
WEAPONIZING NATIONALITY: AN ANALYSIS OF RUSSIA'S PASSPORT POLICY IN GEORGIA

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ABSTRACT

Russia justified its August 8, 2008 invasion of Georgia on its responsibility to protect South Ossetia's Russian citizens from the Georgian government's aggression. While the international community broadly condemned Russia's actions, its condemnation concentrated on the proportionality of Russia's response. But, lost in the discussions of proportionality and "the responsibility to protect" was a question more fundamental to the legitimacy of Russia's action: how did 90% of South Ossetia's citizens come to hold Russian passports and citizenship? This article analyzes the legitimacy of Russia's actions through the prism of nationality and its regulation under international law.

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This analysis is important because by marrying the state's sovereign right to confer citizenship with the state's sovereign right to protect its citizens, the former right can be effectively transformed into a tool of state aggression. In light of humanity's increasing mobility and Russia's continued policy of conferring its nationality extraterritorially, such as in Trans-Dniester (Moldova) and Crimea (Ukraine), it is important to understand how international law limits a country's ability to protect people it claims as nationals. After analyzing international nationality law's development and current regime, this article argues that under the current regime it cannot be said that Russia violated international nationality law by conferring its citizenship en masse extraterritorially. The article then suggests that the abuse of rights doctrine may serve as a more effective legal tool for analyzing Russia's passport policy.

I. INTRODUCTION

On August 8, 2008, while much of the world watched the Beijing Olympics' opening ceremonies, the Russian military began a campaign into the sovereign territory of the former Soviet republic of Georgia. Russia's actions were a response to the Georgian government's attack on separatist groups within Georgia's semiautonomous northern region of South Ossetia. While contingents of the Russian military had been acting as peacekeepers in South Ossetia since 1992,¹ Russia's incursion blatantly exceeded its mandate. Rapidly deploying as many as 25,000 troops, over 1,000 armored vehicles and a strategy that included the Russian navy taking control of Poti, Georgia's main port city,² some argued that Russia's actions resembled a well planned offensive strike.³ According to Russian President Dmitry Medvedev, however, Russia's actions were necessary to "protect . . . the Russian citizens living in [South Ossetia]."⁴

The international community's reaction was overwhelmingly negative and focused on the proportionality of Russia's response.⁵ Some political

¹ PETER ROUDIK, LAW LIBRARY OF CONGRESS, RUSSIAN FEDERATION: LEGAL ASPECTS OF WAR IN GEORGIA 2 (2008), <http://www.loc.gov/law/help/russian-georgia-war.pdf>.

² ARIEL COHEN ET AL., THE HERITAGE FOUNDATION, RUSSIAN FORCES IN THE GEORGIAN WAR: PRELIMINARY ASSESSMENT AND RECOMMENDATIONS 1 (2008), <http://tiny.cc/heritage2>.

³ See *id.* at 2.

⁴ Dmitry Medvedev, President, Russ., Joint Press Conference with Federal Chancellor Angela Merkel (Aug. 15, 2008), available at http://kremlin.ru/eng/speeches/2008/08/15/2259_type82912type82914type82915_205379.shtml.

⁵ U.S. Deputy National Security Adviser James Jeffrey said "[w]e deplore the dangerous and disproportionate actions by Russian forces . . ." Jeremy Pelofsky et al., *U.S.: Russia's Actions in Georgia Could Harm U.S. Ties*, Reuters, Aug. 10, 2008, <http://tiny.cc/Pelofsky>. German Chancellor Angela Merkel said she "found some of

leaders, however, expressed an understanding for Russia's actions.⁶ After initially equivocating about the legal justification supporting the incursion, Russia eventually settled on the emerging human rights doctrine of the "Responsibility To Protect."⁷ Throughout this time, President Medvedev was clear that "Russia [would] not allow anyone to compromise the lives and dignity of its citizens."⁸ Thus, Russia's legal justification rested on the responsibility to protect its citizens. The international community seemed willing to frame the discussion around Russia's justification given that "80% residents [sic] of South Ossetia are Russian citizens" ⁹ But, lost in the debate surrounding the proportionality of Russia's response was a question much more fundamental to the overall legitimacy of Russia's actions. Specifically, "how did so many people in a neighboring country come to hold Russian passports?"¹⁰

South Ossetia's demographics, on which Russia's justification relies, seem to be a product of Russian design. Russia's citizenship laws have undergone a significant change in the last decade. Prior to 2002, the process by which a resident of an ex-Soviet republic obtained Russian citizenship was "complex and involved repeated trips to Russian consulates or moving to Russia altogether."¹¹ But on May 31, 2002, Russia adopted the Law on Russian Federation Citizenship,¹² making the acquisition of Russian citizenship by residents of ex-Soviet republics easier. In fact, not

Russia's actions disproportionate" *Merkel, Medvedev Clash over Russia's War in Sochi Talks*, Deutsche Welle, Aug. 15, 2008, <http://tiny.cc/Merkel>. Following a NATO meeting requested by Georgia, Jaap De Hoop Scheffer said "the excessive disproportionate use of force by the Russians was condemned and deplored" Jaap De Hoop Scheffer, Sec'y Gen., NATO, Speech Following NATO Meeting on Situation in Georgia (Aug. 12, 2008), available at <http://www.nato.int/docu/speech/2008/s080812e.html>.

⁶ "French President Nicolas Sarkozy . . . was quoted as saying that 'it is perfectly normal that Russia should want to defend its interests, those of Russians in Russia and Russian speakers outside Russia.'" Natalie Wild, *Does a State Have the Right to Protect Its Citizens Abroad?*, Radio Free Europe / Radio Liberty, Aug. 22, 2008, <http://tiny.cc/ezg4w>.

⁷ James P. Rubin, *Russia's Poor Excuse For Invading Georgia*, NEW REPUBLIC, Nov. 8, 2008, available at <http://www.cbsnews.com/stories/2008/11/07/opinion/main4582529.shtml>.

⁸ Dmitry Medvedev, President, Russ., Opening Address at the Meeting of the State Council on the Situation Around South Ossetia and Abkhazia (Sept. 6, 2008), available at http://www.kremlin.ru/eng/text/speeches/2008/09/06/1515_type82912type82913_206195.shtml.

⁹ *Vasili Istratov: "Russian Passports Were Issued to South Ossetian Residents Based on Russian Legislation"*, Today.Az, Aug. 13, 2008, <http://tiny.cc/Istratov>.

¹⁰ Alexander Osipovich, *Controversial Passport Policy Led Russians into Georgia: Analysts*, Agence France-Presse, Aug. 21 2008, available at <http://tiny.cc/64iok>.

¹¹ *Id.*

¹² *Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF][Russian Federation Collection of Legislation] 2002, No. 62-FZ*, available at <http://tiny.cc/z5suj>.

only did it become unnecessary to relocate to Russia, residents of South Ossetia were able to “apply without leaving their homes.”¹³ “Reportedly, following this regulatory change, up to 90 percent of South Ossetia’s population of under 100,000 . . . acquire[d] Russian citizenship.”¹⁴ This wholesale distribution of Russian citizenship has been described as a “creeping annexation of [the] territor[y].”¹⁵ More ominously, some view Russia’s passport policy as a means toward justifying a premeditated invasion.¹⁶

This article analyzes the legitimacy of Russia’s justification for invading Georgia through the prism of nationality and its regulation under international law. Since the “main premise of the Russian argument [is] that Russia acted fully within its rights in defending its citizens[,]”¹⁷ this article asks: was Russia’s distribution of passports to the population of South Ossetia legal under international law? Part II provides a brief overview of the shared history of Russia, Georgia, and South Ossetia. One of international law’s few requirements for recognizing a state’s right to diplomatically protect an individual on whom the state has conferred its nationality is that some “genuine link” exists between a state and that individual.¹⁸ Thus, these countries’ shared histories are an important component of the legal analysis.

Part III analyzes the evolution of international nationality law. After reviewing the development of now established customs, the article analyzes nationality’s more formal legal treatment under various treaties and international tribunals’ holdings. Because of its unique importance to international nationality law, this article discusses the *Nottebohm*¹⁹ case separately at the end of Part III. Parts IV and V analyze unique issues raised by the facts, those relating to state succession and specific views on the extraterritorial conference of nationality. Part VI argues that Russia’s passport policy does not clearly constitute a violation of existing international nationality law. Finally, Part VII argues that the abuse of rights doctrine may serve as a more effective legal tool for analyzing Russia’s passport policy. This analysis of international law’s regulation of

¹³ ROUDIK, *supra* note 1, at 11.

¹⁴ *Id.*

¹⁵ ARIEL COHEN, THE HERITAGE FOUNDATION, SAVING GEORGIA 2 (2008), http://www.heritage.org/Research/RussiaandEurasia/upload/wm_2021.pdf.

