PASSPORTIZATION IN INTERNATIONAL LAW
THEORY AND PRACTICE OF LARGE SCALE EXTRATERRITORIAL CONFFERALS OF NATIONALITY

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Я волком бы вырвать бюрократизм.
К мандатам почтения нету.
К любым чертям с матерями катись.
любая бумажка.
Но эту…
Я Достаю из широких штанин дубликатом бесценного груза.
Читайте, завидуйте, я –
гражданин Советского Союза.

— extract from Vladimir Mayakovksy, ‘My Soviet Passport’ (1929)
I. INTRODUCTION AND RESEARCH QUESTIONS

In early 2014, I travelled to Kiev, where a decision by the Ukrainian government to suspend the Association Agreement with the EU had sparked the Euromaidan revolution just months before. While roadblocks of car tires where still smouldering, ‘little green men’ managed to establish control over the Crimean peninsula. While the Association Agreement was the centre of debates on the causes of the conflict, another document played a more subtle role.

The Russian passport, so coveted by Mayakovsky, has been an instrument in a number of frozen\(^1\) and ongoing conflicts in the countries of the former Soviet Union. In 2008, Russia invaded Georgia to ‘protect’ its recently adopted nationals in the provinces of South Ossetia and Abkhazia, two Georgian provinces where it established control in the years leading up to the clash. At the time, the use of Russian citizenship to grant citizenship to a population of Russians residing in its neighbouring States drew speculation about Russia’s possible redrawing of its 1991 borders as commentators eyed other possible targets.\(^2\) When Russia annexed Crimea, the pattern was quickly detected.\(^3\) In both cases, persons living near the Russian border had apparently obtained Russian passports and were in sudden need of protection from an elusive and impending harm, which then saw Russia intervening and

\(^{1}\) Thomas D Grant, ‘Frozen Conflicts and International Law’ (2017) 50 Cornell International Law Journal 361, 413: ‘The frozen conflict is a mélange of juridical concepts, invoked to entrench a stalemate between separatist forces and an incumbent government on the territory of a recognized State’.


establishing control over the territory.⁴ The importance of Russia’s rhetoric about integrating the CIS region, in combination with talk of ‘compatriots (...) that want to be of use to their historic homeland’ was grasped only after Crimea’s annexation was a fait accompli.⁵

The passportization aspect of these conflicts has been studied both from an international law and a political sciences/international relations perspective. The latter authors have examined the drivers of Russian citizenship policy as it turned from being economically driven towards its instrumentalisation as a tool of its recent ‘civilisational’ foreign policy which emphasizes Russia’s role as the centre of a cultural and political Russian world⁶ and include detailed studies of particular instances of passportization.⁷ In the legal field, the main focus has been

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on the analysis of passportization in the context of—and as a pretext for—the use force, and more specifically within the continuing debate on the so-called protection of nationals doctrine,\(^8\) while others have analyzed it within the context of international nationality law.\(^9\)

The object of this dissertation is ‘passportization’, or the large-scale conferral of nationality by one state to citizens of another state that reside outside the borders of the conferring state. This definition does not render passportization as a priori illegal and describes a process, conducted by a state that results in large numbers of foreign nationals acquiring that state’s nationality. As will become clear, the process can be carried out in different ways, situations and with different intents. The goal of this thesis is to answer the following question: whether and to what degree is a policy of passportization permissible under international law.

In order to answer this question, the first part of this dissertation studies the international legal framework of nationality. After determining what latitude States enjoy in conferring


their nationality and what the relevant consequences of nationality are, a number of principles are distilled as to the permissibility of the conferral of citizenship abroad. These principles will constitute a theoretical answer to the main research question. With these principles in mind, passportization will be studied from the practical perspective of Russian state practice in three case studies. After briefly enquiring as to the relevant Russian policy and legal framework, the cases of Transnistria, Georgia (Abkhazia and South Ossetia) and Ukraine (Crimea and Donbass) are studied in detail. Finally, a conclusion is drawn as to whether the theoretical framework provides an adequate measure for assessing passportization in practice and avenues for further research are identified.
II. NATIONALITY AND NATURALIZATION IN PUBLIC INTERNATIONAL LAW

An enquiry into the topic of passportization requires an assessment of the international law on nationality. A first question (1) concerns the extent to which States are free to determine who is a national. The second question (2) concerns the prerogatives attached to nationality and which the State of nationality may invoke. Lastly, the conferral of nationality through naturalization (3) will be examined in order to come to clear principles governing the extraterritorial conferral of nationality.

1. NATIONALITY AND THE LIMITS OF STATE SOVEREIGNTY

Nationality is defined generally as the relationship between a State and an individual that gives rights to reciprocal rights and duties, both in the national and international domain. From an international perspective, it denotes ‘the assignment of persons to states’. This part focuses on the freedom of those states to determine its nationals. It is ascertained to what extent nationality is governed by international law and by virtue which rules and principles. Due to its enduring relevance, the classical conception of nationality will be considered first (1.1), before reviewing the seminal Nottebohm case (1.2), which in turn gave rise to the genuine link-doctrine (1.3). Finally, the functional approach (1.4) is defended as providing a better understanding of nationality under public international law as it stands today.

1.1. BEFORE NOTTEBOHM — SOVEREIGNTY REIGNS SUPREME?

Early works dedicated little attention to the matter of nationality, which was regarded to be a matter governed exclusively by municipal law.\textsuperscript{12} Arbitral awards supported that position.\textsuperscript{13} In the 1923 *Nationality Decrees Issued in Tunis and Morocco* advisory opinion, the PCIJ held:

> [t]he question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations. Thus, in the present state of international law, questions of nationality are, in the opinion of the Court, in principle within this reserved domain. The power to determine who is a national is situated principally within a State’s domestic jurisdiction.\textsuperscript{14}

In another advisory opinion of the same year, this time dealing with Polish nationality laws, the PCIJ maintained that ‘though, generally speaking, it is true that a sovereign state has the right to decide what persons shall be regarded as its nationals, it is no less true that this principle is (...) subject to the Treaty obligations’ of that state.\textsuperscript{15} This statement, when interpreting the PCIJ’s ‘generally speaking’ as a qualifier intended to broaden its import, is no more than the application of that positivist conception of international law which holds that state sovereignty is unbound in the absence of rules laid down in treaties or arising from


\textsuperscript{13} Flutie Case (United States v Venezuela) [1903] 9 RIAA 148, 152; Esteves Case (Spain v Venezuela) [1903] 10 RIAA 739, 740.

\textsuperscript{14} *Nationality Decrees Issued in Tunis and Morocco* (Advisory Opinion) [1923] PCIJ Rep Ser B No 4, 24.

\textsuperscript{15} *Acquisition of Polish Nationality* (Advisory Opinion) [1923] PCIJ Rep Ser B, No 7, 16.
general international law. The reluctance of tribunals to veer off from municipal law is demonstrated by the 1932 Salem arbitration. In that case, Egypt disputed the validity of the nationality of a naturalized American who was the subject of criminal proceedings in Egypt and had previously claimed to be an Egyptian national, born there from a Persian father. The tribunal dismissed the Egyptian argument that, even if Salem’s American nationality was recognized, precedence should be awarded to the Egyptian nationality on the basis of a principle of effective nationality because of stronger links with Egypt. Instead, the tribunal applied municipal law and determined that Salem was a dual Persian-American national. It added that the effective nationality principle was not established in international law.

While these examples reflect the state of positive international law at the time, great efforts were made in scholarly circles to solve conflicts of nationality, which at the time was considered a great problem causing conflicts of allegiance. In 1929, a Draft Convention was adopted at Harvard, which aimed at developing the international regulation of nationality based on a study of nationality laws in various jurisdictions. Article 2 of the Draft Convention sets out the cardinal rule that ‘[e]xcept as otherwise provided in this convention, each state may determine by its law who are its nationals.’ The commentaries cited a number of treaties on matters ranging from naturalization to the status and military obligations of persons with dual nationality yet struggled to identify customary norms other than ‘obvious’ limitations on the power of States to confer nationality such as forced or arbitrary

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16 see also Lotus Case (France v Turkey) [1927] PCIJ Ser A, No 10, 18-19.
17 Salem Case (US v Egypt) [1932] 2 RIAA 1161.
18 ibid 1184-1188.
naturalization. In the same vain, article 1 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Law includes the formulation that

‘[i]t is for each State to determine under its own law who are its nationals. This law shall be recognized by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality’.

The Hague Convention was the culmination of the work within the first committee of the League of Nation’s Conference For The Codification of International Law. The report detailing its drafting history explains that the first article constitutes an affirmation of the accepted principle that a State is exclusively competent to determine who its nationals are. Aside from this principle, the Convention mostly concerned a progressive development of the law as it stood, omitting any mention of customary norms that would be considered accepted at the time. When the topic of nationality, this time including statelessness, was resumed within the United Nations’ International Law Commission, special rapporteur Manley Hudson reviewed the existing practice on the matter of nationality. After affirming the principle that nationality falls within the domestic jurisdiction of each State, Hudson tried to identify a number of customary rules. He determined that the rules of *ius soli* and *ius sanguinis* as modes of acquisition of nationality had attained the status of customary law, based on the uniformity of nationality laws. While not methodologically sound, it serves as

21 Commentary to the Harvard Draft Convention (n 20) 25-26.
an example for the limited development of international law on the question of nationality at the time.\textsuperscript{25} Indeed, a contemporary author noted that nationality was still a purely formal proposition. It designates the status of a person's belonging to a state, with particular reference to international relations among states concerning this person. In a world divided into states it is the function of the nationality concept to apportion the global population among the several nations.\textsuperscript{26}

The right to exclude others and to defend the territory of the nation from external aggression was the predominant function of nationality.\textsuperscript{27} International law as ‘the law of nations’, preoccupied itself solely with the conduct of States. In that framework, individuals were not subjects but mere objects of the law. Nationality denoted nothing more than the link between municipal law, which governed the relations between individuals and between individuals and the state, and international law.\textsuperscript{28} While it was accepted that international law might well limit the freedom of States to confer its nationality, only exceptional restrictions were identified at the time.\textsuperscript{29}

\bibliography{references}{25}{Hersch Lauterpacht (ed) \textit{Oppenheim’s International Law: Volume 1 Peace} (6th edn, Longmans 1947) 580; Brownlie (n 28) 301 (citing Lauterpacht, Guggenheim, Fitzmaurice, Mc Nair and Redslob).}
1.2. THE NOTTEBOHM CASE

In the *Nottebohm* case, which was brought by Liechtenstein against Guatemala, the International Court of Justice articulated a concept of nationality under international law.\(^3^0\) The Court held that, in order for a State to exercise diplomatic protection on behalf of a national, the bond of nationality between the State and the individual should be based on a ‘genuine connection existence, interests and sentiments’.\(^3^1\) This statement has been central to the debate on nationality since it was delivered in 1955.

Friedrich (‘Federico’) Nottebohm, born in Germany in 1881, emigrated at young age and built a fortune in Guatemala together with his brothers. In the years before the Second World War, Guatemala was aligned with the United States.\(^3^2\) In October 1939, after the outbreak of the war marked by Germany’s invasion of Poland on the first of September, Nottebohm traveled to Hamburg. From there he travelled on to neutral Liechtenstein, where he applied for citizenship. The relevant law required three years of residence yet Nottebohm was naturalized on the 13\(^{th}\) of October, having obtained a waiver for the that requirement. Nottebohm deposited a sum of 30,000 Swiss francs as security and reached an agreement with the revenue authorities to pay a yearly 1000 francs as long as he did not take up residence in the country. Having obtained his passport and a visa from the Guatemalan consulate in Zurich, Nottebohm returned to Guatemala in December 1939, where he resumed his business activities.\(^3^3\) In 1941, the United States included Nottebohm on a list designed to target German commercial interests in Latin America. In 1943, he is deported to the US as

\(^{30}\) *Nottebohm Case (Liechtenstein v Guatemala) (Second Phase) [1955] ICJ Rep 4.*  
\(^{31}\) ibid 23.  
\(^{33}\) *Nottebohm* (n 30) 15-16.
part of a program of detaining contributors to the enemy war effort and was interned there until 1946. By the time of his release, most of his business in Guatemala had been expropriated. Access to the country was denied to him. After diplomatic correspondence with Guatemala aiming to ameliorate the situation failed to deliver any results, Liechtenstein instituted proceedings on behalf of Nottebohm on the 10th of December 1951.

During the proceedings, Liechtenstein defended the view that international law did not prescribe any rule on the conditions or ways in which States may confer their nationality on individuals.\textsuperscript{34} Guatemala, represented by Henri Rolin, seized upon the PCIJ’s \textit{Panevezys-Saldutiskis} judgment, which held that ‘it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection’ and interpreted this as meaning that a qualititative link should be demonstrated between Nottebohm and Liechtenstein.\textsuperscript{35} Guatemala argued that the speed of Nottebohm’s naturalization warranted the conclusion that the validity of Nottebohm’s naturalization under international law was vitiated under the principles of abuse of law and fraud. It argued that this was a simple \textit{manoeuvre} by Nottebohm to evade the effects of German citizenship and enjoy those of Liechtenstein, which, according to Guatemala, conferred its citizenship in an arbitrary manner.\textsuperscript{36} Guatemala challenged Liechtenstein’s citizenship law itself on the basis of the ‘severe restriction’ imposed by the 1930 Hague Convention, which provided that the conferral of nationality should be ‘consistent with international custom, and the principles of law generally recognised with regard to nationality’.\textsuperscript{37} It demonstrated that in a number of arbitral cases, nationality had been disregarded where it had been obtained fraudulently and

\textsuperscript{34} Nottebohm (Oral Arguments in the Second Phase) (n 30) 87.

\textsuperscript{35} Panevezys-Saldutiskis Railway Case (Estonia v Lithuania) (Preliminary Objection) [1939] PCIJ Rep Series A/B no 76, 16.

\textsuperscript{36} Nottebohm (n 30) (Written Proceedings) 188-198; ibid (Oral Arguments) 186-226.

\textsuperscript{37} ibid (Written Proceedings) 188.
asked the Court to do the same. Liechtenstein replied by denying the existence of custom or general principles of law restricting its power to confer nationality.

In its decision, the ICJ affirmed that ‘it is for every sovereign State to settle the rules relating to the acquisition of its nationality, and to confer that nationality by naturalization granted by its own organs in accordance with that legislation’, recognizing that this area of the law was subject to policy choices which inevitably result in a wide variety of municipal rules. The ICJ carefully distinguished the national and international aspects of nationality and avoided having to rule on the compatibility of Liechtenstein’s citizenship law with general international law. Instead, it limited the scope of its enquiry to the question as to what extent third States are obliged to recognize the nationality of foreign individuals for the purpose of exercising diplomatic protection. The Court noted that States could not be expected to recognize effects of the unilateral acts of other States without imposing some limit, even if these acts remained within their sovereign competences. In order to determine when an act of naturalization demanded recognition, the Court looked for inspiration in cases concerning dual nationality. It noted that in such cases, the ‘real and effective nationality’ was usually awarded precedence. In order to determine what constituted a real or effective nationality, factors such as habitual residence, center of interests, family ties and proof of attachment to the country were taken into account. The Court concluded by holding that nationality must be based on ‘a social fact of attachment, a genuine connection of existence, interests and

38 ibid 188-189, 198.
39 ibid (Oral Arguments) 91.
40 ibid (Judgment) 20.
41 ibid 21-22.
42 ibid 22.
43 Nottebohm (n 30) 22.
sentiments’. As a result, a State could only invoke the nationality of its naturalized citizens to exercise diplomatic protection ‘if it constitutes a translation into juridical terms of the individual’s connection with the State which has made him its national’. Applying the criteria, Nottebohm’s main seat of interest was determined to be in Guatemala, were he had spent 34 years and to which he sought access immediately upon release from internment in the US. In contrast, Nottebohm was judged to have no real attachment to Liechtenstein, were Nottebohm paid only passing visits and where he had no real economic interests. The insistence on speedy naturalization in October 1939 and immediate return to Guatemala were found to support this finding. The Court concluded that Nottebohm’s naturalization was not based on ‘any bond of attachment between Nottebohm and Liechtenstein’ and his nationality lacked ‘in genuineness requisite of an act of such importance’. The real reason for the naturalization, according to the Court, was ‘to substitute for his status as a national of a belligerent State that of a national of a neutral State, with the sole aim of thus coming within the protection of Liechtenstein’. Therefore, Guatemala was under no obligation to recognize Nottebohm’s nationality and Liechtenstein’s claim was declared inadmissible. The judgment was delivered by a majority eleven votes to three, with judges Klaestad, Read and judge ad-hoc Guggenheim dissenting.

44 ibid 23 (emphasis added).
45 ibid.
46 ibid 25.
47 ibid 26.
48 During proceedings, Guatemala had produced a 1939 memo of the German Auswärtiges Amt that encouraged German expratriates to adopt foreign nationalities in order to minimise the risk flowing from wartime trade restrictions for the german economy and the risk of expropriation of german property abroad (Oral Proceedings) 208.
49 Nottebohm (n 30) 26.
Judges Klaestad and Read disputed that international law placed a requirement of a genuine connection on the conferral of nationality, positing that a ‘common and effective will’ sufficed under international law.\(^{50}\) Furthermore, it was argued that the Court disregarded article 38 of the Statute and its *Asylum* decision by deciding on the basis of a rule that did not reflect positive law.\(^{51}\) Judge Read noted that no case was to be found ‘in which a State (...) successfully refused to recognize that nationality, lawfully conferred and maintained, did not give rise to a right of diplomatic protection’.\(^{52}\) According to Read, the decision could result in a situation where some State nationals would no longer be able to rely on their nationality for diplomatic protection, even when this individual has just one nationality. Countries with large numbers of expatriate nationals without links to their home State would no longer be able to extend protection to these persons under international law.\(^{53}\) Read argued that nationality belonged to the remit of Sovereign states and that care should be taken in making use of a subjective test in order to establish the genuineness of the link between a person and a State.\(^{54}\) Finally, it was noted that a test of effective connection was a rule meant for ruling in cases where dual nationality arises, not were just one nationality was at stake.\(^{55}\)

### 1.3. THE GENUINE LINK DOCTRINE

The judgment in *Nottebohm* has been understood as positing a limitation on the freedom of states to invoke nationality, employing a two-pronged reasoning. It upheld a dualist conception of nationality, separating its domestic and international aspects and determined that, in the international sphere, the opposability of a given nationality for the purpose of

\(^{50}\) *Nottebohm* (n 30) Dissenting Opinion Judge Klaestad, 30.
\(^{51}\) ibid.
\(^{52}\) *Nottebohm* (n 30) Dissenting Opinion Judge Read, 42.
\(^{53}\) ibid 44.
\(^{54}\) ibid 46.
\(^{55}\) *Nottebohm* (n 30) Dissenting Opinion Judge Ad-Hoc Guggenheim, 60.
exercising diplomatic protection is dependent on an underlying link between the individual and the State.

A. THE DUALIST CONCEPTION OF NATIONALITY

According to the dualist concept of nationality, States remain free to determine by virtue of their municipal law who its nationals are, irrespective of international law.\(^5\) This corresponds to the doctrinal distinction between the municipal and international aspects of nationality, reflected in the twin concepts of citizenship and nationality.\(^5\) Both notions refer to the legal bond between a State and an individual yet are distinct insofar as that bond is invoked on the nationally or internationally.\(^5\) The rationale behind the dualist concept of nationality is to give States the widest margin of appreciation in choosing between *ius sanguinis*, *ius soli* or mixed systems given its specific circumstances.\(^5\) The ICJ endorsed the dualist approach, noting that States are best placed to adapt their nationality rules to their own demographic conditions.\(^6\) Therefore, the Court had nothing to say about the validity of Nottebohm’s status as a Liechtenstein national, ‘only [whether] his nationality could not be used as a weapon against another state’.\(^6\) As a result, it is incorrect to say that international law determines the *validity* of a given nationality; international law may only determine the *opposability* of a

\(^{5}\) *Nottebohm Case* (n 30) 20-21.


\(^{5}\) Koessler (n 26) 58.


\(^{6}\) *Nottebohm* (n 30) 23.

given nationality. In *Nottebohm*, the Court identified the ‘genuine link criterion’ as the rule determining whether a given nationality is opposable, in a case concerning diplomatic protection. However, as was pointed out by the dissenting judges, the Court has transposed the test from cases involving dual nationality and applied it in a case where the individual had just one nationality.

**B. THE NOTION OF EFFECTIVE NATIONALITY**

In the wake of the *Nottebohm* judgment, the genuine link came to be understood by some as a general requirement for ‘effective’ nationality, which required that a legal bond of nationality expressed the ‘fact of attachment, a […] connection of existence, interest and sentiments’. The Inter-American Court of Human Rights has affirmed this conception of nationality by stating that ‘[n]ationality can be deemed to be the political and legal bond that links a person to a given state and binds him to it with ties of loyalty and fidelity, entitling him to diplomatic protection from that State’.

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62 An exception to the dualist reasoning can be found in a report on the elimination or reduction of statelessness of the ILC Special Rapporteur Cordova, who noted that the Nazi-era Delbrück Law, enacted by Germany, under which a German citizen could be nationalized in a foreign country without losing his original German nationality, was ‘illegal’ under international law, since it ran counter the ‘broader interests of the international community’ (1953) UN Doc A/CN.4/64, 169.

63 *Nottebohm* (n 30) (Dissenting opinion Judge Read) 40-42.

64 ibid 20; Alice Edwards and Laura van Waas (eds) *Nationality and Statelessness in International Law* (CUP 2014) 11.

While the ICJ limited its *Nottebohm* judgment to the question of diplomatic protection,\(^{66}\) it spelled out a general rule of law that ‘a State cannot claim that the rules it has thus laid down are entitled to recognition by another State unless it has acted in conformity with this general aim of making the legal bond of nationality accord with the individual's genuine connection with the State’.\(^{67}\) Again, it supported this finding by referring to arbitral judgments that had awarded precedence to a ‘dominant nationality’ in order to resolve situation where two States claimed to represent an individual.\(^{68}\) Despite early criticism directed at the judgment,\(^{69}\) scholars were quick to pick up on this general rule, with Van Panhuys’ treatise on nationality stating that ‘for purposes of recognition [of nationality], there must in fact exist a genuine connection between the national and his State’.

\(^{66}\) *Nottebohm* (n 30) 17.

\(^{67}\) ibid 23.

\(^{68}\) For an overview of arbitral awards employing the dominant nationality standard, see ILC, ‘First report on diplomatic protection, by Mr. John R. Dugard, Special Rapporteur’ (7 March 2000) UN Doc A/CN.4/506, paras 121-160.

\(^{69}\) Kunz (n 61) 560: ‘the conclusion is, therefore, inescapable that the genuine link theory is not required by international law and, as applied in the Nottebohm Case, constitutes a clear-cut instance of judicial legislation’; Jack H Glazer, ‘Affaire Nottebohm (Liechtenstein v Guatemala) - a Critique’ (1956) 44 Georgetown Law Review 313, at 325: ‘The majority opinion is but a hollow triumph of form.’

\(^{70}\) Haro Frederik Van Panhuys, *The Role of Nationality in International Law* (Sijthoff 1959) 158.

