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Is Owning a Passport a Right or a Privilege?

An analysis of the different meanings behind the notion of a passport in light of the right to freedom of movement

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Abstract

The implications of WW I can still be seen in the current time. One of these is the passport system which was implemented as a temporary measure after the outbreak of the war. This outdated system is still applicable today with no mentionable changes. Passports play a major role in international mobility, surveillance and state monopolisation. But there is no international definition of the passport and its functions.

In this research, the author analysed the passport in its historical context, tracing the important stages this document has undergone. An understanding of the notion of the passport in its historical context was essential for determining its current situation. In this thesis, the notion of the passport is analysed in light of the right to freedom of movement, to provide a legal understanding of passports and their position in international law. This work provides a comparative study of the legal framework regarding passports in Germany and Syria, taking into account their obligations according to the regional and international conventions these states have ratified.

It is argued in this thesis that passports are still a privilege in many countries in the world in which people do not have access to them. States should not arbitrarily deprive their subjects of owning a passport. Passports are an official document for international travel issued by the respective authority, indicating the nationality of the bearer, serving as an identification document, and entitling the bearer to leave, to return and to claim the diplomatic protection of the issuing state. The abolition of the passport system is impossible. However, the conditions for admitting or excluding travellers into and from foreign territories should be more individual than collective and not depend only on the document which travellers possess.

INDEX WORDS: passport, travel document, freedom of movement, right to leave, right to enter, Germany, Syria, safe conduct, international mobility, ICCPR, UDHR, identification, diplomatic protection, discrimination, human rights, citizenship, nationality.

TABLE OF CONTENTS

ABSTRACT	2
ACKNOWLEDGEMENTS	5
I. INTRODUCTION	7
1.1. Significance, Purpose and Hypothesis of the Research	7
1.2. Research Questions	10
1.3. Author’s Personal Note	11
1.4. Research Methodology	12
1.5. Limits of the Scope of the Thesis	15
1.6. Literature Review and State of Art of the Research Field	17
II. THE HISTORICAL DEVELOPMENT OF THE PASSPORT IN THE LIGHT OF FREEDOM OF MOVEMENT	19
2.1. Instrument of Facilitating and Restricting the Movement of People (From 445 B.C. until the 13th Century)	20
2.2. Safe conducts (From 13th century until the peace of Westphalia)	22
2.3. From the peace of Westphalia until outbreak of the WW I	23
2.4. From the Outbreak of WW I until the Creation of the United Nations (UN)	28
2.5. From Post- WW II until the present time	32
2.6. Conclusion	35
III. THE NOTION OF PASSPORT AND ITS CURRENT POSITION IN INTERNATIONAL LAW	36
3.1. The Definition of the Passport in International Law and its Functions	37
3.2. Not Every Travel Document is a Passport	40
3.3. Passport Holder as a subject of International law	42
3.4. Passport as an Instrument of Establishing International Trust	45
3.5. Passports are not Owned by the Bearer but are Government Property	48
3.6. The right to Leave and Passports	51

3.7. There is no Right to Leave without a Right to Enter.....	54
3.8. Conclusion.....	57
IV. COMPARISON BETWEEN GERMANY AND SYRIA REGARDING PASSPORTS AND FREEDOM OF MOVEMENT.....	59
4.1. Germany.....	60
4.1.1. Analysis of the German passport act.....	60
4.1.2. Germany as a member state of the European Union.....	63
4.1.3. Compliance with international and regional human rights law regarding freedom of movement.....	65
4.1.4. Migrants with no access to national passports in Germany.....	66
4.1.5. The functions of the German passport and Germans’ understanding of the notion of passport	68
4.2. Syria before the Syrian war.....	70
4.2.1. The Right to Freedom of Movement.....	71
4.2.2. People with no access to national passport in Syria.....	73
4.2.3. The Syrian passport and its functions.....	75
4.3. Current state in Syria ‘state of emergency’	76
4.3.1. Analysis of the Syrian passport act.....	77
4.3.2. Accessibility to Syrian passports and issuing procedure internally and abroad...	78
4.3.3. The Functions of the Syrian Passport and Syrians’ Understanding of the Notion of Passport	80
4.4. Comparison and Analysis.....	82
V. CONCLUSION.....	86
ABBREVIATIONS.....	90
BIBLIOGRAPHY.....	91
ANNEX.....	104

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I. Introduction

Human beings become aware of the importance of water only if they are dying of thirst. As long as water is permanently available, no one appreciates it. It is regarded as a given. When we start feeling a little bit thirsty but have no access to drinkable water, then we start to recognize its value. And subsequently, we start considering drinking any kind of water we can access. This analogy helps us to understand the importance of a passport, which is considered in many countries over the world as a simple document that people always have access to, to the extent that people in countries which respect the rule of law can no longer differentiate between citizenship and owning a passport.

However, enjoying the citizenship of a particular country does not always mean the entitlement to own its passport, at least not in every state. For instance, being a German citizen is a precondition of owning a German passport, but under particular circumstances the issuing of German passports for German citizens can be denied, if said citizen '[constitutes] a threat to the internal or external security, or [intends] to evade tax obligations'.¹ It is definitely not an easy task to find a common, general definition of the passport, assuming such a definition even exists.

1.1. Significance, Purpose and Hypothesis of the Research

The idea for this thesis was sparked by witnessing the suffering of too many people in the process of seeking refuge in Germany. Human beings who became victims of the political decisions of their own governments and of the legislation of the countries of residence. The author was an official in charge of the German immigration office, and was in daily contact with migrants who have no access to passports or any other kind of travel documents. The author dealt with many cases in which families could not be reunified because family members were denied a passport in their home countries and hence their visa applications could not be decided on.

¹ *German Passport Act*, art. 7(1).

There are no exact numbers for how many migrants are living in Germany and have neither a passport nor access to one. Those people cannot travel outside Germany. An article published by Reuters reported that in 2017 about 26,000 family reunification visa applications were pending because of people having no passports.² Talking in numbers is easy. It is very difficult, on the other hand, to deal with the human side of the story, in which for instance Marwa, a five-year-old girl, has not seen her father for three years. He is living in Germany, but she and her mother are still in Lebanon and cannot obtain passports because her mother demonstrated in the past against the Syrian regime and they left Syria illegally.

These people are not numbers in statistics. They are as human as you and me, and with the same rights, which are supposed to be universally protected. Unfortunately, the only thing the author can do about their predicament is write about their suffering and discuss the illegality of them being deprived of their rights.

Despite the existence of numerous relevant international and domestic provisions ensuring the right to freedom of movement, the applicability of these laws does not seem to be effective. In Syria, the authorities are very selective, issuing passports only to those who share their political views. They treat passports as a privilege. Only people who have shown loyalty to the regime can be issued a passport.³ In Germany, foreigners who have no access to national passports have the obligation to prove that there is no possibility of them obtaining one in order to be entitled to a German travel document for foreigners.⁴ This means that these people should provide the German authorities with conformation issued by their national embassy confirming that they will not be issued a

² Shadia Nasralla, 'Syrian refugees must buy travel papers from Assad', *Reuters*, 26 April 2017 <https://www.reuters.com/article/us-europe-migrants-raqqa-insight/syrian-refugees-must-buy-travel-papers-from-assad-idUSKBN17S0WF> (accessed 14 May 2019)

³ 'Citizens were denied passports and other important documents by the government based on their political views, association with opposition groups, or ties to geographic areas where the opposition dominated'. Canada: Immigration and Refugee Board of Canada, Syria: requirements and procedures to obtain, renew, and replace passports and national identity cards; information and details contained in each document, including physical characteristics (2013-July 2015), 13 August 2015, SYR105232.E, available at: <https://www.refworld.org/docid/55debf164.html> (accessed 14 May 2019)

⁴ *The German residence regulation*, art. 5 (1): 'A foreigner who demonstrably has no passport or passport substitute and cannot obtain one through reasonable means, could be issued a travel document for foreigners in accordance with the following provisions'. (Translated by author).

national passport. Obtaining such proof is almost impossible. Quite simply, no country is going to confirm that it is not willing to issue passports for its nationals.

This ongoing problem makes passports a political weapon in states' hands, and puts the effectiveness of both international and domestic laws in jeopardy. It also places a question mark next to the universality and protection of human rights. We are too far from the statement of the former UN Secretary General on Human Rights Day 2014, in which he stated: 'We denounce authorities who deny the rights of any person or group. We declare that human rights are for all of us, all the time: whoever we are and wherever we are from; no matter our class, our opinions, our sexual orientation'.⁵

This work has arisen from the need for in-depth research into the implications of the refusal to issue passports in general and in Syria and Germany in particular. The roots of the problem of passport denial and the fact that states have failed to ensure their nationals or legal residents in their territories the enjoyment of the right to freedom of movement, and especially analysis of the nature of the passport itself, have not yet been sufficiently addressed. In this thesis the author wants to draw attention to the problem of passport denial, urging the international community to take a short break from developing new generations of human rights and to take a look back to the first generation of human rights which are being violated in several parts of the world. This is an appeal for all steps to be taken to enable all human beings without access to passports to enjoy the right to freedom of movement.

The objective of this research is to fill the gap in the literature on that significant document called a *passport*, particularly on the nature of the passport, its position in international law, its functions and its discriminatory aspects. Firstly, a passport - the author argues in this thesis - is more than a simple document for international travel. It is an essential instrument enabling the enjoyment of the right to freedom of movement as well as a political weapon used by sovereign states to control and protect their nationals, or in other words, to emphasise their sovereignty. Secondly, it is argued in

⁵ UN Secretary-General Ban Ki-moon, [website], 'Message on Human Rights Day', New York, 10. December 2014 <https://www.un.org/sg/en/content/sg/statement/2014-12-10/secretary-generals-message-human-rights-day-scroll-down-french> (accessed 14 May.2019)

this thesis that a passport is viewed in states' and international practice in an out-dated way, stemming from the needs that emerged after WW I. More importantly, this approach to passports is not in compliance with international human rights standards. Governments are using the passport for the purpose of controlling their subjects and their free movement by establishing additional, questionable criteria to obtain passports. These criteria may not always be in compliance with international human rights law, especially in countries which do not respect the rule of law. Freedom of movement is not an absolute right that cannot be limited. However, in order to obtain full enjoyment of the right to freedom of movement, it is essential not only to facilitate the departure of citizens, but also to regulate their possibilities of entering the country of destination. Currently, people are being denied or allowed entry into the territory of a particular country simply depending on the passport they possess. The hypothesis of this research is not only that people have the right to own a passport, but also that these passports should be functional.

1.2. Research Questions

This thesis analyses the legal meaning and significance of the passport in light of the right to freedom of movement. It seeks an answer to the questions of *whether owning a passport is a right or a privilege; is it merely an identification document (for travel purposes) or a tool for a state to exercise control over or protection of its citizens? Is there discrimination on the basis of passports regarding their functions and the possibilities for entering other states?*

Many sub-questions arose in this regard: *What is the definition of the passport? is it permission to leave a country or to enter another country? Does it include a right to return and a right to stay? Is it proof of nationality? Is it all of the above?*

The research questions will be carried out by analysing the history of the passport from its appearance until the emergence of the modern passport system applicable today, which affords a better understanding of the current position of the passport. Analysing the notion of the passport in light of the right to freedom of movement provides deeper

insight into the functions of the passport and the role it has gained in enabling people to enjoy their human rights, but also its role in controlling and protecting individuals. It also shows the interrelation between passports and the rights to leave, enter, and return. The different understanding of passports from one country to another and the different functions of the passport depending on the state of issuance will be dealt with by comparing the passport systems in Syria and Germany and indicating the kinds of discrimination that occur on the basis of passports. Not all passports are the same, and in terms of international mobility, people are categorized depending on the passport they possess.

1.3. Author's Personal Note

The topic of this thesis flew through my head for the first time on 03 December 2017 as I queued with my brother in front of the passport control section in the airport of Larnaca. My brother has two passports: A German one and a Syrian one. He showed his German document and passed through the gate with no particular questions, whereas I was interrogated for more than 15 minutes. The Cyprus authorities were not happy to see my Syrian passport despite my permanent German residence permit, and doubted that I just wanted to spend my vacation in Cyprus.

My brother and me look alike. So I do not think that the reason for this interrogation was that I gave an impression of being dangerous. It was merely my passport! I thought at the time that it really does not matter who you are, the level of education you have, or which political or religious views you hold. It is not even important what origins or skin colour you have. In terms of freedom of movement, all that matters is which document you can present. Your document decides if you are a decent citizen or a suspected terrorist, and whether you constitute a threat to the national security of "developed" states or not. Our recognition as humans depends on a document.

At that moment I felt dehumanized. I became aware of human beings being classified, and that I belonged, just because of my passport, to the worst class. Perhaps this

personal note has gone beyond academic norms, but I feel compelled to mention that this situation was the trigger for this research.

1.4. Research Methodology

The research is mainly qualitative and carried out primarily from a legal, human rights perspective. Analytical and comparative methods have been used to achieve the research goals. However, the topic needs to be put in historical perspective, and an understanding of political and social factors is relevant to understand the context in which the laws on passports are operating.

To achieve the aims expressed above, this thesis is divided into three main chapters besides the introduction and conclusion. To understand the nature of the passport we need to know its past, because historical understandings of passports (whether justified or not today) are still reflected in states' practices today. The first chapter starts by looking at the notion of the passport from a historical perspective to show the development of the meaning and understanding of this document thus far, with historical analysis of the reasons for changes over time, based on a literature review. The existence of this significant document and its importance in our lives cannot be separated from its historical context.

Notable is that whereas our world is moving towards removing limitations on movement of goods and products, at the same time more limitations on the freedom of movement of human beings are being imposed.

In the second chapter, the notion of the passport in the context of international law in general and international human rights law in particular is probed. This chapter analyses the provisions of international conventions and related documents, such as the General Comments of the UN Human Rights Committee. A literature review as well as intensive reading on experts' understanding of the right to freedom of movement are also an integral part of this chapter. The lack of international documents dealing specifically

with passports in particular or travel documents⁶ in general made the interpretation of international documents on the right to freedom of movement the only possible way to understand the position of passports in international law. One of the newest international documents dealing with the notion of passports specifically is a resolution adopted by the Conference on Passports in Paris 1920 under the umbrella of the League of Nations, which stated that passports should be identical to facilitate control during travelling.⁷ This was followed by many international and regional agreements on the security features of passports but not on the notion and the nature of said passports. Therefore, the starting point of this chapter was analysing international documents dealing with the right to freedom of movement. The internationally recognised right to freedom of movement cannot be exercised without appropriate travel documents serving this aim. The right to freedom of movement is the legal basis of the right to own a passport, and passports are the main instrument of the enjoyment of the right to freedom of movement. Although the right to freedom of movement is not an absolute right, it cannot be restricted without justified reasons. ‘The application of restrictions in any individual case must be based on clear legal grounds and meet the test of necessity and the requirements of proportionality’.⁸

The third chapter analyses the notion of the passport in Germany and Syria from a comparative perspective. This comparison seeks to indicate the differences between the German legal system and the Syrian one and whether they are in compliance with the international conventions of which they are members. The author of this thesis speaks both Arabic (which is the official language in Syria) and German fluently. In addition, the author practiced as a lawyer in Syria and was an official in charge of the immigration office in Germany for the last three years.

Syria used to be known to Germans and citizens of many other European countries merely as a holiday destination. Since the Syrian war started in 2011, many European countries and especially Germany have granted hundreds of thousands of Syrians

⁶ It should be mentioned that travel documents for refugees are internationally sufficiently dealt with.

⁷ *Resolution adopted by the conference on passports, customs formalities and through tickets* in Paris 1920, s1

⁸ *CCPR General Comment No. 27*, 1999. s16

residence permits for humanitarian reasons. Syria has therefore become a current topic of discussion in Germany. Legal comparisons between both states should start taking place in order to establish a reasonable understanding of the legal issues between Syrians and the Syrian authorities as well as between Syrians and the German authorities. The passport question is pivotal to the aforementioned relations because of its importance for issues ranging from the registration of children and clarification of their identities to family reunification procedures and all other issues surrounding migration and free movement of people. The choice of comparators in this thesis stems from the above and the fact that no legal comparison between Germany and Syria has yet been carried out. Accessibility of documents and resources in both countries for the author was an additional reason for conducting this specific comparison.

It was essential for the completion of this comparison not only to examine side by side the legislation regulating passports in both countries, but also the function of this legislation and the factual function of the passport itself. It is not sufficient to merely have a passport, if it does not serve its aim. While conducting this comparative analysis, the political and social context in which the relevant laws operate was looked at. This is important to understand the reasons for adopting specific laws. This is also significant for understanding difficulties in complying with international law and its implementation. To indicate the different understandings of the notion of passport and to understand the reasons behind them, a survey was carried out questioning about 100 people (a mix of Germans and Syrians) about their understanding of passports. The survey was presented online and targeted four different categories of people: Germans born in Germany, naturalized Germans, Syrians living in Syria, and Syrians living abroad. These four categories were selected to indicate the different understandings of the notion of passport between people who have not yet experienced difficulties regarding this issue and others who have experienced the differences between their old passport and their German one, as well as Syrians who have no access to passports in Syria, and Syrians who have no access to passports and are living in a foreign country. The number of participants was limited to 100 due to financial reasons.⁹ On the basis of

⁹ The questions posed in the survey can be found in the *Annex*.

comparing the German legal system to the Syrian one in terms of passports, not only the differences in the understanding of the notion of passport between different legal systems was clarified but also the differences in the factual function¹⁰ of the passport depending on the state of issuance. In addressing the aforementioned topics, this thesis fills a gap in the literature dealing with the notion of the passport. This thesis furthers the understanding of the notion of the passport in its historical context as well as in the context of international law. It also contributes to highlighting discrimination based on passports in terms of the right to freedom of movement.

1.5. Limits of the Scope of the Thesis

The issue of passports is more complex than a comparison between just two countries. Due to the limits of a master's thesis, not all aspects related to passports can be covered here. Although comparing the German passport system to the Syrian one clarifies the differences in the understanding of the notion of passport and its functions, more comprehensive research including passport systems in other countries needs to be done in the future. For example, Russian passports are worthy of examination, especially after the statement by President Putin indicating the Russian intention to ease the obtaining of Russian passports for all residents of Ukraine.¹¹ Similarly, Armenian ones, which are strongly related to military duty, should be analysed. In addition, addressing the issue of state sovereignty in-depth and denationalization and its implications on passports is needed and will be hopefully carried out by the author in the future.

Furthermore, the existence of sovereign states was one of the main reasons for the establishment of the modern passport control system. It is an essential need for sovereign states to control their borders to express themselves as the only legal power acting within their territories. Acceding to international conventions in general and international human rights conventions in particular leads to limits on the powers of the

¹⁰ Which means, if both passports the German and the Syrian one provide their bearer with the same functions.

¹¹ *BBC News*, [website], 'Putin mulls easing Russian passport rules for whole Ukraine', 2019 <https://www.bbc.com/news/world-europe-48078842> (accessed 14 May 2019)

rulers of sovereign states.¹² Passports are the main instrument for controlling the movement of people from one sovereign state to another. Without passport control, sovereign states are not able to determine who entered their territory and who left, or who is allowed to enter or depart. The interrelation of passports and state sovereignty is undeniable and cannot be ignored when analysing the notion of the passport. But the notion of sovereignty itself and its justifications and contradictions as well as the implications of the principle of sovereignty on passports and *vice versa* could not be analysed in-depth within the limited number of pages allowed for this thesis.

The differences between refugee status and subsidiary protection are also important issues when dealing with the right to have a passport. Whereas refugees are ensured the right to be issued a travel document according to the International Refugee Convention of 1951,¹³ states are not obliged to issue travel documents to people who enjoy subsidiary protection. As a result of that, there are people who enjoy subsidiary protection and have no travel document and hence they cannot practice their right to freedom of movement. Despite the importance of these topics, examining the reasons for discrimination between refugee status and subsidiary protection or the requirements for the recognition of refugee status or subsidiary protection is unnecessary to pursue the aims of this thesis, thus they were not analysed.

The deprivation of the right to have a passport does not mean denationalization. Passports are *mainly* issued to nationals. But if the authorities deny an applicant the issuance of a passport, then they deprive him or her of owning a passport. They do not denationalize the applicant by rejecting his or her passport application. Passports are internationally accepted as proof of nationality. Prof. Muchmore argues that ‘the ability to enforce international limitations on state power to denationalize is closely tied to the evidentiary question of how to prove nationality before a court or international tribunal’.¹⁴ Thus passports could serve as a good instrument for limiting states’ power to denationalize. Denationalization is carried out for many reasons and with different

¹² Stephen D. Krasner, *Sovereignty Organized Hypocrisy*, Princeton University Press, 1999, p. 106

¹³ *International refugee convention*, 1951, art. 28

¹⁴ Adam I. Muchmore, ‘Passports and Nationality in International Law’, *10 U.C. Davis J. Int’l L. & Pol’y* 301, 2004, p. 307

implications. Acknowledging the importance of the passport as proof of nationality as well as the strong links between nationality and passports were essential for the aim of this thesis, but without researching deeply in the issue of denationalization itself.