¹⁶ “By issuing citizenship to South Ossetians, Russia gained a pretext to invade in early August . . .” Damien McElroy, *South Ossetian Police Tell Georgians to Take a Russian Passport, or Leave Their Homes*, Telegraph.co.uk, Aug. 30, 2008, <http://tiny.cc/McElroy>.

¹⁷ Wild, *supra* note 6, at 1.

¹⁸ See *infra* Part III.C.

¹⁹ *Nottebohm (Liech. v. Guat.)*, 1955 I.C.J. 4, 13 (Apr. 6).

nationality may inform how the international community should react to Russia's growing use of such passport diplomacy.²⁰

II. THE SHARED HISTORY OF RUSSIA, GEORGIA, & SOUTH OSSETIA

Georgia and Russia share a long history. Political interaction between the countries long predated the Soviet Empire's annexation of Georgia. The first political contacts between Russia and Georgia were established in 1558.²¹ Although the distance between the two countries prohibited extensive contacts,²² Georgia looked to Russia for help in its struggle against Persia and other external threats. After exchanging ambassadors in 1587, Russia agreed to accept Georgia as a vassal state and promised it protection accordingly.²³ While Russia's promise translated into little action,²⁴ it marked the beginning of Russia's military and political involvement in Georgia; an involvement that eventually led to Georgia's outright incorporation into the Russian empire in 1801.²⁵ Throughout the nineteenth century Russia's influence on Georgia's political structure was substantial, but Russia's demographic influence was less so.²⁶ Following the Bolshevik revolution in 1917, Georgia once again became a sovereign state.²⁷ Georgia's independence was relatively short lived, however, as the country's independent government fell to the Soviets in 1921.²⁸ Georgia remained a Republic within the Soviet Union until formally declaring its independence from the then crumbling Soviet Union on April 9, 1991.²⁹

South Ossetia has always enjoyed a unique status within Georgia. The Ossetians are an ethnic Iranian group who established communities within northern Georgia around the thirteenth century.³⁰ During the Soviet takeover of Georgia, the Ossetians sided with the Soviet Bol-

²⁰ "In . . . Trans-Dniester (Moldova), Crimea (Ukraine), and other regions, Russia has engaged in a systematic pattern of issuing passports, declaring thousands of residents to be Russian citizens, and then asserting its right to intervene in their defense . . ." Howard Cincotta, *Russian Claims of Privileged Sphere Draw Criticism*, America.gov, Oct. 9, 2008, <http://tiny.cc/Cincotta>.

²¹ RONALD GRIGOR SUNY, *THE MAKING OF THE GEORGIAN NATION* 49 (2d ed. 1994).

²² NICHOLAS V. RIASANOVSKY, *A HISTORY OF RUSSIA* 155 (6th ed. 2000).

²³ SUNY, *supra* note 21, at 49. Georgia's king declared the country's fealty to Russia, declaring that "[e]verything belongs to God and to my great Sovereign, the Tsar and Great Prince Fedor Ivanovich of all Russia." *Id.*

²⁴ *Id.*

²⁵ *Id.* at 49-59.

²⁶ Russians did not make up more 9% of Georgia's population until 1959, but that quickly eroded to less than 8% by 1979. *Id.* at 299.

²⁷ RIASANOVSKY, *supra* note 22, at 484.

²⁸ *Id.* at 485.

²⁹ *Id.* at 593.

³⁰ ROUDIK, *supra* note 1, at 1.

sheviks against the Georgian Mensheviks.³¹ During Soviet control, South Ossetia was granted the status of an autonomous oblast within Georgia,³² which some believe was a reward for helping the Soviets.³³ Despite this initial aid, the South Ossetians resisted intervention in their internal affairs by both the Georgian and Soviet governments.³⁴ As the Soviet Union's collapse approached, the struggle for power among the various factions operating within South Ossetia led its main town Tskhinvali to be trifurcated, with control distributed between the local Ossetian militia, Georgian national forces, and the Soviet army.³⁵ Even before Georgia declared independence, in the autumn of 1990 South Ossetia claimed its own sovereignty within the Soviet Union.³⁶ Following Georgia's declaration of independence, conflicts between the Georgian government and South Ossetian separatists quickly led to South Ossetia's de facto secession from Georgia.³⁷ In 1992, Russia brokered a ceasefire that included the introduction of a trilateral peacekeeping force made up of South Ossetian, Georgian, and Russian battalions.³⁸

For twelve years following the Russian brokered ceasefire, Georgia and South Ossetia engaged in no military conflicts.³⁹ During this time, Russia began issuing Russian passports to the South Ossetians.⁴⁰ But the election of Georgian President Mikheil Saakashvili brought renewed tension as the new administration made Georgia's reunification a top priority.⁴¹ Along with Georgia's internal tension with South Ossetia, the country's relationship with Russia grew increasingly hostile.⁴² Russia supported the South Ossetians in their struggle against the Georgian government, "emphasiz[ing] an obligation to protect the large number of Ossetians to whom it had given Russian passports."⁴³ On the evening of August 7, 2008 the Georgian military launched a barrage of shelling into Tskhinvali and its surrounding villages. According to Georgian authorities, the attack was necessary to "suppress [Ossetian] firing positions."⁴⁴ In response to these attacks, Russia launched a military campaign into

³¹ During a meeting of the communist party in South Ossetia "party members claimed that 'since . . . 1920 we all fought together against the Mensheviks . . .'" SUNY, *supra* note 21, at 243.

³² ROUDIK, *supra* note 1 at 1-2.

³³ *Id.*

³⁴ SUNY, *supra* note 21, at 307.

³⁵ RIASANOVSKY, *supra* note 22, at 591.

³⁶ HUMAN RIGHTS WATCH, UP IN FLAMES 16 (2009), <http://tiny.cc/02isy>.

³⁷ *Id.* at 17.

³⁸ *Id.*

³⁹ *Id.* at 18.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 20-21.

⁴³ *Id.* at 20.

⁴⁴ *Id.* at 22.

Georgia beyond the boundaries of its peacekeeping mandate, ostensibly fulfilling its obligation to South Ossetia's recently minted Russian nationals.

III. THE LAW CONCERNING THE REGULATION OF NATIONALITY

Nationality is a legal concept that uniquely stands astride domestic and international law. By conferring its nationality on an individual a state creates a reciprocal relationship of rights and obligations with that individual. Nationals enjoy benefits derived from state resources that are unavailable to aliens, such as access to public assistance programs.⁴⁵ Reciprocally, the national owes the state an obligation of allegiance and through conscription can be called upon to defend the state. Because of the importance of such reciprocal domestic rights and obligations, determination of who a state's nationals are has always been considered "a matter which falls within the domestic jurisdiction of each state and is regulated by its municipal law."⁴⁶

Nationality also serves important extraterritorial functions. Arguably most importantly, nationality serves as "the justification in international law for the intervention of one government to protect persons and property in another country."⁴⁷ Such protection is most often manifested as "diplomatic" protection, or a state's right to seek compensation for the violation of its citizens' rights by another state.⁴⁸ Since identifying an individual as a national affects a state's rights vis-à-vis other states, international law plays a role in determining a state's ability to claim an individual as a national. Although no single treaty regime governing international nationality law exists, customary international law is recognized as having evolved to impose some limitations on states' abilities in this area. Analyzing the evolution of this field of international law provides insight into the limits of state power in conferring nationality and the corresponding obligation of the international community to recognize the legitimacy of a state's claim of the right to protect an individual or group.

State control over the conference of nationality occurs in two separate instances, either upon the birth of the individual or when an individual requests to become a state's national. The nationality ascribed to an individual at birth is called their *nationality of origin* and has historically been derived from either the territory in which the individual was born or the

⁴⁵ For example, "Russian passports allowed Ossetians . . . to cross freely into Russia and entitled them to Russian pensions and other social benefits." *Id.* at 18.

⁴⁶ PAUL WEIS, NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW xiii (1956).

⁴⁷ *Id.* at 35 (quoting *Russell v. Mex.*, 4 R. Int'l Arb. Awards 805, 811, 815 (Mex.-U.S. Spec. Cl. Comm'n 1951)).

⁴⁸ WEIS, *supra* note 46, at 35.

individual's parents' nationality.⁴⁹ Alternatively, *naturalization* is the process by which a nationality other than the individual's nationality of origin is conferred on that individual. The issue motivating this article is Russia's conference of nationality on individuals outside its territory, therefore the article focuses on international law's influence on naturalization and not nationality of origin.

