TREATMENT OF ALIENS IN INTERNATIONAL LAW: APPLICABLE RULES WHEN CITIZENS BECOME ALIENS*

Abstract
State succession as a global phenomenal is not peculiar to a region or sub region. State succession issues can result from transfer of territory, unification, separation, among others; the entities are classified as the predecessor and the successor States. The predecessor state maintains the existing legal personality while the successor state is the new state emerging from the existing one. The case of succession is a critical aspect that can nullify the legal personality of an individual where a new state is created, or emerges; the nationals of the new state may become aliens in the former state. What then happens to the person who is now an alien in the former state and their property? How should such a person be treated while he/she remains in the old state and their property? These are issues discussed in this chapter. The authors adopted the doctrinal approach, employing secondary sources such as books, journals articles, reports and internet sources. The experience of the authors also contributed. This study further discussed the position of international law for the treatment of aliens.

Keywords: Aliens, Citizens, International Law, Statelessness, State Succession

1. Introduction

The State is regarded as the primary subject of international law. The criteria for Statehood in international law are fairly settled. The Montevideo Convention on the Rights and Duties of States concluded by the Organisation of American States[1] is commonly accepted as reflecting, in general terms, the requirement of statehood in Customary International Law. According to the Convention[2] 'the State as a person in international law should possess the following qualifications: (a) a permanent population (b) a defined territory (c) government and (d) capacity to enter into relation with other States'. However, according to Brownlie, there is some evidence however, to suggest that these requirements which are concerned solely with the effectiveness of the entity claiming the rights and duties of a State, have recently been supplemented by others-independence achieved (i) in accordance with the principle of self-determination and (ii) not in pursuance of racist policies of a political or moral characters.[3]

In history, States rise and States fall, others go into extinction by various ways and means. State succession is a concept that is used to describe a definitive replacement of one State by another with regard to the exercise of sovereignty and in accordance with international law. Events that may lead to such dismemberment of an existing State include' secession, war and decolonization, merger of existing states into a new one, annexation and cessation. According to Brownlie, *succession is predicated upon the permanent displacement of sovereign power and thus temporary changes resulting from belligerent occupation, agency, or grant of exclusive possession of territory by treaty are excluded*.[4] The object of State succession is often controversial and uncertain. In most cases, issues relating to it are not susceptible to any generalized theory. There is evidence in state practice suggesting that each case is determined by its own peculiar circumstances and special agreements concluded for dealing with consequences arising therefrom. Nevertheless, the International Law Commission (ILC) have attempted a codification of rules on state succession in two separate Conventions, namely, the 1978 Convention on Succession of States in respect of Treaties and the 1983 Convention on the Succession of States in Respect of Property, Archives and Debts, with little success. Both treaties received a limited number of ratifications on the grounds that it departed from established international law on the subject. However, it has been rightly observed that the international transformation of the last two decades, have revealed a tendency to rely on them or at least some of their provisions to resolve controversial questions for want of a better articulation of legal principles involved[5].

One of the fundamental issues that may arise following State succession is the question of nationality which the present study intends to deal with extensively. This is because in such cases, nationals of the new State who were hitherto its citizens may become aliens. In customary international law, the terms and conditions for the award of nationality and loss of it is essentially within the domestic jurisdiction of States. Thus, nationality questions are determined by domestic law. However, as earlier stated, problem may arise in the context of state succession which may *ipso facto* culminate in questions relating to the loss of nationality, statelessness and the treatment of aliens and their property in international law. This is because nationality changes with sovereignty. Furthermore,

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[1]Montevedio Convention 1933. (1934) 165 L.N Ts 19.
[2] Art. 1. ibid
[3] See: D.J. Harris, *Cases and Materials in International Law* (6th ed.). London: Sweet & Maxwell. P.99
[4] James Crawford (ed.) *Browlie's Principles of International Law*, Oxford: Oxford University Press (OUP) 423.
[5] See: Brownlie, Ibid p. 424. The 1978 Convention is in force with 22 parties and the latter not in force. See also: Gabcikovo-Nagymaros Project (*Hungary v Slovakia*) ICJ Rep 1979. P.7 70-72. ILC

it may entail the violation of rights contained in international human rights instruments. This study attempts to unravel the controversies surrounding the changes in nationality of a person also identity the circumstance(s) under which a person can becomes an alien under International law and what happens to the property of such a person in the former state? This study will make recommendations.

