on the territory of that State of parents having no nationality, or of unknown nationality, *may* obtain the nationality of the said

der the operation of its law.”, *reprinted in* U.N. HUMAN RIGHTS INSTRUMENTS, *supra* note 32, vol. 1, pt. 2, at 625.

122. See Paul Weis, *The United Nations Convention on the Reduction of Statelessness, 1961*, 11 INT’L AND COMP. L.Q. 1073 (1972).

123. The provisions that related to the married women, moreover, were reiterated and strengthened by the 1957 Convention on the Nationality of Married Women, *reprinted in* U.N. HUMAN RIGHTS INSTRUMENTS, *supra* note 32, vol. 1, pt. 2, at 611.

124. 1930 Hague Convention, *supra* note 36, art. 14.

State."¹²⁵ A Protocol to the Convention stiffened the permissive language into a requirement in cases where the mother possessed the nationality of the said state and the father was without or with unknown nationality.¹²⁶ The Convention's provisions taken as a whole, however, did not prohibit the practice of denationalization or the deprivation of nationality, which were major causes of statelessness in the late 19th century and immediately following the First World War. Nor did the Convention relate directly to situations involving state succession, although its general obligations would apply to a state succession *mutatis mutandis*.

Article 15 of the Universal Declaration of Human Rights, which sets forth the right to a nationality, also included a provision related to statelessness: "No one shall be arbitrarily deprived of his nationality. . . ."¹²⁷

The other major international instrument relating to statelessness is the 1961 Convention on the Reduction of Statelessness.¹²⁸ Article 1(1) of the Convention provides that "[a] Contracting State shall grant its nationality to a person born in its territory who would otherwise be stateless."¹²⁹ This conferral must be done either at birth, by operation of law, or upon application. If the latter, the state may make the application subject to a number of procedural conditions. Article 1(3), though, requires the state to make the conferral of nationality at birth if the child is born in wedlock and the mother has the state's nationality, echoing the provision of the Protocol to the 1930 Convention. Article 4 slightly expands the category of persons covered by providing that "[a] Contracting State shall grant its nationality to a person, not born in the territory of a Contracting State, who would otherwise be stateless, if the nationality of one of his parents at the time of the person's birth was that of that State."¹³⁰ The state could make the conferral of nationality under this paragraph subject to several procedural conditions.

125. *Id.*, art. 15.

126. Protocol Relating to a Certain Case of Statelessness (April 12, 1930), 179 L.N.T.S. 115 (1937).

127. U.N. HUMAN RIGHTS INSTRUMENTS, *supra* note 32, at 4.

128. The 1954 Convention Relating to the Status of Stateless Persons is omitted from the discussion because it relates not so much to the obligation of a state to confer nationality, but rather to the treatment to be accorded by a state to stateless persons residing on its territory. The 1954 Convention is essentially an instrument designed to invest stateless persons with legal status and civil rights within the domestic jurisdiction of the state of residence, roughly in parallel with the provisions set forth for refugees by the 1951 Convention Relating to the Status of Refugees.

129. U.N. HUMAN RIGHTS INSTRUMENTS, *supra* note 32, at 273. Article 1 thus extends the principles contained in the 1930 Hague Convention and adopts its Protocol without the Protocol's conditions.

130. *Id.*

In addition to the foregoing obligations on states to confer nationality, the Convention for the first time prohibits states parties from depriving people of their nationality if the deprivation would result in statelessness.¹³¹ Unfortunately, however, this provision was made subject to a number of exceptions, some of them quite broad. It would, for example, permit a state party to subject a naturalized citizen to statelessness if that person maintained residence abroad for a period of time as specified by the state's nationality law, but not less than seven consecutive years.¹³² Moreover, if a child were born abroad, the state of nationality may, after the expiring of one year following the child's attaining majority age, subject that person to statelessness if that person were not at that time resident in the state. The Convention would also permit a state to subject a person to statelessness if that person obtained the state's nationality by misrepresentation or fraud. Finally, the Convention permits a state to subject a national to statelessness in various instances of failure to show proper allegiance: such as if the person rendered services to or received payments from another state in disregard of an express prohibition by the state of nationality; or has "conducted himself in a manner seriously prejudicial to the vital interests" of the state; or has "taken an oath, or made a formal declaration, of allegiance to another State, or given definite evidence of his determination to repudiate his allegiance to the Contracting State."¹³³

Article 9 places one additional limitation on a state's freedom to deprive people of their nationality: the principle of non-discrimination. The article provides that "[a] Contracting State may not deprive any person or group of persons of their nationality on racial, ethnic, religious or political grounds."¹³⁴ This provision reflects the intrusion of yet another human rights principle into the realm of state discretion with respect to nationality questions and applies *mutatis mutandis* to situations of state succession, as do the Convention's other provisions on arbitrary deprivation of nationality.

