Passports and Nationality in International Law

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I. INTRODUCTION

War, revolution, and ethnic hatred have long wreaked havoc on the nationality of individuals. Soviet Russia, Nazi Germany, Fascist Italy, and post-WWII Czechoslovakia, Poland, Yugoslavia, and Japan all passed legislation expressly denationalizing large segments of their populations.[1] More recently, the Dominican Republic, Ethiopia,[2] and Mauritania have implemented ethnically-based expulsion programs that in effect functioned as denationalization programs.[3]

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[1] P. WEIS, NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW 119-20 (1979) [hereinafter WEIS] (discussing denationalization of opponents of the Bolshevik regime in Russia; Jews in Germany and Italy; ethnic Germans and Hungarians in Czechoslovakia; and ethnic Germans in Poland and Yugoslavia); JEAN-MARIE HENCKAERTS, MASS EXPULSION IN INTERNATIONAL LAW AND PRACTICE 89 (1995) (discussing mass denationalization of ethnic Koreans in Japan).

[2] Full disclosure: I have done work on behalf of the State of Eritrea in two cases currently pending before the Eritrea-Ethiopia Claims Commission. One of these cases involves the denationalization and expulsion of ethnic Eritreans from Ethiopia.

[3] HUMAN RIGHTS WATCH, "ILLEGAL PEOPLE": HAITIANS AND DOMINICO-HAITIANS IN THE DOMINICAN REPUBLIC (2002) [hereinafter ILLEGAL PEOPLE] (discussing denationalization/expulsion of ethnic Haitians from the Dominican Republic); HUMAN RIGHTS WATCH, THE HORN OF AFRICA WAR: MASS EXPULSIONS AND THE NATIONALITY ISSUE (JUNE 1998 TO APRIL 2002) 18-31 (2003) [hereinafter THE HORN OF AFRICA WAR] (discussing denationalization/expulsion of ethnic Eritreans from Ethiopia); HENCKAERTS, *supra* note 1, at 81-82 (discussing denationalization/expulsion of ethnic Senegalese from Mauritania). Perhaps less formally, it seems that a similar program expelling ethnic Nepalese has taken place in R

Of course, numerous international instruments purport to limit the ability of states to deprive individuals of their nationality.[4] However,

Bhutan. *See* AMNESTY INTERNATIONAL, NATIONALITY, EXPULSION, STATELESSNESS, AND THE RIGHT TO RETURN 4 (2000).

[4] *See, e.g.*, Convention on the Reduction of Statelessness, August 30, 1961, art. 8(1), U.N. Doc. A/Conf. 9/15 (except as provided in paragraphs 2 and 3 of this article, "A Contracting State shall not deprive a person of his nationality if such deprivation would render him stateless."); *id.* art. 8(4) ("A Contracting State shall not exercise a power of deprivation permitted by paragraphs 2 or 3 of this article except in accordance with law, which shall provide for the person concerned the right to a fair hearing by a court or other independent body."); *id.* art. 9 ("A Contracting State may not deprive any person or group of persons of their nationality on racial, ethnic, religious or political grounds."); International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, art 5(d)(iii), 660 U.N.T.S. 195 ("In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of . . . [t]he right to nationality."); American Convention on Human Rights, Nov. 22, 1969, art. 20(3), 1144 U.N.T.S. 123 [hereinafter American Convention] ("No one shall be arbitrarily deprived of his nationality or of the right to change it."); Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, art. 9, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46 ("States Parties shall grant women equal rights with men to acquire, change or retain a nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband."); African [Banjul] Charter on Human and Peoples' Rights, June 27, 1981, art 12(2), OAU Doc. CAB/LEG/67/3 rev. 5 ("Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality."); European Convention on Nationality, 1997, art. 4, 37 I.L.M 44 (listing under "principles" that "no one shall be arbitrarily deprived of his or her nationality."); *id.* art. 7(1) ("A State Party may not provide in its internal law for the loss of its nationality *ex lege* or at the initiative of the State Party except [listing seven cases where this is permissible, including voluntary acquisition of another nationality, acquisition of the nationality of the state party by fraud, foreign military service, conduct prejudicial to the vital interest of the state, lack of a genuine link to the state in the case of a national living abroad, and certain circumstances relating to minor children]"); *id.* art. 8(1) ("Each State Party shall permit the renunciation of its nationality provided the persons concerned do not thereby become stateless."); *id.* art 8(2) ("However, a State Party may provide in its internal law that renunciation may be effected only by nationals who are habitually resident abroad."). *See also* Universal Declaration of Human Rights, art. 15(1), G.A. Res. 217A (III), U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948) ("Everyone has right to a nationality."); *id.* art. 15(2) ("No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality."); American Declaration of the Rights and Duties of Man, Mar. 30-May 2, 1948, art. 19, O.A.S. Res. XXX ("Every person has the right to the nationality to which he is entitled by law and to change it, if he so wishes, for the nationality of any other country that is willing to grant it to him."); Protocol No. 4 to the European Convention on Human Rights and

with the exception of the European Convention on Nationality, these instruments either consist of "soft law"[5] or are of limited factual applications.[6] Noting this, scholars have attempted to prove the existence of general rules of international law prohibiting denationalization, either in all cases or in particular circumstances.[7] Unfortunately for those who favor a norm against denationalization, these efforts have met with only limited success.[8]

Fundamental Freedoms, Sep. 16, 1963, art. 3(1), E.T.S. No. 46 ("No one shall be expelled, by means either of an individual or of a collective measure, from the territory of which he is a national."); *id.* art. 3(2) ("No one shall be deprived of the right to enter the territory of the State of which he is a national."); International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 12(4), 999 U.N.T.S. 171 ("[N]o one shall be arbitrarily deprived of the right to enter his own country.").

[5] The term "soft law" has now acquired a number of different meanings, and I include in this category three distinct types of legal provisions. First, I include provisions that by their own terms are not intended to contain enforceable obligations. *See, e.g.*, Universal Declaration of Human Rights, *supra* note 4. Second, I include provisions which seem at first to include a solid proposition of law, but in fact contain exceptions so extensive as to risk vitiating the right purportedly guaranteed. *See, e.g.*, African [Banjul] Charter on Human and Peoples' Rights, *supra* note 4, art 12(2). Third, I include provisions with weak enforcement mechanisms. *See, e.g.*, Optional Protocol to the International Covenant on Civil and Political Rights, art. 4(2), G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302. All three categories should be contrasted with "hard" international law, by which I simply mean those treaty provisions, custom, general principles of law, or series' of authoritative and controlling decisions, which are generally accepted as binding by relevant international actors. *See infra* notes 90-94 and accompanying text. Although not an absolute rule, it is probably fair to suggest that law governing interstate relations (i.e., law pertaining to trade and extradition) is generally "harder" than law purporting to govern they way that states behave within their own territories (i.e., law pertaining to protection of the environment and human rights). R R R R

On the varying conceptions of soft law, *see* Prosper Weil, *Towards Relative Normativity in International Law*, 77 AM. J. INT'L L. 413 (1983); Gunther F. Handle et al., *A Hard Look at Soft Law*, 82 AM. SOC'Y INT'L L. PROC. 371 (1988); Francesco Francioni, *International 'soft law': a contemporary assessment*, *in* FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE: ESSAYS IN HONOR OF SIR ROBERT JENNINGS 167 (Vaughan Lowe and Malgosia Fitzmaurice ed., 1996) [hereinafter FIFTY YEARS OF THE ICJ]; Alan Boyle, *Some Reflections on the Relationship of Treaties and Soft Law*, *in* MULTILATERAL TREATY-MAKING: THE CURRENT STATUS OF CHALLENGES TO AND REFORMS NEEDED IN THE INTERNATIONAL LEGISLATIVE PROCESS (Vera Gowlland-Debbas ed., 2000).

[6] For example, certain provisions apply only in the case of denationalizations creating statelessness, or denationalizations for overtly discriminatory reasons.

[7] WEIS, *supra* note 1, at 123-24 (discussing efforts of other authors). R

[8] *Id.* at 125 ("With [the possible exception of a prohibition on discriminatory denationalization], the views of those who regard denationalization or, at least, denationalization for penal or political reasons as inconsistent with the law of nations, find no justification in the present state of international law.").

This Article proposes an alternate means by which to limit the ability of states to denationalize their own citizens.[9] At least in the case of passport holders, a well-established body of "hard" international law[10]—what I term the law of binding state action—limits state authority more effectively than human rights norms of controversial status. The act of issuing a passport is the key event triggering the application of this body of law.

Below, Part II offers a framework for analyzing the proof of nationality problem. I outline three contexts—or types of international claims—in which it can be necessary to prove an individual's nationality under international law: diplomatic protection, substantive eligibility, and denationalization. The first two contexts arose frequently in traditional international disputes, and the law regarding proof of nationality in those areas is correspondingly well developed. By contrast, in the third context, the requirements for proof of nationality have rarely been addressed. It is this denationalization context, where an individual has a claim against a state expressly because it was once the state of his or her nationality, that the remainder of this Article addresses.

In international adjudication, proof of nationality is complicated by the differences between international and domestic nationality law. Part III examines the relationship between these bodies of law, with particular emphasis on the variations that arise when one state, multiple states, or no state claims a person as its national. It is the third variation—where no state claims a person as its national—that is most relevant to proof of nationality in the denationalization context.

Part IV turns to the passport, a document with special relevance to the proof of nationality problem. The passport has developed from a somewhat ad-hoc letter addressed to foreign powers into a sophisticated, formalized document attesting to both the identity and nationality of its

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[9] Although I approach this problem primarily from the perspective of the *ex-post* litigation, the principles discussed in this Article can also be applied in both settlement negotiations and *ex-ante* efforts to prevent denationalization. Few parties will be willing to settle an international dispute—particularly states accused of distasteful acts such as denationalization—unless they believe that they have an accurate understanding of their rights and liabilities in the litigation context. Similarly, an understanding of the proper application of the law of binding state action to passport holders may help to deter states from denationalizing individuals.

Of course, this last assertion is open to the criticism that the approach presented in this Article would not in fact prevent states from denationalizing their passport-holding citizens, but would simply encourage them to undertake the necessary public notification efforts before doing so. However, I suggest that the negative publicity and international pressure that would result from a requirement that denationalization of passport holders be done more "openly" might in itself serve as a substantial deterrence to such efforts.

[10] On the distinction between hard and soft law, *see supra* note 5. **R**

bearer. Although early passports were not always accepted as proof of nationality, even under the law of the issuing state, the modern passport is now widely accepted as proof of nationality under domestic law. Moreover, at least one major international tribunal has accepted the passport as near-conclusive evidence of domestic law nationality.

Part V presents the main normative claim of this Article: that a passport-issuing state should be prevented from denying that the holder of a valid passport is in fact a national of that state. Support for this proposition can be found in the law of binding state action, a set of related legal principles by which a state's past actions have been held to be enforceable against that state in the future. Although existing applications of this body of law have primarily involved boundary disputes and high diplomacy, it may be even more appropriate to apply these principles to the relatively mundane issue of passports and nationality.

Part VI sets out three exceptions to Part V's normative claim. The issuing state should not be prevented by the law of binding state action from denying the passport holder's nationality in situations where the individual in question has obtained a passport through fraud, in situations where the individual in question has lost the nationality of the issuing state, and in certain cases involving dual nationality.

Part VII addresses international procedure. Although standing requirements have historically operated to prevent denationalized individuals from asserting claims, some factual permutations and some newer fora may now make such claims possible. Once a claim is asserted, the burden to prove the applicability of the exceptions discussed in Part VI should be on the issuing state rather than the passport holder. Once the claim is established, remedies should involve monetary compensation rather than orders to treat a particular passport holder as a national.

Part VIII concludes, addressing two main types of denationalization and attempting to set the issues addressed here in a broader context. In the case of denationalization by operation of law, shifts in state control over territory can have unintended effects on the nationality of individuals. In the case of discriminatory denationalization, fully intentional efforts are made to denationalize politically unpopular groups. In both cases, a proper application of the law of binding state action can provide substantial protection to passport-holding individuals.[11]

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[11] Before moving to Part II, three definitions are in order. Throughout this Article, I use the term "nationality" in a strictly formal sense, as denoting an individual's "quality of being a subject of a certain state." OPPENHEIM'S INTERNATIONAL LAW § 378 (Sir Robert Jennings and Sir Arthur Watts eds., 9th ed.

II. The Need to Prove Nationality Under International Law

The ability to enforce international limitations on state power to denationalize is closely tied to the evidentiary question of how to prove nationality before a court or international tribunal. This is because it is necessary to establish that an individual is, or was, a national of a particular state in order to apply such a substantive norm. This Article will thus focus on two main topics: the proof of nationality problem, which will be addressed in Parts II through IV; and the effect of the law of binding state action on denationalization of passport holders, which will be addressed in Part V.

In this Part, I set out three specific contexts in which it may be important to prove the nationality of an individual under international law.[12] First, a state may need to prove that an individual has its

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1992) [hereinafter Oppenheim]. Such a formal definition is useful from a legal perspective, because it permits a focus on the rights and privileges associated with such formal nationality. Similarly, I use the term "denationalization" to refer to the process by which a state formally strips an individual of his or her legal nationality, even though that individual may still share a culture and sense of shared identity with other members of the national group.

A third definition—that of the term "state"—is more problematic. For present purposes, I adopt the definition set forth in the 1933 Montevideo Convention. *See* Montevideo Convention on the Rights and Duties of States, Dec. 26, 1933, art. 1, 49 Stat. 3097 ("The state as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states."). Although this definition has been criticized, *see* Thomas D. Grant, *Defining Statehood: The Montevideo Convention of 1933 and its Discontents*, 37 Colum. J. Transnat'l L. 403, 434-439 (1999) (summarizing criticisms), it is perhaps the most commonly cited definition and is sufficient for purposes of this Article. *See id.* at 414-415.

Finally, it is worth recognizing that at least two of these terms—nationality and state—are significant not only in law but also in other academic disciplines. In particular, they have come to play an important role in political science and related fields. Without engaging in terminological debate or making any effort to be comprehensive, a list of important works addressing these concepts might include the following: Robert Cooper, *The post-modern state and the world order* 15-20, 31-33 (2000), http://www.demos.co.uk/catalogue/thepostmodernstate_page83.aspx. (setting out three stages of state development); Ernest Gellner, Nations and Nationalism 3-6, 53-62 (1983) (discussing the ideas of state, nation, and nationality); Anthony D.S. Smith, Nationalism in the Twentieth Century 1-13 (1979) (discussing the development of the "national ideal"); Hedley Bull, The Anarchical Society: A Study of Order in World Politics 8-9 (1977) (defining "state"); Max Weber, Economy and Society 54-56 (Guenther Roth & Claus Wittich eds., University of California Press 1968) (1922) (same).

[12] The nationality of an individual under international law may be different from his or her nationality under domestic law. For example, an individual may qualify as a national of two or more different states under those states domestic law, but under international law only one of those nationalities can be "dominant and effective" at a particular time. *See Nottebohm Case* (Liech. v. Guat.), 1955 I.C.J. 4 (Apr. 6) (Second

nationality in order to exercise diplomatic protection on behalf of that particular individual. Second, proof of an individual's nationality may be necessary in order to show that the tribunal may entertain a claim by or on behalf of that individual against some common fund. Third, the nationality of a particular individual may be relevant to the merits of a denationalization[13] claim.

This third context will be the primary concern of this Article. As the discussion below will demonstrate, the structure of international adjudication has rarely given parties the opportunity to prove nationality in an adversary proceeding against the state of which the litigant claims to be a national. It is a project of this Article to set out one way that such proof can be established.

A. Diplomatic Protection

The diplomatic protection context involves the exercise of a substantive right one state has against another state with regard to some action taken by the defendant state against an individual.[14] This is the problem of "diplomatic protection," that is, the standing of one state to represent a particular person before an international tribunal. In general, states may only exercise diplomatic protection on behalf of their nationals.[15] For example, the claim of an individual can only be brought

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Phase); *Case No. A/18*, Decision No. 32-A18-FT (6 Apr. 1984), 5 Iran-U.S. Cl. Trib. Rep. 251.

[13] It is worth noting that a denationalization claim will frequently be tied to another claim for unlawful expulsion of nationals. However, for simplicity, I use the term "denationalization claim" to include both claims for denationalization alone (i.e., when the decision is made while the individual is outside of the state of (former) nationality) and claims where a successful denationalization claim is prerequisite to a successful expulsion claim (i.e., when an expulsion that has taken place will be unlawful only if it can be established that the individuals in question were unlawfully denationalized prior to or at the time of expulsion).

[14] Because injury to individuals does not traditionally give rise to state responsibility, a sort of fiction is established whereby an injury to an individual is treated as an injury to the state of his or her nationality. *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 482 (5th ed. 1998) [hereinafter BROWNLIE 1998] ("A normal and important function of nationality is to establish the legal interest of a state when nationals, and legal persons with a sufficient connection with the state, receive injury or loss at the hands of another state. The subject-matter of the claim is the individual and his property: the claim is that of the state. Thus, if the plaintiff state cannot establish the nationality of the claim, the claim is inadmissible because of the absence of any legal interest of the claimant.") (citations omitted).

