Nationality and Defining "The Right to Have Rights"

Since the late 1990s, the U.N. High Commissioner for Refugees and scholars have suggested that legal nationality, as is relevant to the right to a nationality, comprises not only traditional rights regarding movement and access to diplomatic protection but also civil and political rights. They have equated nationality with enfranchised citizenship, identifying certain groups of non-citizen nationals as stateless. This Note reviews the history of nationality in international law and concludes that nationality and citizenship were and continue to be separate concepts. Assertions that nationality and citizenship were interchangeable concepts or have converged since the post-World War II period are not supported historically or contemporarily by widespread and consistent State practice and opinio juris. Having reached this conclusion, this Note then discusses the prudence of opaquely progressively developing the law and of internationalizing citizenship.

INTRODUCTION

Statelessness is a condition by which an individual lacks a nationality.[1] The United Nations High Commissioner for Human

1. Convention Relating to the Status of Stateless Persons art. 1, Sept. 28, 1954, 360 U.N.T.S. 117. To preface any discussion on nationality, it is important to distinguish legal nationality, hereinafter defined, from "historico-biological" nationality, or membership in a particular race or nation. Though historico-biological nationality may be relevant in legal discussions regarding discrimination, this Note only investigates the history and implications of legal nationality. *See* PAUL WEIS, NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW 3 (2d ed., 1979).

Rights ("UNHCR") estimates that there currently are over ten million stateless persons worldwide. Through its #IBelong Campaign, UNHCR seeks to end statelessness by securing a nationality for those millions of persons by 2024.[2]

Non-citizen Latvians fall within the class of stateless persons identified and assisted by UNHCR. Pursuant to Latvian law, former USSR citizens situated in Latvia but not of Latvian ethnicity are entitled to "special legal status."[3] This status differs materially from, and is expressly unequal to, citizenship. Non-citizen Latvians are neither obligated to enlist in Latvia's compulsory military service nor entitled to participate in Latvian governance by voting or pursuing public employment.[4] Non-citizen Latvians, however, are entitled to diplomatic protection[5] and extradition[6] by Latvia, when appropriate. Latvia issues passports to its non-citizens and provides safeguards against their expulsion from the State. Barring the restrictions on political participation and public employment, Latvia guarantees its non-citizens equal protection of the law.

The Constitutional Court of Latvia has stated that non-citizen Latvians are "neither citizens, nor aliens and stateless persons."[7] In similar fashion, several scholars have written that non-citizen Latvians hold "functional Latvian nationality."[8] UNHCR disagrees. Since its 1995 receipt of the statelessness mandate, UNHCR has classified Latvia's roughly 336,000 non-citizens as stateless.[9] UNHCR acknowledges that the qualities of Latvian special legal status are nearly "identical to those attached to the possession of nationality"

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2. *See* UN HIGH COMM'R OF REFUGEES, GLOBAL ACTION PLAN TO END STATELESSNESS 4 (2014).

3. David Weissbrodt, *Final Report on the Rights of Non-Citizens—Regional Activities*, U.N. Doc. E/CN.4/Sub.2/2003/23/Add. 2, ¶ 33 (2003).

4. Kristīne Krūma, *Checks and Balances in Latvian National Policies: National Agendas and International Frameworks*, *in* CITIZENSHIP POLICIES IN THE NEW EUROPE 63, 73 (Rainer Bauböck et al. eds., 2007).

5. Diplomatic and Consular Service Law ch. 1, sec. 2 (1995) (Lat.).

6. Krūma, *supra* note 4, at 79.

7. Constitutional Court of the Republic of Latvia, March 7, 2005, Case No. 2004-15-0106, http://www.satv.tiesa.gov.lv/web/viewer.html?file=http://www.satv.tiesa.gov.lv/wp-content/uploads/2004/07/2004-15-0106_Spriedums_ENG.pdf#search= [https://perma.cc/C2PQ-RJU2].

8. *See, e.g.*, Kristīne Krūma, *supra* note 4, at 70; Dimitry Kochenov, *The Puzzle of Citizenship and Territory in the EU: On European Rights Overseas*, 17 MAASTRICHT J. EUR. & COMP. L. 230, 239 n.58 (2010).

9. *See, e.g.*, U.N. HIGH COMM'R FOR REFUGEES, SUBMISSION BY THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES FOR THE OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS' COMPILATION REPORT—UNIVERSAL PERIODIC REVIEW: LATVIA 6 (2010).

but notes what it believes is a critical exception of "certain limited civil and political rights."[10]

Latvia is just one of several States that differentiate between citizens and non-citizen nationals. Despite its strong support for UNHCR's efforts to end statelessness, the United States maintains that American Samoans are non-citizen nationals, disenfranchised in federal elections.[11] The United Kingdom differentiates between British citizens, British subjects without citizenship, and British protected persons.[12] Mexico, Bolivia, Nicaragua, and Honduras have Constitutional distinctions between citizens and non-citizen nationals.[13] Are all of these other non-citizen nationals stateless?[14]

Statelessness turns on the presence or absence of nationality. Determining whether a person is stateless thus requires a clear understanding of nationality as it exists in international law. The Statelessness Convention,[15] though it references nationality, does not define the term. States and scholars rarely discuss the meaning of nationality, and there is no definitive articulation of nationality as a matter of customary international law. Accordingly, elucidation of the meaning and implications of nationality requires recourse to history and contemporary practice.[16] This Note, in an attempt to clarify

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10. *See, e.g.*, U.N. High Comm'r for Refugees, Rep. of the United Nations High Commissioner for Refugees, U.N. Doc. A/61/12, at 22 n.16 (2006).

11. Tuaua v. United States, 788 F.3d 300, 302 (D.C. Cir. 2015); *see also* 8 U.S.C. § 1101(a)(29) ("The term 'outlying possessions of the United States' means American Samoa and Swains Island."); *id.* § 1408 ("[T]he following shall be nationals but not citizens of the United States at birth: . . . A person born in an outlying possession of the United States on or after the date of formal acquisition of such possession. . . .").

12. *Types of British Nationality*, GOV.UK, https://www.gov.uk/types-of-british-nationality [https://permacc/Y2P9-NTND].

13. Constitución Política de los Estados Unidos Mexicanos, CPEUM, art. 41 base III, Diario Oficial de la Federación [DOF] 5 de Febereo de 1917, últimas reformas DOF 10 de Febereo de 2014 (Mex.); CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] arts. 96–98; CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE NICARAGUA [CN.] tit. III, arts. 15–22, LA GACETA, DIARIO OFICIAL [L.G.] 9 January 1987, as amended by Ley No. 330, Jan. 18, 2000, Reforma Parcial de la Constitución Política de la República de Nicaragua, L.G. Jan. 19, 2000; Constitución de República de Honduras de 1982 con reformas hasta 2006, tit. II, arts. 22–43; *see generally* Evelyn Téllez Carvajal, *The Political Rights of Mexican Migrants: Nationality and Citizenship in Mexico*, 6 MEX. L. REV. 178, 186 (2013) (noting that in the constitutions of some Latin American countries "it is common to distinguish between nationals and citizens").

14. *See infra* § III.D.1.

15. Convention on the Reduction of Statelessness, Aug. 30, 1961, 989 U.N.T.S. 175.

16. Matthew Craven, *Introduction: International Law and Its Histories*, *in* TIME, HISTORY AND INTERNATIONAL LAW 6 (Matthew Craven et al. eds., 2007); Randall Lesaffer, *International Law and Its History: The Story of an Unrequited Love*, *in* TIME, HISTORY AND

the law as regards statelessness, investigates the historical development of nationality as an international legal concept.

This Note identifies three inflection points in the history of nationality in international law. Section I identifies World War I as a first inflection point, after which nationality practice moved from regulation exclusively under municipal law to regulation under treaty law. Section II identifies World War II as a second inflection point, after which the international community announced the right to a nationality, as a matter of customary international law, and defined the contours of that right. Section III identifies the end of the Cold War as a third and final inflection point—but questions whether the new law announced by UNHCR and scholars reflects an actual shift in customary international law rather than a progressive development effort.

I. WORLD WAR I AND THE RISE OF TREATY REGIMES FOR NATIONALITY

The concept of nationality dates back to some of the earliest scholarship on international law. Vattel described nationality as "*le lien qui rattache a l'Etat chacun de ses membres*," or the link between a State and its subjects.[17] The link was defined exclusively by municipal law. Indeed, in 1907, Sir Francis Taylor Piggott declared that the extension of nationality lay "outside the domain" of international law, as there were "*no* elements common to the systems of all or many nations" that could serve as a basis for any general principle.[18] The municipal law concept of nationality would soon shift.

World War I shocked the global system, not only with its unprecedented casualties and geographic scope, but also with its abuse and mass displacement of stateless persons. In the wake of World War I, States and scholars criticized the wartime practices that had created and exacerbated a global statelessness crisis. States subsequently concluded treaties on nationality and changed their domestic laws regarding the extension of nationality. In 1923, the Permanent Court of International Justice ("PCIJ") pronounced that international law could regulate States' nationality practice, either by treaty or by customary international law, should norms crystallize in future

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INTERNATIONAL LAW 29 (Matthew Craven et al. eds., 2007).

17. FRANCIS TAYLOR PIGGOTT, NATIONALITY INCLUDING NATURALIZATION AND ENGLISH LAW ON THE HIGH SEAS AND BEYOND THE REALM 5 (1907) (quoting Emer de Vattel) (internal citation omitted).

18. *Id*. at 4 (emphasis added).

years.[19]

This Section elaborates on the pre-World War I state of international law with respect to nationality. It then discusses the events of World War I that bore on nationality and that ultimately led to changes in States' nationality practice during the interwar period. It concludes by analyzing State practice, treaties, and discussions thereof to discern how international law changed, and what the implications of nationality were, in the interwar period.

A. Pre-World War I State of the Law

1. Regulation in Municipal Law

Prior to World War I, the International Law Association ("ILA") only once discussed, as its focus, the matter of nationality.[20] In 1893, the Sixteenth Annual Conference of the ILA reviewed a three-page report urging the creation of a committee to address international law as it pertained to nationality. The authors of this report worried about the increasing militarization of Europe and how "all and sundry are swept into the armies irrespectively of any considerations of nationality . . . regardless of the fact that an Englishman cannot be turned into a Frenchman, or a Frenchman into a German, by merely putting him into a uniform."[21] Of particular concern to the authors was the notion of dual nationality, by which young men could be "liable to military service in two States."[22] The ILA agreed to the appointment of the requested committee, but its committee produced no reports in advance of World War I.

From the 1893 report and its brief discussion, it is apparent that municipal law governed the extension of nationality. The substance of nationality, however, bore on matters of *international*, not local, import and appeared to have common meaning across States. Nationality was viewed as an "allegiance" between a State and its subject, capable of compelling the subject to fight under the banner of the State.[23]

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19. Nationality Decrees Issued in Tunis and Morocco on November 8th, 1921, Advisory Opinion, 1923 P.C.I.J. (ser. B) No 4, ¶¶ 38–41 (Feb. 7).

20. This was determined through a review of all published ILA conference reports from the inception of the ILA, up to 1913.

21. *The Nationality Question*, 16 ASS'N REFORM & CODIFICATION L. NATIONS R. CONF. 94, 94 (1893).

22. *Id.* at 96.

23. *Id.*

2. What It Meant to Have a Nationality

Additional ILA conference materials, though not focused specifically on nationality, further clarify the implications of nationality in the prewar period. In 1879, a discussion on the slave trade and piracy touched on the role of nationality in determining the scope of States' extraterritorial jurisdiction.[24] In an early articulation of universal jurisdiction over pirates, the ILA endorsed the notion that the courts of any State could try pirates, "without regard to their nationality."[25] Impliedly, nationality was relevant for determining the scope of States' extraterritorial jurisdiction.

A 1907 paper regarding the exercise of diplomatic protection—the process through which a State invokes the responsibility of another State for its injury to an individual[26]—articulated that diplomatic protection was the "right" of the national and the "duty" of the State.[27] The paper recognized that States, within their municipal laws or through ministerial decision, could deny certain nationals, or classes of nationals, diplomatic protection.[28] The exercise of diplomatic protection was contingent upon the ability of the national to "prove nationality," through naturalization, descent, or birth on domestic soil.[29]

Two ILA papers from this period, one from 1901 and another from 1892, curb the effect of nationality. The former, a discussion of neutrality and non-State actors, argued that nationality, alone, could not dictate the behavior of a neutral State's nationals with respect to belligerent parties.[30] The latter, a discussion of domicile for the purpose of extradition, emphasized that most States distinguished between nationality and citizenship—or full, enfranchised membership of a State. In other words, most States would bestow on individuals "two distinct legal states or conditions, one by virtue of which he becomes the subject of some particular country, binding him by the tie of natural allegiance . . . another by virtue of which he has ascribed to

24. *The Slave Trade*, 7 ASS'N REFORM & CODIFICATION L. NATIONS R. CONF. 224, 226 (1879).

