

2017

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Recommended Citation

William T. Worster, *Human Rights Law and the Taxation Consequences for Renouncing Citizenship*, 62 St. Louis U. L.J. (2017).

Available at: <https://scholarship.law.slu.edu/lj/vol62/iss1/8>

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HUMAN RIGHTS LAW AND THE TAXATION CONSEQUENCES FOR RENOUNCING CITIZENSHIP

WILLIAM THOMAS WORSTER*

INTRODUCTION

Very few states in the world, including the United States, impose a tax on persons who renounce their nationality, and this practice implicates the human right of expatriation. While one might think that a person who gives up his nationality would no longer have any tax obligations to his former state of nationality, this expatriation tax, or “exit tax,” imposes a tax event and potentially continuing tax obligations for years to follow. It might even chill the practice of renunciation as a tax avoidance scheme. However, international human rights law provides that every person has a right to leave any country, including his own, and to renounce and change his nationality. This Paper will examine whether the U.S. exit tax regime violates the international human right of expatriation.

I. U.S. EXIT TAX REGIME

A U.S. citizen may renounce nationality¹ and upon expatriation, the former U.S. national incurs a taxation consequence.² When a person ceases to be a U.S. national, he or she also usually ceases to be a U.S. tax person,³ and thus the former national would no longer be subjected to taxation on his or her worldwide income, only U.S. source income, and would enjoy a lower rate on U.S.-source income.⁴ In an effort to reduce the attractiveness of renouncing nationality for

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1. *See* Immigration and Nationality Act § 349(b), 8 U.S.C. § 1481(b) (2012) (“[A]ny act of expatriation under the provisions of this chapter or any other Act shall be presumed to have done so voluntarily, but such presumption may be rebutted . . .”).

2. *See* I.R.C. § 877A (2012) (discussing tax responsibilities of expatriation).

3. *See* I.R.C. § 7701(b)(6) (2012).

4. I.R.C. § 871(a)(1) (2012) (nonresident aliens pay a thirty percent tax on U.S.-source income).

tax savings,⁵ Congress has passed a number of tax measures specifically aimed at U.S. citizens renouncing nationality,⁶ including the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”),⁷ the American Jobs Creation Act of 2004 (“AJCA”),⁸ and the Heroes Earnings Assistance and Relief Tax Act of 2008 (“HEART Act”).⁹

The rules specially designed for expatriates subjected these former U.S. citizens to ten years of additional U.S. tax compliance.¹⁰ In those years, the former nationals were required to pay the higher of the regular tax regime or the special expatriate tax regime,¹¹ which taxes U.S.-source income and income “effectively connected” with a U.S. trade or business,¹² including investment portfolio income,¹³ interest,¹⁴ and capital gains from U.S. stocks and bonds.¹⁵ There was also a special estate tax on U.S.-situs assets¹⁶ and a gift tax on U.S.-situs intangible property.¹⁷

5. See, e.g., Laurie P. Cohen, *Kenneth Dart Forsakes U.S. for Belize*, WALL ST. J., Mar. 28, 1994, at C1 (reporting on the expatriation of Kenneth Dart, the billionaire heir to Dart Container); Robert D. Hershey, Jr., *Closing a Tax Loophole and Opening Another*, N.Y. TIMES, July 10, 1995, at A1 (discussing legislative proposals to remedy expatriation problem); Michael Kinsley, *Love It or Leave It*, TIME, Nov. 28, 1994, at 95, 95 (comparing “taxpatriates” to draft dodgers); Robert Lenzner & Philippe Mao, *The New Refugees*, FORBES, Nov. 21, 1994, at 131, 131–32 (reporting that the expatriating people included Michael Dingman, a director of Ford Motor company, John “Ippy” Dorrance III, the heir to Campbell Soup, J. Mark Mobius, the billionaire emerging market investment manager, and Ted Arison, the founder of Carnival Cruise Lines); Brigid McMenamin, *Flight Capital*, FORBES, Feb. 28, 1994, at 55, 55.

6. See Foreign Investors Tax Act of 1966, Pub. L. No. 89-809, §§ 103(f), 108(f), 109(a), 80 Stat. 1539, 1551–54, 1573, 1574–75 (codified as amended at I.R.C. §§ 877, 2107, 2501(a) (2012)); see also Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 138, 98 Stat. 494, 672 (codified as amended at I.R.C. § 7701(b) (2012)); Tax Reform Act of 1986, Pub. L. No. 99-514, § 1234(a), 100 Stat. 2085, 2565–66 (codified as amended at I.R.C. § 6039E (2012)).

7. See Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, § 511, 110 Stat. 1936, 2093–2100 (codified as amended at I.R.C. § 877).

8. See American Jobs Creation Act of 2004, Pub. L. No. 108-357, § 804(a), 118 Stat. 1418, 1569–70 (codified as amended at I.R.C. § 877(a), (c)).

9. See Heroes Earnings Assistance and Relief Tax Act of 2008, Pub. L. No. 110-245, § 301, 122 Stat. 1624, 1638–44 (codified as amended at I.R.C. § 877A (2012)).

10. I.R.C. § 877(a)(1)

11. See generally I.R.C. §§ 871, 877 (2012).

12. I.R.C. § 871(b); see Michael S. Kirsch, *The Tax Code as Nationality Law*, 43 HARV. J. ON LEGIS. 375, 379 (2006).

13. I.R.C. § 871(a)(1)(A); see Kirsch, *supra* note 12, at 379.

14. I.R.C. § 871(a)(1)(A). A higher rate than would be imposed under I.R.C. § 871(h).

15. Gains that are not taxed for nonresident aliens under I.R.C. §§ 865, 871(a)(2) (2012).

16. See I.R.C. § 2107(b) (2012) (imposing tax on gains that are exempt from tax for nonresident aliens under I.R.C. §§ 2101, 2104, 2105 (2012)).

17. See I.R.C. § 2501(a)(3) (2012) (imposing tax on gains that are exempt from tax for nonresident aliens under I.R.C. § 2501(a)(2)).

These rules applied if the expatriate's "principle purpose" in renouncing nationality was to avoid taxation.¹⁸ Initially, the burden of proving this purpose fell on the IRS, but the AJCA abolished entirely the need to prove any purpose for the expatriation.¹⁹ Following this change, any "wealthy" person who renounced nationality would have an objective intent to avoid taxes.²⁰ "Wealthy" was defined as a person with an average annual tax of \$124,000 for the previous five years²¹ or a net worth of \$2,000,000.²² However, there are some exceptions for dual citizens from birth who have not had substantial contacts with the United States²³ or were merely U.S. citizens by birth with neither parent being a U.S. citizen.²⁴ These exceptions were lost, however, if the individual could not prove that he or she had been in full compliance with the Internal Revenue Code during the preceding five years²⁵ or had been present in the United States for more than thirty days during any of the ten calendar years preceding expatriation²⁶ and following the expatriation.²⁷

In 2008, Congress also enacted the HEART Act to impose a "mark-to-market" tax on citizens renouncing citizenship²⁸ so that expatriates would continue to pay normal U.S. income taxes on all unrealized gains that exceeded \$600,000 on their worldwide assets.²⁹ In addition, the IRS would now tax distributions from certain retirement plans at any time, not limited to ten years

18. See Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, § 511(a), 110 Stat. 1936, 2093 (codified as amended at I.R.C. § 877(a) (2012)); I.R.C. § 877(f) (putting the burden on the individual renouncing citizenship to prove "that such loss of citizenship did not have for one of its principal purposes the avoidance of taxes"); see also *Furstenberg v. Comm'r*, 83 T.C. 755, 780 (1984).