The 1961 Convention does impose one significant obligation on states parties in the specific context of state succession. Article 10 provides that:

1. Every treaty between Contracting States providing for the transfer of territory shall include provisions designed to secure that no person shall become stateless as a result of the transfer. A Contracting State shall use its best endeavours to secure that

131. See *id.* art. 8(1).

132. See *id.* art. 8(2)(a).

133. See *id.* art. 8(3)(a)(i)-(ii) and 8(3)(b).

134. See *id.* art. 9.

any such treaty made by it with a State which is not a Party to this Convention includes such provisions.

2. In the absence of such provisions a Contracting State to which territory is transferred or which otherwise acquires territory shall confer its nationality on such persons as would otherwise become stateless as a result of the transfer or acquisition.¹³⁵

States involved in a succession are thus under an affirmative duty of assuring that no statelessness results from the succession—provided that they have concluded a treaty for the transfer of territory.¹³⁶

In addition to the substantive obligations on states, the Convention sets forth a range of procedural and technical provisions designed to prevent negative conflicts of law that would result in statelessness—very much along the lines of the provisions set out in the 1930 Hague Convention, as discussed above. As in the case of the Hague Convention, the provisions of the 1961 Convention do not apply specifically to instances of state successions but are general principles that apply to successions *mutatis mutandis*. The most interesting, and novel, procedural provision is found in Article 11:

The Contracting States shall promote the establishment within the framework of the United Nations . . . of a body to which a person claiming the benefit of this Convention may apply for the examination of his claim and for assistance in presenting it to the appropriate authority.¹³⁷

Therein lay the seeds for an international body to exercise international protection on behalf of stateless persons. In 1975, when the Convention came into force, the General Assembly appointed the United Nations High Commissioner for Refugees to serve as the Article 11 body.¹³⁸ As a result, UNHCR has been involved in the context of

135. *See id.* art. 10.

136. This of course assumes that the predecessor state has ratified the 1961 Convention, and that the successor state has established its status as a party to the Convention. *See, e.g.*, 1978 Vienna Convention on Succession of States in Respect of Treaties, art. Art. 17(1), *reprinted in* BLACKSTONE'S INTERNATIONAL LAW DOCUMENTS, *supra* note 5, at 254.

137. U.N. HUMAN RIGHTS INSTRUMENTS, *supra* note 32, vol. 1, pt. 2, at 621.

138. G.A. Res. 3274, U.N. GAOR, 29th Sess., Agenda Item 99, U.N. Doc. A/RES/3274 (XXIX) (1975); G.A. Res. 31/36, U.N. GAOR, 31st Sess., Agenda item 78, U.N. Doc. A/RES/31/36 (1976). Many thought that the UNHCR, which exercises protection on behalf of stateless refugees under the 1951 Convention on the Status of Refugees, would be the most appropriate existing international agency to act in this capacity. The 1954 Protocol on the Status of Stateless Persons, moreover, had originally been intended as a Protocol to the 1951 Convention on the Status of Refugees. *See* Batchelor, *supra* note 20, at 244. The Ex-

several state successions, most visibly in the context of the former Soviet Union, the former Yugoslavia, and the former Czechoslovakia.¹³⁹ The UNHCR has also been requested by its Executive Committee, which consists of a body of states, to provide interested states with relevant technical and advisory services pertaining to the preparation and implementation of nationality legislation, and that to promote the prevention and reduction of statelessness through dissemination of information and the training of government officials.¹⁴⁰ As a result, UNHCR is taking a much more active role with states, particularly those involved in state successions, in assuring that they avoid creating statelessness and that they resolve cases of statelessness on their territory.

In its recent elaboration of principles related to nationality in the context of state succession, the International Law Commission clearly faced a relatively well-developed set of principles related to the prevention of statelessness. "The assumption that States concerned should be under the obligation to prevent statelessness was one of the basic premises on which the Working Group based its deliberations and received clear support in the Commission."¹⁴¹ Likewise in the General Assembly's Sixth Committee, "statelessness has . . . been generally recognized as a serious problem deserving the primary attention of the Commission."¹⁴² That the Draft Articles contain such a tepid affirmation of the duty to prevent statelessness is, therefore, surprising: "The States concerned are under the obligation to take all reasonable measures to avoid persons who, on the date of the succession of States, had the nationality of the predecessor State becoming stateless as a result of the said succession of States."¹⁴³

Aside from the poor draftmanship displayed—one supposes that states will be more than willing to "avoid persons [who are] becoming stateless" (and already tend to do so in practice)—the obligation to take "all reasonable measures" is an obligation without teeth. What constitutes "reasonable", and who makes that determination? If a successor state confronts stateless persons on its territory resulting from the succession, will it be obliged to confer nationality as a "reasonable measure"? Would its refusal to do so be considered "unreasonable"? Nothing in the Comment to the article provides guidance on this crucial

Executive Committee's Conclusion was subsequently confirmed by General Assembly Resolution 50/152, U.N. Doc. A/RES/50/152 (February 9, 1996).