\(^{71}\) Ruth Donner, The Regulation of Nationality in International Law (2nd edn, Nijhoff 1994) 46.
relationship’. SLOANE notes that the doctrine has followed a path from ‘dictum to dogma’ and highlights instances where the highly ‘attractive’ genuine link doctrine has been transplanted to other areas of international law. The wide acceptance of the genuine link requirement as a general restriction on the opposability of nationality in international law can also be observed through recurrence in domestic and international case law. A subtle argument in favor of the genuine link doctrine is delivered by BROWLIE. The main thrust of his argument is directed at demonstrating that international law does and must regulate nationality instead of leaving the question entirely to municipal law, as the classical writers had argued before. The genuine link is identified as a general principle of international law, adaptable to specific legal contexts. BROWLIE argues for a ‘system of attribution for individuals and populations on the international plane,’ which would effectively bring into existence a status of nationality based on the genuine link criteria, which operates independently from the formal status of nationality under municipal law and which, according to the circumstances, may widen or restrict the number of States that can invoke their sovereign prerogatives in relation to the thus determined ‘national’. The rule which then arises is that nationality, in order to be opposable in international law as a whole, needs

72 Alice Edwards & Laura van Waas (eds) Nationality and Statelessness in International Law (CUP 2014) 11.
75 Ian Brownlie, ‘The Relations of Nationality in International Law’ (1963) 39 BYIL 284.
76 ibid 364.
77 ibid 344-347.
to answer to social facts of attachment, determined on the basis of factors such as expressed allegiance to a State, center of economic interests, family ties, habitual residence and others, which, depending on the facts of the case will be weighted to meet the occasion. The nature of this rule is variably described as a rule of international customary law or a general principle of international law. The genuine link then serves as a parallel concept of nationality governed by international law, restricting the opposability of a formal nationality that is not based in fact and allowing the invoke of a factual nationality, irrespective of formal nationality status. The notion of citizenship that arises amongst some authors is one that ‘corrects’ municipal law or even introduces a conception of international citizenship. 78

1.4. THE FUNCTIONAL APPROACH TO NATIONALITY

Contemporary authors have demonstrated skepticism about a general norm of international law governing nationality that is ‘binding on all states (...) in all circumstances’. 79 The functional concept of nationality stands opposed to a general concept of effective nationality in international law. It recognizes that ‘the expectation of a rapid decline of the concept of nationality and its replacement by a post-national or trans-national affiliation has so far not been reflected in State practice’ and affirms that, in practice, nationality still belongs to the domain réservé of States. 80 It accepts that this principal autonomy is limited by rules international of international law yet notes that nationality has acquired a multitude of

79 Alice Sironi, ‘Nationality of individuals in International Law’ in Alessandra Annoni & Serena Forlati (eds) The Changing Role of Nationality in International Law (Routledge 2013) 54; Dugard (n 68) paras 106-120; Hailbronner (n 27) 35-36; Sloane (n 25).
interpretations and functions within ever-proliferating and ever-complex specialty areas of the law, such as diplomatic protection, human rights law or investor-state arbitration.81

The functional approach forms a critique of the effective nationality doctrine as it came to be understood after Nottebohm. SLOANE leads the charge and asserts that the doctrine rests on a broad reading of that judgment that misses the Court’s ‘self-conscious, meticulous effort’ to narrow its holding to the context of diplomatic protection.82 He also finds that the tacit rationale for the genuine link criterion was to prevent the abuse of the right to exercise diplomatic protection in the specific circumstances of Nottebohm.83 Most importantly, however, is the argument that a concept of nationality based on ‘sentiments and attachment’ between an individual and his or her State is no longer reflected in 21st century State practice.84 This is reflected in the wide and growing acceptance of dual nationality.85 As the nature of citizenship has changed in the context of a globalized world, international legal practice has largely dismissed an autonomous concept of ‘effective nationality’, which would create uncertainty in a world where many people have more than one nationality and would

82 Sloane (n 25) 17-24.
83 ibid 29.
84 See for example the anecdote describing how the US Internal Revenue Service subjected British Foreign Secretary Boris Johnson to capital gains tax after he sold his London house in 2015. Johnson was born in the US and is thus a US citizen, despite the fact that he has not lived there since the age of five, in Peter J Spiro, ‘Citizenship Overreach’ (2017) 38 Michigan Journal of International Law 167.
85 Alfred M Boll, Multiple Nationality and International Law (Brill 2007) 173.
risk losing the protection of their formal state of nationality.86 Nationality has lost some of its importance as the exclusive way to seek redress under international law through the mechanism of diplomatic protection.87 Individuals have increasingly become participants and subjects of international law.88 For example, standing of individuals under the main international human rights conventions is usually not tied to nationality.89 Even in the area of diplomatic protection the genuine link does not seem to be a requirement any longer. The commentary to the ILC Draft Articles on the Diplomatic Protection states that the exercise of diplomatic protection ‘does not require a State to prove an effective or genuine link between itself and its national, along the lines suggested in the Nottebohm case [...] where the national possesses only one nationality’.90 SLOANE compellingly concludes that the genuine link requirement should be understood as a judicial solution in a specific case, for a specific time and that a functional concept of nationality under internationality rests on actual practice and is better suited for the increasingly fragmented and specialized nature of international law.

86 Flegenheimer (US v Italy) [1958] 14 RIAA 327, 377 (Italian-US Conciliation Commission); Soufraki v United Arab Emirates (Award of 7 July 2004) ICSID Case No ARB/02/7 (2007) 12 ICSID Rep 156.
87 Robert Jennings and Arthur Watts (eds), Oppenheim’s International Law (9th edn, OUP 1992) 851.
In addition, nationality may be interpreted in function of the purpose it serves in different situations. A common example is the ICSID convention, which does not define nationality in article 25(2)(a), where nationality of natural persons serves as a ground of jurisdiction.\textsuperscript{91} ICSID tribunals have interpreted nationality in a formal way, relying on the internal law to determine the nationality of individuals bringing a claim, occasionally referring to \textit{Nottebohm} as an exception with a high threshold, to be employed only when the application of municipal law would result in a manifestly inequitable or abusive situations.\textsuperscript{92} This interpretation suits the purpose of the ICSID convention which ‘deliberately gives states discretion and flexibility to shape diverse investment instruments, such as BITs, contracts, concession agreements, and the like, and thereby to expand or contract the ability of different foreign investors to access its arbitral machinery’.\textsuperscript{93} In other areas such as State succession or diplomatic protection, the functional approach allows nationality to be interpreted more widely, serving the goal of extending protection rather than guarding investor predictability.\textsuperscript{94} For instance, article 5 of the ILC’s Draft Articles on Nationality of Natural Persons in


\textsuperscript{93} Sloane (n 25) 54.

\textsuperscript{94} Sironi (n 79) 56-57.
Relation to State Succession introduces a presumption of nationality for persons having their habitual residence in a territory affected by State succession.\textsuperscript{95} Article 1(A)(2) of the Refugee Convention disregards the renunciation of a person’s nationality if this was done based on a well-founded fear.\textsuperscript{96} In human rights law nationality is interpreted broadly and protects ‘social bonds of attachment’ against a formal nationality imposed by law.\textsuperscript{97} The definition of ‘aliens’ in the ILC’s Draft Articles on the Expulsion of Aliens explicitly excludes dual nationals from its scope and extends protection to formal nationals in the absence of an ‘effective link’ to the country of nationality.\textsuperscript{98} Finally, the ICTY has interpreted ‘nationality’ in the fourth Geneva Convention broadly, by extending protection to civilians from occupants who share the same formal nationality.\textsuperscript{99} In each case, nationality is defined in order to suit the function it serves within the broader legal purpose of the law, whether it is creating economic certainty, offering protection of persecuted individuals or those left without a State.

It is submitted that as the law stands, States remain largely free to determine its nationals and how persons may acquire that status. The limitations on the freedom to confer nationality are twofold, consisting of (1) treaty and customary law, supported by general principles of international law and (2) from wider or narrower definitions which nationality may attain in different areas of the law. State practice points in the direction of a functional concept of nationality and against a general limitation on State’s freedom in the form of a ‘genuine link’ requirement.

\textsuperscript{95} ILC, ‘Draft Articles on the Nationality of Natural Persons in Relation to the Succession of States with Commentaries’ (1999) UN Doc A/54/10, 20, art 5.


\textsuperscript{97} Sloane (n 25) 56.


2. THE CONSEQUENCES OF NATIONALITY

For states, nationality is both a cause and a consequence. Having nationals is a requirement for claiming statehood,\(^{100}\) which in turn allows it to confer its nationality upon individuals and assert certain prerogatives over its nationals. These prerogatives correspond with the rights and obligations which an individual citizen has vis-a-vis the state of nationality. Examples of duties in the national realm include the duty to pay taxes, to perform jury service or even the possibility of conscription in wartime. The ‘international consequences’ of nationality include but are not limited to the right of the state to protect its nationals, the possibility of incurring state responsibility for the conduct of nationals, duties and rights of territorial admission, the right to refuse extradition, determination of enemy status in wartime and the exercise of jurisdiction.\(^\text{101}\) For the purposes of this dissertation, it is important to understand the value of nationality from the perspective of the state. The importance of personal jurisdiction is discussed first (2.1), followed by the right of states to protect its nationals (2.2).

2.1. PERSONAL JURISDICTION

Jurisdiction is a state’s ‘lawful power to act and (...) decide whether and, if so, how to act, whether by legislative, executive, or judicial means. In this sense, jurisdiction denominates primarily, but not exclusively, the lawful power to make and enforce rules’.\(^\text{102}\) A distinction is made between prescriptive and enforcement jurisdiction or the power to make and enforce these rules, and judicial jurisdiction, which refers to the power to adjudicate disputes before

\(^{100}\) Convention on Rights and Duties of States adopted by the Seventh International Conference of American States (adopted 26 December 1933, entered into force 26 December 1934) 165 LNTS 19 (Montevideo Convention) art 1.

\(^{101}\) Boll (n 85) 113.

state courts. Jurisdiction is most commonly limited territorially.\textsuperscript{103} Yet, states remain free to extend their jurisdiction extraterritorially, provided this does not impinge on the rights of other states.\textsuperscript{104} Jurisdiction becomes a ‘concern of international law when a state, in its eagerness to promote its sovereign interests abroad, adopts laws that govern matters of not purely domestic concern’.\textsuperscript{105} Jurisdiction can be exercised over persons with nationality as a nexus.\textsuperscript{106} Personal jurisdiction can be categorized further depending on whether it is exercised over nationals (active personality) or over any person involved in harming a national (passive personality).\textsuperscript{107} Since the exercise of personal jurisdiction does not require an \textit{a priori} link with the state of nationality, it allows states to extend the area where its domestic law applies extraterritorially. The ability of states to extend the operation of their laws outside their borders is exemplified by the exceptional reach of some US laws,\textsuperscript{108} the far-reaching effects of the European Union’s General Data Protection Regulation\textsuperscript{109} or the debate concerning universal jurisdiction.\textsuperscript{110} The crucial question is to what extent States may extend their jurisdiction outside its own borders.

\begin{thebibliography}{99}
\bibitem{103} Crawford (n 11) 456-458.
\bibitem{104} \textit{Lotus Case} (n 16) 19
\bibitem{105} Cedric Ryngaert, \textit{Jurisdiction in International Law} (OUP 2015) 104-114.
\bibitem{106} Crawford (n 11) 459-460; Oxman (n 102) para 18.
\bibitem{107} Ryngaert (n 105) 5.
\bibitem{109} Paul de Hert and Michal Czerniawski, ‘Expanding the European data protection scope beyond territory: Article 3 of the General Data Protection Regulation in its wider context’ (2016) 6 International Data Privacy Law 230.
\end{thebibliography}
In the *Lotus* case, the PCIJ distinguished the permissibility of extraterritorial enforcement jurisdiction from that of prescriptive and judicial jurisdiction and determined that

the first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State. (...) Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules (...)111

By virtue of extraterritorial prescriptive jurisdiction, nationals abroad remain bound by the law of their home State.112 Obligations of nationals abroad to the state in relation to nationality may include the far-reaching duties of military conscription and the duty to take part in armed conflict on behalf of the state outside its borders.113 Such duties reflect an expectation of allegiance vis-a-vis the state of nationality and make clear that extraterritorial prescriptive jurisdiction may have a real impact on a State hosting foreign nationals. Indeed, the failure to obey national law as a citizen abroad may result in loss of protection or penalties with respect to rights or the person of the individual upon return114 and thus constitutes ‘a threat, which may compel foreign nationals to alter their behavior’.115 Therefore, it has been argued that jurisdiction must be exercised reasonably, that is, not infringing on the customary

111 *Lotus case* (n 16) 18-19.
112 *Acquisition of Polish Nationality* (n 15)
113 *Boll* (n 85) 291.
115 Crawford (n 11) 478.
principles of non-intervention, sovereign equality and international comity. These norms explain why extraterritorial enforcement jurisdiction, which entails forcible action on another State’s territory is *a priori* prohibited while extraterritorial prescriptive jurisdiction is not.

Where the exercise of extraterritorial prescriptive jurisdiction and another state’s territorial jurisdiction clash, a hierarchy arises. The ECtHR, in its Bankovic decision, noted that

from the standpoint of public international law, the jurisdictional competence of a State is primarily territorial. While international law does not exclude a State’s exercise of jurisdiction extra-territorially, the suggested bases of such jurisdiction (including nationality, flag, diplomatic and consular relations, effect, protection, passive personality and universality) are, as a general rule, defined and limited by the sovereign territorial rights of the other relevant States (...) Accordingly, for example, a State’s competence to exercise jurisdiction over its own nationals abroad is subordinate to that State’s and other States’ territorial competence. 117

In the *Palestinian Wall* opinion, the International Court of Justice has also noted that jurisdiction ‘is primarily territorial’. 118 The same hierarchy is implied in the European Convention on Nationality, which determines that dual nationals are required to perform military service in the State where they are habitually resident. 119 The *Institut De Droit International* has also proposed the precedence of territorial jurisdiction over other grounds of

116 Ryngaert (n 105) 9.
117 Bankovic and Others v Belgium and Others [2001] ECHR 890, paras 59-60.
118 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] ICJ Rep 136, para 112.
jurisdiction when there is no clear reason to prefer one of the conflicting laws.\textsuperscript{120} This hierarchy has been opposed by Ryngaert, who finds that ‘international law of jurisdiction does not seem to prioritize the bases of jurisdiction’.\textsuperscript{121} Instead, it is suggested that a balance of interests test might be used to ascertain whether the principle of non-intervention is infringed in cases where territorial and extraterritorial jurisdiction clash.\textsuperscript{122} The argument against hierarchy is based on the case of Laker Airways Ltd v Sabena, in which the D.C. Circuit Court went out of its way to stress that [c]oncurrent jurisdiction does not necessarily entail conflicting jurisdiction.\textsuperscript{123} The politically sensitive case involved a UK injunction restraining Laker, a UK airline in liquidation, from bringing a claim before a US Court. The Court found itself faced with the injunction on the one hand and its own obligation to apply US law. It dismissed a rule granting priority to US territorial jurisdiction over UK’s extraterritorial injunction. In the end, however, it allowed the case proceed in the US, finding that the facts did not allow it to halt proceedings on the grounds of international comity and therefore US domestic law had to be applied. It is submitted that this case does not refute a hierarchy between territorial and extraterritorial jurisdiction. Instead, it should be understood as deferring conflicts of jurisdiction to the executive branch, in the absence of which priority

\textsuperscript{120} Institut De Droit International, ‘The Duality of the Nationality Principle and the Domicile Principle’ (Session of Cairo, 19 September 1987) artt A(2), B(7)(a).

\textsuperscript{121} Ryngaert (n 105) 145.

\textsuperscript{122} ibid 156. The balance of interest test would entail weighing the interests of the state that asserts jurisdiction against the other state’s concerns of interference. Inspiration for such a test is found in §403 US Restatement (Third) of Foreign Relations Law as applied in F. Hoffmann-La Roche v Empagran (2004) 542 US 155. In that case, the US Supreme Court found that US it is to be assumed that Congress takes ‘the legitimate sovereign interests of other nations into account’ when assessing the reach of US law, and avoids extending this reach when such would create a ‘serious risk of interference with a foreign nation’s ability independently to regulate its own commercial affairs’.

\textsuperscript{123} Laker Airways Ltd v Sabena, 731 F.2d 909, 952 (D.C. Cir. 1984).
is granted to the US territorial jurisdiction when considerations of international comity do not come into play.\textsuperscript{124}

The exercise of personal jurisdiction constitutes an important prerogative tied to nationality under international law. The exercise of jurisdiction based on a personal nexus means that delimiting nationality is delimiting sovereignty. Absent clear customary rules of international law, the power of States to assert their legislation abroad under international law as it stands is limited mainly by the predilection of domestic legislatures. Yet, where domestic legislative action is taken and territorial and extraterritorial jurisdiction clash, the home team wins.

\textbf{2.2. THE PROTECTION OF NATIONALS}

The most important consequence of nationality on the international plane is the prerogative of a state to protect its nationals when other States harm them.\textsuperscript{125} This right of protection will be split into the accepted right to exercise diplomatic protection (a) and the controversial forcible protection of nationals abroad (b).

\textbf{A. DIPLOMATIC PROTECTION}

In its \textit{Diallo} judgment, the ICJ cited\textsuperscript{126} the ILC’s Draft Articles on Diplomatic Protection, which provide that

\begin{quote}
[d]iplomatic protection is the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal
\end{quote}

\textsuperscript{124} Monroe Leigh, ‘\textit{Laker Airways Ltd v Sabena, 731 F.2d 909’} (1984) 78 AJIL 666.

\textsuperscript{125} Boll (n 85) 114.

\textsuperscript{126} Case concerning Ahmadou Sadio Diallo (Guinee v DRC) (Preliminary Objections) [2007] ICJ Rep 582, para 39.
person that is a national of the former State with a view to the implementation of such responsibility.\textsuperscript{127}

The right of States to exercise diplomatic protection is grounded in the legal fiction, articulated in the \textit{Mavromatis case}, that ‘taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights - its right to ensure, in the person of its subjects, respect for the rules of international law’.\textsuperscript{128} While the development of international human rights law has made a dent in the function of diplomatic protection as the exclusive means for individuals to bring claims before international Courts, it ‘remains an indispensable instrument for restricting the arbitrary treatment of foreign nationals by a State’.\textsuperscript{129} States are not obliged to exercise diplomatic protection on behalf of their nationals but many constitutions oblige the State to do so.\textsuperscript{130} Diplomatic protection can be exercised through judicial proceedings or by resort to diplomatic action, including but not limited to negotiation, protest, mediation, request for an inquiry, severance of diplomatic relations, countermeasures and economic pressure.\textsuperscript{131} The ILC’s Draft Articles draw the line at the use of force and stipulate that the exercise of diplomatic protection will always remain within the realm of peaceful settlement.\textsuperscript{132} Diplomatic protection should also be distinguished from consular protection, which aims at the protection of individual interests rather than those of the State and is ‘designed to remedy an internationally wrongful act that has been committed while consular

\textsuperscript{127} Draft Articles on Diplomatic Protection (n 90) art 1.
\textsuperscript{128} Case of The Mavromatis Palestine Concessions (Greece v United Kingdom) [1924] PCIJ Series A No 2, 2.
\textsuperscript{129} Hailbronner (n 27) 72-73.
\textsuperscript{130} John Dugard, ‘Diplomatic Protection’ (2009) MPEPIL, paras 13-16.
\textsuperscript{131} ibid, paras 68-73.
\textsuperscript{132} Draft Articles on Diplomatic Protection (n 90) art 1.
assistance (...) mainly aims at preventing the national from being subjected to an internationally wrongful act'.

Nationality, acquired by birth, descent or lawful naturalization is a requirement sine qua non for States to exercise protection on behalf of an individual. The ILC’s Special Rapporteur on the topic of diplomatic protection determined that, in light of the consistent and long-standing practice and legal opinion, states cannot extend their protection to or espouse claims of non-nationals. Exception to this rule is limited to stateless persons and recognized refugees residing lawfully in the territory of the state that exercises protection. In situations of dual nationality, the exercise of diplomatic protection by the state of nationality on behalf of its national against another state whose nationality that individual equally possesses was traditionally prohibited. However, it is now accepted that in cases of dual nationality, the State whose nationality can be determined as ‘dominant’ or ‘effective’ in relation the dual national, may bring a claim against the other State of nationality but not the other way around. For the purpose of exercising diplomatic protection, nationality should also be ‘continuous’, meaning that status as a national its should exist from the date of the imputed injury to the date of the official presentation of the claim. In contrast to the Nottebohm judgment, the ILC’s Draft articles do not find that customary law requires a bond of nationality to reflect a genuine link in order for States to extend diplomatic protection. An ILA Report similarly concludes that

133 Draft Articles on Diplomatic Protection with Commentaries (n 90) 27.
134 Nottebohm (n 30) 23; Dugard (n 68) para 95.
135 Draft Articles on Diplomatic Protection (n 90) art 8; Dugard (n 130) paras 47-52.
136 HCNL (n 22) art 4.
137 Draft Articles on Diplomatic Protection (n 90) art 7; Hailbronner (n 27) 76-78.
138 Draft Articles on Diplomatic Protection (n 90) art 5.
139 Draft Articles on Diplomatic Protection with Commentaries (n 90) 32-33.
the link of nationality has lost to an extent its rigor in the context of international claims. Moreover, to the extent that the intervention of the State is reduced or eliminated as a requirement for submission of international claims, the link of nationality will lose somewhat its relevance.\footnote{The Changing Law of Nationality of Claims (2000) 69 International Law Association Reports of Conferences 604, 638.}

**B. THE FORCIBLE PROTECTION OF FOREIGN NATIONALS ABROAD**

A more far-reaching prerogative related to the protection of its nationals is the capacity of states to use force in order to protect nationals abroad.

The right of states to protect their nationals existed in customary law predating the UN charter and was defined authoritatively by WALDOCK, who subjected its invocation to three cumulative conditions: (i) the existence of an imminent threat of injury to nationals, (ii) a failure or inability of the territorial state to protect these nationals and (iii) the strict limitation of forcible action to the object of protecting nationals.\footnote{Humphrey M Waldock, 'The Regulation of the Use of Force by Individual States in International Law' (1952) 81 Recueil des Cours 467.} The adoption of the UN Charter is widely understood to have supplanted such pre-existing custom by the closed system of articles 2(4) and 51 of the UN Charter, which limit state discretion in resorting to armed conflict in international relations to instances of self-defense in following an armed attack.\footnote{Tom Ruys, ‘Armed Attack’ and Article 51 of the UN Charter (CUP 2011) 7-19.} The debate on the protection of nationals abroad doctrine (PNA) has centered on the proof of customary law in the post-Charter era and the legal basis of such a right,\footnote{For an overview see Natalino Ronzitti, Rescuing Nationals Abroad Through Military Coercion and Intervention on the Grounds of Humanity (Nijhoff 1985) 26-62; Thomas C Wingfield, ‘Forcible Protection of Nationals Abroad’ (2000) 104 Dickinson Law Review 439.} with a wide range
of grounds proposed by an even greater number of authors.\textsuperscript{144} The predominating view is to regard the PNA doctrine as an emanation of the right to self-defense, implying that nationals may be the subjects of an armed attack under article 51 of the UN Charter.\textsuperscript{145} Thorough analysis has revealed that PNA doctrine is negatively viewed by many states, not in the least due to the many instances when the rationale of protecting nationals has served as a pretext for intervention.\textsuperscript{146} While PNA motives continue to raise eyebrows, two attempts have been made to save the doctrine from the scrapheap of international law.