A. 19th Century Developments

Although states have historically had absolute autonomy over determining who their nationals are, state practice has evolved to reduce the incidence of conflict among states' disparate nationality laws. Naturalization has been a rich source of such conflict because it raises the prospect of an individual having more than one nationality and therefore being allied to more than one state. In 1868, British jurist Sir Alexander Cockburn authored one of the early treatises on nationality law and in it concluded, "[U]nder a sound system of international law . . . double nationality should not be suffered to exist."⁵⁰ Then, as now, nationality laws were neither uniform nor harmonized, leading to "conflict of laws[,] . . . embarrassment and difficulty."⁵¹ At the time, British nationality was considered perpetual; once acquired British nationality remained with the individual forever.⁵² Britain's practice in this regard was considered to be "at variance . . . with the laws of all other civilized nations."⁵³

As emigration from England to the newly formed United States of America increased, Britain's practice of perpetual nationality quickly became a source of tension between the two countries. During Britain's war with France, following the French revolution, British soldiers sought to avoid the harsh conditions suffered by crewmembers of the British

⁴⁹ ALEX COCKBURN, NATIONALITY: OR THE LAW RELATING TO SUBJECTS AND ALIENS, CONSIDERED WITH A VIEW TO FUTURE LEGISLATION 6 (1869); see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 211 cmt. c (1987).

⁵⁰ COCKBURN, *supra* note 49, at 214.

⁵¹ *Id.* at 26-27.

⁵² *Id.* at 90.

⁵³ *Id.* at 63. The nineteenth century nationality laws of France, Spain, Portugal, Sweden, and Norway treated naturalization by a foreign State as triggering the loss of their own nationality. Furthermore, the nationality laws of Prussia and the Ottoman Empire, although requiring permission from the government to change nationality, treated naturalization by a foreign State as triggering the loss of their own nationality. In the absence of permission these States did not disregard the individual's new nationality but treated the individual as having broken local laws should the individual be found within the territory of the State. Finally, the nationality law of Russia also required permission from the government prior to naturalization by a foreign State. But, in the absence of permission, naturalization by a foreign country caused the individual to be "deprived of all the rights of a Russian subject and banished for ever [sic] from the Russian dominions." *Id.* at 62; see also *id.* at 51-62.

navy by emigrating to the United States.⁵⁴ Britain responded by regularly boarding U.S. ships on the high seas in search of contraband of war and “impress[ing] into the Royal Navy all natural born [British] seamen . . . without paying any regard to their acquired American citizenship.”⁵⁵ The United States attempted to alleviate this conflict via treaty but the British government expressly rejected dispelling with perpetual nationality and impressment of British born naturalized Americans.⁵⁶ This conflict escalated into one of the central issues behind the war of 1812.⁵⁷ The war catalyzed a change in Britain’s practice regarding nationality. Although Britain continued to maintain perpetual nationality *de jure*, “for more than half a century the assertion of the indelibility of allegiance was little else than nominal.”⁵⁸ In 1870 Britain finally passed legislation making a British national’s naturalization in a foreign state trigger the loss of that individual’s British nationality, bringing a formal end to the anachronism of perpetual nationality.⁵⁹

Another source of conflict in the early development of nationality law concerned the question of when a state can either confer its nationality on, or justifiably extend protection on behalf of, a foreign national operating within that state’s territory. Some early conflicts involving the United States and Brazil shed light on the contours of state power in this regard. In 1853 Martin Koszta was a Hungarian revolutionary domiciled in the United States who had taken preliminary steps toward naturalization.⁶⁰ While traveling in Turkey on a U.S. passport, Koszta was abducted on behalf of the Austrian Consulate and delivered to Austrian authorities aboard an Austrian warship.⁶¹ In response, the United States sent a warship to demand Koszta’s release with the express authorization to use force.⁶² To avert any use of force, the French Consul arranged to hold Koszta and mediate a settlement between the two states. The U.S. Secretary of State, William L. Marcy, outlined the United States’ position as follows:

[International law] gives the national character of the country . . . to all residents in it who are there with, or even without, an intention to become citizens, provided they have a domicile therein It is a

⁵⁴ *Id.* at 70.

⁵⁵ *Id.* at 71.

⁵⁶ *See id.* at 72. “[T]he sovereign jurisdiction of the State in matters of nationality may be restricted by the conclusion of treaties concerning nationality” WEIS, *supra* note 46, at xiv.

⁵⁷ COCKBURN, *supra* note 49, at 72; *see also* WILLIAM EDWARD HALL, A TREATISE ON INTERNATIONAL LAW 282-83 (8th ed. 1924).

⁵⁸ HALL, *supra* note 57, at 283.

⁵⁹ *Id.*

⁶⁰ COCKBURN, *supra* note 49, at 118.

⁶¹ *Id.*

⁶² *Id.*

maxim of international law that domicile confers a national character; it does not allow anyone who has a domicile to decline the national character thus conferred; it forces it upon him often very much against his will, and to his great detriment. International law looks only to the national character in determining what country has the right to protect.⁶³

Despite Austria ultimately agreeing to turn Koszta over to the United States,⁶⁴ the U.S.'s position in this regard was considered as "carrying the doctrine of acquired nationality further than it ever ha[d] been carried"⁶⁵ The United States effectively espoused the position that international law imposed a state's nationality – to the extent that nationality is what "justifi[es] . . . the intervention of one government to protect persons and property in another country"⁶⁶ – on individuals based on their mere domicile within that state's territory. This assertion, however, seems to have later been set aside.

Shortly following the Koszta incident, the United States refused to extend diplomatic protection extraterritorially to another Austrian national domiciled in the United States. In 1854, Simon Tousig, an Austrian national domiciled in the U.S., was traveling in Austria on a U.S. passport when he was arrested for crimes committed prior to his being domiciled in the United States.⁶⁷ Unlike with Koszta, Secretary of state Marcy rejected Tousig's request for protection from the United States. In a letter to the U.S. Minister in Austria, Secretary Marcy wrote, "It is true [Tousig] left the country with a passport issued from this department; but as he was neither a native born nor naturalized citizen, he was not entitled to it. It is only to citizens that passports are issued."⁶⁸ Although Tousig's case is distinguishable from Koszta's case due to Tousig's voluntary return to his country of origin, the language of Secretary Marcy's letter is telling because it does not recognize Tousig as a U.S. national in any respect, highlighting the fact that he had not yet become naturalized. This is markedly different treatment from that received by Koszta who faced strikingly similar circumstances just one year prior.

The reversal of the United States' position, and the general acceptance that naturalization must be instigated by an individual's affirmative act is supported by states' reactions to a Brazilian nationality decree in 1889. In 1889, Brazil issued a decree declaring that all foreigners domiciled in Brazil as of November 15, 1889 would be considered Brazilians unless they made a contrary declaration within six months.⁶⁹ Brazil's decree

⁶³ *Id.* at 120 (emphasis added).

⁶⁴ *Id.*

⁶⁵ *Id.* at 122.

⁶⁶ WEIS, *supra* note 46, at 35.

⁶⁷ COCKBURN, *supra* note 49, at 123.

⁶⁸ *Id.*

⁶⁹ WEIS, *supra* note 46, at 106.

elicited a backlash from a broad contingent of the world's then leading powers. Joint protests were lodged by Italy, Austria-Hungary, France, Great Britain, Portugal, and Spain.⁷⁰ Although Britain did not protest the decree in its entirety, it did not agree that nationality could be forced upon a foreign national "whether they ha[d] notice of the terms of the Decree or not."⁷¹ Britain's position required that foreign nationals have notice and voluntarily abstain from making the necessary declaration to maintain their nationality of origin.⁷² In a separate response, U.S. Secretary of State James Blaine "declared that by the Brazilian Decree the principle of voluntary action had been wholly discarded."⁷³ Secretary Blaine's response made it clear that the United States' position was that "the mere residence of an individual in a foreign country could not be regarded as conclusive evidence of [their] desire and intention to become one of its citizens."⁷⁴ Thus, the United States seems to have adopted the otherwise prevailing practice that nationality can only be conferred on an individual following a voluntary and affirmative act by that individual.⁷⁵

As emigration rates increased during the nineteenth century, states increasingly faced conflicting claims of sovereignty over individuals. Although states did not cede power over determining which individuals were their nationals, an interest in reducing the incidence of conflict led state practice to develop some self-imposed limitations on their sovereign rights in a way arguably recognizable as custom. States have accepted that nationality does not follow an individual indefinitely; through some series of actions defined by municipal law an individual can change their nationality.⁷⁶ Furthermore, nationality cannot be imposed; it is the prod-

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *See id.*

⁷³ *Id.* at 107.

⁷⁴ *Id.*

⁷⁵ Importantly, restricting a State from imposing nationality on an individual did not derive from the right of the individual to choose their nationality. Since individuals were not recognized as subjects of international law, this restriction derives from its impact vis-à-vis the State of the individual's nationality of origin. Imposing nationality "purports to deprive other States of a number of their nationals, of the right of protection over a number of their subjects." *Id.* at 116.

⁷⁶ This is not to suggest that dual-nationality cannot exist. Indeed, international treaties have recognized dual nationality. *See, e.g.,* European Convention on Nationality chap. V, Nov. 6, 1997, Europ. T.S. No. 166, *reprinted in* 37 I.L.M. 44 (1998). A state may not, however, impose its nationality on an individual who has acted to shed that state's nationality in favor of another state. While this assertion is unquestionably true with regard to naturalization, its veracity with regard to nationality of origin was questioned, though not settled, in *Champion Trading Co. v. Egypt*, ICSID (W. Bank) Case No. ARB/02/9 (Oct. 21, 2003) (Decision on Jurisdiction). In *Champion Trading*, Iran argued that the tribunal lacked jurisdiction because the claimants were dual nationals of the United States and Iran and therefore

uct of an individual's voluntary and affirmative actions in compliance with municipal law. Thus, since the 19th century, states' abilities to confer nationality have been restricted in various ways by historically accepted norms.