25. *Id*.

26. Int'l Law Comm'n, Articles on Diplomatic Protection art. 1, [2006] Y.B. INT'L L. COMM'N 16, U.N. Doc. A/61/10.

27. Gaston de Leval, *Diplomatic Protection of Citizens Abroad*, 24 INT'L L. ASS'N R. CONF. 196, 197 (1907).

28. *Id*. at 198.

29. *Id*. at 199.

30. *The Responsibility of Neutral States for Acts of Their Citizens*, 20 INT'L L. ASS'N R. CONF. 394, 394 (1901).

him the character of a citizen . . . possessed of certain municipal rights."[31] Nationality, alone, could not confer citizenship or its associated municipal rights.

B. The Challenges of War and Nationality: World War I

World War I, in effect, created the original dialogue regarding statelessness. Stateless persons, denationalized or otherwise unrecognized by their State of origin, had undefined status under States' municipal laws. During the War, this meant that States took liberties in conscripting stateless persons hailing from allied territory. Further, it meant that States took no risks in detaining stateless persons hailing from enemy territory. In the aftermath of the War, crises of statelessness continued; World War I had precipitated the Russian Revolution and the dissolution of the Ottoman Empire, both of which led to the expulsion of hundreds of thousands of denationalized persons.

The wartime abuse of stateless persons, through either arbitrary conscription or detention, proved itself a legal, political, and moral morass.[32] Great Britain, as an example, conscripted stateless Poles and Jews who had previously held Russian nationality but had fled persecution, losing their legal status in the process.[33] Great Britain, entitled by a bilateral treaty[34] to conscript Britain-based Russian nationals, assessed stateless persons' nationality based on British municipal law, which did not recognize the possibility of statelessness.[35] The British government identified stateless Poles and Jews as Russian nationals. Accordingly, the stateless Poles and Jews fled persecution in Russia, only to find themselves conscripted into the hard-labor battalions of a foreign State.

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31. William Griffith, *Domicile and Allegiance, or, Civil and Political Status, and Extradition*, 15 ASS'N REFORM & CONDITIONAL L. NATIONS R. CONF. 165, 165 (1892) (quoting Lord Chancellor Westbury in *Udny v. Udny*, L.R. I., Sc. Ap. 457).

32. R.S. Fraser, *Nationality and Allegiance*, 4 INT'L L. NOTES 12, 13 (1917).

33. 3 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 622 (noting that Russia "forb[ade] the return of her subjects who might choose to abandon her protection and escape from their allegiances").

34. An Agreement Concluded Between His Majesty's Government and the Provisional Government of Russia Relative to the Reciprocal Liability to Military Service of British Subjects Resident in Russia and Russian Subjects Resident in Great Britain, July 16, 1917, Rus.-Gr. Brit., art. 3, 1917 Cd. 8588. *See also* Sharman Kadish, *Bolsheviks and British Jews: The Anglo-Jewish Community, Britain and the Russian Revolution*, 50 JEWISH SOC. STUDIES 239, 249 (1988).

35. Fraser, *supra* note 32, at 13.

Denationalized Germans fared no better in the British system.[36] Regardless of their actual connections to Germany, denationalized Germans were detained as enemy nationals, their property expropriated. Tasked with justifying the designation of stateless persons as enemy nationals, British jurists declared that it would be improper to find that a man "can shake off his position as a national of the country in which he was born without acquiring the duties and responsibilities of a national of some other country."[37]

Though these particular abuses of stateless persons did not persist after the War, the influx of stateless persons to Europe and Asia because of the Russian Revolution and the dissolution of the Ottoman Empire ensured that statelessness remained a salient issue. An estimated 400,000 to 500,000 persons, most of them Jews, fled Russia in anticipation of, or in response to, the Russian Revolution.[38] France and Manchuria each received 70,000 displaced persons.[39] Germany faced an influx of over 50,000.[40] An "unknown" number of persons sought refuge in the Balkans.[41] Between 1921 and 1925, the USSR issued a series of decrees officially stripping its refugees of their nationality, transforming them into *de jure* stateless persons.[42]

Persecution in the Ottoman Empire, particularly of Armenians, exacerbated the mass displacement crisis. Non-Turks were, by either decree or administrative decision,[43] denationalized for "political, racial, and religious reasons."[44] During the drafting of the Treaty of Lausanne establishing peace between the Ottoman Empire and the Allies, one of the State representatives referred to the persecution and displacement of non-Turks as "one of the greatest world scandals."[45] Hundreds of thousands of Armenians, Assyrians, and Assyro-Chaldeans, stripped of their nationality, flooded the rest of Europe and Central Asia.[46]

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36. *See, e.g.*, *R. v. Superintendent of Vine-Street Police Station*, 32 TLR 3 (1921); *Stoeck v. Public Trustee*, 37 TLR 666 (1921).

37. Ex parte Weber, [1916] 1 K.B. 280, 283.

38. MARC VISHNIAK, THE LEGAL STATUS OF STATELESS PERSONS 34–35 (1945).

39. Jane Carey, *Some Aspects of Statelessness Since World War I*, 40 AM. POL. SCI. R. 113, 114 (1946).

40. *Id*.

41. *Id.*

42. *Id*.

43. *Id*. at 115.

44. VISHNIAK, *supra* note 38, at 22.

45. *Id.* (quoting Lord Curzon).

46. General Report of the Governing Body to the 18th Assembly, League of Nations

Concurrent with the wartime rise in stateless and undocumented displaced persons, States across Europe began implementing new or stricter passport regimes.[47] Controlling the movement of nonnationals was viewed as a means of "assuring [States'] protection of the military and economic interests."[48] This left hundreds of thousands of stateless persons stranded in Eastern Europe, unable to travel to States where they could find work and be free of persecution.[49]

C. Changes in Practice and New Regulations in International Law

Though the extension of nationality was once viewed as a matter purely of municipal law, the PCIJ pronounced in 1923 that "[t]he question whether [nationality] is or is not solely within the domestic jurisdiction of a State . . . depends on the development of international relations."[50] The PCIJ further determined that State authority to decide who would be regarded as a national was "subject to . . . Treaty obligations."[51] That same year, the ILA stated as fact that "the question of what nation a man may make himself a subject of" is a matter of public international law.[52] Its Committee on Nationality specified that international law should provide mechanisms for avoiding statelessness, an "evil[]" associated with nationality practice[53] that could subject a man to improper conscription, detention, or displacement.[54]

Statelessness was addressed not only in the rhetoric of the ILA but also in the practice of States. Responding to the mass displacement of persons across Europe, States created a stopgap method for addressing stateless persons' lack of documentation and restrictions on movement. In 1922, the League of Nations, through a series of treaties,[55] began issuing "Nansen Passports" to recognize

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Doc. A.21 1937 XII (1937).

47. John H. Simpson, *The Refugee Problem*, 17 INT'L AFF. (ROYAL INST. INT'L AFF.) 607, 607 (1938).

48. Egidio Reale, *The Passport Question*, 9 FOREIGN AFF. 506, 506 (1931).

49. *Id*. at 507–08.

50. Nationality Decrees Issued in Tunis and Morocco, *supra* note 19, ¶ 24.

51. Acquisition of Polish Nationality, Advisory Opinion, 1923 P.C.I.J. (ser. C) No. 3, at 16 (Aug. 27).

52. *Conference on Nationality and Naturalization*, 32 INT'L L. ASS'N R. CONF. 1, 5 (1923).

53. *Id*. at 7.

54. *Report of the Committee on Nationality and Naturalization*, 33 INT'L L. ASS'N R. CONF. 22, 23 (1924).

55. *See* Arrangement with Respect to the Issue of Certificates of Identity to Russian

stateless persons' status and help stateless persons resettle.[56] Recognition of statelessness as an international issue necessitated recognition of nationality practice as an international issue.

In 1924, the ILA's Committee on Nationality, by way of a model statute and model treaty provisions, began proposing long-term changes in nationality practice.[57] The model statute proposed that nationality be extended on the basis of *jus soli*;[58] this, scholars believed, would reduce the incidence of stateless birth to displaced parents.[59] The model statute further proposed that individuals not lose their nationality without acquiring the nationality of another State.[60] The model treaty provisions explained how the contracting parties should consider denationalized or stateless individuals. Though the Committee discussed and sought to promulgate rules regarding the extension of nationality, it did not define nationality or its implications at length.

Three years later, the Eighth Assembly of the League of Nations adopted a resolution calling for the codification of international law pertaining to nationality.[61] Codification on the subject was considered "material for the progress of justice and the maintenance of

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Refugees, July 5, 1922, 13 L.N.T.S. 355; Arrangement of 12 May 1926 Relating to the Issue of Identity Certificates to Russian and Armenian Refugees, May 12, 1926, 89 L.N.T.S. 2004; Arrangement of 30 June 1928 Relating to the Legal Status of Russian and Armenian Refugees, June 30, 1928, 89 L.N.T.S. 2005.

56. Norman Bentwich, *The League of Nations and Refugees*, 16 BRIT. Y.B. INT'L L. 114, 115 (1935). Fifty-one States ratified the treaties giving rise to Nansen passports. Resettlement options in those fifty-one States were available to stateless persons. Reale, *supra* note 48, at 507.

57. *Report of the Committee on Nationality and Naturalization*, *supra* note 54 at 28.

58. *Id*. at 29.

59. *Id*. at 91.

60. In other words, a State would only be able to divest a national of his or her legal affiliation if that national had successfully obtained the nationality of another State through, as an example, application after marrying a foreign spouse or immigrating. *Id*. at 31.

61. Resolution of September 27, 1927, League of Nations Official Journal, Special Supplement No. 53, at 9. Prior to the adoption of this resolution, the Committee of Experts of the League of Nations for the Progressive Codification of International Law had produced a preliminary draft of a convention on nationality. *See generally* Charles Hyde, *The Nationality Convention Adopted by the League of Nations Committee of Experts for the Progressive Codification of International Law*, 20 AM. J. INT'L L. 726 (1926). A research committee of Harvard Law School faculty would build on this preliminary draft to produce the 1929 Draft Convention on Nationality. *See generally* Francis Deak, *Review: Research in International Law, Draft Conventions on Nationality, Responsibility of States, Territorial Waters by: League of Nations, Conference for the Codification of International Law*, 30 COLUM. L. REV. 142 (1930).

peace."[62] The codification process, which contemplated both contemporary State practice and progressive development efforts,[63] produced the 1929 Draft Convention on Nationality.[64] The Draft Convention, citing municipal law and post-World War I treaties, prescribed extension of nationality on the basis of *jus soli* or *jus sanguinis*, with a preference for the former.[65] Further, it provided several safeguards against statelessness.[66] Forty States signed onto the terms of the Draft Convention, reproduced in the 1930 Hague Convention on Certain Questions relating to the Conflict of Nationality Laws and the Hague Protocol Relating to a Certain Case of Statelessness.[67] Similar treaties, like the 1933 Convention on Nationality concluded at the 7th Inter-American Conference,[68] were promulgated at the regional and bilateral levels.[69]

In the interwar era, treaties were the only source of international law regulating the extension of nationality. In the absence of relevant treaty obligations, States retained unfettered ability to regulate the acquisition and loss of nationality.[70] Several States that had acceded to the Hague Convention revised their nationality laws in accordance with their treaty obligations, but most did not.[71] A few

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62. *Id.*

63. *See* Deak, *supra* note 61, at 142 ("As a general rule, the drafts are not limited to a statement of existing international law, but contain certain provisions which, if adopted, would formulate new law.").

64. *Harvard Draft Convention on Nationality*, 23 AM. J. INT'L L. SPECIAL SUPP. 12 (1929) (reprinted in YAFFA ZILBERSHATS, THE HUMAN RIGHT TO CITIZENSHIP 187 (2002)).

65. Article 3 provides for extension of nationality on either basis, but Article 4 limits States' ability to confer their nationality on multiple generations of persons born outside their territory. The only limitations on *jus soli* extension of nationality arise when a child's parents are officers, including diplomatic personnel, of another State. *Id.*

66. As an example, Article 7 provides that States "shall" confer their nationality upon foundlings. Article 8 attempts to ensure that children born out of wedlock will have a nationality. Article 9 provides that States "shall" confer their nationality upon persons born within their territory who would otherwise be stateless. *Id.* Today, these proposed treaty obligations are some of the mechanisms that States use to give effect to the right to a nationality, as it exists in customary international law.

67. Ivan Kerno, Analysis of Changes in Nationality Legislation of States Since 1930, U.N. Doc. A/CN.4/67, at 2 (1953).

68. *See, e.g.*, Convention on Nationality, Dec. 26, 1933 (reprinted in UNITED NATIONS, LEGISLATIVE SERIES, LAWS CONCERNING NATIONALITY 585 (1954)).