[15] *See Flegenheimer Claim* (U.S. v. Italy), 25 I.L.R. 91, 157 (Italy-U.S. Conciliation Comm'n 1958) (noting that a particular treaty provision "is a rule of an exceptional character, in that it extends the diplomatic protection of the United Nations to persons who are not their nationals; like every exception, it must be interpreted in a restrictive sense, because it deviates from the general rules of the Law of Nations on

before the International Court of Justice (ICJ) by a state of the individual's nationality.[16] Thus, it can be necessary to prove nationality anytime State *A* attempts to exercise diplomatic protection over a person in State *B*, but State *B* does not want to recognize that the person in question is a national of State *A*.[17]

B. Eligibility to Make a Claim

This second context occurs when a treaty gives individuals of some particular nationality a substantive right—either against a state or to compensation from some common fund. For example, post-war claims tribunals often have their jurisdiction limited to claims by individuals of a particular nationality or set of nationalities. One well-known example is the Italian-United States Conciliation Commission. Article 78 of Treaty of Peace with Italy of 1947, which established the Commission, limited the jurisdiction of the tribunal—in essence, access to a pool of money—to those who were nationals of any U.N. member state during the relevant time period.[18] These tribunals typically are established by a politically influential state or group of states during a post-conflict period. Jurisdiction is limited to nationals of the particular state or group

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this point"); BROWNLIE 1998, *supra* note 14, at 406; 1 MARJORIE M. WHITEMAN, DAMAGES IN INTERNATIONAL LAW 94 (1937). One important exception to this rule is that a treaty or other agreement between states may provide for the protection of non-nationals in a particular context. BROWNLIE 1998, *supra*, at 482. *See also infra* Part VII.A. **R**

16 *See* Statute of the International Court of Justice, June 26, 1945, art. 34(1), 59 Stat. 1055 [hereinafter ICJ Statute] ("Only states may be parties in cases before the court."); *Nottebohm Case*, 1955 I.C.J. at 13, 26 (noting that states are entitled to exercise diplomatic protection—and thus submit claims to the I.C.J.—only on behalf of their nationals).

17 *See, e.g.*, *Nottebohm Case*, 1955 I.C.J. at 12-13, 20.

18 The article reads as follows:

> The Italian Government shall invalidate transfers involving property, rights and interests of any description belonging to United Nations Nationals, where such transfers resulted from force or duress exerted by Axis Governments or their agencies during the war.
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> . . . .
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> "United Nations Nationals" means individuals who are nationals of any of the United nations, or corporations or associations organized under the laws of any of the United Nations, at the coming into force of the present Treaty, provided that the said individuals, corporations or associations also had this status on September 3, 1943, the date of the Armistice with Italy.
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> The term "United Nations Nationals" also includes all individuals, corporations or associations which, under the laws in force in Italy during the war, have been treated as enemy.

Flegenheimer Claim, 25 I.L.R. at 97 (quoting Treaty of Peace with Italy of 1947).

of states, in order to put some limit on the number of claims a state will have to pay and to prevent the tribunal from hearing claims against a state by its own nationals.

C. Denationalization

The third context occurs in the special case of denationalization, where an individual has a substantive right against the state of his or her nationality.[19] In order to prove denationalization, however, it is necessary first to prove that the individual once had the nationality of the issuing state. In the two contexts discussed above—diplomatic immunity and eligibility to make a claim—the law regarding proof of nationality is relatively well developed and noncontroversial. Unfortunately, the same cannot be said for proof of nationality in the denationalization context.

First, the language of many of these limitations is stronger than their practical effect. Broadly-phrased international declarations give way to more narrow language in actual legal instruments. For example, the non-binding Universal Declaration on Human Rights declares that "No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality."[20] Binding legal documents, however, make more limited guarantees: the 1961 Convention on the Reduction of Statelessness prevents state-parties from denationalizing persons who would thereby become stateless, but allows for certain exceptions to this

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[19] It has long been recognized that states have a general right to determine issues of nationality under their own domestic law. *See, e.g.*, Convention Concerning Certain Questions Related to the Conflict of Nationality Laws, April 12, 1930, art. 1, 179 L.N.T.S. 89 [hereinafter 1930 Hague Convention] ("It is for each State to determine under its own law who are its nationals."); Advisory Opinion Concerning the Tunis and Morocco Nationality Decrees, PCIJ, (ser. B) No. 4 (1923) ("The question whether a certain matter or not is wholly within the jurisdiction of a State is an essentially relative question; it depends upon the development of [international] relations. Thus, in the present state of international law, questions of nationality are, in the opinion of this Court, in principle within this reserved domain."); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 381-84 (4th ed. 1990) [hereinafter BROWNLIE 1990] (explaining that the standard construction of the *Tunis and Morocco Nationality Decrees* opinion is that "states are exclusively in control of nationality matters"). However, at least for purposes of international law, the scope of this right is not unlimited. Because the relation of nationality between an individual and a state can affect the rights of other states, as well as the rights of the individual involved, international law has long placed some limits on a state action in this area. *See, e.g.*, 1930 Hague Convention, *supra*, art. 1 ("It is for each State to determine under its own law who are its nationals. This law shall be recognized by other States *in so far as it is consistent with* international conventions, international custom, and the principles of law generally recognized with regard to nationality.") (emphasis added). On the inherent tension in article 1 of the 1930 Hague Convention, see BROWNLIE 1990, *supra* at 386.

[20] Universal Declaration of Human Rights, *supra* note 4, art 15(2). **R**

general rule.[21] In regard to persons who would not become stateless, the Convention simply provides that they may not be denationalized "on racial, ethnic, religious or political grounds."[22] The International Convention on the Elimination of Racial Discrimination is even narrower—it merely requires that the "right to nationality" not be denied for discriminatory reasons.[23] The Convention on the Elimination of All Forms of Discrimination Against Women mandates only that women be granted equal rights with men in regard to nationality and not be forced to change nationality by marriage or a change in a husband's nationality.[24] The International Covenant on Civil and Political Rights does not directly discuss nationality, but provides that "[n]o one shall be arbitrarily deprived of the right to enter his own country."[25]

The jurisprudence of nationality in human rights law is also underdeveloped for a second reason. Most of these "soft law" provisions lack regular enforcement mechanisms. In fact, as will be discussed further below, the structure of international adjudication makes it very difficult to enforce international norms governing the relationship between an individual and the state of his or her nationality. Controversies over diplomatic protection and substantive eligibility are routinely adjudicated as procedural prerequisites to litigation over other, substantive claims. But, as we will see, there is no commonly available procedural vehicle for lodging complaints against one's own state when one has been denationalized. The end result is that international treaties promise more than they deliver, and, in practice, international law has not served as an effective limit on state prerogative in this area.

Yet, this should not detract from the importance of limitations on state power to denationalize as a matter of substantive international law. The sheer number of treaties, declarations, and publications touching on nationality testify to the strong interest in this area by, at the very least, a small but influential minority. Moreover, in certain cases, a forum may

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[21] Convention on the Reduction of Statelessness, *supra* note 4, art. 8(1) (except as provided in paragraphs 2 and 3 of this article, "[a] Contracting State shall not deprive a person of his nationality if such deprivation would render him stateless"). When exercising its right under one of these exceptions to denationalize individuals who would thus become stateless, a state-party must provide some basic degree of due process or non-arbitrariness. *Id.* art. 8(4) ("A Contracting State shall not exercise a power of deprivation permitted by paragraphs 2 or 3 of this article except in accordance with law, which shall provide for the person concerned the right to a fair hearing by a court or other independent body."). **R**

[22] *Id.* art. 9.

[23] International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 4, art 5(d)(iii). **R**

[24] Convention on the Elimination of All Forms of Discrimination Against Women, *supra* note 4, art. 9. **R**

[25] International Covenant on Civil and Political Rights, *supra* note 4, art. 12(4). **R**

already exist in which individuals who claim to have been deprived of nationality may bring a claim against their own state.[26] Given the general

[26] There are three permanent international fora that may be able to hear a deprivation of nationality claim. Additionally, there is at least on ad hoc international tribunal that should have jurisdiction over such claims.

Perhaps most important of the permanent fora is the Inter-American Court of Human Rights. Although the Court does not receive petitions from individuals, the Inter-American Commission on Human Rights has the power to do so under Article 23 of its statute. If, after hearing the petition and issuing a report, the Commission discovers that the relevant state has not complied with its recommendations, the Commission is required to refer cases to the Court in the absence of an absolute majority vote not to do so. Rules of Procedure of the Inter-American Commission on Human Rights, art. 44(1), http://www.cidh.oas.org/Basicos/basic16.htm ("If the State in question has accepted the jurisdiction of the Inter-American Court in accordance with Article 62 of the American Convention, and the Commission considers that the State has not complied with the recommendations of the report approved in accordance with Article 50 of the American Convention, it shall refer the case to the Court, unless there is a reasoned decision by an absolute majority of the members of the Commission to the contrary."). Through this procedure, it should be possible for an individual to bring a claim against a state that has arbitrarily deprived him of its nationality. *See* American Convention on Human Rights, *supra* note 4, art 20(3). **R**

A second forum that deserves mention due to its general institutional success is the European Court of Human Rights. Despite its relative success in forcing states to respect human rights norms in other areas, this forum is probably less important here because substantive European human rights law is less favorable to deprivation of nationality claims than substantive Inter-American human rights law. Protocol 4 to the European Convention prohibits expulsion of nationals and deprivation of the right of a person to enter the country of his nationality. Protocol No. 4 to the European Convention on Human Rights and Fundamental Freedoms, Sep. 16, 1963, art. 3(1) ("No one shall be expelled, by means either of an individual or of a collective measure, from the territory of which he is a national."); *id.* art. 3(2) ("No one shall be deprived of the right to enter the territory of the State of which he is a national."). Unfortunately, as one former member of the European Commission has argued, "[t]here is no guarantee that a State may not also in [the] future follow the well-known pattern in the history of dictatorships of depriving undesirable nationals of their citizenship and then expelling them as foreigners." RUTH DONNER, THE REGULATION OF NATIONALITY IN INTERNATIONAL LAW 226 (1994) (quoting Castberg, THE EUROPEAN CONVENTION ON HUMAN RIGHTS 185 (1974)). This argument is buttressed by the observation that:

> [I]t appears evident from the Explanatory Reports that the Committee of Experts rejected a proposal to include in Article 3 of Protocol 4 a provision according to which "a State would be forbidden to deprive a national of his nationality for the purpose of expelling him," because the majority thought "it was inadmissible in Article 3 to touch on the delicate question of the legitimacy of measures depriving individuals of nationality."

DONNER, *supra* at 227. *See also* P. VAN DIJK & G.J.H. VAN HOOF, THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 367-75 (1984). However, it is worth noting that even in the case that a state did follow this unsavory path, a deprivation of nationality claim could force it to take the action more openly. Such a test case, even if unsuccessful on the law, could have the salutary effect of

trend toward the establishment of courts and international tribunals with jurisdiction over human rights claims,[27] it does not seem unlikely that

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bringing political pressure on a state that wished to quietly denationalize and then expel an individual or group.

Finally, the Optional Protocol to the International Covenant on Civil and Political Rights also has an individual complaint procedure. Optional Protocol to the International Covenant on Civil and Political Rights, *supra* note 5, art. 2 ("[I]ndividuals who claim that any of their rights enumerated in the Covenant have been violated and who have exhausted all available domestic remedies may submit a written communication to the Committee for consideration."). This is the least useful of these three potential fora, because neither the relevant substantive law nor the remedy available is particularly strong. As noted above, the Covenant prohibits "arbitrary" deprivation of "the right to enter [one's] own country," but does not explicitly mention deprivation of nationality. International Covenant on Civil and Political Rights, *supra* note 4, art. 12(4). As a remedy, the Commission is instructed to bring complaints submitted to it to the attention of the responsible state. Optional Protocol to the International Covenant on Civil and Political Rights, *supra* note 5, art. 4(1) ("[T]he Committee shall bring any communications submitted to it under the present Protocol to the Attention of the State Party to the present Protocol alleged to be violating any provision of the Covenant." There is then a very soft legal requirement that "[w]ithin six months, the receiving State shall submit to the Committee written explanations or statements *clarifying the matter* and the remedy, *if any*, that *may have been taken* by that State." *Id.* art. 4(2) (emphasis added). The procedure is thus useful for documenting violations of the Covenant and bringing political pressure to bear on the responsible state, but it does not provide a means to remedy the harm that the individual has suffered. **R** **R** **R**

In addition to these permanent fora, the Eritrea-Ethiopia Claims Commission is of particular interest. Article 5(9) of the December 12, 2000, Agreement between the Government of Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea [hereinafter December 12 Agreement] provides that:

> In appropriate cases, each party may file claims on behalf of persons of Ethiopian or Eritrean origin who may not be its nationals. Such claims shall be considered by the Commission on the same basis as claims submitted on behalf of that party's nationals.

December 12 Agreement, art. 5(9). The Commission has subject matter jurisdiction over claims related to the 1998-2000 conflict between the two state-parties that "result from violations of international humanitarian law, including the 1949 Geneva Conventions, or other violations of international law." *Id.* art. 5(1). Combined, these two provisions allow the commission to hear both (1) deprivation of nationality claims brought against Eritrea by persons of Ethiopian origin; and (2) deprivation of nationality claims brought against Ethiopia by persons of Eritrean origin. Moreover, given the driving role of ethnicity in recent refugee-producing conflicts, it does not seem improbable that similar provisions could be included in future peace agreements.

[27] The second half of the Twentieth Century saw the establishment of the European Court of Human Rights, the Inter-American Court of Human Rights, the UN Human Rights Commission, and African Commission on Human Rights. Perhaps more importantly, the European and Inter-American courts have increased substantially in power and authority in the decades after their establishment.

Additional support for the trend toward internationalization of individual rights—from a different perspective—can be found in the various international criminal

additional fora for the litigation of deprivation of nationality claims will develop in the foreseeable future. Before such fora are established, however, it is worth considering the substantive law that may already be applicable to such claims.

III. The Relationship between National and International Law

Having discussed the situations in which it can be necessary to prove international law nationality, it is necessary to step back and make an important distinction: domestic law nationality and international law nationality are neither identical nor mutually preclusive. A state's judgment whether an individual is its national under domestic law is final and binding within that state.[28] However, this judgment is not conclusive in international law. International tribunals are not infrequently faced with claims that can only be resolved by deciding which of two or more valid domestic-law nationalities is effective on the international level.[29] As will be discussed further in Part VI, below, international tribunals have been fairly consistent in applying the nationality judged "dominant and effective" at the time of the events at issue.[30]

For now, it is sufficient to note two things. First, under the dominant and effective nationality test, a finding by State *A* that an individual is its national does not prohibit an international tribunal from determining that, for purposes of international law, that individual in fact has the nationality of State *B*.[31] Second, and more importantly, a finding by State *A* that an individual is not its national for purposes of domestic law would not prohibit an international tribunal from finding that the individual in question does in fact have the nationality of State *A* for purposes of international law.[32]

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tribunals established over the past decade: the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, and the new International Criminal Court. Although these tribunals punish individuals responsible for criminal acts rather than enforce rights against a state, the fundamental idea is still to provide some sort of remedy for victims of human rights violations.

28 This would not be the case, of course, if the state agreed to submit the decision to an international tribunal, and to respect the decision of that tribunal.

29 *See, e.g.*, *Nottebohm Case* (Liech. v. Guat.), 1955 I.C.J. 4, 20-21 (Apr. 6) (Second Phase).

30 *See infra* Part VI.C.

31 *See Nottebohm Case*, 1955 I.C.J. 4. For an explanation of the dominant and effective nationality test, see *infra* Part VI.C.1.

32 On possible remedies after such a finding, s*ee supra* Part VII.C.

A. National Law

Naturally, proof of nationality under domestic law is governed solely by the law of the state at issue. This generally involves proof to the satisfaction of the competent domestic court or administrative tribunal that a particular individual satisfies the requirements for possession of that country's nationality. There are usually several alternative "tracks" by which a person can possess nationality, including: birth within the territory of the state; descent from one or more persons who at that time possessed the nationality of the state; naturalization; and operation of law (in cases of state succession). The way in which an individual acquires the nationality of a state often governs the available means of proof, which generally consists of some type of documentary evidence accepted as probative of acquisition of nationality in a particular way.[33] Of course, such documents are typically conclusive only in the absence of contrary evidence demonstrating loss of nationality or fraud in the acquisition of the document.

