
State succession and issues of nationality and statelessness

INETA ZIEMELE

9.1. Introduction

The wave of disappearances or dissolutions of states that took place in the 1990s, especially in Europe, created a vast problem for many of the nationals of these former states, specifically in relation to citizenship status, and left many persons stateless. This is not the first time that world history has witnessed such consequences of state succession. For instance, the period of decolonization in the 1960s and 1970s saw similar problems, with the emergence of many newly independent states.

The international community has shown concern as to the resolution of nationality problems in these situations and ‘such concerns have re-emerged in connection with recent cases of succession of States’.¹ Through the work of the International Law Commission (ILC) on the *Articles on Nationality in relation to the Succession of States* (‘Articles on Nationality’), an insight can be gained into what, more specifically, these concerns are. First of all, paragraph six of the accompanying commentary refers to the protection of human rights of persons whose nationality may be affected by a succession of states. Secondly, paragraph eight of the commentary points out the need for greater juridical security for states and for individuals. In many ways, the concerns remain classical in that where an individual does not have a nationality or the nationality status is uncertain, he or she is much less protected and more vulnerable to abuse. This reality comes up in different contexts, but can present an especially acute challenge in state succession situations. As such, the response of the international community to nationality in the specific state succession context is the focus of the present chapter.

¹ See Articles on Nationality of Natural Persons in relation to the Succession of States with commentaries, 1999, *Yearbook of the International Law Commission*, 1999, vol. II, Part Two, pp. 23–4.

The chapter begins by outlining how the succession of states has historically been viewed under international law and by commentators, presenting some of the major developments in thinking and debate in this field. Thereafter, an overview is provided of international law instruments that contain relevant rules and principles for the regulation of nationality in situations of state succession. I will attempt to highlight the concerns and the aims that international efforts in this area have tried to cater for. I will also look at the role that nationality was considered to play in situations of change of sovereignty and how the emergence of human rights has influenced this. Lastly, I will look more closely at the phenomenon of state succession by exploring the meaning and importance of different types of change of sovereignty over the territory.

For the purposes of this chapter I adopt the following description of the phenomenon of state succession, as provided for in Article 2 of the two Vienna Conventions on State Succession and as followed by all other legislative efforts, i.e., ‘Succession of States’ means the replacement of one state by another in the responsibility for the international relations of territory and assuming that such replacement generally falls within the framework of international law. I will also touch upon instances of replacement of one state by another, which are often described as transitions from illegal regime and where very special questions arise concerning both the qualification of this transition process and solutions to be adopted in relation to nationality. It is in this respect that the decolonization process is of interest and the way it was approached within the law of state succession.

9.2. The state succession paradigm

The key question underlying this chapter is whether international law sets forth rules or principles which may obligate the states concerned to solve, in one way or another, the nationality status of those individuals who may be affected by state succession. The views in the classical legal literature of the mid-twentieth century – coinciding with the major wave of decolonization – were divided. In Ian Brownlie’s analysis, ‘the population follows the change of sovereignty in matters of nationality’.² Manley Hudson argued that such a rule did not reflect state practice because nationality

² See I. Brownlie, ‘The Relations of Nationality in Public International Law’, *British Yearbook of International Law* 39 (1963), 320.

was not necessarily attributed to all inhabitants in these situations.³ Daniel O'Connell observed that: 'Undesirable as it may be that any person becomes 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'.⁴ He qualified this problem as 'one of the most difficult problems in the law of State succession'⁵ and called for codification or legislation at an international level.⁶

In fact, the topic of succession of states and governments was one of the topics that the ILC selected as early as its first session, in 1949, with a view to their codification. The question of nationality, which was covered by a broader title, namely, 'Status of the inhabitants', was the first part of the codification efforts under the title 'Succession in respect of matters other than treaties'. However, in view of the breadth and complexity of the topic it was later narrowed down to the economic aspects of succession. Nationality was not included.⁷ Subsequently, it took several more decades and one more wave of dissolutions and disappearances of states for the international community to react and adopt several documents containing some rules and principles relevant to the regulation of nationality in cases of succession.

The 1990s wave of dissolutions of states took place within a different legal and political reality, one which can be characterized by denser legal regulation in general and in the field of human rights in particular. Apart from the fact of more legal regulation, the nature of modern international law had seemingly changed. In the decolonization period of the 1960s and 1970s, the manner in which succession issues were addressed represented an attempt to part from international law's colonial past.⁸ The vindication of the 'clean slate' principle in the Vienna Conventions on

³ See M. Hudson, 'Nationality, Including Statelessness' *Yearbook of the International Law Commission* 2, Part Three (1952), 7.

⁴ See D. P. O'Connell, *State Succession in Municipal and International Law* vol. I (Cambridge University Press, 1967) 499, 503.

⁵ *Ibid.* ⁶ *Ibid.*

⁷ Vaclav Mikulka, Special Rapporteur on Succession of States with respect to Nationality/ Nationality in relation to the succession of States, 'First report on State succession and its impact on the nationality of natural and legal persons', A/CN.4/467, (Mikulka Report) paras. 5–6.

⁸ See A. Anghie, 'The Evolution of International Law: Colonial and Postcolonial Realities' *Third World Quarterly* 27(5) (2006), 739.

State Succession,⁹ even if recognizing a number of limitations, was seen as a proper functioning of self-determination and the sovereign equality of states, as reflected in the UN Charter.¹⁰ At the same time, international law has always been preoccupied with the search for legal continuity and has disliked the disruption represented by the 'clean slate' principle. It is therefore no surprise that the majority of commentators of the events in the 1990s were engaged in the search for arguments that would support the least possible disruption in legal relations. Mathew Craven notes in this regard that '[a]ll were agreed that the "new events" were profoundly different from the past, and the sense of contestation that had underpinned discussions during decolonization was almost entirely absent'.¹¹

Thus, the ILC, when working on the Articles on Nationality in the 1990s, took the following approach to the practice generated during the decolonization process:

Notwithstanding the fact that the Commission has duly taken into account the practice of States during the process of decolonization for the purpose of the elaboration of the provisions in Part I, it decided to limit the specific categories of succession dealt with in Part II to the following: transfer of part of the territory, unification of States, dissolution of a State and separation of part of the territory. It did not include in this Part a separate section on 'Newly independent States', as it believed that one of the above four sections would be applicable, *mutatis mutandis*, in any remaining case of decolonization in the future.¹²

The ILC considered that the general principles within the broad categories of state succession which it identified would apply to any possible newly independent state.

It is important to point out in this context that Article 3 of the Articles on Nationality makes a clarification of the scope of the Articles in that:

The present draft articles apply only to the effects of a succession of States occurring in conformity with international law and, in particular, with the principles of international law embodied in the Charter of the United Nations.

⁹ See Vienna Convention on Succession of States in Respect of Treaties, Vienna, 23 August 1978, in force 6 November 1996, 1978 UNTS 3; Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, Vienna, 18 April 1983, not yet in force, 22 ILM 308.

¹⁰ See M. Craven, *The Decolonization of International Law. State Succession and the Law of Treaties* (Oxford University Press, 2007), 263.

¹¹ *Ibid.*, 264.

¹² See Articles on Nationality, p. 23.