The first attempt has been to define a narrower rule, which would escape the hostility of some states. Judge Greenwood, writing extra-curially, argues that:

\begin{quote}
an attack of sufficient violence upon a substantial number of a State’s nationals, especially where those nationals are selected as victims \textit{on account of their nationality} and, in particular, where they are attacked in order to harm, or put pressure upon, their State of nationality, is a more serious assault upon the State than some forms of attack upon its territory. Thus the rescue of nationals abroad
\end{quote}

\begin{flushright}
\textsuperscript{144} Tom Ruys, ‘The “Protection of Nationals” Doctrine Revisited’ (2008) 13 Journal of Conflict and Security Law 233, 236-237. The PNA doctrine has been defended on the grounds that (a) it does not constitute a use of force in the sense of art. 2(4) of the UN Charter, (b) it expresses a customary rule which did not cease to exist after the adoption of the UN Charter, (c) it is an exception based on a ‘state of necessity’, (d) it is an expression of a broader notion of humanitarian intervention and (e) it constitutes an autonomous, customary exception to art. 2(4) UN Charter separate from art. 51 UN Charter.
\textsuperscript{146} Ruys, ‘The “Protection of Nationals” Doctrine Revisited’ (n 144) 259-263.
\end{flushright}
may well fall within the ambit of the right of self-defence, where the territorial State itself is unable or unwilling to act.\textsuperscript{147}

Similarly, Dinstein observes that

the protection of nationals abroad can be looked upon as protection of the State (...) if the attack against (...) nationals is mounted primarily \textit{because of their link of nationality} (...).\textsuperscript{148}

The 2016 Conference Report of the ILA’s Committee on the Use of Force states that

armed attacks can include actions outside the victim state's territory, although there is disagreement whether attacks against the nationals of a state are included. The view that they are is stronger if it is clear that the nationals have been attacked directly as a \textit{result of their nationality} and are seen by their attackers as individual manifestations of their state\textsuperscript{149}

The PNA-doctrine is thus narrowed down to describe instances where States act in self-defense upon an armed attack on its nationals when the attacking State has attacked these nationals precisely because of their nationality, in order to extract concessions from the State of nationality. Such an \textit{animus} seems to fit well with hostage situations, epitomized by the Entebbe raid, which explicitly target the hostages’ home State, and seem to be tolerated more than large-scale interventions.\textsuperscript{150} Nevertheless, it has been argued that instead of providing a

\begin{footnotes}
\item[147] Greenwood (n 145) para 24 (emphasis added).
\item[148] Dinstein (n 145) 218, 258 (emphasis added).
\item[149] Use of Force (2016) 77 International Law Association Reports of Conferences 248, 266 (emphasis added).
\item[150] Dinstein (n 145) 257-258.
\end{footnotes}
permissive rule, ambivalence in regard to forcible hostage rescue is more likely reflective of a willingness to tolerate its illegality.\textsuperscript{151}

Another avenue of support for the PNA doctrine is found in the proliferation of non-combatant evacuation operations (NEO) in the military manuals of different States.\textsuperscript{152} NEO’s can be conducted in ‘permissive’ environments, implying host nation support, or in hostile environments, where the host nation is either unable to support the evacuation or is ‘obstructive’ to that end.\textsuperscript{153} Where host nation consent is lacking, NEO’s are justified either as an ‘exception to the scope of the prohibition on the use of force’ or in terms of self-defense, meaning that the strict requirements of proportionality, necessity and notification and follow-up by Security Council need to be observed.\textsuperscript{154} Manuals may specify that such operations be conducted without the ‘intent to use force’.\textsuperscript{155} It is therefore implied that NEO operations can remain outside the scope of the prohibition on the use of force if no actual fighting occurs. Yet, this contradicts the accepted approach to Article 2(4) of the UN Charter, which includes all forcible measures on the territory and without the consent of the other state.\textsuperscript{156} An

\textsuperscript{151} Ruys, ‘The “Protection of Nationals” Doctrine Revisited’ (n 144) 270.
\textsuperscript{153} Ruys, ‘The “Protection of Nationals” Doctrine Revisited’ (n 144) 265.
\textsuperscript{154} Mareike Nürnberg and David Schenk, ‘Deployment of Soldiers for the Protection of Nationals Abroad and Inner-State Justification: The German Federal Constitutional Court Decision on the Operation of German Military in Libya’ (2016) 59 German Yearbook of International Law 517, 524-528.
argument based on the intention of not using of force would moreover fall apart upon first contact with hostile actors on foreign soil obstructing the evacuation effort. The main problem with the basis of self-defense is the armed attack requirement. In addition to whether a State’s nationals can qualify as targets of armed attack, it is not clear whether armed attacks can emanate from non-state actors in cases where the territorial state is unable to prevent such attack. Also, questions remain as to whether there is a de-minimis threshold of violence and whether a rule exists requiring the exhaustion of non-forcible means.\textsuperscript{157} Manuals often stress that forcible action can only be undertaken after diplomatic efforts have failed and when Security Council authorization cannot be expected (in time). This suggests that NEO’s are to be regarded as last-resort measures. Many operations have also been conducted on the basis of a threat to nationals following civil unrest, without a threat of attack emanating from the territorial state. Therefore, it seems that NEO’s are predicated on the assumption that non-state actors may mount an armed attack in the sense of article 51 of the Charter and that pure threats suffice, challenging a de-minimis threshold.

Actual practice in recent years has failed to provide clear answers. The Arab Spring uprisings prompted numerous countries to launch civil and military NEO’s.\textsuperscript{158} China joined the ranks of States conducting NEO’s by evacuating more than 35,500 nationals from Libya in an operation including elements of its armed forces, without host nation consent or Security Council approval and justifying its action on the ground of its duty to protect citizens of 9 April 1949 (1949) ICJ Reports 33-35.

\textsuperscript{157} Ruys, \textit{Armed Attack} (n 142) 485-502.

abroad. Reports of Chinese nationals and businesses being attacked by armed gangs lead
president Hu Jintao to order his government to ‘spare no efforts to ensure the safety of life and
properties of Chinese citizens in Libya’. The German armed forces airlifted its nationals out
of Libya in 2011 without consent of the territorial State, leading to a case before the
Constitutional Court, which determined that the mission constituted a ‘deployment of armed
forces’ under German Law, since it went beyond self-defense purposes in the strict sense. Commentators noted that this operation went ahead ‘without the intent to use force’ and was
only geared towards evacuating nationals. The UK also ordered Special Forces to evacuate its citizens from Libya without host nation consent. The UK even coordinated with anti-
Gaddafi forces and private contractors on the ground in order to secure airfields and exchanged gunfire during the operation. The Dutch also launched a military operation
resulting in the capture and trial of three marines by the Libyan government, a situation,
which the Dutch government conceded was within the rights of the Libyans. The conflict in
Yemen provided another occasion for the evacuations of nationals. The Chinese Navy preventively evacuated foreign nationals alongside its own in 2015, inspiring China’s third

159 Shaio H Zerba, ‘China’s Libya Evacuation Operation: a new diplomatic imperative—
162 Nürnberg & Schenk (n 154) 531.
164 Grimal & Melling (n 163) 545-546 (at note 21).
highest grossing film ever.\textsuperscript{165} India conducted its first NEO following the crisis in Yemen\textsuperscript{166} and is developing a NEO doctrine foreseeing the involvement of military elements and hostile environments.\textsuperscript{167} Japanese armed forces in 2016 evacuated nationals from South Sudan who were ‘trapped in the fighting’ around the capital.\textsuperscript{168} These examples involve the use of armed forces to evacuate nationals from the territory of another state without consent in the case of Libya and unclear consent in the case of Yemen. They are justified on the basis of preventing harm to nationals, absent an armed attack, and if so, emanating from non-state actors.

It is clear that the PNA-doctrine remains stranded between the stringent requirements of customary international law and the reality of state’s willingness to intervene in order to safeguard its nationals.\textsuperscript{169} The spread of the NEO and the fact that states are ready and willing to use military force, even if this challenges the Charter framework, highlights the ‘divergence of pragmatic practice from pure theory’.\textsuperscript{170} Paradoxically, while NEO’s elicit less protest,

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{165} X, 'Success of 'Operation Red Sea' echoes Yemen rescue mission’ (Xinhua News, 14 March 2018) <www.chinadaily.com.cn/a/201803/14/WS5aa89339a3106e7dcc141963.html> accessed 3 May 2018.
\item \textsuperscript{166} Ishaan Tharoor, ‘India leads rescue of foreign nationals, including Americans, trapped in Yemen’ (Washington Post, 8 April 2015) <www.washingtonpost.com/news/worldviews/wp/2015/04/08/india-leads-rescue-of-foreign-nationals-including-americans-trapped-in-yemen/?utm_term=.8c1c49ac077e> accessed 3 May 2018.
\item \textsuperscript{169} Dinstein (n 145).
\item \textsuperscript{170} Thomas M Franck, \textit{Recourse to Force: State Action against Threats and Armed Attacks} (CUP 2002) 96.
\end{enumerate}
\end{footnotesize}
large-scale operations following actual attacks on civilians at the hands of a territorial State fit better with the *jus ad bellum* framework.\(^{171}\) Small-scale evacuations often consist of incursions by armed forces without consent of the territorial State and with the motivation of preventively removing nationals from uncertain harm at the hands of unidentified aggressors. In contrast, large-scale operations are typically launched in response to threats or violence of greater import while also providing more instances of abuse. Yet, criticism directed at such cases has focused on the disproportional or unnecessary character of those operations rather than the legitimacy of the rationale itself.\(^{172}\) Interestingly, Panama, a State that was the scene for one of the most salient examples of abuse of the PNA doctrine, joins this point of view.\(^{173}\) An effort to narrow PNA to instances where nationals are targeted precisely for their nationality further restricts the scope of application and may well reflect a rule deserving of greater acceptance, especially when the conditions of proportionality and necessity are emphasized.\(^{174}\) Therefore, while questioning its validity *de lege lata*, the working hypothesis for this dissertation is that the use of force to protect nationals abroad is permissible as an exercise of self-defense following an armed attack against nationals in cases where these nationals have been subjected to harm because of their nationality.

\(^{171}\) Grimal & Melling (n 163) 550-551.


\(^{173}\) Record of UNSC Meeting 5953 (10 August 2008) UN Doc S/PV.5953, 15.

3. INTERNATIONAL LAW AND NATURALIZATION

Nationality is conferred either at birth, through the operation of rules governing the ‘original’ acquisition of nationality, or later in life, through ‘derivative’ acquisition of nationality. The original mode of acquisition finds expression in the rules of jus soli and jus sanguinis, by which newborns acquire either the nationality of the place where they are born or that of its parents. For the purpose of this dissertation, the rules governing naturalization must be analyzed further. After delimiting the concept of naturalization under international law (3.1) and the general limitations on States’ freedom to confer nationality, (3.2) concrete rules concerning extraterritorial naturalization are identified (3.3) which serve as the normative standard for gauging the particular instances of passportization described in the second part.

3.1. DEFINING NATURALIZATION

Naturalization is a mode of derivative acquisition of nationality based on the expressed will of an individual to obtain a state’s nationality or through the operation of a law. An example of naturalization by virtue of the law is found in cases of state succession, where residents of the predecessor state automatically receive the nationality of the successor State. Instances of individuals receiving the nationality of a conferring State by virtue of the operation of a law, applicable to an indeterminate number of cases is referred to as collective naturalization. Individual naturalization may require the renunciation of prior nationality, a residency requirement, wealth standards, proof of socialization, merit in academics or sports and affinity-

175 Peters (n 80) 627.
176 For an overview of international norms governing original modes of nationality acquisition, see Hailbronner (n 27) 54-58.
178 ibid, para 12-15.
179 Peters (n 80) 628.
based requirements such as cultural, religious or linguistic ties.\textsuperscript{180} The ICJ held in \textit{Nottebohm} that ‘[n]aturalization is not a matter to be taken lightly (...) It involves his breaking of a bond of allegiance and his establishment of a new bond of allegiance’.\textsuperscript{181} Yet, ‘state practice has been very generous in recognising (...) criteria for the conferment of nationality’.\textsuperscript{182} On the basis of such criteria, a distinction can be made between ordinary naturalization that applies generally to foreign residents and preferential naturalization schemes that target particular groups of people such as ethnic diasporas abroad.\textsuperscript{183} While the wide variety in national legislation hints at the fact that international law provides little guidance on the question of naturalization, some restrictions have crystallized over time.

\textbf{3.2. THE LIMITATIONS ON THE NATURALIZATION POWER OF STATES}

\textbf{A. THE REQUIREMENT OF CONSENT}

The definition of naturalization as the acquisition of nationality based on an expressed will of a natural person implies that consent is required in order to constitute to a valid naturalization.

The consent requirement is already included in the 1930 Harvard Draft Convention. The commentaries elucidate that the absence of consent would disregard the interests of the state of nationality of the individual undergoing forced naturalization, ‘particularly in view of the


\textsuperscript{181} \textit{Nottebohm} (n 30) 20.

\textsuperscript{182} Hailbroner (n 27) 60.

The fact that nationality involves obligations as well as rights or privileges. The commentary to the Draft Convention points at state practice of the US and several European States protesting against broad naturalization laws of some South-American states in the early 20th century. These states imposed their nationality ex lege on the grounds of residence or the acquisition of real property and deprived the States of nationality from their right to exercise diplomatic protection. Here, the protest against involuntary naturalization is based on the infringement of the interests of state who sees its national naturalized by the other state. The development of human rights law in the area of nationality gradually reframed the consent requirement as protective of individual liberty. Article 15 of the Universal Declaration of Human Rights proclaims a right to a nationality, to change one’s nationality and prohibits the arbitrary deprivation of nationality. The Inter-American Convention contains a similar provision. Several human rights treaties include rules that protect nationality in various situations. Yet, a general ‘right to nationality’ is not regarded as positive international law. Another expression of the consent requirement is found under International Humanitarian Law, which prohibits an occupying power from imposing its nationality on persons residing in the

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184 Commentary to the Harvard Draft Convention (n 20) 53.
185 Commentary to the Harvard Draft Convention (n 20) 53-55; Spiro (n 84) 175.
189 Hailbronner (n 27) 38.
occupied area. A final ground was provided by the Badinter Arbitral Commission, which held that ‘every individual may choose to belong to whatever ethnic, religious or language community he or she whishes’ and derived this from the principle of self-determination. The requirement of consent may thus be regarded as safeguarding both the interest of the state of nationality and that of the individual and is ingrained in international legal instruments.

As a rule, individual consent is needed in order for nationality, acquired through naturalization, to be regarded valid and opposable under international law. Indeed, ‘naturalizations are illegal under international law if the affected person’s consent is not free and therefore vitiated’. Because nationality gives rise to both rights and obligations, forced naturalization amounts to a unilateral imposition of obligations upon a foreign national and deprives the state of nationality from certain prerogatives. For the same reason, it is also illegal under international law to conscript aliens without their consent. Aside from the protests directed at the broad naturalization laws of Latin America, which were cited earlier, ex lege naturalization by the Nazi regime of persons considered to be ethnic Germans and living in the occupied territories was also considered illegal. The prohibition of compulsory naturalization, i.e. the conferral of nationality against the will of the individual, has since long time been recognized as part of


192 Peters (n 80) 668.


international customary law. As Peters notes, in cases of clear pressure, threat or force there is no discussion as to the involuntariness of naturalizations. Difficulty arises when dealing with imperfect expressions of will or the soft imposition of citizenship by handing out golden passports for investors or enticing foreign citizens with the promise of higher pensions. States may even be obliged to facilitate naturalization for foreigners that have been residing on its territory for a prolonged period.

In sum, collective naturalization is only permissible in those cases where another rule such as the obligation to prevent statelessness takes precedence or where persons affected have an effective right to refuse so as to prevent its qualification as forcible naturalization. The requirement of consent is grounded in both the interests of states to not see their nationals ‘adopted’ by other states and in the safeguard of individual liberty as expressed in various human rights instruments. Further on (3.3) it is described how this balance between sovereign interest and individual will changes when naturalization occurs extraterritorially.

B. THE OBLIGATION TO PREVENT STATELESSNESS

Consent may be weighed against other interests. The obligation to prevent statelessness is one rule that may require states to override the consent requirement and confer nationality. It constitutes an obligation of means that has two main aspects: an obligation to refrain from withdrawing citizenship from persons who would otherwise become stateless and the obligation to facilitate the granting of citizenship to stateless persons. Article 1 of the

195 Weis (n 10) 110; Hailbronner (n 27) 59-60; Koessler (n 26) 74.  
196 ECN (n 119) art 6.  
197 Dahm, Delbrück & Wolfrum (n 177) 49.  
198 Which *ipso facto* has been argued to constitute persecution, citing a number of national decisions, see Maryellen Fullerton, ‘Comparative Perspectives on Statelessness and Persecution’ (2015) 36 Immigration & Nationality Law Review 853.
Convention on the Reduction of Statelessness obliges that States confer nationality only upon stateless persons if these are born in the territory of the contracting State or born from parents holding nationality of the contracting State. The same obligation is echoed in multiple treaties and in Draft articles prepared by the Venice Commission and the ILC. It has also been considered as a rule of customary international law.

The obligation to facilitate the grant of nationality to stateless persons is relevant for the purpose of assessing the legitimacy of large-scale naturalization efforts, as the conferral of nationality upon stateless persons in these cases does not constitute an infringement of the prohibition of forced naturalization. This exception does not apply for stateless persons qualified for nationality in more than one state, in case of which a right to choose exists.

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200 Convention on the Reduction of Statelessness (n 199) artt. 1, 4; ECN (n 119) art 4, 6; CERD (n 188) art 5(iii); CRC (n 188) art 7; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art 24(3); Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW) art 9.
203 ILC Draft Articles on Nationality of Natural Persons in Relation to the Succession of States (n 95) art 11(1).
C. THE PROHIBITION OF DISCRIMINATION

In addition to the prohibition of statelessness, many international human rights instruments include a general prohibition of discrimination or specifically in the context of nationality.

The ICCPR provides that the law ‘shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’.\(^{204}\) There is no reason to assume that this general rule is not applicable to matters of nationality and certain treaties indeed explicitly apply a non-discrimination rule to the question of nationality. For example, article 1(3) the CERD provides that ‘nothing in the Convention may be interpreted as affecting in any way the legal provisions of States parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality’.\(^{205}\) The Committee on the Elimination of Racial Discrimination has added that States should ‘[e]nsure that particular groups of non-citizens are not discriminated against with regard to access to citizenship or naturalization’.\(^{206}\) The Explanatory Report to the European Convention on Nationality explains that while ‘the very nature of the attribution of nationality requires States to fix certain criteria to determine their own nationals’ and this ‘could result, in given cases, in more preferential treatment in the field of nationality’, discrimination on the basis of nationality or ethnic origin is prohibited.\(^{207}\) The Inter-American Court of Human Rights has also stated that

\(^{204}\) ICCPR (n 200) art 26.

\(^{205}\) CERD (n 188) art1(3).


\(^{207}\) ECN (n 119) Art 5. See for
the peremptory legal principle of the equal and effective protection of the law and non-discrimination determines that, when regulating mechanisms for granting nationality, States must abstain from producing regulations that are discriminatory or have discriminatory effects on certain groups of population when exercising their rights.208

The result of the prohibition of discrimination in the context of nationality is that a general exclusions of individuals based on ethnicity or nationality from naturalization is prohibited.209 Yet, cultural, religious and social ties with the naturalizing state are conditions often found in nationality laws and which have been considered as factors in determining the existence of a ‘genuine link’ between individual and naturalizing State.210 In practice, states do distinguish on grounds laid down in general non-discrimination clauses and create provisions allowing for preferential naturalization of certain groups, regardless of residence status.211 For instance, Spain, Portugal and the Nordic Countries (Denmark, Finland, Iceland, Norway and Sweden) grant preferential access to naturalization for persons from, respectively, Hispanic Latin American countries, Portuguese-speaking ex-colonies and other Nordic Countries.212 Former citizens and their descendants are also often granted preferential status, as are speakers of the native language and ‘ethno-cultural relatives’. Consider for example the Sephardic Jews who enjoy preferential naturalization conditions in Spain and ethnic Germans in Eastern Europe who enjoyed special immigration rights upon return to Germany.213 Non-European States,

208 Case of the Girls Yean and Bosico v Dominican Republic (n 65) para 141.
209 Dahm, Delbrück & Wolfrum (n 177) 44-45; see also Brief of International Law Scholars and Nongovernmental Organizations in Support of Respondents in Trump v. Hawaii, 859 F.3d 741 (9th Cir. 2017), cert. granted (U.S. Jan. 19, 2018) (No 17-965).
210 Nottebohm (n 30) 22.
211 Dumbrava (n 183) 47-58.
212 ibid 49.
213 ibid 51.
unconstrained by the ECN or the CERD, often provide for preferential or even automatic naturalization of female spouses upon marriage. In some North-African and Middle-Eastern countries, citizenship is barred for persons afflicted by physical or mental disabilities.214

It is clear that discrimination in terms of access to citizenship is still far from illusory. Indeed, international law leaves some room for preferential treatment of persons that have cultural, religious or ethnic ties to the naturalizing State.215 The prohibition of discrimination in matters of naturalization is the strongest where criteria are based on biological factors such as race.216

3.3. EXTRATERRITORIAL NATURALIZATION

Naturalization usually entails the grant of nationality to a foreign national who has resided on the territory of the naturalizing State for a given number of years. In some cases, states have provide that foreign nationals residing in another State can acquire nationality of the former state, either through an application or collectively, trough the operation of a law. In these cases, naturalization occurs extraterritorially. These instances of extraterritorial naturalizations may be qualified as passportization in certain circumstances. After providing an overview of state practice concerning extraterritorial naturalization (a), a number of principics are distilled which be used to ascertain their legality under positive international law (b) and an interim conclusion is reached as to what the

216 Dumbrava (n 183) 79.
A. TENTATIVE OVERVIEW OF STATE PRACTICE

In the following section, light is shed on the national legislation and policy of various states concerning cross-border naturalization and the accompanying reactions of other states.

It has been observed that the possibility for a citizen of one state to apply for the nationality of another state while remaining resident in the first state typically occurs in three situations. First, states experiencing decolonization often create special provisions for persons residing in former colonial territories. An example is the special status of Commonwealth citizenship that remained after the dissolution of the British Empire. A second scenario is where territorial rearrangements follow state succession or civil war. Examples are the Serbian and Croatian.

\(^{217}\) Peters (n 80)

\(^{218}\) Laurie Fransman, ‘Commonwealth, Subjects and Nationality Rules’ (2009) MPEPIL.

\(^{219}\) Article 23 of Law on Citizenship of the Republic of Serbia (Zakon o Državljanstvu Republike Srbije), 2004, Official Gazette No 35/04 (translation by Yugoslav Survey, 2008) \(<www.refworld.org/docid/4b56d0542.html>\) accessed 30 April 2018. The article reads: ‘[Para 1] A member of Serbian or another nation or ethnic group from the territory of the Republic of Serbia, who is not residing in the territory of the Republic of Serbia, can be admitted to citizenship of the Republic of Serbia if he is 18 years old and if he is not deprived of working capacity and if he submits a written statement considering the Republic of Serbia his own state. [Para 2] Subject to conditions defined in the para. 1 of this Article, a person born in another republic of the former Social Federal Republic of Yugoslavia who had citizenship of that republic or is citizen of another state created in the territory of former SFRY, who residing in the territory of the Republic of Serbia as a refugee, expatriate or displaced person or who exiled abroad, can be admitted to citizenship of the Republic of Serbia.’

nationality laws, which allow extraterritorial naturalization for those persons of Serbian or Croatian ethnicity and have ended up in the various states arising from the former Republic of Yugoslavia. Spanish nationality law facilitates the naturalization of children of exiled compatriots following the Spanish Civil War and the Franco dictatorship. A third scenario concerns those States that have faced large numbers of expulsions or emigration such as Ireland. These laws can all be regarded as measures delivering some sort of restitution for past injustices and ‘have so far not given rise to mass naturalizations and have not caused major international tensions’.

Extraterritorial naturalization may also be an instrument of a policy designed to bring a state’s diaspora closer to the ‘motherland’. Such policies are mainly observed in the states of the belonging to the Croatian people is determined by previous declarations and belonging to legal transactions, by statements and affiliation in certain public documents, through the protection of rights and promoting the interests of the Croatian people and active participation in the Croatian cultural, scientific and sports associations abroad. Art. 8 (1) point 5 requires ‘that a conclusion can be derived from his or her conduct that he or she is attached to the legal system and customs persisting in the Republic of Croatia and that he or she accepts the Croatian culture.’

221 Art. 20 (1)(b) Spanish Civil Code (Código Civil Español), 24 July 1889, Boletín Oficial del Estado No 206 of 25/7/1889, 249 amended by Act 36/2002 of 8 October 2002, BOE 2002, 35638-35640, in force since 9 January 2003 (translation by Francisco Saffie Gatica, 2010) <www.legislationline.org/download/action/download/id/6580/file/Spain_civil_code_excerpts_on_citizenship_as_of2007_en.pdf> The article reads: ‘[Para 1] The following have the right to opt for Spanish nationality [...] b) Those whose father or mother were Spanish by birth and were born in Spain’. The right of option is limited to children, whereas grandchildren need a residence period of one year in Spain, see Art 22 (2) (f) Spanish Civil Code.

222 Peters (n 80) 632-634.


224 Peters (n 80) 634.
former Soviet space, where forced resettlements have resulted in a mosaic of ethnic groups strewn across regions. A first example is Bulgaria’s citizenship law that provides that any

[p]erson who is not Bulgarian citizen can acquire Bulgarian citizenship by naturalisation, without the presence of the conditions under Art. 12, item 2, 4, 5 and 6 if he meets one of the following requirements:

1. to be of Bulgarian origin (...)\textsuperscript{225}

This provision has garnered suspicion in the light of Bulgaria’s EU accession, since a great number of Moldovan and Ukrainian citizens have made use of the provisions to acquire EU citizenship.\textsuperscript{226} Another state providing for extraterritorial naturalization is Hungary. Its constitution provides that ‘[e]very Hungarian citizen shall have the right to be protected by Hungary during any stay abroad’.\textsuperscript{227} Hungarian law provides two avenues for extraterritorial citizenship. The first concerns the Hungarian Status Act of 2001, by virtue of which a form of quasi-citizenship encompassing cultural, social and health care benefits can be extended to

\textsuperscript{225} Article 15 Law For the Bulgarian Citizenship, promulgated 18 November 1998, last amended 30 April 2010 (unofficial English translation) <www.legislationline.org/download/action/download/id/6269/file/Bulgaria_law_citizenship_1998_am2010_en.pdf> accessed 20 April 2018. This article releases persons of Bulgarian origin from the conditions of residency, language proficiency, income and the release of present citizenship (thus allowing for dual citizenship).