19. See Kirsch, *supra* note 12, at 380 n.18.

20. See *id.*

21. See I.R.C. § 877(a)(2) (providing for an annual cost of living adjustment thereafter).

22. See *id.* However, the net worth measure does not benefit from an annual cost of living adjustment. *Id.*

23. See I.R.C. § 877(c)(2)(B).

24. See I.R.C. § 877(c)(3).

25. See I.R.C. § 877(a)(2)(C).

26. See I.R.C. § 877(g)(1).

27. See *id.* Although it is unclear, we can presume that this provision will also be interpreted to subject the expatriate to the U.S. person estate and gift taxes.

28. See Heroes Earnings Assistance and Relief Tax Act of 2008, Pub. L. No. 110-245, § 301(a), 122 Stat. 1624, 1638 (codified as amended at I.R.C. § 877A(a)(1)).

29. See I.R.C. § 877A(a)(3)(A)–(B) (2012) (indexed for inflation); see also I.R.C. § 877A(h)(2) (providing that long-term permanent residents who fall under the expatriation rules receive a stepped-up basis equivalent to the fair market value of the asset on the date of acquisition of permanent residency rather than the date of purchase).

following expatriation.³⁰ There are similar exceptions for dual citizens with minimal connections to the United States.³¹

II. INTERNATIONAL HUMAN RIGHTS LAW ON CHANGING NATIONALITY

The Universal Declaration of Human Rights (“UDHR”) contains the basic human rights that all people enjoy. It states that “[n]o one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.”³² The right to change nationality, or renounce nationality, was already included in the earliest drafts.³³ Throughout the drafting process, various delegates continued to reaffirm that the right to change or renounce nationality was fundamental, and there was no opposition to these submissions.³⁴ The various drafts always made

30. See I.R.C. § 877A. This rule does not include Individual Retirement Accounts, which are included in the mark-to-market system and therefore taxable at the time of expatriation. See I.R.C. § 877A(e)(1).

31. See I.R.C. §§ 877(c)(2)(B), (c)(3); I.R.C. § 877A(g)(1)(B)(i)–(ii).

32. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 15(2) (Dec. 10, 1948).

33. G.A. Res. 43 (I), U.N. Doc. A/234, at 68 (Dec. 11, 1946); U.N. Div. Human Rights, *Draft Outline of International Bill of Rights*, art. 10, U.N. Doc. E/CN.4/AC.1/3 (June 4, 1947) (“The rights of emigration and expatriation shall not be denied.”); U.N. Div. Human Rights, *Draft Outline of International Bill of Rights*, art. 32, U.N. Doc. E/CN.4/AC.1/3 (June 4, 1947) (“Every one has a right to a nationality. Every one is entitled to the nationality of the State where he is born unless and until on attaining majority he declares for the nationality open to him by virtue of descent.”); Inter-Am. Juridicial Comm., *Draft Declaration of the International Rights and Duties of Man*, art. 9, U.N. Doc. E/CN.4/2 (Jan. 8, 1947) (“Every person has the right to renounce the nationality of his birth, or a previously acquired nationality, upon acquiring the nationality of another state.”).

34. See U.N. ESCOR, 3d Sess., 59th mtg. at 10–11, U.N. Doc. E/CN.4/SR.59 (June 4, 1948) (“[Mr. Wilson of the United Kingdom] agreed with the suggestion made by the representative of Uruguay [Fontaina] that the words ‘or denied the right to change his nationality’ should be added to the India-United Kingdom amendment.”); U.N. ESCOR, 3d Sess., 59th mtg. at 11, U.N. Doc. E/CN.4/SR.59 (June 4, 1948) (statement of Mr. Malik, Lebanon) (“No one should be arbitrarily deprived of his nationality or of the right to change his nationality.”) (amendment was adopted on vote); U.N. ESCOR, 1st Sess., 14th mtg. at 2, U.N. Doc. E/CN.4/SR.14 (Feb. 5, 1947) (statement of Mr. Mora, Uruguay) (“The right to freedom of movement ought also to include the freedom to change one’s nationality.”) (accepted without opposition); U.N. Econ. & Soc. Council, Comm’n. on Human Rights, Sub-Comm’n on Prevention of Discrimination & Prot. of Minorities, C.L.C. Mubanga-Chipoya (Rapporteur), *Final Rep. on Analysis of the Current Trends and Developments Regarding the Right to Leave any Country Including One’s Own, and to Return to One’s Own Country, and Some Other Rights or Consideration Arising Therefrom*, ¶ 60, U.N. Doc. E/CN.4/Sub.2 (Part 1) (July 10, 1987) [hereinafter U.N. Econ. & Soc. Council, *Final Rep.*] (documenting France’s support of the U.K. proposal to include renunciation: “Subject to any general law adopted in the interest of national welfare and security, there shall be liberty of movement and free choice of residence within the borders of each State; individuals may also freely emigrate or expatriate themselves.”); U.N. Econ. & Soc. Council, Comm’n on Human Rights, Professor H. Lauterpacht (Rapporteur), *Prelim. Rep. on Human Rights, the Charter of the United Nations and the International Bill of the Rights of Man*, at 38, U.N. Doc. E/CN.4/89 (May 12, 1948) (“Article 9 . . . The right of emigration and expatriation shall not be denied.”); U.N. Econ. & Soc. Council, Comm’n on Human Rights, *Comments from Governments on the Draft International*

reference to the right of the individual's decision.³⁵ And, important for this Paper, the right to change nationality was continually linked to the right to leave any state generally, phrased broadly as the right to "emigrate."³⁶

Unfortunately, the UDHR is not a binding instrument like a treaty;³⁷ however, the rights contained in the UDHR were later implemented in a binding treaty: the International Covenant on Civil and Political Rights ("ICCPR"). The text of the ICCPR, however, does not contain the right to change nationality explicitly. It reads in part: "Everyone shall be free to leave any country, including his own."³⁸ Various special rapporteurs on the right to leave have consistently held that the right to leave in the ICCPR was linked to human rights in the UDHR.³⁹ Subsequently, the Human Rights Committee ("HRC") held that the freedom to leave is not limited to any specific purpose.⁴⁰ Scholars have

Declaration on Human Rights, Draft International Covenant on Human Rights and the Question of Implementation, Communication from the United Kingdom, at 4, U.N. Doc. E/CN.4/82/Add.9 (May 10, 1948) [hereinafter U.N. Econ. & Soc. Council, *Communication from the United Kingdom*] ("Article 10(2) . . . His Majesty's Government have assumed that it aims at ensuring that 'everyone has the right to divest himself of his nationality, if he wishes to do so.' His Majesty's Government are not convinced of the need to include a provision covering the above point.").

35. See *Draft International Declaration of Human Rights (Draft United Nations Declaration of Human Rights)*, art. 13, U.N. Doc. E/CN.4/148/Add.1, annex A (June 18, 1948) ("No one should be arbitrarily deprived of his nationality or denied the right to change his nationality."); U.N. Econ. & Soc. Council, *Communication from the United Kingdom*, *supra* note 34, at 4.

36. See U.N. Econ. & Soc. Council, Comm'n. on Human Rights, Sub-Comm'n on Prevention of Discrimination & Prot. of Minorities, Joseph Nisot (Rapporteur), *Report Submitted to Commission on Human Rights, Draft Declaration of Human Rights*, at 6-7, U.N. Doc. E/CN.4/52 (Dec. 6, 1947); U.N. Econ. & Soc. Council, Comm'n. on Human Rights, Proposal for a Human Rights Convention Submitted by the Representative of the United States on the Commission on Human Rights, art. 11, U.N. Doc. E/CN.4/37 (Nov. 26, 1947) ("Everyone shall have the right to emigrate.").