1.6. Literature Review and State of Art of the Research Field

The more this thesis developed, the more sources were analysed. The International Covenant on Civil and Political Rights (ICCPR) is the main international convention serving as the legal basis for this thesis, as it bindingly ensures the right to freedom of movement. The CCPR General Comment No.27 on article 12 (Freedom of Movement) adopted by the Human Rights Committee on 02 November 1999 also played a major role in this thesis, especially because it connects the enjoyment of the right to freedom of movement with the necessity of owning a passport. In addition, both the International Refugee Convention 1951 and the Convention relating to the Status of Stateless Persons of 1954 were also among the sources for this thesis, mainly because they ensure refugees and stateless persons the right to be issued a travel document. Two documents agreed on in the two conferences on passports organized under the auspices of the League of Nations in 1920 and 1926 enriched this thesis owing to them dealing specifically with passports. Both the German and the Syrian Passport Acts and related regulations were dealt with in order to analyse the notion of the passport in both legal systems.

The nineteen essays gathered in one book edited by Prof. Jane Caplan and Prof. John Torpey and titled 'Documenting Individual Identity', discuss the emergence of identification and its contemporary issues. This matter is one of the most important issues facing modern Europe. This book was essential for this research, especially for understanding the history of the passport and its development.

Freedom of movement is a right which is strongly related to international borders. In his valuable book 'Rights of Passage, The Passport in International Relations', Assistant Professor of Political Science Mark B. Salter addresses the emergence and definition of borders as well as the notion of sovereignty, citizenship and identity. He links all these

notions with the passport, emphasising the major role passports have not only in international law but also in international relations. Analysing the notion of the passport in international law could not have been sufficiently carried out in this thesis without this book.

‘The Invention of the Passport’ is a book written by Prof. John Torpey and published by Cambridge University in 2000. In this book, Prof. Torpey goes beyond the mere presentation of the history of the modern passport in detail to provide explanations for each step of its development. He also analyses the functions of the modern passport as well as the major incidents that led to strengthening the importance of passports at international level. This book was the main source for understanding the current functions of the passport as well as the steps and the development of passport laws. It also contributed to understanding passports as an instrument to implement states’ policies. This book was a great motivation for further and deeper research.

In order to provide sufficient understanding of several points of this thesis, numerous articles in relation to the notion of passport were studied and often quoted. These articles were written by respected experts in the field of freedom of movement and passports like *inter alia* the noted legal scholar Louis L. Jaffe who was Professor of Administrative Law at Harvard Law School and Mary Crock, Professor of Public Law at the University of Sydney. The contributions of Dame Rosalyn Higgins who was the President of the International Court of Justice were often used in this research. The writings of Professor Adam I. Muchmore from Yale Law School provided the author of this research with great assistance, as did the contributions of Professor Daniel C. Turack due to his expertise in international law and Professor Satvinder Juss with expertise in comparative constitutional law and public and administrative law. These articles played a leading role in this thesis, especially in examining the position of the passport in international law and its functions. They also contributed to proving the hypothesis of this thesis.

Moreover, numerous reports published by the Immigration and Refugee Board of Canada, Amnesty International, the UK Border Agency, the Danish Immigration Service, and the Refugee Studies Centre at the University of Oxford, as well as states’

reports to the Human Rights Committee and concluding observations were analysed in order to understand the notion of the passport in Germany and Syria. The websites of governmental ministries in Germany and Syria were also a valuable source of information for this aim.

On the basis of all the aforementioned resources, this thesis was carried out considering the gap in the literature basically on the nature of the passport, its definition, and the implications of passport denial. This thesis also bridges the gap on the discriminatory aspect of passports in terms of international travel, in the way that indicates the different functions of passports and their accessibility depending on the issuing power.

II. Chapter I. The Historical Development of the Passport in the Light of Freedom of Movement

This chapter aims to trace the development of the passport and its importance to freedom of travel from its emergence in its simplest form to the document we use now by discussing the major changes that the notion of a passport has undergone. The notion of a passport cannot be appropriately understood outside its historical context.

The linguistic meaning of the word passport itself indicates to some extent its main function. The word is of French origin and is a combination of two words: "Passer" –*to pass*- and "Porte" –*Gate*-. Every traveller was obliged to show a kind of permission in order to be allowed to enter a city; or more precisely, in order to "pass" through its gate.¹⁵ To understand the meaning of passports today it is necessary to give a brief account of the development of the meaning of this document, which started, in the words of Prof. Louis L. Jaffe, as ‘... a permission given, it might be, to an enemy alien or a departing foreign ambassador, to pass safely through the territory of the issuing

¹⁵ British section of the International Commission of Jurists, *Going abroad: A report on passports*, London, for Justice Educational and Research Trust by Barry Rose publishers, 1974, no.3

Power'.¹⁶ The necessity of owning a passport for the aim of international travel is a new concept and until recently was not widely implemented.

2.1. Instrument for Facilitating and Restricting the Movement of People (From 445 B.C. until the 13th Century)

The first known historical event to which the notion of passport could be ascribed can be found in the Book of Nehemiah in the Old Testament, 'where the Persian King grants safe passage to Nehemiah to return to Judah' (445 B.C.)¹⁷ This "passport" was in the form of a letter confirming the identity of the bearer and asking for his safe passage.¹⁸

The term "passport" in its earliest usage was kind of allowance or *permission* to enter and 'to pass safely through the territory of the issuing power'.¹⁹ This means that before the emergence of the nation state, passports or passage permissions were issued to foreigners wanting to enter the territory of another dominating power. It was similar to a modern-day "visa".

In the early Middle Ages, rulers noticed that allowing their subjects to leave the realm and not controlling their movement had the negative implication of depriving the king of their military service in wartime. The citizens of the realm were considered subjects of the king. And the king was entitled to determine 'who may enter and leave his personal territory'.²⁰ Therefore, it was not legal to leave the realm without obtaining the king's permission, as it was the so-called 'principal duty of a subject [which means] to be at the service of his king and country'.²¹ From then on, passports were used as an instrument to control the movement of people.

¹⁶ Louis L. Jaffe, 'The right to travel: the passport problem', 35 *Foreign Aff.* 17,1956, p. 17

¹⁷ Filippe Gelin, *Shorex Capital*, [website], 'A brief history of passports: from Laissez-Passer to biometric passports', <https://shorexcapital.com/a-short-history-of-the-passport/> (accessed 14 May 2019)

¹⁸ *ibid*

¹⁹ Jaffe, *The right to travel: the passport problem*, p.17

²⁰ Mark B. Salter, *Rights of Passage- The passport in international relations-*, London, Lynne Rienner Publishers, 2003, p.13

²¹ Salter, *Rights of Passage*, p.13

In England in 1093, the consecrated Archbishop of Canterbury "Anselm" was prevented from going to Rome by King William II after he asked for permission to leave. This incident marks 'the first significant instance of conflict between subject and Crown'.²² When King John issued his Charter "Magna Carta" in 1215, he ended a long debate in England about whether English subjects had the right to travel freely in peacetime. Chapter c.42 of the Magna Carta ensured the right for any one 'to leave [the] kingdom and to return, safe and secure by land and water, except for a short period in time of war, on grounds of public policy—reserving always the allegiance due to [the King]'.²³ This came after provision c.41 which gave all merchants free exit from and free entry to England. This was a privilege 'awarded by the king in his capacity of generalissimo of the realm', which only merchants enjoyed.²⁴ The inclusion of the freedom of travel in the Magna Carta, whereas 'many of the civil liberties as we know them today- the freedom of speech, worship and assembly- are not mentioned, in Magna Carta'²⁵ indicates the importance of this issue in the Middle Ages.

This charter did not last long, as after King John died his son King Henry III took power and in 1217 issued his own charter of liberties, in which merchants' liberty of exit and entry was preserved, but not that of subjects.²⁶

More restrictions on the freedom to travel were imposed in the era of Edward III,²⁷ who not only prohibited people from leaving the realm, but also 'asserted the correlative prerogative of recalling them under penalty of losing the profits of their lands until they returned'.²⁸

²² Charles M. Whelan, 'Passports and Freedom of Travel: The Conflict of a Right and a Privilege', 41 *Geo. L. J.*63, 1952, p.65

²³ *Magna Carta* 1215, chapter 42c, 'An exception was made to those imprisoned or outlawed... natives of any country at war with the Kingdom...'

²⁴ N. W. Sibley, Esq, 'The passport system', *Journal of the Society of comparative legislation*, vol. 7, 1906, p.33, <https://archive.org/details/journalsocietyc02legigoog/page/n48> (accessed 14 May 2019)

²⁵ Jaffe, *The right to travel: the passport problem*, p.19

²⁶ King Henry III was at that time nearly 10 years old and William Marshal was the real regent of the realm.

²⁷ King Edward III ruled between 1327-1377

²⁸ Whelan, *Passports and Freedom of Travel*, p.68

2.2. Safe conducts (From the 13th century until the Peace of Westphalia)

Both France and Britain have claimed the invention of the passport. But the first official mention of this kind of document was found in a Parliamentary Act of 1414 in England under the reign of Henry V, referring to ‘safe conducts’.²⁹ A safe conduct was a ‘letter of patent that included the name of the bearer and the purpose of his mission and asked that the bearer not be hindered in his journey, often threatening punitive action if the safe conduct pass was not provided’.³⁰ Carrying a safe conduct meant the king was responsible for the protection of the bearer rather than the bearer himself: ‘Safe conducts protected merchants and deterred thieves’.³¹ This document thus had a dual function ‘assuring security’ on national level as well as ‘exchanging wealth for protection’.³²

At the beginning of the sixteenth century, restrictions on the freedom to travel were partially repealed and maintained their applicability only for ‘absconding debtors’.³³ At the same time, territorial boundaries were partly defined in Europe and safe conducts were similarly applied across the continent.³⁴

The safe conducts system aimed to promote the king’s monopoly on violence by convincing his subjects ‘that the international or non-national was more dangerous than the national’,³⁵ implying that subjects needed the protection of the king outside his territory too. It also indicated his power to control and protect his subjects not only in his territory but also beyond the limits of his authority through diplomacy, which then meant that ‘any interference with the bearer would result in the wrath of the ruler’.³⁶

²⁹ HO News Team, *Home office in the media*, [website], ‘A history of the UK passport’, 2017, <https://homeofficemedia.blog.gov.uk/2017/12/22/a-history-of-the-uk-passport/> (accessed 14 May 2019)

³⁰ Salter, *Rights of Passage*, p.13

³¹ *ibid*

³² *ibid*

³³ William B. Gould, ‘Right to Travel and National Security’, *1961 Wash. U. L. Q.* 334, 1961, p.334 https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=3264&context=law_lawreview (accessed 14 May 2019)

³⁴ Salter, *Rights of Passage*, p.14

³⁵ *ibid* p.15

³⁶ *ibid* p.14

This system represented a significant change in the history of the passport. It was no longer a permission given to foreigners who wanted to pass as it was in the past, nor merely a permission to leave the realm. Now it took the form of a letter issued by the ruler to his subjects enabling them not only to leave his territory but also asking other powers to ensure the bearer a safe passage through their territories. Not every subject had the right to a safe conduct. It was a privilege enjoyed by merchants and people who enjoyed the king's trust.

In 1534, Fitzherbert³⁷ wrote, an English subject enjoyed the freedom to travel. But the king had the possibility of calling on his subjects to return. He was also able to prevent subjects from leaving the realm by issuing '*Ne exeat regnum*'.³⁸ The notion of *Ne exeat regnum* was a result of the strategy followed by the rulers of the Middle Ages, who in order to centralise power in their hands, legitimized their own violence and prohibited other kinds of violence. In this regard no subject was allowed to leave the realm without the king's permission.³⁹ Controlling the freedom to travel was one of the features of the emergence of sovereign states in the Middle Ages.⁴⁰

2.3. From the Peace of Westphalia to the outbreak of WW I

The notion of nation states emerged after the Peace of Westphalia in 1648, which brought the thirty years' war between Protestants and Catholics to an end, and marked the beginning of a new era in which a 'new system [emerged] characterized by the coexistence of a multiplicity of states, each sovereign within its territory, equal to one another, and free from any external earthly authority'.⁴¹ The Peace of Westphalia abolished the possibility of uniting Europe under the rule of one emperor and established 'national sovereignty, characterized by autonomy and interstate competition,

³⁷ Anthony Fitzherbert wrote '*La Nouvelle Natura Brevium*' in (1534), a treatise on English law.

³⁸ Whelan, *Passports and Freedom of Travel*, p.70

³⁹ Salter, *Rights of Passage*, p.12

⁴⁰ *ibid* p.11

⁴¹ Leo Gross, 'The peace of Westphalia 1648-1948', *The American journal of international law*, Vol. 42, no.1, 1948, p.28-29

[which] became the primary governing system among European states'.⁴² But a sovereign state could not function independently and isolate itself from the international domain. The state's stability depended on an international system based on the principles of non-interference in internal matters and equality,⁴³ which were set forth in the treaties of Westphalia.

New regulation of people's movement started to emerge after the treaties of Westphalia. In 1669, the king of France Louis XIV prohibited his subjects from leaving the realm unless they obtained passports allowing them to leave.⁴⁴ As a result of the interaction between sovereign states, the term passport was mentioned for the first time in the treaty between Great Britain and Denmark in 1670. Whereas the provisions of this treaty allowed the subjects of both kingdoms to enter and trade in each other's territories 'in time of peace without licence or safe of conduct',⁴⁵ an exception was stated for colonies and some ports in Denmark. To enter these everyone was required to carry 'Letters of passport and certificates'.⁴⁶

In France during the eighteenth century, commoners' movement within the realm was restricted and they had to carry an identification document with them.⁴⁷ The complaint against the French government at the beginning of the French revolution as contained in the 2nd article of the cahiers of the parish of Neuilly-sur-Marne stated that '...it is the wish of this assembly⁴⁸ that individual liberty be guaranteed to all the French, and therefore that each must be free to move about or to come, within and outside the kingdom, without permissions, passports, or other formalities that tend to hamper the liberty of its citizens'.⁴⁹ However, the articles of the 1789 Declaration of the Rights of Man and the Citizen did not mention freedom of movement. This right was inherent in

⁴² Jason Farr, 'Point: The Westphalia legacy and the modern Nation-State', *International Social Science Review*, vol. 80, no. 3/4, 2005, p.156

⁴³ Salter, *Rights of Passage*, p.12

⁴⁴ John C. Torpey, *The invention of the passport: surveillance, citizenship and the state*, (second edition), New York, Cambridge University Press, 2018, p.26

⁴⁵ N. W. Sibley, Esq, 'The passport system', *Journal of the Society of comparative legislation*, vol. 7, 1906, p.30, <https://archive.org/details/journalsocietyc02legigoog/page/n48> (accessed 14 May 2019)

⁴⁶ *ibid*

⁴⁷ Torpey, *The invention of the passport*, p.27

⁴⁸ Estates General.

⁴⁹ Mary Crock, *Refugees and Rights*, Sydney, Routledge, 2017, p.38

the right to liberty.⁵⁰ After two and a half years of debates and intense work the new French constitution was announced in September 1791, guaranteeing for the first time the freedom ‘to move about, to remain, [and] to leave’.⁵¹ The enjoyment of this freedom was an exclusive privilege of French citizens. The fear of invasions and the uncontrolled influx of foreigners led to the imposition of strict controls on foreigners, who had to present themselves to the local authorities in order to have their passports checked and to apply for permission to stay.⁵²

Nevertheless, this freedom did not last long even for French citizens. In January 1792, the national assembly discussed the passport law.⁵³ At the end of the debate the voices in favour of reintroducing movement restrictions won, ‘and the national assembly mandated that everyone –whether French or foreign- travelling within the kingdom be in possession of a passport’.⁵⁴ Nonetheless, merely carrying such passports was insufficient for leaving French territory. Those wishing to depart were obliged to ask the authorities in their place of residence to put a ‘Notation to this effect’ in their passports.⁵⁵

After the restriction of the freedom to travel, the assembly was faced with huge complaints, which led to it re-establishing "free circulation" within the French territories in the last quarter of 1792. But the need to identify subjects was increasing at that time, not only because of the imminent wars and the need for conscription, but also because the Catholic church, which carried out birth registrations at the time, did not register Jews and Protestants. The need for modern states to ‘distinguish between member and non-member, those with rights of access to the territory and those lacking of them’,⁵⁶ led to the establishment of ‘civil status’; after its establishment a citizen could only exist if he or she was registered.⁵⁷ A new administrative era begun with this procedure.

⁵⁰ *ibid*

⁵¹ Torpey, *The invention of the passport*, p.36

⁵² *ibid* p. 36-37

⁵³ *ibid* p. 44

⁵⁴ *ibid* p. 51

⁵⁵ *ibid*

⁵⁶ *ibid* p. 53

⁵⁷ *ibid*

The Napoleonic wars led *inter alia* to the separation of internal and external and to the creation of a distinction between aliens and nationals.⁵⁸ This distinction led to obliging all travellers at the beginning of the 19th century to carry identity documents with them, in a system similar to the one we know now. These passport or identity paper restrictions aimed to prevent the gathering of hostile persons and hostile agents in strategic locations, as well as to fight crime and suppress criminals.⁵⁹

By 1815, passports and identity cards were in use across Europe. Besides certificating the bearer's identity,⁶⁰ these documents facilitated distinguishing between citizens and foreigners, as well as controlling travel and 'clandestine communication between police officials'.⁶¹

After the Congress of Vienna in 1815, restrictions on the freedom of movement softened in Europe.⁶² But passports were still in use and their function as proof of nationality was still not clear. The British Secretary of State for Foreign Affairs complained in 1858 that the French consulate was issuing passports 'without any reference to nationality', which led to their misuse.⁶³ In addition, linguistic barriers played a major role in facilitating the misuse of passports, given that outside the national territory the national language in which passports were issued could not be understood. Passports were judged on their appearance. 'The more important a travel document looked, the more important it was considered'.⁶⁴

⁵⁸ Andrea Geselle, 'Domenica Saba takes to the road: Origins and development of a modern passport system in Lombardy- Veneto', in Jane Caplan and John Torpey (ed.), *Documenting individual identity- The development of state practices in the modern world*, Princeton, Princeton University Press, 2001, p.206

⁵⁹ Andreas Fahrmeir, 'Governments and Forgers: Passports in nineteenth-century Europe', in Jane Caplan and John Torpey (ed.), *Documenting individual identity- The development of state practices in the modern world*, Princeton, Princeton University Press, 2001, p.219

⁶⁰ 1817 Prusian *Passinstruktion* described their function like: 'to provide the blameless and honest traveler, who is unknown in the area to which he comes, with a simple ... means of providing the legally required proof that he is who he pretends to be.'

⁶¹ Fahrmeir, *Documenting individual identity*, p.219-220, 'Communication between police officials was in form of coded entries on passports to give information about the bearer's political views.'

