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# THE NATURE OF A PASSPORT AT THE INTERSECTION OF CUSTOMARY INTERNATIONAL LAW AND AMERICAN JUDICIAL PRACTICE

RICHARD A.C. ALTON<sup>†</sup> AND JASON REED STRUBLE<sup>‡</sup>

## INTRODUCTION

In the United States of America, the Department of Homeland Security (“DHS”) confiscates a foreign national’s passport when he or she is detained pursuant to the initiation of removal proceedings. This is done for practical reasons—to prevent flight and facilitate return of the foreign national to his or her country of origin if ordered deported. If the foreign national is not ordered to be removed from the United States, his or her passport will be returned by the DHS.

Because “international law is part of United States law, and therefore must be ascertained and administered by the courts of justice of appropriate jurisdiction,”<sup>1</sup> one would think that the practical reasons for administratively confiscating and impounding a foreign national’s passport would comport with general principles of customary international law. However, this may not be so.

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1. *The Paquete Habana*, 175 U.S. 677, 700 (1900).

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When an agent of the DHS confiscates a foreign passport from a foreign national, that agent is in fact seizing the property of another sovereign state. Although some may say that the legal maxim *de minimis non curat lex*<sup>2</sup> applies to such actions, there exists an unpleasant experience ensuing from the impounding of a foreign national's passport. The unfortunate reality that flows from the DHS's administrative confiscation of a foreign national's passport is that the DHS either misplaces the passport or fails to return it in a timely manner upon completion of the removal proceeding. As a result, people have been forced to either wait months in detention until the passport is located, or request travel documents from their consulate in the United States, which causes further unnecessary delay and hardship. Such a situation lends itself desirous of a legal standard that could be used to prevent such confiscations.

We seek to flesh out such a standard in this paper through a survey of international law. We explore under what legal standard, if any, such a confiscation and subsequent impoundment of sovereign property by another sovereign State is to be evaluated and by which court. We do so in order to ascertain whether the DHS's confiscation and impoundment of a foreign passport violates general principles of customary international law.

In order to fully develop the argument that the DHS's confiscation and impoundment of passports is a violation of customary international law, we begin by examining the history of a passport and its treatment in the international community. Next, we survey general principles of customary international law and analyze German case law holding that one State's confiscation or impounding of a valid foreign passport constitutes an encroachment upon the passport jurisdiction of the foreign State issuing the documents which is impermissible under customary international law. Thereafter, we discuss case law where courts avoided addressing the international implications of passport seizures. We then examine the United States government's view of passports by tracking the shift in its behavior from adhering to international norms to placing domestic prerogatives over customary international law. In doing so, we survey United States law pertaining to confiscation of passports.

We conclude that the United States government's impounding of a foreign passport violates general principles of customary international law because the United States government's act of impounding a foreign passport is an encroachment upon the personal jurisdiction of the issuing

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2. "The law does not notice or concern itself with trifling matters." BLACK'S LAW DICTIONARY 1630 (7th ed. 1999).

State. However, we acknowledge that the rationale behind the DHS's continued practice of impounding passports in violation of customary international law suggests that the United States government believes ensuring the return of the foreign national is more important than a State's personal jurisdiction over its property. Accordingly, we recommend that the United States codify the authority, means, and methods by which such impounding can be carried out in order to avoid international retaliation.

## THE NATURE OF A PASSPORT

### A BRIEF HISTORY OF PASSPORTS

The word passport is a combination of the French words "passer," meaning to pass, and "port," meaning a port or a gate.<sup>3</sup> It is thought that the term "passport" is derived from a medieval document required to pass through the gate of a city wall.<sup>4</sup>

Over the centuries, a passport has denoted many different types of documents, including:

*[A]n authorization to pass from a port or leave the country, or to enter or pass through a foreign country; a permit for soldiers to depart from their service; a sea letter; and a document issued in time of war to protect person from the general operations of hostilities.*<sup>5</sup>

Although passports have existed for centuries, no other subject has received so little attention in international law literature.<sup>6</sup> More than 60

3. DANIEL C. TURACK, *THE PASSPORT IN INTERNATIONAL LAW* 15 (Lexington Books 1972).

4. *See id.* The Old Testament holds the earliest known reference to a document that embodied the nature of a passport under customary international law. *See Nehemiah 2:7-9*. During the time of the Persian Empire in about 450 B.C., Nehemiah, cupbearer at the court of King Artaxerxes, said, "If it pleases the king, let letters be given me to the governors beyond the river, that they may let me pass through until I come into Judah." *Nehemiah 2:7*. King Artaxerxes granted him leave and gave him "letters" "to the governors beyond the river" requesting safe passage for Nehemiah as he traveled through their lands on his way to Judea. *Id.* at 2:7-9. Those letters eventually became diplomatic passports that permitted enemy subjects or others safe travel in a belligerent's territory or enemy territory occupied by him.

5. TURACK, *supra* note 3, at 16 (*citing* HENRY WHEATON, *ELEMENTS OF INTERNATIONAL LAW* 1:268 and 2:122 (London 1836)).