2. Conceptualization

State Succession

The concept of state succession is not entirely new in international law. There are different grounds for which state succession can take place within the confines of law. State succession is 'the replacement of one state by another in the responsibility for the international relations of territory'[6]. This definition will be the thrust of this research because of the broad base of the definition which shows that state succession can come up through several dimensions and not a straight jacketed thing.[7] State succession comes into existence as a result of the aforementioned replacement of one state by another in the responsibility for the international relations of territory such as (but not limited to) succession, or a state which has acquired territory as a result of state succession. Further to this, a 'predecessor state' is a state which has lost territory. If a predecessor state is however recognized as possessing the same international legal personality despite a change in its circumstances caused by succession, it is a 'continuator state'. Emanuelli[8] on his part argues that changes which affect the territory of a State give rise to so called succession of States. The transfer of the territory known in 1803 as Louisiana, by France to the United States of America, illustrates both the concept of State succession, as well as some of the issues arising from it, the issue of alien. The rules governing State succession in international law have evolved overtime. However, the solutions which were developed two hundred years ago to deal with most of the issues arising from the Louisiana Purchase seem to be in line with current rules governing the transfer of a territory from one State to another.

Devaney,[9]gives a taxonomy under which state succession can take place. The first category is transfer of territory, where one part or parts of the territory of a state is transferred to become part of the territory of another state.[10] The second category is that of unification, which contains within it two sub-categories: (i) incorporation of one state into another, and (ii) mergers of multiple states to form one. The third and fourth categories are the separation of one part of a state to form another state or states and the complete dissolution of a state into a new state or states. Succession happens on the basis of a rupture in the international legal personality of a pre-existing state or states. The law of state succession regulates the legal effects of a change in responsibility for international relations of a territory caused by the transfer of territory, unification, separation and so on. The concern is that the predecessor state continues to maintain her legal personality since the status in international law has not changed but the new state has acquired new identity in international law. Likewise, the nationals of the predecessor state maintained their identity but the new state whose nationals are predecessor state are now termed as alien in the former state.

One of the fundamental issues that arise from succession of states is what consequence(s) arise for inhabitants of the predecessor as successor state. As earlier noted, inhabitants of the predecessor state retain their nationality while other inhabiting or having a link with the successor state becomes aliens in the predecessor State, though it is not as simple as that, and more often than note, such issues may be settled by agreement if becomes necessary to determine who the alien is actually an alien.

An Alien

An alien is a person who is not a citizen or national of the State concerned. Article 2 of the *Principles Concerning Admission and Treatment of Aliens,* 25 February 1961 clearly stipulates that:

> (1) The admission of aliens into a State shall be at the discretion of that State. (2) A State may- (i) prescribe conditions for entry of aliens into its territory- (ii) except in special circumstances, refuse admission into its territory of aliens who do not possess travel documents to its satisfaction-, (iii) make a distinction between aliens seeking admission for temporary sojourn and aliens seeking

[6] See also the decision of the arbitral tribunal in the Case concerning the Arbitral Award of 31 July 1989 (*Guinea-Bissau v. Senegal*) 83 ILR 31

[7]Matthew Craven, 'The Problem of State Succession and the Identity of States under International Law' (1998) 9 *EJIL* 142;

[8]Emanuelli, C., State Succession, Then and Now, With Special Reference to the Louisiana Purchase (1803) 63 *La. L. Rev.* (2003) Available at: https://digitalcommons.law.lsu.edu/lalrev/vol63/iss4/19

[9] James G. Devaney, What Happens Next? The Law of State Succession *GCILS Working Paper Series* No. 6, November, 2020. Glasgow Centre for International Law & Security

[10] The transfer of Alaska from Russia to the USA in 1867, the 1871 transfer of Alsace and Lorraine to Germany from France, the treaties of Versailles in 1919 (Versailles, St German and Trianon) and treaties following World War II concerning Germany, Italy Romania and Hungary. See also the transfer of West New Guinea from the Netherlands in 1962, the transfer of Walvis Bay from South Africa to Namibia in 1994 among others.

admission for permanent residence in its territory; and (iv) restrict or prohibit temporarily the entry into its territory of all or any class of aliens in its national or public interest[11].