⁶² Torpey, *The invention of the passport*, p.70

⁶³ N. W. Sibley, Esq, 'The passport system', *Journal of the Society of comparative legislation*, vol. 7, 1906, p.27, <https://archive.org/details/journalsocietyc02legigoog/page/n48> (accessed 14 May 2019)

⁶⁴ Fahrmeir, *Documenting individual identity*, p.232

The Dutch government issued passports for both the Dutch and foreigners to enable them to go abroad. However, issuing a passport was regarded as a *'favour'* of the government, and was granted after fulfilling particular conditions like military service and not having committed any crimes. These conditions were imposed upon both Dutch citizens and foreigners. 'Citizenship was not yet firmly linked to nationality, but rather residence or birth'.⁶⁵

The technical developments in transportation in the middle of the 19th century, namely the invention of railways and steamboats, made travelling easier and more accessible. Passports control and movement restriction 'was seen as a by-product'.⁶⁶ Apart from Persia, Romania, Russia, Serbia, Turkey and the Papal States, aliens did not need to present a passport in order to enter any European state in the late 19th century. Even leaving one's own country did not require owning a passport. Freedom of movement in peace time was widely accepted.⁶⁷ It should be mentioned here that this 'new *passportless* regime' which lasted until the outbreak of WW I,⁶⁸ did not mean that people totally forwent passports. Passports were still needed for some destinations, but they were not yet connected to nationality. This means, for instance, that upper class travellers were issued a British passport to travel across Ottoman territories, a French one for Venice and an Italian one for Switzerland.⁶⁹ Furthermore, Thomas Cook and other travel agents that expanded tourism in Europe by making it available to the middle classes, 'began to procure passports on behalf of their customers directly from the British Passport Office'.⁷⁰

In general, the alleged elimination of passport controls in the second half of the 19th century was for particular social ranks. Non-citizen Jews as well as *the migrant poor* did

⁶⁵ Leo Lucassen, 'A Many-Headed Monster: The evolution of the passport system in the Netherlands and Germany in the long Nineteenth century', in Jane Caplan and John Torpey (ed.), *Documenting individual identity- The development of state practices in the modern world*, Princeton, Princeton University Press, 2001, p.240-241

⁶⁶ Salter, *Rights of Passage*, p.102

⁶⁷ Lucassen, *Documenting individual identity*, p.245-246

⁶⁸ *ibid* p.246

⁶⁹ Salter, *Rights of Passage*, p.102-103

⁷⁰ *ibid*

not benefit from the softening of the restrictions on freedom of movement in Europe and were more likely to be denied entry or be expelled.⁷¹

Owning a passport was very important for specific groups even in the period of the elimination of passport controls. Migrants, gypsies, vagrants etc... used passports as protection against the arbitrariness of local authorities.⁷² Passports and other identification documents reassured the local authorities that the bearer could be expelled if necessary (mostly in the case of benefiting from poor relief), which made their acceptance of the bearer more likely.⁷³

2.4. From the Outbreak of WW I until the Creation of the United Nations (UN)

WW I put an end to the so-called ‘closet approximation to an open world in modern times’ and introduced the era of a strict regime restricting freedom of movement.⁷⁴ An era, in which ‘there came a bureaucratic-governmental need to track combatants and verify deserters’.⁷⁵ Aliens were again strongly suspected and both nationals and foreigners suffered under the strict system of passport control which was reintroduced in Europe. ‘War-inspired xenophobia’⁷⁶ allowed the French government to impose an obligation upon foreigners to always carry identification cards with them. ‘These cards were to include the bearer’s nationality, civil status, occupation, photograph, and signature...’.⁷⁷ In Britain an Aliens Act was issued in 1914 which entitled the government ‘to prohibit or impose restrictions on the landing or embarkation of aliens in the United Kingdom’.⁷⁸ Passports were not part of this act, but they were regulated in

⁷¹ *ibid* p.103-104

⁷² Lucassen, *Documenting individual identity*, p.254-255

⁷³ *ibid* p.247-248

⁷⁴ John Torpey, ‘The great war and the birth of the modern passport system’ in Jane Caplan and John Torpey (ed.), *Documenting individual identity- The development of state practices in the modern world*, Princeton, Princeton University Press, 2001, p.256

⁷⁵ Salter, *Rights of Passage*, p.78

⁷⁶ Torpey, *Documenting individual identity*, p. 258

⁷⁷ *ibid*

⁷⁸ *ibid*

1905 as reaction to the threat of ‘a large scale influx of East European Jews’.⁷⁹ After the Aliens Act, it was the duty of people to prove that they were not aliens.⁸⁰

In July 1914, Germany imposed ‘*temporary*’ passport controls upon everyone who wanted to enter the *Reich*. Foreigners in Germany were obliged to carry passports or other identification documents with them. By the end of the year, both entering and leaving Germany required a passport.⁸¹ Following the Treaty of London,⁸² Italy put restrictions on Italians leaving Italy and also imposed passport controls on foreigners who wanted to enter Italy.⁸³ In the middle of 1916, visas from the state’s embassies abroad were required to enter Germany and Italy. Before entering Britain, travellers’ documents had to be checked and passports stamped with approval by the Home Office Aliens department.⁸⁴ It turned out that these temporary measures were not temporary at all.

After the dark years of WW I came to an end, the League of Nations (LoN) was created.⁸⁵ In October 1920, a conference on passports was held in Paris and a resolution was adopted on 21 October 1920 that aimed to facilitate international travelling, which was strictly hindered ‘by passports and Customs formalities’, and hoped to ‘return to pre-war conditions’ in the future.⁸⁶

This conference set forth the key aspects of the modern passport which we use now. The resolution emphasized the importance of unifying the type of passport ‘in order to facilitate control during the journey’⁸⁷ and gave in its first annex a description of the form in which passports should be produced, which is almost the same as passports we use today.⁸⁸

⁷⁹ *ibid*

⁸⁰ *ibid*

⁸¹ *ibid* p.259

⁸² *Treaty of London* 26 April 1915, which led Italy to become part of the war on the side of the Allies.

⁸³ Torpey, *Documenting individual identity*, p.261

⁸⁴ *ibid* p.260-262

⁸⁵ The League of Nations was created on 10th January 1920

⁸⁶ *Resolution conference on passports* 1920, preamble.

⁸⁷ *ibid* s1.

⁸⁸ *ibid* annex 1. ‘The passport is to contain 32 pages. The first four pages only are reproduced herewith. The other 28 pages should all be numbered and should contain the visas of the countries for which the passport is valid. The passport should be drawn up in at least two languages, i.e., in the national language

According to the resolution, passports should ‘only be issued for a single journey or for a period of two years’.⁸⁹ The resolution also recommended that exit visas should be abolished ‘for all except nationals’.⁹⁰ It is also worth mentioning that passports were issued for particular countries, and issuing passports for non-nationals was still possible.⁹¹

Despite the fact this resolution organised the then complicated passport system and given it a unified form, it must be said that it lacked a formal definition of the passport and sufficed to give a description of it. It also did not mention whether people have a right to such a document, or if its issuance was at the national authorities’ discretion. Hence the nature of this document was still unclear.

In 1922, the Soviet Union invalidated the passports of Russians who had left its territory. As reaction to this an arrangement was concluded in July 1922 to issue travel documents for those Russians. These documents were known as ‘Nansen Passports’.⁹² They gained acceptance but did not entitle their bearers to return to the country of issuance.⁹³ The USA implemented so-called ‘national origins quotas’⁹⁴ controlling the influx of migrants through a procedure of ‘remote border control’⁹⁵ after 1924. The second passport conference was held in Geneva in May 1926. The abolition of the passport system was the main agenda of this conference. A consensus could not be reached on the abolition of the passport system and the conference stated after long debates that:

and in French. The passport must be bound in cardboard, bearing on the top the name and in the centre the coat of arms of the country and at the bottom the word " Passport", with the addition, according to the desire of the various Governments, of any practical information concerning the regime of passports. Any passport of which the pages are entirely filled must be replaced by a fresh passport’.

⁸⁹ *ibid* s2

⁹⁰ *ibid* s6

⁹¹ *ibid* s3

⁹² Torpey, *The invention of the passport*, p.158

⁹³ In May 1926 the agreement was amended, and bearers obtained the right to return. The scope of beneficiaries was expanded to include Armenians too. These passports are the origin of the travel documents refugees are entitled to today.

⁹⁴ Torpey, *Documenting individual identity*, p.266 The ‘Quota system in the USA meant that a particular percentage of each nation was allowed to enter the USA every month.’

⁹⁵ *ibid*

‘...recognising the value of passports as establishing identity and the right to travel, and taking into account the different opinions which have been expressed regarding the necessity or utility of demanding the production of passports when crossing frontiers, recommends that the passage of frontiers should be facilitated by means of bilateral agreements or agreements between more than two countries’.⁹⁶

The French proposal for the abolition of passports ‘was rejected by roll-call by 13 votes to 10’.⁹⁷ Concerning passport control, the conference recommended controlling passports on entering and leaving countries.⁹⁸ Although the participating countries acknowledged that prior to 1914 passport controls were not in use, many countries emphasized the importance of passports as an international identity document.

Identification cards and other identification documents could not replace passports due to language barriers. Thus, abolishing the passport system would mean depriving people of the possibility of identifying themselves abroad and hence of claiming the protection of the diplomatic representative of their countries abroad, as well as of the possibility to return to their countries without difficulty.⁹⁹ The proposal submitted by the Hungarian delegation is worth mentioning, because it described the nature and the functions of passports, stating that a passport proves the identity of the bearer, is for international use, and issued by a public authority. It confers the right to travel and to the protection of the national diplomatic representative abroad.¹⁰⁰ Moreover, the proposal stated that: ‘The passport itself does not yet constitute proof of the holder’s nationality. In doubtful cases the national laws and regulations relating thereto must be referred to’.¹⁰¹

The passport system remained, but on the other hand many bilateral and mutual agreements were concluded, abolishing visa requirements between the parties.¹⁰² The persistence of the passport system after WW I was ‘an essential aspect of [the]

⁹⁶ *Passport conference held at Geneva* from May 12th to 18th, 1926, s1, p. 164

⁹⁷ *ibid* p. 56

⁹⁸ *ibid*

⁹⁹ *ibid* delegates’ opinions on abolition of the passport system, p. 17-29

¹⁰⁰ *ibid* the Hungarian delegation’s proposal, p.158-159

¹⁰¹ *ibid*

¹⁰² *ibid* annexes

identification revolution'¹⁰³ which enabled the countries to discriminate between citizens and non-citizens and hence 'to construct themselves as nation-states'.¹⁰⁴ In 1938, an executive order in the USA gave the Secretary of State broad authority to 'refuse issuing passports, to restrict a passport for use in certain countries, to revoke passport already issued, and to further restrict a passport already issued'.¹⁰⁵ US citizens were entitled to leave and re-enter the USA without presenting a passport. A passport was a privilege in the USA before WW II, because the Secretary of State was not obliged to issue them; issuing a passport was at his discretion. 'Travel was a right; passports a privilege'.¹⁰⁶ One day after WW II begun, the Secretary of State invalidated all passports.¹⁰⁷ From 1941 on, leaving the USA without a passport was regarded as a crime.¹⁰⁸ During and after WW II, international travel without a passport was impossible. Passports proved the citizenship of the bearer and had essential importance in enabling people to return to their homelands.¹⁰⁹

2.5. From Post-WW II until the present time

One of the brutalities of WW II was that after it ended there were about 30 million refugees in Europe. But there was not only a refugee crisis in Europe; the Indian-Pakistan war in 1947 left more than 14 million refugees, and hundreds of thousands of Palestinians were forced to leave their homes after the creation of Israel in 1948. These sad events led UNHCR to invite the member states of the United Nations to join the Refugee Convention of 1951, which obliged the enjoined countries to provide refugees in their territories with travel documents.¹¹⁰

¹⁰³ Torpey, *Documenting individual identity*, p.269

¹⁰⁴ *ibid*

¹⁰⁵ Whelan, *Passports and Freedom of Travel*, p.75

¹⁰⁶ *ibid*. p.77

¹⁰⁷ *ibid* p.78

¹⁰⁸ *ibid* p.64

¹⁰⁹ Mary L. Sinderson, 'Executive Restriction on Travel: The Passport Cases', *5 Hous. L. Rev.* 499, 1968, P.499

¹¹⁰ Torpey, *The invention of the passport*, p.178

There were voices in the Council of Europe calling for a ‘European Passport’ in the early 1950s. Yet the representatives of the member states were not ready to take any steps that could endanger their sovereignty. This led to changing the idea from a European passport to standardization of national passports.¹¹¹ The states’ surveillance of their citizens was very strict and justified mostly by the necessity of controlling the movement of dangerous people (like communists for instance). On the other hand, it should be admitted that controlling these dangerous people constituted a ‘heavy burden on the movement of the broad mass of innocent travellers’.¹¹² And it must be taken into account that passport controls are only useful when people subject themselves to them. Dangerous people will find other ways to enter or leave a country.¹¹³

In 1973, Dame Rosalyn Higgins said that ‘The right to travel abroad is effectively tied to the ability to obtain a passport. Some countries exercise an area restriction upon travel movements in this way- passports are issued as being valid for only certain listed countries. Thus travel to other parts of the world becomes prohibited’.¹¹⁴ She went on to describe how foreigners were obliged to obtain an exit visa before leaving their country of residence and that many countries (mostly developing ones) have restricted the ‘departure of skilled persons’.¹¹⁵ Again, the issue of European passports was a topic of debate, this time within the government of West Germany. At almost the same time, the Schengen Accords of 1985 regulated ‘*passportless*’ movement between Germany and France.¹¹⁶ Still, countries’ main concern was losing control of their outer borders. Every country, regardless of its economic or political development, imposed movement controls either to protect its privileged position or its dominance upon its citizens. And after the Schengen Accords a European concern arose about protecting the outer borders of Europe.¹¹⁷ The European Union (EU) was established and European citizens were no

¹¹¹ *ibid* p.180

¹¹² *ibid* p.183-184

¹¹³ *ibid* p.184

¹¹⁴ Dame Higgins, *The right in international law of an individual*, p.353-354

¹¹⁵ *ibid*

¹¹⁶ Torpey, *The invention of the passport*, p.189

¹¹⁷ *ibid* p.191

longer obliged to carry passports within the Union, although they still need to carry identification cards with them.

Instead of moving towards the abolition of the passport control system, the international civil aviation organization was established in 1944 and is responsible for unifying the standards of passports worldwide. It is also responsible for improving the security features of passports.¹¹⁸ To be born in a particular place connects people with a state, and carrying its documents has an enormous influence on the future of the bearer in a world of nation states.¹¹⁹ The minimum international tendency towards softening of passport controls disappeared after the sad events of 11th September 2001. The war on terror was announced and resulted in dividing the world into two: countries which constitute no danger, and the rest, which were regarded as home of terrorists.

Connecting terror to Islam and also connecting Islam to Arabs led to the nationals of numerous Arabic and Islamic countries being put on the black list, regardless of whether these people possessed passports and the required visas or not. Merely the fact of them coming from the "dangerous" side of the world was an accusation of terrorism.

Border walls have been built to protect Europe and the one President Trump is trying to build on the border with Mexico, as well as the walls established between Turkey and Syria and between Israel and Palestinian territories, are incidents of the human civilization moving backwards to the era of walled cities. In this way, the linguistic meaning of passports from the Middle Ages as '*to pass a gate*' will be restored.

In the end, unfortunately, we can be sure that '...the passport and other documents used to regulate identity and movement will continue to play an important role in enforcing states' monopoly on the legitimate means of movement'.¹²⁰

¹¹⁸ ICAO is a special agency of the United Nations, [website], <https://www.icao.int/about-icao/Pages/default.aspx>

¹¹⁹ Torpey, *The invention of the passport*, p.193

¹²⁰ Torpey, *The invention of the passport*, p.217

2.6. Conclusion

The stages that the modern passport system has undergone through the ages reflects the then applicable conditions regulating the internal interests of ruling powers and the relationship between these powers. Passports were issued to particular subjects of the issuing powers and they have never been a right everyone can claim. Just the close circle around the governor or ruler was entitled to this privilege. In the past, passports also indicated the social rank and the position of their bearer. Being in possession of a passport was the exception before the emergence of the modern passport system and the reinforcement of the conception of nation states. The temporary measures imposed after the outbreak of WW I established a system which the international community has been unable to revoke ever since. The passport system has strong roots in controlling and restricting international mobility, to the extent that no country can now imagine its abolition. Today, we automatically present our passports when asked to, in airports or elsewhere abroad, without even thinking about what we actually presenting. However, historically, a passport had different meanings, like permission to enter and pass through, permission to leave, a protection guarantee abroad, and an identification document. Moreover, in the past, passports were not only issued to nationals. The relationship between nationality and passports is a relatively new concept and took shape after WW II. By the eighteenth century, for instance, and according to Prof. Adam I. Muchmore, passports were issued to aliens not to nationals and were like present-day visas, serving the aim of travel through and temporary stay in the issuing state.¹²¹

If there is a lesson to be learnt from the history of the passport, then it would be that passports have always been an instrument serving the interests of the ruling power and they still have the same nature now. It depends on governments how they use or misuse them. Apart from the fact that passports are currently available for nationals to obtain mostly in developed countries, unfortunately passports are still a privilege if not a dream for many people in developing countries, in which people must fulfil particular requirements and above all be loyal to the governing regime in order to be entitled to the

¹²¹ Muchmore, *Passports and Nationality in International Law*, p.319

privilege of owning one. The out-dated notion of a passport system established after the outbreak of WW I and still applicable now does not provide any protection for human rights, and is definitely not in compliance with modern human rights norms.

III. Chapter II. The Notion of Passport and its Current Position in International Law

In what follows, the notion of the passport and its current position in international law will be addressed. This includes analysing the notion of the passport in international law and its functions as well as questioning whether every travel document is regarded as a passport. The role of passports in triggering international treaties and establishing international trust will be examined. Finally, the interrelation between the right to leave and the right to enter in international mobility will be discussed.

This chapter aims to provide a comprehensive definition of the passport in light of international human rights law and to distinguish between passports and other travel documents. It also aims to clarify the role passports have in international mobility as well as analysing their diverse functions. The right to freedom of movement is the starting point for the right to a passport. The right to freedom of movement as set forth in article 12 ICCPR includes the right to move freely in the state's territory as well as the right to leave any country including the country of origin. Whereas the right to freedom of movement does not guarantee any rights to enter foreign territories, it ensures the right to return to one's own country. The right to freedom of movement is not an absolute right and could be restricted in exceptional circumstances in order 'to protect national security, public order (*ordre public*), public health or morals and the rights and freedoms of others'.¹²²

¹²² CCPR General Comment No. 27, 1999, s11

3.1. The Definition of the Passport in International Law and its Functions

There is no international definition of the passport. The two passport conferences held under the umbrella of the LoN did not provide a definition of the passport but merely a description of it. The UDHR ensured freedom of movement for everyone, but it left decisions on passports in the hands of national governments.¹²³ The UN *ad hoc* Committee on Statelessness pointed out that the possession of a passport is a general precondition for international travel and demanded that refugees should be issued documents replacing the passport.¹²⁴ Notably, the right to freedom of movement is recognised in the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), obliging state parties to grant everyone without any kind of discrimination the right to freedom of movement within the borders of the country as well as the right to leave any country including their own, and also the right to return.¹²⁵ Freedom of movement within the territory of the state and the right to leave are inherent rights in the ICCPR and can be restricted only under particular conditions as set forth in article 12 (3) ICCPR.¹²⁶ But the provisions of this covenant contain no mention of passports. Governments have the power to distribute passports according to their domestic laws, not to mention other documents controlling freedom of movement (like visas, residence and work permits). Passports enable states to know who has entered and who has left their territory by imposing passport controls and establishing particular points to cross the borders when entering or departing their territory, which is a valid aim for sovereign states. And hence passports give governments the ability to prevent individuals from leaving the country ‘according to the changing demands of economic, social, and political contingencies’.¹²⁷

¹²³ Lesley Higgins and Marie Christine Leps, ‘“Passport, Please”: Legal, Literary, and critical Fictions of Identity’, *College Literature and Interdisciplinarity*, vol. 25, no. 1, 1998, p.118

¹²⁴ *Ad Hoc Committee on Statelessness and Related Problems, Status of Refugees and Stateless Persons - Memorandum by the Secretary-General by ECOSOC* | 03 January 1950. Comment on Art.22.

¹²⁵ *International Convention on the Elimination of All Forms of Racial Discrimination*, art.5

¹²⁶ *ICCPR* art.12

¹²⁷ Higgins and Leps, ‘Passport, Please’, p.95

Besides the importance of passports in enabling individuals to enjoy the right to freedom of movement, they also establish evidence of the nationality of their bearers.¹²⁸

This in turn entitles the bearer to the diplomatic protection of their state. The US Supreme Court gave the following definition of the passport and its functions:

‘[a passport] is a document, which, from its nature and object, is addressed to foreign powers; purporting only to be 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 an American citizen; and which, by usage and the law of nations, is received as evidence of the fact’.¹²⁹

Prof. Hertig Randall defines the European passport as ‘equivalent to a national passport, i.e. an official document for the purpose of travel, attesting to the holder’s identity and nationality, and obliging the issuing State to admit the holder to its territory should he or she be expelled from another State’.¹³⁰ In his book, the invention of the passport, Prof. Torpey described the passport as:

‘primarily an expression of the attempt by modern nation-states to assert their exclusive monopoly over the legal means of movement. But the passport cannot be reduced exclusively to a mechanism of state control, even if this is certainly its principal function today. For in addition to enhancing bureaucratic domination over persons and territories, the passport vouchsafes the issuing state’s guarantee of aid and succor to its bearer while in the jurisdiction of other states’.¹³¹

From the previous definitions and other similar definitions in some domestic laws,¹³² a national passport could be defined as an essential *document* for international travelling,

¹²⁸ Ivan Shearer and Brian Opeskin, ‘Nationality and statelessness’, in Brian Opeskin et al (ed.), *Foundations of International Migration Law*, Cambridge, Cambridge University Press, 2012, p. 118

¹²⁹ *Haig v. Agee*, 453 U.S. 292 (1981).