\textsuperscript{226} Peters (n 80) 633.

persons declaring themselves to be of Hungarian nationality who are not Hungarian citizens and who have their residence in the Republic of Croatia, the Federal Republic of Yugoslavia, Romania, the Republic of Slovenia, the Slovak Republic or the Ukraine, and who (a) have lost their Hungarian citizenship for reasons other than voluntary renunciation, and (b) are not in possession of a permit for permanent stay in Hungary.

The certificate, or Hungarian card, does not establish full citizenship which would include full social and political rights but has been described as a ‘veiled form of dual citizenship [...] occasion[ing] allegations of a hidden Hungarian irredentist agenda directed at symbolically reconstructing Greater Hungary’. The law was criticized by Slovakia and Romania, the latter for discriminating on the basis of ethnicity and the extraterritorial character of the law, which constituted a ‘breach of state sovereignty as Romania understood it’. The Venice Commission and the Parliamentary Assembly of the Council of Europe (PACE) directed

231 Iordachi (n 229) 266.
criticism at the law, urging respect for the principles of territorial sovereignty, friendly relations and respect for human rights. While the 2001 Status Act, which had been amended slightly in response to the criticisms directed at it, has become void upon accession to the European Union, the Hungarian parliament amended the law on citizenship in 2010 to make naturalization possible for non-residents. The law provides that

[...] upon request a non-Hungarian citizen whose ascendant was a Hungarian citizen or who is able to substantiate of being of Hungarian origin may be naturalized on preferential terms, if he/she proves that he/she is sufficiently proficient in the Hungarian language.234

The most-affected countries of Serbia and Ukraine have not protested outright against the amendment, because combining their own nationality with EU citizenship is attractive235 and/or prohibited.236 Slovakia has criticised the move publicly, with its Prime Minister labelling it a ‘security threat’.237 The Slovak National Council also passed an amendment to

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235 Peters (n 80) 647.
236 In response to the Hungarian amendment, Ukraine introduced criminal penalties for tardy notification of a new nationality, see Monika Ganczer, ‘Hungarians outside Hungary – the twisted story of dual citizenship in Central and Eastern Europe’ (Verfassungsblog, 8 October 2014) <www.verfassungsblog.de/hungarians-outside-hungary-twisted-story-dual-citizenship-central-eastern-europe/> accessed 30 April 2018.
the Slovak Citizenship Act, according to which persons automatically lose their Slovak citizenship upon the voluntary acquisition of another nationality. This retaliatory law was challenged unsuccessfully before the ECtHR, which did not find that operation of the law led to arbitrary withdrawal of citizenship for dual Hungarian-Slovakian nationals and thus affirms the power of states to determine that the voluntary acquisition of another nationality may be a ground for the automatic loss of prior citizenship.

Another example is Romania, which adopted a citizenship law in 1991 that provides for the ‘restitution’ of Romanian citizenship for former Romanian citizens and their descendants, and allows Romanians to apply for naturalization without an intention to take up residence abroad. The law broke with Romanian legal tradition since it allows dual citizenship and enables individuals to gain citizenship while holding and maintaining residence abroad. In contrast to the Hungarian naturalization provision, which is limited to persons ‘of Hungarian origin’, the Romanian law does not include an ethnic requirement. The law was officially motivated by the need to remedy past injustices such as the annexation by the Soviets of areas currently part of Moldova and Ukraine but was ‘also animated by implicit nationalist motivations’ and a ‘strategy aimed at reuniting Romania and Moldova’. The law of 1991 was amended in 2010 and provides that

Romanian citizenship can also be granted to persons who have lost this citizenship, as well as to their descendants to the second degree inclusively and

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239 Fehér and Dolnik v Slovakia App nos 14927/12 and 30415/12 (ECtHR 21 May 2013).
240 Iordachi (n 229) 244.
241 ibid (n 229) 268.
242 ibid (n 229) 245-246.
who request its reacquisition while maintaining the foreign citizenship and establishing their residence in the country or maintaining it abroad (...).  

The persons who acquired the Romanian citizenship by birth or adoption and have lost it for reasons non-imputable to them or this citizenship has been revoked without their consent, as well as their descendants to the third degree, can apply to reacquire or can be granted the Romanian citizenship, having the possibility to maintain the foreign citizenship and to establish their residence in the country or to maintain it abroad (...).

Romania’s easy citizenship primarily affects Moldova and Ukraine, and both countries have protested against the law. In late 1990’s and early 2000’s, Moldovans applied en masse for Romanian citizenship, motivated by Romania’s looming EU membership and the promise of free travel in the Union. Moldova, which, according to unofficial estimates now counts half a million Moldova-Romanian dual citizens among its population, has criticized Romania’s policy as ‘undermining the national security and the principles of state’. Romania’s extraterritorial conferral of citizenship was cited by the French Minister for EU affairs as an

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244 Article 11 Law no 21 of 1 March 1991 regarding Romanian Citizenship.


obstacle to full EU accession for Romania. The EU itself relayed ‘serious concerns of the possible risks arising from adopting simplified procedures for Romanian citizenship’ in response to the planned amendment of 2010. Romania was also accused by Ukraine, which prohibits dual nationality, of conducting a policy of ‘creeping expansion’ with the final aim of ‘reacquiring Northern Bukovina and Southern Bessarabia’, with Kiev speculating on the possibility that, on the eve of Romania’s EU accession, a critical mass of Ukrainian-Romanian citizens in the border area might hold a referendum to join Romania.

Aside from these examples, the countries of Albania, Estonia, Germany, Greece, Latvia, Lithuania, Macedonia, Portugal, Slovenia, Switzerland and Turkey all provide for the preferential naturalization of ethno-cultural relatives and/or descendants of (former) nationals with exceptions on the residency requirement. In the second part of this dissertation, further state practice in the context of Russia’s passportization policies will be covered in detail. The extraterritorial conferral of citizenship based on ethnicity or cultural affinity without residency requirements seems to be largely limited to the European context, with States such as Israel and Brazil providing for facilitated access yet still retaining a minimal residency requirement or intention to settle in the territory of the naturalizing State.

250 Iordachi (n 229) 255-256.
251 Dumbrava (n 183) 58.
The examples described above should be carefully distinguished from instances where extraterritoriality arises from territorial disputes. In such cases, the qualification of a policy as extraterritorial naturalization is predicated on the assumption that two different State exists, where this might not be the case. Thus, when Cypriot nationality is extended to persons living in the Northern part, this is not an instance of extraterritorial conferral of citizenship, since recognition of the Turkish Republic of Cyprus (TRNC) is unlawful and does not constitute a State from the perspective of international law. Similarly, a ‘single German citizenship’ based on a 1913 law was argued to dormant during the partition of Germany from 1945-1990 and as such, any naturalizations undertaken by East Germany, under its 1967 citizenship law, was found to be inconsequential upon re-unification in 1990. These instances of ‘illusive extraterritoriality’ are instructive insofar as they highlight the need to confirm the stately nature of entity affected by naturalization efforts.

This tentative overview of state practice has made clear that extraterritorial naturalization is a widespread phenomenon in central and eastern European states. In fact, many states benefit from acquiescing to the acquisition of another nationality by their citizens when this allows them to work in the European Union and in turn may deliver remittance flows. On the other hand, Slovkia, Moldova and Ukraine have all protested law on grounds of security or as emanations of expansionist policies, revealing the sensitivity of states confronted with the acquisition of foreign citizenship by their nationals, even when there is nothing to suggest this

255 Peters (n 80) 652-653.
did not occur voluntarily. The limited practice described in this section, however, does not seem to suggest that states regard the adoption of these laws as contrary to international law, but that protest occurs when ulterior motives, threatening the state, are suspected. In the following section, a number of relevant principles are discussed which may inform a more substantiated position.

B. PRINCIPLES OF EXTRATERRITORIAL NATURALIZATION

At the outset, it should be noted that the consent requirement, the prohibition of discrimination and the obligation to prevent statelessness apply equally in a transboundary context. As an example, racial discrimination in naturalization practice is equally prohibited if the affected individual resides on the territory of the naturalizing State or is a national of another State residing abroad. Human rights norms are geared towards the protection of individuals and as a result are not modified substantively by a transboundary context. Other rules protect both individual and state interest. An example is requirement of consent, which safeguards both individual freedom but is also based on legitimate concerns the state of nationality not to be deprived of its nationals.256 Finally, a number of principles directed exclusively at the protection of state interests apply in cases of extraterritorial naturalization. In the following, such principles are discussed as a basis for the prohibition of passportization.

(I) SELF-PRESERVATION AND THE LOSS OF NATIONALS

While not constituting a legal norm, the most fundamental interest of any state is that of self-preservation. One of the broadly accepted requirements of statehood, as codified in the 1933 Montevideo Convention, is that of a permanent population.257 By virtue of extraterritorial naturalization, the naturalizing state enlarges its population. This either results in a net loss in

256 ECN (n 119) recital 4 of the preamble.
257 Montevideo Convention (n 100) art 1.
population for another state or may give rise to a situation of dual citizenship, depending on the interplay of both citizenship laws. The importance of a state’s population as a precondition of statehood makes it so that the extraterritorial naturalization of another state’s nationals resulting in a net loss will infringe on the interest of the latter state in preserving its statehood. Where dual citizenship arises, the first state of nationality will see its link to its national weakened, as rights and obligations resulting from the second nationality will apply equally to the dual national in the absence of a dual nationality treaty between the two states. A state does not have the duty to tolerate dual citizenship and it may avoid it by denationalizing individuals that voluntarily acquire another nationality. Yet, the impact of extraterritorial naturalization will lead to a choice forced upon the former state of nationality to either allow dual citizenship or to cut its nationals loose, which will either weakens its citizenship or diminish its population base all the same. Due to the emphasis of international (human rights) law of individual interests over those of states, an infringement of a ‘state’s sovereignty over its nationals’ has lost in salience compared to violations relating to territory or political independence, which constitute the other pillars of statehood. The principle of non-intervention may therefore provide a better vehicle for describing the problem.

(II) EXTRATERRITORIAL NATURALIZATION AS INTERVENTION

The non-intervention principle provides guidance in cases where one state, by virtue of extraterritorial naturalization and accompanying jurisdiction violates another state’s territorial sovereignty. The Friendly Relations Declaration provides a ‘duty not to intervene in matters within the domestic jurisdiction of any State’ and clarifies that

258 Peters (n 80) 671.
No State may use or encourage the use of economic political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind.

(...)

Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State.  

In the Nicaragua Case, the ICJ affirmed that intervention is prohibited if it bears on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones.  

While the precise content of the principle is often described as elusive, non-intervention builds on two main aspects: territorial integrity, which prohibits certain actions on foreign soil, and political independence, which prohibits the interference in a state’s domestic affairs.  

In addition, the Nicaragua judgment makes clear that interference must also involve coercive means. In regard of the first aspect, the question arises whether extraterritorial naturalization interferes with another state’s domestic affairs. In principle, the naturalizing

state remains within its sovereign power when it determines that non-resident individual may acquire its citizenship. Yet it is clear that a conflict does arise where the naturalization of another state’s national residing within the first state results in a situation of dual citizenship or leads to the automatic loss of that national’s prior nationality. The former state of nationality is confronted with a national who is beholden to a foreign state. In cases where the freedom of two states to determine their ‘political, economic, social and cultural systems, i.e. their jurisdiction, clash, precedence must be given to the State exercising that choice within its own territory. In this respect, the Venice Commission’s report on the Hungarian Status law notes

> When [a] law specifically aims at deploying its effects on foreign citizens in a foreign country, its legitimacy is not so straightforward. It is not conceivable, in fact, that the home State of the individuals concerned should not have a word to say on the matter.

The Venice Commission strikes a similar balance between the legal interests of the territorial state and that of the Kin state and concludes that when

> [unilateral acts] aim at deploying their effects on foreign citizens abroad, in fields that are not covered by treaties or international customs allowing the kin-State to assume the consent of the relevant home-states, such consent should be sought prior to the implementation of any measure.

The non-intervention norm therefore does not prohibit the existence of laws allowing for the acquisition of nationality by individuals residing in another State but takes issue with the

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263 See 2.1
264 Venice Commission (n 232) 16-17.
concrete jurisdictional effects that the acquisition of nationality brings with it. Although the naturalizing State is prevented from enforcing its law abroad, it may, through its prescriptive jurisdiction, extend its legal sphere of influence outside of its own territory. Depending on whether domestic nationality rules allow dual nationality, a state either sees its jurisdiction diminished or diluted, since dual nationals will be subjected to the laws of both states. In this respect, the OSCE’s recommendations regarding national minorities in interstate relations stress that states should abroad should refrain from policies towards it diaspora abroad with the ‘intention or effect of undermining the principles of territorial integrity’ and note that

[states should (...) ensure that such a conferral of citizenship respects the principles of friendly (...) relations and territorial sovereignty, and should refrain from conferring citizenship en masse, even if dual citizenship is allowed by the State of residence.]

The capacity of states to exert jurisdiction constitutes a legally protected interest under public international law since it is considered an aspect of state sovereignty. While the weakening of a claim to statehood through the conduct of another state will in and of itself suffice to render that conduct unlawful, a reduction in population through the prism of lost capacity to exercise jurisdiction, leads Peters to the conclusion that extraterritorial naturalization may constitute ‘personal, as opposed to, territorial, annexation’.

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266 *Lotus Case* (n 16) 18-19
267 Dahm, Delbruck & Wolfrum (n 177) 45.
269 Peters (n 80) 658.
Aside from the capacity to exercise jurisdiction, it should also be noted that nationality invests the naturalizing state with the right to exercise protection. Therefore, a state hosting large numbers of foreign nationals will have to accept that the naturalizing state takes a greater interest and concern in its affairs. When a state acts as a protector of its citizens abroad, this creates political consequences for the receiving state. The naturalizing state also incorporates its new citizens in its electorate, creating conflicts of allegiance. In this respect has been argued that

Larger numbers of multiple nationals may also create difficulties and conflicts in connection with the exercise of the political rights of non-residents and the potential interference of external interests in the political process (...) A guiding principle is supposed to be that primary obligations of dual nationals should be with the state of residence and that state should also serve as a primary protector of the individual.

The resolution of such ‘conflicts of allegiance’ is up to individual states. They have resulted in calls to restrict dual citizenship or legislation prohibiting dual nationality. Again, the fact that states are free to legislate in order to prevent such conflicts does not do away with the interfering character of extraterritorial naturalization. It ultimately impacts the freedom of the affected State to determine its ‘political, economic, social and cultural systems, even if that interference manifests itself in the necessity to legislate in defense of that system.

271 Hailbronner (n 27) 85.
273 See the Slovakian response to the Hungarian ‘Status Law’ (n 237).
Yet, in order to be prohibited under the principle of non-intervention, the interference must also be coercive. Collective extraterritorial naturalization, meaning the conferral of nationality by law to a group of persons residing abroad, will certainly entail an infringement of the non-intervention principle, as individuals are bestowed with another State’s nationality without active consent.\(^{274}\) The commentary to the Harvard Draft Convention makes the point that

\[\text{[i]f State A should attempt, for instance, to naturalize persons who have never had any connection with State A, who have never been within its territory, who have never acted in its territory, who have no relation whatever to any persons who have been its nationals, and who are nationals of other states, it would seem that State A would clearly have gone beyond the limits set by international law. Thus, if State A should attempt to naturalize all persons living outside its territory but within 500 miles of its frontier, it would clearly have passed those limits; or similarly if State A should attempt to naturalize all persons in the world holding a particular political or religious faith or belonging to a particular race.}\(^{275}\)

Weis notes that such extraterritorial naturalizations

\[\text{[are] inconsistent with international law [as] it purports to deprive other states of a number of their nationals, of the right of protection over a number of their subjects. It consists an encroachment upon the personal jurisdiction of these states and must be regarded, if it affects a considerable number of nationals, as an unfriendly or even hostile act against the state of nationality comparable to}\]

\(^{274}\) Dahm, Delbruck & Wolfrum (n 177) 49; Weis (n 10) at 110, noting that naturalising 'all persons living outside the territory but within 500 miles of its frontier [is].

\(^{275}\) Commentary to the Harvard Draft Convention (n 20) 26.
the violation of a state's territorial jurisdiction: it constitutes a threat to peaceful relations and is as such illegal\textsuperscript{276}

The collective naturalization of foreign nationals should therefore be regarded as illegal in all circumstances. Coercive interference is will be harder to establish when individuals acquire the nationality of a foreign voluntarily. However, as described further, the sheer numer of individual applications may warrant an equation of massive voluntary extraterritorial naturalizations with collective ones.

\textit{(III) PASSPORTIZATION, ABUSE OF RIGHTS AND THE RETURN OF THE 'GENUINE LINK'}

States may oppose extraterritorial naturalizations even when these occur on an individual and voluntary basis. The abuse of rights principle prevents the arbitrary exercise of a state’s extraterritorial naturalization power when this causes injury to another state and equally prohibits the exercise of that power when it aims to evade another rule of law.

The abuse of rights ‘refers to a State exercising a right either in a way which impedes the enjoyment by other States of their own rights or for an end different from that for which the right was created, to the injury of another State’.\textsuperscript{277} It also ‘requires [that] every right (...) be exercised honestly and loyally. Any fictitious exercise of a right for the purpose of evading either a rule of law or a contractual obligation will not be tolerated’.\textsuperscript{278} Further, ‘[a]n abuse of rights occurs when a state avails itself of its right in an arbitrary manner in such a way as to inflict upon another state an injury which cannot be justified by a legitimate consideration of

\textsuperscript{276} Weis (n 10) 110.
\textsuperscript{278} Bin Cheng, \textit{General Principles of Law as Applied by International Courts and Tribunals} (Stevens, 1953) 121.
its own advantage’. The principle as applies in three different situations: where one state exercises its rights in a way that hinders the exercise of another state’s rights, to the injury of that state; where a right is exercised intentionally for and end which is different than which the right has been created and in cases where the arbitrary exercise of a right results in injury of another state. The principle denotes situations where States act within their sovereign competences, and do not clearly violate another state’s rights, but ‘interrogates the purpose for which that right has been conferred or recognized by law’. The ICJ’s Nottebohm judgment has been understood as an example of the application of the abuse of rights, consisting of Nottebohm's adoption of Liechtenstein’s nationality to evade the application of rights of Guatemala under the law of war. ‘Even though States have the right to freely determine who their citizens are, they should not abuse this right by violating the principles of sovereignty and friendly (...) relations’. It is submitted that the apparent lack of specific customary rules governing extraterritorial naturalizations justifies the resort to an abstract principle that aims at balancing competing interests where both parties are acting within legal limits. As the ILC’s Special Rapporteur Garcia Amador explains, the purpose of the principle of the abuse of law is one of ‘limiting the exercise of rights which are not always well-defined and precise rules in general international law or in the particular instruments which recognize them’. Lauterpacht, writing in 1933, equally observed that nationality is an area of international law where the abuse of rights doctrine may serve an important role, providing the example of

279 Jennings & Watts (n 87) 407.
280 Kiss (n 277) paras 4-6.
281 Sloane (n 25) 20.
282 Bolzano Recommendations (n 268) 19.
arbitrary denationalization of its citizens residing abroad.\textsuperscript{284} It is argued that this principle may be qualified as a general principle of law.\textsuperscript{285}

1. A FACTUAL LINK AS THE ABSENCE OF ARBITRARINESS

The application of the abuse of rights principle is useful in instances where a state confers its nationality upon a willing foreign national when this leads to the injury of the former state. Article 8 ECN reflects the balancing act between the state of nationality and the naturalizing in stating that ‘States may the refuse the renunciation of nationality when the national is not habitually resident abroad’.\textsuperscript{286} It is submitted that the principle prohibiting the abuse of rights precludes a state from arbitrarily conferring nationality upon foreign nationals resident abroad, defined as the absence of legitimate or appropriate links between the conferring state and the individual, when this causes injury to another states.\textsuperscript{287} This injury can be defined as the weakening of its citizenship or the loss of population described in (i). At the very minimum, states should not be required to tolerate the naturalization of an individual if this naturalization occurs in the absence of legitimate criteria. The use of an adapted genuine link criterion reflects the fact that, as in Nottebohm, a neutral criterion needs to be found in order to balance the interests of two states that have both acted within their sovereign prerogatives. Thus, when factual connections with the naturalizing state are missing, the state of nationality’s refusal to release its national is not arbitrary. Inversely, factual connections should override the former state's opposition provided that the extraterritorial naturalization is

\textsuperscript{284} Hersch Lauterpacht, \textit{The Function of Law in the International Community} (first published 1933, OUP 2011) 308-309.
\textsuperscript{285} UN, Statute of the International Court of Justice (18 April 1946) art 38(1)(c); B O Iluyomade, ‘Scope and Content of a Complaint of Abuse of Right in International Law (1975) 16 Harvard International Law Journal 47, giving an overview of the use of the principle in decisions of the PCIJ and in municipal legislation.
\textsuperscript{286} ECN (n 119) art 8.
\textsuperscript{287} Peters (n 80) 681.
voluntary.\textsuperscript{288} It may be useful to point out that other factors may prevent the finding of arbitrariness, such as when the extraterritorially naturalized person would otherwise be stateless. In practice, establishing what constitutes an appropriate link will be a case-by-case affair. In many cases, extraterritorial naturalization is based on an ethnic or historical relationship, sometimes overlapping with family or religious ties, which cannot simply be dismissed as arbitrary. The example of the Bulgarian citizenship law, which opens up naturalization for every person that self-identifies as being ‘of Bulgarian origin’ does cross the line of arbitrariness, since no practicable objective factors may be relied upon to test such claims.

Furthermore, as Peters and Hailbronner have argued, ‘the larger the groups of persons naturalized are, and the more mass naturalizations upon request resemble formally collective naturalizations, the closer the links between the persons and the naturalizing State must be.’\textsuperscript{289} Pure scale warrants the equation of massive voluntary extraterritorial naturalizations with collective. The OSCE’s Bolzano Recommendations pick up this rule in noting that

\begin{quote}
[t]he conferral of citizenship is generally considered to fall under the exclusive domestic jurisdiction of each individual State and may be based on preferred linguistic competencies as well as on cultural, historical or familial ties. When this involves persons residing abroad, however, it can be a highly sensitive issue. (…) This is particularly likely to happen when citizenship is conferred en masse, i.e. to a specified group of individuals or in substantial numbers relative to the size of the population of the State of residence or one of its territorial subdivisions. States should therefore refrain from granting citizenship without
\end{quote}

\textsuperscript{288} ibid.

\textsuperscript{289} ibid 688; Hailbronner (n 27) 60.
the existence of a genuine link between the State and the individual upon whom it is conferred\textsuperscript{290}

Since the sovereign interests of a state are affected more in relation to the number of people being naturalized by a foreign state, a massive conferral of nationality to willing individuals may at a certain point be equated with prohibited collective naturalization. An abuse of rights-based perspective allows to the scale of the injury to another state in determining the (il)legitimacy of the naturalizing state’s conduct when that conduct, consisting of the facilitation of massive numbers of applications, is legal on its own. This is the most relevant rule in regard to passportization, where the massive adoption of foreign citizenship usually occurs voluntary and applicants may possess the required links with the naturalizing state.

2. ABUSE OF RIGHTS AND INTENTIONAL HARM

Where the abuse of rights principle provides additional protection for the former state of nationality is where such appropriate connections may exists (and thus is not arbitrary) but where the purpose or intent of the extraterritorial naturalization effort is paired with the intent of evading a rule of law or inflicting harm on another state.\textsuperscript{291} As CHENG has argued, ‘[e]very right is the legal protection of a legitimate interest. An alleged exercise of a right not in furtherance of such interest, but with the malicious purpose of injuring others can no longer claim the protection of the law’.\textsuperscript{292} The exercise of a state’s freedom to confer its nationality with malign intent was alluded to by the Mexico-United States General Claims Commission, which pointed to the United States’ conferral of citizenship and subsequent right to diplomatically protect a U.S. national operating in Mexico as demonstrating the legitimacy of the ‘fears of certain nations with respect to abuses of the right of protection (...) and how

\textsuperscript{290} Bolzano Recommendations (n 268)19.  
\textsuperscript{291} Sloane (n 25) 23.  
\textsuperscript{292} Cheng (n 278) 122.
seriously the sovereignty of those nations within their own boundaries would be impaired if some extreme conceptions of this right were recognized and enforced’. 293

This application of the abuse of rights has been brought to bear on Russia’s passportization practice by Natoli, who argues that, in the context of its 2008 intervention in Georgia (see III.2.2), Russia exercised a sovereign right to confer its citizenship in an injurious way vis-a-vis Georgia, by diminishing its legal right to protect that population through diplomatic means. 294 This results from the fact that the state nationality may not exercise diplomatic protection in respect of a person against a State of which that person is also a national when the nationality of the former State is not predominant. 295 In addition, the exercise of the right to protect foreign nationals abroad by force after a legitimate conferral of citizenship upon willing foreign nationals can also be brought under the abuse of rights doctrine. Here, the main difficulty will consist of proving bad faith, which is not to be presumed.

