NTRODUCTION

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 nationality[1] 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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* Lecturer, International Law, The Hague University of Applied Sciences, The Hague, The Netherlands; LL.M. (Adv.) in Public International Law, *cum laude*, Leiden University, Faculty of Law, Leiden, The Netherlands; J.D., Chicago-Kent College of Law, Illinois Institute of Technology, Chicago, Illinois; B.A., Modern European History, University of Kansas, Lawrence, Kansas.

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).

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 years[21]

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

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

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] and for protecting national security,[44] public order,[45]

sentence,[52] an obligation to provide military/national service,[53] or the refusal to pay lawfully incurred taxes.[54]

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, "

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

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.

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 C

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

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 health[113] or morals,[114] and the rights and freedoms of others[115]), 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 qu5f318 0 EMC /2.4(s)2d5s ter8 rs