6. We examined Digests of International Law authored by WHARTON (1887), MOORE (1906), HACKWORTH (1944), and WHITEMAN (1963). We also examined the DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW (1974 - 2003), and RESTATEMENT OF THE LAW THIRD, FOREIGN RELATIONS LAW OF THE UNITED STATES. These repositories of State practice and custom—the fibers of customary international law—barely mentioned passports. When mentioned, most of the focus was on diplomatic passports.

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years ago, it was said that passports have received little mention in international law because:

*[I]nternational law is concerned primarily with those [passports] which are issued by a belligerent to the diplomatic representatives of an enemy state after the outbreak of hostilities to enable them to return to the country which they represent; for the right to such 'passport' is a matter of international law which flows from the generally recognized right to immunity of diplomatic representatives.<sup>7</sup>*

Once international travel grew in the second half of the nineteenth century, many governments sought international agreements either limiting the requirements of passports or abolishing them altogether.<sup>8</sup> States looked to reduce administrative control procedures at border crossings that began to hamper international travel.<sup>9</sup>

The League of Nations sought to layout a fixed passport style for all signatories. It convened several Geneva Conferences on the subject of passports from 1920 to 1929.<sup>10</sup> The Geneva Conference of 1920 adopted a recommendation of a set style, layout, content, validity and issuing fees for Member States.<sup>11</sup>

In order to carry out the recommendations of the League of Nations, Austria, Czechoslovakia, Hungary, the Kingdom of Serbia, Croatia, Slovenia, Poland, Romania, and Italy signed an agreement providing uniform rules for the issuance of passports on January 27, 1922 in Graz, Austria.<sup>12</sup> With the onset of World War II, the move toward a standard passport disintegrated.

The United Nations created the International Civil Aviation Organization (IACO) in 1946, which revived the move towards standardization of

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7. TURACK, *supra* note 3, at 17 (citing HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW, 1:268 and 2:122 (London, 1836)).

8. *Machine Readable Travel Documents (MRTDs): History, Interoperability and Implementation*, at 6, ICAO ISO/IEC JTC1 SC17 WG3/TF1 for ICAO-NTWG Release 1, Draft 1.4 (March 23, 2007), available at [http://www2.icao.int/en/MRTD/Downloads/Technical%20Report/ICAO\\_MRTD\\_History\\_of\\_Interoperability.pdf](http://www2.icao.int/en/MRTD/Downloads/Technical%20Report/ICAO_MRTD_History_of_Interoperability.pdf).

9. *Machine Readable Travel Documents (MRTDs): History, Interoperability and Implementation*, at 6, ICAO ISO/IEC JTC1 SC17 WG3/TF1 for ICAO-NTWG Release 1, Draft 1.4 (March 23, 2007), available at [http://www2.icao.int/en/MRTD/Downloads/Technical%20Report/ICAO\\_MRTD\\_History\\_of\\_Interoperability.pdf](http://www2.icao.int/en/MRTD/Downloads/Technical%20Report/ICAO_MRTD_History_of_Interoperability.pdf).

10. *Id.*

11. *Id.*

12. THE ENCYCLOPEDIA OF THE UNITED NATIONS AND INTERNATIONAL AGREEMENTS 607 (Edmund Jan Osmanzyk ed., Taylor & Francis 1985).

passports. The standardization of passports seeks to move away from individual discrepancies between governments as to what is required upon a passport in order for a foreign national to enter that country. Thus, standardization removes the need for an individual to be issued a different passport depending upon the country he is seeking admission to.<sup>13</sup> To that end, in 1980 the IACO suggested the use of machine readable passports to ease travel at airports.<sup>14</sup>

#### GENERAL PRINCIPLES OF CUSTOMARY INTERNATIONAL LAW PERTAINING TO PASSPORTS

In itself, a passport confers no rights recognized under international law.<sup>15</sup> It is not a document that enables a citizen of the issuing State to enter that State.<sup>16</sup> However, under the doctrine of restricted returnability, a State can return an individual who is refused entry into its borders to the State that issued the individual's passport because<sup>17</sup> "international comity recognizes that the bearer of a legal passport will be readmitted to the issuing State if the passport is valid."<sup>18</sup>

A passport is "... only a matter of international law when issued by arrangement between one or more states.<sup>19</sup> "Apart from express treaty or generally recognized usage it is . . . a matter of discretion for a state to decide what documents it requires aliens within its territory to carry."<sup>20</sup>

Thus, much that can be said about the nature and function of passports is derived from the jurisprudence and practice of each State with respect to its own passports and its view towards the passports issued by other

13. *Id.* See also Machine Readable Travel Documents, *supra* note 8, at 6-7.

14. See Machine Readable Travel Documents, *supra* note 8, at 7.

15. TURACK, *supra* note 3, at 17 (citing K. Diplock, *Passports and Protection in International Law*, 32 TRANSACTIONS OF GROTIUS SOCIETY, 42, 58 (1946)).

16. *Id.* at 19 (citing V.G. Row v. The State of Madras, 154 Madras 242). See also Kent v. Dulles, 357 U.S. 116 (1958). The United States considers a passport as an exit permit exempting the bearer from exit restrictions; thus, "its main function ... is control over exit." 59A AM JUR. 2D *Passports* § 4 (2003) (citing Kent v. Dulles, 357 U.S. 116 (1958)).