139. See Blackman, *supra* note 16; *The Czech and Slovak Citizenship Laws and the Problem of Statelessness*, *supra* note 16.

140. U.N. Doc. A/AC.96/860 (October 23, 1995), ¶ 20.

141. Mikulka, *Third Report*, *supra* note 8, at 43 (citations omitted).

142. *Id.* at 44.

143. Draft Article 2, in Mikulka, *Third Report*, *supra* note 8, at 10.

point. Perhaps, given the obligatory language in the articles relating to each category of state succession,¹⁴⁴ the provision that states avoid statelessness is redundant: states would already be obliged to do more than merely avoid creating statelessness among nationals of the predecessor state; they would be obliged to confer their nationality on such nationals. Nevertheless, the provisions related to conferral of nationality are most probably in the realm of *lex ferenda*, whereas the duty to prevent statelessness is a principle with a stronger pedigree under international law, including obligatory language in instruments dating back nearly 70 years. The Commission has done the principle a disservice by casting it in such permissive language.

The duty to prevent statelessness as formulated in Article 2 only extends to nationals of the predecessor state on the date of the state succession. The state is under no obligation with respect to those people residing on the territory of the successor state who had been stateless in the predecessor state. The state, of course, has the discretion to confer nationality on such people but is not under an obligation to do so.¹⁴⁵

The draft articles also set out several other provisions related to the duty to prevent statelessness. These draft articles include the standard procedural device that renunciation of nationality as part of acquiring the nationality of another state not result in statelessness (Article 5, 8(2)), the application to state successions of the principle of no arbitrary deprivation of nationality (Article 13), and a novel obligation in Article 15 that:

States concerned are under the obligation to consult in order to identify any detrimental effects that may result from the succession of States with respect to the nationality of individuals and other related issues concerning their status and, as the case may be, to seek a solution of those problems through negotiations.¹⁴⁶

Regarding this latter obligation, the Special Rapporteur's report noted that "[d]uring the debate in the Sixth Committee, satisfaction was especially expressed with the Working Group's position that negotiations should be aimed, in particular, at the prevention of statelessness."¹⁴⁷ One wonders, therefore, why the "obligation to consult" set out in Article 15 did not specifically name the prevention of statelessness as one of the "detrimental effects" to be negotiated and resolved. Moreover, the question arises why the Draft Articles do not include a

144. See discussion *supra* pp. 18–21.

145. See O'CONNELL, *supra* note 29, at 517.

146. Mikulka, *Third Report*, *supra* note 8, at 14.

147. *Id.* at 96.

provision mirroring that of Article 10 in the 1961 Convention, which requires that every treaty between states providing for the transfer of territory "shall include provisions designed to secure that no person shall become stateless as a result of the transfer." Instead of an explicit provision aimed at avoiding statelessness, such as Article 10, which has been in force for twenty-two years, the Draft Articles have put forth an "obligation to consult" which does not even mention the prevention of statelessness as an object of consultation. This despite the Special Rapporteur's statement that "[t]he most effective measure that the States concerned may take is to conclude an agreement by virtue of which the occurrence of statelessness would be precluded."¹⁴⁸

Although a general right to a nationality has not become part of customary international law, the trend in international law suggests a strong presumption in favor of the prevention of statelessness in any change of nationality, including in a state succession. While a state may not have a positive obligation to confer its nationality on anyone, a state may have at least a negative duty not to create statelessness. This can be conceived both as a corollary to the emerging individual right to a nationality and as an independent obligation *ergo omnes*.

3. The Norm of Non-Discrimination

Non-discrimination, or the principle of equal treatment, is another principle of international human rights law that bears directly on the issue of nationality in the context of state succession.

The principle of non-discrimination is set forth in numerous international instruments, with antecedents dating back at least to the minority treaties regime following World War I.¹⁴⁹ The Universal Declaration of Human Rights contains a non-discrimination clause in Article 2: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."¹⁵⁰ Among the "rights . . . set forth in this Declaration"¹⁵¹ are included, in Article 15, the right to a nationality.