In the commentary to this article the ILC explains that ‘it was not incumbent upon it to study questions of nationality which could arise in situations such as illegal annexation of territory’.¹³ Nevertheless illegal territorial transfers also generate questions about the status of the populations. I submit that the wave of dissolutions of the 1990s embraced also situations that more properly fall within this category of illegal territorial regimes. However, it is true that since the codification work of the law of state succession has focused on ‘normal’ situations of state succession, and since the decolonization process received a somewhat separate approach, state practice and debate on cases outside this scope have shown to be rather inconsistent. This chapter will nevertheless make a few remarks in this regard in [section 9.4](#).

Given the foregoing developments, the question arises of what effect the evolution in rules and nature of international law has had with respect to the problem of statelessness and nationality in situations of state succession. The analysis of this question has to be situated within a broader analysis as to whether the traditional paradigm that considered nationality as a matter of state sovereignty and national identity is changing. In other words, is the individual rights paradigm meant to trump the discretionary power of states in this field and in relation to specific claims related to sovereignty, identity and security that successor states have raised in the past and continue to raise today?¹⁴ These questions will be dealt with as the chapter further explores the international law on nationality in the context of state succession.

9.3. The law of state succession and nationality

The acquisition and loss of nationality has traditionally been a matter for each state to regulate under municipal law and in accordance with its own interests and values. It follows that the main principle and point of departure for any discussion on nationality, is that ‘it is for each State to determine under its own laws who are its nationals’.¹⁵ However, over the past century, states have cooperated to agree international rules that would influence the content of these municipal laws, in order to address certain nationality questions (such as dual nationality and statelessness)

¹³ *Ibid.*, p. 27. ¹⁴ See also [Chapter 1](#) by Edwards in this volume.

¹⁵ Convention on Certain Questions Relating to the Conflict of Nationality Law, The Hague, 13 April 1930, in force 1 July 1937, 179 LNTS 89. See further [Chapter 1](#) by Edwards in this book.

or provide guidance for particular contexts in which the issue of nationality arises (such as the succession of states).

The initial approach to questions relating to nationality in situations of state succession was very much in line with the notion expressed above: that it is for the state concerned to deal with as a matter of sovereign interest. Early instruments did not delineate whose nationality would or should be affected by state succession, or how.¹⁶ Even when the decolonization process of the 1960s and 1970s raised new questions about the nationality and residence status of different groups of inhabitants in these territories, the issue was not legislated at an international level, giving preference to a case-by-case approach and the principle of self-determination in these cases.¹⁷ The 1961 Convention on the Reduction of Statelessness,¹⁸ which sought to limit the incidence of statelessness in various contexts, also takes a rather minimalist approach in relation to the regulation of nationality following state succession. Article 10 called for treaties that provide for the transfer of territory to include provisions ‘designed to secure that no person shall become stateless as a result of the transfer’ – an obligation of conduct only, rather than result. However, where states have failed to agree such provisions, the second paragraph of Article 10 does establish an explicit obligation for the state to which territory is transferred to ‘confer its nationality on such persons as would otherwise become stateless as a result of the transfer or acquisition’.¹⁹ This is one of the first norms laid down in a general instrument of international law for the regulation of nationality in the context of state succession.

Yet, it was only after the last major wave of state successions in the 1990s that international law really made strides in elaborating standards for the regulation of nationality in this context. These state successions affected Europe in particular and, as such, the Council of Europe took an active

¹⁶ For instance, the Latin American States’ Code of Private International Law adopted in 1928 (known as the Bustamante Code) acknowledged that, while the nationality of a population could be collectively affected by the transfer of sovereignty, it is for the new state to develop rules for determining who its nationals are on a case-by-case basis. See further I. Ziemele, *State Continuity and Nationality: The Baltic States and Russia* (Leiden: Martinus Nijhoff Publishers, 2005), 192–3.

¹⁷ R. Hofmann, ‘Denaturalization and Forced Exile’, in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* vol. III (Oxford University Press, 2012), 33.

¹⁸ Convention on the Reduction of Statelessness, New York, 30 August 1961, in force 13 December 1975, 989 UNTS 175.

¹⁹ See further on the content of the 1961 Statelessness Convention in relation to the avoidance of statelessness following state succession, L. E. van Waas, *Nationality Matters. Statelessness under International Law* (Antwerp/Oxford/Portland, OR: Intersentia, 2008), 130–4.

role in addressing the issues and problems that arose in this context. One of the key questions was that of the status of inhabitants in a number of former federal states.

In the following sections, the development of standards in the Council of Europe will therefore be discussed first, before turning to the work pursued at United Nations level. As the presentation of relevant instruments advances in this chapter, I will pay attention to the inter-play between the principles of the right to a nationality, avoidance of statelessness and the right of option and the criterion of genuine or effective link to the territory. Since the 1990s, normative efforts in the field of nationality and state succession were based on these principles and, most importantly, on the search for a proper balance between them.

9.3.1 *Council of Europe*

The first step taken in the Council of Europe was the adoption in 1980, by the European Commission for Democracy through Law (the Venice Commission), of a Declaration on the Consequences of State Succession for the Nationality of Natural Persons (hereafter the Venice Declaration).²⁰ The Venice Declaration does not express any particular view on the meaning of nationality and its function in relation to state succession, but a vision emerges from a set of principles that the Venice Commission identifies as relevant for its work in drafting the Declaration. The Venice Commission thus took the following principles as a backbone for its work:

- (a) the principle that questions of nationality fall within the national jurisdiction of each state;²¹
- (b) the principle that everyone has the right to a nationality, and
- (c) the principle that statelessness must be avoided.

Bearing these principles in mind and keeping in view state practice, the Venice Commission established that all the nationals of the predecessor state, who are genuinely resident in the transferred territory – the condition of attachment to this territory is of paramount importance – lose the

²⁰ See Declaration on the Consequences of State Succession for the Nationality of Natural Persons (and commentary), reproduced in Council of Europe, European Commission for Democracy through Law, 'Consequences of State Succession for Nationality' CDL-INF (97).

²¹ *Nationality Decrees issued in Tunis and Morocco*, PCIJ Advisory Opinion of 7 February 1923, Series B, No. 4, p. 24.

nationality of the predecessor state and acquire that of the successor state. It follows that the successor state may choose not to confer its nationality on those nationals of the predecessor state who do not have effective links with the transferred territory, or on those who are resident in the territory for reasons of public service, such as civil servants of the predecessor state, members of the armed forces, etc. The Commission also noted the importance of taking into consideration the wishes of the individuals concerned and thus discerns the importance of the right to opt where possible.

It is interesting to note that the Venice Commission speaks about genuine residence in the territory subject to succession events and specifies that individuals who belonged to the state apparatus of the predecessor state may not have such genuine connection with the territory. This position of the Commission indicates a certain view of nationality. I would submit that the Venice Commission did not abandon the view that generally nationality evidences certain loyalty or some sort of attachment to the political entity concerned. I believe that the genuine attachment to the territory should be seen in this context, which explains the view adopted by the Venice Commission that individuals loyal to the state apparatus of the predecessor state form a separate group and require special consideration when a new state determines its nationals. Here, one can recall one of the main premises that the ILC identified at the early stages of its work on Articles on Nationality. It was pointed out that:

The problem of nationality is closely linked to the phenomenon of population as one of the constitutive elements of the State, because '[i]f States are territorial entities, they are also aggregates of individuals'.²²

While statehood is contingent on the existence of at least some permanent population, nationality is contingent on decisions of the state. And, being in fact 'a manifestation of sovereignty, nationality is jealously guarded by States'.²³ It can be argued that the Venice Commission was especially mindful of the particular relationship between nationality and state sovereignty when adopting the Declaration.