17. See GUY S. GOODWIN-GILL, INTERNATIONAL LAW AND THE MOVEMENT OF PERSONS BETWEEN STATES 8, 44-46 (1978). Courts have noted, however, that a passport is not always to be considered conclusive evidence of nationality for restricted returnability purposes. See *id.* at 26 n.6 (citing Rex v. Burke, Casey and Mullady, II Cox C.C. 138 (1868)). A United States passport is merely an aid in establishing citizenship for purposes of reentry into the United States. 59A AM JUR. 2D *Passports* § 4 (2003) (citing Kent v. Dulles, 357 U.S. 116 (1958)).

18. TURACK, *supra* note 3, at 21. The authors believe that the prevention of public charges is the public policy rationale driving States to accept a national with a valid passport returned to its borders.

19. *Id.* (citing HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW, 1:268 and 2:122 (London, 1836)).

20. *Id.*

States.<sup>21</sup> Over time, the widespread consistent State practice arising from a sense of legal obligation would support a view that a particular practice has become a rule of customary international law.

### *A Passport is Government Property*

A passport is the property of the issuing government.<sup>22</sup> A State's property right in its passport flows directly from its sovereign right to determine its own citizens and the criteria for becoming one under domestic law.<sup>23</sup> The competency of a State to oversee citizenship has been balanced with its ability to exercise competence in matters such as territory and jurisdiction.<sup>24</sup> Therefore, the State issuing the passport has the right to demand its return from a foreign government taking custody of the document<sup>25</sup> since the actions of one State should not interfere with, or encroach upon, the personal jurisdiction of another State.<sup>26</sup>

Even though there may not be enough widespread consistent State practice arising from a sense of legal obligation to crystallize it as a rule of customary international law, there is case law stating that the impounding of an alien's passport is an impermissible interference with the personal jurisdiction of the issuing State.<sup>27</sup>

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21. TURACK, *supra* note 5, at 18 (citing K. Diplock, *Passports and Protection in International Law*, 32 TRANSACTIONS OF GROTIUS SOCIETY, 42, 58 (1946)).

22. *Id.* at 226 (citing THE DAILY TELEGRAPH, Nov. 11, 1967 at 16). See also Passports, 3 HACKWORTH DIGEST § 259, 437-38 (1942). See generally British passport ("This passport remains the property of Her Majesty's Government in the United Kingdom and may be withdrawn at any time."), Jamaican passport ("This passport remains the property of the Government of Jamaica and may be withheld or withdrawn at anytime."), and Canadian Passport Order ("Every passport shall at all times remain the property of Her Majesty in right of Canada."). A United States passport is the property of the United States government and must be returned upon demand. 22 C.F.R. § 51.7 (2009).

23. Nottebohm Case (Liechtenstein v. Guatemala), 1955 I.C.J. 4 (Apr. 6). The ICJ stated that it is the sovereign right of all states to determine its own citizens and the criteria for becoming one under municipal law.

24. GOODWIN-GILL, *supra* note 17, at 11 (citing D.P. O'CONNELL, STATE SUCCESSION IN MUNICIPAL AND INTERNATIONAL LAW 760 (1967)).

25. TURACK, *supra* note 3, at 226 (citing THE DAILY TELEGRAPH, Nov. 11, 1967 at 16). See also Passports, 3 HACKWORTH DIGEST § 259, 437-38 (1942).

26. See Greek National Military Service Case, 73 I.L.R. 606, 607 (Federal Administrative Court 1973) (Federal Republic of Germany). The court said:

*The issue of an alien's passport could represent an encroachment on the personal jurisdiction of another State. In such a case consideration should be given to the emphasis put by that other State upon the exercise of its personal jurisdiction by means of its competence to issue passports.*

See also Nottebohm Case, 1955 I.C.J. at 23.

27. Passport Seizure Case, 73 I.L.R. 372 (Superior Administrative Court of Munster 1972) (Federal Republic of Germany).

*A State's Impounding of a Foreign National's Passport is an Impermissible Interference with the Personal Jurisdiction of the Issuing State: The Passport Seizure Case*

In 1972, an alien living in the Federal Republic of Germany challenged the impounding of his passport by the federal authorities in proceedings before the Superior Administrative Court of Munster.<sup>28</sup> The alien argued that Article 3 of the Law on Aliens (*AuslG*) does not entitle the German administrative authorities to confiscate or impound a valid foreign passport.<sup>29</sup> The Court agreed.

Only if the alien had placed himself under German passport jurisdiction by obtaining a German alien's passport or refugee document, or by losing his former nationality by acquiring German citizenship, would the issue of confiscation of a foreign passport have come into question under German Federal law.<sup>30</sup> Because the alien had not submitted himself to German passport jurisdiction, the court relied on general principles of international law.<sup>31</sup>

The court found that under Article 25 of the Basic Law (*GG*), general rules of public international law are an integral part of German Federal law and take precedence over those federal laws.<sup>32</sup> The court reasoned that the issuance of a passport to a national falls under the personal jurisdiction of the country of origin which the state of residence is required to respect under general principles of international law.<sup>33</sup> The court concluded that the confiscation or impounding of a valid foreign passport—even on the grounds of control of aliens—constitutes an encroachment upon the passport jurisdiction of the foreign State issuing the document.<sup>34</sup> The court held that the impounding of the alien's passport by the German administrative authorities was impermissible.<sup>35</sup>

In *The Passport Seizure Case*, the Superior Administrative Court of Munster addressed head on, the international implications of one State impounding a foreign passport. The court found a direct interference

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28. *Id.*

29. *Id.* (citations omitted).