B. International Law

There are several variations on the problem of proof of nationality under international law.[34] The first variation arises when a person claims to be a national of a particular state, and that state supports the claim. The second variation occurs when two or more states claim a particular individual to be their national, and the individual claims to be a national of one of the states claiming him or her. The third arises when an individual, otherwise stateless, attempts to prove that he or she is a national of a state that denies this claim. This third variation—which has, until now, been almost exclusively the domain of "soft law"—will be explored in more detail below.

1. When One State Claims a Person

The simplest version of the proof of nationality problem occurs when a single state claims a person. For instance, an individual claims to be a national of State *A*, and State *A* supports (or does not deny) that claim. The international tribunal hearing the case is then left to

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[33] For example, birth certificates are used to prove nationality by birth, and naturalization certificates are used to prove nationality by naturalization.

[34] Other situations combining these categories can of course arise. For example, an individual who is claimed as a national by State *B*, but not claimed as a national by State *A*, may claim to be a national of State *A* but not State *B*. The problem would be similar, though more complicated, if States *C*, *D*, etc., also each claimed that the individual was its national only, or if the individual claimed to qualify as a national of more than one state. Such combined situations can be analyzed by extension of the principles discussed below.

determine whether the assertion of nationality is valid. The other party may deny that the individual is a national of State *A*, but does not submit any evidence as to other possible nationalities of the individual. In this type of case, a tribunal will examine the documents that purport to establish that the individual is a national of State *A*. Unless the tribunal finds that the documents are fraudulent, were procured by fraud, or were procured by an illegitimate favor, the tribunal will typically find that the individual is in fact a national of State *A*.[35]

2. When Two or More States Claim a Person

This second, more complex, variation has given rise to extensive case law.[36] As will be discussed below, the Iran-U.S. Claims Tribunal has contributed substantially to this jurisprudence. Variations in domestic nationality law allow for the possibility that a particular person can be a national of State *A* under State *A*'s domestic law, and at the same time also be a national of State *B* under State *B*'s domestic law. This can be the case even if the laws of both State *A* and State *B* prohibit their nationals from also being the national of another state.

Prior to the Second World War, international tribunals sometimes applied a principle of *non-responsibility*, preventing states from exercising diplomatic protection over an individual against a state of which that individual was also a national.[37] By the mid-1950s, however, international tribunals began to assert that, while an individual could validly have more than one nationality, only one of those nationalities could be *dominant and effective* for purposes of international law at any given time.[38] This test is the one most commonly used today. It will be discussed at greater length in Part VI.C, below.

3. When No State Claims a Person

The third variation of the proof of nationality problem has rarely arisen in international adjudication. Nonetheless, this variation becomes important when an individual is denationalized through some means impermissible under international law. Interestingly, the lack of case law is due not to its lack of importance but to a basic feature in the structure of international tribunals. This particular feature is that, with some

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[35] *See Flegenheimer Claim* (U.S. v. Italy), 25 I.L.R. 91 (Italy-U.S. Conciliation Comm'n 1958); *see also* OPPENHEIM, *supra* note 11, § 378. **R**

[36] See *infra* Part VI.C.1.

[37] *See generally Case No. A/18*, Decision No. 32-A18-FT (6 Apr. 1984), 5 Iran-U.S. Cl. Trib. Rep. 251 (discussing this phenomenon); *see also* 1930 Hague Convention, *supra* note 19, art. 4 ("A State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses."). **R**

[38] *See Nottebohm Case* (Liech. v. Guat.), 1955 I.C.J. 4 (Apr. 6) (Second Phase); *Mergé Case*, 14 R.I.A.A. 236 (June 10, 1955) (Italian-U.S. Conciliation Commission).

exceptions, individuals have not had access to international tribunals.[39] The claims of individuals have generally come before international tribunals only when a state has filed a claim on behalf of someone whom it claims as its national. Because a state will, quite naturally, not espouse a claim against itself by a person whom it does not recognize as its national, these claims have not traditionally been heard in international tribunals.[40]

Thus, despite the claims of some international instruments to regulate the deprivation of nationality,[41] this structural aspect of international adjudication has often had the effect of making deprivation of nationality—for practical purposes—wholly a matter of domestic law. However, as discussed above, it appears that this situation is changing. Given the substantive importance of the issues involved, it seems worthwhile to examine this variation of the proof of nationality problem before it becomes a procedurally more frequent occurrence. It is fitting to begin such a discussion with an examination of the basic legal document involved in modern international travel: the passport.

IV. The Passport in International Law

In the law of nationality, passports play a special role. Indeed, as will be seen below, passports are uniquely probative of nationality under international law. Were this the limit of their relevance, passports would still be documents of substantial international legal significance.[42]

However, in addition to their evidentiary value, I argue that passports are also important as a matter of substantive international law. A central claim of this Article is that acquisition of a valid passport fundamentally changes the international legal status of an individual in

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39 There are, however, several important exceptions to this general rule. *See supra note* 26. *See also* Part VII.A, *infra*. **R**

40 *Cf.* Kunkel et al. v. Polish State, *Case No*. 318, 1925-26 Ann. Dig. 418 (Germano-Polish Mixed Arb. Trib. 1925) ("[T]he Tribunal had no jurisdiction to decide a claim against Poland by Polish nationals.").

41 *See* sources cited *supra* note 4. **R**

42 Of course, this is by no means the limit of their relevance. In fact, passport issuance has been important in a related area of law that is nonetheless outside the scope of this Article. During the Cold War, substantial litigation resulted from U.S. State Department passport policies that were said to inhibit the "right to travel." *See generally* Guy S. Goodwin-gill, International Law and the Movement of Persons Between States 29-34 (1978). Landmark decisions in this area included *Kent v. Dulles*, 357 U.S. 116, 117-120, 129-130 (1958) (overturning the State Department policy of refusing to issue passports to individuals suspected of being members of the Communist party) and *Haig v. Agee*, 453 U.S. 278, 309-10 (1981) (upholding policy of revoking passports, without purporting to thereby revoke citizenship, from individuals when there was "a substantial likelihood of serious damage to national security or foreign policy as a result of the passport holder's activities in foreign countries").

relation to the passport-issuing state. In other words, by issuing a passport, a state takes an action that substantially alters the legal relationship between itself and the passport holder. My argument is that once the passport is issued, the nationality of the passport holder becomes a proper concern of public international law.[43] Without a passport, however, an individual is limited to the relatively soft guarantees of international human rights law.

Below, I examine the passport's proof of nationality role in more detail. Later, in Part V, I will return to the passport's significance in substantive international law.

A. Historical Context

1. Passports and their Legal Significance

Passports, as prima facie evidence of nationality,[44] are "normally accepted for the usual immigration and police purposes."[45] In other words, states take daily legal action on the basis of passports issued by other states, without taking time to investigate whether the passport holder is "really" a national of the issuing state. If an individual travels to France on a U.S. passport, the French border agent's decision to admit the individual without a visa is based on the faith that the French government places in the U.S. government's representation that the passport holder is in fact a U.S. national. A passport in this case is different from a national identity card, addressed only to other actors within the issuing state.

Here, a historical note is in order. One problem that occurs in examining the legal significance of the passport is that the term has been used to indicate several different, but closely related, types of documentation.[46] For example, it has referred to

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[43] Of course, it is not necessarily the case that, absent a passport, an individual's nationality is solely an issue of domestic nationality law. *See supra* note 4 and accompanying text. My position, however, is that even in a case where soft law on nationality is inapplicable or ineffective, the nationality of a passport holder is a subject addressed effectively by hard international law. **R**

[44] *See*, *e.g.*, OPPENHEIM, *supra* note 11, §§ 378 n.16, 381; WEIS, *supra* note 1, at 228; DANIEL C. TURACK, THE PASSPORT IN INTERNATIONAL LAW (1972). *See also Ruinart Père & Sons v. Franzmann*, Franco-German Mixed Arb. Trib. (May 27, 1927) (accepting an Argentinean passport as partial evidence, together with a certificate of release from German nationality, that the defendant was not a German national). **R**

[45] OPPENHEIM, *supra* note 11, §§ 378 n.16. **R**

[46] *See generally* WEIS, *supra* note 1, at 222-30; 8 MARJORIE M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 194-204 (1967); TURACK, *supra note* 44, at 15-21; THE INVENTION OF THE PASSPORT: SURVEILLANCE, CITIZENSHIP, AND THE STATE (John Torpey ed., 2000). An early mention of letters used for a similar purpose can be found in the Old Testament. *See Nehemiah* 2:7 (King James) ("Moreover I said unto **R** **R**

> an authorization to pass from a port or leave the country, or to enter or pass through a foreign country; a permit for soldiers to depart from their service; a sea letter; and, a document issued in time of war to protect persons from the general operation of hostilities.[47]

By the eighteenth century, however, the term had developed into something more analogous to what we refer to as a "visa" today, that is, a document issued to aliens for travel or sojourn within the territory of the issuing state.[48] Although this meaning began to die out during the nineteenth century, this sense of the term is still used in some diplomatic and military contexts.[49] The use of the term passport to refer to a document issued by the country of nationality for use by the national in other countries developed sometime in the nineteenth century, but the practice did not become generalized until the time of the First World War.[50] Thus, early sources discussing "passports" must be interpreted in light of this historical context.

a. Passports as Proof of Nationality in U.S. Courts: The Older Practice

The oft-cited holding of the U.S. Supreme Court in *Urtetiqui v. D'Arcy*[51] should be understood in context of these changes in the nature and meaning of the term "passport." The passport in this case is functionally similar to the modern passport, but the institutionalized protections against mistake and fraud that we now associate with the term passport had not yet developed. The resolution of this case depended in part on the nationality of Domingo D'Arbel, one of the plaintiffs. D'Arbel claimed to be a citizen of the United States, but the defendants in the case tried to establish that he was instead either a subject of the King of Spain or a native Frenchman. In order to prove his citizenship, D'Arbel attempted to introduce a passport, signed by then-Secretary of State John Quincy Adams, which asserted that D'Arbel was in fact a citizen of the United States. The Court held that, in general, a passport was not admissible in court as legal evidence of citizenship.[52]

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the king, If it please the king, let letters be given me to the governors beyond the river, that they may convey me over till I come into Judah.").

47 TURACK, *supra* note 44, at 15. **R**

48 *See* WEIS, *supra* note 1, at 222-23. **R**

49 *Id*. at 223.

50 *Id.*

51 34 U.S. 692 (1835).

52 Most of the court's language seems to indicate that a passport is never admissible in court as evidence of citizenship. However, one statement raises the possibility that a passport may in some special cases be admissible in evidence: "But whether the circuit court erred in admitting the passport in evidence, under the circumstances stated in the exception, this court is divided in opinion, and the point is of course undecided." *Urtetiqui*, 34 U.S. at 699.

This case has not been explicitly overruled by the Court, and is still sometimes cited (for instance, by legal encyclopedias) for the proposition that U.S. passports are not admissible as proof of citizenship in U.S. court.[53] This position, however, is demonstrably false. Passports are explicitly made admissible as proof of U.S. citizenship by 22 U.S.C. § 2705(1).[54] It is not, however, only the existence of the statute which ensures the invalidity of this case. In order to demonstrate that the reasoning of this case is not applicable in the international context, it is worth quoting the Court at some length:

> There is some diversity of opinion on the bench, with respect to the admissibility in evidence of this passport, arising, in some measure, from the circumstances under which the offer was made, and its connexion with other matters which had been given in evidence. Upon the general and abstract question, whether the passport, per se, was legal and competent evidence of the fact of citizenship, we are of opinion that it was not.

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[53] For instance, the version of *American Jurisprudence* consulted during initial drafting of this Article cited *Urtetiqui* as if it were still good law on this point. *See* 59 AM. JUR. 2D § 4 (1987 and Supp. 2002) ("A passport is generally not considered legal evidence in the courts of this country that the person to whom it was issued was a citizen of the United States.") (citing *Urtetiqui*, 34 U.S. 692). On March 25, 2004, the version of *American Jurisprudence* available on LEXIS still contained this language. However, the version available on Westlaw had been updated. It no longer cites *Urtetiqui*, but relies instead on more recent law—including 22 U.S.C. § 2705 and the Ninth Circuit's *Magnuson* decision. *See* 59 AM. JUR. 2D § 4 (Westlaw 2004) ("A passport is an aid in establishing citizenship for purposes of reentry into the United States, and, if unexpired and issued for the maximum period of validity, it is regarded as proof of United States citizenship to the same extent as a certificate of naturalization or a certificate of citizenship.") (citations omitted).

[54] The statute reads as follows:

> The following documents shall have the same force and effect as proof of United States citizenship as certificates of naturalization or of citizenship issued by the Attorney General or by a court having naturalization jurisdiction:
>
> (1) A passport, during its period of validity (if such period is the maximum period authorized by law), issued by the Secretary of State to a citizen of the United States.
>
> (2) The report, designated as a "Report of Birth Abroad of a Citizen of the United States", issued by a consular officer to document a citizen born abroad. For purposes of this paragraph, the term "consular officer" includes any United States citizen employee of the Department of State who is designated by the Secretary of State to adjudicate nationality abroad pursuant to such regulations as the Secretary may prescribe.

22 U.S.C. § 2705. It should be noted, however, that passports can also be issued to non-citizens who nonetheless owe allegiance to the United States. *See* 22 U.S.C. § 212.

> There is no law of the United States, in any manner regulating the issuing of passports, or directing upon what evidence it may be done, or declaring their legal effect. It is understood, as matter of practice, that some evidence of citizenship is required, by the secretary of state, before issuing a passport. This, however, is entirely discretionary with him. No inquiry is instituted by him to ascertain the fact of citizenship, or any proceedings had, that will in any manner bear the character of a judicial inquiry. It is a document, which, from its nature and object, is addressed to foreign powers; purporting only to be a request, that the bearer of it may pass safely and freely; and is to be considered rather in the character of a political document, by which the bearer is recognized, in foreign countries, as an American citizen; and which, by usage and the law of nations, is received as evidence of the fact. But this is a very different light, from that in which it is to be viewed in a court of justice, where the inquiry is, as to the fact of citizenship. It is a mere ex parte certificate; and if founded upon any evidence produced to the secretary of state, establishing the fact of citizenship, that evidence, if of a character admissible in a court of justice, ought to be produced upon the trial, as higher and better evidence of the fact.[55]

It is apparent from this quotation that the court's decision did not turn on whatever international character a passport may at that time have had. Instead, it turned on the internal procedures by which the passport had been granted. The thrust of the court's holding is that a passport should not be accepted as evidence of citizenship when there was no statutory requirement that the applicant establish citizenship before the passport could be issued. Although the Court did acknowledge that, "as a matter of practice, some evidence of citizenship is required,"[56] it did not consider this practice to be sufficiently reliable to bind a U.S. court.

b. The Modern Practice

In this light, it is easy to see how the *Urtetiqui* holding is largely inapplicable to the modern passport. Today, the issuance of U.S. passports is governed by specific provisions in the United States Code[57] and the Code of Federal Regulations.[58] U.S. passports may only be issued to citizens and noncitizen nationals,[59] and the application must be

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55 *Urtetiqui*, 34 U.S. at 699.
56 *Id.*
57 *See generally* 22 U.S.C. §§ 211(a)-218.
58 *See generally* 22 C.F.R. § 51.
59 22 U.S.C. § 212; 22 C.F.R. § 51.2(a).

verified by oath or affirmation, in person, before a duly authorized individual.[60] Photographs must be provided.[61] Similarly, as long as foreign passports are issued under some type of statutory authority, with some reasonable procedure designed to minimize opportunities for fraud, the reasoning of *Urtetiqui* should not militate against their serving as evidence of citizenship.

The Ninth Circuit's 1990 decision in *Magnuson v. Baker*[62] is a better statement of current U.S. law.[63] Myers[64] applied for a U.S. passport on the basis of derivative citizenship, but his application was rejected. He requested reconsideration, and the highest ranking officer in the Seattle passport office conducted additional research, personally concluded that Myers was a U.S. citizen, and issued him a passport. Several months later, an INS official wrote to the Seattle office, expressing INS disapproval of the decision and noting that INS was attempting to deport Myers. However, under 22 U.S.C. § 2705, the INS could not deport Myers as long as he possessed a valid passport.[65] Several months after the INS letter to the Seattle passport office, a State Department official

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60 22 C.F.R. § 51.21(a).

61 *Id.*

62 911 F.2d 330 (9th Cir. 1990).