148. *Id.* at 42.

149. *See, e.g.*, *Minority Schools in Albania*, 1935 P.C.I.J. (ser. A/B) No. 64 (April 6, 1935) at 4-36. *See also* *Acquisition of Polish Nationality*, *supra* note 37, at 15 ("One of the first problems which presented itself in connection with the protection of minorities [following the creation of states subsequent to World War I] was that of preventing these [new states] from refusing their nationality, on racial, religious or linguistic grounds, to certain categories of persons, in spite of the link which effectively attached them to the territory allocated to one or other of these States").

150. Universal Declaration of Human Rights, *supra* note 108, art. 2.

151. *Id.*, art. 2, para. 1.

Article 9 of the 1961 Convention on the Reduction of Statelessness prohibits states parties from depriving “any person or group of persons of their nationality on racial, ethnic, religious or political grounds.”¹⁵² This provision, while not directly related to the conferral or withholding of nationality on a discriminatory basis, is at least a negative application of that principle to the context of statelessness. The duty to avoid statelessness may thus be said to encompass an element of non-discrimination.

The principle of non-discrimination is perhaps nowhere set out more famously than in Article 26 of the International Covenant on Civil and Political Rights:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.¹⁵³

On the face of Article 26, the provisions for equality and non-discrimination are not confined in application to the rights set forth in the Covenant. The provisions operate whenever the State exercises its legislative authority. The ICCPR Human Rights Committee adopted this view:

In the view of the Committee, article 26 does not merely duplicate the guarantee already provided for in article 2 but provides in itself an autonomous right. It prohibits discrimination in law or in fact in any field regulated and protected by public authorities. Article 26 is therefore concerned with the obligations imposed on States parties in regard to their legislation and the application thereof. Thus, when legislation is adopted by a State party, it must comply with the requirement of article 26 that its content should not be discriminatory. In other words, the application of the principle of non-discrimination contained in article 26 is not limited to those rights which are provided for in the Covenant.¹⁵⁴

152. Convention Relating to the Status of Refugees, *supra* note 32.

153. International Covenant on Civil and Political Rights, art. 26, *reprinted in* U.N. HUMAN RIGHTS INSTRUMENTS, *supra* note 32, at 28.

154. General Comment No. 18. Non-discrimination CCPR/C/21/Rev. 1/Add. 1. The Committee has, moreover, applied Article 26 in this manner in several individual communications. See *Broeks v. The Netherlands*, Communication No. 172/1984, *reprinted in* London School of Economics, Masters of Laws Programme, International Protection of Human

Article 26 of the ICCPR is the most significant non-discrimination provision in the context of nationality, because Article 26 applies autonomously to all legislative acts by states, including nationality legislation, and not merely those in furtherance of the other rights secured by the Covenant.

In the European context, Article 5 of the European Convention on Nationality includes a general prohibition of discrimination in matters of nationality, prohibiting states from adopting nationality legislation that makes distinctions on grounds of sex, religion, race, color or national or ethnic origin. Article 18 of the Convention also applies this provision to situations of state succession.¹⁵⁵

The emergence of the norm of non-discrimination in international law has been duly noted by the International Law Commission in its current deliberations: "During the Commission's debate . . . emphasis was placed upon the obligation of non-discrimination which international law imposes on all States and which is also applicable to nationality, including in the case of a succession of States."¹⁵⁶ Likewise, the representatives in the Sixth Committee "expressed their agreement with the Working Group's preliminary conclusion that States had the duty to refrain from applying discriminatory criteria, such as ethnicity, religion or language, in the granting or revoking of nationality in the context of State succession."¹⁵⁷ Accordingly, the Commission's Draft Articles on Nationality in relation to the Succession of States expressly prohibits states from applying discriminatory criteria in withdrawing or granting nationality or when providing for the right of option. Article 12 states that:

When withdrawing or granting their nationality, or when providing for the right of option, the States concerned shall not apply criteria based on ethnic, linguistic, religious or cultural

Rights: International Human Rights Texts 665, in which the Committee found The Netherlands in breach of Article 26 by denying women social security benefits on an equal basis as men, despite the fact that the ICCPR nowhere requires states to provide social security benefits:

Although article 26 requires that legislation should prohibit discrimination, it does not of itself contain any obligation with respect to the matters that may be provided for by legislation. Thus it does not, for example, require any State to enact legislation to provide for social security. However, when such legislation is adopted in the exercise of a State's sovereign power, then such legislation must comply with article 26 of the Covenant.