B. 20th Century Developments

States' autonomy in determining who their nationals are has continuously been reaffirmed, albeit not wholly outside the strictures of international law. This was evident in the Permanent Court of International Justice's (PCIJ) decision in the *Tunis and Morocco Nationality Decrees* case. On November 8, 1921, France issued identical decrees covering its areas of influence in both Tunis and Morocco.⁷⁷ The decrees stated that anyone born in the French zone of influence was a French national provided at least one of their parents was also born in the French zone of influence.⁷⁸ Britain protested to the Council of the League of Nations, claiming the decrees imposed French nationality on the children of British subjects born within territories over which Britain claimed jurisdiction.⁷⁹ The Council in turn requested an advisory opinion from the PCIJ addressing whether the application of the French decrees as applied "to British nationals was, or was not, by international law, solely a matter of domestic jurisdiction" ⁸⁰ The PCIJ reaffirmed the classic posture of states that "nationality, is not, in principle regulated by international law" and was therefore solely within the jurisdiction of the state.⁸¹ The PCIJ, however, determined that the dispute between France and Britain over the nationality decrees issued in Tunis and Morocco was not solely one of

unable to sue before an ICSID tribunal pursuant to article 25(2)(a) of the ICSID convention. *Id.* at 284. While Iran argued that the claimants were Iranian by virtue of *jus sanguinis* and despite their pleas to the contrary, the tribunal determined that the claimants' Iranian nationality was established by virtue of their own actions. *Id.* at 289 ("What is relevant for this Tribunal is that the three individual Claimants . . . used their Egyptian nationality without any mention of their US nationality."). Furthermore, the tribunal questioned the extent to which states are able to invoke *jus sanguinis*. *Id.* at 288 ("It might for instance be questionable if the third or fourth foreign born generation, which has no ties whatsoever with the country of its forefathers, could still be considered to have, for the purpose of the Convention, the nationality of this state."). Thus, even the reach of nationality of origin is questionable.

⁷⁷ WEIS, *supra* note 46, at 71.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* The Council of the League of Nations was unable to make a recommendation as to the settlement of conflicts that "arise out of a matter which by international law is solely within the domestic jurisdiction" of one of the parties involved. League of Nations Covenant art. 15, para. 8.

⁸¹ Nationality Decrees Issued in Tunis and Morocco (French Zone) on Nov. 8th, 1921, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 4, at 24 (Feb. 7).

domestic jurisdiction because France's decrees extended extraterritorially.⁸² Thus international tribunals recognized that international law had a role to play in defining the limits of state sovereignty over questions of nationality. Britain and France eventually negotiated a settlement in which France agreed that "a British national who was the child born in Tunis of a British national who was himself born in Tunis should be entitled to decline French nationality"⁸³ This has been viewed by some writers on international law as "significan[t] for the question of the limitations imposed by international law on the right of states to confer their nationality on individuals."⁸⁴ While the resolution of the Tunis and Morocco affair suggests the existence of a limitation on states' abilities to confer nationality extraterritorially, ascribing too much weight to it would overstate the extent to which this limitation has crystallized into custom applicable to Russia's actions in Georgia from the perspective of international law.

The growing importance of nationality as a subject of international law led attempts to further the law's advancement. To this end, the Convention on Certain Questions Relating to the Conflict of Nationality Laws (Hague Convention), which came into force in July of 1937, has been referred to as "the most important multilateral agreement in the field of nationality"⁸⁵ Signed by twenty-seven states and ratified or acceded to by an additional thirteen,⁸⁶ the treaty was not an attempt to codify the scarce international nationality law that existed – rather, it sought to advance a body of "rules governing conflicts of nationality laws, regard-

⁸² "The question whether the exclusive jurisdiction possessed by a protecting State in regard to nationality questions in its own territory extends to the territory of the protected State depends upon an examination of the whole situation as it appears from the standpoint of international law. The question therefore is no longer solely one of domestic jurisdiction" *Id.* at 28.

⁸³ WEIS, *supra* note 46, at 75.

⁸⁴ *Id.*

⁸⁵ *Id.* at xiv.

⁸⁶ Convention on Certain Questions Relating to the Conflict of Nationality Laws art. 1, Apr. 12, 1930, 179 L.N.T.S. 89 [hereinafter Hague Convention]. Among the States that ratified or definitively acceded to the Hague Convention were: Great Britain, China, India, Brazil, and Australia. *Id.* Among the signatory States who have not ratified, but are nonetheless bound by international law not to frustrate the treaty's object and purpose are: Germany, France, Spain, Mexico, and Italy. *Id.* Although an active participant in its drafting, the United States is not a signatory to the Hague Convention, primarily because "its delegates considered it inconsistent with American policy to sign a treaty which recognized that dual nationality might arise out of a grant of naturalization not assented by the state of origin" Edwin Borchar, *Three Hague Conventions on Nationality*, 32 AM. J. INT'L L. 126, 126 (1938).

less of whether such rules declared old law or made new law.”⁸⁷ The Hague Convention maintained states’ historical sovereignty over the determination of who their nationals are, clearly stating, “[I]t is for each state to determine under its own law who are its nationals.”⁸⁸ Furthermore, “[a]ny question as to whether a person possesses the nationality of a particular state shall be determined in accordance with the law of that state.”⁸⁹ Bowing to the sovereignty of states, the Hague Convention did not outline any principles for how nationality may be acquired or lost.⁹⁰ It did, however, restrict state power by affording a negative right, the right of a state to disregard any nationality conferred by a law that is inconsistent “with international conventions, international custom, and the principles of law generally recognized with regard to nationality.”⁹¹ But the delegation tasked with drafting the Hague Convention was unable to specify the customs and principles to which the Hague Convention referred.⁹²

Following the Hague Conference numerous treaties touching on issues of nationality have been drafted.⁹³ Nevertheless, like the Hague Convention, these treaties do not clearly delineate limitations on state power in determining who are its nationals. Many international agreements have touched upon the issue of nationality tangentially, within the context of broader issues, such as human rights.⁹⁴ For example, the Universal Declaration of Human Rights (UNDHR) declares that “[e]veryone has the

⁸⁷ Richard W. Flournoy, Jr., *Nationality Convention, Protocols and Recommendations Adopted by the First Conference on the Codification of International Law*, 24 AM. J. INT’L L. 468 (1930). Indeed, the paucity of international nationality law was such that “[e]arly in the discussions at the . . . Hague Conference it was realized that there was little international law on the subject of nationality law which could be codified, if ‘codification’ [was] to be limited to the reduction to writing of rules of law already generally agreed upon by [S]tates.” *Id.* Thus, “[t]he idea of such a declaration of existing law was . . . early discarded.” *Id.*

⁸⁸ Hague Convention, *supra* note 86, art. 1.

⁸⁹ *Id.* art. 2.

⁹⁰ Although “an attempt was made to set forth [such] principles . . . it was very properly decided to omit this statement of principles.” Flournoy, *supra* note 87, at 469.

⁹¹ Hague Convention, *supra* note 86, art. 2.

⁹² Although the U.S. delegate in the committee on nationality felt “it [was] obvious that international law does place a limit upon the power of a [S]tate to make effective claims upon the nationality of persons,” he felt that “it [was] doubtful that [such limits] could be stated more definitely.” Flournoy, *supra* note 87, at 469.

⁹³ See, e.g., European Convention on Nationality, *supra* note 76.

⁹⁴ See generally, American Convention on Human Rights art. 20, Nov. 22, 1969, 1144 U.N.T.S. 123; International Covenant on Civil and Political Rights (ICCPR) art. 24(3), Dec. 19, 1966, 999 U.N.T.S. 171; International Convention on the Elimination of All Forms of Racial Discrimination art. 5(d)(iii), *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195.

right to a nationality”⁹⁵ and that “[n]o one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.”⁹⁶ Thus the UNDHR incorporates the established norm against perpetual nationality⁹⁷ but is silent as to which state the individual’s right to a nationality applies. Furthermore the UNDHR’s clause banning the arbitrary deprivation of an individual’s nationality cannot be read to ban the arbitrary conference of nationality.⁹⁸ Some human rights treaties that contain clauses related to nationality go so far as to explicitly limit the treaty’s impact on state sovereignty in this field.⁹⁹ Understandably, these treaties’ contexts offer little opportunity for addressing state power with regard to conferring nationality.