30. Passport Seizure Case, 73 I.L.R. 372 (Superior Administrative Court of Munster 1972) (Federal Republic of Germany) at 372-73.

31. *Id.* at 372.

32. *Id.* at 373.

33. *Id.* at 372 (citing VGH Munich, Judgment of March 8 1967: No. 303 VIII 66, DOV 1967, 862; Weissmann, *AuslanderG* 1966, Note 4a to Article 4 *AuslG*).

34. *Id.* at 373.

35. *Id.*



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with a foreign State's jurisdiction.<sup>36</sup> Such a finding by a domestic court would be rare because domestic courts generally apply constitutional procedural safeguards such as protection against unlawful searches, rather than general principles of customary international law, to passport seizures.

DOMESTIC COURTS AVOID THE INTERNATIONAL IMPLICATIONS OF  
PASSPORT SEIZURES BY APPLYING MUNICIPAL CONSTITUTIONAL LAW  
RATHER THAN CUSTOMARY INTERNATIONAL LAW

More than six decades ago, Turack shed light on judicial avoidance of customary international law in cases where passport seizures are involved in his review of the South African case *R. v. Teplin*.<sup>37</sup> Turack reported that the court was concerned about whether a magistrate was entitled to order the surrender of an Israeli passport in a maintenance action.<sup>38</sup> The court, on appeal, could find no authority by which the magistrate had power to order surrender of the passport.<sup>39</sup> However, the court thought that the magistrate had full power to order the surrender of the passport as one of the conditions of the suspension of the sentence to prevent the Israeli national from fleeing the country and thereby avoiding the process of the court.<sup>40</sup> Turack concluded that the South African court neglected to consider the international aspects of the case in that "Teplin could not be deprived of his Israeli passport without permission of the Israeli government."<sup>41</sup>

There is another domestic court case where the court applied constitutional law while altogether avoiding the international aspects and implications of passport confiscations. In *Mahtab v. Canada Employment and Immigration Commission and R.C.M.P.*, a Canadian federal court analyzed a Canadian Immigration Officer's confiscation of a foreign passport under constitutional due process rights.<sup>42</sup>

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36. VGH Munich, Judgment of March 8 1967: No. 303 VIII 66, DOV 1967, 862; Weissmann, *AuslanderG* 1966, Note 4a to Article 4 *AuslG* at 373.

37. Turack, *supra* note 3, at 236 (citing *R. v. Teplin* 1950(2) S.A.L.R. 250, 254).

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Mahtab v. Canada Employment and Immigration Commission and R.C.M.P.*, [1986] 3 F.C. 101 (Fed. Ct.). See also Edward M. Morgan, *Aliens and Process Rights: The Open and Shut Case of Legal Sovereignty*, 7 WISCONSIN INT'L L. J. 107 (1988-89). Edward M. Morgan reviewed the Canadian Federal Court case of *Mahtab v. Canada Employment and Immigration Commission and R.C.M.P.* in his article on aliens and due process rights.

Mahtab, an Iranian national, entered Canada on a forged Spanish passport in her attempt to claim refugee status.<sup>43</sup> Prior to the immigration hearing on her claim of refugee status, Mahtab received her Iranian passport, which was being held for her in France at her previous residence.<sup>44</sup> At that hearing the presiding immigration officer confiscated the Iranian passport and eventually turned it over to the police.<sup>45</sup> The court upheld Mahtab's claim for unconstitutional search and seizure of her Iranian passport.<sup>46</sup> Even though Mahtab violated Canadian law and could be deported, the court asserted that "this does not, in any way, negate the fact that no warrant was obtained from an independent person, such as a judge, to seize the alien's passport."<sup>47</sup>

In *Mahtab*, the Canadian Federal Court applied constitutional unreasonable search and seizure principles to the confiscation of a foreign passport while avoiding the fact that the Iranian passport belonged to the Iranian government.<sup>48</sup> Thus, *Mahtab*, like *R. v. Teplin*, demonstrates that domestic courts will apply municipal constitutional law whenever possible rather than customary international law to cases where a foreign passport has been confiscated and impounded.

#### THE UNITED STATES' VIEW AND TREATMENT OF PASSPORTS

In 1835, the Supreme Court of the United States defined a passport as:

*A document, which from its nature and object, is addressed to foreign powers; purporting to be only a request that the bearer of it may pass safely and freely, and is to be considered rather in the character of a political document, by which the bearer is recognized in foreign countries, as American citizen; and which, by usage and the law of nations, is received as evidence of the fact.*<sup>49</sup>

This definition lives on today in the United States Code where a passport is defined as:

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43. *Mahtab*, [1986] 3 F.C. at 106.

44. *Id.* at 103-04.

45. *Id.*

46. *Id.* The court found § 111(2)(b) of the Immigration Act, 1976, authorizing the seizure of travel documents by an immigration officer, to be contrary to §8 of the Canadian Charter of Rights & Freedoms that guarantees "everyone has the right to be secure against unreasonable search and seizure." This conclusion was later overruled in *Nunes v. Minister of Employment and Immigration*, [1986] 3 F.C. 112, 114 (Fed. C.A.).