¹³⁰ Maya Hertig Randall, ‘European Passport’, 2008

¹³¹ Torpey, *The invention of the passport*, p.220

¹³² *The Canadian passport order*, 1981, defines a passport as: ‘an official Canadian document that shows the identity and nationality of a person for the purpose of facilitating travel by that person outside Canada’

The Italian passport act, art.2 Law no.1185/67, defines a passport as: ‘The passport is a document to be used both for travel and for identification, and is issued by: The Italian Police (Questura) in Italy; diplomatic-consular missions abroad. It is valid in all countries whose governments have been recognised

issued by a *national authority* to its subjects, serving as an *instrument* for controlling the means of movement, addressed to foreign authorities asking them to give the bearer a *safe pass* through their territory, indicating the *identity* and *nationality* of the bearer as well as ensuring the *returnability* of the bearer to the territory of the issuing power and entitling them to the *diplomatic protection* of the issuing state. In this sense, travel documents are less than passports. They provide their bearers only with an indication of their identity and their right to return to the territory of the issuing power, and facilitate the crossing of international borders.¹³³

The functions of the passport from the standpoint of the issuing state differ in some respects from its functions from the standpoint of the receiving state and both of these differ from its functions from the standpoint of the bearer.¹³⁴

The issuing state seeks control over its subjects and its borders, which means, passports and passport control help the government ‘[to] determine who is in and who is out’¹³⁵ and enable it to discriminate between nationals and foreigners. In contrast, passports from the standpoint of the receiving state provide authoritative evidence of the identity and nationality of the bearer who seeks to enter its territory.

For individuals, passports are indispensable for international mobility. Without a passport, international travel is impossible in general. Passports also provide their bearers with proof of their identity and nationality, which entitle them to claim the diplomatic protection of their state when in foreign countries. Moreover, passports give their bearers the possibility to return to and enter the territory of the issuing state.¹³⁶

Dame Rosalyn Higgins said about freedom of movement that ‘from the point of view of the individual – whether he is a Soviet Jew seeking to go to Israel, an Arab wishing to

by the Italian government, and can be made valid for those that have not been recognised upon request by the bearer and indication of the place of destination.’

¹³³ Commentary on the International Refugee Convention 1951, art. 28, p. 93-94, it reveals a limited function for travel documents issued to refugees, which consisted of enabling them to cross the border of the issuing state. Moreover, these travel documents are ‘without prejudice to and in no way [affect] the holder’s nationality’ and holders of these documents have towards the country which issued those documents ‘no claim or right to protection’.

¹³⁴ British section of the international commission of jurists, *Going abroad*, No.43

¹³⁵ Torpey, *Documenting individual identity*, p.269

¹³⁶ British section of the international commission of jurists, *Going abroad*, No.43

return to Palestine, or an East African Asian expelled from Uganda – he is trying to assert certain fundamental human rights'.¹³⁷ And without passports individuals could not fully exercise their right to freedom of movement. Modern passports emerged as an instrument serving *state security* and *foreign policy* as explained in the first chapter of this thesis. Because of the importance of these notions to governments, '[they] have been able to grant themselves extensive discretionary powers in the granting and withholding of passports, against all hegemonic beliefs in freedom of movement'.¹³⁸ The main function of passports was and remains a powerful instrument in the hands of governments, enabling them to fulfil their political, economic and social strategies.

3.2. Not Every Travel Document is a Passport

Passports have more functions than being mere travel documents. There are also other documents enabling their bearer to travel internationally but they have fewer functions than passports. Both article 28 of the UN Refugee Convention of 1951 and article 28 of the 1954 Convention Relating to the Status of Stateless Persons state that travel documents shall be issued to refugees and stateless persons by member states to enable them to leave the territory of the state of residence.¹³⁹ This document ensures its bearer the right to return to the territory of the issuing state.¹⁴⁰ Issuing of this document does not in any way change the nationality of the bearer,¹⁴¹ and also does not entitle the bearer to the diplomatic protection of the issuing power.¹⁴² This means that these travel documents do not establish any *national* relation between the issuing state and the bearer. They merely serve as a facilitator of international travel. States that ratified the abovementioned conventions are obliged to issue these documents and have in this regard no discretionary power. The same functions are provided by the so-called 'travel document for foreigner' or 'Aliens passport' or 'Grey passport' which are travel

¹³⁷ Dame Higgins, *The right in international law of an individual*, p 342

¹³⁸ Higgins and Leps, *Passport, Please*, p.124

¹³⁹ *UN refugee convention* 1951, art.28 - *Convention relating to the status of stateless persons* 1954, art.28

¹⁴⁰ *ibid* art 28 § 13

¹⁴¹ *ibid* art 28 § 15

¹⁴² *ibid* art 28 § 16

documents issued to foreigners legally residing in the territory of the issuing state. The issuance of these documents requires that the applicant is in possession of a valid residence permit and has neither a passport nor possible access to one from their country of origin.¹⁴³ The only difference between travel documents for foreigners and travel documents for refugees and stateless persons is that the issuance of the former is at the discretionary power of the state of residence, and not all foreigners *per se* are entitled to obtain such a document.

Another kind of travel document is the EU laissez-passer, which is a travel document issued by EU states in order to enable the deportation of illegal migrants, or aliens compelled to depart.¹⁴⁴ These documents have been criticized by Amnesty International because they ‘do not offer guarantees for people’s access to national identification documents, which entails risks for statelessness’.¹⁴⁵ A special kind of laissez-passer is issued by the United Nations to its officials and staff members and is called UNLP (United Nations Laissez Passer). This document does not provide any information about the nationality and birthplace of the bearer and serves as an indication of the immunity of UN officials. Bearers are only allowed to use this document for official travel.¹⁴⁶

In some special circumstances and according to special bi and multilateral treaties, people are allowed to use their identification cards as travel documents, for instance, European citizens within EU borders.

Travel documents facilitate international travel but they are less than passports, which also reflect the relationship between bearers and the issuing state as its nationals, and hence entitle them to the diplomatic protection of their state while being abroad.

¹⁴³ *Estonian aliens’ act* 1993, art.8- And the explanation on the police department, [website], <https://www2.politsei.ee/en/teenused/isikut-toendavad-dokumendid/valismaalase-pass/> (accessed 14 May 2019)

The same provisions can be found in the *German residence regulations "Aufenthaltsverordnung"*, art.5

¹⁴⁴ *Migreurop*, ‘The European travel document Yet another step to deport by all means’, [website], 2017, <http://www.migreurop.org/article2775.html?lang=fr> (accessed 14 May 2019)

¹⁴⁵ Amnesty International, ‘Deported- Human Rights in the context of forced returns-summary-’, *Amnesty International Netherlands*, 2017, p.4

¹⁴⁶ Tomas P. Hanley, ‘United Nations issues electronic Laissez Passer’, *International civil aviation organisation*, 2012, https://www.icao.int/Meetings/mrtd-symposium-2012/Documents/11_pm_Hanley.pdf (accessed 14 May 2019)

3.3. The Passport Holder as Subject of International Law

Passport control officers on the borders follow the presumption that every individual is a foreigner. Travellers must ‘bear the marks of state identification’¹⁴⁷ which in turn contribute to the decision-making procedure of the passport control officer regarding whether the entry or departure of the passport bearer should be permitted or denied. For instance, a foreigner who is trying to leave a country and cannot clarify how and when entrance occurred (no entry stamp in the passport) is more likely to face difficulties because of illegal entrance and residence, and his or her departure could be denied until this issue has been clarified.

Standing in front of the passport officer in the passport control area and handing one’s passport over to the officer has a double symbolic significance. The first is ‘the act of submission and recognition of new legal authority’¹⁴⁸ as travellers follow the orders and laws of the sovereign state they want to enter. Secondly, handing the passport over is ‘symbolic of a dialogue between two sovereign states in which one foreign secretary asks another foreign secretary for entry on the bearer’s behalf’.¹⁴⁹ This dialogue can only take place between two countries which recognise each other as sovereign states. An individual in possession of a passport issued by the Kosovar authorities cannot use this document at the Russian borders, as Russia does not recognise Kosovo as a sovereign state and hence cannot admit an individual holding a Kosovar passport. ‘A passport is only a matter of international law when issued by arrangement between one or more states’.¹⁵⁰ States wishing to be internationally recognised mostly start issuing passports. Even the so called Islamic State (IS) has issued passports. This step was seen as an attempt to become a ‘legitimate part of the international order’.¹⁵¹

Despite the impressive formulations written in passports asking authorities of other countries to grant the bearer a safe pass and stating that the bearer enjoys the protection

¹⁴⁷ Higgins and Leps, *Passport, Please*, p.108

¹⁴⁸ Salter, *Rights of Passage*, p.127

¹⁴⁹ Ibid

¹⁵⁰ Richard A.C. Alton and Jason Reed Struble, ‘The nature of a passport at the intersection of customary international law and American judicial practice’, *Annual Survey of International & Comparative Law*, vol. 16, iss.1, Article 6, 2010, p.13

¹⁵¹ Torpey, *The invention of the passport*, p.204

of the issuing state, as well as the inalienable human right to mobility, in reality the decision is made by the passport officer based on the documents presented to him/her by the traveller. Prof. Muchmore argued that 'by issuing a passport, a state makes a formal representation to other states that the passport holder is its national. This act triggers the application of the body of international law regulating state representations and other formal actions-the law of binding state action'.¹⁵² In this moment at international borders, the practicing of rights is postponed, regardless of whether travellers are nationals or foreigners. 'As in the Middle Ages, the sovereign has absolute control over who enters his territory'.¹⁵³ For instance, the Executive Order given by President Trump in January 2017¹⁵⁴ forbid nationals of several 'Islamic' countries from entering the USA, even if in possession of valid passports and Green Cards or visas. Following this announcement, hundreds of travellers were kept in detention in airports and some of them were placed on return flights.¹⁵⁵ It is questionable in this regard, whether president Trump would be able to issue such an executive order against travellers in possession of passports allowing them to enter the USA without a visa according to bi- or multilateral treaties. By doing so, the US government would breach a binding international treaty which would result in negative legal consequences. Obviously, the mere protection of international human rights law and in particular the right to freedom of movement was not sufficient to guarantee nationals of the banned states entry into the USA. The decision on denial of entrance was not based on the travellers themselves, but because they had presented a passport issued by a banned state. The decision was made based on the document not the person. Travellers who are denied entry after their papers have been inspected face two choices, either 'going home on the next plane or being detained and having admissibility determined in exclusion proceedings before a Department of Justice immigration judge'.¹⁵⁶

¹⁵² Muchmore, *Passports and Nationality in International Law*, p.328

¹⁵³ Salter, *Rights of Passage*, p.128

¹⁵⁴ *Executive Order*, 'Protecting the Nation from Foreign Terrorist Entry into the United States', President Donald Trump ,27.01.2017

¹⁵⁵ E. Perez, P. Brown and K.Liptak, , 'Inside the confusion of the Trump executive order and travel ban', *CNN Report*,2017, <https://edition.cnn.com/2017/01/28/politics/donald-trump-travel-ban/index.html> (accessed 15 May 2019)

¹⁵⁶ Janet A. Gilboy, 'Deciding who gets in: Decision making by immigration inspectors', *Law & Society Review*, vol. 25, no.3, 1991, p.574

Moreover, holders of passports issued by ‘developed countries’ mostly enjoy facilitations to enter other countries. For instance, whereas the Turkish law on foreigners and international protection states in article 7.1b that ‘foreigners wishing to enter Turkey should carry a travel document (passport) with an expiration date at least 60 days beyond the ‘duration of stay’ of their visa, e-Visa, visa exemption, or residence permit’,¹⁵⁷ citizens of seven countries are allowed to enter Turkey with an expired passport.¹⁵⁸ Those people enjoy this privilege because of the document they hold and the interstate agreements between their countries and Turkey, not because of them enjoying their human rights. Thus, Prof. Salter argues ‘the border becomes the only dangerous space where rights are abrogated’.¹⁵⁹ Even if passport holders are interrogated only for a few minutes at the border, they should feel fear and reckon with the possibility of being denied entrance. That is the way sovereign states show their power and reaffirm the principle of non-interference. The only deviation from this norm are refugees who cannot be repatriated after claiming asylum and before a decision has been made on their claim.¹⁶⁰ However, asylum seekers do not usually enter through the regular checkpoints.

A passport holder standing at an international border and asking for permission to cross it is a matter for international treaties regulating the affairs between the state that issued the passport and the state of destination as well as the jurisprudence and practice of these states. ‘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 States’.¹⁶¹ In this regard, the internationally recognised right to freedom of movement plays a subordinate role, if any. The cornerstone of this border-crossing procedure is the passport, which determines the nationality of its bearer and hence triggers the applicability of the

¹⁵⁷ Ministry of Foreign Affairs of the Republic of Turkey, [website], <http://www.mfa.gov.tr/passport-validity-requirements-while-entering-turkey-in-accordance-with-law-on-foreigners-and-international-protection.en.mfa> (accessed 15 May 2019)

¹⁵⁸ Ibid, these countries are: Germany (expired within the last year) Belgium, France, Spain, Switzerland, Luxemburg, and Portugal (expired within the last 5 years). http://www.mfa.gov.tr/countries-whose-citizens-are-allowed-to-enter-turkey-with-their-national-id_s.en.mfa (accessed 15 May 2019)

¹⁵⁹ Salter, *Rights of Passage*, p. 129

¹⁶⁰ Ibid

¹⁶¹ Alton and Struble, *The nature of a passport*, p.13

international treaties between the state of origin and the state of destination. The question of whether the traveller *could* be admitted or not and if their departure could be permitted or not, does not depend on the personal identity of the traveller as much as it depends on the kind of passport the traveller can present. ‘Passports play a limited role in the identification and classification of travellers. But the role was essential to the institutional procedures of separating safe from dangerous persons, who often are classified according to their membership, or assumed membership, within a particular population’.¹⁶² The investigation of passports does not lead to determining the intentions of the bearer but merely their nationality. Even the issuing powers mostly do not examine the history of the individual applying for a passport, though some previous crimes committed by the passport applicant *could* lead to denial of its issuance. In addition, ‘there are more than 2 million blank passports in potential circulation’.¹⁶³ These blank passports could be easily misused to manipulate the real identity of the bearer, weakening the function of passports as proof of identity.

Citizens who remain within the borders of the nation state do not contribute to the establishment of the international presence of their nation state as much as passport bearers do when they cross the border. The bearer of a passport, albeit a national or a foreigner, contributes to the recognition of the national border of the nation state and hence to the creation of its sovereign character at the international level.¹⁶⁴

3.4. Passport as an Instrument of Establishing International Trust

As mentioned above, passports cannot guarantee the identity of their bearers beyond all doubt. Whether the information in the passport reflects the bearer’s real personal information or not plays a subordinate role compared to his/her nationality. ‘If an individual travels to France on a U.S. passport, the French border agent’s decision to admit the individual without a visa is based on the faith that the French government places in the U.S. government’s representation that the passport holder is in fact a U.S.

¹⁶² Salter, *Rights of Passage*, p. 121

¹⁶³ *ibid* p.154

¹⁶⁴ *ibid* p.157

national'.¹⁶⁵ In terms of international mobility, the real identity of the bearer is not as important as their nationality, which is explicitly determined by the passport. Passports are normally issued to nationals to represent that the issuing state is willing to receive their nationals again in case of repatriation. Travel documents issued to stateless persons or refugees initially did not ensure the returnability of their bearers to the territory of the issuing power. In 1926, an intergovernmental agreement was reached giving the bearer of these documents (Nansen passport) the right to be readmitted to the territory of the issuing power.¹⁶⁶ Apart from these obligations upon states which ratified the 1951 UN Refugee Convention and the 1954 Convention relating to the Status of Stateless Persons to readmit the bearer of travel documents (non-citizen) issued by them 'as a matter of international law, states are required to admit their own citizens (and only them)'.¹⁶⁷ Nevertheless, Prof. Torpey argues that just as passports reassure the country of destination that the bearer will be readmitted by the issuing state, passports give their bearers the right to return to the territory of the issuing power.¹⁶⁸ That can be seen more clearly in the words of J.D. Alton and J.D. Struble in their article 'the nature of a passport':

'a passport confers no rights recognized under international law. It is not a document that enables a citizen of the issuing State to enter that State. 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 international comity recognizes that the bearer of a legal passport will be readmitted to the issuing State if the passport is valid'.¹⁶⁹

The UDHR states in article 13(2) that 'Everyone has the right ... to return to *his country*'.¹⁷⁰ This formulation of the right to return led to some confusion in its implementation. It was not clear whether the 'country' in this article meant the country of residence or the country of origin, or both. Asians who lived in the British colonies in

¹⁶⁵ Muchmore, *Passports and Nationality in International Law*, p.318

¹⁶⁶ Torpey, *The invention of the passport*, p.159

¹⁶⁷ *ibid* P.225

¹⁶⁸ *ibid*

¹⁶⁹ Alton and Struble, *The nature of a passport*, p.13

¹⁷⁰ *UDHR*, 1948, 13(2)

Kenya and decided to hold a British passport after decolonisation were not granted the right to enter the United Kingdom.¹⁷¹ After much debate, the United Kingdom decided that returnability ‘is said to be an obligation as between states, and not a claim which the individual can make against the state issuing the passport (save only insofar as the domestic law of the latter provides)’.¹⁷² Dame Rosalyn Higgins said that ‘The 1966 covenant on Civil and Political Rights, mindful of the possibility of the existence of passport holders who had never yet been to their country of nationality, spoke of the right not to be arbitrarily deprived of the right to enter his *own country*’.¹⁷³

The ICCPR General Comment No.27 on the right to freedom of movement released in 1999 broadened the notion of ‘his own country’. This phrase contains not only the right of passport holders to enter their country of nationality, even if they were born and since then have been living abroad. But the interpretation also went beyond the norm of nationality to state that ‘it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien’.¹⁷⁴ That could be understood as meaning that permanent residents in a country also have the right to return to their country of residence, as well as nationals having the right to return to their country of nationality. The only difference in this regard is that a state could deport foreigners denied entry or who no longer have the right to reside in its territory to their country of origin but not to the country where they permanently reside. The procedure of deportation was addressed once by a Canadian court which stated that in order to find out if a state is willing to receive the deportee (assuming the deportee is not in possession of a valid passport), the deporting state must communicate with the receiving state. ‘Such communication takes the form of a passport application’.¹⁷⁵ The individual *could* enter the country of residence but cannot be forcefully returned back there. The deliberate continuity of states’ practice of combining passports and returnability over a long period of time, led of this practice

¹⁷¹ Dame Higgins, *enter, stay in and leave a country*, p.345

¹⁷² *ibid* P.346

¹⁷³ *ibid* P.344

¹⁷⁴ *CCPR General Comment No. 27*, 1999, s20

¹⁷⁵ Daniel C. Turack, ‘Selected Aspects of international and Municipal Law Concerning Passports’, *12 Wm. & Mary L*, rev. 805, 1971, p.820

being recognised as rule of customary international law.¹⁷⁶ There is no doubt that passports enhance international trust, because passports provide a certain place to which the bearer can be returned, assuming their entry to the receiving state was denied or their residence in its territory no longer desired. Dr. Paul Weis described this function saying:

‘Because a kind of contract or obligation results from the granting of a passport to an individual by a state so that when the individual enters a foreign state with the passport, the state whose territory he enters is entitled to assume that the other state whose nationality he possesses will receive him back in certain circumstances’.¹⁷⁷

Foreigners who entered a country for a particular purpose like study, tourism, work etc... are *temporarily* residing in the territory of the receiving country. Either these foreigners will be naturalized upon their application (providing the possibility of naturalization is foreseen in the laws of the country concerned) or they have to leave its territory after the reason for their residence ceases to apply. As long as foreigners have not yet been naturalized, their residence in the receiving state can be ended according to the domestic laws of the state of residence. Passports are the only internationally recognised guarantee which ensures the returnability of their bearer. Hence, passports establish international trust regarding international movement of people.

3.5. Passports are not Owned by the Bearer but are Government Property

Passports are issued by the respective national authorities of a particular state for their nationals upon application. Almost every passport contains, mostly on the last page, a sentence stating that the passport is and remains the property of the issuing state. It is merely in the possession of the bearer who is authorized to use it. Moreover, it is also

¹⁷⁶ Alton and Struble, *The nature of a passport*, p.14

¹⁷⁷ Paul Weis, *Nationality and Statelessness in international law*, Hyperion Press, 1956 p.56

mentioned in some passports that the passport ‘may be withdrawn at any time’¹⁷⁸ or ‘must be returned upon demand’.¹⁷⁹

The fact that passports are the property of the issuing state constitutes possible tension in the case of impounding of passports by foreign authorities in preparation for deportation. The Superior Administrative Court of Munster in Germany stated in its decision on a case challenging the legality of impounding of passports, that ‘the issuance of a passport to a national fall under the personal jurisdiction of the country of origin which the state of residence is required to respect under general principles of international law’.¹⁸⁰ Such decisions, despite their legal correctness, are rare occurrences. Courts and states’ practice of relying on the principles of national security and public order place more importance on deporting foreigners than analysing the nature of passports in a way which makes their impounding an intervention in the passport jurisdiction of other sovereign states.¹⁸¹

Looking at this issue from the other side, one can say that the issuing state as the real owner of the passport could demand its return or even invalidate it. J.D. Alton and J.D. Struble argue that ‘a passport is the property of the issuing government. 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’.¹⁸² This power of the issuing state disturbs and weakens the role of passports in establishing international trust. The receiving state cannot be sure that the passport carried by the foreigner will not be invalidated or withdrawn by the national authorities or the embassies of the issuing state in the near future. However, this invalidation of passports by states does not change the situation of the passport bearer regarding their returnability. Travellers left their country of nationality in the good faith that they are in possession of valid passports. Those people were also admitted by the receiving state in accordance with the

¹⁷⁸ The British passport: ‘This passport remains the property of Her Majesty’s Government in the United Kingdom and may be withdrawn at any time’

¹⁷⁹ *CFR*, art. 51 (7) a ‘A passport at all times remains the property of the United States and must be returned to the U.S. Government upon demand’.