C. CONCLUSION: THE RULES OF THE GAME

In part (1) it was submitted that states are free to determine their nationals and how persons may acquire that status. The limitations on the freedom to confer nationality consist of treaty and general international law and from wider or narrower definitions which nationality may attain in different areas of the law. From the general principles analyzed above, it is possible to distill a number of rules limiting the power of States to confer nationality abroad. The nature of these rules should be understood as the expression of the interplay of the principles

293 North American Dredging Corporation of Texas (US v Mexico) (1926) 4 RIAA 26 as quoted in Cheng (n 278) 129.
295 ILC Draft Articles on Diplomatic Protection with Commentaries (n 90) art 7.
of non-intervention and the abuse rights, as well as the customary prohibition of forcible naturalization and the obligation to prevent statelessness.

1. Collective extraterritorial naturalization is prohibited at all times. States cannot extend their nationality to groups of foreign nationals residing abroad by virtue of national law and without individual consent.

2. Individual extraterritorial naturalization are legitimate, provided they occur voluntarily and non-discriminatory. Nevertheless, these must occur in a non-arbitrary way, meaning that there must be a factual link between the foreign national and the naturalizing state.

3. Large-scale extraterritorial naturalizations are more injurious to state interests and require stronger links. If preferential access to naturalization is provided for defined groups of foreign individuals without sufficient links, this may amount to de-facto collective naturalization.

4. Extraterritorial naturalization of stateless persons residing abroad is legitimate if the territorial state does not extend its nationality to such persons.

5. Any extraterritorial naturalization will be prohibited if the right to confer nationality is excised with intent on injuring the state of nationality of the naturalized individuals.

When the principles underlying these rules are infringed, the penalty will be constituted of the lack of opposability of the resulting nationality. Both the 1930 Hague Convention and the ECN hold that when a state fails to confer nationality in ‘accordance with applicable international conventions, customary international law, and the principles of law generally recognised with regard to nationality’, other states are under no obligation to recognize
nationality so conferred. While a general presumption of international lawfulness exists in regard of of nationality conferred in accordance with a state’s domestic law, it has been argued that such presumption does not apply to the conferral of nationality to non-residents. Arguably, the rationale of that presumption—international comity—should give way when the conferral impacts another state in the same measure. In some cases, the illegality of the extraterritorially conferred nationality could even give rise to an obligation resting upon third states not to recognize it, when it amounts to an ‘important violation’. The ILC’s Draft Articles on state responsibility preserve such the duty of non-recognition to violations of peremptory norms. The non-opposibility of nationality also extends to passports, which constitute prima facie evidence of the bearer’s identity and nationality. As notes, should ‘international tribunals [be] required to treat passports, certificates, government affidavits (...) as more than prima facie evidence of nationality, this would open the door for a state to confer nationality in order to achieve a jurisdictional advantage.

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296 HCNL (n 22) art 1; ECN (n 119) art 3
297 Peters (n 80) 716-718.
298 Wall Opinion (n 118) para 159.
301 Sloane (n 25) 22-23.
III. PASSPORTIZATION IN RUSSIAN PRACTICE

In this part the legal framework will be put to the test by applying it to contemporary Russian practice. First, (1) some essential domestic legal and political context will be provided before (2) applying the rules developed in the first part on three cases of passportization. This part will provide an indication of the adequacy of the principle-based normative framework and provides additional examples of state practice that could support a customary rule.

1. DOMESTIC POLICY AND LEGAL CONTEXT

In the following section, the importance of ‘compatriots’ and citizens abroad in Russia’s foreign policy thinking will be highlighted before looking into Russia’s citizenship law.

1.1. THE COMPATRIOT ISSUE IN RUSSIAN FOREIGN POLICY

The collapse of the Soviet Union left 25 million Russians outside its former borders.\textsuperscript{302} In the ensuing years, the Russian Federation took an expansive view of its role as a successor state and defined its nation as stretching further than its borders. The ‘homeland nationalism’ of as a state with a spatial identity extending beyond its inherited borders means that

its elites imagine residents of other states as co-nationals, part of a single transborder nation, and (...) that this shared nationhood makes the state responsible, in some sense, not only for its own citizens but also for ethnic co-nationals, who live in other states and possess other citizenships.\textsuperscript{303}

In Russia this strand of nationalism was captured early on in rhetoric of Russia as a ‘divided nation’, denoting the fact that millions of nationals or ‘compatriots’ were left outside their mother country.\textsuperscript{304} During the 1990’s Russia relaxed its citizenship rules and promoted dual citizenship in order to mitigate the problem of its stranded expatriate community. This was

\textsuperscript{303} Rogers Brubaker, \textit{Nationalism Reframed - Nationhood and the National Question in the New Europe} (CUP 2010) 5.
met with opposition from the newly independent states of the former Soviet Union (FSU), who regarded this as a threat to their sovereignty. A different course was taken in the mid 1990’s, when Russia developed a policy framework that offered protection to its diaspora abroad. The 1994 policy document of titled ‘The Main Directions of the State Policy of the Russian Federation Towards Compatriots Living Abroad’ declared that ‘the government of the Russian Federation intends to make use of all possible acceptable means under international law to ensure that the rights of its compatriots are not encroached upon’ and was followed by measures which aimed to assist Russian in settling into their new states of residence. In 1999, the law ‘on State policy in respect of Russian compatriots abroad’ was adopted, which defines compatriots as Russian citizens residing abroad, citizens of States that once constituted the former Soviet Union and descendants of those groups.

While Russia struggled to solve its compatriot problem in the nineties, it was able to turn the problem into a useful instrument of Russian foreign policy in the next decade. The policies for protecting compatriots implied that their integration in the new states was now preferred over repatriation. Sergey Karaganov, who would become a presidential advisor from 2001-2013, noted in 1992 that ‘everything must be done to keep Russian speakers in those regions where they live right now. Not only because we cannot afford to welcome large crowds of

308 Compatriot Law of 1999 (n 312) art 4.
309 Laruelle (n 307) 89.
310 Agnia Grigas, Beyond Crimea – The New Russian Empire (Yale University Press 2016) 57-93; Laruelle (n 307) 94.
refugees, but also because we must leave there strings of influence with a further perspective.\textsuperscript{311} In 2010 the compatriot law was amended to broaden its scope to ‘people living outside the borders of the Russian Federation who made a choice in favor of spiritual and cultural connection with Russia and who usually belong to peoples who have historically lived on the territory on the Russian Federation’.\textsuperscript{312} Compatriot status became an ‘act of self-identification’ that is ‘certified by a respective civil society organization or by the person’s activities to promote and preserve the Russian language and culture, or by other evidence which testifies to the person’s spiritual and cultural connection to Russia’.\textsuperscript{313} This is as an effort ‘to conceptualize compatriots as active rather than passive members of the Russian World’ and ‘enables Moscow to define all former Soviet citizens as compatriots, but does not legally require [it] to do so’.\textsuperscript{314}

\textsuperscript{311} Grigas (310) 76.
\textsuperscript{313} Compatriot Law as amended by Federal Law 179-FZ of 23 July 2010 (in Russian) art. 3(2) <www.mid.ru/pereselenie/-/asset_publisher/evI8J0czYac3/content/id/283970> accessed 14 May 2018. The law provides state support to compatriots, including the protection of their interests and the conditions under which they may live as equal citizens in foreign states or return to the RF (art 5)? Compatriots have preferential access to Russian citizenship trough the simplified procedure (art 11), enjoy rights and bear responsibilities on equal footing with citizens of the RF during their stay on the territory of the RF and have access to the voluntary resettlement program of the RF (art 13). It further warns that any discrimination vis-a-vis compatriots will lead to a review of the policy towards countries where such discrimination takes place and may result in measures by the RF to protect the interests of compatriots in accordance with international law (art 14). The law promises support for compatriot organizations [art 16(1)] and protects linguistic, cultural, religious and educational ties to the RF, including media access (artt 17-18). ‘Compatriot commissions’ are designated by the federal government as responsible for policymaking (artt 20-22). The law reserves the right of the RF to provide ‘humanitarian assistance to compatriots in emergency situations’ [16(3)].
\textsuperscript{314} Grigas (310) 90 (citations omitted).
The protection of compatriots abroad is also an important part of the idea of a ‘Russian World’ (Russkiy Mir) or cultural Russian space. In foreign policy terms, it is translated as Russia’s ‘near abroad’—a zone comprised of the FSU States in which Russia considers itself entitled to exercise ‘privileged influence’.\footnote{Demonstrating the sensitivity of such pronouncements, Russia’s accession to the Council of Europe was conditional on its explicit rejection of the concept, see Council of Europe, 
there are the tri-annual World Congress of Compatriots, the Russkiy Mir foundation and the Russia House network, which are all government bodies.  

The protection of compatriots abroad has effectively become an element of state power in order to strengthen Russia’s linguistic and cultural presence and influence over neighboring states.

It is important to see the relation between Russia’s its self-styled role as proud protector of its Russian kin abroad and its objective of remaining the main actor within its ‘privileged sphere of interests’ and its passport policies. The above described policy framework provides flexibility in defining populations over which the Russian state claims patronage. Depending on the situation, Russia may choose to define a population group as compatriots, thereby triggering a number of legal provisions it has taken upon itself vis-a-vis these persons.

1.2. RUSSIAN CITIZENSHIP LAW

While municipal law is irrelevant as a measure of the international legality of state conduct, matters of nationality are greatly dependent on municipal law and procedures. In addition, they provide a useful context for the case studies analyzed further on.

The 1993 Russian Constitution lays down the general framework of nationality and protection of nationals. Article 6 determines that ‘citizenship of the Russian Federation shall be acquired and terminated according to federal law; it shall be one and equal, irrespective of the

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320 Conley & Gerber (n 305) 13.
322 Gerard Toal, Near Abroad – Putin, The West and the Contest of Ukraine and the Caucasus (OUP 2016) 28; Kallas (n 304) 8; Laruelle (n 307).
grounds of acquisition’. Article 62 states that ‘citizen[s] of the Russian Federation may hold the citizenship of a foreign State (dual citizenship) according to federal law or an international agreement of the Russian Federation’ and that ‘possession of foreign citizenship by a citizen of the Russian Federation shall not diminish his (her) rights and freedoms and shall not free him from the obligations stipulated by Russian citizenship, unless otherwise provided for by federal law or an international agreement of the Russian Federation’. Nationals abroad can count on article 61(2) that provides: ‘[th]e Russian Federation shall guarantee to its citizens protection and patronage abroad’. The law on citizenship of 1991, enacted after the election of Yeltsin and just before the break-up of the Soviet Union aimed at providing easy access to Russian citizenship. It granted Russian citizenship on the basis of internal residence registration (the internal Soviet passport or ‘propiska’ system) and made it possible to apply for citizenship upon simple declaration for persons residing in the republics that made up the former Soviet Union. This created an inflow of Russian speaking people returning to the motherland after having emigrated or been resettled during Soviet times. Between 1992 and 2002, more than two million people gained Russian citizenship trough Russian consulates abroad. When Russia signed the 1997 European Convention on Nationality and the stream of Russian repatriates were replaced with labor immigrants from Central Asia, an overhaul of the citizenship law was tabled.

324 ibid.
325 ibid.
The Federal Law No 62-FZ of 2002 forms the backbone of Russia’s nationality legislation and has been heavily amended since its entry into force. It reaffirms the constitution in providing that ‘citizens of the Russian Federation outside the Russian Federation shall be granted protection and assistance by the Russian Federation’. Overall, the new citizenship law restricted and restructured access to citizenship. Acquiring Russian citizenship can be done in two ways: by ‘general order’ (art. 13) and ‘simplified procedure’ (art. 14). Article 13 lays down the general conditions: five years of residency, observance of the constitution, proof of legal means of subsistence, renunciation of prior citizenship (except where dual citizenship treaties apply) and a language requirement. However, in certain cases, a simplified procedure may be followed. Paragraph 1 of article 14 provides that foreign citizens and stateless persons are entitled to file for naturalization in a simplified manner without observing the residency requirement if those persons

a) Have at least one parent who is a Russian citizen and resides on Russian Federation territory

b) Have had USSR citizenship, and having resided and residing in the states that have formed part of the USSR, have not become citizens of these states and as a result remain stateless persons

Article 14(1)(b) provides the possibility of extraterritorial naturalization and was proposed by a member of the Congress of Russian Communities (CRC), a nationalist organization

defending the interests of the Russian expatriate diaspora. Another draft of the law proposed to include the term ‘compatriots’ to describe the former Soviet citizens who would be eligible for Russian citizenship. The government, intent on remaining within the spirit of restricting avenues to citizenship, opposed the inclusion of ‘compatriots’ in the law.\textsuperscript{331} However, multiple changes to the law have eased access to citizenship again. Article 14 has been amended to provide for additional grounds of preferential naturalization, some of which are of particular interest for the present discussion.

The first additional ground determines that foreign citizens residing on the territory of the Russian Federation may apply for naturalization without the residency requirement of five years if they ‘have been born within the territory of the RSFSR and have been citizens of the former USSR’.\textsuperscript{332} Technically, this does not allow extraterritorial naturalization since the persons need to apply for citizenship while on Russian territory. Still, this may be a useful provision for populations of ‘compatriots’ living near the border yet residing outside the Russia Federation. This is especially so since the ‘born within the territory of the RSFSR’ does not equal ‘born in the RSFSR’ and includes all territory that has at one point belonged to the Russian Soviet Federative Socialist Republic. That territory has at one point included most of Kazakhstan, Kyrgyzstan, Turkmenistan, Uzbekistan (as the Kyrgyz and Turkestan Autonomous Soviet Socialist Republics, part of RSFSR) and Crimea (as the Crimean ASSR).

Another interesting provision lays down the preferential naturalization regime for persons taking part in the voluntary resettlement program for compatriots.\textsuperscript{333} It was introduced in 2008 as an extra ‘carrot’ in order to encourage Russian diaspora abroad to relocate to Russia and fulfill its demand of ‘desired’ labor migration.\textsuperscript{334} The definition of compatriots is refers back to the law on compatriots abroad of 1999 and includes persons that were citizens of the

\textsuperscript{331} Nagashima (n 329) 5.
\textsuperscript{332} Russian Citizenship Law, art 14(2)(a)
\textsuperscript{333} Russian Citizenship Law, art 14(7)
\textsuperscript{334} Myhre (n 334) 697.
former Soviet Union and are now citizens of the republics within the territory of the former Soviet Union, stateless persons and residing within the territory of the former Soviet Union and the descendants of the last two categories, regardless of residence or citizenship.\textsuperscript{335} Compatriots residing abroad are to be identified by diplomatic agents and issued certificates proving their Status.\textsuperscript{336} The resettlement program for compatriots was established by presidential decree in 2006.\textsuperscript{337} It provides free relocation to Russia and a stipend for those willing to settle in ‘prioritized territories’ in the Far East or Siberia.\textsuperscript{338} The program is actively promoted and, for instance, has an office in Bender, Transnistria.\textsuperscript{339} Important is that no language or wealth requirement applies for resettled compatriots seeking naturalization.

A third ground for preferential naturalization covers former USSR citizens without Russian citizenship who were registered residents in the RF by July 2002 or, without a specified date had received temporary residence permits, irrespective of actual residence. These applicants can become Russian citizen upon a simple declaration made before the first of January 2008, later extended to 1 July 2009.\textsuperscript{340} This ground for naturalization waived the general language and wealth requirements. The extension of the limit was adopted in the wake of the 2008 Georgian conflict.

\textsuperscript{336} Russian Citizenship Law, art 4.
\textsuperscript{338} Myhre (n 334) 697.
\textsuperscript{339} See <http://pereselenie.moscow/en/> accessed 12 May 2018. The website notes that ‘[w]ith Russian citizenship, You will gain confidence in the future!’
\textsuperscript{340} Russian Citizenship Law, art 14(4).
A final exception was enacted in 2014 and applies to foreign nationals who are recognized as ‘native Russian speakers’ legally residing in the RF in a permanent basis.\(^{341}\) The legislative rationale is clear, since it specifically includes a facilitated way for renouncing Ukrainian citizenship, which may be done by a notarized declaration directed at the Ukrainian government instead of a document emanating from the relevant governmental services. Proof of status as a native Russian speaker requires a decision by a commission formed by agents of the federal migration service and can be obtained by persons permanently residing or having permanently resided in the RF or ‘in the territory which formed part of the Russian Empire or USSR’ and his/her descendants.\(^{342}\) The potential for corruption has been duly noted.\(^{343}\)

None of the above described simplified naturalization procedures waive the requirement of renouncing prior citizenship. Foreigners acquiring Russian citizenship will have to renounce their prior citizenship except for cases where a dual nationality treaty applies.\(^{344}\) In practice, however, it is unclear whether this requirement is uniformly enforced.\(^{345}\) More leeway is granted by the executive decree holding the rules for handling naturalization applications. In lieu of actual renunciation, the rules accept a document proving the mere application for renunciation of prior citizenship. In addition, the rules also make an exception to the renunciation requirement where such renunciation is impossible—the illegality of dual citizenship in the prior state (!) is accepted as a ground of impossibility.\(^{346}\) Furthermore, a

\(^{341}\) Russian Citizenship Law, art 14(2.1).

\(^{342}\) Russian Citizenship Law, art 33.


\(^{344}\) Russian Citizenship Law, art 13(1)(d).

\(^{345}\) Danish Immigration Service (n 343) 13.

ministerial decree of June 2008 determines that for the purposes of the simplified procedure, the renunciation requirement can be replaced by an obligation of the applicant to submit proof of renunciation within one year, rendering the renunciation requirement an unenforceable formality. In contrast, Russian nationals do not have to renounce their citizenship when acquiring another citizenship. They will, however, be regarded only as citizens of the Russian Federation except for the cases where dual nationality treaties apply. Important to note is that since 2014, Russians with dual citizenship are required to give a detailed notice to the Russian government or risk criminal penalties. While dual citizenship is legal in most cases or at least tolerated, registration will always be required.

In sum, Russia’s municipal citizenship law offers many opportunities for facilitated access to citizenship and explicit grounds for extraterritorial naturalization. The most onerous condition for naturalization—the requirement of renunciation of prior citizenship—seems to be largely unenforced. The different amendments and their coincidence with different phases in Russia’s passportization activities reflect the instrumentalization of compatriot policy described above.

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348 Russian Citizenship Law, art 6.
349 Russian Citizenship Law, art 7(3-11).
350 Molodikova (n 327) 113-114.
### Procedure for foreign citizens to acquire Russian citizenship through naturalization

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<tr>
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*not uniformly enforced by administrative services

### Selected naturalization regimes

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2. PUTTING THE PRINCIPLES TO THE TEST: THREE CASE STUDIES

In this section three cases of passportization will be tested against the principles delineated in the first part. Each case starts with a background of the case (a), after which the legal status of the targeted territory is determined in order to confirm the extraterritorial nature of the naturalizations which have take place (b). Then, the passportization processes are compared on parameters such as ethnic makeup, speed of the passportization procedure, numbers of naturalized persons, laws on dual citizenship in the targeted state, method of conferral, indications of discrimination and reactions of third states (c). Finally, each case is tested on the elaborated principles governing extraterritorial naturalizations (d).

2.1. MOLDOVA (TRANSNISTRIA)

A. BACKGROUND

Moldova is a landlocked country situated between Romania and Ukraine. It was annexed by the USSR in 1940 and after the war was ‘russified’ through deportations of locals and the introduction of the Cyrillic script. Russian immigration to the Moldovan Soviet Socialist Republic (MSSR) resulted in an ethnic mix of Russian and Ukrainian minorities and a majority of Romanian speaking Moldovans.351 During the breakup of the Soviet Union, reformers started demanding official status for the Romanian language.352 On 23 June 1990, the MSSR’s Supreme Council declared the supremacy of its laws over the USSR and one

year later changed its name to the Republic of Moldova. Russian speaking minorities preferred membership of the USSR and feared unification with Romania. The heavily industrialized left bank of the Dnester river, home to a sizable Russian minority, declared the Pridnestrovskaya Moldavskaya Respublika (PMR) on 2 September 1990. The Republic of Moldova declared independence from the USSR on 27 August 1991.

In 1991, a referendum held in the PMR confirmed its independence with in a 98% vote. Tiraspol, Transnistria’s main city, was taken over by paramilitaries supported by the Russia’s 14th Guards, stationed near the city. In the spring of 1992, fighting broke out as Moldova attempted to reimpose order. The Russians forced the parties to an armistice, codified in a July 21 Agreement. The agreement sets up a demilitarized zone of 10 kilometers left and right of the Dnester river, overseen by a Joint Control Commission (JCC) of Moldovan, Russian and Transnistrian delegations, assisted by a peacekeeping force of 5 Russian, 3 Moldovan and 2 Transdniestrian battalions; the remaining Russian forces stationed in the area were to observe strict neutrality. A Russian promise to withdraw military equipment from Moldova

355 ibid 15.
357 OSCE ‘Transdnistrian Conflict: Origins and Issues’ (n 351); Troebst (n 354) 16.
358 Troebst (n 354) 17.
360 ibid artt 2, 4.
was included in the 1999 OSCE Istanbul Summit Declaration.\(^{361}\) After initial compliance, Russia halted withdrawals in 2004 when Moldova refused to sign a Russian proposal settlement including a veto for the PMR in the Moldova’s government.\(^{362}\) Its troops remain today, in violation of Moldova’s neutrality, according to its highest Court.\(^{363}\)

The ECtHR has ruled on Transnistria in a number of cases.\(^{364}\) It has held consistently that violations committed by the PMR on the territory of Transnistria fall under the jurisdiction of Russia. In Ilăşcu and Ivanţoc, it accepted that Moldova’s incapacity enforce the convention in the Transnistria and determined that it was bound only by a positive obligation to engage in negotiations with a view on re-establishing such control, while Russia was found responsible for multiple violations. The Court held that the PMR ‘remains under the effective authority, or at the very least under the decisive influence, of the Russian Federation, and in any event that it survives by virtue of the military, economic, financial and political support given to it

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\(^{363}\) Noting that its Constitution cannot be interpreted as a ‘suicide pact’ and that ‘in case of a threat to such fundamental constitutional values, such as national independence, territorial integrity or state security, the Moldovan authorities are obliged to take all necessary measures, including military ones, which would allow them to defend themselves effectively against them’ Decision No. 14 of 02.05.2017 Application No 37b/2014 (Constitutional Court of Moldova) <www.constcourt.md/ccdocview.php?tip=hotariri&docid=613&l=ropara> accessed 23 April 2018, para 188.