37. See G.A. Res. 217 (III) A, *supra* note 32, at pmbl.

38. See G.A. Res. 2200 (XXI) A, art. 12(2) (Dec. 16, 1966).

39. See U.N. Econ. & Soc. Council, Comm'n. on Human Rights, Sub-Comm'n on Prevention of Discrimination & Prot. of Minorities, *Working Paper on the Right to Freedom of Movement and Related Issues Prepared by Mr. Volodymyr Boutkevitch in Implementation of Decision 1996/109 of the Sub-Commission*, ¶ 5, U.N. Doc. E/CN.4/Sub.2/1997/22 (July 29, 1997) (finding that ICCPR Article 15 is linked to the UDHR); U.N. Econ. & Soc. Council, Comm'n. on Human Rights, Sub-Comm'n on Prevention of Discrimination & Prot. of Minorities, José D. Inglés (Special Rapporteur), *Study of Discrimination in Respect of the Right of Everyone to Leave Any Country and to Return to His Country*, at 11, U.N. Doc. No. E/CN.4/Sub.2/220/Rev.1 (1963) ("The right to change one's nationality presupposes the right to leave one's country."); U.N. Econ. & Soc. Council, *Final Rep.*, *supra* note 34, ¶ 70.

40. See *Varela Núñez v. Uruguay*, Communication No. 108/1981, ¶ 9.3 (July 22, 1983), *reprinted in HUMAN RIGHTS COMM.: SELECTED DECISIONS UNDER THE OPTIONAL PROTOCOL*, at 143, 145 ¶ 9.3, U.N. Doc. CCPR/C/OP/2, U.N. Sales No. E.84.XIV.1 (1990); *Lichtensztejn v. Uruguay*, Communication No. 77/1980, ¶ 8.4 (Mar. 31, 1983), *reprinted in HUMAN RIGHTS COMM.: SELECTED DECISIONS UNDER THE OPTIONAL PROTOCOL*, at 102, 104-05, U.N. Doc. CCPR/C/OP/2, U.N. Sales No. E.84.XIV.1 (1990); *Pereira Montera v. Uruguay*, Communication

studied the ICCPR and its implementation and concluded that the permissible purposes can include expatriation;⁴¹ in fact, expatriation is a form of leaving.⁴²

Unlike the UDHR, some of the rights in the ICCPR can be limited. Any limitation on a right must be necessary in democratic society (proportionate)⁴³ for protecting national security,⁴⁴ public order,⁴⁵ public health⁴⁶ or morals,⁴⁷ and the rights and freedoms of others,⁴⁸ and not otherwise inconsistent with other rights in the ICCPR.⁴⁹ Based on this analysis, the right to leave may be limited by mental capacity,⁵⁰ pending judicial proceedings,⁵¹ the need to serve a prison

No. 106/1981, ¶ 9.4 (Mar. 31, 1983), *reprinted in* HUMAN RIGHTS COMM.: SELECTED DECISIONS UNDER THE OPTIONAL PROTOCOL, at 136, 138, U.N. Doc. CCPR/C/OP/2, U.N. Sales No. E.84.XIV.1 (1990); Vidal Martins v. Uruguay, Communication No. 57/1979, ¶ 7 (Mar. 23, 1982), *reprinted in* HUMAN RIGHTS COMM.: SELECTED DECISIONS UNDER THE OPTIONAL PROTOCOL, at 122, 123, U.N. Doc. CCPR/C/OP/1, U.N. Sales No. E.84.XIV.2 (1985); U.N. Human Rights Comm., *General Comment No. 27: Freedom of Movement (Art. 12)*, ¶ 8, U.N. Doc. CCPR/C/21/Rev.1/Add.9 (Nov. 2, 1999) [hereinafter *General Comment No. 27*] (“Freedom to leave the territory of a State may not be made dependent on any specific purpose . . .”).

41. See SARAH JOSEPH, JENNY SCHULTZ & MELISSA CASTAN, *THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY* 355 (2d ed. 2005) (“The right to leave one’s country pertains to both short or longer visits and the freedom to leave, semi-permanently, or to emigrate.”).

42. See MANFRED NOWAK, *U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY* 267 (2d rev. ed. 2005) (“The right to leave a country covers both brief and somewhat more extended stays abroad . . . and long-term departure from a country with or without surrender of citizenship (*freedom to emigrate*).”).

43. *Id.* at 274.

44. See *Karker v. France*, U.N. Human Rights Comm., Communication No. 833/1998, ¶¶ 9.2, 9.3, 10, U.N. Doc. CCPR/C/70/D/833/1998 (2000); *González del Río v. Peru*, U.N. Human Rights Comm., Communication No. 263/1987, ¶ 5.3 (Oct. 28, 1992), *reprinted in* OFFICIAL RECORDS OF THE HUMAN RIGHTS COMMITTEE, 1992/93, at 516, U.N. Doc. CCPR/12/Add.1 (Vol. II), U.N. Sales No. E.96.XIV.2 (1997); *Celepli v. Sweden*, U.N. Human Rights Comm., Communication No. 456/1991, ¶ 7.5, U.N. Doc. CCPR/C/51/D/456/1991 (1994); *General Comment No. 27, supra* note 40, ¶ 11.

45. See *González del Río*, ¶ 5.3; *General Comment No. 27, supra* note 40, ¶ 11.

46. See *Bhinder v. Canada*, U.N. Human Rights Comm., Communication No. 208/1986, ¶¶ 4.2, 6.2, U.N. Doc. CCPR/C/37/D/208/1986 (1989); *General Comment No. 27, supra* note 40, ¶ 11.

47. See *Hertzberg et al. v. Finland*, U.N. Human Rights Comm., Communication No. 61/1979, ¶¶ 6.3, 10.4 (Apr. 2, 1982), *reprinted in* HUMAN RIGHTS COMM.: SELECTED DECISIONS UNDER THE OPTIONAL PROTOCOL, at 124, 126, U.N. Doc. CCPR/C/OP/1, U.N. Sales No. E.84.XIV.2 (1985); *General Comment No. 27, supra* note 40, ¶ 11.

48. See *General Comment No. 27, supra* note 40, ¶ 11.

49. See *id.*

50. See NOWAK, *supra* note 42, at 268–70.

51. See *González del Río v. Peru*, U.N. Human Rights Comm., Communication No. 263/1987, ¶ 5.3 (Oct. 28, 1992), *reprinted in* OFFICIAL RECORDS OF THE HUMAN RIGHTS COMMITTEE, 1992/93, at 516, U.N. Doc. CCPR/12/Add.1 (Vol. II), U.N. Sales No. E.96.XIV.2 (1997); NOWAK, *supra* note 42, at 270.

sentence,⁵² an obligation to provide military/national service,⁵³ or the refusal to pay lawfully incurred taxes.⁵⁴ That being said, the right to renounce nationality expressed in the European Convention on Nationality would prohibit these measures because refusing renunciation of nationality is not strictly necessary to achieve these ends.⁵⁵

However, the HRC has held that exit or travel visas do violate the right to leave, even when it is (theoretically) possible to acquire one.⁵⁶ In addition, burdensome fees or administrative costs applying to exercise this right⁵⁷ (e.g., passport application fees)⁵⁸ that go beyond the administrative expense are also violations because they are not necessary.⁵⁹ In general, the argument that the individual owes the state an obligation has been viewed skeptically because: “As shown by the practice of many States, governments have a keen interest in preventing their working population or certain groups . . . from leaving the country. It is always possible to come up with some sort of ‘debt’ owed the State”⁶⁰

In addition to treaty law, we can consider customary international law and its interaction with the right to change nationality.⁶¹ In order to determine if a

52. See NOWAK, *supra* note 42, at 270.

53. See *Peltonen v. Finland*, U.N. Human Rights Comm., Communication No. 492/92, ¶ 8.3, U.N. Doc. CCPR/C/51/D/492/1992 (July 21, 1994). *But see* U.N. Human Rights Comm., *Consideration of Reports Submitted by the States Parties Under Article 40 of the Covenant, Comments of the Human Rights Committee: Russian Federation*, ¶ 20, U.N. Doc. CCPR/C/79/Add.54 (July 26, 1995).

54. See NOWAK, *supra* note 42, at 270.

55. See *Riener v. Bulgaria*, App. No. 46343/99, ¶ 90 (Eur. Ct. H.R. May 23, 2006); Council of Europe, Explanatory Report to the Convention on Nationality, E.T.S. No. 166, ¶¶ 78, 81 (May 14, 1997).