69. Manley Hudson, Report on Nationality, Including Statelessness, U.N. Doc. A/CN.4/50, at 6 (1952).

70. *Bases of Discussion Drawn up for the Conference by the Preparatory Committee—Nationality*, League of Nations Doc. C.73.M.38 1929 V (1929).

71. Kerno, *supra* note 67, at 3; VISHNIAK, *supra* note 38, at 18.

States that had not acceded to the Hague Convention took it upon themselves to revise their nationality laws in accordance with the Hague Convention.[72] Altogether, the majority of States had yet to incorporate the provisions of the Committee's model statute or the stipulations of the Hague Convention into their municipal laws by the start of World War II.[73] Instead, States including the Soviet Union, Turkey, and Italy implemented nationality-stripping decrees and legislation.[74] Ethnic minorities, and Jews in particular, were denationalized or denied nationality throughout Europe.[75]

Though customary international law regarding States' nationality practices did not crystallize—for want of "extensive" and generally uniform State practice supported by opinio juris[76]—treaties concluded in response to World War I still altered the nature of States' obligations to one another and to individuals within their jurisdiction. The promulgation of treaties regulating nationality reflected a stark break from pre-war practice. The growing support for regulation of nationality at the international level would be critical for the development of law in the post-World War II period.

1. What It Meant to Have a Nationality

Nationality enabled States to "exercise the right of diplomatic protection on behalf of [an injured] person."[77] The Committee[78] and the Draft Convention[79] suggested that nationality also bore on States' ability to conscript and expel individuals. Relatedly, passport practice from the interwar period suggested that nationality bore on

72. *Id.*

73. *Id.*

74. VISHNIAK, *supra* note 38, at 21–23.

75. *Id*. at 19.

76. ANTONIO CASSESE, INTERNATIONAL LAW 157 (2d ed., 2005).

77. *First Codification Conference: Schedules of Points Drawn up by the Preparatory Committee for Submission to the Governments*, League of Nations Doc. C.44.M.21 1928 V (1928). This is further evident from the work done by the Committee and from the preliminary draft convention produced by the League Committee of Experts, which foregrounded diplomatic protection in its proposed Article 1.

78. *Id*. at 32.

79. Article 11 provides that individuals with multiple nationalities cannot be conscripted by one State of nationality if they reside in another State of nationality. Article 20 provides that States must allow their nationals, as well as their former nationals, if stateless, entry upon their expulsion or exclusion from the territory of another State. ZILBERSHATS, *supra* note 64, at 188–89 (reprinting the Draft Convention).

States' ability to restrict entry.[80] Beyond this, however, treaties provided no guidance regarding the implications of nationality.

Neither the ILA's Committee nor the preparatory committee for the Draft Convention discussed what, precisely, nationality entailed. Indeed, a comment to Article 1 of the Draft Convention noted, "No attempt is made in this draft to define the meaning of allegiance."[81] Scholars found State practice regarding the implications of nationality too varied to codify or even develop.[82] Though some scholars had attempted to equate nationality with citizenship, the preparatory committee for the Draft Convention rejected the notion that nationality "necessarily involve[s] the right or privilege of exercising civil or political functions."[83] States had, since the development of territorial sovereignty, distinguished between citizens "participating in the sovereign power" and subjects merely "subjected to the laws of the State."[84]

2. Nationality and Diplomatic Protection

Though nationality did not secure particular citizen rights, it was of great importance, as evidenced by the extensive discussion regarding how nationality ought to be extended. Diplomatic protection, only available by virtue of nationality, provided the exclusive avenue for bringing individuals' international claims. Stateless individuals had no recourse for State-caused injury and had no international legal rights. In the 1931 *Dickson Car Wheel Company Case*, the Mexico/U.S. General Claims Commission declared, "A State . . . does not commit an international delinquency in inflicting an injury upon an individual lacking nationality, and consequently, no State is empowered to intervene or complain on his behalf either before or

80. *See generally* Reale, *supra* note 48.

81. *Harvard Draft Convention on Nationality*, 23 AM. J. INT'L L. SPECIAL SUPP. at 23; Maximillian Koessler, *"Subject," "Citizen," "National," and "Permanent Allegiance"*, 56 YALE L.J. 58, 69 (1947) (quoting the Commentary to Article 1 of the Draft Convention).

82. *Id.* ("It may be observed, however, that the 'tie of allegiance' is a term in general use to denote the sum of the obligations of a natural person to the state to which he belongs. The draft itself does not spell out these obligations, since they are quite different in different societies").

83. *Id.*; *See, e.g.*, Minor v. Happersett, 88 U.S. 162 (1874) (refusing female citizens the franchise); Gonzalez v. Williams, 192 U.S. 1 (1904) (holding that Puerto Ricans are not "aliens" or "alien immigrants" but refusing to recognize Puerto Ricans as full citizens).

84. Koessler, *supra* note 81, at 61 (quoting Rousseau's distinction between the two concepts).

after the injury."[85]

The "shifting sands of nationality"[86] could leave individuals stateless and rights-less, without access to diplomatic protection. Even with the post-World War I regulations on the extension of nationality, worries about statelessness and the potential inaccessibility of diplomatic protection were well-founded. In 1921, two scholars speculated that the State-based system under the League of Nations, which provided no mechanism for individuals—rather than States—to vindicate their rights, was "condemned to failure from its inception."[87] At the heart of these scholars' prescient work was a call for the individual as the subject of international law, or the development of a supranational human rights regime that could protect against and provide universal recourse for violations.[88]

II. WORLD WAR II AND THE CRYSTALLIZATION OF CUSTOMARY INTERNATIONAL LAW

The lessons of World War I and the treaty regimes of the interwar period proved insufficient to prevent nationality-related crises during and after World War II. Again, war shocked the global system, this time challenging the old model of the role of and relationship between States and individuals. States began altering their nationality practices even during the war. By the late twentieth century, international instruments, customary international law, and judgments from the International Court of Justice, the PCIJ's successor, had cabined States' authority in establishing lawful nationality practices.

The developments of the post-World War II period bore first and foremost on the way in which nationality was conferred or regulated at the international level. They set limitations on when a State could naturalize or denationalize an individual without his or her consent. Further, they resolved questions regarding when nationality could be considered internationally "effective." Second, the developments gave clearer substantive meaning to the previously-amorphous concept of nationality. Nationality, as a matter of customary international law, dictated: the treatment afforded individuals

85. Dickson Car Wheel Company (U.S.A.) v. United Mexican States, 4 R. INT'L ARB. AWARDS 669, 678 (1931).

86. G.M.W. Jellinghaus & R.S. Fraser, *The Status of the Individual in International Law*, 30 INT'L L. ASS'N R. CONF. 289, 293 (1921).

87. *Id*. at 310.

88. *Id*. at 309.

seeking entry to or exit from a State; the permissibility of a State's exercise of diplomatic protection; the permissibility of a State's exercise of extraterritorial jurisdiction; and the legitimacy of a State's international sanctions and wartime undertakings. Nationality did not implicate the extension of citizenship with its concomitant civil and political rights.

This Section discusses the framing and events of World War II that bore on nationality and the broader human rights regime. It then turns to the works of jurists and State practice in the postwar period, focusing in particular on States' understanding of nationality, as evidenced by the text and *travaux préparatoires* of international instruments.

A. The Challenges of War and Nationality: World War II

In World War II, as in World War I, several States arbitrarily detained stateless persons and expropriated their property.[89] Millions of stateless persons, persecuted and denationalized, flooded Europe once more.

World War II and its lead-up exacerbated the post-World War I refugee and statelessness crisis in Europe. In 1933, the German Reich promulgated a law authorizing the denationalization of those "regarded as undesirable."[90] Thousands of Jews were individually denationalized in both Germany and its annexed territories.[91] Two years later, the Nuremberg Laws were passed, rendering Jews, Roma, and persons of African descent German subjects rather than citizens.[92] Hundreds of thousands fled German control and spread across Europe.[93] Many of these refugees were stateless or at risk of

89. *See* United States ex rel. Schwarzkopf v. Uhl, 137 F.2d 898 (2d Cir. 1943); Hans Goldschmidt, *Recent Applications of Domestic Nationality Laws by International Tribunals*, 28 FORDHAM L. REV. 689, 690 (1959); Eritrea-Ethiopia Claims Commission - Partial Award: Civilian Claims - Eritrea's Claims 15, 16, 23 and 27–32, 26 R. INT'L ARB. AWARDS 195, ¶ 127 (2004) (discussing the widespread nature of States' detention and expropriation practices during World War I and World War II).

90. Law on the Revocation of Naturalization and the Deprivation of German Citizenship (Ger.) (adopted on July 14, 1933); *see* VISHNIAK, *supra* note 38, at 24.

91. OSCAR JANOWSKY & MELVIN FAGEN, INTERNATIONAL ASPECTS OF GERMAN RACIAL POLICIES 217–28 (1937).

92. DORIS L. BERGEN, WAR AND GENOCIDE: A CONCISE HISTORY OF THE HOLOCAUST 71–73 (2d ed., 2009); VISHNIAK, *supra* note 38, at 25. There is some measure of scholarly dispute over whether the Nuremberg Laws rendered affected persons non-citizen nationals or stateless. This dispute is referenced *infra*, note 168.

93. *See generally* Susanne Heim, *International Refugee Policy and Jewish Immigration*

being denationalized.[94] In 1941, a third law deprived all German Jews outside of German territory of their nationality.[95]

Anti-Semitism and ensuing refugee flows were not unique to the German Reich. Poland and the Free State of Danzig, before German occupation, enacted new nationality laws depriving individuals, typically Jews, of their nationality.[96] The Slovak Republic, Hungary, and Romania ordered civil administrative review of Jewish nationals' documentation and status, denationalizing Jews without promulgating new nationality laws. In Romania alone, 350,000 Jews were rendered stateless pursuant to the civil administrative review.[97] Several States implemented policies expelling Jews. Even for States from which Jews were not expelled, Jews were forced across borders by the consequences of statelessness—deprivation of the freedom of movement, the ability to work, the ability to attend school, etc.

In response to the mass displacement crisis, the League of Nations, during the war, established the Office of the High Commissioner of the League of Nations for Refugees.[98] The High Commissioner was charged with ensuring the "political and legal protection" of refugees. It was evident, however, that under the contemporary legal regime, the Office of the High Commissioner would be unable to address the pressing and multifarious needs of the displaced. Though the League of Nations had assigned the Office of the High Commissioner an impossible mandate, the very creation of the High Commissioner's office during World War II—as well as Allied efforts to avoid the other abuses and crises of World War I[99]—reflected

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under the Shadow of National Socialism, *in* REFUGEES FROM NAZI GERMANY AND THE LIBERAL EUROPEAN STATES 17–47 (Frank Caestecker & Bob Moore eds., 2010).

94. VISHNIAK, *supra* note 38, at 7.

95. *See id.* at 25; Germany Ordinance of November 26, 1941 (Ger.).

96. *See, e.g.*, DAVID CYMET, HISTORY VS. APOLOGETICS: THE HOLOCAUST, THE THIRD REICH, AND THE CATHOLIC CHURCH 122 (2010) ("The Polish issued a denaturalization decree on March 25, 1938 . . . Polish Jews in Austria and Germany became stateless pariahs overnight. In June 1938, the Polish government again announced that those Polish Jews who would return . . . would be interned.").

97. WILLIAM CONKLIN, STATELESSNESS: THE ENIGMA OF AN INTERNATIONAL COMMUNITY 106 (2014).

98. Budislav Vukas, *International Instruments Dealing with the Status of Stateless Persons and of Refugees*, 8 BELGIAN REV. INT'L L. 143, 171 (1972) ("On September 30, 1938 the Assembly of the League decided to establish a High Commissioner's Office for the joint protection of all refugees."); *see also* Report of the Council Committee Appointed to Draw up a Plan for International Assistance to Refugees, League of Nations Doc. A.27 1938 XII (1938) (describing the future mandate of the Office).

99. *See* Quincy Wright, *The Munich Settlement and International Law*, 33 AM. J. INT'L L. 12 (1939); Statement of Mr. Rundall, U.K. Representative, Three Hundred and Twenty-

the human approach integral to the Allies' wartime mobilizing rhetoric.