See also *Dannig v. The Netherlands*, Communication No. 180/1984; *Zwaan-de Vries v. The Netherlands*; and *Gueye v. France*, Communication No. 196/1985, *reprinted at id.*

155. See Mikulka, *Third Report*, *supra* note 8, at 90.

156. *Id.*

157. *Id.* at 91-92.

considerations if, by so doing, they would deny the persons concerned the right to retain or acquire a nationality or would deny those persons their right of option, to which such persons would otherwise be entitled.¹⁵⁸

Given the predominance of ethnic conflict involved in state successions, this provision is necessary and welcome. But one cannot help but express dismay at the qualifying language, which can be read to create broad and unjustifiable exceptions to the principle of non-discrimination. Article 12 appears to be intended to prohibit successor and predecessor states from discriminating in granting or withdrawing nationality when this would result in denying nationality to persons who would otherwise be entitled to the nationality of one or more of the states concerned. For example, if an individual has the right to nationality in state A and state B, the states concerned may not contrive to apply discriminatory criteria resulting in the denial of nationality in state A. The non-discrimination provision would prevent states in a succession from assigning a minority group to one state or another, whether to preserve ethnic purity or as part of some broader agreement.

Unfortunately, the ambiguous way in which the provision is drafted admits a reading that would permit precisely those scenarios. The problem is with the final modifying phrase in the conditional clause ("to which such persons would otherwise be entitled"): whether that phrase modifies the entire conditional clause ("if, by so doing, . . ."), or whether that phrase modifies only the third of the three conditions in the clause ("or would deny those persons their right of option."), which immediately precedes it, is not clear. As a whole, the provision only prohibits states from applying discriminatory nationality criteria when the provision would "deny the persons concerned the right to retain or acquire *a nationality* or would deny those persons their right of option, to which such persons would otherwise be entitled [emphasis added]."¹⁵⁹ If this final modifying phrase is restricted to the third condition, then the language as drafted would permit the states concerned to apply discriminatory criteria, so long as the persons concerned still had the right to retain or acquire *a nationality*, any nationality, in one of the states involved in the succession, and provided that the states did not "deny those persons their right of option, to which such persons would otherwise be entitled." According to this reading, state A and state B may contrive, by introducing discriminatory nationality criteria, to exclude members of an ethnic minority group from nationality in state A, so

158. *Id.* at 14.

159. *Id.*

long as these individuals still had the right to a *nationality* in state B, and so long as the states did not deny those persons a right of option to which they were entitled (a right which is largely illusory under the draft articles, as will be seen). This reading would, in effect, restrict the principle of non-discrimination to the narrow context of *de jure* statelessness: the non-discrimination provision prohibits states concerned from applying discriminatory criteria *only* when the result would be the denial of a *nationality*, or in other words, statelessness. This inadvertent circumscription of the non-discrimination principle could hold ominous practical implications for minority groups caught up in a state succession—precisely the issue that spurred urgent attention to strengthening the international law governing state succession.

The final phrase of the qualifying clause, now read restrictively to apply solely to the denial of the right of option, does not by itself provide a cure for this defect. The phrase would prohibit the application of discriminatory criteria if this would “deny the persons concerned . . . their right of option, to which such persons would otherwise be entitled.” Even using this restrictive reading, the provision might yet have been effective if persons concerned were widely and effectively entitled to the right of option. If this interpretation had been adopted the application of discriminatory nationality criteria would almost always operate to “deny the persons concerned . . . their right of option, to which such persons would otherwise be entitled.” But the right of option is not at all so broad or so effective. It is made voluntary by Article 7 and is limited to instances of statelessness: “[T]he legislation of a State concerned *should* provide for the right of option for the nationality of that State by any person concerned who has a genuine link with that State if the person would otherwise become stateless as a consequence of the succession of States.”¹⁶⁰ States should provide the right of option if statelessness would otherwise ensue, but the matter is purely discretionary under the draft articles.

The right of option is attached to two of the four specific categories of state succession—namely dissolution of a state and the separation of part of a state’s territory.¹⁶¹ But the right of option in those provisions would not necessarily operate within Article 12 to prevent a state from applying discriminatory criteria. The Special Rapporteur has made clear that those provisions belong to the realm of *lex ferenda*.¹⁶² As for the

160. *Id.* at 12 (emphasis added).

161. Articles 21 and 25, respectively.

162.

[T]he principles in Part II [relating to the four categories of state succession] are intended mainly to facilitate negotiations between the States concerned or to en-

second category mentioned, the transfer of a part of a state's territory, the right of option pertains only to the predecessor state; the successor state is under no obligation to extend a right of option and is not, under this restrictive reading of Article 12, constrained from applying discriminatory criteria within the meaning of Article 12. As for the other relevant category—that of transfer of a part of a state's territory—no provisions mandate the right of option. This right is regulated only by the general voluntary provision of Article 7.