Treaties for which nationality is a central issue have also done little to address the issue. Some, in fact, serve to restrict states’ power not to confer their nationality but to revoke it. Signatories to the Convention on the Reduction of Statelessness are not only required to grant “nationality to a person born in its territory who would otherwise be stateless,”¹⁰⁰ they may “not deprive a person of his nationality if such a deprivation would render him stateless.”¹⁰¹ But, similar to the human rights treaties, the context of the Convention on the Reduction of Statelessness does not provide an ideal platform on which to rest general rules regarding state power over the conference of nationality. This was not true, however, with regard to the European Convention on Nationality.

Although limited in its geographic scope, the European Convention on Nationality (European Convention) sought “to consolidate in a single text the new ideas which have emerged as a result of developments in internal law and in international law,”¹⁰² thus creating a comprehensive convention on European nationality law. While the European Conven-

⁹⁵ Universal Declaration of Human Rights (UDHR) art. 15, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

⁹⁶ *Id.*

⁹⁷ *See supra* Part III.A.

⁹⁸ This problem is partly addressed by custom such that conference of nationality must be preceded by a voluntary act by the individual in an effort to adopt such nationality. *See supra* Part III.A. But, in cases where the extraterritorial conference of nationality unto an individual who voluntarily sought such nationality could be viewed as “arbitrary,” a clause such as that contained in the UNDHR would not support a claim that the action was contrary to international law. Finally, being an aspirational text only, the UNDHR’s authority regarding any question of nationality is limited.

⁹⁹ *See* International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 94, art. 1(3).

¹⁰⁰ Convention on the Reduction of Statelessness art. 1(1), Aug. 30, 1961, 989 U.N.T.S. 175.

¹⁰¹ *Id.* art. 8(1).

¹⁰² European Convention on Nationality, *supra* note 76, explanatory report para. 11.

tion presented an ideal platform through which to elucidate the otherwise vague restrictions on state power put forward by international tribunals, preceding texts, and custom, its drafters decided to maintain the status quo. The European Convention adopts verbatim the Hague Convention's approach, stating, "Each state shall determine under its own law who are its nationals."¹⁰³ Indeed, this notion is reaffirmed as being "the guiding principle of public international law . . ." ¹⁰⁴ Similarly, the European Convention's limitations on states' power in this regard mirrored that of the Hague Convention by giving states a negative right to disregard any nationality conferred in a way contrary to customary international law, without elucidating the prevailing customs.¹⁰⁵

Thus, while the issue of nationality as a subject of international law has been addressed by numerous tribunals and treaties throughout the twentieth century, little has been done to limit the scope of state power with regard to conferring nationality beyond the customary limits developed throughout the nineteenth century. A unique exception to this, however, is the PCIJ's opinion in the *Nottebohm* case handed down in 1955. Like the Hague Convention, "the effects of the *Nottebohm* decision have radiated throughout the international law of nationality."¹⁰⁶ Because of *Nottebohm*'s importance, both historically and to the question at hand, the case is discussed separately below.

C. *Nottebohm's Genuine Link Doctrine*

Friedrich Nottebohm, a German by birth, emigrated to Guatemala in 1905.¹⁰⁷ In Guatemala Nottebohm established himself as a businessman in a variety of fields including banking and plantations.¹⁰⁸ Although he continued to have business connections in Germany and had visited a brother in Liechtenstein a few times, Nottebohm maintained his residence in Guatemala until 1943.¹⁰⁹ In 1939, at the beginning of the World War II, Nottebohm transferred power of attorney over his Guatemalan assets to his business and left Guatemala for Europe.¹¹⁰ Eventually landing in Liechtenstein, Nottebohm applied to become a national in October of 1939, approximately one month after World War II's commencement.¹¹¹ Despite Liechtenstein's residency requirement of three years prior to naturalization, Nottebohm was able to secure naturalization and a pass-

¹⁰³ *Id.* art. 3(1).

¹⁰⁴ *Id.* at explanatory report para. 28.

¹⁰⁵ *Id.* art. 3(2).

¹⁰⁶ *Iran v. U.S.*, 5 Iran-U.S. Cl. Trib. Rep. 251, 23 I.L.M. 489, 500 (1984).

¹⁰⁷ Robert Sloane, *Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality*, 50 HARV. INTL. L.J. 1, 1 (2009).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

port that same month.¹¹² Having secured the nationality of a neutral country in the war, Nottebohm returned to Guatemala in 1940 to resume his business activities.¹¹³ In 1943 Nottebohm was arrested by Guatemalan authorities and turned over to the United States.¹¹⁴ Nottebohm was interned in the United States for over two years, during which time Guatemala confiscated his assets by commencing fifty-seven lawsuits against him.¹¹⁵ Upon his release in 1946, Nottebohm attempted to reenter Guatemala to defend himself in pending lawsuits but was denied entry.¹¹⁶ Nottebohm then returned to Lichtenstein and was able to persuade the principality to defend his interests against Guatemala in front of the ICJ in 1951.¹¹⁷ At trial, Guatemala argued that Lichtenstein's claim was inadmissible because Nottebohm's Lichtenstein nationality was not granted in conformity with international law.¹¹⁸ Therefore, Guatemala argued, Lichtenstein should not be allowed to exercise diplomatic protection for Nottebohm because "it is the bond of nationality between the state and the individual which alone confers upon the state the right of diplomatic protection."¹¹⁹

In making its determination, the ICJ analyzed the connection between Nottebohm and Lichtenstein as the determining factor regarding the legitimacy of Nottebohm's Lichtenstein nationality for the purpose of exercising diplomatic protection against Guatemala. The ICJ first acknowledged and reaffirmed state sovereignty over the decisions of nationality, reiterating that "it is for every sovereign State[] to settle by its own legislation the rules relating to the acquisition of its nationality" ¹²⁰ This proposition was so broadly accepted that the ICJ stated, "determin[ing] whether international law imposes any limitations on [a state's] freedom of decision in this domain" was unnecessary.¹²¹ But, while a state is free to confer its nationality as it sees fit, the ICJ made clear that the international community is not obliged to recognize such nationality. This limitation, focusing on the link between the individual and the state was expressed as follows:

[A] State cannot claim that [its nationality laws] are entitled to recognition by another State unless it has acted in conformity with th[e] general aim of making the legal bond of nationality accord with the

¹¹² Nottebohm (Liech. v. Guat.), 1955 I.C.J. 4, 13-15 (Apr. 6).

¹¹³ *Id.* at 16.

¹¹⁴ See Josef L. Kunz, *The Nottebohm Judgment (Second Phase)*, 54 AM. J. INT'L L. 536, 536 (1960).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Nottebohm*, 1955 I.C.J. at 16.

¹¹⁸ *Id.* at 9.

¹¹⁹ *Id.* at 13.

¹²⁰ *Id.* at 20.

¹²¹ *Id.*

individual's genuine connection with the State which assumes the defence of its citizens by means of protection as against other States.¹²²

The *genuine connection* the ICJ looks to is "a social fact of attachment" based on the answer to the question: is the individual "more closely connected to the population of the state conferring nationality than with that of any other state[?]"¹²³ Factors the ICJ identified as determining the genuineness of such a connection include the individual's traditions, interests, activities, family ties, and future intentions toward the conferring state.¹²⁴ Ultimately, the ICJ determined that Nottebohm's ties to Lichtenstein were not sufficient enough to either oblige Guatemala to recognize Nottebohm's Lichtenstein nationality or allow Lichtenstein to extend diplomatic protection on behalf of Nottebohm.¹²⁵

Nottebohm's genuine link doctrine has become a central component of international nationality law.¹²⁶ International tribunals have since held that "the relevant rule of international law . . . is the rule that flows from the dictum of *Nottebohm*, the rule of real and effective nationality."¹²⁷ States too have adopted *Nottebohm* as the proper exposition of international nationality law.¹²⁸ The explanation of the definition of "nationality" in the European Convention quotes *Nottebohm* and directs readers to the case.¹²⁹ Thus, *Nottebohm* clarifies two aspects of international nationality law: 1) "international law . . . does not determine who is a national, but rather sets forth the conditions under which that determination must be recognized by other states,"¹³⁰ and 2) the legitimacy of an individual's nationality derived from naturalization is based on the existence of a genuine link that makes the individual "in fact more closely connected with the population of the state conferring nationality than with that of any other state."¹³¹ Therefore, determining the international

¹²² *Id.* at 23 (emphasis added).

¹²³ *Id.*

¹²⁴ *Id.* at 24.

¹²⁵ *Id.* at 26.

¹²⁶ Belief in the propriety of this view is not universal, however. Some scholars argue that *Nottebohm's* oft-parroted genuine link doctrine represents a misreading of the ICJ's opinion. See, e.g., Sloane, *supra* note 107 (arguing that the abuse of rights doctrine better explains and justifies the ICJ's opinion than does the genuine link doctrine).

¹²⁷ *Iran v. U.S.*, 5 Iran-U.S. Cl. Trib. Rep. 251, 23 I.L.M. 489, 501 (1984).

¹²⁸ "For purposes of international law, an individual has the nationality of a state that confers it, but other states need not accept that nationality when it is not based on a *genuine link* between the state and the individual." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 211 (1987) (emphasis added).