If World War I was "the war to end all wars," World War II was the war to secure the rights of man. In January 1941, President Franklin D. Roosevelt delivered his Four Freedoms speech, in which he directly linked global security to "four essential human freedoms," encompassing civil, political, and economic rights.[100] Issued in August 1941, the Allies' Atlantic Charter built on the Four Freedoms speech, promising that all people had the right to self-determination.[101] It reiterated that all men "may live out their lives in freedom from fear and want."[102] Chairman Chiang Kai-Shek referred to these rights as the "cornerstones of our fighting faith," linking the wartime efforts to the late President Sun Yat-Sen's vision of rights and equality.[103]

Meanwhile, H.G. Wells and Lord Chancellor John Sankey coauthored *The Rights of Man, or, What Are We Fighting For?*[104] Frank Capra directed *Why We Fight*, which portrayed the Axis powers' abuses as an unacceptable affront to "the liberty and dignity of man."[105] Stuart Legg produced *The War for Men's Minds*, which declared that the Allies "must conquer men's minds for their own great cause: the cause of human freedom, everywhere."[106] Hersch Lauterpacht penned the International Bill of the Rights of Man.[107] The American Law Institute, as war raged on, began producing its own catalogue of fundamental rights[108] and contemplating the "international law of the future."[109] These rights documents were meant to serve as "a basis and a test of any plan for the postwar world."[110]

Sixth Meeting, Study of Statelessness, U.N. Doc. E/OR(IX), (Aug. 6, 1949).

100. Franklin D. Roosevelt, 1941 State of the Union Address: The Four Freedoms (Jan. 6, 1941).

101. Atlantic Charter (Aug. 14, 1941), http://www.un.org/en/sections/history-united-nations-charter/1941-atlantic-charter/index.html [https://perma.cc/W6SM-VYYM].

102. *Id*.

103. CHIANG KAI-SHEK, ALL WE ARE AND ALL WE HAVE 59 (1943) (specifically mentioning President Sun Yat-Sen's commitment to "progressive realization of democracy, and a rising level of living conditions for the masses").

104. H.G. WELLS & JOHN SANKEY, THE RIGHTS OF MAN, OR, WHAT ARE WE FIGHTING FOR? (1940).

105. WHY WE FIGHT: WAR COMES TO AMERICA (U.S. Army Pictoral Services 1945).

106. THE WAR FOR MEN'S MINDS (Nat'l Film Board of Canada 1943).

107. HERSCH LAUTERPACHT, AN INTERNATIONAL BILL OF RIGHTS OF MAN (1945).

108. AM. L. INST., STATEMENT OF ESSENTIAL HUMAN RIGHTS (1945).

109. AM. L. INST., THE INTERNATIONAL LAW OF THE FUTURE (1944).

110. AM. L. INST., DRAFT OF THE RIGHTS OF FREE MEN 2–3 (1944) ("Upon the freedom

The Allies and the academy defined themselves in opposition to Axis persecution, legally enabled by the stripping of rights through targeted denationalization.

The rhetorical framing of World War II galvanized peoples, politicians, and international law scholars alike. World War II thus brought about a paradigmatic shift in international law. The purely State-based system that persisted in the interwar period succumbed to the notion of individuals as the subjects, not the objects, of law. The recognition of individuals as rights-bearers rejected the core holding of *Dickson Car Wheel Company*;[111] nationality would serve at most as the basis for *enforcing* rights, not as the basis for *having* rights.

B. Changes in Practice and New Regulations in International Law

In the wake of World War II, Allied States and scholars began asserting that customary international law regarding the extension and implications of nationality had crystallized. Accordingly, international law would regulate nationality, even in the absence of binding treaty obligations. As a conceptual move, the ICJ's *Nottebohm* judgment, which rejected Lichtenstein's ability to exercise diplomatic protection over a recently naturalized individual with limited ties to the State,[112] bifurcated nationality into a concept of international law and a concept of domestic law.

"Functional" nationality, operative in international law, would entitle a State to exercise diplomatic protection over its nationals' claims and would give rise to an international relationship of rights and duties.[113] "Technical" nationality, operative in municipal law, would encompass whatever citizen or non-citizen national relationships a State could want to create, in excess of its international obligations.[114]

In contrast to their stance in the interwar period, scholars began recognizing a unified substantive content of nationality in international law, or the "many rules of international law which attach consequences to the fact that a particular individual belongs to the

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of the individual depends the welfare of the people, the safety of the state and the peace of the world.").

111. Dickson Car Wheel Company (U.S.A.) v. United Mexican States, 4 R. INT'L ARB. AWARDS 669, 678 (1931).

112. Nottebohm (Liech. v. Guat.), 1955 I.C.J. 4, 20 (Apr. 6).

113. WEIS, *supra* note 1, at 11; BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 525–26 (8th ed. 2012).

114. WEIS, *supra* note 1, at 11; BROWNLIE'S PRINCIPLES, *supra* note 113, at 525–26.

population of a particular State."[115] Such rules bore on the exercise of diplomatic protection, the treatment that States had to afford individuals seeking entry, the legitimacy of international sanctions and wartime undertakings, and the exercise of extraterritorial jurisdiction.[116]

Perhaps more radical than the actual crystallization of norms regulating nationality was the post-World War II assertion of the right to a nationality as a fundamental human right. The right was first recognized in response to World War II's discriminatory denationalization and mass displacement crises. It was included in the Universal Declaration of Human Rights ("UDHR"),[117] a non-binding recognition "of the inherent dignity and of the equal and inalienable rights of all members of the human family."[118] The right was subsequently incorporated into, *inter alia*, the International Covenant on Civil and Political Rights,[119] the International Convention on the Elimination of All Forms of Racial Discrimination,[120] the Convention on the Elimination of All Forms of Discrimination against Women,[121] and the Convention on the Rights of the Child.[122] The 1954 and 1961 Statelessness Conventions are predicated on the right to a nationality.[123] Several scholars have argued that the right to a nationality crystallized, or was "accepted," in the post-World War II period for circumstances in which it was clear which State owed its na-

115. H.F. VAN PANHUYS, THE ROLE OF NATIONALITY IN INTERNATIONAL LAW: AN OUTLINE 20 (1959).

116. *Id.* at 22.

117. G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 15 (Dec. 10, 1948).

118. *Id.* at preamble.

119. International Covenant on Civil and Political Rights art. 24, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171 [hereinafter "ICCPR"].

120. International Convention on the Elimination of All Forms of Racial Discrimination art. 5, Mar. 7, 1966, 660 U.N.T.S. 195.

121. Convention on the Elimination of All Forms of Discrimination Against Women art. 9, Dec. 18, 1979, 1249 U.N.T.S. 13.

122. Convention on the Rights of the Child art. 7, Nov. 20, 1989, 1577 U.N.T.S. 3.

123. Office of the U.N. High Commn'r for Refugees, Introductory Note to the Convention on the Reduction of Statelessness (2014) ("[T]he Convention gives effect to article 15 of the Universal Declaration of Human Rights which recognizes that 'everyone has the right to a nationality.'"); Office of the U.N. High Commn'r for Refugees, Introductory Note to the Convention Relating to the Status of Stateless Persons (2014) ("Because protection as a stateless person is not a substitute for possession of a nationality, the Convention requires that States facilitate the assimilation and naturalization of stateless persons.").

tionality to a particular stateless person.[124] Other scholars have argued that a prohibition on arbitrary deprivation of nationality crystallized as a function of the widespread adoption of the aforementioned treaties.[125]

1. What It Meant to Have a Nationality

The ICJ's *Nottebohm* judgment declared that nationality was a bond, predicated on a "genuine connection" between a State and an individual, giving rise to "reciprocal rights and duties."[126] The clearest understanding of those post-World War II rights and duties can be gleaned through analysis of the UDHR's *travaux préparatoires*.[127] The drafters' decision to include, in Article 15, a single line on the right to a nationality was neither easy nor uncontroversial. Though the right was initially written into the Draft Outline of the International Bill of Rights,[128] the right was debated[129] and removed[130] before the final reinsertion of its seven simple-but-vague words—

124. Václav Mikulka (Special Rapporteur), *Third Rep. on Nationality in Relation to the Succession of States*, 36–37 n.72, U.N. Doc. A/CN.4/480 (Feb. 27, 1997) (citing Rezek).

125. RICHARD PLENDER, INTERNATIONAL MIGRATION LAW 149 (2d ed., 1988); WEIS, *supra* note 1, at 125.

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

127. Of the available *travaux préparatoires*, that of the UDHR has the longest and most thorough discussion of the implications of nationality. The *travaux préparatoires* for the Statelessness Conventions are not yet compiled. The *travaux préparatoires* for the Refugee Convention include a discussion on the distinction between refugees and stateless persons but do not delve into the implications of nationality; during the first meetings of the drafting conference for the Refugee Convention, the State representatives decided to refer matters pertaining to statelessness to a separate conference. *See* ALEX TAKKENBERG & CHRISTOPHER C. TAHBAZ, THE COLLECTED TRAVAUX PREPARATOIRES OF THE 1951 GENEVA CONVENTION RELATING TO THE STATUS OF REFUGEES, VOL. III 1, n.1 (1989). The *travaux préparatoires* for the ICCPR, which at Article 24 ensures children's right to a nationality, include a discussion challenging the decision to limit protection of the right to children, rather than to all people. There evidently was no discussion seeking to elucidate the meaning of the right to a nationality. *See generally* MARC BOSSUYT, GUIDE TO THE "*TRAVAUX PRÉPARATOIRES*" OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 463–68 (1987).

128. Comm'n on Human Rights, Draft Outline of International Bill of Rights art. 32, U.N. Doc. E/CN.4/AC.1/3 (June 4, 1947).

129. Comm'n on Human Rights, Third Session: Comments from Governments on the Draft International Declaration on Human Rights, Draft International Covenant on Human Rights and the Question of Implementation, U.N. Doc. E/CN.4/82/Rev.1 (Apr. 22, 1948); Comm'n on Human Rights, Second Session: Summary Record of the Thirty-Sixth Meeting, U.N. Doc. E/CN.4/AC.1/SR.36 (May 19, 1948).

130. Comm'n on Human Rights, Summary Record of the Fifty-Ninth Meeting, U.N. Doc. E/CN.4/SR.59 (June 10, 1948).

"Everyone has a right to a nationality."[131] The *travaux préparatoires* show that the inclusion of the right was the direct result of the mass displacement of persons in Europe.[132] Acquisition of nationality was seen as wholly remedial to statelessness, a problem then viewed as individuals' inability to access diplomatic protection[133] and inability to enter or remain in a State at will.[134] As evidenced by the record,[135] as well as by the UDHR's inclusion of Article 21's separate "right to take part in the government,"[136] nationality was distinct from enfranchised citizenship.

i. Diplomatic Protection

As in the interwar period, the most salient promise of nationality in the postwar period was the availability of diplomatic protection. In describing persecutory laws targeting particular ethnic groups, scholars noted that German Jews "were not given diplomatic

131. Comm'n on Human Rights, Hundred and Twenty-Fourth Meeting, U.N. Doc. A/C.3/SR.124 (Nov. 6, 1948).

132. Communications Received Requesting the Inclusion of Certain Specific Provisions in the International Bill of Rights, U.N. Doc. E/CN.4/AC.1/6 (June 6, 1947); Comm'n on Human Rights, Analysis of Various Draft International Bills of Rights, U.N. Doc. E/CN.4/W.16 (Jan. 23, 1947); Suggestions Submitted by the Representative of France for Articles 7–32 of the International Declaration of Rights, U.N. Doc. E/CN.4/AC.1/W.2 (June 16, 1947); Comm'n on Human Rights, First Session: Summary Record of the Ninth Meeting, U.N. Doc. E/CN.4/AC.1/SR.9 (July 3, 1947); Comm'n on Human Rights, Second Session: Summary Record of Thirty-Seventh Meeting, U.N. Doc. E/CN.4/SR.37 (Dec. 13, 1947).

133. Comm'n on Human Rights, Second Session: Summary Record of Thirty-Seventh Meeting, *supra* note 132, at 13–14 (proposed text from Belgian Representative DeHousse); Comm'n on Human Rights, Third Session: Comments from Governments on the Draft International Declaration on Human Rights, Draft International Covenant on Human Rights and the Question of Implementation, *supra* note 129, at 7 (observations from the Netherlands) ("[T]he object of this article [on nationality] is to ensure that every one will have the right to invoke some official protection.").

134. Comm'n on Human Rights, Second Session: Summary Record of the Fifth Meeting, U.N. Doc. E/CN.4/AC.2/SR.5 (Dec. 8, 1947) (statement from French representative Cassin).

135. *See, e.g.*, Comm'n on Human Rights, Ninetieth Meeting, U.N. Doc. A/C.3/SR.90 (Oct. 1, 1948) (statement from South African representative Louw) ("[T]he right to participate in government was not universal; it was conditioned not only by nationality but also by qualifications of franchise.").

136. G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 21. (Dec. 10, 1948). The rule against surplusage or principle of effectiveness would suggest that the right to take part in government is, or at least was, considered as distinct from the right to a nationality, which was separately enumerated.

protection" and "thus, a usual consequence of nationality was denied them."[137] Scholars articulated that nationality was significant because it "set[] in motion the machinery of diplomatic protection."[138] The primacy of diplomatic protection manifested not only in the works of scholars but also in the negotiations of State representatives.