47. *Mahtab*, [1986] 3 F.C. at 109-110.

48. *See Mahtab*, [1986] 3 F.C. at 109-110.

49. *Urtetiqui v. D'Arcy*, 34 U.S. (9 Pet.) 692, 699 (1835).

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*Any travel document issued by competent authority showing the bearer's origin, identity, and nationality if any, which is valid for the admission of the bearer into a foreign country.*<sup>50</sup>

Under United States law, the issuance of a passport is an Act of State.<sup>51</sup> A United States passport is the property of the United States government and must be returned upon demand.<sup>52</sup> When the United States government seeks to deny or revoke a United States citizen's passport, due process is required under the Fifth Amendment of the United States Constitution.<sup>53</sup>

A survey of the small amount of literature and cases pertaining to passports in general, and confiscation of passports more particularly, reveals that the United States government's view of passports has changed over time. Its shift in view mirrors its shift in behavior from adhering to international norms to placing domestic prerogatives over customary international law. Traditionally, the United States government has long declared that the impounding of U.S. passports by foreign nations is a violation of customary international law. Today, the United States views foreign passport confiscations as a matter of domestic policy to be evaluated under constitutional search and seizure principles.

#### TRADITIONAL POSITION OF PASSPORT SEIZURES

In the early part of the twentieth century, the United States government's view on a foreign government impounding United States passports pursuant to either administrative or criminal instances mirrored the German court's holding in *The Passport Seizure Case*.<sup>54</sup>

Several United States Department of State memoranda and dispatches from the 1920s and 1930s indicate that the United States government considers the impounding of a United States citizen's passport by foreign governments "inconsistent" with customary international law.<sup>55</sup>

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50. 8 U.S.C. § 1101(a)(30) (2000).

51. *Underhill v. Hernandez*, 168 U.S. 250 (1897).

52. 22 C.F.R. § 51.7 (2009).

53. *Bauer v. Acheson*, 106 F. Supp. 445, 451 (1952). *See also* *Kent v. Dulles*, 357 U.S. 116 (1958); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964).

54. *See* Passports, 3 HACKWORTH DIGEST § 259, at 437-43 (1942).

55. *See id.* Hackworth reported,

*Since 1920 two different types of cases have arisen in which the Department [of State] has consistently protested against the taking up of passports by the officials of foreign governments. One group of cases consists of instances in which passports of naturalized citizens have been taken up by officials of the country of origin; the second group*

In a response to a United States Department of State memorandum concerning the Chilean government's impounding of United States citizen's passport, the Office of the Solicitor for the Department of State acknowledged, "[t]he issuing government always...retains a paramount right to a passport."<sup>56</sup>

In 1931, the United States Department of State issued a memorandum to the Turkish government in regard to several instances of the Turkish government's impounding of U.S. passports obtained by Turkish nationals who had become naturalized United States citizens.<sup>57</sup> The Department of State said:

*...except in cases where there is a reasonable doubt as to the genuineness of a passport or as to the identity of the bearer, it is inconsistent with the comity of nations for the authorities of one nation to seize and withhold from another national of another nation a passport issued by the latter nation.*<sup>58</sup>

Several other Department of State memoranda and dispatches from the 1920's and 1930's share the same desire to inform foreign governments that the impounding of a United States citizen's passport was "inconsistent" with customary international law,<sup>59</sup> and that outside of suspected fraud or genuineness, there was no apparent reason for such impounding.<sup>60</sup>

#### MODERN POSITION OF PASSPORT SEIZURES

Cases like *R. v. Teplin* and *Mahtab* show that domestic courts will attempt to avoid the international implications of one State impounding a foreign passport by applying municipal constitutional law rather than customary international law. Today, the United States has adopted an approach that views foreign passport confiscations as a matter of domestic policy to be evaluated under constitutional due process principles. Moreover, the confiscation of foreign passports by the DHS continues because it ensures the return of the foreign national in the event that he or she is ordered deported.

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*consists of instances in which passports have been taken up by foreign governments for various reasons—chiefly regulatory or penal in character.*

56. *Id.* at 438 (citing MS. Department of State, file 825.00/622, /624 (Jan. 30, 1931)).

57. *Id.* at 439.

58. *Id.* (citing MS. Department of State, file 867.111 American Passports/52 (Feb. 12, 1931)).

59. *Id.* at 437-443.

60. *Id.*

The United States Government's Impounding of a Foreign National's Passport Encroaches Upon the Personal Jurisdiction of Another State but Ensures Returnability: *Onwubiko v. United States*

*Onwubiko v. United States* not only demonstrates how domestic courts will apply municipal constitutional law rather than customary international law to passport seizures, but also represents the United States Federal Courts' current view on the DHS's confiscation of a foreign national's passport.<sup>61</sup> Unlike *The Passport Seizure Case*, where the Superior Administrative Court of Munster addressed head on the international implications of passport seizures and found one State impounding a foreign passport a direct interference with another State's jurisdiction under general principles of customary international law,<sup>62</sup> the case of *Onwubiko* alludes to the international implications of one State's impounding of a foreign passport by implying that the DHS had a valid interest in ensuring restricted returnability.<sup>63</sup>