63 Although this case has not yet been followed by other courts, it has also not been contradicted. The two published decisions citing the case neither question its general reasoning nor cast any doubt on its holding that the State Department is unable to revoke a passport based simply on a finding that its own prior determination of the passport applicant's citizenship was erroneous. *See Scales v. I.N.S.*, 232 F.3d 1159, 1165 n.10 (9th Cir. 2000) (distinguishing *Magnuson* as inapplicable to a citizenship claim by an individual born abroad to the wife of U.S. citizen, where the individual in question apparently did not have a U.S. passport); *Kelso v. U.S. Dept. of State*, 13 F.Supp. 1 (D.D.C. 1998) (distinguishing *Magnuson* as inapplicable to passport revocation when the citizenship of the passport holder was never challenged). Moreover, it seems to be fully consistent with a proper understanding the relevant statutes, regulations, and case law. See also discussion *supra* note 53. **R**

64 Although not important to the holding of the case, it is worth noting that Myers was not an appealing character. He was born in Canada, but fled to the United States after being convicted of tax evasion in Canada. He based his claim to U.S. citizenship on a contention that his father was a naturalized U.S. citizen. At the passport office, he was able to support this claim only with circumstantial evidence, because the Oklahoma records that could have established his father's citizenship were incomplete. The court noted that whether Myers should or should not have received a passport was not at issue in the appeal. *Id.* at 331 n.1.

65 *Id.* at 333. The court stated:

> Given these two effects of section 2705, Myers' passport had significant consequences. Because the passport provided conclusive evidence of citizenship which the INS could not collaterally attack, Myers' passport prevented the INS from deporting him.

Id. The court also cited *Matter of Villanueva*, Interim Decision No. 2968, in which "[t]he INS held that 22 U.S.C. § 2705 made a passport conclusive proof of citizenship." *Id.* at 333 n.7.

wrote to Myers, stating that the passport had been issued in error, and demanding that he return it immediately or face a fine and/or imprisonment. Myers requested a hearing, and when the request was denied, sued in federal district court. The district court granted summary judgment to Myers.

The Ninth Circuit panel upheld the decision of the district court, explaining that 22 U.S.C. § 2705 did not grant the Secretary of State any greater power to revoke a passport than that granted to the Attorney General[66] or a district court[67] to revoke certificates of citizenship. Because of this, the panel held that the Secretary of State could only revoke a passport on "exceptional grounds such as fraud or misrepresentation."[68] "Second thoughts" about the decision to issue a passport are not permissible grounds for revocation.[69] Even when revoking a passport on permissible grounds, the Secretary of State must give notice and an opportunity to be heard before revoking the passport, at least where the passport is being revoked on the ground of fraud relating to the establishment of citizenship.[70]

2. Other Identity Documents

a. The Special Case of Passports Issued to Non-Nationals

In some cases, passports have been issued specifically for use by non-nationals. Because these passports do not assert that the bearer is a national of the issuing state, the international law relating to proof of nationality does not apply to bearers of this type of passport. In particular, the argument below—that the law of binding state action prohibits denationalization of passport holders—does not apply when the passport itself states that the bearer is a non-national.

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66 The U.S. Attorney General has the authority to revoke a certificate of citizenship or naturalization only when he is satisfied that the document was "illegally or fraudulently obtained from, or was created through illegality or by fraud practiced upon, him or the Commissioner or a Deputy Commissioner." 8 U.S.C. § 1453. However, in order to do so he must give the certificate holder at least 60 days to show why the certificate should not be canceled. *Id.* It is worth noting that "[t]he cancellation under this section of any document purporting to show the citizenship status of the person to whom it was issued shall affect only the document and not the citizenship status of the person in whose name the document was issued." *Id.*

67 A U.S. district court has power to set aside an order admitting a person to citizenship and to cancel the certificate of citizenship "on the ground that such order and certificate of naturalization were illegally procured or were procured by concealment of a material fact or by willful misrepresentation." *Id.* § 1451(a). The person whose naturalization is to be revoked must be given 60 days to answer the charge that the certificate was fraudulently procured. *Id.* § 1453(b).

68 *Magnuson*, 911 F.2d at 336.

69 *See id.* at 335.

70 *See id.* at 336.

b. Birth Certificates and Certificates of Naturalization

As will be shown below,[71] many international tribunals have accepted birth certificates and certificates of naturalization as proof of nationality.[72] However, some have refused to do so,[73] and in the past at least one writer has asserted that it is "well established" that an international tribunal may question the validity of a naturalization certificate.[74]

For present purposes, it is sufficient to note two things. First, the jurisprudence of the Iran-U.S. Claims Tribunal strongly suggests that birth certificates and certificates of naturalization can in some cases serve as conclusive proof of nationality. Second, because these documents—unlike passports—do not make any representation to foreign states, the law of binding state action would not apply to them.

B. The Passport as Proof of Nationality in International Law

1. Significance of the Iran-United States Claims Tribunal

Decisions of the Iran-U.S. Claims Tribunal are particularly probative as evidence of the international law of nationality.[75] The Tribunal has enjoyed great prestige as a general matter, but there are two reasons that its decisions on the nationality issue are especially influential.

First, and most importantly, these decisions are persuasive because of the high degree of political tension associated with nationality issues before the tribunal. In particular, the issue of jurisdiction over "dual

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[71] See *infra* Part IV.B.3.

[72] Driver's licenses and military identification are beyond the scope of this analysis. However, one would assume that military identification would serve as strong evidence of nationality. This would not be for any presumption of accuracy as to nationality (if nationality were in fact listed) but for the strong value that military service itself can have as evidence of nationality (and as a cause for losing a former nationality). It is worth noting, however, that the law of binding state action might in fact apply to military identification, since one of the functions of this form of identification is presumably to identify captured military personnel to a foreign power.

By contrast, one would also assume that a driver's license would be of little or no use as proof of nationality, unless the laws of the issuing country actually restricted the driving privilege to nationals. Even then, it would seem necessary to establish that nationality was actually checked with serious care in order to use the license as proof of nationality. It goes without saying that, since a drivers license is not directed at another state, the law of binding state action would not apply.

[73] *See, e.g.*, *Flegenheimer Claim* (U.S. v. Italy), 25 I.L.R. 91, 98 (Italy-U.S. Conciliation Comm'n 1958).

[74] DURWARD V. SANDIFER, EVIDENCE BEFORE INTERNATIONAL TRIBUNALS 220 n.77 (Rev. ed. 1975).

[75] For a general discussion of the significance of the jurisprudence of the Iran-U.S. Claims Tribunal as a source of international law, see CHARLES N. BROWER & JASON D. BRUESCHKE, THE IRAN-UNITED STATES CLAIMS TRIBUNAL 631-656 (1998).

nationals"—persons who were both nationals of Iran under Iranian law and nationals of the United States under U.S. law—was extraordinarily contentious.[76] This political fact focused the attention of both the parties and the tribunal on this issue, ensuring that the position of each party was thoroughly argued and that the tribunal understood the significance of the decisions that it made.[77]

Second, these decisions are convincing because of their relative youth in the realm of international law. The Iran-U.S. Claims Tribunal was established in 1981 and continues its work today.[78] The cases cited below were decided between 1983 and 1989. Although fifteen to twenty years may be a long time in some areas of U.S. domestic jurisprudence, it is relatively short in the world of public international law.[79] The recency

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[76] *See, e.g.*, GEORGE H. ALDRICH, THE JURISPRUDENCE OF THE IRAN-U.S. CLAIMS TRIBUNAL 44 (1996) ("On one issue, jurisdiction over claims by dual Iranian-United States nationals, levels of intense political sensitivity were reached that were higher than those encountered on the merits in other cases."); Lucy F. Reed, *The Long Twilight: An Agent's View of the Closing Stages*, *in* THE IRAN-UNITED STATES CLAIMS TRIBUNAL AND THE PROCESS OF INTERNATIONAL CLAIMS RESOLUTION: A STUDY BY THE PANEL ON STATE RESPONSIBILITY OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 339-41 (David D. Caron & John R. Crook ed., 2000) (noting that dual national claims were "highly politicized" even after the decision in *Case No. A/18*, and suggesting that the Chamber Chairmen should have moved these cases along by refusing to let Iran re-litigate the dual nationality issue each time one of these claims arose); *see also Case No. A/18*, Decision No. 32-A18-FT (6 Apr. 1984), 5 Iran-U.S. Cl. Trib. Rep. 251 (dissent of Iranian arbitrators).

[77] Of course, this proposition is open to an obvious rebuttal. Shifting viewpoints slightly, it could be argued that the contentious nature of the tribunal's dual nationality decisions in fact reduces their probative value as evidence of current international law. As international decisions are not per se binding on other courts, the argument goes, they are only valid as evidence of international law to the extent that they serve to demonstrate international law as accepted by states. It then follows that Iran's extreme protest against these decisions suggests that they were not in conformity with the content of international law, at least as understood by Iran, but instead were some attempt by an international tribunal to "progressively develop" the law.

This argument, however tempting, proves far too much. If protest by a losing state were sufficient to strip a decision of whatever value it had as an indicator of international law, it is hard to imagine international tribunals relying heavily on such decisions (since, in general, at least one state will be the loser in each case). However, even a brief survey of the opinions issued by international tribunals reveals extensive reliance on the decisions of other tribunals.

[78] *See* Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (Claims Settlement Declaration), 19 January 1981, art. 2.

[79] *See, e.g.*, BROWER & BRUESCHKE, *supra* note 75, at 631 ("As the International Court of Justice recognized in *Barcelona Traction*, many areas of international law are addressed by comparatively few decisions of international tribunals.") (noting also that the subject of protection of foreign investment—a subject frequently addressed **R**

of these decisions is particularly relevant in relation to proof of nationality. As demonstrated above, the nature, relevance, and probative value of identity documents has changed with the passage of time. As governmental ability to guarantee the accuracy of certain types of identity documents has increased, the willingness of both domestic courts and international tribunals to accept identity documents as proof of the statements they contain has also increased.[80]

The Iran-U.S. Claims Tribunal is the only significant international tribunal that has addressed the probative value of identity documents as proof of nationality within the past forty years. Considering the changes that have taken place within that time in the ability of governments to process information, its decisions in relation to this issue should be particularly relevant as evidence of current international law.

2. A Note on Iranian Nationality Law

The attention paid by the Iran-U.S. Claims Tribunal to passports as proof of nationality in these cases results in part from the strict provisions of Iranian nationality law. During the relevant time period, Iranian law required approval of the Iranian Council of Ministers for renunciation of nationality. Once that renunciation was granted, the expatriate was allowed to enter Iran only once, for the specific purpose of selling or transferring all his property. After that, the expatriate was forever barred from entering Iran.[81] The practical result of this policy was that most Iranians who acquired U.S. citizenship continued to use an Iranian passport to enter and exit Iran, often for years or decades after acquiring U.S. citizenship. Some also used the number of their Iranian identity card to carry out certain activities (especially financial or property-related activities) that were open only to Iranian citizens. The U.S. government largely tolerated this practice. The result was that in dual nationality cases, the claimants often held and used both a valid U.S. passport and a valid Iranian passport.[82]

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by the Iran-U.S. Claims Tribunal—was "virtually untouched" in the "53 contentious cases on the merits and the 48 judgments [the ICJ] had rendered in the 40 years of its existence up to 1 July 1986").

[80] It appears that national security concerns may soon push passport reliability to a new level. A recent report indicates that the United States will soon require all visitors to have either a machine readable passport or a visa containing biometric identification data (such as fingerprints and a digital image of the passport holder's face). *See Land of the Free, Home of the Bar Code*, *in* THE WORLD IN 2004 (The Economist Newspaper Ltd. ed., 2003).

[81] *See* Esphahanian v. Bank Tejarat, Award No. 31-157-2 (29 March 1983), 2 Iran-U.S. Cl. Trib. Rep. 157, 167-68.

[82] It is worth noting that the Tribunal was more willing to overlook the use of the Iranian passport to enter and exit Iran, than the use of an Iranian identity card number to enter into some type of transaction in Iran. *See, e.g.,* Golpira v. Iran,

3. The Passport as Proof of Nationality

In the absence of evidence demonstrating loss of nationality, the Iran-U.S. Claims Tribunal accepted birth certificates and U.S. passports listing birth in the United States as conclusive proof that the holder was a national of the United States under U.S. law.[83] These documents were sufficient to prove the bearer had U.S. nationality, even prior to the date of the document. The Tribunal also accepted naturalization documents and U.S. passports not listing birth in the United States as conclusive proof of U.S. nationality under U.S. law, although only for periods of time subsequent to the date of the document.[84]

Award No. 32-211-2 (29 Mar. 1983), 2 Iran-U.S. Cl. Trib. Rep. 171. For a more detailed discussion of the tribunal's jurisprudence in regard to "abuse of nationality," see Nancy Amoury Combs, *Toward a New Understanding of Abuse of Nationality in Claims Before the Iran-United States Claims Tribunal*, 10 AM. REV. INT'L ARB. 27 (1999).

[83] *See*, *e.g.*, R.N. Pomeroy v. Iran, Award No. 50-40-3 (8 June 1983) (accepting passports and "birth registration documents" as sufficient to show shareholders' U.S. nationality by birth); Cal-Maine Foods, Inc. v. Iran, Award No. 133-340-3 (11 June 1984), 6 Iran-U.S. Cl. Trib. Rep. 52 (accepting birth certificate and U.S. passport as sufficient proof of majority shareholder's U.S. nationality); Michelle Danielpour v. Iran, Award No. 424-183-3 (16 June 1989), 22 Iran-U.S. Cl. Trib. Rep. 118 (accepting birth certificate and U.S. passport as sufficient evidence of U.S. nationality); Stephen Joseph Danielpour v. Iran, Award No. 69-169-3 (16 June 1989), 22 Iran-U.S. Cl. Trib. Rep. 123 (accepting birth certificate and U.S. passport as sufficient evidence of U.S. nationality); Ebrahimi v. Iran, Award No. 71-44/45/46/47-3 (16 June 1989), 22 Iran-U.S. Cl. Trib. Rep. 138 (birth certificate and U.S. passport sufficient to prove U.S. nationality of claimant mother; birth certificates sufficient to prove U.S. nationality of two claimant children; U.S. passport and certificate of registration of birth abroad to an American mother sufficient to prove nationality of third claimant child); Haber v. Iran, Award No. 437-10159-3 (4 Sept. 1989), 23 Iran-U.S. Cl. Trib. Rep. 133 (accepting U.S. passport issued after claim was filed as proof of sole shareholder's U.S. nationality by birth); Williams v. Iran, Award No. 342-187-3 (18 Dec. 1987), 17 Iran-U.S. Cl. Trib. Rep. 269 (accepting birth certificate as sufficient proof of U.S. nationality), *enforcement denied*, Federal Reserve Bank of New York v. Williams, 708 F.Supp. 48 (S.D.N.Y. 1989) (finding that claimant was not person referred to in birth certificate, and that the person named in the birth certificate was dead); Benedix v. Iran, Award No. 412-256-2 (22 February 1989), 21 Iran-U.S. Cl. Trib. Rep. (accepting birth certificate as sufficient proof of claimant husband's U.S. nationality; assuming for purposes of award that passports are sufficient evidence to prove claimant wife's U.S. nationality).

[84] *See*, *e.g.*, Esphahanian v. Bank Tejarat, Award No. 31-157-2 (29 March 1983), 2 Iran-U.S. Cl. Trib. Rep. 157 (accepting U.S. naturalization certificate and U.S. passport as sufficient proof of U.S. nationality); Golpira v. Iran, Award No. 32-211-2 (29 Mar. 1983), 2 Iran-U.S. Cl. Trib. Rep. 171 (apparently accepting U.S. naturalization certificate as sufficient proof of U.S. nationality); Reza Said Malek v. Iran, Award No. 68-193-3, 19 Iran-U.S. Cl. Trib. Rep. 48 (23 June 1988) (accepting "Application for Verification of Information from Immigration and Naturalization Service Records" as sufficient proof of U.S. nationality); Nahid (Danielpour) Hemmat v. Iran, Award No. 70-170-3 (16 June 1989), 22 Iran-U.S. Cl. Trib. Rep. 129

However, when the Tribunal was faced with competing evidence that an individual was also a citizen of Iran under Iranian law, these documents were not necessarily sufficient to establish U.S. nationality under international law. This problem of dual nationality will be explored further below.[85] Absent an issue of dual nationality or loss of nationality, however, a passport was treated as dispositive of the nationality question.

V. The Law of Binding State Action

The soft norms of human rights law address the relationship between the individual and his or her own state, but at least in the case of a passport holder this is not the only relationship relevant to an instance of nationality deprivation. I argue that by issuing a passport, a state makes a formal representation to other states that the passport holder is its national. This act triggers the application of the body of international law regulating state representations and other formal actions—the law of binding state action. This body of law, properly understood, gives other states, as well as the passport holder,[86] a potential legal claim against the denationalizing state.

Up to this point, however, the law of binding state action has been applied only in limited contexts. When a state has in fact been found to be bound, it has generally involved personal representations made by heads of state and high level functionaries relating to major diplomatic issues such as international boundaries and nuclear weaponry. With this in mind, it might be reasonable to hesitate to apply this body of law to passports issued to everyday people. However, such hesitation would be mistaken. As will be explained below, intellectually consistent application of the law of binding state action requires its extension to the passport context. Significantly, this argument is neither radical nor new, but has at various times been suggested—albeit in less developed form—by respected authors[87] and at least one national delegation.[88]

(naturalization certificate sufficient to demonstrate U.S. nationality as of the date of the certificate); Mohajer-Shojaee v. Iran, Award No. 490-273-1, 25 Iran-U.S. Cl. Trib. Rep. 196 (U.S. passport not listing birth in the United States dated prior to relevant period for Tribunal jurisdiction sufficient to prove U.S. nationality of claimant wife; U.S. passport not listing birth in the United States dated subsequent to relevant period for Tribunal jurisdiction not admissible to prove U.S. nationality of claimant husband).