56. See U.N. Human Rights Comm., *Consideration of Reports Submitted by the States Parties Under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee: Uzbekistan*, ¶ 18, U.N. Doc. CCPR/C/UZB/CO/3 (Apr. 7, 2010) (criticizing the requirement of an exit visa); *see also* U.N. Human Rights Comm., *Consideration of Reports Submitted by the States Parties Under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee: Turkmenistan*, ¶ 12, U.N. Doc. CCPR/C/TKM/CO/1 (Apr. 19, 2012); U.N. Human Rights Comm., *Consideration of Reports Submitted by the States Parties Under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee: Gabon*, ¶ 16, U.N. Doc. CCPR/C/79/Add.71 (Nov. 18, 1996); NOWAK, *supra* note 42, at 269–70.

57. See *General Comment No. 27*, *supra* note 40, ¶ 17.

58. See U.N. Human Rights Comm., *Consideration of Reports Submitted by the States Parties Under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee: Iraq*, ¶ 14, U.N. Doc. CCPR/C/79/Add.84 (Nov. 19, 1997).

59. See *General Comment No. 27*, *supra* note 40, ¶ 17; NOWAK, *supra* note 42, at 279.

60. NOWAK, *supra* note 42, at 278.

61. If the reader concludes, however, that this author has not succeeded in establishing widespread and consistent practice with *opinio juris*, then the author also submits that the vast amount of state practice could be seen as subsequent practice for purposes of interpreting the

rule exists under customary international law, we have to establish a sufficient amount of state practice with *opinio juris*.⁶² When the International Law Commission (“ILC”) has studied this question of a human right to renunciation, it has repeatedly reached the same conclusion that there was a right to renounce.⁶³ The U.N. Secretariat has reached the same conclusion.⁶⁴ The Institute of International Law as long ago as 1896,⁶⁵ and the International Law Association as long ago as 1924,⁶⁶ recognized the right to expatriate. Classic authors of public international law have also argued in favor of a right to renounce nationality as a human right.⁶⁷ The only restriction the ILC could find

ICCPR. See Vienna Convention on the Law of Treaties art. 31(3)(b), May 23, 1969, 1155 U.N.T.S. 331, 340.

62. See, e.g., Jurisdiction Immunities of the State (Ger. v. It.), Judgment, 2012 I.C.J. 100, ¶ 55 (Feb. 3); Continental Shelf (Libya v. Malta), Judgment, 1985 I.C.J. 13, ¶¶ 27–30 (June 3); North Sea Continental Shelf (Ger. v. Den.; Ger. v. Neth.), Judgment, 1969 I.C.J. 3, ¶ 77 (Feb. 20); S.S. “Lotus” (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10, at 98, 101 (Sept. 7); Int’l Law Comm’n, Michael Wood, (Special Rapporteur), *First Report on Formation and Evidence of Customary International Law*, ¶¶ 13–15, U.N. Doc. A/CN.4/663 (May, 17 2013); INT’L LAW ASS’N, FINAL REPORT OF THE COMMITTEE: STATEMENT OF PRINCIPLES APPLICABLE TO THE FORMATION OF GENERAL CUSTOMARY INTERNATIONAL LAW ¶¶ 8–11 (2000).

63. See F.V. García Amador (Special Rapporteur), *Report on International Responsibility*, ¶ 108, U.N. Doc. A/CN.4/96, reprinted in [1956] 2 Y.B. Int’l L. Comm’n 173, 194, U.N. Doc. A/CN.4/SER.A/1956/Add.1, U.N. Sales No. 1956.V.3, Vol. II (observing that “existing laws of progressive, enlightened civilization” provide for a right to expatriate); Manley O. Hudson (Special Rapporteur), *Report on Nationality, Including Statelessness*, U.N. Doc. A/CN.4/50 (Feb. 21, 1952), reprinted in [1952] 2 Y.B. Int’l L. Comm’n 3, 9, 11, 18, U.N. Doc. A/CN.4/SER.A/1952/Add.1 (recognizing right to renounce nationality). But see U.N. SECRETARY-GENERAL, SURVEY OF INTERNATIONAL LAW IN RELATION TO THE WORK OF CODIFICATION OF THE INTERNATIONAL LAW COMMISSION, at 44, U.N. Doc. A/CN.4/1/Rev.1, U.N. Sales No. 1948.V.1(1) (1949) (“[N]o agreement proved possible on important questions of substance such as . . . the right of expatriation.”).

64. The U.N. Secretariat, in preparing a study on nationality for the International Law Commission, noted that the “right to expatriation and to change nationality has long been recognized as an inherent right of the human person at least by certain countries.” U.N. Secretariat, Survey of the Problem of Multiple Nationality, ¶¶ 37, 43, U.N. Doc. A/CN.4/84 (May 14, 1954), reprinted in [1954] 2 Y.B. Int’l L. Comm’n 52, 61, 63, U.N. Doc. A/CN.4/SER.A/1954/Add.1.

65. See 15 ANNUAIRE DE L’INSTITUT DE DROIT INTERNATIONAL 32, 131 (1896).

66. See Ernest J. Schuster & Wyndham A. Bewes, *Report of the Committee on Nationality and Naturalisation*, in INT’L LAW ASS’N., REPORT OF THE THIRTY-THIRD CONFERENCE 22, 32 (1925).

67. See HENRY BONFILS, MANUEL DE DROIT INTERNATIONAL PUBLIC § 410, at 269 (Librairie Rousseau 7th ed., 1914) (Fr.); DAVID DUDLEY FIELD, OUTLINES OF AN INTERNATIONAL CODE § 267, at 138 (London, Trübner & Co. 2d ed. 1876) (“Expatriation does not change the national character of the person until completed by naturalization, but meantime he is entitled to be protected by the country whose naturalization he is seeking.”); EMMERICH DE Vattel, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS III, at 90, 91 (Charles G. Fenwick trans., Carnegie Institute 1916) (1758) (“There are certain cases under which a citizen has the absolute right . . . to renounce allegiance to his country and abandon it. . . . If the sovereign undertakes to interfere with those who

on renunciation was to prevent the individual from becoming stateless.⁶⁸ Suggestions that exit visas might be acceptable were rejected.⁶⁹ The U.N. Secretariat opined that another possible exception to that right would be individuals subject to a military service obligation.⁷⁰

In addition to the UDHR and ICCPR mentioned above, we also have numerous other binding and non-binding resolutions and declarations reaffirming the right to change nationality. Beginning with binding law, the Migrant Worker Convention, Racial Discrimination Convention, Apartheid Convention, Rights of the Child Convention, all support the right to freedom to leave and/or emigrate.⁷¹ The Convention on the Rights of the Child protects the child's right to form his identity, which some authorities have viewed as overlapping with nationality.⁷² In Europe, the European Convention on

have the right to emigrate he does them a wrong"); FRANCISCI DE VICTORIA, *DE INDIS ET DE JURE BELLI RELECTIONES* 386 (John P. Bate trans. 1917) (1557) ("[I]t was permissible from the beginning of the world . . . for any one to set forth and travel wheresoever he would."); U.N. Secretariat, *Survey of the Problem of Multiple Nationality*, *supra* note 64, ¶ 312 *bis*. For more contemporary authors, see Richard B. Lillich, *Civil Rights, in HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES* 115, 149–52 (Theodor Meron ed., 1984); Rosalyn Higgins, *The Right in International Law of an Individual to Enter, Stay in and Leave a Country*, 49 *INT'L AFF.* 341, 341–42, 352–53 (1973).

68. See Hudson, *supra* note 63, at 14, 21 (recognizing the only valid prohibition on renunciation should be to avoid statelessness).