¹⁸⁰ Alton and Struble, *The nature of a passport*, p.15

¹⁸¹ *ibid* p. 10-11

¹⁸² *ibid* p.14

internationally recognised assumption that the issuing state will readmit them. States that have decided for some reasons to withdraw an issued passport for their nationals, mostly issue them a document enabling them to return to their territory. In this case one must distinguish between the mere invalidation of passports and denationalization. In the case of the latter, states' power is restricted according to international conventions *inter alia* by article 9 of the UN Convention on the Reduction of Statelessness, which states that: 'A Contracting State may not deprive any person or group of persons of their nationality on racial, ethnic, religious or political grounds'.¹⁸³ States still have the power to invalidate passports issued by them. As long as passports are issued in accordance with domestic laws, they can be invalidated in the same way. This invalidation has no influence on the returnability of the passport bearer to their country of origin, which is ensured in article 12(4) of the ICCPR, provided that the state has ratified it.¹⁸⁴ The revocation of a passport does not change the national status of its bearer unless it was a result of denationalization. In the case of Edward Snowden,¹⁸⁵ the US State Department revoked his passport but at the same time 'reaffirmed that Snowden remained an American citizen... Only if and when he decides to return to the United States will the State Department grant him an official document permitting his return to the U.S.; it will not grant him a passport of the common kind, which allows a U.S. citizen to remain abroad'.¹⁸⁶ Another example could be seen in the annexation of Crimea. The residents of Crimea were given three months after the Russian annexation to exchange their Ukrainian passports for Russian ones. Travellers were asked to return within three months too.¹⁸⁷ To sum up, states have the power to invalidate passports already in use. This invalidation does not deprive the people of returning to their state of origin. It merely deprives them of the possibility of remaining abroad as nationals of the issuing state.

¹⁸³ *UN Convention on the reduction of statelessness*, 1954, art.9

¹⁸⁴ No one shall be arbitrarily deprived of the right to enter his own country.

¹⁸⁵ Edward Snowden is a whistle-blower. He worked for the National Security Agency and published secret information about its activities.

¹⁸⁶ Patrick Weil, 'Citizenship, Passports, and the Legal Identity of Americans: Edward Snowden and Others Have a case in the Courts', *123 Yale L.J.F.*565, 2013-2014, p.566

¹⁸⁷ Agnieszka Pikulicka-Wilczewska & Richard Sakwa (ed.), *Ukraine and Russia: People, Politics, Propaganda and Perspectives*, Bristol, E-International Relations, 2015, p.70

3.6. The Right to Leave and Passports

The right to leave is an inherent right in the ICCPR article 12(2) which states that ‘Every one shall be free to leave any country, including his own’.¹⁸⁸ The wording of this paragraph makes no distinction between nationals and foreigners regarding the right to leave (everyone). Given the fact that ‘passports are also normally required for entry into other countries, the right to a passport from one’s own government is virtually synonymous with the right to travel abroad’.¹⁸⁹

The CCPR General Comment No.27 states, that:

‘in order to enable the individual to enjoy the rights guaranteed by article 12, paragraph 2, obligations are imposed both on the State of residence and on the State of nationality. Since international travel usually requires appropriate documents, in particular a passport, the right to leave a country must include the right to obtain the necessary travel documents’.¹⁹⁰

The abovementioned General Comment ended the debate at international level as to whether passports are a given from governments and if their issuance lies within the discretion of states or not. It reveals the positive obligation inherent in article 12 (2) ICCPR upon states to issue passports in order to enable their subjects to enjoy the right to leave. States which recognize the right to leave, have the positive obligation to provide their nationals with passports for the reason of international travel. Although the General Comment stated that both countries of residence and of nationality are obliged to provide individuals with the ‘necessary travel documents’, it also provided that ‘The issuing of passports is normally incumbent on the State of nationality of the individual’.¹⁹¹ Still, countries are obliged to ensure everyone within their territory the enjoyment of the rights recognised in the ICCPR.¹⁹² An individual legally residing in the territory of a state party to ICCPR and not in possession of a passport or other travel document enabling him or her to leave its territory, has a right to a travel document for

¹⁸⁸ ICCPR 12(2)

¹⁸⁹ Torpey, *The invention of the passport*, p.221

¹⁹⁰ CCPR General Comment No. 27, 1999. s9

¹⁹¹ *ibid*

¹⁹² ICCPR 2(1)

foreigners issued by the state of residence in accordance with the obligations upon states party to ICCPR, providing the individual does not have a national passport and has no access to one from the diplomatic representative of the country of nationality. This procedure is mostly internally regulated. This could be the case for people enjoying subsidiary protection status in a member state of the EU. Article 25 (2) of the EU Directive 2004/83/EC set forth that:

‘Member States shall issue to beneficiaries of subsidiary protection status *who are unable to obtain a national passport, documents which enable them to travel*, at least when serious humanitarian reasons arise that require their presence in another State, unless compelling reasons of national security or public order otherwise require’.¹⁹³

The right to leave is not an absolute right. It can be subject to restrictions which ‘provided by law, are necessary to protect national security, public order (order public), public health or morals or the rights and freedoms of others,...’.¹⁹⁴ Thus, these restrictions must serve a legitimate purpose, but most importantly they have to be necessary for the protection of this purpose. Moreover, these restrictions must be provided by law and consistent with the rights protected by ICCPR. ‘Furthermore, the principle of proportionality must be respected not only in the law but also in the administrative practices’.¹⁹⁵ There is no list of acceptable restrictions. Countries apply restrictions depending on their interpretation of the restrictions listed in art. 12 (3) ICCPR. For instance, restrictions on brain drain immigration could be justified by poor countries due to suffering lack of skilled people but not by rich countries which mostly facilitate the admission of skilled foreigners.¹⁹⁶ Like the situation in Zambia, where ‘for a population of almost 12 million people, Zambia has only 646 doctors and 6,096 nurses’.¹⁹⁷ On the other hand there are some unacceptable restrictions, which have a

¹⁹³ *EU-Directive 2004/83/EC*, 29 April 2004, art. 25(2)

¹⁹⁴ *ICCPR* 12(3)

¹⁹⁵ Elspeth Guild, Jean Monnet et al, *The right to leave a country*, France, Council of Europe, 2013, p.13-14

¹⁹⁶ *EU-Directive 2016/801*, 11.05.2016

¹⁹⁷ Kieran Oberman, ‘Can Brain Drain Justify Immigration Restrictions?’, *Ethics- University of Chicago press*, vol. 123, no. 3, 2013, p.429

discriminatory nature. Like for instance, prohibiting women from leaving their country without the permission of their husbands, fathers, or other males in charge.¹⁹⁸

The strong relationship between practicing the right to leave and issuance of passports was ‘consistently upheld’ by the Human Rights Committee, asserting that ‘the refusal to issue passports constitutes a breach of Article 12.2 and therefore any state taking this action must justify it under Article 12.3 ICCPR’.¹⁹⁹ This means, that the denial of passport issuance can only be justified according to the restrictions set forth in article 12(3) ICCPR. Unfortunately, states still deal with the matter of passport issuance according to their own domestic law. The Human Rights Committee pointed out some states’ practices which constitute a breach of the right to leave, like *inter alia* ‘issuance of passports only on payment of high fees... [or] the applicant is said to harm the good name of the country’.²⁰⁰ The diversity of restrictions imposed on the right to leave and hence on the issuance of passports as well as the ‘arbitrary’ manner of restrictions imposed by many states because of the wide possible interpretation of article 12(3) urge the international community into regulating the issue of passports at international level. Passports are essential for the right to leave. Without passports, individuals cannot exercise this right. Lesley Higgins and Marie Christine Leps argued ‘what should be advocated, is not an inalienable human right to mobility, but rather an international legal right to a passport, in order to end its status as a government prerogative’.²⁰¹ Even in situations in which states are allowed to restrict the right to leave, there is no need for passport denial. States could impose a travel ban and circulate the names of banned persons to their departure gates. Passport denial merely aims to deprive nationals of the possibility of identifying themselves and claiming the protection of their state abroad, if they decided to leave the state illegally. It also seeks to force them, for this aim, to return to their countries. Passports are an expression of states’ monopolization of their nationals.

¹⁹⁸ § CCPR General Comment No. 27, 1999, s18

¹⁹⁹ Elspeth Guild, Jean Monnet et al, *The right to leave a country*, France, Council of Europe, 2013, p. 14

²⁰⁰ § CCPR General Comment No. 27, 1999, s17

²⁰¹ Higgins and Leps, *Passport, Please*, p.124

3.7. There is no Right to Leave without a Right to Enter

Whereas both the UDHR and ICCPR set forth that everyone has the right to freedom of movement within the territory of the state they reside in, as well as the right to leave any country and to return to their own country,²⁰² they remain silent with regard to the right to enter other countries. Apart from some regional agreements ensuring the right to enter other countries, there is no binding international document laying out the right to enter a foreign territory.

Prof. Torpey argues that ‘the idea of belonging that is at the root of the concept of citizenship is threatened when people cross borders, leaving spaces where they "belong" and entering those where they do not’.²⁰³ The stability of the *Nation State* could be disturbed by foreigners accessing its territory. States are therefore selective regarding who is allowed to enter their territory and who is not, and, above all, for which purpose.

Due to the absence of an international obligation upon states to grant entry to foreigners, and as long as sovereignty is one of the main principles controlling the international system and shaping international relations, no one can assume that after leaving the territory of the state of residence, the state of destination is definitely going to admit him or her.²⁰⁴ Each state has the right according to the principle of sovereignty to determine the conditions under which foreigners may enter its territory, in a way that fulfils the interests of the concerned state and does not constitute discrimination on any basis. Passports play a major role in this regard by ensuring the returnability of their bearer as well as certificating their identity.²⁰⁵ Passports are mostly a precondition for crossing international borders, but they do not always entitle their bearer to enter the state of destination. Depending on the passport the traveller is in possession of, a visa could be required for entering particular countries. ‘Passport and visa controls... are the "first line of defense" against the entry of undesirables’.²⁰⁶ The complicity of the right

²⁰² UDHR art.13, ICCPR art. 12

²⁰³ John Torpey, ‘Coming and Going: On the State Monopolization of the Legitimate “Means of Movement”’, *Sociological Theory*, 16:3, 1998, p. 245

²⁰⁴ Torpey, *The invention of the passport*, p.223

²⁰⁵ Torpey, *Coming and Going*, p.253

²⁰⁶ *ibid* p.252

to enter is not only a result of states refusal to admit foreigners, but it also occurs in some cases because the state of origin forbids its nationals from entering particular countries due to political disputes or even non-recognition issues. They also restrict the entrance of people opposed to their policies. For instance, some Arab states which do not recognize Israel, have not only prohibited their nationals from visiting Israel, but have also refused admission to foreigners whose passports indicated that they visited Israel.²⁰⁷

It lies within the discretion of the state to exclude aliens trying to enter its territory, providing they have no obligation to admit them. Prof. Nafziger argues ‘that a state may exclude aliens under some circumstances at least, and that it must meet its treaty obligations to admit aliens’.²⁰⁸ The internationally protected ‘right to leave a country cannot be fully exercised without a corresponding right to enter another country’.²⁰⁹ The right to leave has no mentionable value if the individual allowed to leave the territory of one state does not have the possibility of entering the state of destination. Still, there is no obligation upon states to admit foreigners to their territory. States are only obliged to practice their discretion without discrimination. Prof. Juss argues that the only duty states have towards people wanting to enter their territory is to treat them justly.²¹⁰

The entry requirements vary depending on which kind of passport the individual seeking entry carries. The world we are living in is divided in two regarding the freedom of movement. The first group contains the inhabitants of developed countries, who enjoy a wide freedom of international mobility. The second contains the inhabitants of the developing countries who are restricted in their international movement.²¹¹ ‘Tourism for the poor is simply unthinkable in a world of consumption’.²¹²

²⁰⁷ Turack, *Selected Aspects*, p.831

²⁰⁸ James A. R. Nafziger, ‘The General Admission of Aliens under International Law’, *The American Journal of International Law*, vol. 77, no.4, 1983, p. 830

²⁰⁹ Juss, *Free Movement and the World Order*, p.294

²¹⁰ Ibid p.318

²¹¹ Salter, *Rights of Passage*, p.149

²¹² Didier Bigo and Elspeth Guild (ed.), *Controlling Frontiers- Free Movement Into and Within Europe*, London and New York, Routledge, 2016, p.7

States conclude treaties to regulate mobility of their nationals in accordance with their economic and social needs, in a way that does not endanger their national or social security. Treaties on mobility determine whether nationals of a particular country are allowed to enter the other country, and the conditions thereto. For example, the agreement on visa liberalisation for Albania and Bosnia Herzegovina concluded with the EU in 2010, which enables nationals of Albania and Bosnia Herzegovina to enter the Schengen area for the purpose of tourism without a visa for no more 90 days, providing they possess a biometric passport. Entering the Schengen area for purposes other than tourism is still conditional on visa requirements.²¹³

The very right to leave is an inherent right in both UDHR and ICCPR. There is no doubt that the enjoyment of the right to leave is impossible without the right to enter the state of destination. The principle of sovereignty enables states to impose restrictions on aliens trying to enter their territories. The conditions for entering a particular state are subject to the domestic laws of the states and to bi-and multilateral treaties on mobility. Hence, the enjoyment of the internationally recognised right to leave is conditional on domestic laws and bi-and multilateral treaties. However, Member States of the United Nations are obliged according to its Charter to promote human rights and freedoms.²¹⁴In addition, article 2(2) of ICCPR states that ‘each State Party [...] undertakes to take the necessary steps, [...], to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant’.²¹⁵

Regarding exercising the right to leave, the Human Rights Committee found in its General Comment No. 27 that states have the positive obligation to issue passports to enable their subjects’ enjoyment of this right. As discussed above, enjoyment of the right to leave is strongly related to the right to enter. A ‘State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party’.²¹⁶

²¹³ Council of the European Union, *Visa liberalisation for Albania and Bosnia and Herzegovina*, 08. Nov. 2010, 15957/10 Presse 294

https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/117555.pdf

²¹⁴ *UN Charter*, art. 55- 56

²¹⁵ *ICCPR*, art. 2(2)

²¹⁶ *CCPR General Comment No.31,2004*, s.10

For this reason, and according to the obligation upon states to take all necessary steps to enable the enjoyment of the rights inherent in ICCPR,²¹⁷ states are obliged to change their domestic laws to ensure their conformity with the provisions of ICCPR.

Justifications on the basis of political, social, cultural or economic reasons are not acceptable.²¹⁸ Moreover, states should liberalize visa restrictions by concluding treaties *granting* travellers the right to enter their territories if they do not endanger their national security or public order. States are always willing to conclude treaties liberalizing the condition of the mobility of products, but when it comes to the mobility of people, states prefer to close the doors of globalization. The Secretary General of the United Nations, Boutros Boutros Ghali said at the World Conference in Vienna in 1993, that ‘I believe that in this point in time it is less urgent to define new rights than to persuade states to adopt existing instruments and apply them effectively’.²¹⁹ The restrictions imposed by states (mostly developed countries) on entry into their territories has led to depriving a wide range of people of enjoying their right to freedom of movement, while the nationals of the developed countries enjoy an almost unrestricted right to enter the territories of the developing countries, ‘Around the world, thousands wait in queues for their turn to immigrate legally to Western countries’.²²⁰

3.8. Conclusion

The passport system is a cornerstone in terms of international mobility. A passport is a document which must be issued by the government of the country, the holder enjoys its citizenship, it serves to clarify the identity and nationality of the holder, and its aim or main use is to enable the holder to travel internationally and return to the territory of the issuance power. Passports contribute to the establishment of international trust because of the function of returnability. They also enable their bearer to identify themselves and to claim the protection of their state of nationality. Passports reflect the strong

²¹⁷ ICCPR, art. 2(2)

²¹⁸ CCPR General Comment No.31,2004, s.13-14

²¹⁹ Juss, *Free Movement and the World Order*, p.295

²²⁰ Gary P. Freeman, ‘National models, policy types, and the politics of immigration in liberal democracies’, *West European Politics*, vol. 29, no. 2, 2006, p.231

relationship between the state and its subjects. Still, passports are a political instrument in the hands of governments, enabling them to monopolize their nationals and to control their borders. The importance of the passport lies in its function as a proof of nationality and not in its function as an identification document.

The very right to leave could not be claimed without countries issuing relevant documents allowing their citizens to legally cross the border. This logical positive obligation upon the states which ratified ICCPR was reaffirmed in the CCPR General Comment No.27 obliging states to provide their citizens with passports, not to mention their passive obligation to abstain from preventing their citizens from leaving the country.

Prof. Satvinder S. Juss wrote: ‘The right to leave a country cannot be fully exercised unless there is a right of entry into another country’.²²¹ Despite the international efforts towards the abolition of visas, there is still no right to enter the territory of another country without its approval.²²² This decision is being mostly taken under the principle of state sovereignty and its right to non-intervention in its internal regulations. This practice makes the enjoyment of a right inherent in international law depending on national laws and bi and multilateral treaties. Admission into a country or expulsion from it primarily depends on the passport travellers are in possession of. For instance, countries are not willing to admit a traveller holding an Afghani passport because of the Taliban in Afghanistan, regardless of whether the traveller is in favour of the Taliban or totally against it. On the other hand, foreign countries are willing to admit people holding passports issued by ‘developed countries’, although some holder of passports issued by ‘developed countries’ have committed terror attacks. Collectively banning passport holders of a particular state from entering a country does not serve the legitimate aim of each state in protecting its national security and public order. It merely discriminates against holders of particular passports. The decision on admitting or excluding a traveller should not simply be taken based on their passports. Instead, it

²²¹ Satvinder S. Juss, ‘Free Movement and the World Order’, *International Journal of Refugee Law*, vol. 16, no.3, 2004, p. 294

²²² Dame Rosalyn Higgins, ‘The right in international law of an individual to enter, stay in and leave a country’, *International Affairs*, vol. 49, no. 3, 1973, p.346.

should be taken after examination of each individual case, in which countries strike a balance between protecting their national security and public order and the interests and rights of the traveller, in light of their obligations under the international conventions they ratified.

IV. Chapter III. Comparison between Germany and Syria regarding Passports and Freedom of Movement

To deepen the understanding of the notion of the passport in general and to examine the issue of discrimination on the basis of passports in particular, a comparison between the notion of the passport in Germany and in Syria was carried out. The differences between these two systems regarding their legislation and the matter of rule of law, as well as the compliance of their domestic legislation with international law in general, and international human rights law specifically, were analysed.

The issuing procedure for passports in both countries, as well as the legal and political grounds for refusal to issue a passport, are compared and discussed in depth in this chapter. Given the fact that the German passport is the second most powerful²²³ passport in the world after that of the United Arab Emirates, and the Syrian one is almost the worst,²²⁴ a comparison between the functions of the German and the Syrian passports, taking into account which treaties and conventions they are members of, was more than essential for this research. Moreover, after an enormous wave of Syrian refugees arrived in Germany seeking protection, Syria has become a hot topic in Germany. It is difficult to compare the legal system of a highly developed country to the legal system of a developing country, but nonetheless it was very useful to indicate the

²²³ Powerful is measured in this regard on the basis of how many countries the passport entitles its bearer to enter without a visa.

²²⁴ *Passport Index*, [website], Comparison between German and Syrian passports, <https://www.passportindex.org/comparebyPassport.php?p1=sy&p2=de&fl=&s=yes> (accessed 14 May 2019)

differences between people's possible enjoyment of their human rights, merely because they hold different passports.

4.1. Germany

In what follows, the German laws and regulations regarding passports and freedom of movement as well as the German understanding of passports will be analysed and assessed in light of the international commitments Germany must fulfil in accordance with the international and regional conventions it has ratified.