\(^{364}\) See Ilăşcu and Others v Moldova and Russia ECHR 2004-VII 179; Ivanţoc and Others v Moldova and Russia App No 23687/05 (ECtHR, 15 November 2011); Catan and Others v the Republic of Moldova and Russia ECHR 2012-V 309; Mozer v the Republic of Moldova and Russia App No 11138/10 (ECtHR 23 February 2016); Turturica and Casian v The Republic of Moldova and Russia App No 28648/06 and 18832/07 (ECtHR 30 August 2016).
by the Russian Federation’.\textsuperscript{365} It noted, in 2012 and 2016 judgments covering events situated between 2002 and 2010, that ‘the [PMR] was able to continue in existence [...] only because of Russian military, economic and political support’.\textsuperscript{366} Former ‘president’ Smirnov of the PMR claimed in 2010 that 60\% of PMR property is owned by Russians.\textsuperscript{367} After the Maidan revolution, the PMR has become even more reliant on Russian support since Ukraine now sees it as a threat and is working with the Moldovan government to facilitate its re-integration.\textsuperscript{368}

Negotiations on Transnistria are still ongoing.\textsuperscript{369} Russia is the key actor in the process. It is focused on countering NATO and the EU and wants a special status for Transnistria in a neutral Moldova.\textsuperscript{370} The EU concluded an Association Agreement with Moldova in 2013.\textsuperscript{371}

\begin{itemize}
\item \textsuperscript{365} Ilășcu and Others v Moldova and Russia (n 364) paras 392-393; Ivanțoc and Others v Moldova and Russia (n 364) para 118.
\item \textsuperscript{366} Catan and Others v the Republic of Moldova and Russia (n 364) para 122; Mozer v the Republic of Moldova and Russia (n 364) para 110.
\item \textsuperscript{369} For a systematic overview of the diplomatic initiatives undertaken by these actors with the goal of reaching a solution for Transnistria see Bowring (n 353) 158-174. The latest diplomatic effort was the 2016 Berlin Protocol signed by Moldova, Russia, Ukraine, the PMR and the OSCE, but results have been limited, see Protocol of the Official Meeting of the Permanent Conference for Political Questions in the Framework of the Negotiating Process on the Transdniestrian Settlement (3 June 2016) <www.osce.org/moldova/244656?download=true> accessed 23 April 2018.
\end{itemize}
Russia’s policy regarding Moldova has grown more assertive since Moldova’s adoption a pro-European outlook and protests in 2009 that opposed the pro-Russian Communist Party.\(^{372}\)

### B. LEGAL STATUS OF TRANSNISTRIA

Since the Moldovan declaration of independence, the government in Chisinau has affirmed its sovereignty over the territory of the former Moldovan SSR, including Transnistria.\(^{373}\) The Constitution of the Republic of Moldova stipulates that the country is sovereign, independent, unitary and indivisible, that it is a neutral state and that its borders are governed by organic law in accordance with ‘recognized principles and norms of international law’.\(^{374}\) The PMR, declares to be a ‘sovereign, independent, democratic [and] legal’ State.\(^{375}\) However, while Moldova was admitted as a UN member State on 2 March 1991,\(^{376}\) the PMR has been recognized only by South Ossetia, Abkhazia and the Republic of Artsakh (Nagorno-Karabakh), with all of which it has concluded some form of agreement.\(^{377}\) The PMR is not

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374 Articles 1, 3 & 11 of the Constitution of the Republic of Moldova (17 August 1994, last amended by LP185-XVI of 29.06.06, MO106-111 / 07.14.06 art 502).
377 Agreement on Friendship, Cooperation and Partnership between the Pridnestrovskaya Moldavskaya Respublika and the Republic of South Ossetia (20 September 2016) <www.mid.gospmr.org/ru/Pjf> accessed 18 April 2018; Agreement between the
recognized by any UN Member as of 2018 and Russia has always maintained it will not recognize the left bank government, instead opting for incremental rapprochement between Chisinau and Tiraspol.\textsuperscript{378}

The PMR bases its claim of statehood on being the successor to the Moldovan Autonomous Soviet Socialist Republic (MASSR), carved out of the Ukrainian SSR in 1924 to symbolize the Soviet claim on Bessarabia, lost in 1917 to Romania.\textsuperscript{379} According to the PMR, the creation of the Moldovan SSR in 1940 was based on the Molotov-Ribbentrop Pact which was declared null and void by Moldova in a 1990 declaration of the Supreme Council of the MSSR.\textsuperscript{380} However, the Moldovan SSR was created by a decision of the USSR of 2 August 1941.\textsuperscript{381} The operation of the uti possidetis principle requires that the borders of the MSSR remain those of the successor State.\textsuperscript{382} The left bank area did not enjoy any special federative status within the Moldovan SSR.\textsuperscript{383} The Transnistrian case for self-determination has been

\begin{itemize}
\item Pridnestrovskaya Moldavskaya Respublika and the Republic of Abkhazia on Friendship and Cooperation (22 January 1993) <www.mfa-pmr.org/ru/dDJ> accessed 18 April 2018;
\item Ignatiev (n 379) 12.
\item Il	extsc{a}s	extsc{c}u and Others v Moldova and Russia (n 364) para 28.
\item Giusepe Nesi, ‘Uti possidetis doctrine’ (2011) MPEPIL.
\end{itemize}
analyzed in a 2006 report compiled by the New York City Bar Association.\(^{384}\) The report analyzes the claim of the PMR against accepted criteria for external self-determination: (1) the secessionist must constitute a ‘people’, (2) the State of which they are currently part brutally violates their human rights, and (3) the absence of other effective remedies under either domestic law or international law.\(^{385}\) Applying these criteria to the facts, the Report did not find that the people living in the PMR constituted a people, nor that alleged infringements of cultural rights, the 1992 war or the alleged denial of economic rights could be seen as grave human rights violations, imputable to Chisinau and giving rise to a right to external self-determination in the form of secession from the Moldovan Republic.\(^{386}\) Another author disagrees, stating that the people of the PMR have acquired a ‘distinct character’ and could well exercise a right to self-determination in the form of federative autonomy, given the fact that after ‘20 years of separation from Moldova, [...] a strongly state-like, if unrecognized, social and political entity has taken root in the territory’.\(^{387}\) While this may be the case, historical allegiances and cultural factors alone do not give rise to a right of external self-determination or remedial secession.\(^{388}\) Even if the people living on the left bank of the Dniester river could be seen as constituting ‘minorities forming a distinctive unit in a particular area of the state and constituting a substantial majority of the population in that


\(^{385}\) NYC Bar Report (n 384) 38.

\(^{386}\) NYC Bar Report (n 384) 40-47.

\(^{387}\) Bowring (n 353) 173; see also Ilașcu and Others v Moldova and Russia (Dissenting Opinion Judge Kovler) (n 364) 144-147.

area’, no ‘gross human rights violations’ or deprivation of an internal right to self-determination vis-a-vis the PMR could possibly be established in fact.

The ECtHR affirmed the international consensus that Moldovan government is the only legitimate government of the Republic of Moldova under international law. Russia’s Foreign Minister Lavrov has said that ‘it is crystal clear that no international institution supports the idea of Transnistrian independence or Moldova as a unitary state’. The status of the PMR is thus at most a de-facto regime, an entity that exercises control over a territory through a government and identifies itself as independent but which in fact is not recognized as a new state, nor a government of an existing State. Transnistria is therefore Moldova.

C. RUSSIAN PASSPORT POLICY IN TRANSNISTRIA

Russia’s policy towards Transnistria has reflected the shifts in relations between the Moldova and itself. A study conducted by the Centre for East European Policy studies has analyzed in detail Russia’s consular policy toward Moldova, including Transnistria.

391 Ilașcu and Others v Moldova and Russia (n 364) para 330.
392 Ekho Moskvy, ‘Interview with Foreign Minister Sergei Lavrov’ (June 5, 2011) (in Russian) <echo.msk.ru/blog/echo_ua/781613-echo> accessed April 19 2018, Lavrov added that Transnistria should have the right to secession if Moldova decides to join any military block’, referring to the country’s NATO ambitions.
393 Jochen Frowein, Das de facto-Regime im Völkerrecht (Carl Heymans Verlag 1968) 7.
394 Rogstadt (n 372) 52.
Russia has provided consular services in Transnistria since the early nineties. Moldova’s 1991 citizenship law determined that everyone permanently residing in the territory at its entry into force could be recognized as a Moldovan citizen within a period of one year, which was extended for those living in the PMR. The law allows dual citizenship, provided that the other country equally provides dual citizenship. The PMR itself also hands out passports and allows dual citizenship. Between the Russian Federation and Moldova, there are no visa requirements.

Transnistrrian residents usually possess Ukrainian or Russian citizenship in addition to Transnistrian ‘citizenship’. A 1989 census shows that out of 601,600 inhabitants 25.5% or 153,393 identified as Russian. NAGASHIMA calculates that the process of conferring nationality has kept a steady pace between 2001 and 2014 with 10,000 PMR residents

395 Gatis Pelnens (ed) The Humanitarian Dimension of Russian Foreign Policy Toward Georgia, Moldova, Ukraine and the Baltic States (Centre for East European Studies 2009) 211-244.
396 Toru Nagashima, (n 329) 9.
398 ibid art 24.
400 Ministry of Foreign Affairs and European Integration of the Republic of Moldova, ‘Visas to Moldova’ <www.mfa.gov.md/entry-visas-moldova/citizens-additional-checks/> accessed 19 April 2018;
acquiring Russian citizenship every year. While in 2001, the number of Russian citizens in the PMR was reported at 65,000, in 2004 the PMR’s Russian ‘president’, Igor Smirnov, complained that the pace of the applications was too slow, noting that, ‘if things go at this pace, it will take 100 years to eliminate the line [of waiting applicants]’. In 2007 the number of PMR residents with Russian passports had risen to 110,000 and in 2010 Izvestiia reported that 150,000 residents were Russian citizens. In 2014 the number totalled 200,000.  

In 2017, TASS reported a newspaper interview in which PMR president Vadim Krasnoselsky said that 220,000 Transnistrians possessed Russian citizenship. Given the fact that in 2015 census data showed that the PMR’s population had fallen to 475,373, nearly half of the Transnistrian population is now estimated to be a Russian citizen.

The process of acquiring a Russian passport in the PMR was reported to be difficult, due to the fact that middlemen have asked sums amounting to four times the average wage in the area. Moldova consistently refused Russian requests to open a consulate in Tiraspol yet Russia has organized regular consular officials visit twice a week to provide consular services. In 2012, the PMR provided the Russian embassy in Moldova with a new office, which was opened in 2013 by the Russian ambassador to Moldova and granted citizenship

401 Nagashima (n 329) 9.  
402 ibid.  
404 Pelnens (n 395) 225.  
406 Pelnens (n 395) 226.  
407 V Tiraspole otkrili noviy korpus viyezdnovo konsulskovo punkta posolstvo Rossii (In Tiraspol, a new complex of the consular outpost point of the Russian embassy opened)
to 9,185 Transnistrians in 2017. While not a consulate in legal terms, the ‘Outpost Point for Consular Services’ in Tiraspol is open five days a week according to the Facebook page ‘@consrustiraspol’. It provides visa, citizenship and notary services. Applications can also be transmitted by telephone. The PMR has actively promoted acquiring Russian citizenship for its residents. Finally, the PMR has also called upon Russia to recognize its own passports, as it did with those issued in the Donbas ‘republics’. The recipients of Russian passports are not exclusively ethnic Russians. While the 2015 census revealed that fewer than 30% of PMR residents identified as being ethnic Russians, while half were Russian citizens.

The rationale for acquiring Russian citizenship is clear. A main reason is to be able to work and travel abroad, with almost 500,000 Moldovans reportedly working in Russia and sending home money. Russia also decided to add $10 to the pensions received by each pensioner from Transnistria, added to the meagre $40-50 that pensioners received already. This bonus is not extended to Russian citizens living in Moldova. Russia also recruits soldiers from the

(TVPMR 16 April 2013) <www.youtube.com/watch?v=oZoaUJvH9Tg> accessed 21 April 2018.
411 Ministry of Foreign Affairs of the PMR, ‘Vyeznoi konsulskiy punkt Rossii v Tiraspole prinimaet zayavleniya na oformlenie rossiickovo grazhdanstva’ (Consular outpost of Russia in Tiraspol accepts applications for Russian citizenship) <www.mfa-pmr.org/ru/hQg> accessed 21 April 2018.
413 Hill (n 378).
414 Pelnens (n 395) 227.
Transnistrian populations and rotates them through its own units, which forms both a source for much sought employment for PMR residents and a way for Russia to increase its influence over the area.\textsuperscript{415} In addition, Russia has opened polling stations in the PMR for parliamentary and presidential elections, while the Moldovan Ministry of Foreign Affairs has protested against such measures.\textsuperscript{416}

Russia’s passport policy in Transnistria has elicited few reactions from the international community, perhaps due to the fact that further negotiations under the auspices of the OSCE in the 5+2 format (Moldova, PMR, OSCE, Ukraine, Russia, with the US and EU as observers) count on wide support from multiple States and the UN\textsuperscript{417} and are still ongoing.\textsuperscript{418} Moldova has protested against the presence of Russian troops on its territory multiple times.\textsuperscript{419} It has also protested against joint exercises of Russian forces and PMR


\textsuperscript{418} Record of UN Security Council meeting 7635 (29 February 2016) UN Doc S/PV.7635, Statements by Germany, France, Angola, Senegal and the United States; Record of UN Security Council meeting 7117 (24 February 2014) UN Doc S/PV.7117, Statements by the Republic of Korea, Australia and Luxembourg.

\textsuperscript{419} UNGA, ‘Letter from the Permanent Representative of the Republic of Moldova to the United Nations addressed to the Secretary-General’ (20 October 1992) UN Doc A/47/561; Record of the UNGA First Committee meeting 8 (12 October 2010) UN Doc A/C.1/65/PV.8, Statement by Moldova; UNGA, ‘Letter from the Permanent Representative of the Republic of Moldova to the United Nations addressed to the Secretary-General’ (26 July 2017) UN Doc A/71/997.
paramilitaries in Transnistria. In a joint letter to the UN Secretary General, Georgia and Moldova protested against the handing out of passports by the Russian Federation on their territory. The European parliament, in a resolution calling for the settlement of the conflict in Transnistria, directed criticism at Russian passports in PMR, yet only on the grounds that this constituted discrimination vis-a-vis Moldovans, who could not benefit from the EU-Russia visa regime. A more recent resolution did not mention Russian passports. The Parliamentary Assembly of the Council of Europe (PACE) has condemned ‘the opening of polling stations in (...) Transnistria (Republic of Moldova) without the explicit consent of the de jure authorities (...)’ and ‘the prior “passportization” of populations in these territories’ as violations of Moldova’s territorial integrity.

D. ASSESSMENT

The Transnistrian case is a particular in a number of ways. First, the conflict that lies at its origin is nearing its thirtieth birthday, which distinguishes it from the Georgian and Crimean crises, which occurred after Russia had reasserted itself on the world stage. As a consequence, a second feature is that the passportization campaign has not preceded but followed the outbreak of hostilities. In this sense, it is comparable to the Donbass situation, where Russia has also tried to consolidate its influence post-facto. Finally, the focus on consolidation has caused the process to run at a steady pace instead of a sudden surge, explaining the limited attention that has gone into the passportization of Transnistria.

421 UNGA ‘Letter from the Permanent Representatives of Georgia and Moldova addressed to the Secretary-General’ (7 March 2007) UN Doc A/61/785.
422 EP Resolution on Moldova (Transnistria) (26 October 2006) OJ C313E/427
423 EP Resolution on Transnistria (6 February 2014) OJ C93/150
424 PACE Resolution 1896 (2 October 2012) para 18.
When applying the principles elaborated in part II.3.3.c, it is clear that Russia’s conferral of citizenship is not \textit{prima facie} illegal. There are no indications of forced naturalization or discrimination in the process. Passports have been granted upon application on an individual basis. It does not seem to appear from the facts that these individual applications were based on arbitrary motives. Many people in the Transnistrian territory have ties to the Russian federation and the self-declared republic is both culturally and linguistically Russian. Even if considering the large numbers of persons applying, it is difficult to conclude that the conferral of Russian citizenship to the PMR residents amounts to de-facto collective naturalization. For that to be the case, the clear existence of legitimate motives and factual links underlying individual applications for Russian citizenship would have to be offset by the harm caused to the Moldova’s interest in retaining its citizens. However, many in the PMR do not possess Moldovan citizenship, since this requires eligible individuals to actively confirm their wish to become Moldovan citizens. In cases where PMR residents were stateless, Russia’s conferral of citizenship may even be characterized as fulfilling its obligation to prevent statelessness within the territory they effectively control. A final possibility is the abuse of rights doctrine, which penalizes one state’s otherwise legitimate exercise of rights with the intention of harming another state’s interests. It is clear that a broad application of this rule is to be prevented, since, arguably, interstate relations involve the constant breaching of other state’s interests within the legal framework. In order to demonstrate the abuse of Russia’s sovereign right to confer its nationality, bad faith must be shown to have dominated its motivation to do so—a task that lies beyond the scope of this enquiry. Nevertheless, the way in which Russia has extended its consular services in Transnistria, through the establishment of its ‘Potemkin consulate’ in Tiraspol without the territorial state consent, clearly infringes the latter’s territorial integrity. However, this violation does not disqualify outright Russia’s passport policy in Transnistria as it disqualifies the method, not the substantive practice itself.

It is thus submitted that Russia’s naturalization of residents living in Moldova’s Transnistria region does not violate the principles governing extraterritorial naturalization.
2.2. GEORGIA (SOUTH OSSETIA & ABKHAZIA)

A. BACKGROUND

Abkhazia and South Ossetia are situated South of the Greater Caucasus mountain range, which forms the border between Russia and Georgia. In 1918, current-day Georgia enjoyed a brief period of independence, during which Bolshevik-supported Abkhazia and South-Ossetia resisted to different degrees the establishment of central rule. Later, the Georgian Soviet Socialist Republic (SSR) was established and the Abkhaz Autonomous Republic (capital Sukhumi) and the Ossetian Autonomous Oblast (Tskhinvali) given a degree of autonomy. When the Soviet Union collapsed, Abkhazia and South Ossetia resorted to separatism. Tblisi’s attempt to unify Georgia triggered wars with both regions, who wished to remain in the USSR as separate entities. Both enjoyed military support from Russia. The conflicts ended when Georgia joined the CIS and both conflicts were frozen in ceasefire agreements.

The Georgian-Ossetian conflict was settled between Georgia and the Russian Federation in 1992. It established a ceasefire and a demilitarized corridor to be determined by a joint observer mission, in addition to a mixed control commission with attached ‘joint peacekeeping forces’ made up of Ossetian, Russian and Georgian troops. An agreement with regard to Abkhazia was signed in 1993 by Georgian, Russian and Abkhaz representatives and

427 George (n 426) 28-44.
428 George (n 426) 110-121.
429 Pelnens (n 395) 97.
was endorsed by the Security Council. It established a CIS Peacekeeping Force of 3000 Russian troops. Both the UN and the OSCE set up observer missions for Georgia.

In 2003, Georgia’s pro-Russian course under president Shevarnadze was reverted when the ‘Rose Revolution’ brought Mikheil Saakashvili to power. Relations with Russia soured when Georgia entered a US funded modernization program for the country’s military, sought NATO accession and received increasing numbers of EU aid. Saakashvili prioritized the re-establishment of state control over the whole territory of Georgia and in 2004 proved this by reasserting control over the wayward region of Adjara. When he attempted to do the same in South-Ossetia that year, Saakashvili was rebuffed by armed clashes and a Russian threat to impose a blockade. Georgian grew frustrated with the Russia who it accused of a creeping annexation of Abkhazia and South-Ossetia through the distribution of passports, further economic integration with the separatists and the increasing domination of Russia in the security cadres of the breakaway regions. As Georgia set its sights on NATO accession at the Bucharest Summit of 2008, Putin stressed that he considered further expansion of

433 IFFMCG Report Vol 2 (n 432) 7-9.
434 ibid.
435 ibid 11-12.
436 ibid 14-15.
NATO as a ‘serious provocation’. Russian officials noted that Georgian accession to would lead to Russia’s recognition of Abkhazia and South Ossetia. A new presidential decree ordered the territorial authorities of North Ossetia and Krasnodar to provide ‘consular assistance’ to citizens in Abkhazia and South Ossetia as passportization efforts were beefed up. Georgia condemned this ‘direct threat to Georgia’s statehood and sovereignty’ as ‘designed for the annexation of parts of Georgian territory’. Russia’s foreign minister declared that Russia would ‘defend [its] citizens with all the means at [its] disposal’.

In August of 2008 tensions between Russia and Georgia came to a head in a five-day war. In the preceding month, Russia conducted a large-scale military exercise (Kavkaz 2008) on its side of the border while in Georgia a US-Georgian exercise named ‘Immediate Response’ was underway. In South Ossetia, Georgian and Ossetian villages began exchanging artillery fire after a series of bombings. Then, on the night of the 7th of August 2008, Georgia

440 ibid.
443 see Ronald D Asmus, A little war that shook the world: Russia, Georgia and the future of the West (Palgrave Macmillan 2010); Cornell & Starr (n 437); Christopher P Waters (ed) Conflict in the Caucasus: implications for the international legal order (Palgrave Macmillan 2010); Vicken Cheterian, ‘The August 2008 war in Georgia: From ethnic conflict to border wars’ in Stephen F Jones, War and revolution in the Caucasus: Georgia ablaze (Routledge 2010) 63.
444 IIFFMCG Report Vol 2 (n 432) 199-209.
mounted a large-scale offensive directed at the South-Ossetian capital of Tskhinvali. When, on the 8th of August, the Georgians had failed to establish complete control of the town, Russian forces, some of which had remained in place after the Kavkaz exercise, began to cross into South-Ossetia. In Abkhazia, open hostilities broke out on the 9th of August, with Russian forces crossing into Georgia on the 10th and occupying areas of Georgia-proper. A ceasefire was brokered after Russia pushed far into Georgia, threatening its capital Tbilisi.

Russia justified its intervention on the grounds of protecting its peacekeepers and nationals, and was met with skepticism, even among its allies. Legal analysis of Russia’s claims has been conclusive in condemning the intervention as illegal on either lack of an armed attack or on account of its blatant disproportionality. Georgia has tried to bring aspects of the conflict before international tribunals. A claim brought against Russia before the ICJ under

446 ibid 219.
the compulsory jurisdiction clause of the CERD failed when the Court upheld Russia’s preliminary objection on the non-exhaustion of procedural mechanisms provided under article 22.\textsuperscript{449} Georgia has also brought a claim against before the European Court of Human Rights that is awaiting verdict.\textsuperscript{450} The International Criminal Court has also authorized an investigation into the events between 1 July 2008 to 10 October 2008, for war crimes and crimes against humanity allegedly committed in and around South Ossetia.\textsuperscript{451} On the ground, the ceasefire lines have been ‘borderized’ and are patrolled by the FSB, since Russia signed agreements providing economic assistance and a ‘military alliance’ with both regions, under which Russian regular forces are deployed in Tskhinvali and Sukhumi on a permanent basis.\textsuperscript{452} The OSCE and UN missions mission took an end in 2008 and 2009\textsuperscript{453} and the EU monitoring mission (EUMM) is now the sole actor observing the border.\textsuperscript{454}

**B. LEGAL STATUS OF SOUTH OSSETIA AND ABKHAZIA**

Georgia declared independence on the 9\textsuperscript{th} of April 1991 and was admitted into the UN on the 31\textsuperscript{st} of July 1992. In April 2008, months before the outbreak of the Russo-Georgian War, the

\textsuperscript{450} Georgia v. Russia (II) App No 38263/08 (ECtHR 13 December 2011) (Decision on Preliminary Objections).
\textsuperscript{451} Situation in Georgia (Decision on the Prosecutor’s request for authorization of an investigation Office of The Prosecutor) (27 January 2016) ICC-01/15.
\textsuperscript{453} Record of UNSC Meeting 9681 (15 June 2009) UN Doc S/PV.6143.
Security Council unanimously reaffirmed ‘the commitment of all Member States to the sovereignty, independence and territorial integrity of Georgia within its internationally recognized borders’.\textsuperscript{455} Georgia has adopted the Law on the Occupied territories in 2008, which criminalizes access to the breakaway territories from Russia.\textsuperscript{456}

The generally accepted elements of statehood are (1) the existence of a permanent population, (2) a defined territory, (3) an effective government and (4) the capacity to enter into relations with other States.\textsuperscript{457} The last criterion implies the recognition of the territorial entity by other States, which is generally withheld when the proclaimed State came into existence through a breach of international law, does not meet the first three criteria of statehood or when the UN Security Council has barred recognition.\textsuperscript{458}

‘The Republic of Abkhazia’ declared sovereignty on the 23 July 1992 by reviving its 1925 constitution which it replaced by a new one two years later.\textsuperscript{459} Georgia was admitted to the UN on a subsequent date, implying that Abkhazia has been recognized as an integral part of the country. The war and resulting ceasefire of 1993 cemented Abkhazia’s de-facto autonomy under Russia’s patronage.\textsuperscript{460} In 1999 a referendum on independence, which was boycotted by

\textsuperscript{455} UNSC Res 1808 (15 April 2008) UN Doc S/RES/1808.
\textsuperscript{457} Montevideo Convention (n 100) art 1.
\textsuperscript{458} ‘Recognition/Non-Recognition in International Law’ (2014) 76 International Law Association Reports of Conferences 424, 457-458.
ethnic Georgians, resulted in an affirmation of Abkhazia’s independence. In 2006, Abkhazia received ‘recognition’ from Transnistria, South Ossetia and Nagorno-Karabakh yet the position that Abkhazia constituted an integral part of Georgia was universally accepted until 2008. On the 26th of August, Russia recognized Abkhazia as an independent State, citing the Helsinki Final Act and the Friendly Relations Declaration and alluding at the right to self-determination. Tuvalu, Vanuatu, Nicaragua, Venezuela and Nauru followed suit, although the former two later withdrew their recognition. The IIFFMCG Report came to the conclusion that, in view of Abkhazia’s large degree of de facto autonomy from Georgia since the early 1990’s, it should be regarded as a ‘state-like entity’. The ‘effective government’ requirement is doubtful considering its near total dependence on Russia.