69. See *Summary Records of the 218th Meeting*, [1953] 1 *Y.B./ Int'l L. Comm'n* 220, 222, U.N. Doc. A/CN.4/SER.A/1953 (discussing the draft convention on the elimination of future statelessness and objections to the implication that states can require an exit permit for renunciation).

70. See U.N. Secretariat, *Survey of the Problem of Multiple Nationality*, *supra* note 64, ¶ 374 ("The right of expatriation is now recognized by most States, although with certain restrictions in respect of individuals subject to military obligations; and in most municipal laws loss of the nationality of origin is the consequence of naturalization by a foreign State upon request of the individual concerned.").

71. See G.A. Res. 2106 (XX), *International Convention on the Elimination of All Forms of Racial Discrimination*, at art. 5(d)(ii) (Dec. 21, 1965) ("State Parties undertake to . . . guarantee the right . . . to leave any country, including one's own, and to return to one's country . . .").

72. See *Riener v. Bulgaria*, App. No. 46343/99, at 31–32 (Eur. Ct. H.R. May 23, 2006) (Maruste, J., dissenting) ("[In the context of the European Convention on Human Rights] . . . I see nationality (citizenship) as part of someone's identity. If Article 8 covers the right to self-determination in respect of, for example, sexual orientation and so forth, it undoubtedly also covers the right to self-determination in respect of nationality and citizenship. It is true that the Convention does not guarantee the right to citizenship. But it follows from the general idea of freedom, freedom of choice and self-determination that there should be a right to apply for citizenship and also a negative right to renounce it. This is part of the social, cultural and political self-determination of the individual which, to my mind, also falls within the general scope of Article 8."); G.A. Res. 32/5, *Human Rights and Arbitrary Deprivation of Nationality*, ¶ 11 (June 30, 2016) ("Reiterates that the right to identity is intimately linked to the right of nationality . . ."); U.N. Secretary-General, *Annual Report of the United Nations Commissioner for Human Rights and Reports of the Office of High Commissioner and the Secretary-General: Arbitrary Deprivation of Nationality: Rep. of the*

Nationality obliges states to permit renunciation as a human right,⁷³ and the European Convention on Human Rights protections on private life might also treat renunciation similarly as a human right.⁷⁴

Turning to non-binding instruments that would demonstrate *opinio juris*, we can observe that the right to renounce nationality has been acknowledged in international meetings and fora for a long time with a high degree of consistency.⁷⁵ For example, the Uppsala Declaration affirmed that all people enjoyed the human right to renounce nationality,⁷⁶ and this declaration was cited in other studies on the rights in the UDHR and ICCPR.

Turning to specific instances of state practice, voluntary renunciation of nationality is essentially universally recognized as a right. Specifically, it is included in the law on nationality of 172 states. This is a remarkable concurrence of opinion. Only one state prohibits renunciation of nationality completely: Costa Rica.⁷⁷ However, the reason for this choice is that Costa Rica has a constitutional provision against the creation of situations of statelessness.⁷⁸ The

Secretary-General, ¶ 59, U.N. Doc. A/HRC/10/34 (Jan. 26, 2009) [hereinafter U.N. Secretary-General, *Annual Report*] (“Article 8, paragraph 2, of the Convention on the Rights of the Child, expressly stipulates: ‘Where a child is illegally deprived of some or all of the elements of his or her identity [including nationality], States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.’”).

73. European Convention on Nationality, art. 8, Nov. 6, 1997, E.T.S. No. 166.

Article 8 – Loss of nationality at the initiative of the individual

1. Each State Party shall permit the renunciation of its nationality provided the persons concerned do not thereby become stateless.

2. However, a State Party may provide in its internal law that renunciation may be effected only by nationals who are habitually resident abroad.

Id.; see also *Riener v. Bulgaria*, App. No. 46343/99, ¶ 89 (Eur. Ct. H.R. May 23, 2006).

74. See *Ramadan v. Malta*, App. No. 76136/12, ¶ 8 (Eur. Ct. H.R. June 21, 2016) (Pinto de Albuquerque, J., dissenting) (“There is nothing to suggest that the above principle cannot apply to cases of deprivation or loss of citizenship or to the right to renounce citizenship.”).

75. See, e.g., *Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE*, 29 INT’L LEGAL MATERIALS 1305, 1311 (1990); *Human Rights in the Concluding Document of the Vienna: CSCE Follow-up Meeting on 15 January 1989*, 10 HUM. RTS. L.J. 270, 277 (1989); U.N. Econ. & Soc. Council, *Final Rep.*, *supra* note 34, ¶¶ 61, 121–22.

76. See *The Right to Leave and the Right to Return: A Declaration Adopted by the Uppsala Colloquium, Sweden, June 21, 1972*, 7 INT’L MIGRATION REV. 62, 63 (1973) (linking the right to leave and the right to renounce nationality: “Article 3: (a) No person shall be required to renounce his nationality as a condition of the exercise of the right to leave a country. (b) No person shall be deprived of his nationality for seeking to exercise or for exercising the right to leave a country. (c) No person shall be denied the right to leave a country because he wishes to renounce or has renounced his nationality.”).

77. See CONSTITUCIÓN DE COSTA RICA [CONSTITUTION OF COSTA RICA] arts. 16–17.

78. See U.N. Secretary-General, *Annual Report*, *supra* note 72, ¶ 18 (“The Government of Costa Rica stated that the Constitution guarantees the right to a nationality, also recognized in international instruments to which Costa Rica is party. . . . Article 16 further indicates that Costa Rican citizenship cannot be lost or renounced. The Government stated that the Constitutional Court

P.R. China only prohibits renunciation outright for military officers and government officials.⁷⁹ However, many states, including for example, the United States, have long argued that expatriation is a human right.⁸⁰ Based on this survey, the right to renounce nationality is certainly widespread and consistent. This conclusion, combined with the international concern and existence of the right in the UDHR and inherently in the ICCPR, suggests that the right to renounce nationality also exists under customary international law.

Following the existence of this right, we next consider whether it may be limited. No authority suggested that the right to expatriate is norm of *jus cogens*, so it must be subject to some limitation. In a number of states, there are a few reasonable restrictions to renunciation. The most common is the avoidance of statelessness by requiring a substitute nationality.⁸¹ This requirement is certainly reasonable since states are under an obligation to avoid the creation of statelessness.⁸² Even states that do not specify this reason for prohibiting

has further clarified that this clause on non-renunciation should be interpreted in conformity with international human rights as an absolute prohibition on statelessness.”).

79. See NATIONALITY LAW OF THE PEOPLE’S REPUBLIC OF CHINA art. 12 (Sept. 10, 1980), <http://www.china.org.cn/english/LivinginChina/184710.htm#> [<https://perma.cc/577J-4A7W>].

80. See U.N. Secretary General, *Rep. on Human Rights and Arbitrary Deprivation of Nationality*, ¶ 39, U.N. Doc. E/CN.4/1999/56 (Dec. 28, 1998) (citing response from the United States (Oct. 9, 1998): “The United States, however, has recognized the right of expatriation as an inherent right of all people.”); see also William Thomas Worster, *The Constitutionality of the Taxation Consequences for Renouncing U.S. Citizenship*, 9 FLA. TAX REV. 921, 967–68 (2010).