From even the earliest drafts of the UDHR, it is apparent that State representatives viewed the key distinction between nationals and non-nationals to be the former's access to diplomatic protection.[139] The Belgian delegate lamented "the tragic situation of stateless persons who had no diplomatic protection."[140] The Dutch delegate interpreted statelessness similarly, characterizing the draft UDHR's inclusion of provisions on nationality as a means of ensuring that "everyone will have the right to invoke some official protection."[141] The South African delegate urged that the right to a nationality be read narrowly, with a focus on access to protection.[142] Multiple State representatives proposed charging the United Nations or the International Refugee Organization with the exercise of diplomatic protection for stateless persons.[143]

Midway through the drafting, the right to a nationality was removed, as State representatives could not agree on the value of announcing the right[144] or the mechanism by which stateless persons should have access to diplomatic protection.[145] The right was only

137. Hudson, *supra* note 69, at 7.

138. PANHUYS, *supra* note 115, at 63.

139. Comm'n on Human Rights, Analysis of Various Draft International Bills of Rights, *supra* note 132.

140. Comm'n on Human Rights, Second Session: Summary Record of Thirty-Seventh Meeting, *supra* note 132.

141. Comm'n on Human Rights, Third Session: Comments from Governments on the Draft International Declaration on Human Rights, Draft International Covenant on Human Rights and the Question of Implementation, *supra* note 129.

142. Comm'n on Human Rights, Third Session: Comments from Governments on the Draft International Declaration on Human Rights, Draft International Covenant on Human Rights and the Question of Implementation, U.N. Doc. E/CN.4/82/Add.4 (Apr. 27, 1947).

143. *See* Comm'n on Human Rights, Second Session: Summary Record of Thirty-Seventh Meeting, *supra* note 132; Comm'n on Human Rights, Third Session: Comments from Governments on the Draft International Declaration on Human Rights, Draft International Covenant on Human Rights and the Question of Implementation, *supra* note 129; Comm'n on Human Rights, Brazil: Amendment to the 3rd Paragraph of the French Amendment, U.N. Doc. A/C.3/324 (Nov. 5, 1948).

144. Comm'n on Human Rights, Second Session: Summary Record of the Forty-Fourth Meeting, U.N. Doc. E/CN.4/AC.1/SR.44 (May 24, 1948).

145. Comm'n on Human Rights, Second Session: Summary Record of the Thirty-Ninth Meeting, U.N. Doc. E/CN.4/AC.1/SR.39 (June 1, 1948).

reinserted because of the persistence[146] of the French delegate, distinguished human rights advocate René Cassin, who insisted that "[e]very person had a right to legal protection."[147]

The categorical inaccessibility of diplomatic protection would render an individual stateless. Notwithstanding the primacy of diplomatic protection, the "mere fact of protection," alone, could not render an individual a national of the protecting State.[148]

ii. Right of Entry

The passport practices that arose during World War I and solidified through World War II—exacerbating the mass displacement crisis—rendered the right of entry a second salient component of nationality. Scholars argued that post-World War II customary international law obligated States to admit their own nationals.[149] Paul Weis suggested that the obligation to admit was an obligation "inherent" in the concept of nationality.[150] H.F. van Panhuys wrote that "[t]he duty to admit nationals is considered so important a consequence of nationality that it is almost equated with it."[151] Judgments from international tribunals[152] and the practice of States[153] confirm that the right to entry inhered in nationality.[154]

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146. Comm'n on Human Rights, Summary Record of the Sixtieth Meeting of the Commission on Human Rights, U.N. Doc. E/CN.4/SR.60 (June 23, 1948); Comm'n on Human Rights, Ninety-Second Meeting, U.N. Doc. A/C.3/SR.92 (Oct. 2, 1948); Comm'n on Human Rights, France: Amendments to the Draft Declaration, U.N. Doc. A/C.3/244 (Oct. 8, 1948); Comm'n on Human Rights, Hundred and Twenty-Second Meeting, U.N. Doc. A/C.3/SR.122 (Nov. 4, 1948).

147. *Id.*

148. PANHUYS, *supra* note 115, at 65. Note that several treaties concluded in the context of demilitarization or decolonization entitled former powers to exercise diplomatic protection on behalf of their denationalized former-nationals. *See, e.g.*, Treaty of Versailles art. 127, June 28, 1919, 2 Bevans 235 ("[T]he native inhabitants of the former German oversea possessions shall be entitled to the diplomatic protection of the Governments exercising authority over those territories.").

149. WEIS, *supra* note 1, at 47; PANHUYS, *supra* note 115, at 55–56; PLENDER, *supra* note 125, at 133.

150. WEIS, *supra* note 1, at 47.

151. PANHUYS, *supra* note 115, at 55–56.

152. *See, e.g.*, *Van Duyn v. Home Office*, Case 41/74, (European Court of Justice, 1974).

153. PLENDER, *supra* note 125, at 135 (listing roughly fifty States, including Chile, Egypt, Malaysia, and Spain, that have constitutional provisions protecting their nationals' right to entry and noting that several States, like India and the United Kingdom, link the right to entry and the right of residence).

154. *See, e.g.*, *R. v. Soon Gin An*, 3 D.L.R. 125 (Canada, 1941).

There exists some measure of scholarly dispute over *to whom* States owed the obligation to admit.[155] Weis and Panhuys, two of the foremost scholars on post-World War II nationality in international law, suggested that the obligation resulted in "a duty of a State towards another State" as an extension of States' territorial integrity.[156] Richard Plender, citing to the UDHR, post-World War II human rights treaties, and States' practice of accepting their unlawfully expelled nationals, countered that norms had crystallized in a manner recognizing individuals' right of entry.[157] Discussions regarding the UDHR's inclusion of the right to return, or nationals' right of entry, support Plender's interpretation; State representatives asserted that it was "logical" that every person had the right to return to his or her own State.[158]

2. The Relationship Between Nationality and Citizenship

The *travaux préparatoires* for the UDHR show that State representatives ultimately distinguished between nationality and citizenship and did not consider the former to include political rights. Initially, there was considerable confusion among the State representatives regarding the meaning of legal nationality, as compared to historico-biological nationality[159] and citizenship.[160] Only upon clarification from the French, Belgian, and Dutch representatives, who argued that "nationality and the right of asylum were closely linked"[161] and that nationality bore on the availability of legal

155. WEIS, *supra* note 1, at 50; PLENDER, *supra* note 125, at 133–34.

156. PANHUYS, *supra* note 115, at 57.

157. *See* PLENDER, *supra* note 125, at 133–39.

158. Comm'n on Human Rights, Hundred and Twentieth Meeting, U.N. Doc. A/C.3/SR.120 (Nov. 2, 1948).

159. *See, e.g.*, Comm'n on Human Rights, Sub-Comm'n on Prevention of Discrimination and Protection of Minorities, First Session: Summary Record of Fifth Meeting, U.N. Doc. E/CN.4/Sub.2/SR.5 (Nov. 27, 1947) (statement from Australian representative McNamara) (addressing the confusion of the Belgian representative by suggesting that "national origin" is "synonymous with nationality, but . . . might also have a wider meaning"). For a brief discussion of the distinction between legal nationality and historico-biological nationality, *see supra* note 1.

160. *See, e.g.*, Comm'n on Human Rights, Sub-Comm'n on Prevention of Discrimination and Protection of Minorities, First Session: Summary Record of Eleventh Meeting, U.N. Doc. E/CN.4/Sub.2/SR.11 (Dec. 1, 1947) ("Mr. McNamara (Australia) thought that some members had a different idea of the concept of 'nationality.' Mr. Borisov appeared to interpret it as meaning the citizenship of a State.").

161. Comm'n on Human Rights, Second Session: Summary Record of the Fifth Meeting, *supra* note 134.

protection, did the drafters reach a consensus.

Before the clarification on nationality, several State representatives proposed that nationality incorporated the exercise of political rights[162] or that individuals were entitled to "the right of citizenship."[163] Such interpretations did not gain traction, and the drafters never adopted the proposals. As noted by the South African representative, "the right to participate in government was not universal; it was conditioned *not only* by nationality but also by qualifications of franchise."[164] Indeed, several of the State constitutions submitted by and to the drafters suggested as much.[165]

Accordingly, Manley Hudson, in his 1952 report for the International Law Commission, declared, "[a] person may be a national of a State without having its citizenship."[166] Peter Mutharika, noting the distinction between nationality and municipal law citizenship, articulated that the right to participate in government "must, almost of necessity, be restricted to citizens."[167] Strikingly, Marc Vishniak, writing for the American Jewish Committee, noted that the Nuremberg Laws, which declared German Jews subjects rather than citizens, did not render Jews stateless.[168]

III. THE POST-COLD WAR PERIOD AND THE ASSERTED LAW OF CITIZENSHIP

In 1995, the U.N. General Assembly adopted a resolution granting UNHCR its current statelessness mandate. Two years later, UNHCR published *The State of the World's Refugees: A Humanitar-*

162. Comm'n on Human Rights, Draft Declaration on the International Rights and Duties of Man formulated by the Inter-American Juridical Committee, U.N. Doc. E/CN.4/2 (Jan. 8, 1947); Comm'n on Human Rights, Second Session: Proposal for a Declaration of Human Rights Submitted by the Representative of the United States on the Commission on Human Rights, U.N. Doc. E/CN.4/36 (Nov. 26, 1947).

163. Comm'n on Human Rights, Summary of the Fourteenth Meeting, U.N. Doc. E/CN.4/SR.14 (Feb. 5, 1947) (statement from Uruguayan representative Mora); Comm'n on Human Rights, Documented Outline, U.N. Doc. E/CN.4/AC.1/3/Add.1 (June 11, 1947).

164. Comm'n on Human Rights, Ninetieth Meeting, *supra* note 135 (emphasis added).

165. Comm'n on Human Rights, Documented Outline, *supra* note 163 (comparing the constitutions of different States for each enumerated right).

166. Hudson, *supra* note 69, at 6.

167. A. PETER MUTHARIKA, THE REGULATION OF STATELESSNESS UNDER INTERNATIONAL AND NATIONAL LAW 134 (1989).

168. VISHNIAK, *supra* note 38, at 25; *but see* WEIS, *supra* note 1, at 6, 29 (arguing that the Nuremberg Laws deprived those of non-German ethnicity of the core elements of nationality, such that these German "subjects" lacked a functional nationality).

ian Agenda, dedicating a chapter to "Statelessness and citizenship."[169] In this chapter, UNHCR used the words "nationality" and "citizenship" interchangeably, in reference to States' obligations under customary international law. UNHCR declared that "citizenship is a fundamental element of human security" insofar as it provides not only protection but also "a legal basis for the exercise of many civil and political rights."[170] It reframed statelessness not as a lack of nationality but rather as the inability to enjoy the rights—including political rights—associated with citizenship. UNHCR cited political theorist Hannah Arendt's *Origins of Totalitarianism* in support of this paradigm shift. In handbooks promulgated since, UNHCR has maintained that nationality bears on access to political rights and that the right to a nationality is tantamount to the right to a citizenship.[171]

Following UNHCR's decision to equate nationality and citizenship, prominent scholars writing on nationality law elected to do the same. Most notably, Peter Spiro has suggested that an international law of citizenship is crystallizing, "with all of its implications of equality and rights," including access to "full political integration."[172] In his work, he cites extensively to UNHCR reports and political theorists like Seyla Benhabib,[173] whose work analyzes and builds on the writings of Hannah Arendt.

Unlike the developments in international law of the World War I and World War II eras, the proclamation of the right to a citizenship does not appear to be rooted in both State practice and opinio juris. The dissolution of particular Eastern European States did result in mass displacement of persons across Europe and Central Asia. States, however, responded to the new migrant, refugee, and statelessness crises by expanding UNHCR's mandate—not by concluding multilateral treaties or making declarations reflective of a shift in the definition of nationality.

Though few States in the post-colonial era maintain a distinction between their citizens and nationals, such distinctions do persist in parts of Europe, Africa, and the Americas. States, unlike UNHCR

169. U.N. HIGH COMMN'R FOR REFUGEES, THE STATE OF THE WORLD'S REFUGEES: A HUMANITARIAN AGENDA (1997).

170. Id. § 6.

171. *See, e.g.*, U.N. HIGH COMMN'R FOR REFUGEES, THE STATE OF THE WORLD'S REFUGEES: IN SEARCH OF SOLIDARITY 14 (2012) (consistently referring to stateless persons' "lack of citizenship," as opposed to lack of nationality, and implying that Baltic State subjects—like the non-citizen Latvians discussed in the Introduction—are in fact stateless).

172. Peter Spiro, *A New International Law of Citizenship*, 105 AM. J. INT'L L. 694, 717 (2011).

173. *Id. passim*.

and select scholars, have refrained from criticizing these persisting non-citizen national practices. U.N. resolutions have never referred to non-citizen nationals as stateless, nor have they used the terms nationality and citizenship interchangeably.