In this regard, it is useful to look briefly at the meaning of nationality. Article 2 of the 1997 European Convention on Nationality (ECN) defines

²² See J. Crawford, *The Creation of States in International Law* (Oxford: Clarendon Press, 1979), 40.

²³ See J. M. M. Chan, 'The Right to a Nationality as a Human Right: The Current Trend Towards Recognition', *Human Rights Law Journal* 12 (1991), 1; Mikulka Report, para. 35.

nationality as 'the legal bond between a person and a State that does not indicate the person's ethnic origin'.²⁴ The Explanatory Report to the ECN states that 'It thus refers to a specific legal relationship between an individual and a State which is recognised by that State.'²⁵ It should be recalled that the International Court of Justice (ICJ) in the *Nottebohm* case defined nationality as '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'.²⁶ Even if the ECN does not refer to the sense of belonging aspect of nationality, as compared with the ICJ's approach, the fact is that the Explanatory Report to the ECN takes the *Nottebohm* case as its point of departure.²⁷ It is therefore necessary to understand the meaning of the description attributed by the Explanatory Report to the bond of nationality as being 'specific' and its reference to the *Nottebohm* judgment.

Neither the text of the ECN nor the Report explains directly what is specific about the bond of nationality. It might be suggested that the following elements, as they appear in the ECN and the Report, could be relevant nevertheless. First, it is noted that matters of nationality continue to fall within the domestic jurisdiction of each state. Second, it is admitted that states can give more preferential treatment to nationals of certain states and that this may not automatically lead to discrimination. There is also a reference to the need to set criteria for naturalization which may include the knowledge of a national language and the reflection that long-term immigrants are more likely to integrate into society with greater ease. These elements are sufficient to suggest that even if the ECN does not take up the *Nottebohm* definition word by word, in fact the questions of attachment, integration and belonging are part of the ECN's meaning of nationality. I would also suggest that the European approach, which leaves the choice of the nature of decisions and modalities of procedures for granting nationality in situations of state succession to states (see further on this below), is directly linked to the above-described understanding of nationality.

²⁴ European Convention on Nationality, Strasbourg, 6 November 1997, in force 1 March 2000, CETS No. 166.

²⁵ Council of Europe 'European Convention on Nationality and Explanatory Report', Council of Europe Doc. DIR/JUR (97)6 (14 May 1997), para. 23.

²⁶ *Nottebohm Case (Liechtenstein v. Guatemala)*; *Second Phase*, International Court of Justice (ICJ), 6 April 1955, ICJ Reports 1955, p. 23.

²⁷ See ECN Explanatory Report, para. 22.

Article 18 of the ECN specifically addresses nationality in situations of state succession. The Article lists several criteria which a successor state has to take into account when either 'granting or retaining' nationality. These are: (1) the genuine and effective link of a person with the state; (2) the habitual residence of a person at the time of state succession; (3) the will of a person; and (4) the territorial origin of a person. The drafters of the ECN admitted that in their understanding a person having a 'substantial connection' with the successor state should be entitled to acquire the nationality of that state through the procedures determined by the state. Their main concern was to develop such guidelines for states that would enable them to tackle the problem of statelessness, as the case may be, in situations of state succession.²⁸ It is true that the ECN does not pronounce on the character of domestic procedures for granting of nationality, nor does it explain the use of the term 'grant'. However, it is noted that the rule of law shall govern any such procedures, with the overall aim in mind of protecting former nationals of the predecessor state from being placed in a vulnerable position in view of state succession.²⁹

The Council of Europe continued to be seized with this matter and adopted a new specific Convention on the Avoidance of Statelessness in relation to State Succession in 2006. The reason for the special focus on a problem of statelessness following state succession was that the ECN was considered to be too general, while other international instruments addressing the issue of statelessness in state succession situations were not binding and the problem in Europe persisted. The key Articles are 5 and 6, which determine responsibility of a successor state and predecessor state respectively. Article 5 states:

1. A successor State shall grant its nationality to persons who, at the time of the State succession, had the nationality of the predecessor State, and who have or would become stateless as a result of the State succession if at that time:
 - a. they were habitually resident in the territory which has become territory of the successor State, or
 - b. they were not habitually resident in any State concerned but had an appropriate connection with the successor State.
2. For the purpose of paragraph 1, sub-paragraph b, an appropriate connection includes *inter alia*:
 - a. a legal bond to a territorial unit of a predecessor State which has become territory of the successor State;

²⁸ Ziemele, *State Continuity and Nationality*, 216–18.

²⁹ Article 18 of the ECN.

- b. birth on the territory which has become territory of the successor State;
- c. last habitual residence on the territory of the predecessor State which has become territory of the successor State.

Article 6 provides that ‘A predecessor State shall not withdraw its nationality from its nationals who have not acquired the nationality of a successor State and who would otherwise become stateless as a result of the State succession.’

The drafters used the opportunity to explain their choice concerning the term ‘grant of nationality’ in this context. In relation to Article 5 they explained that:

It should be noted that the Convention does not prescribe any specific way in which States should grant their nationality since this belongs to the domain of the internal law of the States concerned. Thus, the State can either grant its nationality on the basis of a voluntary act of the person concerned or automatically (*ex lege*).³⁰

This is an important clarification since it is now clear that under the European standards, successor states can either pass legislation accepting the population concerned as nationals of the state *ex lege* or provide for registration or naturalization procedures. These choices are left to states with a view to accommodating specific circumstances and the particular historical role that nationality plays in each society. In that sense, state sovereignty in the matter is preserved. It is also true that whatever procedures new states see as more appropriate for their purposes, they should not be such as to render meaningless the right of individuals concerned to have their nationality status determined.

In this context, one should also keep in mind the question of choice and option. Article 7 of the 2006 Convention addresses the situation where the person might have the right to acquire more than one nationality. It is in this situation that the person’s wishes should be respected. However, it is hard to imagine that a person’s wish to remain stateless should also be respected in view of the fundamental principles on which the two European Conventions rely, that is, the existence of the right to a nationality as linked to the obligation to avoid statelessness and the obligation to prevent persons from becoming stateless in state succession situations. Therefore, it should be concluded that once the state has put

³⁰ See Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession, CETS No. 200, Explanatory report, para.19.

in place reasonable procedures for granting nationality, the persons concerned should make use of them.

Certainly, the development of relevant procedures and their use by the persons concerned is to be seen as part of the identification, or even building, of a genuine link between the individual and the state and as falling within the sovereignty of states. Overall, the European approach seems to be mindful of the role that nationality plays traditionally as a means to determine a particular polity. In other words, citizenship encompasses the formal acknowledgment of membership in a political community and reflects its particular identity. The European rules developed in relation to state succession respect this context.

9.3.2 *International Law Commission*

While the Council of Europe has been very active in adopting international instruments dealing with the problem of nationality in situations of state succession, the United Nations began its work even earlier. The question was included on the agenda of the ILC in 1993. The General Assembly adopted resolution 55/153 on Nationality of Natural Persons in relation to the Succession of States on 12 December 2000, which included the Articles developed by the ILC as an annex.