It follows that an alien is a non-national of a state. In customary international law, States have a general freedom to determine questions relating to the acquisition of its nationality. Accordingly, in nationality Decrees in Tunis and Morocco case,[12]The Permanent Court stated the law as follows: 'The question whether a certain matter is not solely within the jurisdiction of state is an essentially relative question; it depends on the development of international relations. Thus, in the present state of international law, questions of nationality, are in the opinion of the Court, in principle within the reserved domain'. In the same vein, the Special Rapporteur of the International Law Commission (ILC) Manley O' Hudson put it, in principle, question of nationality falls within the domestic jurisdiction of each state. However, while this represents the position of the law, such freedom is not absolute and is subject to the rules against Statelessness as well as other international human rights legal regime. On the corollary, the States retains the power of admission and expulsion of non-nationals from its territory. In *Attorney General for Canada v Cain*[13]: 'One of the rights possessed by the Supreme power of every State is the right to refuse or permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or depot from the State, at pleasure even a friendly alien, especially if it considers his presence in the State opposed to its peace, order and good government, or to its social or material interests'.

However, in contemporary law, the exercise of rights of States in this regard must not violate the rights of the alien as enshrined in international human rights law[14]. Prior to the emergence of human rights law (and contemporary refugee law), limited protection existed for aliens under international law, reflecting their generally low status in society. However, it has long been recognised that the State of nationality is entitled to demand that the host country treat the former's citizens in a manner compatible with the minimum standard set down in customary international law. This right of the country-of-origin stems from its retention of personal supremacy over her nationals, even though the host State possesses territorial supremacy.[15] Accepting an alien in a country is within the prerogative of the receiving state. Citizens of a country have the right to enter and leave that country.[16] While no State may expel its nationals, it is the sovereign prerogative of states to regulate the presence of foreigners on their territory. This power is not unlimited and international human rights law places some restrictions on when and how to exercise this power. With regard to expulsions, three types of protection are available, namely substantive protection against return to face grave violations of human rights, procedural safeguards during deportation procedures, and protection with regard to the methods of expulsions. In addition to the general protection afforded to all foreigners, certain categories of foreigners, such as refugees and migrant workers may be afforded additional protection against expulsions and/or benefit from additional procedural guarantees. As a preliminary remark, one should note that many terms are used by States to refer to 'expulsions': in some cases, these are called 'deportations', 'removals', and so on.

3. State Succession with Regards to Property, Archives and Debts

State succession regarding the property, archives and debts has become a popular discourse within the confines of customary international law. Property of the new state and their nationals in the predecessor state has become a point of argument as some school of thought feel that the property automatically becomes the property of the predecessor especially the remaining nationals of the successor (new) state within the confines of the predecessor (former) state. This is contained in the work of ILC as directed by the United Nations General Assembly (UNGA) in 1983 in the adoption of the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts (VCSSP). However, this time around the 1983 VCSSP did not immediately attract the signatures of states, and in fact with only seven contracting parties presently and has not entered into force. Article 9 of the VCSSP proved that the property rights of the predecessor state which cease to exist expire at the time succession occurs and are replaced by the equal rights of the successor state. The Convention as well protects the relevant property rights of third parties. Under the Convention, in relation to all different types of state succession, immovable property is to be automatically transferred to the respective successor state or states.[17] Further to this, in situations of separation or dissolution, the VCSSP Convention provides that the successor state is to acquire