This Section discusses the nationality-related events of the early 1990s, leading up to UNHCR's receipt of the statelessness mandate. It then discusses UNHCR's and scholars' ensuing assertions of customary international law and assesses those assertions in light of contemporary State practice and opinio juris. Identifying that UNHCR and scholars have overstated the scope of customary international law, this Section considers the implications of these institutions' overstatements of law, generally, and this overstatement, in particular.

A. The End of the Cold War and the Expanded Role of UNHCR

By the late 1960s, post-World War II concern regarding stateless persons had waned. No longer an immediate issue for the global community, and less likely to "arouse international interest from the humanitarian and political angle" than refugee crises,[174] statelessness and nationality law advocacy gained little traction.[175] Indeed, by 1980, only thirty-one States had ratified the 1954 Statelessness Convention and only nine States had ratified the 1961 Convention.[176]

Global complacency with respect to statelessness ended in the early 1990s. The dissolution of the Soviet Union, Czechoslovakia, and Yugoslavia,[177] as well as the use of denationalization as a political weapon in particular African States,[178] brought nationality law back to the fore by 1995.

An estimated sixty million people—Balts, Poles, Chechens, and others forcibly displaced from Russia pursuant to Stalinist relocation policies, and Russians previously induced to settle in non-Russian Soviet Republics—lost their Soviet nationality and were living as ethnic minorities dispersed across the new States of Eastern

174. Paul Weis, *The Convention Relating to the Status of Stateless Persons (1961)*, 10 INT'L & COMP. L. Q. 255, 263 (1961).

175. Matthew Seet, *The Origins of UNHCR's Global Mandate on Statelessness*, 28 INT'L J. REFUGEE L. 7, 16 (2016) ("States' reactions to UNHCR's attempts to engage them on statelessness ranged from indifference to rejection.").

176. *Id*.

177. *Id*. at 18.

178. Cecile Pouilly, *Africa's Hidden Problem*, 147 REFUGEES MAGAZINE 28, 30 (2007).

Europe and Central Asia.[179] A "significant" portion of these minority-group members, rendered stateless upon the dissolution of the Soviet Union, did not meet the legal requirements for nationality promulgated by their new States.[180] As an example, the nationality laws of Croatia only recognized ethnic Croatians, preventing all other ex-Yugoslavian residents from acquiring Croatian nationality.[181] The Czech Republic promulgated nationality laws preventing their long-term residents born in Slovak territory from acquiring a nationality; the Slovak Republic did the same with respect to those born on Czech territory.[182]

Concurrently, the role of nationality in regions beyond Europe began catching the attention of the international community.[183] States and scholars grew concerned by the denationalization of political opponents in quasi-democratic African States. Most notably, the Chiluba administration in Zambia denationalized Kenneth Kaunda, the founder and first president of an independent Zambia. The denationalization, based on the allegation that Kaunda was a Malawian national, followed Kaunda's criticisms of the Chiluba administration as "inept and corrupt."[184] A similar approach to corralling electoral candidates by declaring opposition leaders, and even voters, "foreigners" developed in Côte d'Ivoire in the early 1990s.[185] Separate from political denationalization, resource conflict and ethnic tensions between Mauritania and Senegal led to the cross-border expulsion of an estimated 70,000 Mauritanians lacking any form of State-issued identification or recognition.[186]

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179. Michel Iogna-Prat, *Nationality and Statelessness Issues in the Newly Independent States*, *in* THE PROBLEM OF REFUGEES IN THE LIGHT OF CONTEMPORARY INTERNATIONAL LAW ISSUES 25, 25 (1996).

180. *Id.* at 26.

181. Geraud de la Pradelle, *The Effects of New Nationality Rules on the Status of Individuals*, *in* DISSOLUTION, CONTINUATION AND SUCCESSION IN EASTERN EUROPE 105, 112 (Brigitte Stern ed., 1998).

182. *Id.* at 113.

183. G.A. Res. 49/169, preamble (Dec. 23, 1994) (referring to the "persistent problems of stateless persons in *various regions* and the emergence of *new situations* of statelessness") (emphasis added).

184. Donald Mcneil, Jr., *Founder of Zambia is Delared Stateless in High Court Ruling*, N.Y. TIMES (Apr. 1, 1999), www.nytimes.com/1999/04/01/world/founder-of-zambia-is-declared-stateless-in-high-court-ruling.html [https://perma.cc/8RL7-VG9B].

185. Pouilly, *supra* note 178, at 29; Stephen Jackson, *Congolité: Elections and the Politics of Autochthony in the Democratic Republic of the Congo*, *in* RHETORICS OF INSECURITY: BELONGING AND VIOLENCE IN THE NEOLIBERAL ERA 79–80 (Zeynep Gambetti & Marcial Godoy-Anativia eds., 2013).

186. David Stone, *Enhancing Livelihood Security Among Mauritanian Refugees:*

Throughout the early 1990s, UNHCR conducted emergency operations regarding the mass displacement of persons in the former Yugoslavia,[187] Georgia, Armenia, Azerbaijan, and Tajikistan.[188] This included the provision of assistance not only to refugees but also to stateless persons.[189] UNHCR concurrently petitioned the Mauritanian government to permit the collective return of its expelled persons and to provide State-issued identification to then-unrecognized persons.[190] However, UNHCR lacked a clear mandate regarding the Statelessness Conventions and was not empowered to support stateless persons in Eastern Europe, Central Asia, and West Africa.[191] Between 1990 and 1994, UNHCR's Executive Committee cobbled together a justification for the continuation of its support for stateless persons, based on the relationship between the statuses of refugees and stateless persons and "the absence of an international body with a general mandate for stateless persons."[192] Scholars[193] questioned the legitimacy of UNHCR's "*de facto* extension" of its authority to effect international protection and called for the adoption of a U.N. General Assembly resolution granting UNHCR the statelessness mandate. UNHCR received the mandate in 1995.[194]

In addition to granting UNHCR the statelessness mandate, the States of the Council of Europe adopted the 1997 European Convention on Nationality.[195] The European Convention on Nationality, "[b]earing in mind the numerous international instruments relating to nationality,"[196] rearticulated principles regarding the extension of nationality found in earlier international instruments.[197] It did not seek

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Northern Senegal: A Case Study, U.N. Doc. EPAU/2005/11 (2005).

187. Wilbert Van Hovel, *Issues Arising from the UNHCR Operation in Former Yugoslavia*, *in* THE PROBLEM OF REFUGEES IN THE LIGHT OF CONTEMPORARY INTERNATIONAL LAW ISSUES 19, 20 (1996).

188. Michel Iogna-Prat, *supra* note 179, at 30.

189. *Id.*

190. Tenth Annual Activity Report of the African Commission on Human and People's Rights 1996/97 at 42 (1997), http://www.achpr.org/files/activity-reports/10/achpr20and21_actrep10_19961997_eng.pdf [https://perma.cc/P5RH-D7RE].

191. *Id.* at 31; Exec. Comm. of the High Comm'r's Programme, Stateless Persons: A Discussion Note, ¶¶ 20–22, U.N. Doc. EC/1992/SCP/CRP.4 (Apr. 1, 1992).

192. Seet, *supra* note 175, at 18–19 (discussing how UNHCR slowly adopted more responsibility for stateless persons, even before receiving the statelessness mandate).

193. *See, e.g.*, *id*.; Van Hovel, *supra* note 187, at 20.

194. G.A. Res. 50/152 (Dec. 21, 1995).

195. European Convention on Nationality, E.T.S. No. 166, Nov. 6, 1997.

196. *Id*. at preamble.

197. *See generally id*.

to define nationality as anything more specific than the Vattelian "legal bond between a person and a State."[198] To preempt future nationality crises of the kind suffered after the dissolution of the Soviet Union, the States of the Council of Europe then adopted the 2006 Convention on the Avoidance of Statelessness in Relation to State Succession.[199] This later convention defined stateless persons as those "not considered as a national by any State,"[200] but it, too, did not identify any baseline rights associated with the possession of nationality.[201]

B. The Stance of "Subsidiary Means" of Interpretation

1. UNHCR

In a 1972 speech, UNHCR's High Commissioner articulated that global statelessness was a matter of "great concern."[202] He expanded on the issue, echoing post-World War II sentiments that the distinction between refugees and stateless persons was one of *de facto* versus *de jure* lack of protection. Statelessness was then considered tantamount to a lack of protection—or the refusal of any national authorities to provide a person with "assistance" while at home or to "look after him" while abroad.[203]

In contrast, UNHCR in 1997 provided a definition of statelessness "in its broader sense" as the inability to enjoy the rights "associated with citizenship."[204] Citing Arendt's propositions regarding belonging and community membership, UNHCR suggested that the rights associated with citizenship include the right to participate in the political process.[205] In subsequent publications, UNHCR—sometimes citing Arendt, other times citing Benhabib—more boldly insinuated and asserted that the right to a nationality encompasses the right to political participation. In its 2005 handbook on nationality and statelessness, UNHCR equated nationality with citizenship and

198. *Id*. art. 2(a).

199. Council of Europe Convention on the Avoidance of Statelessness in Relation to State Succession, C.E.T.S. No. 200, Mar. 15, 2006.

200. *Id*. art. 1(c).

201. *See generally id*.

202. High Commn'r to the Twenty-Third Session of the Executive Comm. of the High Commn'r Programme, Opening Statement, U.N. Doc A/8712/Add.1, (Oct. 17, 1972).

203. U.N. Ad-Hoc Comm. on Refugees and Stateless Persons, *A Study of Statelessness*, U.N. Doc. E/1112/Add.1 (Aug. 1, 1949).

204. U.N. HIGH COMMN'R FOR REFUGEES, *supra* note 169.

205. *Id.*

emphasized, as the primary consequence of statelessness, that "a person cannot register to vote in the country in which he/she is living."[206] A 2006 report stated that individuals could be stateless, even if they possessed a set of rights "identical to those attached to the possession of nationality, with the exception of certain limited civil and political rights."[207]

In its 2014 Special Report on Ending Statelessness Within 10 Years, UNHCR designated individuals with functional Estonian nationality—referred to as "undefined" or "undetermined" citizenship[208]—stateless, as they can only vote in local elections and "still cannot stand as candidates, participate in national referenda or parliamentary elections or join a political party."[209] One year later, UNHCR asserted, over Latvia's protest, that individuals with functional Latvian nationality were stateless because they "cannot vote in any elections and cannot hold Government jobs."[210]

Though States and earlier scholars primarily associated nationality with access to diplomatic protection, UNHCR's post-1995 writings deemphasize the relationship between nationality and diplomatic protection. In its 2005 handbook, UNHCR mentions diplomatic protection just three times, with no explanation of the concept.[211]

2. Other Scholars

Since the early 2000s, several scholars have equated nationality and citizenship, suggesting that the two are in effect indistinguishable in contemporary international law. Many of these scholars have suggested that nationality incorporates political rights.[212] These

206. U.N. HIGH COMMN'R FOR REFUGEES, NATIONALITY AND STATELESSNESS: A HANDBOOK FOR PARLIAMENTARIANS 6 (2005).

207. U.N. High Comm'r for Refugees, *supra* note 10, at 22 n.18 (2006).

208. Those with undefined citizenship have right of entry and exit, are issued special Estonian passports, and are entitled to vote in elections at the local level. European Network on Statelessness, *Ending Childhood Statelessness: A Study on Estonia* 1–2, 6 (2015), https://www.statelessness.eu/sites/www.statelessness.eu/files/Estonia.pdf [https://perma.cc/6CPW-4YSU].

209. U.N. HIGH COMMN'R FOR REFUGEES, 2014 SPECIAL REPORT: ENDING STATELESSNESS WITHIN 10 YEARS 16 (2014).

210. U.N. HIGH COMMN'R FOR REFUGEES, UNHCR SUBMISSION ON LATVIA: UPR 24TH SESSION 12 (2015).

211. *See generally* U.N. HIGH COMMN'R FOR REFUGEES, *supra* note 206.

212. *See, e.g.*, Spiro, *supra* note 172, at 739 (specifying that States "remain free to deny rights to noncitizen *residents*, especially in the realm of political rights"—suggesting that

propositions have been rooted in three factors: (1) State practice, or the trend toward the convergence of nationality and citizenship in municipal nationality law, (2) the interchangeability of the terms in writings of other scholars and of UNHCR, and (3) the writings of political theorists on community membership and belonging.

The first two of these factors are intertwined, insofar as the general convergence of nationality and citizenship in municipal nationality law enables scholars and UNHCR to plausibly assert that nationality and citizenship have become indistinguishable concepts. As an example, Ruth Rubio-Marín asserts that the only modern difference between the two terms is their relative popularity in different regions of the world.[213] Yaffa Zilbershats uses the terms interchangeably, as the "instances in which a difference still exists between nationality and citizenship are rare."[214] Peter Spiro, citing Rubio-Marín, Zilbershats, and UNHCR, has suggested that citizenship, given the "vanishingly small"[215] and "dwindling"[216] distinction between citizenship and nationality, may now or soon be regulated by international law.