¹²⁹ European Convention on Nationality, *supra* note 76, explanatory report para. 22.

¹³⁰ *Iran v. U.S.*, 23 I.L.M. at 497.

¹³¹ *Nottebohm (Liech. v. Guat.)*, 1955 I.C.J. 4, 23 (Apr. 6).

community's obligation to recognize the Russian nationality of Georgian citizens, and the corresponding legality of Russia extending its protection to this population, requires analyzing the links between this population and Russia. Before conducting this analysis, however, a unique aspect of the circumstances surrounding Russia's actions requires discussion, that of state succession.

IV. CONSIDERATION OF STATE SUCCESSION

The historical relationship between Russia and Georgia raises a question regarding the impact of state succession on the issue of nationality. Specifically, does the fact that Georgia was once a part of the USSR impact Russia's legal ability to confer its nationality on Georgian citizens under international law?¹³² Weis contends that absent treaty obligations to the contrary a successor state may confer its nationality on those nationals of the predecessor state who maintain a habitual residence within the successor state.¹³³ Agreeing in this view, Donner updates it to reflect *Nottebohm's* holding, arguing that the population of the predecessor state habitually residing in the successor state acquires the successor state's nationality so long as they have a genuine link with the bulk of the of the successor state's population.¹³⁴ But state practice in this regard is not unambiguous.¹³⁵ A related area of international law that highlights this ambiguity is the right of a population within a successor state to choose between the nationality of the predecessor and successor state – referred to as the “option of nationality”.¹³⁶

The right of a population within a successor state to an option of nationality was frequently allowed for by treaty between states and has arguably reemerged as a norm under international human rights law. Option of nationality was an important tool of international law during the latter half of the nineteenth century and first quarter of the twentieth century, reaching its apex in the period immediately following World War I.¹³⁷ This was especially true with regard to Russia, which concluded at least ten such agreements between 1917 and 1924.¹³⁸ Indeed, the general

¹³² It is important to note that Georgia's independence from the USSR was not effectuated by treaty, rather the USSR underwent dissolution, with its component republics reestablishing their historically recognized sovereignty by declaration.

¹³³ WEIS, *supra* note 46, at 151.

¹³⁴ RUTH DONNER, *THE REGULATION OF NATIONALITY IN INTERNATIONAL LAW* 310-11 (1994).

¹³⁵ *Id.*

¹³⁶ *See id.* at 255.

¹³⁷ George Ginsburgs, *Option of Nationality in Soviet Treaty Practice, 1917-1924*, 55 AM. J. INT'L L. 919, 919 (1961).

¹³⁸ Russia's counterparties included Ukraine, Georgia, Belarus, Estonia, Latvia, Lithuania, Poland, Mongolia, Turkey, and Finland. *See id.* “Indeed, perhaps in the diplomatic repertoire of no other nation was option of nationality as frequently

practice was reflected in article 18(b) of the Harvard Research Draft on Nationality, which states:

When a part of the territory of a state is acquired by another state or becomes the territory of a new state, the nationals of the first state who continue their habitual residence in such territory lose the nationality of that state and become nationals of the successor state . . . unless in accordance with the law of the successor state they decline the nationality thereof.¹³⁹

Not only has formal option of nationality by treaty continued to be granted between states in a variety of cases since 1945,¹⁴⁰ international tribunals have recently recognized it as a part of the right to self-determination that exists beyond formal treaty structures. The Badinter Committee, a tribunal convened in 1991 to deal with questions raised by ongoing turmoil in the Socialist Federal Republic of Yugoslavia,¹⁴¹ held that international law affords minority populations within a state undergoing dissolution the right to choose their nationality.¹⁴² When presented with the question whether “the Serbian population in Croatia and Bosnia-Herzegovina, as one of the constituent peoples of Yugoslavia, ha[s] the right to self-determination”, the Badinter Committee held “that the Republics must afford the members of those minorities and ethnic groups all the human rights and fundamental freedoms recognized in international law, *including, where appropriate, the right to choose their nationality.*”¹⁴³

The language of the Badinter Committee’s holding “may be understood as referring to an option of nationality recognized in international law”¹⁴⁴ But the applicability of this decision to determining the legitimacy of Russia’s conference of its nationality on minority groups within Georgia, despite their ostensible choice to adopt Russian nationality, is questionable. While the historical practice of states and the determination of international tribunals such as the Badinter Committee suggest that minority populations have a right to choose their nationality,

resorted to in this or any other comparable period as in the Soviet treaty arrangements of 1917-1924.” *Id.* at 919.

¹³⁹ The Law of Nationality, Draft Conventions and Comments Prepared by the Research in International Law of the Harvard Law School art. 18(b), 23 AM. J. INT’L L. SPEC. SUPP. 11, 15 (1929) [hereinafter Harvard Draft Code]. The Harvard Draft Code was developed in anticipation of the conference that drafted the Hague Convention. DONNER, *supra* note 134, at 50. While the Harvard Draft Code’s provisions were not formally adopted it is viewed as reflecting the practice recognized at the time in many respects. *Id.* at 262.

¹⁴⁰ DONNER, *supra* note 134, at 268.

¹⁴¹ Alain Pellet, *The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples*, 3 EUR. J. INT’L L. 178, 178 (1992).

¹⁴² *Id.* at 184.

¹⁴³ *Id.* at 183-84 (emphasis added).

¹⁴⁴ DONNER, *supra* note 134, at 301.

neither addresses the issue in the context of a state that is not *newly* independent. Analyzing the Badinter Committee's opinion, Donner suggests the right to such an option extends to "those inhabitants of *newly independent States* who are not [part] of the ethnic group of the majority."¹⁴⁵ Others implicitly question the applicability of the Badinter Committee's holding beyond the facts, suggesting it merely "open[s] up an interesting direction of thought" ¹⁴⁶

Thus, the issue of state succession does play a role in shaping the rules governing the conference of nationality. The right of a successor state's minority population to choose their nationality necessarily implies the right of the predecessor state to confer its nationality on that population if requested to do so. ¹⁴⁷ If the predecessor state lacked that right the minority group's right would be hollow. But a state's ability to exercise this right must be limited to a relatively narrow time frame surrounding the formation of the newly independent state. Otherwise the internal stability of states could be threatened. Although Russia's involvement in South Ossetia has been consistent since the dissolution of the Soviet Union, its policy of conferring citizenship on the population of this area is more recent, beginning in earnest in 2002. Furthermore, the South Ossetians' own actions suggest the doctrine should not apply in this case. As the Soviet Union was dissolving and Georgia was moving toward independence the South Ossetians did not immediately identify themselves with Russia.¹⁴⁸ In fact, their first course of action was to declare South Ossetia a sovereign country within the Soviet Union.¹⁴⁹ It was not until nearly a decade later, in the face of the Georgian government's increasingly hostile posture, that South Ossetians adopted Russian citizenship *en-masse*.¹⁵⁰ Therefore, it seems implausible that Russia could invoke a right to acknowledge the choice made by these populations in accordance with the doctrine of option of nationality and the principles of international law surrounding state succession.

V. VIEWS ON CONFERRING NATIONALITY EXTRATERRITORIALLY

Treatise writers addressing the legality of the extraterritorial conference of nationality generally argue that such a practice violates international law. But support for their assertions is limited and the arguments presented appeal to the sanctity of state sovereignty rather than extant

¹⁴⁵ *Id.* (emphasis added).

¹⁴⁶ Pellet, *supra* note 141, at 179.

¹⁴⁷ The predecessor State is not obligated to confer its nationality. Although numerous treaties recognize the right of an individual to a nationality, none dictate to which State that right applies. *See supra* Part III.B. Ultimately, it is up to the State to determine who are its citizens.

¹⁴⁸ *See supra* Part II.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

norms under international nationality law. For instance, Weis argued that the extraterritorial conference of nationality on an individual would “constitute[] an encroachment upon the personal jurisdiction” of the state of which that individual was then a national.¹⁵¹ This was because the action would deprive the state of its citizens and its concurrent right to protect those citizens.¹⁵² Furthermore, to the extent that the conference of nationality was on a large scale, Weis thought it should be viewed as a hostile act “comparable to a violation of the State’s territorial [sovereignty].”¹⁵³ But Weis’s analysis was based on hypothetical examples, in which a state *imposed* its nationality extraterritorially,¹⁵⁴ a practice which has long been a violation of international nationality law.¹⁵⁵ Furthermore, Weis acknowledged that “states are not prohibited by international law from naturalising [sic] persons . . . residing outside the state territory.”¹⁵⁶ Finally, Weis acknowledged that “[i]t appears difficult to deduce . . . a general rule of international law concerning the conditions on which states *may or may not* confer their nationality”¹⁵⁷

Similarly, Donner is unable to unequivocally say that the extraterritorial conference of nationality is unlawful. Donner argues that the public international law rule prohibiting states from passing extraterritorial legislation with binding effect would “seem” to prohibit a state from conferring its nationality extraterritorially.¹⁵⁸ Furthermore, she argues, “to change nationality while remaining resident in the territory of the state of the previous nationality would *indicate* that the change is effected as a fraud . . . and therefore null and void.”¹⁵⁹ But these assertions seem to purposefully frame the issue as equivocal. Furthermore, they are difficult to synthesize with the Badinter Committee’s acknowledgment of minority groups’ right to choose their nationality and the practical existence of permanent foreign national communities created by the dissolution of former colonial and imperial powers – such as the Serbian population in Croatia and Bosnia-Herzegovina.