In this way poor drafting has marred the draft article that applies the principle of non-discrimination in the context of state succession. Language from optional provisions of the draft articles, designated as *lex ferenda* by the ILC, has been used to qualify a principle that is broadly established as *lex lata* elsewhere under international law without such qualifications. A general non-discrimination principle has been narrowed down essentially to a provision that operates to avoid statelessness, but which does so on terms less satisfactory than those that already exist in the 1961 Convention on the Reduction of Statelessness. In light of the autonomous non-discrimination norm set forth in Article 26 of the ICCPR, one wonders why the Special Rapporteur has included any qualifying language at all on the non-discrimination principle in the context of state succession.

The autonomous principle of non-discrimination is particularly important in the context of state succession. A new state is by definition confronted with the issue of creating its identity, a process that is accomplished not only through its assertion of new borders but also, more importantly, through the definition of itself as a people. Indeed, state successions are frequently sparked by the determination of one group in a state to define their identity as against other groups in that state, often in negative and hateful terms of "us" and "them". Nationality legislation is central to this effort at self-definition, and recent state successions have been characterized by the effort of successor states to exclude a particular ethnic group from obtaining citizenship in the new state.¹⁶³

courage their lawmaking efforts. They offer the States concerned certain 'technical' solutions to the problems which arise. The States concerned can base their agreement on the solutions thus proposed. At the same time they can, in the course of their negotiations, find solutions that are more appropriate and better adapted to the needs of the specific situation, and, by agreement, base their respective laws on them.

Mikulka, *Third Report*, *supra* note 8, at 7. In other words, these provisions are optional principles to be used or ignored by the states concerned.

163. Putting aside the issue of whether the Baltic States may properly be considered a state succession, rather than the resumption of pre-existing sovereignty, the reinstatement by Estonia and Latvia of nationality laws that existed prior to the incorporation of those states into the Soviet Union, which included local language requirements for naturalization, had the

This type of exclusionary legislation would seem already to be prohibited by the Covenant's non-discrimination provision in Article 26. As one author noted:

Applied to nationality, the principle of non-discrimination has been interpreted to mean that every habitual or permanent resident's access to a new nationality in a case of state succession should be guaranteed regardless of race, language, religion, political or other opinion, national or social origin, etc. . . . When a change of sovereignty takes place, the habitual or permanent residents of the territory constitute an undifferentiated body in terms of legal link, as a result of which there are no 'permissible' grounds for distinguishing among them. A state must, simply, be held to the highest standards of international human rights regulation both treaty based, where applicable, and of a customary law nature. Among them the principle of non-discrimination figures most prominently.¹⁶⁴

One wonders, therefore, why the draft articles qualify the principle of non-discrimination, when the autonomous operation of Article 26 of the ICCPR appears already to preclude successor states from adopting nationality that is discriminatory on grounds of "race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."¹⁶⁵ The ILC's efforts in this regard are excessively cautious.

Particularly useful, in the context of state succession, is the international authorities' interpretation of the principle of non-discrimination as encompassing not only discriminatory intent, but also discriminatory effects. After all, the nationality legislation adopted by recent successor states have not clearly signalled an intent to exclude certain minorities from citizenship in the new state. Rather, states have adopted and applied objective criteria which they knew would disproportionately affect

effect (undoubtedly intentional) of excluding from citizenship the tens of thousands of Russian-speakers who had moved into the two countries during the course of the incorporation. The Czech Republic's nationality legislation introduced restrictions on the right of option, specifically a clean criminal record requirement, that had an overwhelmingly disproportionate effect on the country's Roma population, consigning them as Slovak nationals despite their birth or life-long residence on Czech territory. Similarly, Macedonia introduced a residency requirement that appears to be calculated to exclude the country's sizeable Albanian population.

164. Pejic, *supra* note 16, at 4-5.

165. International Covenant on Civil and Political Rights, art. 26, *reprinted in* U.N. HUMAN RIGHTS INSTRUMENTS, *supra* note 32, at 28.

the unwanted groups.¹⁶⁶ Although Article 26 of the ICCPR does not include a definition of discrimination, the term has been defined in other international instruments. Article 1 of the Convention on the Elimination of Discrimination Against Women defines discrimination as "any distinction, exclusion or restriction . . . which has *the effect or purpose* of impairing or nullifying the recognition, enjoyment or exercise . . . of human rights and fundamental freedoms in the political, economic, social, cultural, civil, or any other field."¹⁶⁷ Discrimination has also been defined in the Convention on the Elimination of Racial Discrimination,¹⁶⁸ the ILO Convention Concerning Discrimination in Respect of Employment and Occupation,¹⁶⁹ and the UNESCO Convention Against Discrimination in Education.¹⁷⁰ Three of the definitions define discrimination both in terms of intent and of effect; the I.L.O. Convention looks only to intent. Consequently, proof of discriminatory intent is not required under international law.¹⁷¹