4.1.1. Analysis of the German Passport Act

Description and issuance:

The German Passport Act was passed in 1986 and last amended in 2017.²²⁵ This act states in its article 1 that Germans who want to enter or leave the application area of this act have to be in possession of a valid passport.²²⁶ The act differentiates between four kinds of passport (Passports "P", child passports "PC", temporary passports "PP", and service passports "PO").²²⁷ In general, Germans are allowed to carry no more than one German passport.²²⁸

'Passports may be issued only to Germans within the meaning of article 116 (1) of the Basic Law;²²⁹ the passport is the property of the Federal Republic of Germany', though exceptions can be made in special circumstances.²³⁰ This act also foresees the possibility of crossing German borders without a passport depending on special

²²⁵ *Passport Act PassG* of 19 April 1986 (Federal Law Gazette I p. 537), last amended by article 2 of the Act of 07 July 2017 (Federal Law Gazette I p. 2310)

²²⁶ *ibid* art.1 (1)

²²⁷ *ibid* art.1 (2)

²²⁸ *ibid* art.1 (3)

²²⁹ *German Basic Law*, art.116 (1): 'Unless otherwise provided by a law, a German within the meaning of this Basic Law is a person who possesses German citizenship or who has been admitted to the territory of the German Reich within the boundaries of 31 December 1937 as a refugee or expellee of German ethnic origin or as the spouse or descendant of such person.'

²³⁰ *German Passport Act PassG* art.1 (4)

relations with some countries and due to humanitarian reasons.²³¹ People may cross the external borders of Germany only at border crossing points and in respect of inter-governmental agreements.²³²

Article 4 describes the German passport standards and lists the information passports should contain, like *inter alia* full name, gender, citizenship, place of residence and biometric information. Passports must also be provided with a machine-readable zone, in which the personal information of the bearer and their fingerprints are stored. It also foresees the possibility of changing the gender of the bearer in the passport in accordance with the German Act on Transsexuals (*Transsexuellengesetz – TSG*).²³³

Germans over 24 years old are issued passports valid for ten years, whereas Germans aged between 12-24 years will receive passports with six years' validity. Child passports are not valid for more than six years and should expire before their twelfth birthday. Their validity cannot be extended.²³⁴ Passport applicants should submit their applications in person²³⁵ and provide the passport authority with all required documents to confirm their identity and their German citizenship. The authority is allowed to request information from the general register to ensure that the applicant can be issued a passport and that there are no reasons to deny the application.²³⁶ The data protection of the applicant's information and fingerprints is granted.²³⁷ Passport authorities shall keep the information on all issued passports in a register and ensure that only authorized officials have access to this information.²³⁸ The issuance of a normal German passport for ten years costs 60.00 EUR, for six years 37.50 EUR, a child passport costs 13.00

²³¹ *ibid* art.2

²³² *ibid* art.3

²³³ *ibid* art.4

²³⁴ *ibid* art.5

²³⁵ 'If the passport applicant is unable to appear in person, he/she may apply only for a temporary passport'.

²³⁶ *PassG* art.6

²³⁷ *ibid* art. 6a

²³⁸ *ibid* art. 21-22

EUR, and a temporary passport 26.00 EUR.²³⁹ German passports can be applied for at the administrative authority of the place of residence.²⁴⁰

Passport denial and travel bans:

German passport authorities have no discretion regarding passport issuance. An applicant who can provide the passport authority with all required documents shall be issued a passport, unless there are ‘reasonable grounds’ for its refusal. A reasonable ground could be, for instance, that the applicant constitutes an internal or external threat to security or he/she is trying to escape a judicial procedure. Tax or maintenance evasion are also reasons for refusal, as is a breach of the law on the use and traffic of drugs, or the law on monopoly or customs. Passport issuance should also be refused if there is a reason to believe that the applicant intends to serve a foreign army, or is trying to avoid the obligation to carry out military or civil compulsory service.²⁴¹ The reasonability of the refusal of issuance must be provable and not arbitrary. The refusal cannot be justified if ‘it is sufficient to restrict the passport’s area or length of validity’.²⁴²

An issued passport can be revoked for the same reasons mentioned above.²⁴³ A German who has been refused a passport or whose passport was revoked shall not be allowed to leave Germany. Nevertheless, departure should be allowed if there is an urgent reason justifying it. Germans without a passport could be prohibited from leaving the country but not from entering it.²⁴⁴ German applicants who want to return to the Federal Republic of Germany shall not be denied passports.²⁴⁵ German passports can be revoked while the bearer is residing abroad, if he/she committed a crime and ‘the will to evade prosecution is a major reason for continuing [the] stay abroad’.²⁴⁶ Moreover, a German

²³⁹ Regulation on implementing the Passport Act (*Passverordnung PassV*), art.15

²⁴⁰ German Federal Interior Ministry, [website], (Translated by author)
<https://www.bmi.bund.de/DE/themen/moderne-verwaltung/ausweise-und-paesse/reisepass/reisepass-node.html> (accessed 15 May 2019)

²⁴¹ *PassG* art.7(1)

²⁴² *ibid* art.7(2)

²⁴³ *ibid* art.8

²⁴⁴ *ibid* art.10

²⁴⁵ *ibid* art.7(4)

²⁴⁶ Federal Administrative Court in Germany 6 B 3.15, 10.02.2015 (*Beschluss vom 10.02.2015 -BVerwG 6 B 3.15*) (Translated by author).

passport shall be invalidated when it no longer sufficiently establish the bearer's identity, it lacks required information, or its validity has expired. A new amendment was enacted after the debate on the returnability of Germans who have fought in favour of IS. This amendment added the possibility of passport invalidation in the case of joining a terrorist organisation or supporting one as well as in the case of using violence to enforce political or religious views or beliefs. If the issuance requirements cease to apply, the passport must be invalidated.²⁴⁷ Invalid passports must be withdrawn.²⁴⁸ The German Passport Act also states that passports can be confiscated if they are carried by an unauthorized person, or there is a reason to believe that their issuance should have been refused.²⁴⁹ Passports remain the property of the Federal Republic of Germany, even if they are in the possession of individuals. This status is derived from the internationally recognised principle that states have no legitimate power over passports issued by other states. Therefore, passports must be returned to the German authorities following their relevant formal orders.²⁵⁰

The German Passport Act, together with the Regulation and General Administrative Provision on its implementation, provide a comprehensive set of rules dealing with the issue of passports. The only element missing is a definition of the passport itself and its functions.

4.1.2. Germany as a Member State of the European Union:

Article 45(1) of the Charter of Fundamental Rights of the European Union states that 'every citizen of the Union has the right to move and reside freely within the territory of the Member States'.²⁵¹ This Charter only entered into force after the Treaty of Lisbon in

²⁴⁷ *PassG* art.11

²⁴⁸ *ibid* art.12

²⁴⁹ *ibid* art.13

²⁵⁰ *General administrative provision for the implementation of the Passport Act (Passverwaltungsvorschrift - PassVwV)*, §1.4.2

²⁵¹ *Charter of Fundamental Rights of the European Union*, art.45 (1)

2009.²⁵² Before that, the right to freedom of movement was granted to EU Citizens according to EU- Directive 2004/58/EC of 29 April 2004, which stated in its preamble that ‘Citizenship of the Union confers on every citizen of the Union a primary and individual right to move and reside freely within the territory of the Member States’.²⁵³ The provisions of this directive grant EU citizens and their family members who are not EU citizens the right to leave any member state as well as the right to enter any member state and to reside in its territory for up to 90 days without any conditions, providing that the EU citizen is in possession of a valid identity card or passport. The third-national family members must be in possession of valid passports and in certain circumstances they should obtain an entry visa.²⁵⁴ Whereas the ‘entry [to states] itself remains largely beyond human rights protection, and the prosperous nations are doing all they can to make it harder and harder’,²⁵⁵ the right to enter and reside in every member state of EU constitutes a special feature which cannot be found in other regional intergovernmental or supranational organisations. The ECHR itself does not mention the right to freedom of movement, but its Protocol No.4 does. Nevertheless, it merely ensures in its article 2 the right to freedom of movement within the state and the right to leave. It does not ensure any right to enter other states.²⁵⁶ Moreover, Germany is a member state of the Schengen Agreement, which asserts that no ‘border control of persons crossing the internal borders between the Member States of the Union’ should be carried out’.²⁵⁷

The abovementioned conventions and agreements of which Germany is a member, entitle German citizens the right to leave, enter and reside for up to 90 days in each EU state or a state which is a member of the Schengen Agreement without any conditions, except the possession of a valid identity card or a valid passport.

²⁵² European Parliament, [website], *The protection of fundamental rights in the EU*, 2018, <http://www.europarl.europa.eu/factsheets/en/sheet/146/the-protection-of-fundamental-rights-in-the-eu> (accessed 15 May 2019)

²⁵³ *EU-Directive 2004/58/EC*, 29 April 2004, preamble.

²⁵⁴ *ibid* arts. 4-6

²⁵⁵ Catherine Dauvergne, ‘Sovereignty, Migration and the Rule of Law in Global Times’, *The Modern Law Review*, vol. 67, no. 4, 2004, p.612

²⁵⁶ *Protocol No. 4 ECHR*, art.2

²⁵⁷ Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (*Schengen Borders Code*), art.1(1)

4.1.3. Compliance with international and regional human rights law regarding freedom of movement:

According to the provisions of article 12 (1) ICCPR and article 2(1) of the Protocol No.4 of the ECHR, Germany is obliged to grant everyone the right to freedom of movement within its territory and the freedom to choose their place of residence. Germany confers unrestricted freedom of movement on both German citizens and foreigners legally residing in Germany, providing that they have not been charged with committing a crime for which the restriction of freedom of movement is foreseen.

Paragraph 3 of both aforementioned articles foresees the possibility of restricting the right to freedom of movement under certain circumstances and in accordance with law.²⁵⁸ German residence and asylum acts foresee the possibility of imposing restrictions on the freedom of residence and movement of asylum seekers,²⁵⁹ and people whose deportation is temporarily suspended.²⁶⁰ In the case of the former, Germany justifies this restriction with the necessity of the presence of the asylum seeker in the area where their application is being processed.²⁶¹ In the latter case, Germany considers illegal aliens residing in its territory to endanger its national security. Therefore, Germany's priority is to enable the deportation of such persons. Obliging them to take residence in particular locations serves this legitimate aim.²⁶²

After successive waves of asylum seekers entered Germany in the last quarter of 2015, new regulations on the distribution of refugees and people enjoying subsidiary protection were enacted. People who obtained recognition as refugees or subsidiary protection status in Germany after 01 January 2016 are obliged to take their residence in the Federal State where they first entered and claimed for asylum. They are not allowed to move out for three years after they receive recognition (*Wohnsitzauflage*). Germany

²⁵⁸ ICCPR, art. 12(3)- 4th protocol ECHR, art. 2(3)

²⁵⁹ German Asylum Act. *Asylgesetz (AsylG)*, art. 56 (1).

²⁶⁰ German Residence Act. *Aufenthaltsgesetz (AufenthG)*, art. 61 (1)

²⁶¹ German Asylum Act, chapter 6

²⁶² BAMF, *Return from Germany*, Research Study as part of the European Migration Network, BAMF, 2006, p.26 (Translated by author) *Rückkehr aus Deutschland Forschungsstudie 2006 im Rahmen des Europäischen Migrationsnetzwerks BAMF*.

justifies this restriction with its need for the integration of the concerned persons,²⁶³ which the European Court for Justice has accepted.²⁶⁴ Nevertheless, some domestic courts have already found a violation of article 2 of Protocol 4 of the ECHR and rejected the justification provided by the German government. That is the case in North Rhine-Westphalia, where the affected people are not only obliged to stay within the Federal State but also to take residence in particular municipalities. The courts argued that there is no evidence that this allocation facilitates the integration of the people affected.²⁶⁵ To what extent the restriction of freedom of movement imposed on refugees can contribute to facilitating their integration is still unclear. But it apparently serves other aims, like the fair distribution of refugees among the German Federal States, so that refugees do not gather together in one Federal State and build their own parallel society (*Parallelgesellschaft*) within German society.

4.1.4. Migrants with no access to national passports in Germany

States are obliged to enable everyone within their jurisdiction the enjoyment of the right to freedom of movement, which includes the obligation upon states to issue passports or travel documents for this purpose. Passports should normally be issued by the state of nationality.²⁶⁶

However, people enjoying subsidiary protection in Germany do not have a right to travel documents like refugees and stateless persons.²⁶⁷ Whereas the German Asylum Act foresees that the recognition of the refugee status of refugees who have contacted their national embassies for the purpose of issuing or renewal of national passports shall be revoked, people enjoying subsidiary protection are not prohibited from contacting

²⁶³ *German residence Act*, art. 12a (1)

²⁶⁴ *Judgment of the European Court of justice* (Grand Chamber) In Joined Cases C-443/14 and C-444/14 1 March 2016. make sure that you have your references in a uniform matter: dot or no dot after the reference

²⁶⁵ *Higher Administrative Court NRW*, 18 A 256/18- (Translated by author) *Oberverwaltungsgericht NRW*, 18 A 256/18- 04.09.2018

²⁶⁶ *CCPR General Comment No. 27*, s9.

²⁶⁷ *UN Refugee Convention*, 1951, art.28- *Convention relating to the status of stateless persons*, 1954, art.28

their national embassies and applying for national passports.²⁶⁸ Those people have two possible options: Either they obtain a national passport from their national embassies, or conformation issued by the embassy concerned that they would not be issued a national passport. In the latter case, said persons could be issued a travel document for foreigners. Nevertheless, the immigration authorities in Germany have discretionary power in this regard, and they decide individually in each single case whether or not the applicant should be issued a travel document for foreigners. The impossibility of owning a national passport and the necessity to travel are the main requirements for the issuance of this document.²⁶⁹ Applicants must exhaust all possible procedures to obtain a national passport in order to then be issued a travel document for foreigners. Depending on the country of nationality, these procedures could last months or even years.²⁷⁰ During this process, these individuals have no passport or travel document and are deprived of their right to leave as ensured in the ICCPR and ECHR.

Asylum seekers mostly have no identification documents with them.²⁷¹ After they are recognised as refugees, their identity remains unclear. Refugees are not allowed to contact their embassies to apply for identification documents. They are issued travel documents with the note that ‘the identity of the bearer is unclear and based on their own information’.²⁷² This leads to difficulties in the registration of children. If the identity and the nationality of the parents is not certain, then their children will not be issued a birth certificate but merely a sample registration confirmation stating that their identity and nationality is not clarified.²⁷³ It also results in depriving them of the

²⁶⁸ *German Asylum Act*, art. 72(1), (Translated by author)

²⁶⁹ *German Residence Regulation*, art.5-6 (translated by author)

²⁷⁰ To issue a passport for Russian citizens, the permission of the Interior Ministry in Moscow is required. This procedure takes more than 14 months.

²⁷¹ According to the assessments of immigration authorities in Germany, 60% of asylum seekers do not have identification documents. Dr. Richter, Vice President of the German Federal Office for Migration and Refugees, interviewed by Dorothee Frank, 2018, Nürnberg

<http://www.bamf.de/DE/Service/Top/Presse/Interviews/20181008-interview-cyber-security-report/interview-cyber-security-report-node.html> (accessed 14 May 2019)

²⁷² *The German Parliament (Deutscher Bundestag)*, WD 3- 3000- 030/18, 06.02.2018, p.6 (Translated by author)

²⁷³ Stephan Gerbig, ‘Keine Papiere- keine Geburtsurkunde?’, *German Institute for Human Rights*, 2018, https://www.institut-fuer-menschenrechte.de/fileadmin/user_upload/Publikationen/POSITION/Position_18_Keine_Papiere_keine_Geburtsurkunde.pdf (Translated by author) (accessed 12.06.2019)

possibility of owning a driving licence, because a clarified identity is a precondition for applying for a driving licence.²⁷⁴

4.1.5. The functions of the German passport and Germans' understanding of the notion of the passport

The Germans participating in the survey launched by the author were partly Germans by birth and partly Germans by naturalization. Both the former and the latter groups believed that they have a right to obtain a passport because they are German. A passport is, in their opinion, merely a document for facilitating international travel.²⁷⁵

After the right wing and in particular the alternative party for Germany *AFD* gained more power and popularity in Germany, supporters of this party started questioning whether everyone in possession of a German passport should be regarded as German. They argued that people who have gained German citizenship by naturalization are not as German as people who have German origins.²⁷⁶ It is worth mentioning that just a minority of Germans believe that there is a difference between Germans by origin and Germans by naturalization. Until 1999, foreigners had no access to German citizenship and hence to a German passport.²⁷⁷ On the other hand, there are people who were born and grew up in Germany but who do not feel they are German, and hence refuse to carry a German passport. This case can be clearly seen among the Turkish population in Germany. The new generation is aware of the value of a German passport in facilitating visa-free travel, yet 'from their perspective, if they decide to carry a German passport,

²⁷⁴ George Classen, *Guide for refugees in Berlin*, Berlin, Flüchtlingsrat Berlin, 2017, p.258, (Translated by author)- *Ratgeber für Geflüchtete in Berlin* <https://www.women-in-exile.net/wp-content/uploads/2014/12/ratgeber.pdf>

²⁷⁵ The results of the survey can be found under the following link: <https://de.surveymonkey.com/results/SM-JLRWJZPTV/>

²⁷⁶ Jasmin Schreiber, 'Andreas Wild von der AfD erklärt, was Passdeutsche sind und wie Migranten die Frauen wegschnappen', *La Vie Vagabonde*, 27.02.2017 <https://www.lavievagabonde.de/2017/02/27/andreas-wild-von-der-afd-erklaert-was-passdeutsche-sind-und-wie-migranten-die-frauen-wegschnappen/> (accessed 15 May 2019)

²⁷⁷ Max Friedrich Steinhardt, 'Does citizenship matter? The economic impact of naturalizations in Germany', *Labour Economics*, vol.19, 2012, p.814

they will sacrifice their identity for nothing'.²⁷⁸ It seems that both the supporters of the right wing as well as the new generation of Turkish youths in Germany believe that passports are an expression of national identity.

The new generation of German passports has been available since 01 March 2017. The new German passport is recognised as one of the passports most protected against counterfeiting worldwide.²⁷⁹ The German passport fulfils the requirements of the EU-Directive on the Integration of biometric features in passports and travel documents.²⁸⁰ It contains an electronic card on which the personal information of the bearer as well as their photo and finger prints are stored.²⁸¹ In the 2017 3.7 million passports were produced by the *Bundesdruckerei* in Germany.²⁸²

The German passport occupies second place on the international ranking of passports. It enables the bearer to enter 127 countries visa-free and 40 countries with visa on arrival. For 31 other countries, bearers of German passports should apply for a visa in advance.²⁸³ In contrast, nationals of just 92 countries are allowed to enter Germany without an entry visa.²⁸⁴

The German passport entitles its bearer to claim the protection of German representatives abroad.²⁸⁵ This protection includes offering help for Germans who are in

²⁷⁸ Çetin Çelik, 'Having a German passport will not make me German: reactive ethnicity and oppositional identity among disadvantaged male Turkish second-generation youth in Germany', *Ethnic and Racial Studies*, vol. 38, no. 9, 2015, p.1654

²⁷⁹ *Federal Ministry of the Interior, Building and Community*, [website], *Contemporary security features, new materials 23.02.2017* (Translated by author) *Zeitgemäße Sicherheitsmerkmale, neue Materialien* <https://www.bmi.bund.de/SharedDocs/pressemitteilungen/DE/2017/02/reisepass.html> (accessed 15 May 2019)

²⁸⁰ *Council Regulation (EC) No 2252/2004*, 13 December 2004, on standards for security features and biometrics in passports and travel documents issued by Member States.

²⁸¹ Federal Office for Information Security, [website], (Translated by author) <https://www.bsi.bund.de/DE/Themen/DigitaleGesellschaft/ElektronischeIdentitaeten/ePass/ePassSeite.html> (accessed 15 May 2019)

²⁸² *Federal Ministry of Finance*, [website], p.5, <https://www.bundesfinanzministerium.de/Monatsberichte/2019/01/Inhalte/Kapitel-3-Analysen/3-7-beteiligungsbilanz-bundesdruckerei.html> (accessed 15 May 2019)

²⁸³ *Passport Index*, [website], <https://www.passportindex.org/byRank.php?ccode=de> (accessed 15 May 2019)

²⁸⁴ *Federal Foreign Office*, [website], (translated by author), <https://www.auswaertiges-amt.de/en/einreiseundaufenthalt/visabestimmungen-node/staatenlistervisumpflicht-node> (accessed 15 May 2019)

²⁸⁵ *German Consular Act*, art.1, (Translated by author) *Konsulargesetz*

need or in disaster situations. Depending on the particular situation, this help could include transporting them back to Germany or providing them with legal insurance. It could also be in the form of social aid for Germans who are imprisoned in a foreign country. Germans in possession of dual citizenship cannot claim the protection of the German representative in the country whose citizenship they also possess.²⁸⁶ Many Turkish-Germans are detained in Turkey and Germany cannot intervene in their favour because they have Turkish citizenship too.²⁸⁷ In countries in which Germany is not diplomatically represented, Germans can claim the protection of any other EU state represented there. This protection is limited to emergency situations.²⁸⁸

The German passport entitles its bearer to wide freedom of international mobility. It also provides high security features ensuring the identity of the bearer and strict protection against forgery, which makes it one of the most reliable passports globally.