In the Articles, the ILC proposes a presumption of nationality for those individuals having a habitual residence in the territory affected by the succession of states.³¹ However, in the debate in the Sixth Committee, loyalty or genuine link as known from the traditional discussion on nationality were mentioned as necessary to qualify for nationality. In this context, the ILC clarified that presumption of change of nationality was only a point of departure aimed at avoiding the problem of statelessness pending the adoption of domestic legislation on nationality. The decision in a specific case was to be taken in accordance with other applicable rules and principles and in view of the different modes of state succession.³²

Nevertheless, it is true that the ILC at some level meant to depart from the effective link, as understood in *Nottebohm*, when identifying the criteria for the attribution of nationality in succession situations and that it essentially meant to avoid statelessness. One can witness a friction in

³¹ Article 5.

³² For an overview of the debate in the ILC and the Sixth Committee, see Ziemele, *State Continuity*, 212–13.

the drafting efforts, including the government comments. On the one hand, the agenda was guided by human rights considerations, which have matured since the adoption of the Vienna Conventions on State Succession. On the other hand, there were the classical considerations along the lines of the clean slate approach that pertain to events of state succession and that in matters of nationality appear to have even more appeal because of the nature of nationality as the evidence of belonging to a particular state.

Despite the sensitive nature of the topic, the ILC showed admirable efforts in *de lege ferenda* development of the rules. Interestingly, it maintained the position that the rules and principles may differ depending on the mode of state succession and they did not include in the scope of the Articles those situations that have arisen contrary to rules of international law (see Article 3). As such, the ILC confirmed that different rules and considerations apply in situations of territorial changes contrary to international law.

It can be noted that the ILC decided to distinguish between the obligation to attribute and the acquisition of nationality through naturalization, since it considered that in the former case the discretion of a successor state is more limited. This should be contrasted with the European approach described above, which leaves the choice of the methods of granting nationality, including naturalization, to the states.

As for specific principles, Part II of the ILC's Articles on Nationality lists the following for the purposes of attribution of nationality: (1) habitual residence, (2) appropriate legal connection with one of the constituent units of the predecessor state, or (3) birth in the territory. If none of these criteria would be applicable the ILC introduced a saving criterion of 'any other appropriate connection'³³ to the territory. It was explained that:

the Commission chooses to describe the link which must exist between the persons concerned and a particular State concerned by means of the expression 'appropriate connection', which should be interpreted in a broader sense than the notion of 'genuine link'. The reason for this terminological choice is the paramount importance attached by the Commission to the prevention of statelessness, which, in this particular case, supersedes the strict requirement of an effective nationality.³⁴

³³ See Articles on Nationality of Natural Persons in relation to the Succession of States with commentaries, para. 9, p. 34.

³⁴ *Ibid.*

The identification of these criteria caused heated debates within the ILC and the Sixth Committee. The ILC was criticized for having given a preference to the *jus soli* principle. There was also a criticism in relation to habitual residence criterion, even where the person has moved in the meantime, as a ground for the obligation to attribute nationality. Not all governments agreed with such a broad approach.³⁵

Another important feature in the drafting carried out by the ILC was the attempt to identify the role and proper place for wishes of an individual in general or in the form of the right to choose. The ILC attributes to this issue a dual meaning. On the one hand, it is very clear that an individual's wish plays a role only where there are at least two states to which the individual might be linked. On the other hand, the ILC understands the right of option also in another sense as the right of an otherwise stateless person to apply or ask for a nationality of a state with which he or she may have a connection. Even if the ILC admits that the attribution of such a role to an individual in matters of nationality is controversial, it is here that the right of option might change the traditional approach in matters of nationality and state succession. The difficulties that the ILC encountered in the drafting of the Articles should not be underestimated. It is also true that for the time being we operate with Draft Articles that have not been turned into a binding instrument.³⁶ The commentary to the Articles shows the immense variety of state practice during all the relevant historical events of territorial transfers. One could have argued, for example, that the decolonization process indeed had a very specific character and choices taken by these newly independent states concerning the status of their inhabitants may be accepted as special, without giving rise to any binding precedent. However, it should not escape attention that the wave of dissolutions of the 1990s in Central and Eastern Europe, in relation to which the complexities of the decolonization process were not directly relevant, continued to raise similar difficulties and objections by successor states.

9.3.3 Conclusion

There is no question that the issue of nationality, including its political character, and the value attributed to it by states and national societies, makes the development of any international regulation complicated

³⁵ See Ziemele, *State Continuity*, 214.

³⁶ Document: A/RES/63/118 UN General Assembly Resolution on Nationality of natural persons in relation to the succession of States in which the General Assembly invites States to submit comments on advisability of elaborating such a legal instrument.

in general and in situations of territorial change in particular. For new states, challenges posed by the tasks of state and identity building may overshadow the interests of certain individuals or even groups of individuals. In this context, the European approach leaving a considerable space for states to choose and design appropriate procedures for granting nationality might appear a more pragmatic and sensible one.

9.4. Particular challenges posed by state succession for nationality

The foregoing sections elaborate on the overall doctrinal and legal developments relating to nationality in the context of state succession. Some significant conceptual issues remain and warrant further attention. The first of these relates to the influence of the type of state succession on the approach to nationality adopted by states or prescribed by international law. Another, more fundamental challenge is posed in this respect where there is a transition from an illegal regime. Finally, there is the specific question of state obligations with regard to the avoidance of statelessness in the event of state succession and how this has been given content in international law. These questions will be explored below.

9.4.1 *Status first or relevance of types of state succession*

There is no unanimity on the question of whether different rules need to be designed for each type of state succession. I submit that this is linked to a more fundamental disagreement in the international law debate as to whether international law contains, or should contain, the necessary tools to determine the continuity or disruption of a state.³⁷ The wisdom and practicability of distinguishing between state continuity and state succession was already rather strongly criticized in the 1960s by O'Connell³⁸ who 'complained that legal doctrine on succession had been derailed by the predominance of Hegelian conceptions of the State, which, from the time of Bluntschli onwards, had placed the issue of identity at the forefront'.³⁹ In O'Connell's view the question should be whether existing obligations survive the change and the nature and degree of change should be examined with a view to preserving obligations. However, there are scholars who

³⁷ For a good overview of ideas that have led different scholars to adopt their different positions, see Craven, *The Decolonization of International Law*, 75–80.

³⁸ O'Connell, *State Succession in Municipal and International Law*.

³⁹ Craven, *The Decolonization of International Law*, 75.

take a different view and state practice largely confirms that one cannot completely ignore the issue of identity, which remains important for the political realities of the communities concerned.⁴⁰ Indeed, many aspects of the modern state have evolved since Hegelian times. At the same time, as the process of decolonization showed and recent dissolutions of states in Europe confirmed, the self-perception of new states or the societies they represent as to their past, culture and values remains of key importance. Not all these interests are or can be captured by international law.

At the same time, international law does not easily accept the disappearance of states. After all, it is a state-centred legal system.⁴¹ Even where elements of a state are affected or changed, it may well be that the same legal personality, even if within a smaller territory, is preserved and in the relations with new states one considers the former as a predecessor state. In view of various examples of state practice, jurists have even distinguished between two situations of the preservation of the same legal personality: (a) state continuity, despite a change in circumstances, and (b) state identity, without continuity, where a state is revived after temporary extinction. My attempt at a general definition of state continuity is as follows: state continuity describes the continuity or identity of states as legal persons in international law, subject to relevant claims and recognition of those claims determined, in principle, in accordance with the applicable international law rules or procedures when statehood is at issue.⁴²

The importance of knowing whether a state has ceased to exist or continues in some form has been emphasized by James Crawford, who noted that ‘the whole of the law of State succession depends on this distinction’.⁴³ The debate on state continuity and state succession and the importance of the issue of identity of a community is, moreover, of direct relevance for the understanding of the stakes when drafting rules regarding nationality in situations of state succession. This is discussed below.