81. See Bulgarian Citizenship Act art. 20, http://www.bulgarianembassy-london.org/index.php?option=com_content&task=view&id=107 [<https://perma.cc/AY5N-SBUV>]; Andorra, in U.S. OFFICE OF PERS. MGMT., *CITIZENSHIP LAWS OF THE WORLD* 16, 16 (2001) [hereinafter OPM CITIZENSHIP LAWS], <http://www.multiplecitizenship.com/documents/IS-01.pdf> [<https://perma.cc/C9PD-8V4E>]; Austria, in OPM CITIZENSHIP LAWS 24, 24; Belgium, in OPM CITIZENSHIP LAWS 31, 31; Botswana, in OPM CITIZENSHIP LAWS 38, 38; Chile, in OPM CITIZENSHIP LAWS 50, 50; Denmark, in OPM CITIZENSHIP LAWS 64, 64; Germany, in OPM CITIZENSHIP LAWS 82, 82; New Zealand, in OPM CITIZENSHIP LAWS 145, 145; Norway, in OPM CITIZENSHIP LAWS 150, 150; Papua New Guinea, in OPM CITIZENSHIP LAWS 156, 156; Philippines, in OPM CITIZENSHIP LAWS 159, 159; Russian Federation, in OPM CITIZENSHIP LAWS 164, 165; Slovak Republic, in OPM CITIZENSHIP LAWS 177, 177; Slovenia, in OPM CITIZENSHIP LAWS 178, 178; Sweden, in OPM CITIZENSHIP LAWS 189, 189; Switzerland, in OPM CITIZENSHIP LAWS 190, 190.

82. See, e.g., Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, Apr. 12, 1930, League of Nations Doc. C.224.M.III.1930.V (1930); GUY S. GOODWIN-GILL, *INTERNATIONAL LAW AND THE MOVEMENT OF PERSONS BETWEEN STATES* 21 (1978); PAUL WEIS, *NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW* 32, 45–46, 125 (reprint 1979) (1956); William Thomas Worster, *International Law and the Expulsion of Individuals with More than One Nationality*, 14 UCLA J. INT’L L. & FOREIGN AFF. 423, 427, 451–52 (2009). *But see generally* Davis v. Dist. Dir., Immigration & Naturalization Serv., 481 F. Supp. 1178, 1179–80, 1181–82 (D.D.C. 1979) (holding that renunciation of U.S. citizenship without a pre-existing dual citizenship, rendering person stateless, was nonetheless effective). *But see* John L.A. de Passalacqua, *Voluntary Renunciation of United States Citizenship by Puerto Rican Nationals*, 66 REVISTA JURÍDICA DE LA UNIVERSIDAD DE PUERTO RICO [U.P.R. LEGAL REV.] 269, 289 n.73

renunciation might have an international legal obligation to do so. Other restrictions include being at least a certain age⁸³ (or simply having full mental capacity),⁸⁴ not being under criminal investigation,⁸⁵ or having some form of unfulfilled duties to the state⁸⁶ (such as military service obligations⁸⁷ or unpaid taxes⁸⁸), maintaining a foreign residency,⁸⁹ that the renunciation ceremony

(1997) (noting that *Davis* was decided before the United States become a party to the International Covenant on Civil and Political Rights).

83. See Iran, in OPM CITIZENSHIP LAWS, *supra* note 81, at 97, 97; New Zealand, in OPM CITIZENSHIP LAWS, *supra* note 81, at 145; Palau, in OPM CITIZENSHIP LAWS, *supra* note 81, at 153, 153; Papua New Guinea, in OPM CITIZENSHIP LAWS, *supra* note 81, at 156; St. Vincent and the Grenadines, in OPM CITIZENSHIP LAWS, *supra* note 81, at 169, 169; Singapore, in OPM CITIZENSHIP LAWS, *supra* note 81, at 176, 176; Slovenia, in OPM CITIZENSHIP LAWS, *supra* note 81, at 178; Switzerland, in OPM CITIZENSHIP LAWS, *supra* note 81, at 190.

84. See New Zealand, in OPM CITIZENSHIP LAWS, *supra* note 81, at 145.

85. See Law on Albanian Citizenship art. 15(4), <http://www.refworld.org/docid/3ae6b5c10.html> [<https://perma.cc/85DN-S635>]; Republic of Lithuania Law on Citizenship art. 20, <http://www.refworld.org/docid/3ae6b5960.html> [<https://perma.cc/9DFC-9EGA>]; Act No. 21/1991 on Romanian Citizenship art. 27(a), <http://www.refworld.org/docid/3ae6b50218.html> [<https://perma.cc/4ZJB-ZCMV>]; Law on Ukrainian Citizenship art. 18, <http://www.legislationline.org/documents/action/popup/id/7179> [<https://perma.cc/Y9T5-NR9W>]; Armenia, in OPM CITIZENSHIP LAWS, *supra* note 81, at 20, 21; Austria, in OPM CITIZENSHIP LAWS, *supra* note 81, at 24; Belarus, in OPM CITIZENSHIP LAWS, *supra* note 81, at 30, 30; Greece, in OPM CITIZENSHIP LAWS, *supra* note 81, at 84, 84; Russian Federation, in OPM CITIZENSHIP LAWS, *supra* note 81, at 165; Slovak Republic, in OPM CITIZENSHIP LAWS, *supra* note 81, at 177; Slovenia, in OPM CITIZENSHIP LAWS, *supra* note 81, at 178; Vietnam, in OPM CITIZENSHIP LAWS, *supra* note 81, at 214, 214.

86. See Law on Albanian Citizenship art. 15(5); Finnish Nationality Act § 35(1), <http://www.finlex.fi/en/laki/kaannokset/2003/en20030359.pdf> [<https://perma.cc/8D2M-P8BU>]; Armenia, in OPM CITIZENSHIP LAWS, *supra* note 81, at 21; Belarus, in OPM CITIZENSHIP LAWS, *supra* note 81, at 30; Estonia, in OPM CITIZENSHIP LAWS, *supra* note 81, at 74, 74; Iran, in OPM CITIZENSHIP LAWS, *supra* note 81, at 97; Latvia, in OPM CITIZENSHIP LAWS, *supra* note 81, at 115, 115; Russian Federation, in OPM CITIZENSHIP LAWS, *supra* note 81, at 165.

87. See CONSTITUTION OF THE REPUBLIC OF MOLDOVA art. 56(2); CODE CIVIL [CIVIL CODE] art. 23-2 (Fr.); U.S. Embassy & Consulates in Ger., *Dual Nationality*, U.S. EMBASSY, <https://de.usembassy.gov/u-s-citizen-services/dual-nationality/> [<https://perma.cc/9U9U-KQ5X>] (“[A] German citizen may not give up citizenship to avoid . . . military service.”); Austria, in OPM CITIZENSHIP LAWS, *supra* note 81, at 24; Croatia, in OPM CITIZENSHIP LAWS, *supra* note 81, at 59, 59; Estonia, in OPM CITIZENSHIP LAWS, *supra* note 81, at 74; Greece, in OPM CITIZENSHIP LAWS, *supra* note 81, at 84; Iran, in OPM CITIZENSHIP LAWS, *supra* note 81, at 97; Latvia, in OPM CITIZENSHIP LAWS, *supra* note 81, at 115; Russian Federation, in OPM CITIZENSHIP LAWS, *supra* note 81, at 165; Slovenia, in OPM CITIZENSHIP LAWS, *supra* note 81, at 178; Vietnam, in OPM CITIZENSHIP LAWS, *supra* note 81, at 214.

88. See Act No. 21/1991 on Romanian Citizenship art. 27(b); Croatia, in OPM CITIZENSHIP LAWS, *supra* note 81, at 59; Slovak Republic, in OPM CITIZENSHIP LAWS, *supra* note 81, at 177; Vietnam, in OPM CITIZENSHIP LAWS, *supra* note 81, at 214.