85 *See infra* Part VI.C.

86 *See infra* Part VII.C.

87 *See, e.g.*, Weis, *supra* note 1, at 55-56 ("The faith of a State which has admitted an alien on the assumption that the State of his nationality is under an obligation to receive him back would be deceived if by subsequent denationalization this duty were to be extinguished."); Brownlie 1998, *supra* note 14, at 407-409 (devoting an entire subsection to the concept of "Nationality by Estoppel"). R R

A. Legal Principles

I use the term "law of binding state action" to describe a set of related principles by which states have been held to have undertaken enforceable legal obligations without entering into formal international agreements. These have variously been referred to as estoppel, preclusion, acquiescence, and unilateral action. Estoppel, preclusion, and acquiescence come from an old and venerable tradition, and they are more or less generally accepted in international law. By contrast, unilateral action is still relatively young and radical: neither the contours of its applicability nor its advisability as a matter of policy has yet been settled.[89] Importantly, both the older principles and their newer counterpart share a common theme: formal actions taken by a state may, in some circumstances, serve to bind that state in the future.

These principles are not, to my knowledge, codified in any major international agreement. Instead, they are based on international custom[90] and general principles[91] derived from the major domestic legal

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[88] Over 70 years ago, the British delegate to the Hague Codification Conference of 1930 asserted that:

> [A] kind of contract or obligation results from the granting of a passport to an individual by a state so that when that individual enters a foreign state with that passport, the State whose territory he enters is entitled to assume that that the other State whose nationality he possesses will receive him back in certain circumstances.

WEIS 1956, supra note 1, at 56 (quoting Acts of the Hague Conference for the Codification of International Law, Vol.II—Minutes of the First Committee: Nationality, League of Nations Doc. No. 351 (a). M. 145 (a). 1930. V., Series of League of Nations Publications V. Legal 1930. V. 15). **R**

[89] *See* W. Michael Reisman, *Unratified Treaties and Other Unperfected Acts in International Law: Constitutional Functions*, 35 VAND. J. TRANS. L. 729, 737, 743-45 (2002).

[90] In the traditional view, custom shares pride of place with treaties atop the hierarchy of international norms. *See* OPPENHEIM, *supra* note 11, §§ 9-11. The *Oppenheim* editors define custom as "a clear and continuous habit of doing certain actions which has grown up under the aegis of the conviction that these actions are, according to international law, obligatory or right." *Id.* § 10. Custom is distinguishable from a simple usage, which is "a habit of doing certain actions which has grown up without there being the conviction that these actions are, according to international law, obligatory or right." *Id*. The requirement that such a habit take place out of a sense of legal obligations is often termed *opinio juris*. *Id*. *See also Asylum* Case, 1950 I.C.J. 266, 276-277 (Nov. 20) (defining custom under the ICJ Statute); *North Sea Continental Shelf* Case, 1969 I.C.J. 3, 44 (defining *opinio juris*). On custom more generally, see ANTHONY D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW (1971). **R**

[91] A number of influential texts in fact provide for direct reliance on such general principles. *See, e.g.*, ICJ Statute, *supra* note 16, art. 38(c) (permitting the court to apply, in the absence of applicable treaty provision or custom, "the general principles of law recognized by civilized nations"); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102) [hereinafter RESTATEMENT (THIRD)] **R**

systems in the world.[92] Although not, in a formal sense, "judicially created," their applicability in international law is demonstrated by a long series of authoritative and controlling decisions.[93] While the published opinions of courts and international tribunals are an important component of this body of decisions, the decisions of other international actors also bear substantial weight.[94]

(asserting that a "supplementary" rule of international law can be discovered "by derivation from general principles common to the major legal systems of the world . . . even if not incorporated or reflected in customary law or international agreement").

[92] For those who subscribe to a formalistic definition of the sources of international law, such as that set out in Article 38 of the ICJ statute, there is some disagreement as to whether international law estoppel is properly analyzed as custom under Article 38(1)(b) or general principle under Article 38(1)(c). *Compare* H. LAUTERPACHT, PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW (WITH SPECIAL REFERENCE TO INTERNATIONAL ARBITRATION) vii-ix, 203-205 (1927) (suggesting that estoppel should be applied as a general principle of law) *with* ANTIONE MARTIN, L'ESTOPPEL EN DROIT INTERNATIONAL PUBLIC: PRÉCÉDE D'UN APERÇU DE LA THÉORIE DE L'ESTOPPEL EN DROIT ANGLAIS 240-46 (1979) (arguing that estoppel should not be considered a general principle of law, but instead a rule of customary international law). *See also* RESTATEMENT (THIRD), *supra* note 91, § 102, comment *l.* ("General principles may also provide rules of reason of a general character, such as acquiescence and estoppel . . . international practice may also convert such a principle into a rule of customary law."); I.C. MacGibbon, *Estoppel in International Law*, 7 INT'L & COMP. L.Q. 468, 468 (1958) ("The question of whether the judicial basis of the doctrine of estoppel is to be found in customary international law rather than in the 'general principles of law' is not free from difficulty . . . ."). However, it is not necessary for our purposes to resolve this disagreement. It is sufficient merely to note that both sides do consider the principle of estoppel to be applicable in international law. **R**

[93] *See generally* W. Michael Reisman, *The View from the New Haven School of International Law*, 86 AM. SOC'Y INT'L L. PROC. 118, 121 (1992) (arguing that law should be understood not as a body of formal rules but as a series of authoritative and controlling decisions).

[94] In particular, official positions taken by the foreign offices of influential states may shed important light on the beliefs of major international actors about what constitutes binding law. In this regard, the numerous instances in which states have taken litigating positions relying on estoppel and related principles provides additional support for their existence as legal rules. For a small sampling of these cases, see *infra* note 97. **R**

1. Estoppel and Related Principles

Estoppel and related principles[95] have long been accepted as playing some role in public international law.[96] They have repeatedly been raised by parties litigating before the ICJ, and have been discussed in majority opinions published by that body.[97] They have also been discussed by

[95] Several authors have attempted to distinguish estoppel from its related principles. For example, Bowett argues that an admission is created in many situations where a necessary condition for full estoppel is absent. Such an admission is less harmful than estoppel to the rights of the party against whom it operates. D.W. Bowett, *Estoppel Before International Tribunals and its Relation to Acquiescence*, 176 BRIT. Y.B. INT'L L. 176, 195-97 (1957) ("An estoppel will exclude altogether evidence of a disputed fact, whereas an admission will either render evidence superfluous where there is no other evidence to contradict the admission or, where there is such contradictory evidence, will weaken or perhaps nullify the contradictory evidence."). Acquiescence, a term describing a state's failure to protest a given action, can sometimes be sufficient to give rise to an estoppel. *Id.* at 198-99. However, it should not be confused with acquisition of territory rights by prescription, which depends on the acquiescence of all states, or at least all those adversely affected by the acquisition. *See id.* at 200.
Similarly, Sinclair, while stressing "the common ancestry of [the concepts of acquiescence and estoppel] in the principles of good faith and equity," has noted that the ICJ has been substantially more willing to find acquiescence than "an estoppel in the strict sense." Sinclair, *Estoppel and acquiescence*, *in* FIFTY YEARS OF THE ICJ, *supra* note 5, at 106, 120. In the end, the case law of the ICJ demonstrates "that there is a close link between the two concepts, and that they must be considered as part of the wider pattern of state conduct which an international tribunal may find to be relevant to the determination of an international dispute." *Id.* at 120. R

[96] *See* LAUTERPACHT, *supra* note 92, at 203-211 (1927) (discussing these principles and their derivation from private law). *See also* MARTIN, *supra note* 92, at 240-46; Bowett, *supra* note 95, at 176; Hugh Thirlway, *The Law and Procedure of the International Court of Justice 1960-1989: Part One*, 60 BRIT. Y.B. INT'L L. 1, 10 (1989); MacGibbon, *supra* note 92, at 468-71. R R R R

[97] *See, e.g.*, Case Concerning the Land, Island and Maritime Frontier Dispute (El. Sal. v. Hond.), 1990 I.C.J. 92, 118-19 (Sept. 13) (Application by Nicaragua for Permission to Intervene); Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.), 1984 I.C.J. 246, 280, 304-311 (Oct. 12, 1984); North Sea Continental Shelf (F.R.G. v. Den. / F.R.G. v. Neth.), 1969 I.C.J. 3, 26 (Feb. 20, 1969); Case Concerning the Temple of Preah Vihear (Cambodia v. Thail.), 1962 I.C.J. 6, 32 (June 15) (Merits) (holding that Thailand was precluded by its later diplomatic conduct from asserting that it did not accept the boundary marked in a 1908 map). *See also* Case Concerning the Temple of Preah Vihear (Cambodia v. Thail.), 1962 I.C.J. 6, 39-51 (June 15) (Merits) (separate opinion of Vice-President Alfaro) (arguing that estoppel, preclusion, forclusion, and acquiescence are all slightly incorrect terms for the principle "that a State party to an international litigation is bound by its previous acts or attitude when they are in contradiction with its claims in the litigation," and discussing cases in which this principle has played a role); Case Concerning the Temple of Preah Vihear (Cambodia v. Thail.), 1962 I.C.J. 6, 52-66 (June 15) (Merits) (separate opinion of Sir Gerald Fitzmaurice); Case Concerning the Arbitral Award Made by the King of Spain on 23 December 1906 (Hond. v. Nicar.), 1960 I.C.J. 189, 222, 236-38 (Nov. 18) (dissenting opinion of Judge *ad hoc* Urrutia

other international tribunals.[98] A former Legal Advisor to the British Foreign and Commonwealth Office has noted the importance of these principles to government lawyers, especially those involved in litigating territorial disputes.[99] A review of some of the more well-known cases involving estoppel and related principles will highlight the general issues involved.[100]

In the *Case Concerning the Temple of Preah Vihear*, the ICJ found that Thailand's actions, over a period of more than fifty years, had demonstrated its acceptance of a 1908 map placing an archeologically important temple in Cambodia.[101] This demonstrated acceptance "precluded" Thailand from asserting at the time of the case that it was not bound by the map, despite the fact that Thailand was correct that the map did not follow the watershed line that a 1904 treaty provided it

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Holguin) (accepting the existence of a principle of estoppel in international law but rejecting its applicability on the facts of the case before the court).

98 *See, e.g.*, *Flegenheimer Claim* (U.S. v. Italy), 25 I.L.R. 91, 151-53 (Italy-U.S. Conciliation Comm'n 1958) (noting existence of principle of estoppel but rejecting principle of "apparent nationality"); *id.* at 155 (refusing to apply principle of estoppel to bind Italian government to an Italian-language version of the treaty, when the Italian version was prepared by all governments working together and was not a legally operative text).

99 *See* Sinclair, *supra* note 95, at 106, 106-120 (noting the importance of these principles and discussing major ICJ cases in which they have been raised). **R**

100 Here, a cautionary note is in order. The ICJ is not by any means a "supreme court" for issues of international law, and (absent some specific treaty provision) its decisions are not formally binding on other international tribunals. In fact, prior ICJ decisions are—again speaking formally—not even binding on the ICJ itself. *See* ICJ Statute, *supra* note 16, Article 38(1)(d) (noting that "judicial decisions" are only a "subsidiary means for the determination of international law."). Looking at actual practice, however, Article 38(1)(d) is somewhat misleading. The ICJ regularly relies on its prior decisions, and its substantial moral authority has frequently led other international tribunals to rely on its decisions as well. *See* OPPENHEIM, *supra* note 11, § 13 ("The International Court of Justice, while prevented from treating its previous decisions as binding, has, in the interests of judicial consistency, referred to them with increasing frequency."); *Case No. A/18*, Decision No. 32-A18-FT (6 Apr. 1984), 5 Iran-U.S. Cl. Trib. Rep. 251, (relying heavily on the ICJ's *Nottebohm* decision). **R** **R**

Despite this potential moral authority, I do not rely on these decisions as a source for any rule of law. As noted above, *see supra* text accompanying notes 90-94, estoppel and related principles can be accepted as either international custom, general principles of law, or legal rules demonstrated through a series of authoritative and controlling decisions by relevant international actors. Their existence—in some form—as a rule of decision for international tribunals is not seriously contested. **R**

However, these judicial decisions are important for another reason. They serve as an example of how one important international tribunal has applied this body of law. As we consider the application of these rules in a new factual context—that of passports and nationality—these past applications can provide important guidance as to how these principles should properly be applied.

101 Case Concerning the Temple of Preah Vihear (Cambodia v. Thail.), 1962 I.C.J. 6, 32 (June 15) (Merits).

would follow.[102] Although the majority opinion in *Preah Vihear* did not discuss the principle of estoppel on a theoretical level,[103] two separate opinions discussed estoppel and related principles at length.[104]

A majority of the court discussed the principle of estoppel in the *North Sea Continental Shelf* case, but did not apply it on the facts before the court.[105] The relevant issue was whether West Germany was bound by Article 6 of the 1958 Convention on the Continental Shelf, which it had signed but not ratified.[106] Denmark and the Netherlands, the other

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102 *Id.*

103 In fact, the majority opinion mentioned the word "estoppel" only in a summary of Thailand's conclusion that "[t]here is no room in the circumstances of the present case for the application in favour of Cambodia of any of the doctrines prayed in aid by Counsel for Cambodia, whether acquiescence, estoppel or prescription." *Id.* at 12.

104 In the first separate opinion, Vice-President Alfaro discussed the principle which he believed to be behind the majority's decision. He argued that it was at least misleading, and perhaps inaccurate, to refer to this principle under the domestic law labels often used—"estoppel, preclusion, forclusion, [and] acquiescence." The essence of the principle, he explained, was simply that "a State party to an international litigation is bound by its previous acts or attitude when they are in contradiction with its claims in the litigation." *Id.* at 39 (separate opinion of Vice-President Alfaro). The remainder of the opinion reviewed the different cases in which this principle had been applied. *Id.* at 41-42 (separate opinion of Vice-President Alfaro).

In a second separate opinion, Sir Gerald Fitzmaurice also discussed the theoretical basis for estoppel. *Id.* at 62-65 (separate opinion of Sir Gerald Fitzmaurice). In doing so, he took pains to distinguish an assertion of estoppel from an assertion that a state is simply bound by an obligation it has undertaken. In the case of a standard obligation, it must simply be shown that a state had in fact undertaken the obligation in order to demonstrate that the state was bound by the obligation. A successful assertion of estoppel, by contrast, blocks a state from denying something that it might in fact otherwise have every right to deny. In other words, estoppel prevents the state from asserting what might in fact be a true claim, on the ground that the state's prior inconsistent action had given other parties reason to believe that it would not make such an assertion. *See id.* at 63 (separate opinion of Sir Gerald Fitzmaurice) ("In other words, if the denial can be shown to be false, there is no room or need for any plea of preclusion or estoppel. Such a plea is essentially a means of excluding a denial that might be correct[—]irrespective of its correctness. It prevents the assertion of what might in fact be true.").

105 *North Sea Continental Shelf* (F.R.G. v. Den. / F.R.G. v. Neth.), 1969 I.C.J. 3, 26 (Feb. 20, 1969).

106 Article 6 of this convention provided for delimitation according to the equidistance principle. In most circumstances, this principle operated to grant each country a portion of continental shelf roughly proportionate to the length of its coastline. However, when applied to a severely concave coastline, bordered on each side by two other states—like that of West Germany on the North Sea—the equidistance principle would operate to give the state with the concave coastline a smaller share of the continental shelf that the length of its coastline would otherwise seem to warrant. Apparently realizing the consequences of the equidistance method after it signed the convention, West Germany made the understandable decision not to proceed with ratification. *North Sea*, 1969 I.C.J. 3.

parties to the case, stood to gain a considerable amount of territorial sea if West Germany were bound by the convention. They put forward several different theories of how West Germany could have bound itself to the convention regime,[107] but the court rejected each of them.[108] The majority concluded that Article 6 could only bind West Germany if West Germany were in fact estopped from denying the article's applicability. Such an estoppel could be created by past conduct by West Germany which both (1) demonstrated clear and consistent acceptance of the convention regime; and (2) caused Denmark or the Netherlands to suffer some detriment as a result of reliance on that past conduct. The majority did not find an estoppel on the facts presented.[109]

Moving from territorial disputes to the subject of this Article, it seems that the principle of estoppel should prevent a state from denying that a passport holder is in fact its national. Passports listing nationality are clear assertions by a state that it wishes other states to treat an individual as its national. They are relied upon by other states in the enforcement of their own domestic laws—most frequently at border crossings, but also in the enforcement of other internal laws and international treaty obligations.