9.4.1.1 Predecessor state continues to exist

The ILC has always taken a nuanced approach to questions of status, both in drafting the general conventions on state succession as well as

⁴⁰ *Ibid.*, 77, with reference to Koskenniemi’s analysis.

⁴¹ See I. Ziemele, ‘Extinction of States’, in R Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, vol. IX (Oxford University Press, 2012), 558.

⁴² Ziemele, *State Continuity*, 118.

⁴³ See Crawford, *The Creation of States in International Law*, 400.

the Articles on Nationality. Part II of the Articles sets out specific rules or principles in relation to each mode of state succession. The 2006 European Convention only distinguishes between obligations of a successor state and a predecessor state, stating in the Explanatory Report that it uses the term of state succession to cover all modes. According to the European Convention there are important obligations on the successor state while the predecessor state should be obliged either to withdraw or not to withdraw nationality depending on decisions taken by the successor state. The Report states:

The provision is applicable only in situations where the predecessor State continues to exist after State succession, as is the case after transfer and separation of part or parts of the territory. In cases where the predecessor State has disappeared or is not a State Party to the Convention, only the previous article concerning the responsibility of the successor State shall apply.⁴⁴

In my view it makes an important difference whether the predecessor state survives a change, even if in a diminished form.

Indeed, territorial changes do not lead to automatic change of nationality. This change 'gives the successor State the right under customary international law to confer its nationality upon the people which are permanently resident in the territory concerned'.⁴⁵ In other words, the question was not whether the population loses nationality of the predecessor state. The question was whether people acquire new nationality *ex lege* or in any other way. Previously I pointed out the difference in approaches between the ILC Articles and the European conventions where the former build their solutions on presumption of nationality in combination with the criterion of any connection while the latter leaves such choices to states.

Andreas Zimmermann observed in relation to changes that affected Eastern Europe that practice continued to vary depending on the type of succession. In cases of transfer of territory, no clear evidence in support of an automatic change of nationality could be obtained, but some examples enabled the acknowledgment that residents were normally granted nationality. He also suggested that, in situations where a predecessor state continued to exist, nationality was looked at from a totally

⁴⁴ See Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession, CETS No. 200, Explanatory report, para. 29.

⁴⁵ See O. Dörr, 'Nationality', in R Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, vol VII (Oxford University Press, 2012), 500.

different viewpoint.⁴⁶ For instance, in such situations the right to opt for nationality becomes more evident because it can be presumed that the predecessor state has no reason to withdraw nationality from nationals even if their place of residence has remained outside the territory of the state. At the same time, a successor state might be more persuaded to grant nationality to such residents.

In other words, the dynamics of the relationships and interests are different where at least in some form a predecessor state remains. Certainly, the existence of the predecessor state is also an element in the successor states' self-identification process. One should be reminded of the position adopted by the Venice Commission, which considered that there are evident categories of citizens of a predecessor state, such as civil servants and soldiers, who by any a priori measure are more linked to that state even if they may continue to reside in the territory of a successor state. For example, upon liberation of Timor-Leste from Indonesia the latter carried out a massive evacuation of about 250,000 persons among whom 70,000 were military personnel while the rest were those who Indonesia had encouraged to move to East Timor during Indonesia's rule.⁴⁷

This example more properly belongs to the context of territorial changes as a consequence of a violation of international law discussed below. However, the Timor-Leste case exemplifies the considerations that may emerge and are legitimate in situations where the predecessor state remains and concerns the issue of genuine link with a state, either the predecessor or the successor. Indeed, there may be legitimate public interests in terms of security and peaceful development of a new state or liberated state to negotiate individual solutions for some groups of individuals with closer ties to the predecessor state or to accept the fact that they remain in the territory as foreign citizens.⁴⁸

⁴⁶ See A. Zimmermann, 'State Succession and the Nationality of Natural Persons – Facts and Possible Codification', in P. M. Eisemann and M. Koskenniemi (eds.), *La succession d'Etats: la codification à l'épreuve des faits/State Succession: Codifications tested against the Facts* (The Hague, Boston, MA, London: Martinus Nijhoff Publishers, 2000), 660.

⁴⁷ See Y. Ronen, *Transition from Illegal Regimes under International Law* (Cambridge University Press, 2011), 229.

⁴⁸ Negotiations between states come up as a means to solve difficult nationality questions. For example, the Constitutional Court of Slovenia noted in one of its judgments addressing the problem of 'erased' former Yugoslav citizens that a proposal had been made in the legislative process in 1991 for a special provision regulating the temporary situation of former Socialist Federal Republic of Yugoslavia (SFRY) citizens living in Slovenia who had not applied for Slovenian citizenship. The legislature had maintained that their situation should not be regulated by the Aliens Act but rather by an agreement between the successor states to the former SFRY.

9.4.1.2 Predecessor state disappears

Given the intrinsic link between a particular state and nationality, as noted above, the situation that arises when a previous state disappears is a complex one since the death of the state is likely to bring about the death of its nationality. Thus, when a predecessor state disappears and there are two or more successor states which have emerged in the territory concerned, different dynamics underlie the search for solutions in general and in relation to nationality of the populations. State practice in Europe shows that groups of individuals have had serious difficulties while their nationality status was determined by successor states.

The European Court of Human Rights has had to deal with this problem in relation to the so-called erased persons in Slovenia, i.e., former Socialist Federal Republic of Yugoslavia (SFRY) citizens who were legally residing in Slovenia but failed to undertake procedures that independent Slovenia established for the purposes of identifying its nationals. As a result, they were erased from the population register. It took more than a decade of various legal steps to regularize the status of these persons, demonstrating the political character and tension that the process of granting nationality in new states may entail.⁴⁹ It is interesting to note that in the context of dissolution of the SFRY the main criterion for granting nationality in the successor states was citizenship in the different republics and legal residence. Specifically there was no reference to Yugoslav citizenship of Serbia. Despite this, Serbia, for a while, continued to claim that it had inherited the rights of the former Yugoslavia and in other words continued its international legal personality. Serbia's position on continuity was not accepted with the effect that no expectations arose in relation to a possible predecessor state as a back-up option.⁵⁰

Indeed, as the dissolution of the SFRY and similar examples show in situations where there are only new states within the territory of the former state, the identification of nationals can be a particularly difficult

⁴⁹ For the problem of erased permanent residents in Slovenia following the dissolution of Yugoslavia, see *Kurič v. Slovenia* (App. No. 26828/06), judgment of 13 July 2010. The Grand Chamber judgment in the case was rendered on 26 June 2012.