89. See NATIONALITY LAW OF THE PEOPLE’S REPUBLIC OF CHINA art. 8 (Sept.10, 1980), <http://www.china.org.cn/english/LivinginChina/184710.htm#> [<https://perma.cc/577J-4A7W>]; Andorra, in OPM CITIZENSHIP LAWS, *supra* note 81, at 16; Slovenia, in OPM CITIZENSHIP LAWS, *supra* note 81, at 178; Switzerland, in OPM CITIZENSHIP LAWS, *supra* note 81, at 190.

occur in the country,⁹⁰ and national security issues generally.⁹¹ Armenia, Slovakia Republic, and Slovenia also block renunciation when the individual has outstanding obligations to private organizations or persons.⁹² In terms of processing restrictions, some states assess a significant fee,⁹³ and a few states reserve some form of residual power over renunciation such as requiring a ministerial act, court decree, or other governmental approval.⁹⁴ Usually the state must approve these applications,⁹⁵ although three states actively frustrate the renunciation process, making the approval process almost impossible: Iran,⁹⁶ North Korea,⁹⁷ and Syria.⁹⁸ Nonetheless, those states still provide for the right to renounce in law, affirming the norm.⁹⁹

In sum, the right to renounce nationality is virtually universally affirmed, and there are only several permissible limitations. Certainly, it is permissible to

90. See Andorra, in OPM CITIZENSHIP LAWS, *supra* note 81, at 16; Argentina, in OPM CITIZENSHIP LAWS, *supra* note 81, at 19, 19; Haiti, in OPM CITIZENSHIP LAWS, *supra* note 81, at 90, 90; Vietnam, in OPM CITIZENSHIP LAWS, *supra* note 81, at 214.

91. See Armenia, in OPM CITIZENSHIP LAWS, *supra* note 81, at 21.

92. See *id.* (“[Renunciation is blocked] if the person has unfulfilled duties connected with the interests of the state, enterprises, organizations, or citizens.”); Slovak Republic, in OPM CITIZENSHIP LAWS, *supra* note 81, at 177 (blocking renunciation if “delinquent in . . . debts”); Slovenia, in OPM CITIZENSHIP LAWS, *supra* note 81, at 178 (blocking renunciation if debts and legal obligations have not been satisfied).

93. See Jordan, in OPM CITIZENSHIP LAWS, *supra* note 81, at 104, 104; South Korea, in OPM CITIZENSHIP LAWS, *supra* note 81, at 110, 110.

94. See Bhutan, in OPM CITIZENSHIP LAWS, *supra* note 81, at 35, 35; Burundi, in OPM CITIZENSHIP LAWS, *supra* note 81, at 43, 43; Cuba, in OPM CITIZENSHIP LAWS, *supra* note 81, at 60, 60; Egypt, in OPM CITIZENSHIP LAWS, *supra* note 81, at 69, 69; Greece, in OPM CITIZENSHIP LAWS, *supra* note 81, at 84; Iran, in OPM CITIZENSHIP LAWS, *supra* note 81, at 97; Jamaica, in OPM CITIZENSHIP LAWS, *supra* note 81, at 102, 102; Jordan, in OPM CITIZENSHIP LAWS, *supra* note 81, at 104; North Korea, in OPM CITIZENSHIP LAWS, *supra* note 81, at 109, 109; Laos, in OPM CITIZENSHIP LAWS, *supra* note 81, at 114, 114; Lebanon, in OPM CITIZENSHIP LAWS, *supra* note 81, at 117, 117; Maldives, in OPM CITIZENSHIP LAWS, *supra* note 81, at 127, 127; Mongolia, in OPM CITIZENSHIP LAWS, *supra* note 81, at 137, 137; Morocco, in OPM CITIZENSHIP LAWS, *supra* note 81, at 138, 138; Poland, in OPM CITIZENSHIP LAWS, *supra* note 81, at 160, 160; Tunisia, in OPM CITIZENSHIP LAWS, *supra* note 81, at 201, 201.

95. See Laos, in OPM CITIZENSHIP LAWS, *supra* note 81, at 114; Morocco, in OPM CITIZENSHIP LAWS, *supra* note 81, at 138.

96. See Iran, in OPM CITIZENSHIP LAWS, *supra* note 81, at 97 (“[P]ractical experiences have shown that Council permission is difficult to obtain, thus hindering legal renunciation of Iranian citizenship.”).

97. See North Korea, in OPM CITIZENSHIP LAWS, *supra* note 81, at 109 (“Voluntary renunciation of North Korean Citizenship is *technically* possible . . .”) (emphasis added).

98. See Syria, in OPM CITIZENSHIP LAWS, *supra* note 81, at 192, 192 (“Though voluntary renunciation of Syrian citizenship is permitted by law, the Syrian Information Office stated that it is so complicated that it is best not to attempt the process.”).

99. Some authorities might also include Morocco on this list. See Morocco, in OPM CITIZENSHIP LAWS, *supra* note 81, at 138 (“Renunciation is not automatic and must be approved by the Ministry of Justice.”).

refuse renunciation in order to prevent statelessness.¹⁰⁰ Having a certain mental capacity seems a minor inconvenience to prevent a catastrophic error. However, the vague category of unfilled duties to the state is problematic. Only a few states consider unpaid taxes as a limitation on renunciation, and it is difficult to understand how limiting renunciation is necessary for a state to recover unpaid revenue, other than the obvious coercion involved. It might be possible for a state to restrict renunciation for those subject to current military service obligations, although the case for that measure is weak,¹⁰¹ as it is for being under a criminal investigation. In order to be truly necessary, such limitations probably only need to apply to the right to leave, not necessarily the right to renounce nationality. It could be argued that for individuals abroad, renunciation could result in loss of jurisdiction over the person under investigation and renunciation might be prohibited lawfully on that basis. Exit visas are clearly prohibited, unless it is a purely ministerial action that does not involve any discretion on the part of the authority.¹⁰² A very few number of states assess a fee for renunciation, showing that it is out of the norm, and, following the HRC, any fee that goes beyond the administrative costs would be unlawfully burdening the underlying right.¹⁰³

III. COMPLIANCE OF U.S. EXIT TAXES WITH THE RIGHT TO RENOUNCE NATIONALITY

Finally, we turn to whether the U.S. exit regime is in compliance with the right to renounce nationality as discussed in this Paper. Detlev Vagts has argued that the exit tax is not a human rights violation.¹⁰⁴ He argued that the taxes are not due to emigration but due to expatriation, which in his view was not a protected right.¹⁰⁵ Implicitly then, if this author can establish that the right to renounce nationality is protected, either on its own or as part of the right to leave, then Vagts' position would fail. The difficulty with his argument is that he does not admit that the right to renounce nationality under the ICCPR is a part of the

100. See Hudson, *supra* note 63, at 14, 21 (recognizing the only valid prohibition on renunciation should be to avoid statelessness).

101. See U.N. Secretariat, Survey of the Problem of Multiple Nationality, *supra* note 64, ¶ 374 ("The right of expatriation is now recognized by most States, although with certain restrictions in respect of individuals subject to military obligations; and in most municipal laws loss of the nationality of origin is the consequence of naturalization by a foreign State upon request of the individual concerned.").

102. *Summary Records of the 218th Meeting*, *supra* note 69, at 222 (discussing the draft convention on the elimination of future statelessness and objections to the implication that states can require an exit permit for renunciation).

103. See *General Comment No. 27*, *supra* note 40, ¶ 17; NOWAK, *supra* note 42, at 279.

104. See Detlev F. Vagts, Editorial Comment, *The Proposed Expatriation Tax—A Human Rights Violation?*, 89 AM. J. INT'L L. 578, 580 (1995).

105. *Id.* at 578.

general right to leave; he limits the right to leave to physical movement,¹⁰⁶ when in fact the history of the right shows that it contemplates a range of separation from a state including short-term visits to permanent expatriation. In addition, he does not address the existence of the right under customary international law.

The U.S. State Department opined that the U.S. expatriation tax did not violate international human rights law stating specifically “that such [expatriation] taxes would not be more burdensome than those [the expatriates] would pay if they were to remain U.S. citizens (or residents).”¹⁰⁷ This argument misses the point because it compares the wrong variables. If the right to expatriate is meaningful, then it means the right to be a non-citizen—an alien. Thus, the comparison should be between the taxes paid by non-citizens and those paid by non-citizens who have exercised their fundamental human right to expatriate. Clearly, these tax rates are different.