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107 They asserted that despite West Germany's failure to ratify the convention, it had conducted itself in such a way that the convention regime—and especially Article 6—should be considered to bind the state. In this regard, Denmark and the Netherlands asserted that West Germany had either (1) unilaterally assumed the obligations of the convention through its public statements and proclamations; (2) manifested an acceptance of the general regime of the convention; or (3) recognized the convention as being generally applicable to continental shelf delimitation. *Id.* at 25.

108 The majority noted first that only a very clear and consistent course of conduct could suffice to bind a state in West Germany's situation, and expressed doubts as to whether it could be assumed that this existed when West Germany had not in fact ratified the convention—which would, after all, have been the most effective way to express its consent. *North Sea*, 1969 I.C.J. at 25-26. Second, it noted that if West Germany had ratified the convention, it would have had the option to enter a reservation to Article 6, since reservations were permitted under Article 12 of the convention. *Id.* at 25-26.

109 The exact words of the majority were:

> Having regard to these considerations of principle, it appears to the Court that only the existence of a situation of estoppel could suffice to lend substance to this contention,-that is to say if the Federal Republic were now precluded from denying the applicability of the conventional regime, by reason of past conduct, declarations, etc., which not only clearly and consistently evinced acceptance of that regime, but also had caused Denmark or the Netherlands, in reliance on such conduct, detrimentally to change position or suffer some prejudice. Of this there is no evidence whatever in the present case.

Id. at 26.

The applicability of the principle of estoppel is most clear when the passport has been used—prior to the denationalization in question—to enter the territory of the state asserting the claim on behalf of the passport holder. In such a situation, a claiming state's reliance on the passport in its decision to admit the individual should satisfy the requirement that, to support an actual estoppel, a state must be able to demonstrate that it had suffered some disadvantage from its reliance on the passport.[110]

This is not to say, however, that detrimental reliance could not be demonstrated in other contexts as well. In particular, there are at least two ways that an individual passport holder could demonstrate detrimental reliance. First, a passport holder denationalized while abroad has almost certainly relied on the passport in his or her decision to travel, in the mistaken belief that he or she could safely return to the territory of the passport-issuing state. Second, a passport holder denationalized while within the state may also have detrimentally relied on his or her possession of a passport. Such reliance might include decisions to acquire real property or make other investments that a rational person would be unlikely to make without confidence in the security of his or her nationality. Conversely, for a person with substantial holdings in such investments, detrimental reliance might include a decision not to liquidate them and flee the country.

2. Unilateral Action

A second, less well-established part of the law of binding state action may also be applicable in the passport context: the principle of unilateral action.[111] The *Nuclear Tests* case is perhaps the most famous statement of this principle.[112] Here, Australia challenged the French practice of conducting atmospheric nuclear tests in the South Pacific. Between the time the case was filed and the time the court reached its decision,

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110 This disadvantage would be most acute if the passport holder is otherwise stateless, because the claiming state would then have no guaranteed location to which it could deport the passport holder.

111 *See generally Nuclear Tests*, 1974 I.C.J. 253 (Dec. 20); Victor Rogríguez Cedeño, Special Rapporteur, International Law Commission, *Fifth Report on Unilateral Acts of* State*s*, April 4, 2002, U.N. Doc. A/CN.4/525, http://www.un.org/law/ilc/sessions/54/54docs.htm.; OPPENHEIM, *supra* note 11, § 576; BROWNLIE 1998, *supra* note 14, at 642-45; PIERRE-MARIE DUPUY, DROIT INTERNATIONAL PUBLIC (4th ed. 1998); J.H.W. VERZIJL, I INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE 105-111 (1973); ERIC SUY, LES ACTES JURIDIQUES UNILATÉRAUX EN DROIT INTERNATIONAL PUBLIC (1962); Philippe Cahier, *Le comportement des états comme source de droits et d'obligations*, *in* RECUIL D'ÉTUDES DE DROIT INTERNATIONAL : EN HOMMAGE À PAUL GUGGENHEIM 237 (1968) ; Krzysztof Skubiszewski, *Unilateral Acts of* State*s*, *in* INTERNATIONAL LAW : ACHIEVEMENTS AND PROSPECTS 221 (Mohammed Bedjaoui ed. 1991). **R**

112 *Nuclear Tests* (Austl. v. Fr.), 1974 I.C.J. 253 (Dec. 20).

however, a series of high-level French officials—including the President of the Republic—made public statements that the then-ongoing series of nuclear tests being conducted in the South Pacific would be the last series of atmospheric tests necessary to the French nuclear program. In a decision that has been taken by some as a "broad statement of principle,"[113] the court asserted that:

> It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding. In these circumstances, nothing in the nature of a quid pro quo nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the State was made.

The Court held that the various statements by French government officials were the type of action that would qualify as such a binding unilateral commitment.[114]

B. Passports and Binding State Action

The situations in which the law of binding state action has so far been applied have an important characteristic in common: they are major state actions taking place at the highest levels of international diplomacy. The decision to commit a state to one of these actions is typically made by politically responsible actors or high-level functionaries. With this in mind, passport issuance does not at first seem to fit in with the other actions. Although nationality laws are

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113 Thirlway, *supra* note 96, at 8. **R**

114 The court then held that such a commitment satisfied Australia's request to the court, and thus no further dispute existed between the parties. It therefore had no occasion to make any further determination. *Nuclear Tests*, 1974 I.C.J. at 271 ("The Applicant has repeatedly sought from the Respondent an assurance that the tests would cease, and the Respondent has, on its own initiative, made a series of statements to the effect that they will cease. Thus the Court concludes that, the dispute having disappeared, the claim advanced by Australia no longer has any object. It follows that any further finding would have no raison d'etre.").

promulgated by politically responsible actors, the decision to grant a passport to a particular individual is generally taken at a much lower level of government. Moreover, if the individual in question has fulfilled a certain set of requirements, the decision often involves little or no discretion on the part of the responsible official.

Nonetheless, I argue that passport issuance is a suitable triggering event for the law of binding state action. The common core of these doctrines is that certain representations made by a state can in the future have a binding effect on that state. It is clear that, at a minimum, representations made by heads of state[115] and senior government officials with a responsibility for foreign affairs[116] can have this effect. It is also clear, however, that representations made by lower level government officials operating outside their sphere of competence will not have this effect.[117] Thus, the operative question becomes whether issuance of a passport is more like a representation by a senior government officer operating in his or her area of competence or more like a representation by a lower level official acting outside of his or her authority.

Although it may initially appear to be a routine administrative action, passport issuance should in fact be considered a binding representation by the issuing state. First, a fundamental purpose of passport issuance is to represent to foreign governments that the passport holder is a national of the issuing state.[118] Second, lower-level officials making decisions on passport issuance are generally operating within their specialized sphere of competence and under the direction of senior, politically responsible authorities.[119] Third, the statement of nationality contained in a typical passport is far more clear and

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115 *See id.* at 267, 272 (Dec. 20) (finding that statements by the French president were sufficient to bind France).

116 *See* Case Concerning the Legal Status of Eastern Greenland, [1933] P.C.I.J. (ser. A/B) No. 53. (finding that a statement by the Norwegian Minister for Foreign Affairs to the Danish Minister that "the Norwegian Government would not make any difficulties in the settlement of this question" was sufficient to bind the Norwegian government).

117 *See* Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.), 1984 I.C.J. 246, 307-08 (Oct. 12) (letter from Assistant Director for Lands and Minerals in the U.S. Bureau of Land Management (part of the U.S. Department of the Interior) not sufficient to bind the U.S. government in regard to its international maritime boundary).

118 Of course, this does not apply in the special case of passports issued to non-nationals. *See supra* Part IV.A.2.a. A passport issued to a non-national would not implicate many of the argument's presented here, since the issuing state would not necessarily have any special knowledge as to the passport holder's nationality (or lack thereof, in the case of a stateless individual).

119 Even if this is not true in a particular case, strong policy arguments exist for establishing a presumption that passports are issued under the careful direction of responsible authorities. *See infra* Part V.B.

unequivocal[120] than the type of representation that has been found to be sufficient in the contexts of both unilateral action[121] and estoppel.[122] Fourth, many passports are phrased in the language of diplomatic communication,[123] or considered to be government property.[124] Fifth, the

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120 Such a statement is more clear and formal, in fact, than an assertion by a head of state in a press conference that his country would not conduct atmospheric tests in the future, where the meaning of the message turned in part on the failure to qualify the assertion with the word *normallement*, as had been done in the past. *See Nuclear Tests*, 1974 I.C.J. at 266.

121 *See id.* at 267-72.

122 *See* Case Concerning the Temple of Preah Vihear (Cambodia v. Thail.), 1962 I.C.J. 6, 32-33 (June 15) (Merits).

123 *See, e.g.*, Canadian Passport issued January 8, 2003 ("The Secretary of State for External Affairs of Canada requests in the name of Her Majesty the Queen, all those whom it may concern to allow the bearer to pass freely without let or hindrance and to afford the bearer such assistance and protection as may be necessary."); Mexican Passport issued December 24, 2003 ("The Ministry for Foreign Affairs of the United Mexican States requests the competent authorities to grant the bearer of this passport, a Mexican citizen, free transit without any delay or hindrance, and to offer him all possible assistance and protection."); Nicaraguan Passport issued July 12, 1993 ("The bearer of the present passport is a Nicaraguan citizen. Therefore, the Government of the Republic of Nicaragua applies to the National and Foreign Authorities to give the bearer of the present document all the facilities available for his normal movement and to give him, if necessary, any help and cooperation that may be useful to him."); Nigerean Passport issued February 22, 1990 ("These are to request and require in the name of the President and Commander-in-Chief of the Armed Forces of the Federal Republic of Nigeria all those whom it may concern to allow the bearer to pass freely without let or hindrance and to afford him or her every assistance and protection of which he or she may stand in need."); United Kingdom Passport issued November 15, 1995 ("Her Britannic Majesty's Secretary of State Requests and requires in the Name of Her Majesty all those whom it may concern to allow the bearer to pass freely without let or hindrance and to afford the bearer such assistance and protection as may be necessary"); United States Passport issued May 11, 1998 ("The Secretary of State of the United States of America hereby requests all whom it may concern to permit the citizen/national of the United States named herein to pass without delay or hindrance and in case of need to give all lawful aid and protection."). *But see* German passport issued April 28, 2000 (making no specific request on the part of German authorities).

124 *See, e.g.*, Canadian Passport issued January 8, 2003 ("This passport is the property of the government of Canada."); German Passport issued April 28, 2000 ("This passport is the property of the Federal Republic of Germany."); Nigerian Passport issued February 22, 1990 ("This passport remains the property of the Government of the Federal Republic of Nigeria and may be withdrawn at any time."); United Kingdom Passport issued November 15, 1995 ("This passport remains the property of Her Majesty's Government in the United Kingdom and may be withdrawn at any time.); United States Passport issued May 11, 1998 ("This passport is the property of the United States government. It must be surrendered upon demand if made by an authorized representative of the United States government.").

Some states explicitly warn of criminal penalties associated with unauthorized passport alteration. *See* United States Passport issued May 11, 1998 ("This passport must not be altered or mutilated in any way. Alteration may make it invalid, and, if

consequences of holding a state bound in regard to a particular individual's nationality are much less severe than those at issue in the classic cases of unilateral action[125] and estoppel.[126] Sixth, absent

willful, may subject you to prosecution. Only authorized officials of the United States or of foreign countries, in connection with official matters, may place stamps or make statements, notations, or additions in this passport."). Others make no specific mention of criminal penalties, but strongly suggest that passport alteration is prohibited. *See* Canadian Passport issued January 8, 2003 ("This passport . . . . must not be altered. You must take every precaution to safeguard it."); United Kingdom Passport issued November 15, 1995 ("This passport . . . . should not be tampered with or passed to an unauthorized person. Any case of loss or destruction should be immediately reported to the local police and to the nearest British passport issuing authority (eg Passport Office, London; British Consulate; British High Commission or Colonial authority); only after exhaustive enquiries can a replacement be issued in such circumstances. The passport of a deceased person should be submitted for cancellation to the nearest such passport authority, it will be returned on request."). The close association of passports and citizenship is further marked by the inclusion in some passports of information of loss of citizenship, military obligations, and dual nationality. *See, e.g.,* Canadian Passport issued January 8, 2003 ("Canadians may have dual nationality through birth, descent, marriage or naturalization. They are advised that while in the country of their other nationality they may be subject to all its laws and obligations, including military service."); United Kingdom Passport issued November 15, 1995 ("British citizens have the right of abode in the United Kingdom. No right of abode in the United Kingdom derives from the status, as British nationals, of British Dependent Territories citizens, British Nationals (Overseas), British Overseas citizens, British protected persons and British subjects."); *id.* ("British nationals who are also nationals of another country cannot be protected by Her Majesty's Representatives against the authorities of that country. If, under the law of that country, they are liable for any obligation (such as military service), the fact that they are British nationals does not exempt them from it. A person having some connection with a Commonwealth or foreign country (eg by birth, by descent thought either parent, by marriage or by residence) may be a national of the country, in addition to being a British national. Acquisition of British nationality or citizenship by a foreigner does not necessarily cause the loss of nationality of origin."); United States Passport issued May 11, 1998 ("Under certain circumstances, you may lose your U.S. citizenship by performing any of the following acts: (1) being naturalized in a foreign state; (2) taking an oath or making a declaration to a foreign state; (3) serving in the armed forces of a foreign state; (4) accepting employment with a foreign government; (5) formally renouncing U.S. citizenship before a U.S. consular office overseas."); *id.* ("A person who has the citizenship of more than one country at the same time is considered a dual citizen. Citizenship may be based on facts of birth, marriage, parentage, or naturalization. A dual citizen may be subject to all of the laws of the other country that considers that person its citizen while in its jurisdiction. This includes conscription for military service."). *See also id.* ("Your passport is a valuable *citizenship* and identity document, so it should be carefully safeguarded.") (emphasis added).

125 *See, e.g.*, *Nuclear Tests*, 1974 I.C.J. at 269-70 (enforceable obligation to halt atmospheric testing).

126 *See, e.g.*, *Preah Vihear*, 1962 I.C.J. at 32-33, 36-37 (international boundary); Case Concerning the Legal Status of Eastern Greenland, [1933] P.C.I.J. (ser. A/B) No. 53. (obligation not to contest Danish sovereignty over Eastern Greenland).

application of these principles in the passport context, a state would be able to attribute its nationality to anyone it wished, perhaps in exchange for an agreement to pay a certain amount of taxes, without fear of ever being required to admit the individual back within its borders later on.

C. Policies Underlying the International Law of Nationality

Strong policy arguments also exist for imposing liability on the issuing state for errant statements of nationality in its passports.[127] First, the issuing state can determine nationality under its domestic law more easily than any other state. Second, imposition of liability on the issuing state creates incentives conducive to orderly administration of the international movement of persons.

The passport-issuing state is by definition the only state having full access to records relating to whether the individual to whom the passport is issued is a national of that state under its domestic law. Suppose that State *A* issues a passport to a particular individual. Although a court of State *B* might examine the nationality laws of State *A* to determine whether that individual is a State *A* national, absent the cooperation of State *A* it would not even have access to a full factual record. Even if State *A* were to cooperate, the process would be long and difficult, and the State *B* court—having no coercive authority over State *A* agencies—would have no way of knowing whether State *A* was providing all relevant information.

Moreover, even if the State *B* court were to gather an adequate factual record, it would not be competent to make a final determination as to whether the individual was a State *A* national under State *A* law. In the case that the judge were sufficiently familiar with State *A* law to apply it in a technically proper manner, this would still not overcome the problem of its lack of competence to exercise any element of discretion allowed under the law. Thus, determination of foreign nationality is difficult even in the forum most suited to such a determination—an administrative or judicial court.

Yet the venue in which states are most often forced to make determinations of foreign nationality is not the court but the border crossing. In this situation, State *B* is simply not able to examine in detail the elements that may or may not qualify an individual as a national of State *A*. Instead, State *B* is forced to rely on State *A*'s passport—its decision whether to count the individual as a State *A* national must rest

[127] It is worth noting that the policy analysis developed here, while not based formally on economic theory, is similar to the type of analysis that might be developed through formal economic analysis of the law.

solely on a determination of whether the passport is genuine.[128] Given the nature of modern international travel, it is hard to imagine a functional system that does not assume that states are entitled to rely on passports issued by other states in making routine decisions to admit or exclude.

A decision to make states responsible for assertions of nationality in their passports creates incentives conducive to the establishment of basic order in the world system. Excessive difficulties associated with investigations of nationality at the border militate in favor of the establishment of a system holding the passport-issuing state responsible for statements of nationality in its passports, even if made by erroneous application of the issuing state's law.[129]

VI. EXCEPTIONS

There are three major exceptions to the applicability of the law of binding state action to passport-issuing states: loss of nationality, fraud, and certain instances of dual nationality.[130] These exceptions are not part of this body of law, but situations in which an essential precondition for its applicability is not present.