⁵⁰ The dissolution of Yugoslavia has been examined extensively in legal literature. See e.g. P. Radan, *The Break-up of Yugoslavia and International Law* (London: Routledge, 2002); R. Mullerson, 'The Continuity and Succession of States by Reference to the Former USSR and Yugoslavia' *International and Comparative Law Quarterly* 42 (1993), 473–93. For comments on the effects of complete dissolution of states in relation to nationality, see A. Zimmermann, 'State Succession on Other Matters than Treaties', in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, vol. IX (Oxford University Press, 2012), 542.

process. Thus, it is no surprise that the 2006 European Convention puts an emphasis on the obligation of successor states while the ILC Articles attempt to propose that any connection is sufficient so as to not leave individuals stateless. In such a context negotiations between successor states and cooperation are of extreme importance. There are examples, such as the re-unification of Germany or dissolution of Czechoslovakia, where state succession was carried out through negotiating relevant agreements in general or on specific issues. However, this practice shows that even this approach does not answer all questions.⁵¹

In view of the above discussion concerning the close link between nationality and the identity of a particular community, it should be emphasized that where a predecessor state has ceased to exist and there are two or more new states in its territory, pressures and interests are somewhat different for the new states. This does not mean that they do not have their particular vision of who they are and how different they are from other states or that no conflicting and competing interests with other successor states exist. Nevertheless, the drafting efforts of relevant rules for attributing or granting nationality in such situations seem to place a particular emphasis on their obligation to grant nationality if the residents in their territory had some nationality status before.

The main question in this section was whether status or type of succession is important for appropriate choices regarding the nationality status of individuals. The reply, in my view, is in the affirmative. This is not least because the nationality issue more than any other issue touches upon the identity of the state concerned. To a great extent all drafting efforts of international rules seem to recognize that.

9.4.2 *Transition from illegal regimes*

It was noted earlier that situations where the changes affecting states and populations originate in an unlawful context have altogether been left out by the ILC Articles. The starting point, therefore, on whether there are any relevant rules affecting regulation of nationality is clearly different. As indeed has been argued, where a transition takes place from an illegal regime or an unlawful occupation, serious questions are raised with respect to the validity of the presence of communities who have been

⁵¹ For example, upon dissolution of Czechoslovakia the question of nationality continued to generate problems. See G. de La Pradelle, 'The Effects of New Nationality Rules on the Status of Individuals', in B. Stern (ed.), *Dissolution, Continuation and Succession in Eastern Europe* (The Hague: Martinus Nijhoff Publishers, 1998), 112–13.

moved into the territory under such regimes. Even the right to remain of persons belonging to such communities may be challenged.⁵²

This is linked to the obligation under international law of non-recognition of illegal regimes. While the exact scope of this obligation is subject to discussion and evolution, the importance of the obligation as such has been emphasized by the ICJ in the *Namibia Advisory Opinion* and more recently in the *Israeli Wall Advisory Opinion*.⁵³ The distinction between lawful and unlawful territorial changes has a whole body of international law addressing it and it is in this respect that, in my view, the distinction between the two broad categories known as state continuity and state succession might be particularly necessary if the maxim *ex injuria non oritur jus*⁵⁴ applies where unlawful territorial changes are affected.⁵⁵

Even in the context of transitioning from illegal regimes some doubts have been voiced as to the legal importance of distinction between state continuity and state succession. A number of eminent international lawyers have taken the view that the proposition of such a distinction has always been essentially politically motivated.⁵⁶ However, it has to be admitted that several elements that are present in the conceptual discussion about state succession should be carefully reassessed when dealing with illegal territorial changes.

It was noted earlier that one of the main aims and concerns following state succession is the preservation of legal relations in force at both international and national levels. In a way, even if the special nature of nationality is recognized, the main concern in the field of state succession and nationality is the same: how to ensure that people do not lose nationality as a result of state transformations. As noted above, in the area of nationality this interest may have to be balanced against another fundamental interest of building or preserving the identity of a community. In many ways the drafting of the two Vienna Conventions on State Succession when confronted with the decolonization process already showed the conflicting agendas of continuity supporters versus self-determination and identity

⁵² See Ronen, *Transition from Illegal Regimes under International Law*, 186 *et seq.*

⁵³ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 ICJ Reports 16; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Advisory Opinion, 9 July 2004.

⁵⁴ A principle of international law such that an unjust act cannot have legal consequences. Stern, *Dissolution, Continuation and Succession in Eastern Europe*.

⁵⁵ The Namibia Advisory Opinion in pronouncing on the obligation of non-recognition of the unlawful presence of South Africa in fact follows this maxim. See Opinion, para. 133(2).

⁵⁶ For a more recent analysis, see Craven, *The Decolonization of International Law*, 69, 77.

supporters. However, there was another dimension in the decolonization process that is relevant when discussing illegal territorial changes or transition from illegal regimes. As with illegal territorial changes which have been effected against important rules of international law (e.g. the prohibition of the use of force between states) the whole decolonization process stems from the understanding that the modern world order can no longer tolerate colonialism. In such contexts, the question is quite simple: is it just and fair to insist that something that applies to a people and has been imposed against their free will, or even by force, should remain in force?

Matthew Craven sums it up very well in stating that the drafting of the Vienna Convention shows in relation to the decolonization process 'the obvious inability of those involved in codification, to deal with the problem of succession in a way that did not draw within it questions of identity and status'.⁵⁷ The reason was the existence of the two already mentioned conflicting understandings of the purpose of the codification of the law of state succession. The first view considered that the primary aim is the maintenance of the integrity of international legal relations and thus advocated the continuity of, for example, treaty obligations of colonial powers in the territories undergoing transformation. The second view emphasized the fundamental role that self-determination played in the transformation from a colonial past and the right of newly independent states to decide for themselves what might or might not be in their interests. Craven points out that the fact that non-self-governing territories had been attributed a separate legal personality under UN law clearly contributed to the approach that dealt differently with the status and rights of colonial peoples.⁵⁸ In other words, this was important for the self-identification process of these entities.

In the end, the formulation of a clean-slate rule in the sense of the right to choose what would be inherited and what would not was the only possible compromise. Craven sums up as follows:

What Waldock achieved was to capture, within a framework of a single convention, two largely inconsistent ideas: the first being that anti-colonial self-determination was a process, which had marked, in revolutionary manner, the end of international law's surrogate relationship with colonialism and which has also ushered in a new era in which the ideals laid down in the United Nations Charter (sovereign equality, self-determination, and equal rights) could be brought into fruition. Against

⁵⁷ *Ibid.*, 202. ⁵⁸ *Ibid.*, 203.

this, however, was the idea that the revolution had also been managed in a way that effectively denied its incipient radicalism.⁵⁹

The wave of dissolutions in Central and Eastern Europe also brought about liberation of some territories from illegal regimes. The restoration of the independence of the Baltic States from illegal Soviet domination should be seen, more properly, in the context of the decolonization processes of the 1960s and 1970s and certainly as falling clearly within the area of transition from illegal regimes.⁶⁰ Craven connected the 1960s and 1970s debate with the state succession wave of the 1990s as follows:

Certainly the events themselves were radical enough, certainly also they seemed to usher in a new era of international law, but there was no 'baggage' so to speak ... There was no reason to insist upon the radically disruptive nature of demise ... Only in case of the Baltic States were arguments about discontinuity prevalent, ... a vindication of a pre-existent international legal status that had been submerged by the violence of occupation.⁶¹

The nationality solutions adopted in the Baltic States and, in particular, in Estonia and Latvia gained considerable attention in international practices and academic writings.⁶² The cases merit more attention for the purposes of this chapter. It should first be pointed out that many academic writings and international reports on the Baltic States have an apparent difficulty in determining from which international law perspective the cases should be examined. A few studies examine the questions of nationality in the context of the doctrine of state continuity as applied in relation to Russia and the Baltic States.