4.2. Syria before the Syrian War

For the credibility of the research, it was necessary to differentiate between the current situation in Syria and the situation before the outbreak of the Syrian War.

In what follows, the Syrian regulations regarding passports and freedom of movement as well as the practices of the Syrian government in restricting this freedom will be analysed in light of national and international reports on the human rights situation in Syria before the outbreak of the Syrian War in March 2011.

²⁸⁶ Ibid art. 5-6

²⁸⁷ Christian Buttkeireit, 'Die fünf Deutschen in türkischer Haft', *Tagesschau*, 28.09.2018, (Translated by author) <https://www.tagesschau.de/ausland/tuerkei-ueberblick-gefangene-101.html> (accessed 15 May 2019)

²⁸⁸ *Federal Foreign Office*, [website], (translated by author), <https://www.auswaertiges-amt.de/de/ReiseUndSicherheit/reise-und-sicherheitshinweise/konsularinfo/konsularhilfe-eu> (accessed 15 May 2019)

4.2.1. The Right to Freedom of Movement:

On 21 April 1969, Syria ratified the ICCPR without any reservations on the right to freedom of movement.²⁸⁹ However, not only the freedom of movement was restricted in Syria, but a wide range of other human rights as well. ‘The state of emergency, in place since 1963 provides a legal basis for emergency laws used to justify violations of freedom of expression and association and other civil and political rights, enforced disappearance, prisoner abuse, travel bans, arbitrary arrest and unfair trials’.²⁹⁰ Syria justified the application of the emergency law by citing the state of war with Israel and the Syrian occupied territories.²⁹¹ The state of emergency was enforced in Syria after the ‘military coup brought the Ba’th Party and others to power’.²⁹² This state of emergency constitutes a violation of the ICCPR, which states in its article 4(3) that each member state is obliged to report any *temporary* derogation it has taken during a state of emergency and the reasons therefore, as well as the date of its termination. Nevertheless, the Syrian government has never submitted such a report or notification.²⁹³

The violations against the right to freedom of movement committed against the Syrian population when Hafiz Al-Assad was in power cannot be analysed in one thesis or even a doctoral dissertation.²⁹⁴ Hafiz was succeeded by his son Bashar, who is the current President of Syria and allegedly sought to reform the Syrian government towards democracy and liberalisation.²⁹⁵ Unfortunately, the outcome was totally different.

²⁸⁹ Treaty Collection of the United Nations.

²⁹⁰ United Kingdom Foreign & Commonwealth Office, *Human Rights and Democracy: The 2010 Foreign & Commonwealth Office Report*, London, The Stationery Office Limited on behalf of the Controller of Her Majesty’s Stationery Office, 2011, p.310

²⁹¹ *ibid.*

²⁹² Amnesty International, *Syria submission to the UN Universal Periodic Review 12th session of the UPR Working Group*, Amnesty International, 2011, p.1

²⁹³ *ibid.*

²⁹⁴ Hafiz Al-Assad, the father of the current President Bashar Al-Assad, was the President of Syria from 1970 until his death in 2000 and was known as a brutal and intolerant dictator.

²⁹⁵ Bashar al-Assad, inauguration as President of Syria, speech in parliament, 2000, <https://al-bab.com/documents-section/president-bashar-al-assad-inaugural-address> (accessed 15 May 2019)

In terms of the freedom of movement, in 2001, ‘many designated categories of nationals [were] still required to obtain an exit visa each time they wish to leave the country’.²⁹⁶ In addition, many Syrians living abroad were forbidden from returning to Syria and their applications for passports were refused for political reasons.²⁹⁷ The Syrian government’s justification for the imposition of the exit visa was that it aims to prevent criminals from leaving the country.²⁹⁸ Why passport control is not sufficient to prevent criminals from leaving the country is still unclear. At the end of 2002, the exit visa requirement was abolished for everyone, except state employees who still need permission to leave. Crossing the Syrian borders requires that travellers are in possession of a valid passport.²⁹⁹ Legally, women were allowed to leave the country on their own but their husbands were entitled to prevent them from leaving the country with their children.³⁰⁰ Syrians who were exiled to Iraq in the 1980s were not issued passports by the Syrian embassy in Baghdad.³⁰¹

Before the war, Syria was a destination for foreign domestic servants, who mostly came from Southeast Asia and East Africa. Those people were deprived of their right to freedom of movement and their passports were confiscated.³⁰²

Using the pretext of ‘weakening the national sentiment’, the Syrian government banned more than 400 critics of the Syrian regime from leaving Syria. Those people learned of the ban at the border while trying to leave. The real aim of these travel bans was in fact preventing these activists from participating in international conferences and hence preventing their voices from being heard internationally and disrupting the "democratic"

²⁹⁶ Concluding Observations of the Human Rights Committee, Syrian Arab Republic, 24.04.2001, CCPR/CO/71/SYR, §.21

²⁹⁷ *ibid*

²⁹⁸ Comments by the Government of the Syrian Arab Republic on the concluding observations of the Human Rights Committee. 28.05.2002, CCPR/CO/71/SYR/Add.1, §.41

²⁹⁹ Consideration of reports submitted by States Parties under article 40 of the covenant, Third periodic report SYRIA 19 October 2004 CCPR/C/SYR/2004/3 §§180,189

³⁰⁰ Freedom House, *Women's Rights in the Middle East and North Africa 2010 - Syria*, 3 March 2010, available at: <https://www.refworld.org/docid/4b99011dc.html> (accessed 15 May 2019)

³⁰¹ Home Office- UK Border Agency, *Country of origin information report- The Syrian Arab Republic*, UK, Country of Origin Information Service, 03.09.2010, p.9

³⁰² *ibid* p.110

image of the Syrian regime at the international level.³⁰³ Due to the non-recognition of Israel, Syrians are not allowed to travel to Israel.³⁰⁴ Apart from all these restrictions, the then Syrian constitution ensured every citizen in its article 33(2) the right to freedom of movement.³⁰⁵ Compliance with international standards was provided by the legal text but definitely not by state practices.

The promises of democracy and freedoms made by the Syrian President Bashar Al-Assad were no more than propaganda. The government continued to oppress its nationals and prevent everyone who claimed the application of human rights or the establishment of civil society from leaving the country. A report submitted by a Syrian journalist who suffered under a travel ban stated: ‘They never properly told me why I was banned from leaving but as is customary for Syrian security officers, they tried to lure me into becoming an informant. The idea of betraying my family and friends was out of the question. I will never collaborate’.³⁰⁶

4.2.2. People with no access to a national passport in Syria:

The Syrian government did not ratify the 1951 Refugee Convention. After the establishment of Israel in 1948 and the Arab-Israel war in 1967, several hundred thousand Palestinians were forced to leave their homes and moved to Syria,³⁰⁷ Lebanon and Jordan. Palestinians in Syria enjoyed ‘the same rights as Syrians, except for those rights dependent on nationality’.³⁰⁸ Since 1963, Palestinians have been issued travel documents, providing that they are ‘registered with the General Administration for Palestine Arab Refugees and hold Syrian provisional identity cards’.³⁰⁹ The disputes

³⁰³ United States Department of State, *2009 Country Reports on Human Rights Practices - Syria*, 11 March 2010, available at: <https://www.refworld.org/docid/4b9e52b78e.html> (accessed 15 May 2019)

³⁰⁴ *ibid*

³⁰⁵ Consideration of reports submitted by State Parties under article 40 of the covenant, Third periodic report SYRIA 19 October 2004 CCPR/C/SYR/2004/3, § 179

³⁰⁶ Institute for War and Peace Reporting, *The Injustice of Travel Bans*, 4 December 2009, SB No. 84, available at: <https://www.refworld.org/docid/4b1e0df6c.html> (accessed 15 May 2019)

³⁰⁷ ‘The UNRWA reported there were approximately 460,000 registered Palestinian refugees in the country’.

³⁰⁸ United States Department of State, *Syria*, 2010

³⁰⁹ *ibid*

between Hafiz Al-Assad and Yasser Arafat³¹⁰ starting in 1982 led to the imposition of strict restrictions on the movement of Palestinians residing in Syria, who since then have been obliged to obtain permission from the Syrian security apparatus in order to be issued travel documents. Palestinians residing in Syria have no right to naturalization because the Syrian government is of the opinion that the naturalization of Palestinians will endanger the Palestinian case at the international level and deprive them of the right to return to Palestine.

The UNHCR estimated that about 1,100,000 Iraqis fled to Syria after the US invasion of Iraq in 2003. Those people had no access to travel documents issued by the Syrian government. Moreover, Syria has required an entry visa from Iraqis wanting to enter Syria since 2007, whereas citizens of other Arab League countries had no such obligation.³¹¹ Problems for Syrian Kurds started after the census of Al-Hasakah,³¹² which resulted in approximately 120,000 Syrian Kurds losing their citizenship. According to UNHCR estimations, more than 300,000 stateless Kurds were living in Syria in 2009.³¹³ Syria is neither a member state of the 1954 Convention relating to the Status of Stateless Persons nor the 1961 Convention on the Reduction of Statelessness,³¹⁴ hence Syria does not issue travel documents for stateless persons. Stateless Kurds were considered undocumented people. It is illegal to leave Syria without a passport, and stateless Kurds do not have any kind of documents. They were thus stuck in Syria and deprived of their rights. Kurds who were granted Syrian citizenship but who were engaged politically against the Syrian regime were mostly imprisoned and ‘have their civil rights revoked after release... [which] entails that one has an exit ban imposed and the denial of a passport’.³¹⁵ Almost every opponent and human rights activist constituted a serious threat to the stability of the Syrian regime as

³¹⁰ Chairman of the Palestine Liberation Organization (PLO) from 1969 to 2004 and President of the Palestinian National Authority (PNA) from 1994 to 2004.

³¹¹ United States Department of State, *Syria*, 2010

³¹² This census determined who among the Kurds in Northern Syria would be granted Syrian nationality. Read more: <https://www.stj-sy.com/en/view/745>

³¹³ UK Border Agency, *The Syrian Arab Republic*, p.127

³¹⁴ UNHCR, [website], <https://www.unhcr.org/un-conventions-on-statelessness.html> (accessed 15 May 2019)

³¹⁵ Landinfo, *Report Syria: Kurds – Groups at risk and reactions against political activists*, Oslo, Landinfo, 16.06.2010, p.14

the only ruler of Syria. Therefore, those people were heavily oppressed and banned from leaving the country.

4.2.3. The Syrian passport and its functions

In 2010 ‘the Syrian government has started the issuance of the new photo-digitized machine-readable passport with newly introduced security features’,³¹⁶ before that, the information in Syrian passports was handwritten and easy to forge. Syrian passports were valid for travelling to every country except Israel. Moreover, ‘Jews were the only religious minority group whose passports and identity cards noted their religion’.³¹⁷ Syria’s relations with the USA and European countries were poor, because of Syria’s support for Hamas³¹⁸ and Hizb-Allah,³¹⁹ as well as due to Syria being an ally of Iran. In addition, Syria’s non-compliance with international conventions and its disrespect for human rights led developed countries and many others to impose visa restrictions on the entry of Syrian citizens into their territories.

Syria’s membership of the Arab League does not provide any extra facilitations or guarantees regarding the mobility of people. The Arab Human Rights Charter ensures in its articles 26-27 the right to leave and choose one’s place of residence. Nonetheless, there are no monitoring mechanisms or even reports issued by the member states which could enhance the protection of the rights inherent in the Charter.³²⁰

Syrian passports were issued with validity either for two or six years depending on the gender, age, and conscription situation of the applicant. Males who had not yet completed the obligatory military service were neither issued passports nor allowed to

³¹⁶ UK Border Agency, *The Syrian Arab Republic*, p.127

³¹⁷ *ibid* p.129

³¹⁸ ‘Islamic Resistance Movement, militant Islamic Palestinian nationalist movement in the West Bank and Gaza Strip’ <https://www.britannica.com/topic/Hamas>

³¹⁹ Islamic Shiite political party supported mainly by Iran and based in Lebanon.

³²⁰ *The Arab Human Rights Charter*, last amended 23.05.2004, (Translated by author) <http://www.lasportal.org/ar/sectors/dep/HumanRightsDep/Documents/%D8%B9%D8%B1%D8%A8%D9%8A.pdf>

leave the country.³²¹ Syrians living abroad who did not want to carry out military service faced two options: either their passports were not renewed, or they had to pay a certain fee, amounting to between 2,000-15,000 USD.³²²

Every Syrian male aged between 17 and 50 needed the permission of the conscription authorities in order to be issued a passport. Given the fact that the Syrian government ‘does not recognize the right to conscientious objection to military service’, the issuance of passports was strongly related to the conscription situation of the applicant, which constituted a major obstacle for millions of Syrians.³²³ Moreover, Syrians who obtained a passport and were able to travel abroad were mostly interrogated by the Syrian security apparatus upon their return.

4.3. Current Situation in Syria: the ‘State of Emergency’

This section seeks to analyse Syrian legislation and the practices of the Syrian government regarding freedom of movement and passports. The Syrian understanding of the notion of passport is also addressed. The extent to which Syria has restricted the right to freedom of movement, as well as the accessibility of Syrian passports and their functions in the current situation, are also discussed. In a state of emergency, some rights can be restricted under certain circumstances.³²⁴ After the outbreak of the revolution in Syria in March 2011, the Syrian President abolished the state of emergency which had applied since 1963.³²⁵ Officially, a state of emergency has not been announced again since then; nevertheless, nothing has changed regarding the oppression of people’s rights and freedoms.

³²¹ Canada: Immigration and Refugee Board of Canada, *Syria: Compulsory military service, including age limit for performing service; penalties for evasion; occasions where proof of military service status is required; whether the government can recall individuals who have already completed their compulsory military service*, 8 March 2007, SYR102395.E, available at: <https://www.refworld.org/docid/47d6547928.html> (accessed 15 May 2019)

³²² *ibid*

³²³ Concluding observations of the Human Rights Committee, Syrian Arab Republic, 09.08.2005. CCPR/CO/84/SYR, §.11

³²⁴ *ICCPR*, art. 4(3)

³²⁵ *BBC News*, ‘Syria protests: Assad to lift state of emergency’, [website], 20.04.2011, <https://www.bbc.com/news/world-middle-east-13134322> (accessed 15 May 2019)

4.3.1. Analysis of the Syrian Passport Act

The Syrian president acting upon the provisions of the Syrian constitution, issued the Passport Act, which was adopted by the Syrian parliament on 02 November 2014.³²⁶

Article 1 of this act gives a brief definition of the Syrian passport and the travel documents for Palestinian refugees. It states merely that passports are official travel documents conferred on Syrian citizens, and that travel documents are also official travel documents conferred on Palestinian refugees residing in Syria and registered by the General Authority for Palestinian Arab Refugees.³²⁷ Syrians are not allowed to leave or enter Syrian territory without a passport. They may cross the borders through the official appointed checkpoints.³²⁸ Syrian passports and travel documents for Palestinians can be issued by Syrian diplomatic representatives abroad and the Syrian Directorate for Migration and Passports internally, whereas the foreign ministry is responsible for the issuance of diplomatic, special and service passports.³²⁹ Syrian passports may be issued to Syrian citizens who fulfil the requirements of owning a passport.³³⁰ The issuance of a Syrian passport or a travel document for Palestinians normally costs 4,000 SYP (almost 8.00 USD now) or as express issuance for 15,000 SYP (almost 30.00 USD now) for people whose usual residence is in Syria.³³¹ For Syrians residing outside Syria, the issuance of a passport costs 400.00 USD.³³²

The executive regulations of the Passport Act determined the documents required to apply for a Syrian passport, which are *inter alia* an identity document (identity card, expired passport, or personal civil registration), the permission of the employer in case of an employee working for the state,³³³ the permission of the conscription authorities

³²⁶ *Syrian Passport Act*, 02.11.2014, *Presidential Order* No. 18/2014 (Translated by author).

³²⁷ *ibid* art.1

³²⁸ *ibid* art.2, 5

³²⁹ *ibid* art. 6

³³⁰ *ibid* art. 7

³³¹ *ibid* art. 10

³³² *Decree No 17*, 21.04.2015 by the Ministry of Foreign Affairs and Immigration. (Unofficial translation prepared by UNHCR).

³³³ Syrian Interior Ministry, [website], 'If they have the permission, they get an exit visa valid for one month', (Translated by author)

<http://www.syriamoi.gov.sy/portal/site/arabic/index.php?node=55444&cat=61&> (accessed 15 May 2019)

for males aged between 17-50, and proof of profession for people aged between 18-60.³³⁴

In summer 2018, the Syrian government issued a new executive order, requiring every Syrian male aged between 17-42 to present a special permission (exit visa) issued by the conscription authorities in order to leave Syria, even if they are in possession of a valid passport.³³⁵

Given the fact that the rule of law is not well respected in Syria, the practices of the government differ in particular points from the legal texts.

4.3.2. Accessibility of Syrian passports and issuing procedure internally and abroad

One of the results of the Syrian war was that more than eight of the 14 passport offices were out of service.³³⁶ Moreover, the destruction ‘of 50 per cent of civil affairs departments’ and the fact that many internally displaced persons lost their identifications documents, led to depriving many displaced people of the possibility of identifying themselves.³³⁷ In turn, this has negative implications on the ability of those people to access public services or to pass the military checkpoints placed almost everywhere in Syria.³³⁸ The lack of identification documents also resulted in depriving those people of the possibility of applying for a passport. ‘With the destruction or

³³⁴ Syrian Interior Ministry, [website], (Translated by author) <http://www.syriamoi.gov.sy/portal/site/arabic/index.php?node=55444&cat=62&> (accessed 15 May 2019)

³³⁵ Enab-Baladi, ‘موافقة سفر’ شرط لمغادرة سوريا’, [website], 02.09.2018, (translated by author), <https://www.enabbaladi.net/archives/249645> (accessed 15 May 2019)

³³⁶ Canada: Immigration and Refugee Board of Canada, *Syria: Requirements and procedures to obtain, renew, and replace passports and national identity cards, including in Canada and in neighbouring countries; information and details contained in each document, including physical characteristics (2015-July 2017)*, 11 September 2017, SYR105970.E, available at: <https://www.refworld.org/docid/59d384c14.html> (accessed 15 May 2019)

³³⁷ *Report of the Special Rapporteur on the human rights of internally displaced persons on his mission to the Syrian Arab Republic*, New York, UN General Assembly, A/HRC/32/35/Add.2, 05.04.2016, §§33-34

³³⁸ *ibid*

closure of civil registries and complicated processes for issuing documents to refugees in host countries, proving who you are can be a major challenge'.³³⁹

In addition, in light of the ongoing war, the issuance requirement that Syrian males should have done their military service constitutes an impossible condition. Aside from the high possibility of being killed during the hostilities, due to a lack of soldiers those conscripted are unlikely to be discharged again. Many Syrians have been doing their military service for more than eight years now.³⁴⁰

Inhabitants of the areas which rebelled against the Syrian regime, as well as opponents of the regime and their families, have been repeatedly denied passports.³⁴¹ These people have no way to challenge this passport denial. It is not even a formal decision, rather applicants have been informed in the passport office that they cannot be issued a passport without any explanations or reasoning.³⁴² Hence, they have no possible way to leave Syria legally. Syrians who have left Syria illegally face imprisonment.³⁴³

Until 23 April 2015, Syrians living abroad who applied for a passport were subjected to 'an intelligence service review'.³⁴⁴ Then the Syrian government lifted this requirement and 'at the same time raised the fee of issuance and renewal abroad to USD 400 and USD 200, respectively'.³⁴⁵ Furthermore, in March 2017, the Syrian government amended the aforementioned prices, which now amount to USD 300 for the issuance of

³³⁹ Marion Couldrey & Jenny Peebles (ed.), *Forced migration Review, Syrians in displacement*, Oxford, University of Oxford- Refugee Studies Centre, February 2018, p.59

³⁴⁰ Arabic RT (Russia Today), [website], 'صدر قرار تسريح أقدم بورة في الجيش السوري' (translated by author), <https://arabic.rt.com/middle-east/946430-%D8%A8%D8%B9%D8%AF-%D8%AB%D9%85%D8%A7%D9%86%D9%8A-%D8%B3%D9%86%D9%88%D8%A7%D8%AA-%D9%85%D9%86-%D8%A7%D9%84%D8%AE%D8%AF%D9%85%D8%A9-%D8%B5%D8%AF%D9%88%D8%B1-%D9%82%D8%B1%D8%A7%D8%B1-%D8%AA%D8%B3%D8%B1%D9%8A%D8%AD-%D8%A3%D9%82%D8%AF%D9%85-%D8%AF%D9%88%D8%B1%D8%A9-%D9%81%D9%8A-%D8%A7%D9%84%D8%AC%D9%8A%D8%B4-%D8%A7%D9%84%D8%B3%D9%88%D8%B1%D9%8A/#> (accessed 15 May 2019)

³⁴¹ Syrian Network for Human Rights, [website], 17.06.2014 (translated by author) <http://sn4hr.org/arabic/2014/06/17/1498/> (accessed 15 May 2019)

³⁴² Syrian Network for Human Rights, 'the fourth worst passport and the highest material cost in the world', 28.01.2019, (translated by author)

³⁴³ UNHCR, "Illegal Exit" from Syria and Related Issues for Determining the International Protection Needs of Asylum-Seekers from Syria, UNHCR, February 2017, p.3

³⁴⁴ Ibid p.6

³⁴⁵ ibid

a passport in a regular procedure (which takes almost three months), and USD 800 for the issuance of passport in the express procedure (which takes no more than three days). Passport renewal was abolished.³⁴⁶ The extremely high costs of Syrian passports, and the fact that Syrian embassies were closed in many countries which have frozen their diplomatic relations with the Syrian government, has led to obstacles to the accessibility of Syrian passports for Syrians living abroad. Moreover, many Syrians do not want to financially support the Syrian regime, for which ‘the issuance of passports abroad is an important source’ of funds now.³⁴⁷ Given the fact that Syrians have no other option than a Syrian passport and that almost all countries require foreigners to be in possession of a valid passport, Syrians are forced to go to Syrian embassies and apply for Syrian passports.³⁴⁸ The National Coalition of Syrian Revolution and Opposition forces tried to renew passports for Syrians who have no access to them, but these passports were not recognised internationally and hence they remained worthless.³⁴⁹

4.3.3. The Functions of the Syrian Passport and Syrians’ Understanding of the Notion of Passport

The Syrian passport is composed of 48 pages and contains a digitalized photo of its bearer as well as the usual personal information. The names of the father and the mother of the bearer are also noted in the Syrian passport to avoid when possible problems caused by similarity of names.³⁵⁰ The validity of the Syrian passport amounts to either two years or six years and depends on the conscription status of the applicant. The determination of the validity of Syrian passports lies within the discretion of the Syrian authorities, as do their issuance or denial.