Finally, Hall relied on the notion of international comity to limit state power in this regard. He argued “it is scarcely consistent with the comity which ought to exist between nations to render so easy the acquisition of

¹⁵¹ WEIS, *supra* note 46, at 116.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *See id.*; *see also id.* at 116 n.94; *id.* at 104.

¹⁵⁵ *See supra* Part III.A.

¹⁵⁶ WEIS, *supra* note 46, at 103. As evidence Weis refers to a letter by the British Home Secretary stating that under Britain’s Naturalisation Act of 1870 domicile in the foreign country was unnecessary for purposes of losing British nationality following an individual’s voluntary naturalization. *Id.* at 103 n.39.

¹⁵⁷ *Id.* at 113 (emphasis added).

¹⁵⁸ DONNER, *supra* note 134, at 150.

¹⁵⁹ *Id.* (emphasis added).

a national character”¹⁶⁰ But Hall prefaced this contention with the acknowledgment that “a [S]tate has in strictness full right to admit foreigners to membership, and protect them as members”¹⁶¹ Finally, Hall never suggested that the state of original nationality should respond by declaring the conferring state’s actions unlawful. Rather, he suggested the conferring state merely has “no right to complain if exceptional measures, such as expulsion from the mother country, are resorted to at the expense of its adopted subjects.”¹⁶² Thus, Hall seems to have suggested that if a state wants to confer its nationality on individuals residing outside the state it can, but it will not be considered very neighborly. Thus, even the exhaustive and impressive research undertaken by treatise writers in this field has been unable to identify, within the framework of international nationality law, an express, or even implied, prohibition on a state’s power to confer its nationality extraterritorially.

VI. RUSSIA’S PASSPORT POLICY AND INTERNATIONAL NATIONALITY LAW

Russia’s policy of conferring citizenship on South Ossetians *en-masse* and subsequently justifying military engagement with Georgia by virtue of its obligation and right to protect those “Russian” citizens raises serious questions. But it is not clear that Russia’s actions constitute a violation of international law as it relates to the regulation of nationality. The one enduring maxim of international nationality law is that “[i]t is for each state to determine under its own law who are its nationals.”¹⁶³ Although custom has evolved to restrict states’ powers in this field, such restrictions are minimal and not clearly elucidated.¹⁶⁴ At a minimum, aside from any treaty obligation to which a state must adhere, what can be said with any certainty is: 1) states may not impose their nationality,¹⁶⁵ 2) individuals must be able to change their nationality,¹⁶⁶ and 3) some genuine connections must exist between an individual and the state to support the legitimacy of any grant of nationality.¹⁶⁷ Ultimately though, “[i]nternational law . . . does not determine who is a national, but rather sets forth the conditions under which that determination must be recognized by other States.”¹⁶⁸

¹⁶⁰ HALL, *supra* note 57, at 293.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ Hague Convention, *supra* note 86, art. 1.

¹⁶⁴ “It appears difficult to deduce . . . a general rule of international law concerning the conditions on which States may or may not confer their nationality” WEIS, *supra* note 46, at 113.

¹⁶⁵ *See supra* Part III.B and note 76.

¹⁶⁶ *See supra* Part III.A.

¹⁶⁷ *See supra* Part III.C.

¹⁶⁸ *Iran v. U.S.*, 5 Iran-U.S. Cl. Trib. Rep. 251, 23 I.L.M. 489, 497 (1984).

Russia's actions do not clearly violate these restrictions. First, there is no clear evidence that Russian citizenship was imposed. While some people claimed coercive measures were being taken,¹⁶⁹ it is clear that many (if not most) of the passports were distributed to voluntary applicants.¹⁷⁰ Second, evidence of coercion would only constitute a violation of international law as it pertains to *the coerced* individuals. But, given the number of Georgians who received Russian passports, it is highly unlikely that all of the passports distributed were the result of coercive measures. Finally, it is also not clear that the connections between the South Ossetian population and Russia are insufficient to satisfy *Nottebohm's* genuine link test.

Blithely suggesting that *Nottebohm's* test is not satisfied because the South Ossetians are not ethnically Russian or because they have historically adopted Georgia as their home would be to miss the point. Importantly, the Ossetians are not ethnically Georgian either.¹⁷¹ More importantly though, *Nottebohm's* test requires asking if the recipients of a nationality are "more closely connected [to] the population of the State conferring nationality than with that of any other State"¹⁷² based on factors such as the traditions, interests, activities, familial ties, and future intentions toward the conferring state.¹⁷³ South Ossetia's geography seems to be an accident of history; the South Ossetians immigrated to Georgia while fleeing a threat, not out of an acknowledgment of any cultural or historical ties with the country.¹⁷⁴ Furthermore, the South Ossetians have historically supported the Russians, choosing to ally with the

¹⁶⁹ One South Ossetian shop-owner interviewed said that "[t]he Russians are telling everyone in the town they *must* take a Russian passport . . ." McElroy, *supra* note 16, at 1 (emphasis added).

¹⁷⁰ There was also a "flood of *applications* in Abkhazia, where some 150,000 residents became Russian citizens in June of [2002] alone . . ." Osipovich, *supra* note 10 (emphasis added). This raises an interesting question regarding Georgia's legal recourse, not against Russia, but against those Ossetians who acquired Russian citizenship. Throughout history countries have often expelled individuals who acquire a foreign nationality. See HALL, *supra* note 57, at 293. Such an approach with respect to Georgia raises practical difficulties because of the size of the South Ossetian population. Furthermore, the antagonistic and violent history between the South Ossetian separatists and the Georgian government suggests this community would meet any attempt at expulsion with armed resistance. Also, international law has evolved to discourage, if not outright prohibit, the forced dislocation of communities and minority groups. But, from the perspective of international nationality law, the question exists whether Georgia has the legal right to demand that those Ossetians accepting Russian citizenship leave Georgia. Admittedly, in light of the policy's attendant practical difficulties, this question seems entirely academic.

¹⁷¹ See *supra* Part II.

¹⁷² *Nottebohm (Liech. v. Guat.)*, 1955 I.C.J. 4, 13 (Apr. 6).

¹⁷³ See *supra* Part III.C.

¹⁷⁴ See *supra* Part II.

Soviets against the Georgians.¹⁷⁵ Also, many Ossetians speak Russian, trade with Russia, and have family residing within Russia. Finally, the Ossetians' flood of applications for Russian citizenship seems to announce that population's future intentions toward Russia; they intend to act and live as Russian citizens. This is all in the context of a population that has actively and aggressively resisted assimilation into Georgian society. Thus, when comparing the relative strength of the Ossetians' connections with Georgia and Russia, as *Nottebohm* requires, Russia's claim is not clearly illegitimate.

That one state can confer its nationality *en-masse* on the population of another state and thereby claim a right to protect that population against the state in which that population is physically located is unsettling. But, based on the existing legal regime – to the extent the patchwork of customs, treaties, and opinions outlined in this article can be considered a regime – there does not seem to be a *legal* basis under international nationality law for saying it cannot.¹⁷⁶ Even treatise writers are relegated to making relatively vague appeals to the sanctity of state sovereignty when arguing that such an outcome is prohibited. But these are not legal arguments, brought under a well-developed framework of international law. Thus, relying on them leaves one questioning what legal claim they support. Furthermore, such arguments fail to consider the rights of individuals and minority groups to choose their nationality. Therefore, Russia cannot be held to have violated existing international *nationality* law.

Nevertheless, determining that international nationality law does not prohibit Russia's extraterritorial conferment of nationality does not mark the end of the legal analysis. The remainder of this article will briefly introduce the doctrine of abuse of rights as a potential alternative legal framework applicable to Russia's passport policy in Georgia.¹⁷⁷

VII. THE ABUSE OF RIGHTS DOCTRINE & RUSSIA'S PASSPORT POLICY

A. *The Abuse of Rights Doctrine*

Abuse of rights is closely connected to the notion of "good faith" insofar as good faith is the "positive form of a principle which in the negative form involves the prohibition of abuse, arbitrariness and discrimina-

¹⁷⁵ *Id.*

¹⁷⁶ It is important to stress that this article does not conclude that international nationality law *justifies* Russia's action, only that it *does not prohibit* it.