A. Fraud

The first situation in which this body of law should not apply occurs when the state can demonstrate that the passport was acquired by fraudulent means. A state could make this showing in two ways. The first possibility is for the state to show that the passport holder knowingly made a false representation as to a fact material to the determination of her nationality, either in the application for the passport itself or during an earlier naturalization proceeding. The second possibility is for the state to show that the passport would not have been issued but for bribery or some other illegal procedure.[131]

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[128] This of course excludes the situation where State *B* asserts that the individual is in fact (or also) a national of State *B*—in this case State *B* should have some independent basis on which to make the determination.

[129] One well-known British case has held that an individual owes allegiance to Britain as long as he holds an unexpired British passport, even if the passport's statement that the bearer is a British subject is later shown to be erroneous. *See Joyce v. Director of Public Prosecutions*, [1946] A.C. 347 (holding that, so long as he held a British passport, an individual who was in fact an American citizen at the time he was issued the British passport could nonetheless be found guilty of treason for actions taken while abroad).

[130] Similarly, in the proof of nationality context, the circumstances described in these exceptions would serve to rebut the presumption of nationality established by a valid passport. *See supra* Part IV.

[131] Importantly, this exception should not allow a state to deny the nationality of a passport holder who had merely paid an "expected bribe" connected in many states

B. Loss of Nationality

The second situation where the law of binding state action should not apply occurs when the passport holder has, since the date the passport was issued, lost the nationality of the issuing state through some means not in violation of international law. The reasoning behind this exception is simple. A passport[132] is an assertion that, as of the date on which the passport is issued, the passport holder has the nationality of the issuing state. If the passport holder voluntarily gives up that nationality, that individual should not be able to hold the issuing state responsible for a prior assertion of nationality. If the passport holder is deprived of nationality, the state can avoid responsibility by (1) attempting to recall the passport *and* (2) notifying all countries with which it has diplomatic relations that the passport in question is no longer valid. Until it has completed both of these actions, the law of binding state action will hold it responsible for the issuance of the passport, even if the passport holder is no longer a national of the country under its own domestic law.

C. Dual Nationality

The third exception applies in cases of dual nationality. A person may be a national of two or more states under each state's domestic law, even though the law of one state prohibits dual nationality. A related problem can arise when a state limits voluntary renunciation of nationality.

1. The Dominant and Effective Nationality Test

In the period before World War II, the general rule was that nationality laws were governed entirely by each state's domestic law.[133] Situations often arose, however, where this rule did not seem appropriate: sometimes the operation of domestic laws led to an individual having more than one nationality, and sometimes to an individual having no nationality at all.[134]

The most notable effort to address these problems was the 1930 Hague Convention on Certain Questions Relating to the Conflict of

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with the processing of normal administrative actions. A finding of bribery should require that the state show not only that the passport would not have been issued but for the bribe, but that for some relevant factual or legal reason the passport should not have been issued to the individual in question.

132 This assumes, of course, that the passport does make an assertion as to nationality. *See supra* Part IV.A.2.a.

133 *See, e.g.*, 1930 Hague Convention, *supra* note 19; DONNER, *supra* note 26, at 29. **R**

134 DONNER, *supra* note 26, at 29. **R**

Nationality Laws.[135] The basic approach of the convention was to prohibit states from asserting protection over a dual national against a state whose nationality that person also possessed.[136] State-parties to the convention would recognize only one nationality of a dual national, and would apparently specify in advance whether this would be the nationality of the place where he was "habitually and principally resident" or the nationality of the place to which "in the circumstances he appears to be in fact most closely connected."[137]

During this time, however, a practice also began to develop in international arbitral tribunals to look, when faced with an actual conflict of nationality laws, for the nationality which was more "real and effective."[138] Faced with a situation not of dual nationality but diplomatic protection, the International Court of Justice adopted this test in the *Nottebohm* case.[139] Months afterward, the Italian-U.S. Conciliation

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135 *Cf.* Harvard Draft Code on Nationality. The code is discussed in DONNER, *supra* note 26, at 50-53 ("The Harvard Draft Code on Nationality, prepared in anticipation of the first conference on the codification of international law at the Hague in 1930, is considerably more innovative than the Hague Convention itself."). **R**

136 1930 Hague Convention, *supra* note 19, art. 4 ("A State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses."). **R**

137 *Id.* art 5.

138 DONNER, *supra* note 26, at 61. **R**

139 *Nottebohm Case* (Liech. v. Guat.), 1955 I.C.J. 4 (Apr. 6) (Second Phase). In this case, Liechtenstein claimed the right to exercise diplomatic protection over Freidrich Nottebohm. Mr. Nottebohm was born in Germany, lived most of his adult life in Guatemala (where he owned substantial assets), and was naturalized as a Liechtenstein citizen shortly after the outbreak of World War II. He then returned to Guatemala on a Liechtenstein passport in early 1940, but was arrested as a German national and deported to the United States in 1943. He was interned there in until 1946, and upon his release returned to Liechtenstein and established himself there. Guatemala began expropriating Nottebohm's property in 1949.

Although several aspects of Nottebohm's Liechtenstein naturalization were questionable (including what appeared to be a waiver of the normal pre-naturalization residency in return for an agreement to pay substantial taxes), the court refused to examine the validity of the Nottebohm's nationality under the law of Liechtenstein. It instead framed the case as presenting the question of whether Guatemala was required to recognize Liechtenstein's action granting Nottebohm Liechtenstein nationality, so as to be required to allow Liechtenstein to exercise diplomatic protection on Nottebohm's behalf. In effect, the court recognized as valid Liechtenstein's claim that, under its own law, Nottebohm was a Liechtenstein national, and moved to examine whether the grant of nationality was sufficiently proper under international law to require Guatemala to recognize Liechtenstein's claim.

In order to do this, the court followed what it explained to be the established practice of international arbitrators and national courts to look for the "real and effective nationality" in any case where a person might be a national of more than one state. It noted that Nottebohm would qualify as a national of Liechtenstein under international law if his connections with Liechtenstein during the period of time

Commission followed the same approach in a situation of dual nationality in the *Mergé* case.[140] Since this time—with only minor exceptions[141]—the *Nottebohm/Mergé* "dominant and effective nationality test" has become the settled law for dealing with dual nationality problems.

Most notably, the Iran-U.S. Claims Tribunal applied the dominant and effective nationality test to its dual nationality claims. As discussed above,[142] the admissibility of claims of "dual" Iran-U.S. nationals was

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immediately before, during, and after his naturalization were stronger than his connection with any other state during that period. The court also emphasized the serious character of an act of naturalization, and cautioned against considering it only in relation to its effect on Nottebohm's property.

Applying this test, the court found that Nottebohm had strong factual connections to both Germany and Guatemala during the relevant time period, but very little connection to Liechtenstein. It held that his naturalization, not being based on any real connection to Liechtenstein, did not require Guatemala to allow Liechtenstein to exercise diplomatic protection on his behalf.

For an in depth discussion of *Nottebohm* and its relation to the international law of nationality more generally, see Ian Brownlie, *Relations of Nationality in Public International Law*, 39 BRIT. Y.B. INT'L L. 284 (1963).

[140] *Mergé Case*, 14 R.I.A.A. 236 (June 10, 1955) (Italian-U.S. Conciliation Commission). This was a claim under Article 78 of the Treaty of Peace with Italy, seeking compensation for the loss of personal property located in Italy and lost during the war. The claimant was born in the United States in 1909, and thus acquired American nationality by birth. She was issued a U.S. passport in 1931, and it was renewed in 1933, for validity until March 16, 1935. In 1933, she married Savatore Mergé, an Italian national, and thus acquired Italian nationality by operation of law. Her husband, an Italian government employee, was sent to the Italian Embassy in Tokyo to work as a translator and interpreter in 1937. Mrs. Mergé traveled with her husband to Tokyo on what was apparently an Italian diplomatic passport, issued in 1937. On February 21, 1940, Ms. Mergé registered herself as a U.S. national at the American consulate in Tokyo.

After the end of World War II in Japan, Ms. Mergé apparently refused to allow American military authorities to return her to the United States and insisted on remaining with her husband instead. She later returned to the United States on a one-way passport in 1946, and remained there for nine months. She then had her passport validated for travel to Italy and was admitted to Italy on a three-month visitors visa in 1947. Soon after arriving in Italy, she executed an affidavit with the American consulate in Rome in order to explain her long absence from the United States. In 1950, she applied for and received a new U.S. passport, claiming a legal residence in New York City and an intention to return to the United States at some time in the future. She remained in Italy at least until the time the case was decided in 1955. After canvassing a large body of potentially applicable law, the commission applied the *Nottebohm* test and concluded that Ms. Mergé's dominant and effective nationality was that of Italy.

[141] *See* BROWNLIE 1990, *supra* note 19, at 411 ("There was very little on the international plane which expressly *denied* the effective link doctrine, and the incidental rejection of it in the *Salem* case was regarded by contemporaries as a novelty.") (footnotes omitted). **R**

[142] *See* supra Part IV.B.1

perhaps the most politically sensitive issue before the tribunal. Over a vehement dissent by the Iranian arbitrator, Chamber Two of the Tribunal followed the *Nottebohm/Mergé* line of cases in *Esphananian v. Bank Tejarat*[143] and *Golpira v. Iran.*[144] After Chamber Two issued its decisions,

[143] Award No. 31-157-2 (29 March 1983), 2 Iran-U.S. Cl. Trib. Rep. 157. In *Esphahanian v. Bank Tejarat*, the claimant was a national of Iran under Iranian law and of the United States under U.S. law. He held both an Iranian identity card and a U.S. Naturalization Certificate (reading in part "former nationality—Iran"). His naturalization date was August 1, 1958. He worked in Iran for a U.S. company 9 out of 12 months each year between 1970 and 1978, and in 1972 used his Iranian identity card number to open a Rial-denominated checking account at Iranians' Bank. He left Iran for the United States in 1978.

The claimant asserted that he should be able to qualify as either a U.S. national or an Iranian national under the agreement. The bank, by contrast, asserted that because Iranian law did not recognize dual nationality, Iran should not be presumed to have accepted the possibility of claims by dual nationals when it signed the Claims Settlement Declaration.

Chamber Two of the Tribunal rejected both of these arguments, holding instead that it must rely on the principle of dominant and effective nationality. It reached this conclusion—after examining other possible rules of international law—by relying heavily on the reasoning of the *Nottebohm* and *Mergé* cases. Applying the principle, Chamber Two found the claimant to have the dominant and effective nationality of the United States. In doing this, the chamber took special care to explain why the claimant's regular use of an Iranian passport was not dispositive:

> It should be noted that Iranian law permits renunciation of Iranian nationality only with the approval of the Council of Ministers. Any person who receives such approval is thereafter allowed to travel to Iran only once, in order to sell or transfer his properties. With respect to Esphahanian's use of an Iranian passport to enter and leave Iran, the Tribunal notes that the laws of Iran in effect forced such use. Once Esphahanian had emigrated to the United States and had become an American citizen, the only way he could return lawfully to Iran was as an Iranian national, using an Iranian passport. If he insisted on using his U.S. passport to enter Iran, he would be turned away or, at least, his U.S. passport would be confiscated and he would be admitted only as an Iranian. In effect, Iran told its citizens that, if they took foreign nationality, they must also retain their Iranian nationality—which in Iran would be considered their sole nationality—or they would be forever barred from returning to Iran. Esphahanian asserts that he used his Iranian passport solely to enter and leave Iran, and a review of copies of his various passports largely supports those assertions. With the exception of one Lebanese and one Saudi Arabian visa, the visas and immigration stamps of countries other than Iran are all in his American passports.
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> On the basis of these facts, the Tribunal concludes that Esphahanian's dominant and effective nationality at all relevant times has been that of the United States, and the funds at issue in the present claim are related primarily to his American nationality, not his Iranian nationality. With the exceptions of his use of an Iranian passport to enter and leave Iran and his nominal ownership of stock on behalf of his employer, all of his

the Iranian government asked the Full Tribunal to consider whether the claims of individuals who were nationals of Iran under Iranian law should be ever admissible against Iran.[145] In *Case No. A/18*,[146] the Full

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actions relevant to this claim could have been done by a non-Iranian. The Tribunal holds that the Claimant, Nasser Esphahanian, is a national of the United States within the meaning of the Claims Settlement Declaration and that the Tribunal has jurisdiction to decide his claim against Bank Tejarat.

Id. at 167-68.

144 Award No. 32-211-2 (29 Mar. 1983), 2 Iran-U.S. Cl. Trib. Rep. 171. *Golpira v. Iran* was essentially a companion case to *Esphahanian*. The claimant was born in Iran to an Iranian father, and was thus a national of Iran under Iranian law. He was issued a numbered Iranian identity card. He received his primary, secondary, and college education in Iran, and earned his medical degree there. At age 26, he left Iran for the United states, where he completed his medical training. He began practicing medicine in Baltimore, Maryland in 1958, and was still practicing in Baltimore at the time the claim was filed. He became a permanent resident of the United States in 1957, and was naturalized as a U.S. citizen in 1964. He received naturalization certificate No. 8527559. Although it is not completely clear, the Tribunal seems to have accepted this naturalization certificate—or evidence of its existence—as proof that the claimant possessed U.S. nationality under U.S. law.

The claimant returned to Iran three times after 1964, each time for approximately two weeks. In 1970, with the help of his father, the claimant purchased a number of shares in an Iranian medical group. The stock certificates listed the claimant's Iranian identity card number, but Iran admitted at the hearing that this stock could be owned by foreign nationals.

Relying on the *Nottebohm* Case, the chamber looked for the claimant's dominant and effective nationality. The chamber relied on the claimant's long residence in the United States and the concentration of his professional life there to hold that the he was a dominant and effective national of the United States.

145 The actual awards in *Esphahanian* and *Golpira* could not be affected by the outcome of this decision, even if the Full Tribunal held that their reasoning was incorrect. *See* Claims Settlement Declaration, *supra* note 78, art. IV, para. 1; Iran-U.S. Claims Tribunal Rules, art. 32, para. 2. **R**

146 Decision No. 32-A18-FT (6 Apr. 1984), 5 Iran-U.S. Cl. Trib. Rep. 251. *Case No. A/18* is the most important case in the Tribunal's dual nationality jurisprudence. After Chamber Two issued awards finding jurisdiction over dual nationals in the *Esphahanian* and *Golpira* cases, the Iranian government asked the Full Tribunal to consider whether the claims of individuals who were nationals of Iran under Iranian law should ever be admissible against Iran. Iran argued that the Tribunal did not have jurisdiction over claims against Iran by those who were Iranian nationals under Iranian law, and that the fact that an individual was a U.S. national under U.S. law should not create an exception to this rule. The United States, in contrast, argued that the Tribunal had jurisdiction over claims against Iran by anyone who was a U.S. citizen under U.S. law, irrespective of whether that person was also an Iranian citizen under Iranian law.

The Full Tribunal rejected both of these contentions. It then examined the 1930 Hague Convention, *see supra* note 19, a number of arbitral and judicial decisions dealing with the conflict of nationality laws, and legal literature relating to conflict of nationality laws. The Tribunal came to the conclusion that Article 4 of the Hague Convention, which asserts that "A state may not afford diplomatic protection to one **R**

Tribunal held that they were, explaining that "the relevant rule of international law . . . is the rule that flows from the *dictum* of *Nottebohm*, the rule of real and effective nationality, and the search for 'stronger factual ties between the person concerned and one of the States whose nationality is involved.'"[147]

2. Passports and Dual Nationality

Because current international law applies the dominant and effective nationality test in situations of dual nationality, it is necessary to take account of the test in applying the law of binding state action to the nationality of passport holders. Under this test, an individual who is a national of State *A* under State *A* domestic law and also a national of State *B* under State *B* domestic law will be a national of one state but not the other for purposes of international law. In this case, it would be inconsistent with international nationality law to apply the law of binding state action to the country of non-dominant nationality, if the internal laws of that country do not recognize dual nationality.

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of its nationals against a State whose nationality such person also possesses," had been supplanted by the rule of dominant and effective nationality. It noted:

> Thus, the relevant rule of international law which the Tribunal may take into account for purposes of interpretation, as directed by Article 31, paragraph 3(c), of the Vienna Convention, is the rule that flows from the *dictum* of *Nottebohm*, the rule of real and effective nationality, and the search for "stronger factual ties between the person concerned and one of the States whose nationality is involved." In view of the pervasive effect of this rule since the Nottebohm decision, the Tribunal concludes that the references to "national" and "nationals" in the Algiers Declarations must be understood as consistent with that rule unless an exception is clearly stated. As stated above, the Tribunal does not find that the text of the Algiers Declarations provides such a clear exception.
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> For the reasons stated above, the Tribunal holds that it has jurisdiction over claims against Iran by dual Iran-United States nationals when the dominant and effective nationality of the claimant during the relevant period from the date the claim arose until 19 January 1981 was that of the United States. In determining the dominant and effective nationality, the Tribunal will consider all relevant factors, including habitual residence, center of interests, family ties, participation in public life and other evidence of attachment.
>
> To this conclusion the Tribunal adds an important caveat. In cases where the Tribunal finds jurisdiction based upon a dominant and effective nationality of the claimant, the other nationality may remain relevant to the merits of the claim.