The ICCPR Human Rights Committee has followed this approach by adopting the definition of discrimination set forth in the Convention on the Elimination of Racial Discrimination and the Convention on the Elimination of Discrimination Against Women:

While these conventions deal only with cases of discrimination on specific grounds, the Committee believes that the term 'discrimination' as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language religion, political or other opinion, national or social origin, property, birth or other status, and which has the *purpose*

166. Thus in the context of the dissolution of Czechoslovakia, in which virtually all Roma inhabitants of the Czech Republic were designated for historical reasons as Slovak nationals under the internal nationality of the former federal state, such internal nationality was adopted, at the insistence of the Czech Republic, as the primary criterion for conferring nationality. This resulted in the initial classification of most Roma living in the Czech Republic as Slovak nationals, including many whose parents and grandparents had been born on Czech soil. Although the right of option was widely available, the Czech nationality legislation placed a condition on the right of option—namely the clean criminal record requirement—which disproportionately affected the Roma population. This condition, combined with an extraordinarily complicated administrative procedure for exercising the right of option, effectively resulted in the exclusion from Czech citizenship of thousands of individual Roma, many of whom had been born on Czech territory or had been lifelong residents thereof.

167. U.N. HUMAN RIGHTS INSTRUMENTS, *supra* note 32, at 152.

168. *Id.* at 67.

169. *Id.* at 96–97.

170. *Id.* at 101–02.

171. See Anne F. Bajefsky, *The Principle of Equality or Non-Discrimination in International Law*, 11 HUM. RTS. L.J. 1, 9 (1990).

or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.¹⁷²

The principle of non-discrimination in international law, as set forth most prominently by Article 26 of the ICCPR, would therefore already prohibit the types of nationality legislation adopted by some successor states in the latest round of state successions in Europe, where the legislation is discriminatory in intent or in effect. The draft articles thus fall short of the international legal principles already applicable to nationality as it relates to state succession.

G. Conclusion: *The Emerging Right to an Effective Nationality in State Successions*

This paper has tried to draw together several strands of international legal principles bearing upon the conferral of nationality within the context of state succession. International law is evolving on this issue from the strictly negative function of delimiting the competence of states in their attribution of nationality toward the assigning of positive obligations on states to confer the nationality which accords with the genuine effective links of the persons concerned. The latter concept has been informed largely by the human rights principles which have developed over the past fifty years, which stress individual rights and positive obligations on states in their treatment of people. In particular, the right to a nationality, the duty to avoid statelessness, and the norm of non-discrimination have emerged to present affirmative obligations, or at least presumptions, on states in their granting and withdrawal of nationality.

These disparate but related principles of international law are becoming fused in the crucible of state succession. The view is increasingly expressed in international fora that states involved in a

172. U.N. HUMAN RIGHTS INSTRUMENTS, *supra* note 32. On the other hand, "[t]he right to equality before the law and to equal protection of the law without any discrimination does not make all differences of treatment discriminatory. A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26." *Zwaan-de Vries v. The Netherlands*, *id.* Indeed, the Inter-American Court of Human Rights has concluded that within a state's sovereignty over nationality questions is the authority to accord special treatment to aliens who would more easily and rapidly assimilate within the national community and identify its traditional beliefs, values and institutions. Proposed Amendments to the Naturalization provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84 of January 19, 1984, 79 I.L.R. 283, 301, para. 59. In the present context, however, measures aimed at excluding an ethnic group from citizenship would be based on neither reasonable nor objective criteria. Furthermore, that such measures would assist in identifying aliens who would be more amenable to becoming a national.

succession have the positive obligation to confer nationality on the individuals who possess genuine effective links to the territory in question. Put another way, there is an emerging right to an effective nationality in that state with which an individual possesses genuine and effective links—at least in the context of state successions, where the states bearing the correlative obligation to confer nationality may be isolated and the population concerned is an as yet undifferentiated body of individuals to whom the new state owes equal protection of the law and non-discrimination in the law's application. This emerging right to an effective nationality in the context of state succession is finding expression in several recent international instruments—including the European Convention on Nationality, the Declaration on the Consequences of State Succession for the Nationality of Natural Persons, and the Ottawa Declaration of the OSCE Parliamentary Assembly—as well as in the recently strengthened mandate of the UNHCR with respect to statelessness as the agency described in Article 11 of the 1961 Convention on the Reduction of Statelessness.