‘The Republic of South Ossetia’ was proclaimed on 29 May 1992, after initially having proclaimed sovereignty as an independent subject of the USSR. This declaration was also of limited importance in the light of Georgia’s subsequent acceptance as a UN member within its recognized borders. It’s de-facto autonomy resulted from the ceasefire agreement of 1992 and support from Russia, which has resulted in dependency equaling or surpassing that of

461 Robert McCorquodale and Kristin Hausler (n 460) 36
463 Robert McCorquodale and Kristin Hausler (n 461) 26.
465 IIFFMCG Report Vol 2 (n 432) 127.
Abkhazia, with nearly all important government positions held by Russian military or administrative personnel.\textsuperscript{468} As South Ossetian ‘president’ Kokoity noted in 2006:

South Ossetia is already de facto an entity of the Russian Federation, because 95% of the citizens of South Ossetia are Russian nationals (...) Russian laws apply in the Republic of South Ossetia; the currency is the Russian ruble; the RF Criminal Code is in force. South Ossetia is de facto an entity of the Russian Federation. We simply have to consolidate this legally.\textsuperscript{469}

The IIFFMCG Report notes that Russian control of South Ossetia meant that it did not possess an ‘effective government’ and should be classified as ‘an entity short of statehood’.\textsuperscript{470}

The ‘constitutions’ of Abkhazia and South Ossetia explicitly base their independence on the right to self-determination\textsuperscript{471} and Russia has justified its recognition on similar grounds.\textsuperscript{472} Georgia’s constitution does not allow for unilateral secession.\textsuperscript{473} As elaborated earlier, the right to external self-determination, if its existence under international law \textit{de lege lata} is assumed, would also require grave human rights violations and the exhaustion of other means of seeking autonomy. Authors analyzing these self-determination claims have stressed the fact that, despite the many years that have gone by since the breakaway territories were able

\textsuperscript{468} Gerrits & Bader (n 466) 301-304.
\textsuperscript{469} President Eduard Kokoity, as quoted in Philip Leach, ‘South Ossetia’ in Elizabeth Wilmshurst (ed) \textit{International Law and the Classification of Conflicts} (OUP 2012) 337.
\textsuperscript{470} IIFFMCG Report Vol 2 (n 432) 132-133.
\textsuperscript{472} Dmitri Medvedev, ‘Why I had to recognise Georgia’s breakaway regions’ (FT, 26 August 2008) <www.ft.com/content/9c7ad792-7395-11dd-8a66-0000779fd18c> accessed 24 May 2018.
to establish de-facto autonomy, negotiations on their status within Georgia have not been exhausted.\textsuperscript{474} The IIFFMCG Report concluded that the threshold of gravity for human rights violations at the hands of the territorial State was not sufficiently met and that any remaining doubts should surely be relinquished based on the many reaffirmations of Georgia’s territorial integrity by the international community.\textsuperscript{475} This position is made clear by the reaction by the US, NATO, EU and Ukraine to Syria’s recognition of the breakaway territories last May.\textsuperscript{476}

For these reasons, the territories of Abkhazia and South-Ossetia, must be seen as integral parts of the Republic of Georgia.

\textsuperscript{474} Farhad Mirzayev, ‘Abkhazia’ in Ossetia’ in Christian Walter, Antje Von Ungern-Sternberg and Kavus Abushov (eds) \textit{Self-Determination and Secession in International Law} (OUP 2014) 213; Waters (n 473) 187-190; Nussberger, ‘South Ossetia’ (n 467) paras 32-35; Nussberger, ‘Abkhazia’ (n 462) 32; Robert McCorquodale and Kristin Hausler (n 461) 40-43.

\textsuperscript{475} IIFFMCG Report Vol 2 (n 432) 145, 147; Nussberger, ‘South Ossetia’ (n 467) para 34; Nussberger, ‘Abkhazia’ (n 462) 31.

C. RUSSIAN PASSPORT POLICY IN ABKHAZIA AND SOUTH OSETIA

Census data from 1989 reveals that Abkhazia counted 17.1% Abkhazians, 45.7% Georgians and 14.4% Russians, and South Ossetia was made up of 66.2% Ossetians and 29% Georgians with a negligible amount of ethnic Russians. These figures are assumed to reflect the situation in 1993, when Georgia conferred its nationality upon all residents that had lived on Georgian territory for 5 years and did not object within three months. The requirement of the need to have received a passport was scrapped in a later amendment, which meant that persons living in Abkhazia and South Ossetia became Georgian nationals ex lege, save for the option of refusal. In the early 1990’s these people all legally became Georgian nationals.

The dissemination of Russian passports is to be divided into the period between 1992-2002 and the period of 2002-2008 when the conferral of Russian citizenship was dramatically stepped up. When Abkhazia and South Ossetia established their de-facto autonomy after the conflicts of the nineties, their leadership prohibited its residents from obtaining a Georgian passport. Tskhinvali and Sukhumi asked Russia to extend citizenship to their residents but were rebuffed by the Kremlin when Georgia acceded to the CIS. Until the law of 2002, Soviet passports continued to be recognized in Russia and a visa-free travel regime between Georgia and Russia was in place. Nevertheless, those residents of Abkhaz and Ossetian

479 IIFFMCG Report Vol 2 (n 432) 152.
480 In the context of state succession, the collective conferral of nationality serves the purpose of avoiding statelessness. European Convention on Nationality (n 119) art 18; ILC Draft Articles on Nationality of Natural Persons in Relation to the Succession of States (n 95) art 5.
482 ibid.
seeking Russian citizenship could do so. In Abkhazia they were helped by the local chapter of the Congress of Russian Communities (CRC), whose head personally collected applications and flew them to Moscow, while in South Ossetia, people used their families in North Ossetia, across the border with Russia. According to Russian sources, at the end this period 40% of Ossetians and 30% of Abkhazians were in possession of Russian citizenship.

The second period started around 2002, when Russia unilaterally withdrew the visa-free regime for Georgian citizens while exempting Abkhazians and South Ossetians—a move that was condemned by the European Parliament as amounting to a ’de facto annexation of these indisputably Georgian territories’. The massive conferral of Russian citizenship in Abkhazia started in 2002 with the local head of the CRC announcing that all those willing could acquire Russian citizenship. Special application centers appeared in six of the seven regions in 2002, while special field brigades of CRC staffers visited more remote areas. Applications were brought to the Russian consulate in Sochi where officers specially dispatched from Moscow were responsible for distributing 150,000 passports in the course of June 2002, with other reports citing a timeframe of 3-8 days. The percentage of Russian citizens in Abkhazia rose to 80%. In South Ossetia, mass conferral of Russian citizenship began in May 2004 where Russian citizenship numbers rose from 56% in 2003 to 98% in September 2004. While the primary wave of passportization was primarily dependent upon

483 Littlefield (n 477) 1473.
484 Pelnens (n 395) 120.
485 Grigas (n 319) 119.
487 Nagashima (n 329) 3.
488 ibid.
489 ibid.
490 Pelnens (n 395) 120.
491 ibid.
492 Nagashima (n 329) 4.
the initiative of nationalist organisations such as the CRC, the second period was marked by an organized effort directed the CRC, which was subordinate to the Russian Foreign Ministry.\textsuperscript{493}

This acceleration in the conferral of citizenship coincided with the entry into force of Russia’s 2002 citizenship law, which allows for extraterritorial naturalization of stateless persons from FSU republics upon declaration.\textsuperscript{494} Yet these persons were technically Georgian nationals and therefore not stateless. In addition, Georgian law does not allow dual citizenship except by presidential authority in cases of special merit.\textsuperscript{495} Further, it was reported that none of the required documents for the application for Russian citizenship were produced by the recipients of passports,\textsuperscript{496} which, given the short timeframe in which the whole operation was completed would seem an insurmountable logistical challenge—even for Russia’s notoriously efficient administrative workers. In regard to the voluntary character of passport distribution, president Putin noted that ‘it was acceptance of applications, not passportization (...) We did not issue passports, we just accepted applications for Russian citizenship (...) under the Russian law, we had no right not to accept applications’.\textsuperscript{497} The IIFMCG concluded that it generally occurred on a voluntary basis.\textsuperscript{498} However, it was reported that some IDP’s were forced to give up Georgian citizenship and accept Abkhaz passports in order to return to their homes.\textsuperscript{499} An OSCE report confirmed that ethnic Georgians were pressured into accepting

\textsuperscript{493} Littlefield (n 477) 1472 -1474; Conley & Gerber (n 305) 13.
\textsuperscript{494} Russian Citizenship Law, art 14(4).
\textsuperscript{496} Pelnens (n 395) 121.
\textsuperscript{497} Pelnens (n 395) 120.
\textsuperscript{498} IIFMCG Report Vol 2 (n 432) 168.
\textsuperscript{499} UNSC, ‘Report of the Secretary-General on the situation in Abkhazia, Georgia, pursuant to Security Council resolution 1839’ (3 February 2009) UN Doc S/2009/69, para 41.
Abkhaz ‘citizenship’ and the renunciation of their Georgian citizenship. A report of the OSCE High Commissioner on National Minorities noted ‘increasing pressure being put on the Georgian population through the curtailing of their education rights, compulsory passportization, forced conscription into the Abkhaz military forces and restrictions on their freedom of movement’.  

The clearest benefit of Russian citizenship is the possession of an internationally recognized nationality and travel document. Since economic opportunities in South Ossetia and Abkhazia are extremely limited, being able to travel into Russia for work or study is highly valuable. In addition, Abkhaz and South Ossetian pensioners with Russian passports count on pensions that are much higher than Georgian ones, directly administered by Russian administrative services and all while remaining exempt from tax obligations. After its recognition of the territories in 2008, Russia concluded agreements with South Ossetia and Abkhazia providing for dual citizenship upon the conclusion of a separate agreement. In 2014, Russia signed a ‘Treaty on Alliance and Strategic Partnership’ with Abkhazia, promising facilitated access to Russian citizenship and in 2015 a similar ‘treaty’ was concluded with South Ossetia.  

502 Mulhfried (n 481) 9.  
504 Treaty on Alliance and Strategic Partnership between the Russian Federation and the Republic of South Ossetia (24 November 2014) (in Russian) art 13
a placeholder for dual citizenship, the agreements abolish limitations on the length of stay for Abkhaz and South Ossetian passport holders in Russia. After 2008, it remained possible to obtain Russian passports in the regions.506

Condemnation of Russia’s intervention was widespread, yet relatively few statements dealt with the passportization issue specifically. In 2002, as passport distribution was stepped up, the Parliamentary Assembly of the Council of Europe (PACE) called on Russia to refrain from any unilateral measures affecting Georgia and its citizens, in particular as regards Abkhazia and South Ossetia, without prior discussion with and the agreement of the Georgian authorities, including in the fields of economic assistance and the freedom of movement of persons and goods, in particular with respect to visas, customs and passport issues507

In 2005, Russia was again called upon to ‘cease with activities, such as the issuing of Russian passports to inhabitants of the Georgian regions of Abkhazia and South Ossetia, which may – directly or indirectly – undermine these countries’ sovereignty and territorial integrity’.508 In 2008 the Parliamentary Assembly of the Council of Europe condemned the notion of ‘protecting citizens abroad’ as unacceptable and warned of ‘the political implications of such

508 PACE Resolution 1455 (22 June 2005) para 14.
a policy’. The accompanying report notes that ‘the mass distribution of Russian passports to the inhabitants of the two breakaway regions undoubtedly also encouraged the separatist leadership of these regions to step up the confrontation and reject a negotiated solution to the conflict’. The European Parliament called on Russia to ‘[support] Georgia's integrity and sovereignty’ and regretted ‘in this regard, the recent decision of the Russian Federation (...) to speed up the process of provision of Russian citizenship to the citizens of Abkhazia’ and after the war stressed ‘the importance (...) of stopping the process of forced passportisation’. In the Security Council debates of August 2008, the conferral of Russian citizenship was condemned by the UK, criticizing Russia’s justification of ‘the protection of its peacekeepers and civilians in South Ossetia and Abkhazia, even though most of those civilians have only recently been handed Russian passports and have not lived in Russia’. Russia’s justification of ‘humanitarian assistance’ as ‘a pretext for the presence of non-Georgian troops’ was also criticized and its statements that it must protect the life and dignity of Russian citizens wherever they were noted to ‘have far-reaching ramifications not limited to the present conflict’. The US disputed Russia’s claim of protecting peacekeepers and civilians. At the OSCE, the US and Norway noted that compulsory ‘passportization’ had

509 PACE Resolution 1633 on The consequences of the war between Georgia and Russia (2 October 2008) para 7.
512 Record of UNSC Meeting 5961 (19 August 2008) UN Doc S/PV.5961, 10.
513 Record of UNSC Meeting 5952 (8 August 2008) UN Doc S/PV.5952 (United Kingdom and Croatia).
514 Record of UNSC Meeting 5961 (19 August 2008) UN Doc S/PV.5961.
led to deterioration of the security environment. Georgia itself has continually protested against the passport policy describing it in the General Assembly as a ‘nefarious tactic (...) called passportization’ which meant that ‘passports were disseminated simply to create a quasilegal justification for claiming that R2P had to be applied’.

D. ASSESSMENT

Russia’s passportization in Georgia has been the most salient and most discussed example of passportization to date. While showing parallels with the Transnistria case in its early phase, the 2002-2008 phase constituted a rapid, widespread and directed effort at providing the populations of the breakaway regions with Russian citizenship. Another point of difference is that this passportization period was followed by an armed conflict in which the protection of its new citizens was invoked as a justification. This has led commentators to conclude that the whole passportization effort was undertaken purely as a pretext for an impending conflict. The context of armed conflict has also raised the conflict’s visibility, creating opportunities for states to voice their concerns and even spurring a legal fact-finding commission.

515 OSCE (759th Meeting of the Permanent Council) Statement by the Delegation of Norway (30 April 2009) PC.DEL/293/09.
516 OSCE (758th meeting of the Permanent Council) Statement by the Delegation of the United States (23 April 2009) PC.DEL/262/09.
The IIFFMCG explicitly posed the question: ‘Does Russia’s “passportisation” policy violate international law and thus constitute an illegal act under international law?’. The report applies broadly the same principles as have been scrutinized in this dissertation and comes to the conclusion that the massive nature of the passportization effort qualifies it as a prohibited (de-facto) collective extraterritorial naturalization violating Georgia’s jurisdiction, its territorial sovereignty, the non-intervention principle and the principle of good neighbourliness. It also found that it abused its right to confer its nationality upon stateless persons residing in Abkhazia and South Ossetia. These conclusions are well reasoned.

The lack of statehood of Abkhazia and South Ossetia qualifies the conferral of citizenship by Russia to persons living in the breakaway republics of Georgia as extraterritorial. The question Despite some evidence of Abkhaz and South Ossetian passports being forced upon nationals, Russian citizenship was generally not conferred forcibly but occurred individually and often for solid economic reasons. The passportization effort thus did not violate the prohibition of forced nor collective extraterritorial naturalization. Yet, the massive scale and short period of time in which the process was completed warrant a strict assessment as to the applicants’ ties to the conferring state. However, strong ties with Russia exist for many of the people living in the breakaway regions, with Ossetians often possessing family in North Ossetia, while russophone Abkhazia has been effectively integrated in the Russian cultural space over the last thirty years. Yet, even strong factual links are offset by the injury that Georgia has suffered as a result of the policy, which allowed Russia to rely on its citizens to invade the country and led to the quasi-annexation that endures today. Russia’s municipal law provided for extraterritorial naturalization through simplified naturalization procedure under article 14(4), provided that the applicant was granted permission to stay on the territory of the

519 IIFFMCG Report Vol 2 (n 432) 149.
520 IIFFMCG Report Vol 2 (n 432) 163-175.
521 ibid 175-177.
Russian Federation and declared a wish to become a citizen before 2009. However, the presumed internal validity of state acts are irrelevant from an international law perspective.

Therefore, the conclusion must be that Russian passportization in Georgia violate the relevant principles of law. As a result, the Russian nationality of those persons naturalized is not deserving of recognition by third states.

\[\textit{see III.1.2}\]
2.3. UKRAINE (CRIMEA AND DONBASS)

A. BACKGROUND

Ukraine is considered the cradle of Russian civilization and for a long time formed the frontier between Eastern and Western Christianity and between Christianity and Islam to the extent that its name signifies its borderland status.\(^{523}\) The Ukrainian Soviet Socialist Republic became a member of the USSR.\(^ {524}\) During German occupation, collaborating nationalists that Stalin’s famine,\(^ {525}\) succeeded in briefly proclaiming independence.\(^ {526}\) As a ‘gesture of fraternity’ cloaking the fact that its geography impeded reconstruction efforts, Nikita Krushchev ceded the Crimean peninsula from the RSFSR to the Ukrainian SSR in 1954.\(^ {527}\) Ukraine declared its sovereignty on 16 July 1991 and its independence on the 24\(^{th}\) of August the same year, supported by a referendum in which 90% voted for independence.\(^ {528}\) Relations with Russia were affirmed in a 1997 ‘Treaty of Friendship’ and a separate agreement was signed which gave Russia a long-term lease over the naval base of Sevastopol.\(^ {529}\) In the 2004-2005 ‘Orange Revolution’, the fraudulent election of Russian-backed Viktor Yanukovich

\(^ {524}\) ibid 122-133, 215-235.
\(^ {525}\) Anne Applebaum, *Red Famine – Stalin’s War on Ukraine* (Doubleday 2017).
\(^ {526}\) Plokhy (n 523) 266-267.
\(^ {527}\) Decree of the RSFSR Council of Ministers No 156 of 5 February 1954 ‘Concerning the Transfer of the Crimean Oblast’ from the RSFSR to the UkSSR (English translation by Wilson Center Digital Archive) <digitalarchive.wilsoncenter.org/document/119634> accessed 24 May 2018.
\(^ {528}\) Plokhy (n 523) 320-321. In Crimea, where 66% of residents were ethnic Russians, 57% voted in favour.
unleashed large-scale protests that brought a revote and the victory of Viktor Yushchenko. Russia, seeing the events in Ukraine as external efforts at destabilization and regime-change that would eventually reach Russia, took a more assertive stance. Yuschchenko’s plans included the objective of NATO and EU accession. Ukraine was a partner in the European Neighbourhood Policy and later in the Eastern Partnership. Russia was clearly not pleased with this course as president Putin noted in 2008 that Ukraine would disintegrate should it join NATO and stressed, wrongly, that ‘seventeen million Russians lived in Ukraine’ and that ‘Crimea was ninety-five percent Russian’. After the election of the more Russia-friendly president Yanukovich in 2010, Ukraine continued pursuing integration with the EU in the form of a proposed Association Agreement while reassuring Russia it would also accede to its proposed customs unions—a combination that proved a legal phantasy. When negotiations entered the final stage, Russia ‘persuaded’ Ukraine to join its customs union by raising gas prices and increasing political pressure. In the background, Russia experienced its Bolotnaya protests of 2011 when Putin returned to the presidency. Russian foreign policy took a ‘civilizational’ turn by emphasizing an alternative ‘Russian world’ (Russki Mir) to the perceived hegemonic position the West in the FSU, coupled to a reinvigorated persuit of a

531 Tsygankov (n 306) 28.
Eurasian Economic Union.536 The pressure on Ukraine proved too much in November 2013 when Yanukovich refused to sign the Association Agreement, which unleashed protests around the country that turned bloody in the streets of Kyiv during the course of the winter.537 Russia saw the protests as a violent ‘coup’ instigated by the West and referred to ‘fascist’ right-wing fringe groups providing the main thrust of the protests.538 In the end of February, Russia decided to seize Crimea by force. The course of events, which was designed to project a semblance of legality,539 saw Viktor Yanukovich requesting Russian military assistance; the seizure by ‘pro-Russian militias’ of Crimea’s Parliament building, which then voted and declared independence; the occupation of the peninsula by 30,000 to 35,000 regular Russian armed forces without insignias (‘little green men’); a referendum on accession with Russia and annexation by Russia through a constitutional amendment.540 Both Russia’s undeclared military invasion and the referendum were condemned by the international community and found illegal by scholars.541 Attention shifted to Ukraine’s eastern border, where Russia held

536 Tsygankov (n 306) 237-250; Toal (n 322) 210-211.
537 For a detailed account see Andrew Wilson, Ukraine Crisis and What it Means for the West (Yale University Press 2014) 66-98.
military exercises in the end of February. In early April, ‘pro-Russian militias’ started taking over government buildings in the Donbass region of Eastern Ukraine, which counted 38.5% ethnic Russians and were the Russian language was spoken by 72%. Soon after, the Donetsk and Luhansk ‘Peoples’ Republics’ were declared, or ‘Novorossiya’, the name of a former imperial governorate. Ukraine responded with an ‘anti-terrorism operation’ to reclaim the cities in the East. When the Ukrainians advanced, unidentified Russian equipment and armed forces were brought in to halt the advance. Amidst these events, a missile belonging to Russia’s 53rd Anti Aircraft Missile brigade brought down Malaysia Airlines MH17, killing 298 people. The so-called Minsk Agreements did not stop the fighting but cemented the frontlines to their current positions. Since 2015, the conflict has remained stable but


A timeline of the events can be found at ‘The Ukraine Crisis Timeline’ (Center for Strategic and International Studies) <http://ukraine.csis.org/east1.htm#42> accessed 23 May 2018.

Wilson (n 530) 119-124.

Toal (n 322) 261.

Wilson (n 530) 136-139.

Paul Robinson, ‘Russia's role in the war in Donbass, and the threat to European security’ (2016) 17 European Politics and Society 506.


Protocol on the outcome of consultations of the Trilateral Contact Group on joint steps aimed at the implementation of the Peace Plan of the President of Ukraine, P. Poroshenko,
ongoing. Ukraine has instituted proceedings against Russia under the CERD and the International Convention for the Suppression of the Financing of Terrorism before the ICJ, which decided that it had *prima facie* jurisdiction.\(^{550}\) It also brought a number of interstate claims before the ECtHR which have been referred to the Grand Chamber and were regrouped in cases concerning Eastern Ukraine and Crimea.\(^{551}\) Russia’s role in the conflict and the shooting down of flight MH 17 has been the subject of intense scrutiny by various NGO’s and think tanks\(^{552}\) and led to a sanctions regime imposed by the EU, US and allies.


\(^{551}\) *Ukraine v Russia* App No 20958/14 (ECtHR 13 March 2014); App No 43800/14 (ECtHR 13 March 2014); App No 49537/14 (ECtHR 9 July 2015); App No 42410/15 (ECtHR 26 August 2015); App No 8019/16 (ECtHR 13 March 2014); App No 70856/16 (27 August 2015); ECtHR, ‘Grand Chamber to examine four complaints by Ukraine against Russia over Crimea and Eastern Ukraine’ (Press Release, 9 May 2018) ECHR 173(2018).

B. LEGAL STATUS OF CRIMEA & DONBASS

The territories of Crimea and Eastern Ukraine were undisputed before Russia’s intervention and annexation of Crimea and the establishment of the ‘People’s Republics’ in 2014. While Putin allegedly remarked in 2007 that Ukraine was ‘a difficult state’, which in large part constituted a ‘gift’ from Russia, its independence was never put into question and self-determination claims only arose as the conflict broke out.\textsuperscript{553}

In the case of Crimea, its ‘return’ to the Russian Federation was ostensibly structured as secession from Ukraine, followed by a fusion of an independent Crimea with the Russian Federation.\textsuperscript{554} A referendum, which was not universal, free, secret nor peaceful,\textsuperscript{555} took place under gunpoint of 25,000 Russian troops with figures allegedly showing 83.1% turnout and 96.7% in favor of ‘union’ with Russia.\textsuperscript{556} A ‘treaty’ with Crimea sealed the deal on the 18\textsuperscript{th} of March and was confirmed by the Russian Duma on the 21\textsuperscript{st}.\textsuperscript{557} The Venice Commission came

\textsuperscript{554} Toal (n 322) 207-208.
\textsuperscript{556} ibid.
\textsuperscript{557} Wilson (n 530) 113.
to the conclusion that, in addition to its illegality under the Ukrainian constitution, ‘circumstances in Crimea did not allow the holding of a referendum in line with European democratic standards’. The illegitimacy of the referendum under Ukrainian constitutional and/or international law was highlighted by a number of States in the Security Council. Furthermore, the absence of any serious human rights violations vis-a-vis the Russian speaking majority in Crimea precludes an appeal to external self-determination. Russia’s intervention in Crimea has been convincingly classified as an illegal use of force under the UN Charter. Therefore, Russia’s acquisition of Crimea constitutes an annexation, which has been illegal under international law for a considerable time and the prohibition of which may well be part of jus cogens. Other states are under a corresponding obligation to refrain from recognizing territorial changes resulting from annexation. In the Security Council, a draft resolution calling upon States ‘not to recognize any alteration of the status of Crimea (...) and to refrain from any action or dealing that might be interpreted as recognizing any such altered status’ was vetoed by Russia with China abstaining. The UNGA adopted a resolution with 100 votes to 11 and 58 abstaining, which reaffirmed Ukraine’s territorial integrity, declared the referendum as invalid and called upon States not to recognize Crimean

559 UNGA (68th Session) Record of the 80th Plenary Meeting (27 March 2014) UN Doc A/68/PV.80 (EU, Albania, Montenegro, Georgia, Norway, Liechtenstein, Costa Rica, Canada, Guatemala, Moldova, Ecuador).
560 Veronika Bilkova, ‘Territorial (Se)Cession in the Light of Recent Events in Crimea’ in Matteo Nicolini, Francesco Palermo and Enrico Milano (eds) Law, territory and conflict resolution : law as a problem and law as a solution (Brill 2016) 195-209; Marxsen (n 541) 380-389.
561 see n 541.
independence from Ukraine. The PACE also adopted several resolutions on the matter and has noted that ‘the so-called referendum that was organised in Crimea on 16 March 2014 was unconstitutional under both the Crimean and Ukrainian Constitutions’ and ‘[t]he outcome of this referendum and the illegal annexation of Crimea by the Russian Federation (...) have no legal effect and are not recognised by the Council of Europe’. The current legal status of Crimea could thus better be described as an enduring military occupation.