[11] Article 2 of the *Principles Concerning Admission and Treatment of Aliens*, 25 February 1961
[12] (1993) PCIJ series B. No 4: 24
[13] (1906) A.C. 542 at546
[14] See e.g. the decision in *Yearger v Iran* (1987) 17 Iran-IIS CTR 92 at 106.
[15] See Oppenheim's *International Law* (1992), Volume 1, Parts 2-4, page 903.
[16] Article 13 of the Universal Declaration of Human Rights provides that 'everyone has the right to leave any country, including his own, and to return to his country'. Article 12(2) of the International Covenant on Civil and Political Rights contains a similar provision, while article 12(4) guarantees that 'no one shall be arbitrarily deprived of the right to enter his own country'. In addition, article 3 of the 4th Protocol to the European Convention on Human Rights, article 22(5) of the American Convention on Human Rights, article 12(2) of the African Charter on Human and People's Rights and article 27 of the 2004 Arab Charter on Human Rights prohibit the expulsion of nationals
[17] See Devaney, Op cit

not only the immovable property located in its territory, but also the movable property related to the activities of predecessor state in its territory, as well as an equitable share of the remaining moveable property.[18] The state practice relating to moveable property is still not clear. In the case of Czechoslovakia, the VCSSP was adopted which was not the same with what was obtainable in Yugoslavia case in which EC Conference in its Opinion No. 14 stated that 'public property passes to the successor State on whose territory it is situated.'[19] This practice appears to have precludes the formation of customary international law in this area and the fact that VCSSP has not attracted enough parties to enter into force, only reinforces the need for states to reach an agreed solution on an *ad hoc* basis[20].

Similarly, in the case of cession of territory or separation, the Convention provides succinctly that, successor state must pay an equitable proportion of the debt of the predecessor state. When it comes to state debt and moveable financial assets located abroad, state practice has been greatly influenced by the failure of the Czech Republic and Slovakia to reach an agreement on these matters. The different international financial institutions such as the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development, and the agreement concluded between the Yugoslav successor states. From this, it shows that the debts of any sort are applicable to the seceding state, become the responsibility of the successor state.[21] Treaty based arrangement in the context of Republic of Sudan and the new state of South Sudan, who concluded an agreement on 'Certain Economic Matters' in year 2012 where both agreed that the continuing state, the Republic of Sudan would retain all external debts, liabilities and external assets of the continuing state. They both agreed that, 'the two states shall treat domestic assets and liabilities in accordance with the territorial principle, by which assets and liabilities have a domestic connection to the territory of Sudan shall be allocated along territorial lines and attributed to the respective state'. Accordingly, under this agreement, both domestic assets (including moveable and immoveable property) located on the territory of a state and liabilities associated with the territory of that state, are be attributed to it.

In respect to individual property in the predecessor state, the principle of non-discrimination has been employed in most recent multilateral instruments to ensure that the property of aliens is secured and treated without any form of discrimination whatsoever. Such multilateral agreements include the Havana Charter for an International Trade Organization (1948) and the Economic Agreement of Bogotá (1948), as well as in the United States Friendship, Commerce and Navigation (FCN) treaties. Also, North American Free Trade (NAFTA),[22] The Energy Charter Treaty[23] and the Organisation for Economic Cooperation and Development (OECD) Draft Multilateral Agreement on Investment where the principle of alien non-discrimination is subjected to various interpretation and contexts. This (OECD) initiative notes and comments to Article 1, a clear reference was made to the source of the standard: 'the standard required conforms to the 'minimum standard' which forms part of customary international law'[24] It is important to note here that the Draft OECD Convention was used by most OECD countries as the basis for their international investment agreement (IIA) negotiations.

Again, the emergence of human rights law over the last fifty years has had a tremendous impact on the position of aliens, and therefore refugees, in international law. In general, human rights law does not distinguish between aliens and citizens. The notable exception is with regard to the right to participation in an electoral process. The efforts of UNHCR have led to greatly increased accessions by African States to the Convention relating to the Status of Stateless Persons and the Conventions on the Reduction of Statelessness. In West Africa, regional and national declarations and plans of action to prevent and reduce statelessness reference these treaties front and center in the reforms and activities they propose. Similar documents adopted by International Conference on the Great Lakes Region, with UNHCR support, are also evidence of a political recognition of the damage that lack of access to citizenship has caused. The draft Protocol to the African Charter on Human and Peoples Rights on the right to a nationality and the eradication of statelessness adopted by the African Commission on Human and Peoples' Rights in 2015 would radically strengthen rights to 'belong,' if endorsed by the political institutions of the AU. The impact of this increased normative effort at continental level is too soon to tell.