A recent study on transition from illegal regimes under international law by Yaël Ronen takes as case studies the examples of the Baltic States, Rhodesia, Namibia, the South African homeland states, Timor-Leste and the Turkish Republic of Northern Cyprus. Ronen explains that 'the main criterion for choosing these cases was that an obligation of non-recognition in response to a violation of international law was (or is) generally recognized to exist in their respect, and that a policy of non-recognition

⁵⁹ *Ibid.*, 263.

⁶⁰ For similar argument, see R. Müllerson, *International Law, Rights and Politics* (London: Routledge, 1994) 64–5.

⁶¹ Craven, *The Decolonization of International Law*, 264.

⁶² See among others and with further references therein, A. Lottmann, 'No Direction Home: Nationalism and Statelessness in the Baltics' *Texas International Law Journal* 45 (2008), 503 *et seq.*

was instituted in practice'.⁶³ This is a perfectly valid choice and indeed an important study to be carried out in international law, that is, on the effects of a non-recognition obligation in different matters of life, including nationality solutions following transitions. One can also notice how the examples naturally link the decolonization process with the unlawful use of force.

As for nationality solutions, the author observes that: 'the post-transition regime is not obliged to recognize the validity of formal status granted by the illegal regime'⁶⁴ to the settlers. 'This status is invalid *ab initio* under international law, and even if it merits partial or ad hoc recognition under the Namibia exception, the general law of State succession does not enable it to transcend the change of regime'.⁶⁵ In other words, where events might be said to fall broadly within a state succession situation, but stem from the withdrawal of an illegal regime from the territory concerned, the solutions for nationality issues are different and the codification efforts on state succession have left such situations outside their scope.

In view of the overall unlawfulness of such situations, there have been good reasons to argue that part of a population moved into such territories had no right to remain there. It could be submitted that this population is more linked to the parting regime rather than the new or restored regime in the territory concerned. However, Ronen concludes that, based on the empirical study of these cases, in such situations states have had great difficulties in making this population leave their territories. She says:

although the implantation of settlers is one of the most visible and objectionable practices of illegal regimes, it is not an easily reversible one. Once the settler community is established in the territory, international human rights law places various obstacles on its removal, insofar as that removal is pursued on the basis of illegality of the previous regime rather than on the personal conduct of individual settlers.⁶⁶

Since the ILC expressly removed illegal territorial situations from its consideration, presumption of nationality and other considerations relevant in typical situations of state succession do not apply. Indeed, as the example of the Cyprus conflict shows, an individual approach and the negotiation of possible special solutions in view of specific political realities of each case are more appropriate, since typically such situations also involve serious security considerations.

⁶³ Ronen, *Transition from Illegal Regimes under International Law*, 10.

⁶⁴ *Ibid.*, 242. ⁶⁵ *Ibid.* ⁶⁶ *Ibid.*, 244.

Nevertheless, solutions advocated in relation to Soviet-era settlers in Estonia and Latvia, while certainly justified by reference to such human rights as the prohibition of discrimination and of expulsion en masse, continue to raise questions as to the right balance in relation to, on the one hand, the obligation of non-recognition of an illegal regime and its consequences and, on the other hand, the legitimate human rights concerns of individuals who may have developed stronger links with the territory of these two states than any other territory.⁶⁷ In other words, the scope and borders of the application of the principles stemming from the ICJ's judgment in *Namibia* in the situation of the Baltic States is still under discussion. Undoubtedly, solutions that are (or will be) accepted will constitute important precedents in international law for some time to come.

At this stage the following summary of principles followed or rather advocated approaches may be provided. Third states seem to have accepted, as have human rights monitoring bodies, albeit reluctantly, that one cannot say that the Baltic States were under an obligation to grant nationality to Soviet settlers *ex lege*. It should also be pointed out that during the early 1990s, the question of the predecessor state, i.e., the Russian Federation and its obligations in relation to Soviet citizens, was not properly addressed. There remains a certain confusion as to whether Soviet settlers are stateless and, if so, who has caused it.⁶⁸ Nevertheless, it should be recognized that all actors pushed for and the Baltic States accepted, offering the option of naturalization to Soviet-era settlers. This could become an important clarification of the scope of the non-recognition rule, as applicable in situations where the illegal regime has managed to persist for a considerable period of time. The question remains whether this approach will be followed in other comparable situations.

Undoubtedly, stability in legal relations has been the underlying concern in relation to various state succession events, including the ones of

⁶⁷ See European Court of Human Rights, *Slivenko v. Latvia*, Application 48321/99, 9 July 2003; US Court of Appeals, Sixth Circuit *Stserba v. Holder*, 20 May 2011. For analysis of the *Slivenko* case in the light of applicable rules of international law on the prohibition of use of force, see I. Ziemele, 'Case-law of the European Court of Human Rights and Integrity of International Law', in R. Huesa Vinaixa and K. Wellens (eds.) *L'influence des sources sur l'unité et la fragmentation du droit international*, (Brussels: Bruylant, 2006), 199–210.

⁶⁸ The High Court of Ireland rendered an important judgment on this issue, accepting that Soviet-era settlers who did not acquire nationality of Latvia or other former republics of the USSR cannot be considered as stateless for the purposes of Irish law in view of the status and rights granted to them under Latvian law. Judgment of Mr. Justice Cooke in the case *Spila v. Minister of Justice*, IEHC 336, 31 July 2012.

the 1990s. This concern is equally relevant in addressing the question of the nationality of the populations concerned. On the other hand, since the establishment of the United Nations and the emergence of the idea of a new global order, there has always been unease about the preservation of those legal relations whose legitimate nature was highly questionable. In other words, the conflict between the old maxims of *ex factis jus oritur*⁶⁹ and *ex injuria non jus oritur* has become more evident with the thinking that the United Nations era strives to promote. It is evident that human rights have stepped into the midst of this conflict and somehow delineate the use of both maxims.

There is one more aspect that is particularly important in identifying the most appropriate nationality solutions in situations of territorial changes emanating in the context of violations of international law. This aspect has to do with the nation-building challenges that such entities face. The search for a strong identity for a community that has been oppressed is a huge challenge. Nationality legislation plays a particular role in determining the identity of the community as it recovers from oppression. State practice shows that nation-building is one area that, while concerned with the continuity of legal relations, has been seriously underestimated.⁷⁰

9.4.3 *Obligation to avoid statelessness*

The entire drafting process of the ILC Articles shows that the ILC was prepared to strongly support the principle that statelessness should be avoided in matters of nationality in situations of territorial change. The drafters of the ECN pointed out too that '[t]here is no reason why persons who had the nationality of the predecessor State should suddenly be left without any nationality following State succession'.⁷¹ It is for this reason that the ECN in Article 18(1) provides that the granting of nationality has to comply with the principle of the avoidance of statelessness and other human rights principles. The Explanatory Report emphasizes that 'all these principles mentioned in paragraph 1 have significance in general, although the primary concern is the avoidance of statelessness'.⁷²

⁶⁹ This rival principle asserts that the existence of facts creates law, regardless of whether the act from which these facts stem was just or unjust.

⁷⁰ See D. Thürer, 'Failing States', in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, vol. III (Oxford University Press, 2012), 1092.

⁷¹ ECN Explanatory Report, para. 12.

⁷² See Council of Europe 'European Convention on Nationality and Explanatory Report', Council of Europe Doc. DIR/JUR (97)6 (14 May 1997), para. 116.