The third factor suggests that scholars are substituting the words of States with those of non-legal academics. Mark Manly and Laura van Waas emphasize the importance of enfranchised community membership in reliance on Arendt's *Origins of Totalitarianism*.[217] Sandra Mantu, rather than presenting statements by State representatives to define citizenship, which she equates with nationality, relies on the works of sociologist T.H. Marshall and Benhabib.[218] Jana Matei also cites Marshall, placing his sociological work alongside the legal pronouncements of the ICJ in *Nottebohm*.[219] Linda

States may not have that same freedom with respect to citizens or non-citizen nationals) (emphasis added).

213. RUTH RUBIO-MARÍN, IMMIGRATION AS A DEMOCRATIC CHALLENGE: CITIZENSHIP AND INCLUSION IN GERMANY AND THE UNITED STATES 19 n.7 (2000).

214. ZILBERSHATS, *supra* note 64, at 5.

215. Spiro, *supra* note 172, at n.6.

216. Peter Spiro, *"American" Samoans Want US Citizenship*, OPINIO JURIS (July 13, 2012), opiniojuris.org/2012/07/13/american-samoans-want-us-citizenship/ [https://perma.cc/QHH4-32UJ].

217. Mark Manly & Laura van Waas, *The State of Statelessness Research*, 19 TILBURG L. REV. 3, 5 (2014).

218. SANDRA MANTU, CONTINGENT CITIZENSHIP: THE LAW AND PRACTICE OF CITIZENSHIP DEPRIVATION IN INTERNATIONAL, EUROPEAN AND NATIONAL PERSPECTIVES 2–5 (2015).

219. Jana Maftei, *Some Aspects of Citizenship from the Perspective of International Law*, 10 EIRP PROC. 225, 226–27 (2015).

Bosniak suggests that, as a normative matter, the right to a nationality, or to a citizenship, should be secondary to recognition of robust universal personhood, instantiated socially and politically.[220] Her interpretation of human rights, which moves beyond the citizen-centric model discussed by Marshall, focuses on imputing dignity to Arendt's "abstract nakedness of being human."[221]

C. Contemporary State Practice and Opinio Juris

UNHCR's and scholars' assertion that nationality can be equated with enfranchised citizenship contravenes the earlier understandings of nationality outlined in Sections I and II. Zilbershats's assertion that the UDHR recognized the "right to a citizenship" glosses over the debates recorded in the UDHR's *travaux préparatoires* showing that the drafters emphatically *did not* articulate the right to a citizenship. To determine if the right to a citizenship crystallized at some point in the 1990s, it is necessary to consider contemporary State practice and opinio juris.

1. State Practice

Today, few States have laws that clearly create multiple classes of nationals, or that distinguish between citizen and non-citizen nationals. Most notable among the States that continue to distinguish between citizens and non-citizen nationals are the United States and United Kingdom. American Samoans, despite a slew of legal challenges,[222] are not entitled to and do not receive U.S. birthright citizenship; they are disenfranchised in federal elections and have no federal representation in the U.S. legislature. Unlike individuals born in one of the United States' fifty states, those born to non-citizen parents in U.S. unincorporated territories receive, at most, statutory citizenship, which the U.S. Congress can withdraw through subsequent legislative action. British Protected Persons, individuals who acquired their status under a former British protectorate or trust territo-

220. Linda Bosniak, *Persons and Citizens in Constitutional Thought*, 8 ICON 9, 10, 26 (2010).

221. *Id*. at 26; *see* HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 295 (1951). ("The conception of human rights, based upon the assumed existence of a human being as such, broke down at the very moment when those who professed to believe in it were for the first time confronted with people who had indeed lost all other qualities and specific relationships [including nationality]—except that they were still human. The world found nothing sacred in the abstract nakedness of being human").

222. *See, e.g.*, Tuaua v. United States, 788 F.3d 300 (D.C. Cir. 2015).

ry, are not British citizens and are not entitled to vote or hold public office in the United Kingdom. Though they are not British nationals for European Commission purposes—i.e. they do not receive the benefit of European Union nationality—British Protected Persons are British nationals in all other international law contexts. Both American Samoans and British Protected Persons enjoy functional nationality, insofar as they can receive consular and diplomatic protection and can receive passports from their respective States.

Several Latin American States also distinguish between citizen and non-citizen nationals,[223] typically through constitutional provisions.[224] These distinctions, which bear on individuals' right to take part in the political process, are drawn along conventional lines for identifying an electorate. As an example, the Mexican constitution provides that citizens are Mexican nationals who are eighteen years of age or older and who "have an honest way of life," or against whom there are no criminal charges.[225] The Costa Rican constitution similarly provides that citizenship attaches when its nationals reach age eighteen and have not been subject to a criminal sentence suspending citizenship rights.[226] In contrast to the U.S. or Latvian distinctions between citizen and non-citizen nationals, the Latin American distinctions between citizen and non-citizen nationals are largely formalistic distinctions, given that citizenship necessarily attaches to all non-criminal nationals who reach adulthood.

Many States, though evidently not all States, shed their distinctions between citizens and non-citizen nationals with the end of the colonial era. Former French colonies ceased operating under French codes *de l'indigénat*, which had rendered African peoples disenfranchised French non-citizen nationals.[227] Similarly, Portugal's distinction between *indígenas* and *não-indígenas*, or non-indigenous full Portuguese citizens, was abolished when former colonies and overseas provinces gained independence.[228] Without their colonies, Spain, Belgium, Germany, and Italy ended their previous

223. Law No. 346, Nov. 23, 2004, A.D.L.A. (Arg.).

224. Constitución Política de los Estados Unidos Mexicanos, Dirio Oficial de la Federación [DOF], art. 34, 05-02-1917 últimas reformas DOF 10-02-2014 (Mex.); Constitución Política de la República de Chile [C.P.] arts. 10, 13; Constitución Política de Colombia [C.P.] arts. 3, 13; República de Costa Rica Constitución Política 1949, arts. 13, 90; Constitución de 1983, arts. 71, 90 (El Salvador).

225. Constitución Política de los Estados Unidos Mexicanos 2005, art. 34.

226. República de Costa Rica Constitución Política 1949, arts. 90–91.

227. BRONWEN MANBY, CITIZENSHIP LAW IN AFRICA: A COMPARATIVE STUDY 40 (2016).

228. *Id*. at 41–42.

regimes that had bifurcated nationality into citizenship and some lesser status, under which individuals had particular work obligations and limited rights.[229]

Only four States currently extend full civil and political rights to non-citizen permanent residents.[230] In 1975, New Zealand extended national voting rights to individuals who had been New Zealand permanent residents for at least one year. Chile, Malawi, and Uruguay also allow their permanent residents, albeit those who have held status for five, seven, and eight years, respectively, to vote in national elections.[231] Scholars have recognized these States as outliers, their practices as a "radical reform."[232] Indeed, New Zealand federal agencies recognized that "[i]t may be questioned whether voting rights should be extended to those who have not become full citizens."[233] Less radically, a number of States and municipalities enfranchise non-citizen permanent residents in local elections.[234]

2. Opinio Juris

Many States, in partnership with UNHCR, have taken an active stance against global statelessness. In 2011, the United States under former Secretary of State Hillary Clinton launched the Women's Nationality Initiative, an attempt to end stateless birth by encouraging States to allow men and women to acquire and transmit nationality on an equal basis.[235] That same year, Southeast Asian

229. *Id*.

230. Several States have extended political rights to non-citizens on the basis of historical relations, as between former colonies and their colonizing States. Cristina Rodriguez, *Noncitizen Voting and the Extraconstitutional Construction of the Polity*, 8 ICON 30 (2010).

231. *Id*. at 34.

232. Fiona Barker & Kate McMillan, *Constituting the Democratic Public: New Zealand's Extension of National Voting Rights to Non-Citizens*, 12 N.Z. J. PUB. INT'L L. 61, 79 (2014).

233. Royal Commission on the Electoral System *Report of the Royal Commission on the Electoral System 1986* (11 December 1986) at ¶ 9.5. (N.Z.).

234. *See, e.g.*, *The Right to Vote*, VALMYNDIGHETEN [Swedish Election Authority] (Apr. 20, 2018), https://www.val.se/servicelankar/other-languages/english-engelska/the-right-to-vote.html [https://perma.cc/R3SE-SPGL]; *Register to Vote*, CITY OF TAKOMA PARK, MARYLAND, https://takomaparkmd.gov/register-to-vote/ [https://perma.cc/YGU5-5EYT].

235. *Statelessness*, U.S. STATE DEP'T, BUREAU OF POPULATION, REFUGEES, AND MIGRATION, https://www.State.gov/j/prm/policyissues/issues/c50242.htm [https://perma.cc/KTT7-2K2M]; *Women's Nationality Initiative: Fact Sheet*, U.S. STATE DEP'T, BUREAU OF POPULATION, REFUGEES, AND MIGRATION (Mar. 8, 2012), https://2009-2017.State.gov/j/prm/releases/releases/2012/185416.htm **[**https://perma.cc/6B3H-CMFK].

State representatives convened to discuss the importance of reducing statelessness in promotion of "economic growth, social progress, stability and the rule of law."[236] In 2015, the European Council adopted its Conclusions on Statelessness, recalling that "the right to a nationality is a fundamental right" and seeking to "reduc[e] the risk of discrimination or unequal treatment" suffered by stateless persons.[237]

Despite the increased efforts of States with respect to ending global statelessness, there exist no clear statements by State governments reflecting the broad interpretation of nationality advanced by UNHCR. States have not suggested that they interpret the content of nationality to include the extension of political rights or to mean more than "juridical status necessary for legal protection."[238] The only State-level criticism of current Latvian and Estonian nationality practice emanates from Russia,[239] which has been accused of using non-citizen ethnic Russians as pawns in a "political game" with the European Union.[240] The United States, the most vocal and financially-generous supporter of UNHCR,[241] has questioned the accuracy of UNHCR's designation of Latvian[242] and Estonian[243] non-citizen na-

236. Summary Report AICHR-UNHCR Regional Workshop on Statelessness and the Rights of Women and Children Manila, Philippines 18 to 19 November 2011, ¶ 3 (Nov. 22, 2012).

237. Conclusions of the Council and the Representatives of the Governments of the Member States on Statelessness, Doc. 893/15 (Apr. 12, 2015).

238. Nationality of Natural Persons in Relation to the Succession of States, Note by the Secretariat: Comments and Observations Received from Governments, U.N. Doc. A/59/180/Add.2 (Oct. 15, 2004) (comment from Mexico).

239. *Moscow Concerned over Statelessness in Baltics*, SPUTNIK NEWS (Oct. 6, 2012), https://sputniknews.com/voiceofrussia/2012_10_06/Moscow-concerned-over-statelessness-in-Baltics/ [https://perma.cc/MRX6-QCD9] ("The Russian Federation has expressed concern over the unresolved problem of mass statelessness in the Baltic region, emphasizing that disregard for international obligations by states was fraught with serious political and social upheavals in society.").

240. Sebastian Kohn, *Russia and the Baltics: The Great Statelessness Game*, EUROPEAN NETWORK ON STATELESSNESS (Oct. 25, 2012), https://www.statelessness.eu/blog/russia-and-baltics-great-statelessness-game [https://perma.cc/ZP25-3D8U].

241. In 2016, the United States contributed more than four times as much to UNHCR than the next largest donor—the European Union, as an institution—and more than five times as much as the next largest State donor—Germany. UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, CONTRIBUTIONS TO UNHCR FOR THE BUDGET YEAR 2016, at 1 (Sept. 30, 2016), http://www.unhcr.org/575e74567.html [https://perma.cc/S3JK-BE8A].

242. *See, e.g.*, U.S. STATE DEP'T, LATVIA 2015 HUMAN RIGHTS REPORT 11–12 (2015). The U.S. State Department consistently questions the accuracy of this designation in its Human Rights Report for Latvia.

243. *See, e.g.*, U.S. STATE DEP'T, ESTONIA 2015 HUMAN RIGHTS REPORT 7–8 (2015). The U.S. State Department consistently questions the accuracy of this designation in its

tionals as stateless.

U.N. General Assembly resolutions, which may reflect opinio juris, recognize the problems arising from statelessness as "protection risks."[244] The resolutions, which generally discuss statelessness as a secondary issue to the management of refugees and internally-displaced persons, express States' concern over the arbitrary detention of stateless persons.[245] Beyond that, the resolutions encourage States to accede to the Statelessness Conventions,[246] and reminds States that the "prevention and reduction of statelessness are primarily the responsibility of States, in appropriate cooperation with the international community."[247] No resolution ever seeks to define the substantive content of nationality.[248]

D. A Break in Process? International Institutions and Scholars as Law-Makers

UNHCR and scholars can serve as a subsidiary means of interpreting international law.[249] Their role is to elucidate the status of the law and the modalities of its application. They are not formally empowered to create binding law.