Martin Onwubiko, a Nigerian national, was arrested at John F. Kennedy International Airport for violating 21 U.S.C. § 952(a) by importing 557 grams of heroin in 72 balloons within his stomach.<sup>64</sup> During his arrest, the arresting officers seized several items from Mr. Onwubiko, including a garment bag, \$2,483 in United States currency, a Nigerian Passport, and his return ticket on Nigeria Airways.<sup>65</sup>

Prior to and after sentencing, Mr. Onwubiko petitioned both the Drug Enforcement Administration and the trial court for release of the aforementioned items.<sup>66</sup> Mr. Onwubiko asserted that these items were unrelated to the criminal violation.<sup>67</sup> The trial judge treated Mr. Onwubiko's request for remission as a motion for return of property pursuant to Federal Rule of Criminal Procedure 41(e).<sup>68</sup> The court subsequently denied the motion.<sup>69</sup>

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61. *Onwubiko v. U.S.*, 969 F.2d 1392 (2d Cir 1992). See IRA J. KURZBAN, IMMIGRATION LAW SOURCEBOOK, 123 (10th ed. American Immigration Law Foundation 2006-07) (citing *Onwubiko v. U.S.*, 969 F.2d at 1397-98 ("Government may seize and retain passport for purposes of removal hearing.")).

62. *Passport Seizure Case*, 73 I.L.R. 373.

63. See *Onwubiko v. U.S.*, 969 F.2d 1392 (2d Cir 1992).

64. *Onwubiko v. U.S.*, 969 F.2d 1392 (2d Cir 1992) at 1394.

65. *Id.*

66. *Id.* at 1394-96.

67. *Id.*

68. *Id.* at 1395.

69. *Id.* at 1396.

Mr. Onwubiko appealed the trial court's denial.<sup>70</sup> The Second Circuit Court of Appeals said, "The district court should not have treated Onwubiko's later filings as a motion for return of property under Fed.R.Crim.P. 41(e)."<sup>71</sup> Instead, the district court should have treated the Rule 41(e) motion as a civil complaint since the criminal proceedings against Onwubiko had completed.<sup>72</sup> Since the Second Circuit Court of Appeals was liberally construing Onwubiko's pleadings as a complaint and not a motion, the court had to determine whether Onwubiko could prove any "set of facts in support of his claim which would entitle him to relief."<sup>73</sup>

The court first addressed Onwubiko's claim that he was entitled to the return of his passport and airline ticket.<sup>74</sup> Because exclusion proceedings were pending against Onwubiko, the government made the following representation,

*Practically speaking, the government must retain the passport until exclusion proceedings are concluded so that, if Onwubiko is excluded, he will be able to be returned to his place of origin. Of course, if Onwubiko is not excluded, his passport and ticket will be returned to him.*<sup>75</sup>

Despite agreeing with the government that while awaiting the results of the pending exclusion proceedings "the passport must be retained for practical reasons,"<sup>76</sup> the Court concluded that Onwubiko had "presented a claim for deprivation of property without due process," among other claims. Accordingly, the Second Circuit Court of Appeals instructed the trial court to:

*(1) Direct the DEA to return Onwubiko's return air ticket, (2) appoint counsel for Onwubiko, (3) hold a civil forfeiture trial as to the disputed \$2,483 in United States currency, and (4)*

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70. *Id.*

71. *Id.*

72. *Id.* at 1397 (citing *Mora v. United States*, 955 F.2d 156, 158 (2d Cir. 1992)).

73. *Id.* (citing *Haines v. Kerner*, 404 U.S. 519, 520 (1972) and *LaBounty v. Adler*, 933 F.2d 121, 122 (2d Cir. 1991)).

74. *Haines v. Kerner*, 404 U.S. 519, 520 (1972) and *LaBounty v. Adler*, 933 F.2d 121, 122 (2d Cir. 1991)

75. *Id.* The Illegal Immigration Reform and Immigrant Responsibility Act (1996) consolidated deportation and exclusion into single proceedings termed as removal proceedings.

76. *Id.*

*determine whether Onwubiko in fact abandoned his black garment bag.*<sup>77</sup>

Although the Second Circuit Court of Appeals alluded to the international implications of one State impounding a foreign passport by implying that the DHS had a valid interest in ensuring restricted returnability in *Onwubiko*, it avoided directly considering international law because it never considered whether Mr. Onwubiko's Nigerian passport was the property of the Nigerian government.<sup>78</sup> Instead, the Second Circuit Court of Appeals looked to the United States Constitution when examining the legality of the United States government's taking of Mr. Onwubiko's possessions rather than general principles of customary international law. Ultimately, the court found that Mr. Onwubiko had made out a constitutional claim for deprivation of property without due process. Thus, *Onwubiko*, like *Mahtab* and *R. v. Teplin*, demonstrates that domestic courts will apply municipal law whenever possible rather than customary international law to cases where a foreign passport has been confiscated and impounded. Furthermore, even if the Second Circuit Court of Appeals ascertained international law and found the United States government's impounding of Mr. Onwubiko's passport impermissible under international law, it is likely the court would have allowed the continued impounding of Mr. Onwubiko's passport in order to ensure Mr. Onwubiko's return to Nigeria under the doctrine of restricted returnability.<sup>79</sup> Hence, *Onwubiko* is emblematic of the American judicial view of passport seizures by DHS today.