Id. at 265.

147 5 Iran-U.S. Cl. Trib. Rep. 251, 265 (internal citations omitted).

For instance, assume an individual holds passports of both States *A* and *B*, but is a dominant and effective national of State *B*. If the individual were traveling in a third state, State *C*, State *A* would not be able to assert diplomatic protection over State *C*'s objection.[148]

- *If State* A *recognizes dual nationality*, it is appropriate to apply the law of binding state action. The passport holder's possession of an additional nationality does not have any effect on his or her continued possession of the nationality of State *A*.
- *If State* A *does not* recognize dual nationality, its issuance of a passport to the individual is an assertion not only that it believes the individual to be a State *A* national, but that it does not believe the individual to be a State *B* national (or a national of any other state). In this case, an individual holding a passport from another state no longer fulfils one of the basic conditions of State *A* nationality—that he not possess the nationality of any other state. Therefore, if State *A* does not recognize dual or multiple nationality, the law of binding state action should not be applied to hold State *A* responsible for a person who is a dominant and effective national of State *B*.
- *It does not matter* whether State B *recognizes dual nationality,* because State *B* is the state of dominant and effective nationality. It will always be prevented by the law of binding state action from denying the nationality of one of its dominant and effective nationals.

VII. International Procedure

The substantive-law focus of the preceding sections would not be complete without an examination of international procedure. In this Part, I elaborate on three important procedural issues: standing, burden of proof, and remedies.

A. Standing

Standing to bring a claim is perhaps the greatest obstacle to denationalized individuals seeking redress. As discussed in Part II, international tribunals have traditionally been open only to claims brought by sovereign states. An individual wishing to recover for a wrong committed by a state would need to arrange for the state of his or her nationality to exercise diplomatic protection and present the claim on the individual's behalf. Although this worked relatively well in claims against foreign states, it presents obvious problems for the individual

148 *See Nottebohm Case*, 1955 I.C.J. 4.

wishing to recover against the state of his or her own nationality. The logical solution would be for the individual to find another state to bring the claim. Unfortunately, this is generally not possible, as most tribunals permit states to exercise diplomatic protection only on behalf of their nationals.[149] However, there are important exceptions to this principle.[150]

Of course, states may contract around the default requirement of nationality when establishing an international tribunal.[151] To date, two examples of contracting around this requirement are particularly important. The first is the Eritrea-Ethiopia Claims Commission, which permits parties to bring claims on the basis of ethnicity, in addition to nationality.[152] The second is the United Nations Compensation Commission, which has allowed certain international organizations to file claims on behalf of "individuals who were not in a position to have their claims filed by a Government."[153]

Moreover, in the past half-century, opportunities for individuals to assert international claims without the sponsorship of a protecting state have become increasingly frequent. The European Court of Human Rights,[154] the Inter-American Commission on Human Rights,[155] and the

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149 *See* BROWNLIE 1990, *supra* note 19, at 480 ("The other generally accepted exceptions [to the principle that states may only exercise diplomatic protection on behalf of their nationals] are alien seamen on ships flying the flag of the protecting state and members of the armed forces of a state."). **R**

150 *Id.*

151 *Id.* ("A right to protection of non-nationals may arise from treaty or *ad hoc* arrangement establishing an agency.") (footnote omitted).

152 *See supra* note 26. **R**

153 United Nations Compensation Commission, *The Claims*, http://www.unog.ch/uncc/theclaims.htm ("The Commission has accepted for filing claims of individuals, corporations and Governments, submitted by Governments, as well as those submitted by international organizations for individuals who were not in a position to have their claims filed by a Government."). *See also* John R. Crook, *The United Nations Compensation Commission—A New Structure to Enforce State Responsibility*, 87 AM. J. INT'L L. 144, 149-150 (1993) ("Eligibility to bring a claim before the Commission is not governed by the traditional principles of diplomatic protection and espousal. States may present the claims of residents who are not nationals; even stateless persons may have their claims brought before the Commission.").

154 Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 34 ("The Court may receive applications from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.").

155 Statute of the Inter-American Commission on Human Rights, Oct. 1979, art. 23(1) ("In accordance with the provisions of Articles 44 to 51 of the American Convention on Human Rights, the Regulations of the Commission shall determine the procedure to be followed in cases of petitions or communications alleging violation of any of the rights guaranteed by the Convention, and imputing such violation to any State Party to the Convention.").

Iran-U.S. Claims Tribunal[156] each have explicit provisions authorizing the receipt of individual claims in at least some circumstances.

Still, there is a relative scarcity of international tribunals with both (1) substantive jurisdiction over denationalization claims; and (2) procedural mechanisms for the receipt of a claim, by or on behalf of an individual, against the state of his or her nationality. Yet, given current trends toward recognition of individual claims, additional fora with both of these attributes may develop in the foreseeable future.

B. Burden of Proof

The basic principles underlying the international law of nationality thus create exceptions to the law of binding state action where fraud, loss of nationality, or the dual nationality problem occurs. For two important reasons, it is the burden of the issuing state to prove that any of these exceptions may apply. First, it is generally accepted in international law that passports constitute at least prima facie evidence of nationality.[157] Second, it makes sense in terms of sound international policy to place this burden on the issuing state.

In the context of the first two exceptions (fraud and loss of nationality), the issuing state has custody of all documentary evidence necessary to either prove or disprove the applicability of these exceptions.[158] In the context of the third exception (dual nationality), the issuing state may not have access to all documents necessary to prove that the passport holder is in fact a dominant and effective national of another state. However, it will be the only party with access to all documents necessary to prove that the passport holder is its own dominant and effective national. Thus, it would be unfair to place the burden of proof on the passport holder, when access to documents necessary to prove his or her case would depend completely on the whim of the issuing state.

Without coercive authority over the issuing state, an international tribunal is unable to force an uncooperative state to produce such

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156 *See* Claims Settlement Declaration, *supra* note 78, art. III(3) ("Claims of nationals of the United States and Iran that are within the scope of this Agreement shall be presented to the Tribunal either by claimants themselves or, in the case of claims of less than $250,000, by the government of such national."). **R**

157 *See supra* Part IV.A.1.

158 *See* SANDIFER, *supra* note 74 (quoting G. SCHWARZENBERGER, INTERNATIONAL LAW 47-48 (3d. ed. 1957)) ("Until evidence to the contrary is produced, nationality must be presumed to be a continuous state of affairs. Thus, it is not for the claimant to prove that, at any particular moment, the claimant has not lost its nationality. This would mean to ask it to discharge an impossible burden of proof and amount to *probatio diabolica*."); *see also Case No. A/18*, Decision No. 32-A18-FT (6 Apr. 1984), 5 Iran-U.S. Cl. Trib. Rep. 251 (dissent of Iranian arbitrators). **R**

documents. Moreover, even if the state does choose to produce documents, the absence of coercive authority also prevents a tribunal from punishing states that fail to comply fully (i.e., states that claim to have produced necessary documents but somehow fail to include those essential to establishing the passport holder's claim). Because of this fundamental asymmetry in access to evidence, a decision to place the burden of proof on the passport holder would effectively deny most of these claims.

C. Remedy

It is true that this lack of coercive authority might make a tribunal less willing to issue an order that a state treat a particular individual as its national.[159] The issuance of such an order would simply give the state an opportunity to "prove" by violating the order that the tribunal had no real authority over such a "domestic" issue. Since international tribunals may remain without extensive equitable authority for the foreseeable future, a passport holder's right not to have his nationality "denied" by the issuing state should instead be protected by what Calebresi and Melamed have termed a "liability rule."[160] A state may of course decide that it will not treat a person as its national. However, if the state cannot demonstrate one of the exceptions discussed above, it should be held liable for compensation to that individual.[161]

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159 Although many international tribunals are constituted by agreement on the part of both states to obey the tribunal's orders, it does not seem unreasonable to assume that nationality is such a sensitive issue that many states would not be willing to allow an international tribunal to order it to treat someone as its national.

160 Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972). Although this proposal may be jarring to those who believe that nationality fits more appropriately into the "inalienability" category, the proposal to protect nationality by a liability rule comes out of a recognition of the limited authority of international tribunals—in the case of claimants whose nationality has been "denied," it is most likely compensation or nothing. *See id.* at 1092-93. Of course, a state would always have the option to credit an international tribunal's determination of wrongful denationalization and re-admit the individual to its nationality. This would mitigate, if not eliminate, financial liability on the part of the passport-issuing state (although substantial liability could still remain for other illicit acts, such as expropriation of property while the individual was being treated as an alien).

161 At least one scholar has argued that monetary remedies are not appropriate for many human rights violations. *See* DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 305 (1999) ("Monetary compensation that tolerates the wrong and allows the perpetrator to buy injustice is not appropriate where inalienable rights are concerned."). However, this argument seems to overlook the likelihood that in the international context, an unrealistic insistence on equitable remedies may in fact be more likely to lead to non-enforcement of the rights in question.

As this Article focuses on the liability phase of a denationalization claim, the appropriate amount of any monetary compensation is outside the scope of this

Although some states might also refuse a tribunal's order to pay compensation to an illegally denationalized individual, there are several reasons for believing that this would not always be the case. First, in at least one circumstance, the establishment of an international tribunal has been accompanied by an agreement that a certain amount of money be set aside in escrow to pay any judgments that might later become due.[162] Second, it is much easier politically for a country to obey an order to pay financial compensation than an order to re-admit an undesired individual to all of the rights and privileges of its nationality. Third, money judgments against a state can potentially be enforced against assets of that state located in other countries. Fourth, money judgments against a state can become part of its general debt, to be paid later on—after political interest in a case has subsided, or after a new administration, eager to atone for past wrongs, comes into power.

VIII. Conclusion

The last fifteen years have seen substantial shifts in state control over territory. Significant examples include the breakup of the Soviet Union, the independence of the countries of the former Soviet Bloc, the division of Czechoslovakia, the secession of Eritrea from Ethiopia, the disintegration of Yugoslavia, the reversion of Hong Kong to China, the secession of East Timor from Indonesia, and the U.S.-led occupation of Iraq. Unlike many aspects of world politics, however, these changes can directly affect the legal status of individuals. Although this effect is sometimes a "simple" change in nationality, at other times it leaves individuals with a choice of multiple nationalities or even with no nationality at all.

For our purposes, it is worth recognizing that changes in territorial sovereignty can lead to large-scale denationalization in two major ways. The first, denationalization by operation of law, occurs when nationality laws adopted by predecessor or successor states operate in such a way as to leave a particular group of individuals stateless, even though those very individuals were previously citizens of a predecessor state. This phenomenon is widely recognized as a problem, and was most recently

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analysis. On valuation of international claims in the related area of wrongful expulsion of aliens, see Whiteman, supra note 15, at 419-427. It is worth emphasizing, however, that while wrongful expulsion claims might be useful precedent in determining appropriate compensation for property lost through expulsion-related aspects of a denationalization claim, they would be less relevant to determining appropriate compensation for the wrongful deprivation of the rights and privileges of nationality. **R**

162 *See* Claims Settlement Declaration, *supra* note 78. **R**

addressed in the International Law Commission's Draft Articles on Nationality in Relation to the Succession of States.[163]

The second, discriminatory denationalization, can occur when changes in territorial sovereignty result in groups of individuals finding that they have suddenly become part of a politically unpopular minority. Political and economic pressure or military conflict can then lead the government in power to denationalize that minority, justifying this action on the idea that those individuals should never have been made nationals in the first place.[164] The risk of discriminatory denationalization may be particularly high when persons from a former colonial power become a minority in a newly-independent successor state,[165] or when the new minority group is overrepresented in government or important sectors of the economy.[166]

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163 *See Chapter IV: Nationality in Relation to the Succession of States*, *in Report of the International Law Commission on the Work of its Fifty-first Session*, U.N. Doc. A/54/10 (1999).

164 Such denationalizations can occur in either a predecessor or a successor state.

165 For example, many ethnic Russians chose to remain in the Baltic states after the collapse of the Soviet Union. Although Lithuania granted citizenship to all who had been living within its borders in 1989, Estonia and Latvia instituted strict citizenship requirements for those who could not trace their heritage back to someone living in the country prior to 1940 (the time of the Soviet occupation). *Baltics. Them and us,* ECONOMIST, Aug. 17, 1993, at 67. One paper published by the Estonian government in 1993 is particularly revealing. It noted:

> Some non-citizens, especially Russians, may find it difficult to get used to the fact that their role has changed from that of representatives of the majority population of a colonial empire to that of a minority in a foreign country. It is understandable that complicated citizenship or human rights problems may develop from this.

Id. (quoting Estonian government paper). Given that, in 1991, ethnic Russians made up nearly a third of the Estonian population and a third of the Latvian population, it is not difficult to imagine either of these governments facing political pressure to expel ethnic Russians. In a worst-case scenario, this could conceivable include denationalization of even those ethnic Russians who had satisfied the strict citizenship requirements (and thus held passports). *See also Unique Culture of the city of Narva, Estonia* (National Public Radio broadcast, Aug. 6, 2003) (noting that many ethnic Russians in Estonia are still officially stateless); Andy Bowers & Linda Wertheimer, *Latvia's Russian Population* (National Public Radio broadcast, Apr. 20, 1998) (noting tensions between Latvians and ethnic Russians); *Estonia. Honored enemy*, ECONOMIST, May 4, 1996, at 46 (suggesting a danger of secession by ethnic Russians in parts of Estonia where they constitute a majority).

166 *See, e.g.,* THE HORN OF AFRICA WAR, *supra* note 3, at 14 (identifying "[p]ublic resentment over the role of people of Eritrean origin in business and government" as one possible cause of Ethiopia's decision to begin expelling ethnic Eritreans). On market-dominant minorities more generally, see Amy L. Chua, *Markets, Democracy, and Ethnicity: Toward a New Paradigm for Law and Development*, 108 YALE L.J. 1 (1998). **R**

In the case of denationalization by operation of law, I have argued that the law of binding state action provides certain guarantees to passport holders and other states. Specifically, any individual who holds a passport from a predecessor state should have a right to retain the nationality of that state if the state in question continues to exist. If the passport-issuing state ceases to exist, the state that succeeds to its rights and obligations should be bound to accept the passport holder as its national.[167]

In the case of discriminatory denationalization, the law of binding state action may help to prevent its occurrence. By holding a state responsible for assertions of nationality in its passports, this body of law makes it much more difficult for a passport-issuing state to expel passport holders on the pretext that they are not citizens. At the very least, this body of law requires a state to take formal action (1) to attempt to recall the individual passports in question; and (2) to formally notify other states that those particular passports are no longer valid.[168] The tendency of some states to conduct ethnically-based expulsions informally, with little process or procedural protection,[169] suggests that a requirement of formal notice to other states might serve as a disincentive to such denationalization.[170]

Of course, the law of binding state action can eliminate neither statelessness nor discriminatory denationalization. However, a proper understanding of its applicability to passport holders provides a basis in "hard" public international law for what many people believe to be an important constraint on state behavior. Admittedly, passport holders are not the only individuals who need this type of protection, and an argument could be made that those wealthy enough to afford international travel (and thus possess passports) are in fact the least likely to need protection from denationalization and expulsion.

Nonetheless, up to this point human rights law has not been effective in protecting individuals from arbitrary or unfair denationalization. There is a substantial amount of soft law on point, but this soft law has not prevented states from denationalizing their citizens.

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167 It is worth emphasizing that this would probably not result in a requirement that the successor state grant nationality to all nationals of its predecessor, because only a portion of the state's population is likely to hold a passport.

168 Because other states cannot be expected to make judgments as to ethnicity at the border, this would require that the passport-issuing state identify recalled passports by name and passport number. It would not be sufficient to send out a general notification that "all persons of ethnicity *X* are no longer citizens of State *Y*."

169 *See, e.g.*, ILLEGAL PEOPLE, *supra* note 3 ("Snatched off the street, dragged from their homes, or picked up from their workplaces, 'Haitian-looking' people are rarely given a reasonable opportunity to challenge their expulsion."). **R**

170 Again, it is worth noting that passport holders will likely be only a small percentage of those subjected to discriminatory denationalization measures.

With the addition of the hard law of binding state action, one small step can be made toward limiting state action in particular factual situations. Considering the general vulnerability of denationalized individuals to other abuses, even such a small step seems to be a significant movement in the right direction.