The exit tax is certainly not an outright ban on expatriation. However, the right to expatriation and the case law discussed above shows that consequences from the act are also prohibited, for example, imposing burdensome administrative costs to exercise this right.¹⁰⁸ In this case, the United States is imposing taxes on persons who are not U.S. nationals and not residents, and not otherwise subject to taxation. It is imposing the tax on these persons as a direct consequence of the decision to renounce nationality—a protected right. Thus, it is an infringement.

Then, the question is whether this infringement is justified. The exit tax is not a measure to prohibit renunciation of nationality due to concerns over statelessness, mental capacity, military service, or criminal investigation, so it is not clearly permissible. While blocking renunciation might be permissible to recover unpaid taxes, the U.S. exit tax regime does not argue that the taxes are incurred prior to the moment the person attempts expatriation. It is also not an exit visa, so it is not clearly prohibited. It appears that the exit tax is an effort to either apply a *bona fide* effort to recover benefits the expatriate accrued during the time he or she was a U.S. citizen, or perhaps a *mala fide* effort to punish the act of renunciation.

Insofar as there may be a *mala fide* motivation, the right to expatriation clearly prohibits any taxation consequence on this scale. The intent in adopting

106. *Id.* at 579.

107. Letter from Wendy R. Sherman, Assistant Sec’y of State for Legislative Affairs, U.S. State Dep’t, to Sen. Robert Packwood, Vice Chairman, Joint Comm. on Taxation (May 9, 1995), reprinted in STAFF OF JOINT COMM. ON TAXATION, 104TH CONG., ISSUES PRESENTED BY PROPOSALS TO MODIFY THE TAX TREATMENT OF EXPATRIATION G-50, G-57 (Joint Comm. Print 1995).

108. See U.N. Human Rights Comm., *Consideration of Reports Submitted by the States Parties Under Article 40 of the Covenant, Comments of the Human Rights Committee: Iraq*, ¶ 14, U.N. Doc. CCPR/C/79/Add.84 (Nov. 19, 1997); *General Comment No. 27*, supra note 40, ¶ 17; NOWAK, supra note 42, at 279.

expatriation taxes is relatively clear. The U.S. Department of the Treasury says that the exit tax is an effort to deter or punish tax-motivated expatriation,¹⁰⁹ and courts have agreed that this tax is “enacted to forestall tax-motivated expatriation.”¹¹⁰ As this justification does not invoke one of the permitted necessary grounds (national security,¹¹¹ public order,¹¹² public health¹¹³ or morals,¹¹⁴ and the rights and freedoms of others¹¹⁵), it must fail.

Insofar as the effort is aimed at imposing taxation on benefits accrued, the human rights test seems to also prohibit it. Essentially, the exit tax regime is attempting to tax the increase in value of assets during the time a person was a U.S. citizen. The question is whether this purpose is a permitted one under international human rights law. Perhaps it is interesting to observe that individuals already receive a stepped-up basis when inheriting assets and are not obliged to pay taxes on the appreciation. This policy shows that imposing taxation on appreciated assets is not a compelling interest. Even if it were compelling for purposes of strict scrutiny under U.S. constitutional law, it is quite a stretch to argue that taxing the increased value of certain assets amounts to matters of national security, public order, public health or morals, or the rights and freedoms of others. This concern harkens back to the observation of Manfred Nowak that states can always find obligations that an individual owes

109. See, e.g., Letter from Leslie B. Samuels, Assistant Sec’y for Tax Policy, U.S. Treasury Dep’t, to Kenneth J. Kies, Chief of Staff, Joint Comm. on Taxation (May 2, 1995), *reprinted in* STAFF OF JOINT COMM. ON TAXATION, 104TH CONG., ISSUES PRESENTED BY PROPOSALS TO MODIFY THE TAX TREATMENT OF EXPATRIATION G-50, G-54 (Joint Comm. Print 1995).

110. *Kronenberg v. Comm’r*, 64 T.C. 428, 434 (1975); see *Di Portanova v. United States*, 690 F.2d 169, 179 (Cl. Ct. 1982) (explaining that the tax is “designed to discourage voluntary expatriation”); see also *Cohen*, *supra* note 5 (reporting on the expatriation of Kenneth Dart, the billionaire heir to Dart Container); *Hershey, Jr.*, *supra* note 5 (discussing legislative proposals to remedy expatriation problem); *Kinsley*, *supra* note 5, at 96 (comparing “taxpatriates” to draft dodgers); *Lenzner & Mao*, *supra* note 5, at 131–32; *McMenamin*, *supra* note 5, at 55.

111. See *Karker v. France*, U.N. Human Rights Comm., Communication No. 833/1998, ¶¶ 9.2, U.N. Doc. CCPR/C/70/D/833/1998 (2000); *Celepli v. Sweden*, U.N. Human Rights Comm., Communication No. 456/1991, ¶ 4.7, U.N. Doc. CCPR/C/51/D/456/1991 (1994); *González del Río v. Peru*, U.N. Human Rights Comm., Communication No. 263/1987, ¶ 5.3 (Oct. 28, 1992), *reprinted in* OFFICIAL RECORDS OF THE HUMAN RIGHTS COMMITTEE, 1992/93, at 516, U.N. Doc. CCPR/12/Add.1 (Vol. II), U.N. Sales No. E.96.XIV.2 (1997); *General Comment No. 27*, *supra* note 40, ¶ 11.

112. See *González del Río*, ¶ 5.3; *General Comment No. 27*, *supra* note 40, ¶ 11.

113. See *Bhinder v. Canada*, U.N. Human Rights Comm., Communication No. 208/1986, ¶¶ 4.2, 6.2, U.N. Doc. CCPR/C/37/D/208/1986 (1989); *General Comment No. 27*, *supra* note 40, ¶ 11.

114. See *Hertzberg et al. v. Finland*, U.N. Human Rights Comm., Communication No. 61/1979, ¶¶ 6.3, 10.4 (Apr. 2, 1982), *reprinted in* HUMAN RIGHTS COMM.: SELECTED DECISIONS UNDER THE OPTIONAL PROTOCOL, at 124, 126, U.N. Doc. CCPR/C/OP/1, U.N. Sales No. E.84.XIV.2 (1985); *General Comment No. 27*, *supra* note 40, ¶ 11.

115. See *General Comment No. 27*, *supra* note 40, ¶ 11.

to the state as a means of preventing persons from leaving.¹¹⁶ Thus, the exit tax does not serve a compelling interest, so whether it is necessary in a democratic society¹¹⁷ for a justifiable purpose is not considered, and the taxation regime cannot be justified.

CONCLUSION

This Paper has assessed whether taxes imposed on expatriation (renunciation of citizenship), sometimes referred to as “exit taxes,” are in compliance with international human rights law.

The first question is whether there is a right to expatriate. The UDHR states that every person has a human right to change his nationality, but this declaration is not binding. The ICCPR protects the right of an individual to leave any country, including his own, but not explicitly the right to renounce nationality. However, the UDHR has been understood to contain binding obligations, though the declaration itself is not formally binding, and the right in the ICCPR can contain the notion of expatriation within the broad meaning of leaving a state. In addition, the negotiation history of both shows that the right to renounce nationality was certainly considered and understood to form a part of the right to leave. In addition, customary international law, both on its own and in relation to the UDHR and ICCPR, supports the right to expatriate. There is a widespread and consistent state practice of providing for a right to renounce nationality and clear expressions of *opinio juris* that this right is obligatory.

The second question is whether the U.S. exit tax can be justified as an acceptable derogation from the right to renounce nationality. The right to expatriate tracks the right to leave generally in permitting exceptions. This right may be limited as is necessary in a democratic society in order to protect national security, public order, public health or morals, and the rights and freedoms of others. Unfortunately, while the imposition of exit taxes does chill the exercise of the right to expatriate, these taxes cannot be justified under any of these goals, and thus are certainly not necessary. Therefore, the taxes imposed on persons exercising their right to renounce their nationality infringe human rights.

116. See NOWAK, *supra* note 42, at 278.

117. See *id.* at 274.