#### CURRENT UNITED STATES DEPARTMENT OF HOMELAND SECURITY RULES AND PROCEDURES

"Do not return the passport of an alien whose departure is being enforced."<sup>80</sup> The 2006 Detention and Removal Officer's ("DRO") Field Manual instructs DHS Agents not to return the passports of a foreign national whose deportation is being enforced. The field manual is an instruction manual issued by the Director of Operations for U.S. Customs and Immigration Enforcement ("ICE"), a department under the DHS, for its officers.

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77. *Id.* at 1400.

78. *See Onwubiko*, 969 F.2d 1392.

79. The element of "returnability" is an important part of United States Law and practice. GOODWIN-GILL, *supra* note 17, at 28.

80. Memorandum from Acting Director John Torres, to Field Office Directors, U.S. Customs and Immigration Enforcement, Detention and Removal Officer's Field Manual, Update Chapter 1, at 79 (March 27, 2006) available at [http://www.ice.gov/doclib/foia/dro\\_policy\\_memos/09684drofieldpolicymanual.pdf](http://www.ice.gov/doclib/foia/dro_policy_memos/09684drofieldpolicymanual.pdf).

The manual explains, “The passport is property of the issuing government and not the alien.”<sup>81</sup> ICE acknowledges that the passport is the property of the foreign state. It uses this basis to allow DRO to continue to hold the foreign passport from the alien. However, the manual, while addressing the proprietary interest of the foreign State, ignores the rights of those States by instructing the DHS agents to continue to hold the passport and not relinquish it to duly authorized agents of a foreign government.

This conclusion from the manual is that “If...no administrative relief is pending and no final order has been entered or the final order has been entered but enforced departure is not contemplated, you may return the passport.”<sup>82</sup> The manual also indirectly confirms the United States’ adherence to the doctrine of restricted returnability<sup>83</sup> because the manual essentially states that if enforced departure is immediately contemplated, then the passport should be retained in order to ensure the return of the foreign national to his or her country.

#### INCREASED FREQUENCY OF PASSPORT CONFISCATIONS BY DHS

The frequency of passport confiscations by the United States government has risen in dramatic fashion. The United States had removed around 16,000 foreign nationals each year<sup>84</sup> when Turack reported in 1972 that “most states no longer take custody of a foreign passport without prompt notification and return of the passport to representatives of the issuing authority.”<sup>85</sup> In contrast, in 2008, over 350,000 foreign nationals were removed from the United States.<sup>86</sup>

On the one hand, the underlying reason behind this exponential growth maybe the terrorist attacks on September 11, 2001. On the other hand,

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81. Memorandum from Acting Director John Torres, to Field Office Directors, U.S. Customs and Immigration Enforcement, Detention and Removal Officer’s Field Manual, Update Chapter 1, at 79 (March 27, 2006) available at [http://www.ice.gov/doclib/foia/dro\\_policy\\_memos/09684drofieldpolicymanual.pdf](http://www.ice.gov/doclib/foia/dro_policy_memos/09684drofieldpolicymanual.pdf).

82. *Id.*

83. The element of “returnability” is an important part of United States Law and practice. GOODWIN-GILL, *supra* note 17, at 28. The United States requires foreign nationals to have valid passports when entering the United States because a valid passport is reassurance by the issuing government that it will receive the foreign national whenever he or she becomes deportable. *See id.* (citing U.N. Doc. E/2933, pp. 107-9).

84. Department of Homeland Security, *Yearbook of Immigration Statistics: 2008*, Table 36, Aliens Removed or Returned: Fiscal Years 1892 to 2008, available at <http://www.dhs.gov/files/statistics/publications/YrBk08En.shtm>.

85. TURACK, *supra* note 3, at 236.

86. Department of Homeland Security, *Yearbook of Immigration Statistics: 2008*, *supra* note 84, at Table 36.



however, it is likely linked to DHS policy.<sup>87</sup> “DRO’s goal is to develop the capacity to remove all removable aliens, and it has developed a strategic plan covering 2003-2012 entitled ‘Endgame,’ to accomplish that goal.”<sup>88</sup> Consequently, the frequency of the DHS’s passport confiscations will increase in the short term.

#### LOSS OF PASSPORTS BY DHS

The DHS Office of Inspector General in its 2008 Status Report acknowledged deficiencies in the passport retention capabilities of the DRO.<sup>89</sup> The Status Report notes several instances of lost or misplaced foreign passports out of the El Centro Service Processing Center.<sup>90</sup> The investigation at El Centro revealed that the current security procedures were, “inadequate, inefficient, and leave opportunities for loss.”<sup>91</sup> Based upon the El Centro incidents, the Status Report found that a Standard Operating Procedure should be created in regard to the retention and security of foreign passports and that all processing centers should be subject to security audits.<sup>92</sup>

#### RECOMMENDATIONS

Based on the understanding that the act of impounding a foreign passport is an impermissible encroachment upon the personal jurisdiction of the issuing State and therefore a violation of customary international law, and that the DHS admitted to mishandling and loss of foreign passports, it is easy to recommend that the DHS halt the practice of impounding foreign passports and relinquish any currently held passports to the appropriate agent of the foreign government. However, this recommendation may be cast aside for two reasons. First, DHS policies like “Endgame” seek to remove all removable aliens and therefore ensure continued confiscation of passports. Second, it is impractical for one State to notify another State when it confiscates a passport, let alone return it to the issuing State’s representatives.