The Syrian passport has also a machine-readable zone which contains the personal information of the bearer and their photo and fingerprints. This feature was supposed to

³⁴⁶ Immigration and Refugee Board of Canada, *Syria: Requirements and procedures*, 2017

³⁴⁷ UNHCR, “*Illegal Exit*”, p.7

³⁴⁸ Syrians who enjoy refugee status are not required to have a Syrian passport.

³⁴⁹ *The Syrian Observatory for human Rights*, [Website], 2015, <http://www.syriahr.com/?p=92293> (accessed 20 June 2019)

³⁵⁰ Immigration and Refugee Board of Canada, *Syria: Requirements and procedures*, 2017

improve the security level of the Syrian passport. Nevertheless, many Syrians who were denied passports have bribed ‘an immigration official into issuing a new Syrian passport with false name’.³⁵¹ After the Syrian government withdrew from many areas in Syria, especially after the rise of IS in North-Eastern Syria, thousands of blank passports ended up in the hands of unauthorised people.³⁵² In addition, forgery of Syrian documents and especially passports was widespread in Turkey after 2015.³⁵³ As a result, the credibility of Syrian passports was highly doubtful. The German authorities have not been recognising Syrian passports issued by the authorities in ar-Raqqa, al-Hasaka, Deir ez-Zor and Idlib since 2016.³⁵⁴ Moreover, every Syrian passport is suspected of being forged and Syrian passports are mostly examined before recognition.

The Passport Index ranked the Syrian passport as the fourth worst passport in the world. It entitles its bearer to enter nine countries visa free, and 28 countries with visa upon arrival.³⁵⁵ After the exclusion of Syria from the Arab League in November 2011,³⁵⁶ almost all Arab countries imposed visa requirements on holders of Syrian passports, with the exceptions of Yemen, Somalia, and Sudan. All European countries as well as Canada, the USA and Australia introduced special procedures for holders of Syrian passports.

‘You will not recognize its value, until you lose it. It is very important, it is a guarantee, even if many people underestimate it. The passport is dignity!’ These are the words of a Syrian girl describing her understanding of the passport. Almost every Syrian residing in Syria who participated in the survey described the passport as a dream or as a key

³⁵¹ Danish Immigration Service- Austrian Centre for Country of Origin, *Human rights issues concerning Kurds in Syria*, Vienna and Copenhagen, ERF- UNHCR- B.M.I, May 2010, p.16

³⁵²The Local, *Isis holds 11,100 blank Syrian passports: German officials*, [website], 10.09.2017, <https://www.thelocal.de/20170910/isis-holds-11100-blank-syrian-passports-german-officials> (accessed 15 May 2019)

³⁵³ BBC-News, *Germany seizes fake Syrian passports in asylum inquiry*, [website], 04.09.2015, <https://www.bbc.com/news/world-europe-34150408> (accessed 15 May 2019)

³⁵⁴ The German Missions in Turkey, *Information Sheet 80*, [website], March 2017, <https://tuerkei.diplo.de/blob/1685456/f421cd5ff284f11ab4af2efe52ae744b/80-erleichtertes-visumverfahren-fz-zum-syrischen-fluechtling-eng-data.pdf> (accessed 15 May 2019)

³⁵⁵ *Passport Index*, [website], <https://www.passportindex.org/byRank.php?ccode=sy> (accessed 15 May 2019)

³⁵⁶ The Guardian, *Syria suspended from Arab League*, [website], 12.11.2011, <https://www.theguardian.com/world/2011/nov/12/syria-suspended-arab-league> (accessed 15 May 2019)

instrument in being recognised as a human being. In addition, about 90% said that they had to bribe someone in order to obtaining a passport. Although all of them believed that they have a right to own a passport, Syrian males thought that they could be denied passports due to conscription reasons. Syrians in Germany described their travel documents for refugees as an identification document for the purpose of international travel.³⁵⁷

4.4. Comparison and Analysis

Having presented the situation regarding passports in Germany and Syria, in this part, these countries will be compared in terms of the legal and functional aspects of their passports as well as the right to freedom of movement.

Both the German and the Syrian passport acts set out that passports are required for both leaving and entering the country. They also state that passports are normally issued only to nationals. Whereas the German Passport Act clearly determines the cases in which the issuance of passports could be denied, the Syrian Passport Act provides no information about passport denial. Hence, a rejected application in Germany could be challenged before the respective administrative courts but Syrian applicants do not have any possible remedy against issuance denial. Moreover, the reasons for denial in Germany are clear, determined by law and in compliance with the norms of the ICCPR. In particular, they do not constitute discrimination on any basis, because they are based on objective and reasonable grounds. On the other hand, obliging males to carry out compulsory military service in Syria in order to be issued passports constitutes discrimination on the basis of gender against males. It is not clear why only males are obliged to spend almost two years of their lives serving in the military. Females serving in professional armies have proven that they are as capable as males of being soldiers. More importantly, females are allowed to join the Syrian army and many of them are regular soldiers and officers. Moreover, it is entirely unjustified that only males who have brothers are under this obligation. Article 12(3) of ICCPR asserts that any

³⁵⁷ Survey launched by the author.

restrictions on the right to freedom of movement must be ‘consistent with the other rights recognised in the present Covenant’.³⁵⁸ In Syria, only males who are not their parents’ sole male child are obliged to do military service in order to be issued passports and allowed to ‘legally’ leave the country.³⁵⁹ This means that Syria restricts the right to freedom of movement as enshrined in article 12(2) of the ICCPR just for Syrian males who have at least one brother. This restriction clearly constitutes discrimination against this category of males. This restriction violates article 2 of ICCPR and hence does not fulfil the requirement of being consistent with the rights inherent in the ICCPR. This restriction constitutes a breach of article 12(3) ICCPR and violates the right to freedom of movement of Syrian males who have brothers.

Passport denial is used in both Germany and Syria as an instrument to force nationals to fulfil particular obligations. The difference is the rule of law, which is highly respected in Germany but not in Syria. Passport denial in Germany can be challenged both before the domestic courts and then before the European Court of Human Rights (ECHR) which ensures accountability in the case of misuse of power by the state. In Syria, applications are rejected informally, and applicants will be orally informed that they could not be issued passports. There are no possible legal remedies against passport denial. That was the case before the outbreak of the war in Syria and now. Syrian legal texts ensure the right to freedom of movement, yet still state practice deprives Syrians of this right.

Refugees and stateless people have the right to travel documents in Germany because Germany is a member state of the 1951 Refugee Convention and the Convention relating to the Status of Stateless Persons 1954. Refugees and stateless persons in Syria enjoy no right to travel documents because Syria did not ratify the aforementioned conventions. Nevertheless, depriving refugees and stateless persons of travel documents restricts their right to freedom of movement, which Syria is obliged to ensure to everyone in its jurisdiction according to article 12 of the ICCPR. Germany, on the other

³⁵⁸ ICCPR, article 12(3)

³⁵⁹ Danish Refugee Council, *Syria Update on Military Service, Mandatory Self-Defence Duty and Recruitment to the YPG*, Copenhagen, Danish Immigration Service, September 2015, p.10-11

hand, refuses to grant people enjoying subsidiary protection in its territory a travel document for foreigners, and hence restricts their right to freedom of movement as protected in the ICCPR and Protocol No.4 of the ECHR. Moreover, prohibiting refugees in Germany from contacting their countries of origin to apply for identification documents endangers the credibility of the travel documents for refugees as they do not provide the real identity of their bearers.

Germany's EU membership confers Germans with a special right to enter and reside in other member states. In addition, as a member of the Schengen Agreement, Germany has no internal borders with other member states. Germany has also concluded a wide range of interstate agreements which give the bearers of German passports visa-free entry to 127 countries across the globe and to 40 countries with visa on arrival. Syria's membership of the Arab League itself did not give any extra rights to bearers of Syrian passports. But Syria's exclusion from the Arab League was combined with sanctions restricting the entry of Syrians to other member states. Both before the outbreak of the war and afterwards, the Syrian passport was/is one of the worst passports worldwide. There is no doubt that the ongoing conflict in Syria has led many countries to impose more restrictions on the entry of Syrians into their territories, because of the difficulty of their return to Syria as long as it is in state of war. But the Syrian War is not the main reason for the Syrian passport's status as one of the worst passports in the world. The main reason is the political agenda of the Syrian regime and its non-compliance with international law. It is also because the regime supports some 'terrorist' groups in the Middle East. Bearers of Syrian passports are allowed to enter nine countries visa free and 28 countries with visa on arrival. None of the neighbouring countries to Syria allows Syrians to enter without a visa.

The security features of the German passport are recognized as among the best in the world. This protection makes the German passport one of the most reliable passports worldwide. In contrast, Syrian passports are vulnerable to forgery. Since the outflow of Syrian refugees, Syrian passports have been forged mostly in Turkey. Therefore, Syrian passports' credibility is highly doubtful.

Opponents of the Syrian regime, as well as human rights defenders, have always been oppressed and banned from travelling outside Syria. They have also been denied passports. On the other hand, many Syrians were expelled from Syria for political reasons and prevented from returning to their homeland. Syrians within Syria have restricted access to passports due to military service obligations, political reasons, lack of identification documents among displaced people, and lack of loyalty to the Syrian regime. Syrians abroad can hardly gain a passport because of the poor diplomatic representation of Syria abroad and the unprecedentedly high prices for passport issuance. Germans have the possibility of applying for a German passport from the authority of their place of residence. Apart from the special cases of denial, Germans will be issued passports. The German authorities have no discretionary power in this regard. Germans cannot be denied entry to Germany under any circumstances. For Germans, owning a passport is a matter of course and they understand it as a simple identification document for international travel. For Syrians, a passport is a dream. It is a gift from the government. Whoever is privileged enough to own a passport will be decided at the discretion of the Syrian authorities.

Passports convey a message of being recognised as a human being.

This significant document called a *Passport* could cost EUR 60 with 10 years' validity in Germany and the possibility of entering 167 different countries with no prior conditions. Or it could cost USD 800 with two years' validity in Syria and possible entry to 37 countries. The passport reflects the relationship between the state and its nationals. It can either be used as an instrument to provide nationals with the best protection and freedoms abroad, or it can be used to oppress nationals and force them to obey the powers of their state. 'There are two worlds of movement. Citizens of the developed North have a freedom of movement that is legitimated by domestic and international government structures. Citizens and refugees of the developing South, however, are restricted in their movements both domestically and internationally'.³⁶⁰

³⁶⁰ Salter, *Rights of Passage*, p.2

V. Conclusion

Passports first appeared as a privilege to which few people were entitled. After the golden period of freedom of movement in the late 19th century, the modern passport system was established as an immediate reaction to the outbreak of WW I. This system was thought to be a temporary measure during wartime. But it has not been abolished since then. Mostly, nationals of every country which respects the rule of law have no mentionable problems regarding the accessibility of national passports. In contrast, nationals of almost every country which does not respect the rule of law have restricted access to national passports, which are treated as a given from the government. There should be an explicit right to own a passport, to prevent states from using them as political weapons to enforce the loyalty of their subjects. The abolition of the passport system is no longer imaginable. Moreover, the importance and necessity of passports are increasing because of the strengthening of the notion of the nation state all over the world. The whole international mobility of people is based on this system. Nevertheless, it depends on national governments, which either consider passports as a right or deal with them as a privilege. In the latter case, people must fulfil particular requirements in order to be entitled to carry a passport. In this regard, states should not be allowed to arbitrarily deprive their subjects of passports and hence prevent them from practicing their right to leave.

Passports are more than mere identification documents for travel purposes. Above all, the passport system enables states to control their international borders. It also serves as an instrument of surveillance in the hands of the government; an instrument which delivers clear information about who is inside the country and who has left it. Passports also contribute to establishing international trust because they facilitate the returnability of their bearer. In addition, passports provide their bearer with the diplomatic protection of their national state abroad.

Apart from the positive obligation upon states to issue passports to enable their nationals the enjoyment of the right to freedom of movement,³⁶¹ passports are still dealt with according to the domestic laws of each country. The absence of an international definition of the passport and its functions has made the misuse of passports by national governments easier. Passports differ from one country to another. The conditions of entry into each particular state depend on the passport travellers have in their possession. Passports reflect the political situation of the issuing state and its position within the international community. The treatment received by the passport holder is not about the individual who is carrying the passport, but depends on the issuing state. Even an extremely qualified person who has made highly appreciated contributions to humanity will not have any facilitations in terms of international mobility if this person is in possession of a passport issued by Afghanistan, which is the worst passport worldwide. Conversely, IS fighters and other terrorists in possession of EU passports enjoy wide freedom of movement internationally as long as they have not yet been legally prosecuted.

The right to leave each country (including the country of origin) which is enshrined in article 12 (2) ICCPR cannot function if people do not have the right to enter the state of destination. The conditions to enter another state are a matter of bi and multilateral treaties and also depend on state practice and domestic law. Hence, the efficiency of the right to freedom of movement in general and the right to leave in particular depends on the will of states, irrespective of human rights. The current political landscape, especially after the sad events of 11 September 2001, furthers the separation of the world into two categories depending on the passport people have. There is discrimination between people who are considered dangerous for national security and shall not be admitted, and people who are safe and can be welcomed. The political situation in the country to which one belongs determines to what extent an individual will be treated as human.

The third generation of human rights and especially environmental rights are gaining increasing importance. Some scholars have even started working on the fourth

³⁶¹ *CCPR General Comment No. 27, 1999, s9*

generation of human rights. Notwithstanding this, basic human rights *inter alia* the right to freedom of movement cannot currently be enjoyed by millions of people over the world. States not only have the right to protect their national security and public order but are also obliged to protect their subjects from any external potential threats. By implementing passport controls, states are able to determine who is allowed to enter and who is allowed to leave. However, imposing entry restrictions merely on the basis of the passports that travellers have does not contribute to affording states with sufficient protection from external dangerous people. Terrorists do not have particular passports issued by particular states. Criminals are unfortunately represented in every country. In a world of nation sovereign states there will be no unrestricted right to enter other countries, but discrimination based merely on passports can never protect the national security of states. Balancing the interests of states to protect themselves and the rights of travellers should be the cornerstone of international mobility.

The comparison between Syria and Germany indicates to what extent states can oppress their nationals through passport denial. Syria is trying to enforce loyalty to the Syrian regime using passports. The principle of state sovereignty makes the accountability of the Syrian regime in cases of violations of the rights of its nationals more difficult. Comparing the functions of the German passport to those of the Syrian one showed that the enjoyment of the right to freedom of movement does not merely depend on owning a passport, but also requires that this passport should function. An untrustworthy passport does not ensure the real identity and nationality of its bearer. Moreover, a passport which does not entitle its bearer to enter other countries is a worthless passport. Apart from the fact that passports are the bedrock of the international mobility, not all passports are the same. The credibility of the passport depends on the security features the passport contains. Passports issued by Syria and other developing countries lack security features and hence are easy to forge. Passports issued by Germany and other developed countries follow the standards set out by ICAO and provide sufficient protection against forgery. Moreover, the number of the countries a passport holder may enter without a visa depends on the bi and multilateral treaties the issuing state is member of, as well as its domestic laws and its practice. Nationals of many developing countries are suffering within their own countries because of the oppression of their

governments, and they also suffer outside their countries because they are judged and discriminated against on the basis of the passport they possess.

Last but most important, is to bear in mind that although the abolition of the passport system is no longer possible, the collective categorization of human beings on the basis of passports must be struck down. At a minimum, adherence to the universality of human rights should be internationally recognized: travellers, regardless of the document they possess are human beings who enjoy human rights and must be treated with respect for their dignity as human beings. But one essential question remains unanswered: are we human beings who enjoy the same human rights regardless of passports, or is it our passports that make us human beings?

Abbreviations

ICCPR	International Covenant on Civil and Political Rights
UDHR	Universal Declaration of human Rights
UN	United Nations
WW I	The First World War
WW II	The Second World War
USA	United States of America
UK	United Kingdom
B.C.	Before Christos
LoN	League of Nations
Prof.	Professor
UNHCR	United Nations High Commissioner for Refugees
CERD	International Convention on the Elimination of all Forms of Racial Discrimination
UNLP	United nations Laissez Passer
EU	European Union
ICAO	International Civil Aviation Organisation
ECHR	European Convention on Human Rights
ECtHR	European Court to Human Rights
IS	Terrorist organisation "Islamic State"

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Annex

Survey, March 2019, the survey was composed of 10 questions and addressed in three languages (German, English, Arabic) and collected the answers from 100 participants.

What is a passport for you? Was ist deiner Meinung nach ein Pass? ما هو جواز السفر بالنسبة لك؟

- 1- Do you have a passport? Hast du einen Pass? هل لديك جواز سفر؟
- 2- Why do/ don't you have a passport? Warum hast du einen/ keinen Pass? لماذا لديك / ليس لديك جواز سفر؟
- 3- How have you got your passport? Wie hast du deinen Pass bekommen? كيف حصلت على جواز سفرك؟
- 4- Which documents did you have to present for the application? Welche Unterlagen musstest du für den Antrag vorlegen? ما الوثائق التي تعين عليك تقديمها للمعاملة؟
- 5- How much have you paid for the whole procedure? and how long did it take? Wie viel hast du für das gesamte Verfahren bezahlt? und wie lange hat es gedauert? كم دفعت مقابل المعاملة بأكملها؟ وكم من الوقت استغرقت؟
- 6- Did you have to bribe someone to get a passport? Hast du jemanden bestechen müssen, um den Pass zu erlangen? هل كان عليك رشوة شخص ما للحصول على جواز سفر؟
- 7- For how long was your passport valid as you got it? Für wie lange war dein Pass gültig, als du den erhalten hast? لكم من الوقت كان جواز سفرك ساري المفعول عندما حصلت عليه؟
- 8- As you applied for a passport, have you thought that your application could be rejected? and why? Hast du bei der Beantragung deines Passes gedacht, dass dein Antrag abgelehnt werden könnte? und warum? عندما تقدمت بطلب للحصول على جواز سفر ، هل فكرت انه من المحتمل ان يرفض طلبك؟ و لماذا؟
- 9- Do you think you have a right of a passport? Why? Glaubst du, du hast Recht auf einen Pass? warum? هل تعتقد أن لديك حق في الحصول على جواز السفر؟ لماذا؟
- 10- What is a passport for you? Was ist deiner Meinung nach ein Pass? ما هو جواز السفر في نظرك؟