4. **Nationality of Persons and State Succession**

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. This was experienced by the affected people when Eritrea was carved out of Ethiopia. Sharpening the concepts and functions of nationality under discussion is necessary at the outset because the subject

[18] Article 17(1) (c) VCSSP
[19] European Community Conference on Yugoslavia Arbitration Commission Opinions No.14 at 731.
[20] Devaney, Op cit
[21] ibid
[22] North American Free Trade Agreement, Dec 17 1992, US-Mex.can32 I.L.M.605.
[23] European Energy Charter Treaty, Dec 17, 1994, I.L.M. 360.
[24] (OECD, 1967, p. 120).

of nationality is an aspect of several different areas of international law and differs among the various domestic legal systems of states both in Africa and globally. According to Blackman[25], 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.[26] These two concepts of nationality are sometimes co-extensive 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).[27] 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 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.

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 and duties on both.'[28] 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.[29]

Changes which affect the territory of a State give rise to succession of States. The transfer of the territory known in 1803 as Louisiana, by France to the United States of America, illustrates both the concept of State succession, as well as some of the issues arising from it. With time, the rules governing State succession in international law have evolved. However, the solutions which were developed two hundred years ago to deal with most of the issues arising from the Louisiana Purchase seem to be in line with current rules governing the transfer of a territory from one State to another.[30] Traditionally, for purposes of international law, these internal nationality categories were not considered legally relevant. 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, 'nationality in the sense of international law is a technical term denoting the allocation of individuals, termed nationals, to a specific State-the State of nationality-as members of that State, a relationship

[25] Blackman, J.L. State Successions and Statelessness: The Emerging Right to an Effective Nationality Under International Law, *Michigan Journal of International Law*, Vol 19(4), 1141-1193.
[26]WEIS, P. Nationality and Statelessness in International LAW 3 (2d. ed. 1979).
[27]Carol A. Batchelor, *Stateless Persons: Some Gaps in International Protection, 7 INT'L J. REFUGEE L.* 232, 233 (1995).
[28] Ibid
[29]Independent Commission on International Humanitarian Issues, Winning the Human Race? 107 (1988) (quoting former Chief Justice of the U.S. Supreme Court Earl Warren).
[30]Emanuelli, C. State Succession, Then and Now, With Special Reference to the Louisiana Purchase (1803), *Louisiana Law Review*, Vol 63(4), 1277-1291

which confers upon the State of nationality **...** rights and duties in relation to other States.'[31] In other words, nationality in international law is the mechanism by which states designate individuals to themselves in dealing with other states; inquiring beyond this designation into possible internal categories of state nationality is not necessary.'[32] However, 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.

Over the last two and a half centuries, the State and its forerunners have held power over norms that regulate access to citizenship, which includes the rights and duties associated with being a citizen of a State.[33] Scholars argue that this discretion over citizenship is declining.[34] Everyone has the right to nationality under international law, and citizenship is slipping out of the State's control.[35] Yet, the State still controls much of citizenship and the lack of it-statelessness. The State is the overwhelming gatekeeper of citizenship. Even in today's globalized world, the State continues to possess authority to govern its borders.[36] The authority is not reposed upon an international parliament or people. In fact, since 9/11, there is a steady rise of laws opening up citizenship to the privileged, while restricting access to or stripping citizenship for the disadvantaged in the name of national security, the economy, national unity, and a host of other reasons.[37]

5. The Uncertainties Surrounding the Minimum Standard of Treatment of Aliens under International Law

The International Law Commission's Elusive Approach Regarding the Minimum Standard of Treatment of Aliens