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87. See Office of Inspector General, Audit Report April 2006, *Detention and Removal of Illegal Aliens*, (OIG-06-33) at 2, available at [http://www.dhs.gov/xoig/assets/mgmtrpts/OIG\\_06-33\\_Apr06.pdf](http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_06-33_Apr06.pdf).

88. *Id.*

89. See Office of Inspector General, Status Report on Open Recommendations to DHS Components February 2008 (OIG-08-27), available at [http://www.dhs.gov/xoig/assets/mgmtrpts/OIG\\_08-27\\_Feb08.pdf](http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_08-27_Feb08.pdf).

90. *Id.* at 217.

91. *Id.*

92. See Office of Inspector General, Status Report on Open Recommendations to DHS Components February 2008 (OIG-08-27), available at [http://www.dhs.gov/xoig/assets/mgmtrpts/OIG\\_08-27\\_Feb08.pdf](http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_08-27_Feb08.pdf) at 140.

Impracticality may explain why the United States government has clearly withdrawn its early twentieth century opinion that the impounding of a foreign national's passport is a violation of customary international law. It would appear now, whether it is based on the amount of occurrences of removal supposedly requiring impounding, or just a general shift in the United States government's interpretation of customary international law, that the United States has entrenched itself into impounding foreign passport for "practical reasons."

Notwithstanding the impracticalities of notifying a State each time a passport is impounded and returning it to the issuing State when required, the United States government's continued confiscation of foreign passports opens itself up to international disputes and retaliation.<sup>93</sup> Theoretically, if a foreign government perceives the United States government's confiscation of its passport as an encroachment upon its personal jurisdiction, that State could request to bring a contentious suit before the International Court of Justice for each particular instance.<sup>94</sup>

If the DHS wishes to continue with its current methodology of impounding passports, the United States should seek to establish this method as a new international norm by enacting a law by which it is justified in doing so. Such a law would bolster its defense before international courts while allowing for the sequestration of a passport for practical reasons when exclusion proceedings are pending.<sup>95</sup> Through such a law, the United States government could solidify under both domestic and international law, its ability to impound foreign passports pursuant to its understanding of the doctrine of restricted returnability.<sup>96</sup>

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93. See *LaGrand Case (Germany v. United States of America)* 2001 I.C.J. 189 (June 27); *Avena and other Mexican Nationals (Mexico v. United States of America)* 2004 I.C.J. 1 (March 31). These contentious cases before the International Court of Justice serve as examples of suits filed by foreign states against the United States. Both *LaGrand* and *Avena* were based on alleged violations of the Vienna Convention on Consular Relations by the United States.

94. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 713-16 (Oxford 1998).

95. For example, the United States could model its law on Australia's Foreign Passports (Law Enforcement and Security) Act 2005. The Act refers to when and how an Australian law enforcement agent can take possession of a foreign passport.

96. It is important to note that this issue stretches beyond impounding of passports by DHS. See Uniform Child Abduction Prevention Act *available at* [http://www.law.upenn.edu/bll/archives/ulc/ucapa/2006\\_finalact.htm](http://www.law.upenn.edu/bll/archives/ulc/ucapa/2006_finalact.htm). This proposed legislation drawn up by The National Conference of Commissioners on Uniform State Laws contains specific provisions by which State Courts can request foreign respondents to surrender their and their child's foreign passports to the court in order to prevent flight. This legislation has been adopted by several states and is currently pending before eight more. More information is available at <http://www.nccusl.org/Update/>.

## CONCLUSION

Is the DHS's impounding of a foreign passport a violation of general principles of customary international law? Because a passport is the property of the issuing government, DHS is impounding the property of a sovereign nation. Under customary international law, the act of impounding a foreign passport is an impermissible encroachment upon the personal jurisdiction of the issuing State. Therefore, we conclude that the United States government's impounding of a foreign passport violates general principles of customary international law because the United States government's act of impounding a foreign passport is an encroachment upon the personal jurisdiction of the issuing State.

The DHS confiscates a foreign national's passport when he or she is in removal proceedings. This is done for practical reasons—to prevent flight and facilitate return of the foreign national to his or her country of origin if he or she is ordered deported. Unfortunately, DHS sometimes loses or misplaces the confiscated passport, resulting in excessive detention at DHS facilities.

The United States government's impounding of foreign passports, despite it being a violation of customary international law, suggests that the United States government believes ensuring returnability is more important than a State's personal jurisdiction over its property. While the United States argued in the past against other countries impounding American passports, it continues to impound foreign passports. This practice epitomizes what is sometimes perceived as a common United States behavior in some international relationships: "Do as I say, not as I do."

Therefore, now is the time to clarify the United States' current position on the issue of impounding foreign passports because it would remove the current policy standard from mere dicta and governmental memoranda to a more authoritative realm. If the United States desires to continue impounding foreign passports in violation of customary international law, it should codify into law the authority, methods, and means by which the DHS may impound foreign passports. The United States should set a standard by which impounding of foreign passports can occur to avoid being drowned by international claims. Such a law would not only serve as an enforceable domestic jurisdictional defense but also forge a new customary norm in the international arena.