¹⁷⁷ The following section is not meant to be an exhaustive discussion of the abuse of rights doctrine, which is both beyond this article's scope and substantial enough to warrant many articles of its own. This section is merely meant to introduce the doctrine and suggest it as an alternative avenue of exploration for analyzing Russia's passport policy in Georgia.

tion.”¹⁷⁸ The principle is one of prudence and restraint, such that “nobody harms another when he exercises his own rights.”¹⁷⁹ This concept - that every right has a corresponding obligation to not exercise that right in a way injurious to others - “seems to be inherent to legal thinking . . . in all legal systems . . .”¹⁸⁰ Therefore the doctrine enters international law as a “general principle[] of law recognized by civilized nations.”¹⁸¹ Although the doctrine’s contents are not precise, the prohibition of abuse of rights applies to conflicts of sovereign rights.¹⁸²

An abuse of rights can occur when a state injures another state by: 1) exercising a right in a way that hinders the other state’s exercise of its own right;¹⁸³ 2) intentionally exercising a right for a purpose other than the purpose for which the right was created;¹⁸⁴ or 3) exercising a right arbitrarily but without clearly violating the other state’s rights.¹⁸⁵ In his treatise on the general principles of international law, Bin Cheng articulated the concept by noting that:

The reasonable and bona fide exercise of a right implies an exercise which is genuinely in pursuit of those interests which the right is destined to protect and which is not calculated to cause any unfair prejudice to the legitimate interests of another State, whether these interests be secured by treaty or by general international law.¹⁸⁶

With respect to the regulation of nationality, abuse of rights seems particularly applicable. Because international nationality law bows to state sovereignty and largely leaves the determination of who are a state’s nationals to the state, the international community has no framework to draw from in the face of state action perceived to be arbitrary and unlawful.¹⁸⁷ Thus there is no legal benchmark against which to judge state action in this field. Indeed, the International Law Commission believes that “the doctrine of the abuse of rights finds its widest application in the context of ‘unregulated matters’, that is, matters which are ‘essentially

¹⁷⁸ Sloane, *supra* note 107, at 19-20; B. O. Iluyomade, *The Scope and Content of a Complaint of Abuse of Right in International Law*, 16 HARV. INT’L L. J. 47, 72 (1975).

¹⁷⁹ A. Kiss, ‘Abuse of Rights’, in R. Wolfrum (Ed.), *The Max Planck Encyclopedia of Public International Law*, Oxford University Press, 2008, available at www.mpepil.com, (last visited Feb. 19, 2009).

¹⁸⁰ *Id.*

¹⁸¹ Iluyomade, *supra* note 178, at 53 (quoting Statute of the International Court of Justice art. 38, ¶ 1(c), June 26, 1945, 33 U.N.T.S. 99).

¹⁸² See Kiss, *supra* note 179, ¶ 34.

¹⁸³ *Id.* ¶ 4.

¹⁸⁴ *Id.* ¶ 5.

¹⁸⁵ *Id.* ¶ 6.

¹⁸⁶ BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 131-32 (1987).

¹⁸⁷ See *supra* Part VI.

within the domestic jurisdiction of States.”¹⁸⁸ It is precisely because a states’ sovereign right to confer its nationality would otherwise face no restrictions that the abuse of rights framework is applicable.

The applicability of the doctrine becomes even clearer in the context of Russia’s passport policy in Georgia because Russia married its sovereign right to confer its nationality with its sovereign right to protect its citizens. In the past, international tribunals have discussed the danger of states abusing their right to *diplomatically* protect their citizens. In the *North American Dredging Co. of Texas Case*, the Mexican-United States General Claims Commission (Commission) pointed to the facts of the case as demonstrating the legitimacy of the “fears of certain nations with respect to abuses of the right of protection[,] and how seriously the sovereignty of those nations within their own boundaries would be impaired if some extreme conceptions of this right were recognized and enforced”¹⁸⁹ That case concerned the United States’ right to *diplomatically* protect a U.S. national operating in Mexico, never approaching the degree of danger the present context presents. Although this article is primarily concerned with Russia’s conference of citizenship on Georgian citizens and not its chosen method for protecting those “citizens,” the former was used to justify the latter. Thus, if states are legitimately concerned about other states abusing their sovereign right to protect their citizens, they should be similarly concerned about those states abusing their sovereign right to declare who those citizens are.

B. *Russia’s Passport Policy as an Abuse of Rights*

The abuse of rights doctrine seems like the appropriate legal lens through which to analyze Russia’s policy of conferring citizenship *en-masse* on South Ossetia’s population. Although the preceding discussion was admittedly and purposefully brief, it provides enough of the doctrine’s framework to get the analysis started. Russia was exercising a sovereign right in a way that was injurious to Georgia. By conferring Russian citizenship on Georgian citizens, Russia hindered Georgia’s legal right to protect that population vis-à-vis other countries. Furthermore, if it could be proved that Russia’s passport policy was a pretext for its subsequent military campaign, then the injury to Georgia becomes that much clearer. Whether it is more appropriate to argue that Russia was intentionally exercising its right for a purpose other than that for which the right was created, or that it was exercising a right arbitrarily but without clearly violating Georgia’s rights, is beyond this article’s scope. But, given the outline of both the abuse of rights doctrine and its underlying principles, the doctrine seems to provide a legal framework in which to

¹⁸⁸ F.V. García-Amador, *Fifth Report on International Responsibility: State Responsibility*, [1960] 2 Y.B. Int’l L. Comm’n 60, U.N. Doc. A/CN.4/125.

¹⁸⁹ CHENG, *supra* note 186, at 129 (quoting *N. Am. Dredging Co. of Texas (U.S. v. Mex.)*, 4 R. Int’l Arb. Awards 26 (Mex.-U.S. Gen. Claims Comm’n 1926)).

argue that Russia's actions violated international law and therefore the international community should not recognize Russia's right to protect the citizens of South Ossetia on the basis of their being Russian citizens.

VIII. CONCLUSION

Prior to Russia's military campaign into Georgia, the Russian government implemented a policy of distributing Russian passports to, and thereby conferring Russian citizenship on, South Ossetia's population. Attempting to legitimize its invasion, Russia asserted its sovereign right to protect its citizens against the aggression of another state. As the international community responded to Russia's actions the focus was on the proportionality of Russia's response and not whether the invasion was actually justified or legitimate. This question may seem purely academic for those who view international law as being at the vanishing point of law, representing little more than an opportunity for states to legitimate, *ex-post*, actions representing nothing more than balance of power politics. But the importance of legitimacy in international relations should not be understated, and to the extent that a state's adherence to international law provides legitimacy to its actions, questioning the legal legitimacy of state action should never be overlooked.

A state's sovereign right to confer citizenship is a powerful right. Not only does it establish a reciprocal relationship of rights and obligations between the state and the individual, it affects a state's rights *vis-à-vis* other states. By marrying the state's sovereign right to confer citizenship with the state's sovereign right to protect its citizens, the former right can be effectively transformed into a tool of state aggression. In a time of historically unparalleled mobility, and as the dislocating ripples of post-colonialism continue to spread, understanding the international legal framework of nationality has never been more important, especially as it applies to state power to confer citizenship.

International nationality law imposes few restrictions on states' powers to confer citizenship. As long as states do not impose their nationality, do not refuse to recognize any citizen's right to adopt a new nationality, and there exists some genuine link with those to whom nationality is conferred, then customary international law does not encroach on state sovereignty in this field. Existing treaties addressing the issue generally recognize this grant of authority. Even state power to confer citizenship extraterritorially is not clearly proscribed by international nationality law. This becomes especially complicated in light of the recognized right of individuals and minority groups to choose their nationality. Thus, under the existing international legal regime governing nationality, it cannot be said that Russia did not have the power to confer its citizenship on the South Ossetia's populace.

International law, however, does not legitimate the arbitrary or abusive use of state power. The abuse of rights doctrine corrals state discretion in

the exercising of acknowledged rights by requiring those rights be exercised in good faith, and declaring any arbitrary or abusive use of those rights resulting in injury to another state illegitimate and unlawful. Russia's policy of conferring its citizenship *en-masse* on the citizens of another country seems like just such an arbitrary and abusive use of an acknowledged right. Whether Russia's passport policy is viewed as a creeping annexation or naked aggression, international law should not, and, this author believes, does not, legitimate such a scheme. Although identifying Russia's passport policy as unlawful and illegitimate may not prevent it from continuing to carry out such policy, the international community should not allow Russia to aggressively reestablish its sphere of influence under the pretense of legal legitimacy. Just as Lichtenstein's grant of citizenship upon Nottebohm failed to empower it to *diplomatically* defend his rights under international law, so it seems that Russia's grant of citizenship upon South Ossetians should fail to empower it to *militarily* defend their rights under international law. Identifying Russia's policy as an abuse of rights would expose any future action based on that policy as aggressive action and give the international community grounds for refuting Russian's claim of having the right under international law to protect its "citizens." Given Russia's implementation of its passport policy in Ukraine and Moldova, nationality seems to be becoming another weapon in states' arsenals that international law must be prepared to address.