Despite the limited nature of international institutions' and scholars' role in developing international law, it seems that since the 1990s, the subsidiary means of interpreting the law have pushed the law beyond what is justified in light of State practice and opinio juris. Though UNHCR and scholars have identified a widespread State practice of collapsing nationality and citizenship into a single legal status, they have not identified any supporting opinio juris suggesting that States equate the two, for the purposes of international human rights law. In the absence of the opinio juris they seek, UNHCR and scholars have substituted the words of States with those of sociolo-

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Human Rights Report for Estonia.

244. *See, e.g.*, G.A. Res. 70/135, ¶ 34 (Dec. 17, 2015); G.A. Res. 69/154, ¶¶ 8–9 (Dec. 18, 2014).

245. *See, e.g.*, G.A. Res. 70/135, *supra* note 244, ¶ 26; G.A. Res. 69/152, ¶ 23 (Dec. 18, 2014).

246. *See, e.g.*, G.A. Res. 64/127, ¶ 4 (Dec. 18, 2009).

247. G.A. Res. 66/133, ¶ 7 (Dec. 19, 2011); G.A. Res 65/194, ¶ 8 (Dec. 21, 2010); G.A. Res. 61/137, ¶ 7 (Dec. 19, 2006) (the origin of this particular language, which has been repeated in several subsequent resolutions).

248. Discerned through review of all of UNHCR's curated U.N. General Assembly resolutions bearing on refugees, internally-displaced persons, and stateless persons from Jan. 31, 2017, back to Dec. 13, 1994, before UNHCR's receipt of the statelessness mandate.

249. ICJ Statute art. 38(1)(d).

gists and political theorists.

This usurpation of power from States, in contravention of the State consent-based model of international law, is not unique to the nationality context. Indeed, a recently released study of international legal scholarship shows the broadly self-referential nature of scholars' assertions of the state of customary international law.[250]

1. The Legitimacy of an Overstatement of Law

Scholars historically have been criticized for overstating the law or for failing to distinguish between their attempts to codify the law and their articulations of progressive developments of law.[251] As early as 1908, notable scholars criticized the rules "ascertained" by their peers as no more than "mere fancies."[252] Undoubtedly, overstatements of law cast doubt on the impartiality of the academy and the ability of the academy to identify law, as divorced from policy. Moreover, overstatements undercut the State-consent premise atop which international law rests, as scholarly writings formally are a subsidiary means of determining the law and judges on international tribunals often hail from the academy.

This is not to say, however, that overstatements are categorically illegitimate. Overstatements can reform rules and regulations, thereby altering State practice, when doing so proves necessary in the interest of, *inter alia*, human rights. The late Antonio Cassese opined that scholars and international law practitioners must "try to contribute to changing the law in addition to interpreting the existing law."[253] Even Bruno Simma and Andreas Paulus, writing in defense of positivism, concede that morality "will almost necessarily inform [legal] answers" when the state of the law is otherwise unclear.[254]

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250. *See generally* Lianne Boer, *"The Greater Part of Jurisconsults": On Consensus Claims and Their Footnotes in Legal Scholarship*, 29 LEIDEN J. INT'L L. 1021 (2016).

251. Aldo Borda, *A Formal Approach to Article 38(1)(d) of the ICJ Statute from the Perspective of the International Criminal Courts and Tribunals*, 24 EUR. J. INT'L L. 649, 659–60 (2013).

252. *See, e.g.*, Lassa Oppenheim, *The Science of International Law: Its Task and Method*, 2 AM. J. INT'L L. 313, 334 (1908).

253. ANTONIO CASSESE, FIVE MASTERS OF INTERNATIONAL LAW: CONVERSATIONS WITH R-J DUPUY, E. JIMENEZ DE ARECHAGA, R. JENNINGS, L. HENKIN, AND O. SCHACHTER 143 (2011); *see also id.* (Judge Richard Jennings questioning whether *judges*, and not just advocates, "have to be able to distinguish between proposals and what is really law and so on").

254. Bruno Simma & Andreas Paulus, *The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View*, 93 AM. J. INT'L L. 302, 316 (1999)

Richard Posner's discussion of legal pragmatism is relevant here. Legal pragmatism, a results-oriented method for navigating law and legal argumentation, provides that the law should advance just, practical outcomes, to the extent possible. Scholars, advocates, and judges should consider not only traditional sources of law but also the human and moral ramifications of law. They must strike the appropriate balance between these considerations, mindful that an articulation of law that is too unmoored from the traditional sources jeopardizes institutional legitimacy:

> The pragmatic judge must bear in mind at all times that he is a judge and that this means he must consider all the legal materials and arguments that can be brought to bear upon the case. If legal reasoning is modestly defined as reasoning with reference to distinctive legal materials such as statutes and legal doctrines and to the law's traditional preoccupations, for example with stability, the right to be heard, and the other "rule of law" virtues, then it ought to be an ingredient of every legal decision, though not necessarily the decision's be-all and end-all.[255]

Failure to consider the institutional or long-term ramifications of a particular judgment or articulation of law is "myopic pragmatism," at best.[256]

This is to say, the legitimacy of international law, or any legal system, cannot be derived exclusively from positive sources of law, notwithstanding the principle of voluntarism.[257] Overstatements of law, when measured and principled, can be legitimate themselves and can lead to a more legitimate legal regime.

("When we were invited to contribute a positivist perspective to the present symposium, we did not know whether to regard this invitation as flattering or as an insult: does positivism not represent . . . naive ideas of dead white males on the possibility of objectivity in law and morals? . . . [W]e have certainly not seen ourselves as positivists of that kind.").

255. Richard Posner, *Pragmatic Adjudication*, 18 CARDOZO L. REV. 1, 16 (1996).

256. *Id*. at 17.

257. A commonly used illustration: Does customary international law prohibit torture, even though States frequently engage in torture, fail to criminalize torture, or fail to enforce municipal laws prohibiting torture? Scholars have argued that statements by State representatives and the widespread adoption of the Convention Against Torture reflect sufficient State practice to identify a customary rule, indeed a peremptory norm. Perhaps. Consider, however, the legitimacy of the international human rights regime if there were no prohibition on torture. It is immediately apparent that the human rights regime *must* prohibit torture, irrespective of inconsistent State practice, if any number of other rights should exist.

2. The Legitimacy of the Nationality-as-Citizenship Overstatement

In interpreting the substantive content of nationality, UNHCR and scholars must figure out how to strike the appropriate balance between what the law "is" and what it "should be." This gives rise to two inquiries. First, will UNHCR and scholars tarnish their reputations and burn their social capital trying to advance a new articulation of law? Second, is the chosen articulation of law actually preferable to the previous articulation? Though it is possible that UNHCR has analyzed both of these questions, its publications and the subsequent writings of scholars seem uncritical of the impact of equating nationality with participatory citizenship.

States, notwithstanding Russia's targeted support for ethnic Russians in Baltic States, have not endorsed the idea that non-citizen nationals are stateless. Instead, States have expressed skepticism at UNHCR's expansive interpretation of nationality. Over the past two decades, key players in the international system[258] and select scholars[259] have grown increasingly hostile to overstatements of international law, if not the very idea of international regulation. International law may be more fragile now than it has been since World War II.[260] Instead of repeating overstatements of nationality that have

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258. *See, e.g.*, Boris Johnson, *There Is Only One Way to Get the Change We Want – Vote to Leave the EU*, TELEGRAPH (Mar. 16, 2016), www.telegraph.co.uk/opinion/2016/03/16/boris-johnson-exclusive-there-is-only-one-way-to-get-the-change/ [https://perma.cc/RWP9-L98J] ("We are seeing a slow and invisible process of legal *colonisation*, as the EU infiltrates just about every area of public policy.") (emphasis added); American Justice for American Citizens Act, H.R. 1658, 109th Cong. § 3 (2005) ("Neither the Supreme Court of the United States nor any lower Federal court shall, in the purported exercise of judicial power to interpret and apply the Constitution of the United States, employ the constitution, laws, administrative rules, executive orders, directives, policies, or judicial decisions of any international organization.").

259. *See, e.g.*, J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449, 475 (2000) ("The [customary international law] articulated in judicial opinions and treatises remains the domain of experts familiar with and able to *selectively manipulate* a vast body of legal materials and contradictory legal theory.") (emphasis added); Jean d'Aspremont, *Customary International Law as a Dance Floor: Party 1*, EJIL: TALK! (Apr. 14, 2014), https://www.ejiltalk.org/customary-international-law-as-a-dance-floor-part-i/#more-10650 [https://perma.cc/4KF2-YXKU]: ("The inconsistency and deceitfulness of customary international law have long been proven. It is even astounding that such a frail gospel has been able to survive for so long. . . . [I]t now seems possible to say anything about customary international law without running any risk of epistemic invalidation. The traditional constraints on the making of arguments based on customary international law have been growing thinner.").

260. This, it seems, has been the concern of scholars and practitioners since Brexit and the election of President Donald Trump. The unifying theme of the 2018 International Law

failed to take hold since 1997, UNHCR and scholars should focus their efforts on the stateless Rohingya in Myanmar or Bajau Laut in Malaysia—neither of whom possess functional nationality.

At a high level, UNHCR and scholars also should be concerned about reentrenching formalistic, legal distinctions among peoples. If human rights obligations are, or soon will be, accepted as obligations *erga omnes* or *erga omnes partes*,[261] diplomatic protection will be largely obsolete. Everyone will have the right to invoke some official protection,[262] irrespective of nationality. The human rights regime will have progressed far beyond what the drafters of the UDHR, who ideated the right to a nationality to ensure universal access to diplomatic protection, could have imagined.

By attempting to expand the right to a nationality, UNHCR and scholars are blowing new life into an old construct. On the one hand, UNHCR and scholars can argue that this is the best or fastest way to ensure the spread of civil and political rights for all. This argument has not been borne out in practice, as States have rejected an expansive interpretation of nationality. On the other, civil and political rights seem capable of developing and spreading along their own trajectory, divorced from nationality. As the practice of New Zealand, Chile, Malawi, and Uruguay has shown, States can and have extended full political membership to non-nationals. Other States, including Estonia, have extended limited political membership—e.g., the right to vote in local elections or hold particular public service positions—to non-nationals or non-citizens.[263] This separate trajec-

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Weekend was "Developing International Law in Challenging Times." The American Society of International Law has been running a livestream series called "International Law and the Trump Administration," which questions the likelihood of continued U.S. participation in international law and policy mechanisms.

261. Obligations *erga omnes* can be enforced by any State, irrespective of whether that State has suffered a direct and particularized injury. Obligations *erga omnes partes* can be enforced by any State party to a particular treaty regime. *Barcelona Traction, Light and Power Company, Limited* (Belg. v. Spain), Judgment, 1970 I.C.J. Rep. 3, 32 (enumerating several obligations *erga omnes*, including obligations relating to human rights); Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Senegal), Judgment, 2012 I.C.J. Rep. 422, 449–50 (finding that obligations in the Convention Against Torture are obligations *erga omnes partes*, notwithstanding the fact that torture was not mentioned in the *Barcelona Traction* judgment).

262. *See* Comments from Governments on the Draft International Declaration on Human Rights, *supra* note 133.

263. *See* Human Rights Comm., CCPR General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote), U.N. Doc. CCPR/C/21/Rev.1/Add.7 (July 12, 1996) (suggesting that States' decisions to extend political rights to non-citizens are relevant to Article 25). Though Article 25 of the ICCPR provides that "[e]very citizen" shall have political rights, limiting the enjoyment of political rights to citizens seems in tension

tory places political rights squarely within the pantheon of *human* rights, as opposed to *citizen* rights.

CONCLUSION

The international law of nationality is particularly relevant in today's political climate. Individuals' legal status has been, since World War I, an important safeguard against States' infringements of individual wellbeing and abuses of individual rights. Rises in nationalism, coupled with reduced access to free travel, or more stringent border control, have set the stage for two of the greatest mass displacements and human tragedies of the past century. For this reason, the campaign against statelessness is ever the more important.

In light of the ambitiousness of the #IBelong campaign and increasing international resistance to municipal-level acceptance of ethnic others, UNHCR and scholars must expend their resources and political capital judiciously. This may mean returning to the traditional, albeit limited, articulation of nationality, as a distinct concept from enfranchised citizenship. This not only would comport with the consent-based model of international law but would also de-emphasize the role of nationality or citizenship in our political rights dialogue.

*Katherine Ebright**

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with the universality of human rights, as advanced in the ICCPR preamble. The preamble states, "[T]he ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby *everyone* may enjoy his civil and political rights" (emphasis added).

* Law Fellow at the Public International Law & Policy Group; J.D., Columbia Law School, 2018.