Apparently, the minimum standard of treatment of aliens has a secure and clear place in international law, since the ICJ recognized it in its judgment in the Case Concerning the Barcelona Traction Light and Power Company Limited (*Belgium v. Spain*), Second Phase when it said in passing that:

> When a State admits into its territory foreign investment or foreign nationals it is … bound to extend to them the protection of the law. However, it does not thereby become an insurer of that part of another State's wealth which these investments represent. … The real question is whether a right has been violated, which right could only be the right of the State to have its nationals enjoy a certain treatment guaranteed by general international law, in the absence of a treaty applicable to the particular case…[38]

However, the reference to the standard, although it more or less recognizes its existence as a matter of general international law, says nothing about its content, even at the highest level of generality, or regarding its nature as either a general principle or as a customary rule of international law. The uncertainty around the minimum standard of treatment of aliens under international law increases once one looks at the other readily available source for identification of international customs and their content, the works of the International Law Commission (ILC). The ILC has been unable to deal with the minimum standard of treatment of aliens and has avoided it for decades, which is telling evidence of the difficulty of defining the content of the standard. In effect, in 1957, the Special Rapporteur, Garcia Amador, tried to link the minimum standard of treatment of aliens with the new international human rights law produced after World War II. However, the Commission did not support this approach, and in 1963, decided that: 'it was desirable to carry out a general study of the subject [of State Responsibility], taking care not to confuse the definition of the rules relating to responsibility with that of the rules of international law and in particular those relating to the treatment of aliens-the breach of which can give rise to

[31] 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.

[32]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.

[33] Ayelet Shachar, Rainer Bauböck, Irene Bloemraad & Maarten Vink, *Introduction: Citizen-ship—Quo Vadis?*, *in The Oxford Handbook of Citizenship* 3, 8 (Ayelet Shachar et al. eds., 2017).

[34]*See e.g.,* David Jacobson, Rights across Borders: Immigration and the Decline of Citizenship 9 (1996) (arguing that the distinction between citizen and alien has eroded because rights are more and more predicated on residency); Linda Bosniak, *Citizenship Denationalized*, 7 *IND. J. GLOB. LEGAL STUD.* 447, 449–50 (2000) (arguing that efforts to conceive of citizenship beyond the nation-state are coherent and desirable). Certainly, I agree that thinking of citizenship as a changing or changed concept has merits, States nonetheless still control access to citizenship, as well as to its bundle of rights and duties.

[35] Ibid

[36] Ibid

[37] See Catherine Dauvergne, 'Citizenship with a Vengeance', 8(2) *THEORETICAL INQ. L*. (2007)

[38] International Court of Justice. Judgment of 5 February 1970. [1970] I.C.J. Rep. 3 87. [hereinafter] Case Concerning the Barcelona Traction Light and Power Company Limited (*Belgium v. Spain*), Second Phase,

responsibility'.[39] Again, in 2006, the ILC did the same when it released its Draft Articles on Diplomatic Protection. The ILC stated:

> Diplomatic protection belongs to the subject of 'Treatment of Aliens'. No attempt is made, however, to deal with the primary rules on this subject – that is, the rules governing the treatment of the person and property of aliens, breach of which gives rise to responsibility to the State of nationality of the injured person. Instead, the present draft articles are confined to secondary rules only – that is, the rules that relate to the conditions that must be met for the bringing of a claim for diplomatic protection. …[40]

The ILC's decision is simply the most telling proof of the fact that the content or contents of the standard are not clear,[41] nor is the nature of the standard evident as a general principle of law or as customary international law. The standard exists, as evidenced by the ICJ's mention of it in *Barcelona Traction*, but its content, which determines when the actions or omissions of a State with regard to an alien fall below this minimum standard, is altogether uncertain, and so is its nature.[42]

International Minimum Standard or National Treatment of Alien

The import of the international standard for treatment of aliens is the proposition that the international has set a minimum standard of treatment of aliens from which no state is allowed to derogate from. This is not withstanding how such state treats its own nationals. In other words, when it comes to matters relating to treatment of aliens, it is international that determine whether there has been a fair treatment of the alien and not the domestic law of the state. Accordingly, it has been strenuously argued that while under customary international law, a state is under no duty to admit aliens into its territory, but once admitted, certain duties arise which the admitting state must fulfill.