It has been argued, however, that, despite numerous legislative efforts, it is difficult to prove *opinion juris* for the existence of a customary international law obligation to avoid statelessness. The obligation applies to states parties in relevant treaties.⁷³ Zimmermann argues that state practice shows a joint obligation of successor states to avoid statelessness, which points towards the obligation to harmonize domestic laws and to negotiate relevant solutions, while leaving a great number of details unsettled.⁷⁴ One may add here that exceptionally in relation to children, the obligation not to render them stateless combined with the acknowledged right to acquire nationality at birth can be considered as having achieved the necessary *opinion juris* under customary international law and most likely applies irrespective of the lawful or unlawful context of territorial change.⁷⁵ In other words, there is no question that strong recommendations and pressures exist within the international legal process requiring successor states to adopt such nationality laws that would avoid creating statelessness. On the other hand, it is difficult to say that there is a clear obligation as a matter of customary international law to avoid statelessness in each and every case. It is thus that in situations where as a result of state succession new states emerge, it is difficult to identify such a new state as having the obligation to grant nationality to everyone in the territory. Many different considerations come into play, as has been outlined above.

9.5. Conclusions

The concept of nationality or citizenship has evolved over the centuries along with the evolution of political thought. It has become more inclusive, and more democratic. Nevertheless, it continues to denote a particular legal relationship and involves elements of attachment to, and interest in, a particular polity.

The fact that societies continue to organize themselves in the form of states rather than any other type of organization continues to provide the basis for the importance of nationality of the particular polity. Even the European Union with its EU citizenship has not done away with the

⁷³ See Dörr, 'Nationality', 498.

⁷⁴ Zimmermann, 'State Succession on Other Matters than Treaties', 542.

⁷⁵ See I. Ziemele, 'Article 7: The Right to Birth Registration, Name and Nationality, and the Right to Know and Be cared for by Parents', in A. Alen *et al.* (eds.) *A Commentary on the United Nations Convention on the Rights of the Child* (Leiden: Martinus Nijhoff Publishers, 2007), 25.

state system. It is true that in the long run EU citizenship has the potential to consolidate a stronger European identity and build some sort of a European demos among those living in Europe, but whether it will or should replace national identities and nationalities is another issue.⁷⁶

Thus the view on nationality as traditionally defined by a republican position, which emphasizes that ‘only citizens who are present in the polity can govern themselves by participating in making its laws’ remains the backbone of how we view and organize ourselves.⁷⁷ It is true that today this premise has been surrounded by other modalities concerning non-resident citizens or aliens residing in the territory of a state.⁷⁸ Clearly the development of human rights has had an impact on the classical republican position on nationality and its role within the territory of a state. Nevertheless, broadly speaking these developments have not changed the function of nationality and even its sentimental value. On the contrary, even human rights law emphasizes the importance of nationality status and points out the shortcomings in terms of enjoyment of rights for individuals who do not have a nationality. Human rights law does not challenge the traditional way of organizing societies in states and thus the role of nationality. It is in fact dependent on states and their ability to enforce human rights rules.

In situations of state succession when states and societies go through dramatic, often painful, transformations and breakdown of their legal and economic systems, there should be space for states concerned to consolidate themselves, albeit in a non-discriminatory manner since in the long term it is a strong state that better protects individuals within its territory.⁷⁹ Clearly, the state succession context, since it involves the creation of new states and determination of new political communities, brings out more sharply the conflicting interests that directly affect decisions regarding nationality.

It is fair to say that, within the last twenty years, the number of adopted instruments of different legal characters, all attempting to regulate or set some principles in relation to nationality solutions in situations of state

⁷⁶ See D. Graus, ‘Legitimate Political Rule Without a State? An Analysis of Joseph H. H. Weiler’s Justification of the Legitimacy of the European Union Qua Non-Statehood’, RECON Online Working Paper 2008/12.

⁷⁷ See R. Bauböck, ‘Expansive Citizenship: Voting beyond Territory and Membership’, *Political Science and Politics* 38(4) (October 2005), 685.

⁷⁸ *Ibid.*, at 683.

⁷⁹ For an overview on some problems of so-called failed or failing states, see Thürer, ‘Failing States’, 1088.

succession, is impressive. That attests to the pressure that situations of state succession create for individuals and the concern that the problems associated with state succession have raised with different international actors. It is interesting to note that following the adoption of the ECN, which has received a fairly high number of ratifications,⁸⁰ the Council of Europe still considered it necessary to draft the Convention on the Avoidance of Statelessness in relation to State Succession adopted in 2006. However, the first six years of its existence only saw six ratifications among forty-seven Council of Europe member states. Among those six only two states are new successor states, namely Moldova and Montenegro.

Of course, one should be cautious in drawing conclusions from the above facts. It may well be that the European states consider that state succession is no longer on the agenda in Europe. Nevertheless, it is undeniable, as argued above, that there are not many rules with relevant obligations in customary international law which would apply to successor states and limit their discretion to grant or not grant nationality. Therefore, such attempts to draft treaties have persisted. Undoubtedly, the ILC Articles have taken the most comprehensive and nuanced approach, trying to identify relevant criteria that would differentiate, depending on the type of state succession, which state should attribute nationality to which individuals. The fact remains that despite multiple reaffirmations of the right to nationality as a human right in different international law and human rights texts, the right to a specific nationality has not evolved. As noted, children form an exception, while at the level of state practice problems remain even in relation to children and their nationality status.⁸¹

This brings me back to the questions raised at the outset of this chapter. I would maintain that in examining this area of law, it is essential to keep in mind that the population, as identified through the link of nationality, is an essential element of a state. New states might be particularly concerned about the strengthening of their state institutions, including nationality and identity. There should be, and there is in fact, in international law, space for the states to do so. Interestingly, the difficulty arises in situations when there is more than one state with likely responsibility for a group of individuals. It is in this context that all available rules, principles and presumptions should be used to identify the primary responsible state and the necessary exceptions to the main approach. It is along these lines that the ILC admitted that 'one cannot consider each

⁸⁰ Out of forty-seven member states twenty have ratified the Convention.

⁸¹ Ziemele, 'Article 7', 25.

particular State concerned to be responsible for all cases of statelessness resulting from the succession'.⁸² As an example, the ILC discusses the type of state succession where the predecessor state is preserved and where, for various reasons, it may be argued that the retention of nationality for those outside the territory may lead to relationships without appropriate connection on a large scale. At the same time, on a case-by-case basis, such retention of nationality might be necessary.

There is no doubt that the latest codification efforts within the law of state succession have placed the rights and interests of individuals at the centre of their concern. However, this has not changed the classical paradigm, which accepts that in nationality matters states also have a lot to say. The main difficulty of the law of state succession is that interests of individuals and of states may be particularly vital in such situations and in relation to nationality in particular – and may not always be the same.

Questions to guide discussion

1. Why is state succession such a challenging context for questions of nationality?
2. Why has the Council of Europe taken such an interest in developing standards for the regulation of nationality in the context of state succession and what role has been given to the notion of 'appropriate connection' within these standards?
3. What different considerations are raised by the continued existence versus the disappearance of the predecessor state for the regulation of nationality?
4. To what extent is the stability of international relations the basic premise for the rules relating to state succession? How is this reconciled with the interests of individuals, especially those with no other claim to nationality?
5. Is there any obligation to avoid statelessness in state succession contexts? What issues are at play?
6. What might be the significance of a transition from an illegal regime for the application of international standards relating to nationality in the context of state succession? Do you think that such circumstances should influence the way in which states interpret and apply these international standards?

⁸² See Commentary under Article 4, Report of the International Law Commission (1999), Chapter IV.