The International Law Commission's effort to develop and codify the law in this area is the most significant current development in this field. As has been seen from reflecting on the ILC's work to date, the legal principles of state succession with respect to the nationality of persons affected are developing very rapidly. The law in this area of state succession has quickly evolved to encompass international human rights norms. But the ILC has taken a cautious view of the legal trends in this area, perhaps too cautious in an exercise meant in part to develop progressively the *lex ferenda*. The Commission's deliberations have admittedly travelled considerable intellectual distance on the subject—from treating the topic as a matter thinly regulated by the international law of state succession and of diplomatic protection—to treating it as a matter directly affected by international human rights norms.

Nevertheless, the ILC has stopped short of drawing out the full implications of applicable human rights norms, particularly given how rapidly these norms have been evolving. It has taken a conservative view on the right to a nationality,¹⁷³ on the principle of effective nationality,¹⁷⁴ and especially on the implications of the principle of non-discrimination,¹⁷⁵ particularly as those norms relate to the obligation of successor states to grant nationality to some core of its population. The Commission has undercut the principle of non-discrimination through its clumsy use of qualifying language in Draft Article 12. Yet in practice

173. See, e.g., Mikulka, *Second Report*, *supra* note 8, ¶ 19.

174. See, e.g., *id.* ¶¶ 27–33, 44–47.

175. See *id.*, ¶¶ 31, 45–47.

one of the most serious issues arising out of recent state successions has been the use by successor states of nationality legislation to exclude unwanted ethnic minorities from becoming citizens—leaving large numbers of people disenfranchised and rendering them aliens vulnerable to expulsion measures.¹⁷⁶ International law has thus far proven wholly inadequate to address this specific issue. If the present ILC exercise of developing international law in this area is to be effective, a more robust approach to fleshing out the applicable legal norms is required.¹⁷⁷

Finally, “nationality in relation to state succession” is becoming legally indistinguishable from nationality issues generally. The distinction already had been presciently called into question by Professor Ian Brownlie over thirty years ago.¹⁷⁸ This distinction is becoming increasingly difficult to maintain as nationality issues come to be regulated by international human rights norms, which do not easily admit distinction: stateless people are stateless regardless of the fact of a state succession; discriminatory domestic nationality legislation is discriminatory whether or not it issues from a successor state. That the right to a nationality, as applied by the draft articles to instances of state succession, cannot also be applied to states generally is not logical. The distinction of state succession in this area will retain its significance less as a matter of logic and law than as a matter of fact, to which human rights norms will apply generally, and which will continue to spur the development of those norms in response to some of the disturbing episodes of state succession that will inevitably arise again.

These recent episodes illustrated the limits to the international legal system as it is currently configured and provoked the sobering rediscovery that nation-states have always been created through bloodshed.

176. These include, for example, the exclusionary citizenship laws adopted by most states of the former Yugoslavia (directed at various ethnic groups), by the Baltic states (directed at ethnic Russians), and by the Czech Republic (directed at ethnic Roma, a charge the Czech authorities continue implausibly to deny).

177. The Draft Articles to be discussed at the forty-ninth session of the ILC, which are currently unpublished, do indeed contain a stronger statement of legal principles and a much clearer recognition of specific duties on successor states with respect to nationality questions. As such it marks a departure from the previous discussions of the ILC and in the Sixth Committee. It will be interesting to see what form these Draft Articles will take following another round of discussions within the ILC and the Sixth Committee.

178. Ian Brownlie regarded the rubric of state succession as

one of convenience and a matter of convention . . . [N]o help is to be derived from the categories of the law of State succession. Indeed, in view of the rule that every State must have a determinate population (as an element of its statehood), and therefore nationality always has an international aspect, there is no very fundamental distinction between the issue of statehood and that of transfer of territory.

Brownlie, *supra* note 30, at 319.

Today's observer must surely wonder whether humankind will ever find the capacity to banish the bloody process by which its states are created. Faced with these seemingly intractable human habits, international lawyers may be tempted to despair of solutions, particularly in a legal regime in which the state—that creature of bloodshed—is the central actor. Yet if a solution is to be found it will surely entail an assertion of law against the continuum of force. With this objective in mind, international lawyers must continue to chip away at the ethnic conflict that fuels the death and birth of states, developing the legal mechanisms necessary to prevent ethnic tension from exploding into the destruction of human societies. This effort must involve, at the outset, imposing an affirmative duty on states, new and old, not to disenfranchise minorities through domestic nationality legislation.