According to Lillich,

> These duties may stem from conventional international law, obligations voluntarily assumed by the state. Under bilateral treaty, a regional agreement or a universal convention but even when such conventional obligations are absent, customary international law requires that the state live up to certain minimum standards in its treatment of aliens. If it fails to do so, it renders itself internationally responsible to the alien's state.[43]

We agree to some extent with the postulations of the author. This is because where there are bilateral or multilateral treaties setting out the obligations assumed by parties thereto, no problem arises but where there are none; reference to customary international appears quite vague since there seem to be no laid down criteria for determining what this minimum standard of treatment is.

It has already been mentioned that the international standard of treatment is strenuously supported by the practice of most European states and the United States of America. This is so because the initial principles of international law were enunciated by a few European states solely for the purpose of enhancing their interests. The international minimum standard of treatment has the support of a lot of international scholars, the decisions of international arbitral tribunals and the practice of states and also received the support of majority of states at the Hague Codification Conference of 1930. The international minimum standard or a moral standard for civilized states have the support of some learned authors like Vattel, Anzilloti, Vedross, Moore,[44] Eagleton, among others. One of the earliest proponents of this doctrine was Vattel. Although he focused mainly on responsibility of states for denial of justice, his proposition formed the basis for subsequent support arising both from writings of eminent scholars as well as state practice.

6. Conclusion and Recommendations

This study has looked at the controversies surrounding succession within the confines of states in international vis a vis he rights of aliens in the new state and their assets in the previous state. The rules governing such

[39] For a detailed analysis of the handling, of lack of it, of the ILC of the minimum standard of treatment of aliens, Richard B. Lillich, in Richar B. Lillich, ed., *International Law of State Responsibility for Injuries to Aliens* (Charlottesville: University Press of Virginia, 1983) 1 20.

[40] ILC Commentaries…ibid

[41] Ian Brownlie holds a similar view. Ian Brownlie, *Principles of International Law* 5 ed. (Oxford: Oxford University Press, 1998) at 529

[42] This is not to say that aliens can be treated in any way by States, but that the treatment depends on the factual situation of the alien and on the application to such facts of particular rules of international law, such as humanitarian international law or the Vienna Convention on Consular Relations, which, in particular, gives aliens specific rights when detained or imprisoned in States party to the Convention. But the content of a general standard to be applied, regardless of specific factual situations, is uncertain.

[43] Op Cit

[44] Moore, J.B. *Digest of International Law* (Washington D.C. Government Press, 1906) p. 50.

transmissions, and State successions generally, have evolved since the Louisiana Purchase. Their evolution is linked to the replacement of the doctrine of continuity by the 'clean' slate doctrine under the influence of voluntarist theories. This development is reflected in the practice of States which became independent through the process of decolonization. However, state practice relating to State succession is not uniform. It often embodies both the doctrine of continuity and the 'clean slate' doctrine in a proportion which varies from case to case. Yet, some rules seem to be well settled, such as the rules favoring the passage to the Successor State of 'real' treaties, of immovable located on the territory transferred, and of archives necessary to administer that territory. These rules are usually found in devolution agreements which are often concluded between the Predecessor State and the Successor State. Such was the case with respect to the transfer of Louisiana from France to the United States. Questions arising from this transfer were governed by three agreements. The solutions found in these agreements are informed by the doctrine of 'universal succession' which was applicable at the time. Those solutions are generally in line with the rules developed by State practice and, to a certain extent only, with those codified by the International Law Commission with respect to the cession of a territory. As a rule, the solutions developed by the Commission to govern issues arising from State succession hardly reflect the practice of States. As a result, the documents in which these solutions are embodied did not get much support from States. However, international community must collectively articulate clear standards for avoiding statelessness in state succession, such as by creating an optional protocol to the 1961 Convention on the Reduction of statelessness using as a basis for the International Law Commission Articles and the state Council of European Convention.