With respect to Eastern Ukraine, matters are more complicated. Instead of providing a clear-cut example of annexation, Russian military support for the ‘separatist regions’ has been well documented but consistently denied. On the 7th and 27th of April 2014, the respective ‘People’s Republics’ of Donetsk (DPR) and Luhansk (LPR) were proclaimed, followed up by referendums that were not recognised by the Ukrainian government nor the international community. Yet, both the Minsk-I Agreement, which was signed by the representatives of the DPR and LPR, and the Minsk-II Agreement, affirm that Ukrainian law should finally govern the territories, thereby conceding the claim to external self-determination. Nevertheless, while having signed these agreements, both the DPR and LPR have claimed to be striving for independence while Russia has remained ambivalent on the matter. Again, the absence of large-scale human rights violations and the adoption by Kyiv of a number of

566 PACE Resolution 1988 (9 April 2014) para 16; PACE Resolution 2018 (2 October 2014); PACE Resolution 2035 (28 January 2015); PACE Resolution 2078 (1 October 2016); PACE Resolution 2132 (12 October 2016); PACE Resolution 2149 (26 January 2017); Resolution 2198 (23 January 2018);
567 Bothe (n 541) 100-103; Tancredi (n 561) 21-29.
568 Toal (n 322) 247-252.
570 ibid, 409.
laws compromising with the separatists on greater autonomy preclude a legitimate invocation of a right to external self-determination and/or remedial secession.\textsuperscript{572} States and international organisations also voiced their opposition to a possible repetition of the Crimean scenario and the direct involvement of Russia as the guardian angel of the de-facto regimes. The EU Parliament has condemned ‘Russia’s act of aggression in invading Crimea’ and ‘the escalating destabilisation and provocations in eastern and southern Ukraine (...) by pro-Russian armed, trained and well-coordinated separatists led by Russian special forces’ in addition to reiterating it ‘will not recognise the illegal annexing of Crimea and Sevastopol or the attempts at creating quasi-republics in Donbas’.\textsuperscript{573} NATO member states condemned ‘Russia's illegal and illegitimate annexation of Crimea’ and called on Russia to ‘end its illegitimate occupation of Crimea [and] withdraw its troops; halt the flow of weapons, equipment, people and money across the border to the separatists; and stop fomenting tension along and across the Ukrainian border’.\textsuperscript{574} The PACE declared that the DPR and LPR are not legitimate under Ukrainian or international law and qualified Russia’s involvement as ‘an ongoing military aggression’.\textsuperscript{575} Taking these factors into account, the Donbas ‘breakaway republics’ should be qualified as de-facto entities lacking a claim to international personality.

The conclusion of this summary enquiry seems to be that both the Crimean peninsula and the territories in the East of Ukraine under control of the DPR, LPR and the Russian Federation, should be regarded as integral parts of Ukraine. Any passport policy undertaken in respect of these areas will therefore be regarded as extraterritorial.

\textsuperscript{572} ibid, 885.
\textsuperscript{575} PACE Resolution 2133 (12 October 2016); PACE Resolution 2203 (25 January 2018) para 7(6).
According to 2001 census data, 60% in Crimea identified as ethnically Russian, while this figure stood at 50% in the Luhansk Region and 48% in the Donetsk Region. In a 2014 census of Crimea, conducted by Russia after its annexation, the figure stood at 65%. All persons permanently residing within Ukraine on the 24th of September 1991 automatically became Ukrainian citizens.

In Crimea, Russia passports and citizenship were made available to the Russian minority since the nineties and in 2008 led Ukrainian to point accusingly to the Russia’s consulate in Simferopol and naval base in Sevastopol, from where passports were allegedly distributed. Many Russian officers that were discharged from the Black Sea Fleet illegally acquired Ukrainian citizenship and remained in the country. Estimates suggest that after this initial period, anywhere from eight to forty thousand Crimeans (about 2%) acquired Russian

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580 Grigas (n 319) 120.
citizenship, a figure denied by Russian officials.\textsuperscript{581} A similar policy was not reported in respect of the Donetsk or Luhansk Regions before 2014.

The large-scale distribution of Russian passports in Crimea began on 18 March 2014, with an estimated one million people acquiring Russian citizenship through the simplified procedure.\textsuperscript{582} Russia’s FMS was reported to have completed the passport distribution process in December 2014.\textsuperscript{583} Ad hoc Russian immigration centres were set up by the Russian Federal Migration Service across the peninsula in order to handle the massive amount of applications.\textsuperscript{584} The chief of the FMS at the time declared that by June 2014 ‘over a million Russian passports had been issued and approximately 1.25 million applications for naturalization had been submitted’, with a peak of 150,000 applications per day handled by the 160 offices.\textsuperscript{585} It is doubtful whether the massive scale of the operation allowed for the strict following of the legal procedures, with residents reportedly only having to present a Ukrainian passport and prove residency in Crimea in order to receive a passport, which finalized the naturalization procedure.\textsuperscript{586} In 2008, a Ukrainian study found that 80% of Crimeans would prefer Russian to Ukrainian citizenship.\textsuperscript{587} It is therefore no surprise that in 2014, passportization largely occurred voluntarily, with residents noting ‘Russian promises of increased financial security[,] (...) greater employment and mobility opportunities’ and the

\textsuperscript{581} Grigas (n 319) 120; Pelnens (n 395) 266.
\textsuperscript{583} Sabine Fischer, ‘Russian Policy in the Unresolved Conflicts’ in Sabine Fischer (ed) Not Frozen! The Unresolved Conflicts over Transnistria, Abkhazia, South Ossetia and Nagorno-Karabakh in Light of the Crisis over Ukraine (Stiftung Wissenshaft und Politik 2016) 21.
\textsuperscript{584} Wrighton (n 582) 290.
\textsuperscript{585} Wrighton (n 582) 291.
\textsuperscript{586} Wrighton (n 582) 290.
\textsuperscript{587} Pelnens (n 395) 267.
promise of doubled pensions. Adoption of Russian citizenship, however, was crucial to being able to continue benefiting from public and private services on the peninsula after Russia’s annexation, with reports noting that persons refusing Russian citizenship found it nearly impossible to find work, schools or financial services and in some cases were harassed by the authorities. In addition the refusal of Russian citizenship required an explicit rejection within one month, which was made deliberately difficult by the authorities. Russian citizenship was conferred automatically upon those who failed to submit their rejection in time. People that rejected Russian citizenship and later decided to apply for it were faced with a ‘bureaucratic slowdown’ and fees that had risen from $8,5 (which was often waived) at the height of the passportization campaign to $99 in 2015. This systematic harassment has reportedly resulted in the de-facto forced emigration for those citizens presumed to be hostile subjects. Aside from contributing to a policy of cracking down on dissenter, Russia’s passportization policy has been convincingly framed within a larger assault on the Crimean Tatar population in Ukraine. As a consequence of the conferral of citizenship, Crimean residents have even been conscripted into the Russian armed forces.

588 Wrighton (n 582) 289.
589 Wrighton (n 582) 292-293
590 Wrighton (n 582) 294.
592 Wrighton (n 582) 295.
593 ibid, 296;
In Donbas, Russia was more hesitant to deliver passports and no massive distribution of Russian passports followed the establishment of the de-facto authorities in the course of 2014. This presumably reflects Russia’s objective of retaining plausible deniability in regard of its role in the conflict. Nevertheless, reports say that in 2015, after the conflict had more or less stabilized, preparations were made in the nearby Russian city of Rostov-on-Don to accommodate applications for Russian citizenship through the simplified procedure. It was reported that in March 2016, the ‘DPR’ had started distributing the ‘Donetsk People's Republic passports’. A year earlier, the ‘LPR’ had also started distributing its own passports. In 2017, the DPR/LPR authorities reportedly ordered residents to convert to their own passports before May. In 2018, the DPR reportedly issued 178,000 of its own passports. It was noted that the creation of these passports was intended to serve as a halfway house towards actual Russian citizenship when, on 18 February 2017, president Putin signed a decree holding the recognition of passports, license plates, marriage and divorce certificates, and university diplomas issued by the DPR/LPR and providing visa-free travel

596 Fischer (n 583) 21.
599 RT Ruptly, Ukraine: Self-proclaimed LPR issue passports to residents of Lugansk (Youtube, 5 May 2015).
into Russia.\textsuperscript{602} One Russian newspaper claimed that the sequence of events was intended to allow residents of the DPR and LPR to apply for Russian citizenship on the basis of their local passport rather than on those of Ukraine.\textsuperscript{603} Unfortunately, there is no publicly available information on the number of residents from Eastern Ukraine who have received Russian citizenship based on a DPR or LPR passport. It seems that applications for citizenship have mainly come from Ukrainians that have fled to Russia, with the FMS reporting that 125,312 of these refugees applied for citizenship and 146,367 applied to the State Program to Facilitate Voluntary Resettlement of Compatriots Living Abroad, which also leads to facilitated access to citizenship.\textsuperscript{604} In addition, no information is available on possible discriminatory practices in handing out DPR/LPR or Russian passports in Eastern Ukraine.

In regard to the compatibility of Russia’s passportization policy with Ukrainian, it should be noted at the outset that Ukrainian law does not recognize dual citizenship as every national is regarded as exclusively Ukrainian.\textsuperscript{605} While not prohibiting dual citizenship as such, the voluntary acquisition (naturalization) of foreign citizenship may result in the loss of Ukrainian citizenship.\textsuperscript{606} This rule has rarely been enforced, leading to the situation that double passport holders may risk statelessness when their new state of nationality requires the

\begin{flushleft}
\textsuperscript{605} Ukrainian Law on Citizenship, art 2.
\textsuperscript{606} Ukrainian Law on Citizenship, art. 19.
\end{flushleft}
relinquishment of prior citizenship and both States retract citizenship simultaneously.\textsuperscript{607} On the 4\textsuperscript{th} of April 2014 Russia amended its 2002 citizenship law by introducing a simplified procedure for foreign nationals recognized as ‘native Russian speakers’ legally residing in the RF in a permanent basis.\textsuperscript{608} It specifically includes a facilitated way for renouncing Ukrainian citizenship, which may be done by a notarized declaration directed at the Ukrainian government instead of a document emanating from the relevant governmental services. Proof of status as a native Russian speaker requires a decision by a commission formed by agents of the federal migration service and can be obtained by persons having permanently resided in the territory that formed part of the Russian Empire or USSR.\textsuperscript{609} This amendment is directed at Ukrainians residing in the Eastern regions under separatist control and technically requires residence in Russia but no required duration of residence is provided. In respect of Crimea, the constitutional law that incorporated the territory into Russia handles the question of citizenship. It provides that

From the day of admission into to the Russian Federation of the Republic of Crimea and the formation of new constituent entities within the Russian Federation, citizens of Ukraine and stateless persons permanently residing on this day in the territory of the Republic of Crimea or in the City of Federal Importance Sevastopol are recognized as citizens of the Russian Federation, with exception of those who, within the period of one month after that day, declare their wish to preserve their existing citizenship and (or) that of their minor children or to remain stateless.\textsuperscript{610}

\textsuperscript{608} Russian Citizenship Law of 2002, art 14(2.1).
\textsuperscript{609} Russian Citizenship Law of 2002, art 33.
\textsuperscript{610} Federal Constitutional Law of 21 March 2014 N 6-FKZ on the admission to the Russian Federation of the Republic of Crimea and the formation in the Russian Federation of new
In response to Russia’s passportization efforts, Ukraine adopted a law that affirms its non-recognition of compulsory enrollment to the citizenship of the Russian Federation in Crimea, which does constitute a ground for loss of citizenship.\(^{611}\) A subsequent Russian decree made the renunciation of Russian citizenship impossible without a Russian passport, thereby effectively preventing renunciation of citizenship for those who refused to accept Russian passports but was automatically bestowed with Russian citizenship anyway.\(^{612}\) Additional decrees introduced mandatory work permits for non-visa based residents and quotas.

The international community widely condemned Russia’s passportization strategy. In 2017, the UNGA adopted a resolution was adopted by 70 votes to 26, with 76 abstentions

> [c]ondemning the imposition and retroactive application of the legal system of the Russian Federation, and its negative impact on the human rights situation in Crimea, the imposition of automatic Russian Federation citizenship on protected persons in Crimea, which is contrary to international humanitarian law, including the Geneva Conventions and customary international law, and the regressive


effects on the enjoyment of human rights of those who have rejected that citizenship.  

Other reactions to Russia’s policies linked the passportization issue to Russia’s invocation of protecting its ‘compatriots abroad’. The European parliament addressed the compatriot motive in its resolution on the invasion of Crimea in which it condemned ‘as contrary to international law and codes of conduct the official Russian doctrine under which the Kremlin claims the right to intervene by force in the neighbouring sovereign states to ‘protect’ the safety of Russian compatriots living there’.  

It also condemned ‘the enforced “passportization” of Ukrainian citizens in Crimea’. The Parliamentary Assembly of the Council of Europe has called upon Russia to ‘stop forcing Ukrainian citizens living in annexed Crimea to accept Russian passports and stop the forcible deportation of Ukrainian citizens without Russian passports from annexed Crimea’. In 2014, the PACE also adopted a resolution on the implementation of the European Convention on Nationality in which it called on the Russian Federation to ‘stop the en masse distribution of Russian passports in other member States’. It considered both this mass conferral as well as the justification of protecting compatriots abroad as ‘contrary to the Council of Europe's principles’.

D. ASSESSMENT

Even more so than in respect of Georgia, the case of Ukraine has provided many occasion for states to voice their opinions on Russia’s conduct. The issue of passportization featured in many resolution, including the UNGA, which condemned the passportization of Crimea as

615 EP Resolution on the situation in Ukraine and the state of play of EU-Russia relations (18 September 2014) OJ C234/14, para 4.
616 PACE Resolution 2198 (23 January 2018) para 10(9).
618 ibid, para 6.
constituting a violation of international humanitarian law, predicated on the correct assumption of Russia as an occupying power. In regard to Eastern Ukraine, criticism directed at Russia’s recognition of the separatist passports is characterized as a violation of its Minsk agreement commitments rather than constituting a separate violation of international law.

From the outset, it should be clear from the facts that the Crimean case of passportization differs radically from the situation in Eastern Ukraine. The passportization effort in Crimea is predicated on Russia taking full responsibility for the administration of the territory and departs from the logic of State succession rather than military occupation. Yet, as described above, the law contradicts Russia’s account as it did not legally acquire Crimea. The passportization of Crimea occurred by virtue of the Federal Law of 21 March and therefore constitutes an instance of collective naturalization. As elaborated in the first part of this dissertation, extraterritorial collective naturalization is to be considered prohibited at all times. It is true that the law provided a limited opportunity to reject the conferral of Russian citizenship but a law which, in the absence of individual action on behalf of foreign citizens to refuse its effects, confers naturalization on an undetermined number of foreign citizens living abroad, amounts to de-facto collective naturalization. This is further reinforced by the illusory character of the ‘choice’ to refuse Russian passports. In addition to the practical obstacles that marked the way toward refusing, the incredibly short period in order to do so and the near-impossibility to function as an individual in Crimean society without a Russian passport warrants the conclusion that this ‘choice’ to refuse should be dismissed as legal window dressing. Another remarkable situation is the limbo in which individuals find themselves when they refuse to accept Russian passport and, as a result of subsequent Russian legislation, are unable to renounce their Russian citizenship, which comes down to the imposition of Russian citizenship. Even in cases of state succession, which the Crimean annexation is not, the ILC determined that an effective choice should be given a right of
option in regard to citizenship of the successor state.\textsuperscript{619} In view of the fact that all persons that were collectively naturalized presumably possessed Ukrainian citizenship, no application can be made of the exception for stateless persons. Finally, while the process of passport distribution did not seem to be discriminatory on an ethnic basis in and of itself, taken as a whole, it has been described as an instrument in an overarching policy which might give rise to separate violations of non-discrimination and freedom of expression norms.\textsuperscript{620} In addition, as UNGA Resolution 72/190 sets out, Russia’s imposition of its citizenship and enlistment into its armed forces of the residents of Crimea also constitutes violations of its duties as an occupying power under International Humanitarian Law.\textsuperscript{621} For these reasons, Russian citizenship accorded to the residents of Crimea is not opposable under international law. Furthermore, since Russia’s annexation of Crimea may constitute a breach of a peremptory norm, other States are under an obligation to refrain from recognizing the granting of citizenship which has accompanied this annexation.\textsuperscript{622} The resolutions adopted by organs of the UN, EU and PACE support this assessment.

Russia’s actions in Eastern Ukraine are harder to qualify using the lens of passportization. So far, Russia has not outright provided its citizenship to the populations of the DPR/LPR. The recognition of local passports on itself can be characterised as an infringement of Ukraine’s


\textsuperscript{622} ARSIWA, art 42(2).
territorial integrity, jurisdiction, as well as the commitment under the Minsk II agreement to bring the regions under a special regime within Ukraine’s jurisdiction. Yet, the recognition of the separatist passports, as Russia has done in Transnistria and South Ossetia and Abkhazia, does not constitute passportization itself, unless it could be proven that such documents were intentionally created as a step-up to full citizenship—an assessment which the available facts cannot support. Another possibility is to regard Russian passports delivered to Eastern Ukrainian residents across the border with Russia as de-facto extraterritorial naturalization, provided that the applicants continue to reside in the DPR/LPR regions. However, it appears from the facts that most of the applicants are refugees or resettled Ukrainians which have effectively relocated to Russia. This is supported by the fact that the provision introducing a simplified naturalization procedure for Ukrainians in 2014 applies only to those partaking in the voluntary resettlement for compatriots. The passportization of Eastern Ukraine also does not seem to align with Russian objectives in Eastern Ukraine. Since the situation already provides it with leverage over Ukraine, the need to consolidate by extending citizenship seems unnecessary. In this sense, the situation may over time evolve along the lines of Transnistria, with the possibility for extending citizenship retained left open as a trump card, should additional pressure be needed on Kyiv. Should Russia decide to distribute passports in the DPR/LPR, it would constitute extraterritorial naturalization which would provide a basis for legal analysis. Given the lack thereof, no passportization can currently be analyzed.
IV. CONCLUSION

This dissertation has identified how international law regulates states when extension their citizenship across borders and has tested these rules by applying them to three concrete cases. This warrants an answer to the main questions and allows for a number of broad observations.

1. DOES INTERNATIONAL LAW PROHIBIT PASSPORTIZATION?

Nationality is one of the rare subjects of international law where states are left largely to their own devices. The functional concept of nationality, defended in the first part of this thesis, places no substantive requirement on the bond between a national and a state for the purposes of international law. Instead, treaty law, general international law and specified concepts of nationality in different areas of the law provide the limits on a state’s ability to freely determine its nationals. When assessing extraterritorial naturalization, general treaty provisions are of limited use, with instruments such as the 1930 Hague Convention (12 ratifications) and the 1997 European Convention (21 ratifications) referring back to general international law. In specific areas like human rights law, nationality has been increasingly regulated, with the prohibition of compulsory naturalization and the obligation to prevent statelessness as prime examples. Further guidance is provided by the prohibition to confer nationality to protected civilians and the prohibition of forced conscription under international humanitarian law. This leaves a gap in the middle where the law is less clear. In these cases, general principles of law must be applied. The principle of non-intervention disqualifies the collective naturalization of foreign citizens. The abuse of rights principle allows states to retain their principal autonomy while providing a penalty when these rights are exercised arbitrarily or arranged in a constellation intent on harming another state. The flexibility of these principles means that the legality of the conferral of citizenship to willing individuals abroad may take into account the concrete interests and motivations of the parties in a given situation. As such, while both not prima facie illegal, the Moldovan and Georgian cases of passportization were distinguished on the basis of factors such as pace, scale, compatibility with the laws of the territorial state and context, which are presumed to be reflective of the injury to the territorial state. The violation of the identified principles and rules results in the
non-opposability of the illegally conferred nationality. With these rules, it has been possible to assess the three case studies without encountering unequitable results. Therefore, I believe the principle-based framework provides an adequate legal measure for state conduct.

2. DO THE CASE STUDIES PROVIDE A BASIS FOR A CUSTOMARY RULE?

The three case studies have attempted to distill the essence of what the legal elements of passportization entail but have not produced a satisfactory amount of material for a rule of customary law. Passportization is a highly specific, relatively recent phenomenon that seems to be geographically limited to the FSU countries and therefore knows comparatively little examples in state practice. Aside from reactions by the states that are directly affected by passportization, third states have largely remained absent in the debates. While Russia has faced punitive measures in response to its conduct in Ukraine, these can only be interpreted as directed at Russia’s illegal use of force an annexation of Crimea. Russian passportization in Abkhazia, South Ossetia nor Transnistria has elicited a directed response from states other than Georgia or Moldova. While a number of resolutions at the UN, PACE and European Parliament have explicitly condemned Russia’s distribution of passports in the three cases, these are not binding and do not express state practice. In respect of opinio juris, the fact that passportization has been referenced mainly in debates on the use of force and has not been placed on the agenda as a specific topic means that states have rarely commented on norms they possibly see fit for governing such case. As a result, it would be too far a stretch to argue that a customary rule prohibiting passportization as such exists or even de lege ferenda.

3. OBSERVATIONS AND OUTLOOK

The topic of this dissertation has proven to be specific but relevant for a number of reasons.

First, as Russia’s objectives in its ‘near abroad’ and its use of its compatriot policy do not suggest any changes of heart, the possibility of future passportization in Ukraine, Kazakhstan, Latvia or elsewhere should not be rule out. The case studies have demonstrated how nationality may be ‘weaponized’ in order to gain leverage over countries with russophone diasporas. Where this leverage does not yield results, a body of russian citizens may serve as
a justification when military action is undertaken. In this sense, the study of the topic of passportization is useful in highlighting a highly specific course of conduct which may be the subject of further debate and progressive development of the law.

Second, the topic of passportization constitutes one of those ‘grey areas’ of the law caused by the disconnect between the current international law of nationality and the reality of current day interconnectedness. While the assumptions governing nationality in international law have remained largely the same since the early part of the last century, the idea of citizenship as signifying an exclusive loyalty to a state grounded in both facts and sentiments, has become anachronistic at best. Dual citizenship has proliferated and in the EU, ‘European citizenship’ challenges the very idea of citizenship as a link between an individual and a state. Similar to current discussions about cybersecurity or environmental damage, nationality is an issue were competing interests are difficult to solve with the legal tools available.

As a final note, this topic has demonstrated the usefulness of often underappreciated general principles of law. While admittedly providing little in *a posteriori* normative content, principles deserve praise as being ‘the law of of the gaps’ when individual disputes need to be decided. This means that an important role is reserved for international courts and tribunals. The *Nottebohm* case sparked a new wave in legal scholarship on the law of nationality when the International Court of Justice ruled on the then largely unregulated matter of nationality by adopting the ‘genuine link’ principle. While the case between Ukraine and Russia before the ICJ might offer a passing remark on Russian passports in its analysis of discriminatory policies vis-a-vis Crimea’s tatar community, it is the soon to be decided ten-year old Georgia v Russia case before the ECtHR that will possibly elaborate on the problem further. The law would surely benefit from a clear and principled verdict concerning a very foggy subject.
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