

**VOTING RIGHTS OF RECOGNISED GENEVA
CONVENTION REFUGEES IN THEIR COUNTRIES
OF ASYLUM**

**Reuven (Ruvi) Ziegler
Lincoln College**

**Thesis Submitted in Partial Fulfillment of the
Requirements for the Degree of Doctor of Philosophy**

89,175 Words

Hilary Term 2013

ABSTRACT

VOTING RIGHTS OF RECOGNISED GENEVA CONVENTION REFUGEES IN THEIR COUNTRIES OF ASYLUM

Reuven (Ruvi) Ziegler, Lincoln College
Doctor of Philosophy, Hilary Term 2013

This thesis concerns persons recognised as refugees based on the criteria set by Article 1A(2) of the 1951 Geneva Convention Relating to the Status of Refugees (CSR1951) and residing in a Contracting State. It appraises the exclusion of CSR1951 refugees from participation in elections of their countries of asylum pursuant to a *citizenship* voting qualification, which most countries set. It is emphasised that, since neither the CSR1951 refugees nor their country of asylum know when or indeed whether cessation of CSR1951 refugee status may occur, their exclusion may last for an *indeterminate* period of time.

CSR1951 confers on recognised refugees a host of civil, social and economic rights in their country of asylum; *voting* rights are absent. Concomitantly, while the International Covenant on Civil and Political Rights (and regional human rights treaties) pronounce that all persons are entitled to have their rights respected, protected and promoted, Contracting States are permitted to reserve two rights for their (full) members: the right to enter and remain in their country, and the right to vote in its elections.

The central claim of this thesis is that recognised CSR1951 refugees are a *special* category of non-citizen residents, due to their unique political predicament. They are unable to participate in elections of their country of origin, do not enjoy its diplomatic protection and consular assistance abroad, and – most fundamentally – are unable or unwilling, owing to a well-founded fear of persecution, to return to it for an indeterminate (and potentially protracted) period. It is submitted that recognised CSR1951 refugees should be entitled to vote in elections of their countries of asylum, notwithstanding general citizenship qualifications imposed by these countries.

At present, treaty law does not require countries of asylum to enfranchise their recognised CSR1951 refugees. Hence, this thesis explores a gap in international refugee law and international human rights law between *de lege lata* and *de lege ferenda*; it is an exercise in ‘progressive development of the law’. Its inquiry is located in the international domain, and concerns, in principle, any Contracting State which admits and recognises CSR1951 refugees. References to national or regional practices serve solely an illustrative purpose.

To my parents

TABLE OF CONTENTS

Abstract	ii
Table of Contents	iv
Table of Abbreviations	vii
Table of Cases	ix
Table of Statutes	xii
Table of Treaties	xiii
Table of Other Primary Sources	xiv
INTRODUCTION	1
PART A	
Chapter One: Recognised CSR1951 Refugees in Context	15
A. Introduction	15
B. Migration Control and State Sovereignty	17
C. CSR1951 Refugees as a (Qualified) Exception to Migration Control	21
D. Recognition: Beyond Non-Uniform Interpretation	28
E. After Recognition: Conditional Protection from Expulsion	32
F. Concluding Remarks	37
Chapter Two: Rights of CSR1951 Refugees and Citizenship Voting Qualifications	39
A. Introduction	39
B. Interrelations between CSR1951 and the ICCPR	42
C. Political Activities of Refugees under the CSR1951	48
D. Refugee Rights under CSR1951 and the ICCPR	52
E. Electoral Participation under the Migrant Workers Convention	65
F. The Failed Attempt to Create a ‘Protected Person’ Status in International Law	66
G. Concluding Remarks	68

PART B

Chapter Three: Perspectives on the Meaning and Purposes of Voting in Elections	72
A. Introduction	72
B. Voting Eligibility and Political Community Membership: Prelude	73
C. The Fundamentality of Voting for Individuals: Four Grounds	75
D. Functions of Voting: Between Protection and Non-Domination	84
E. The Electoral Process and Social Decision-Making: Three Perspectives	90
F. ‘Cultural Relativity’ Challenges	95
G. ‘Core’ and ‘Penumbra’ of Rights	99
H. Concluding Remarks	102
Chapter Four: Perspectives on the Meaning and Purposes of State Citizenship	103
A. Introduction	103
B. The Multi-dimensional Character of State Citizenship	107
C. ‘Liberal’ Perspectives	111
D. ‘Republican’ Perspectives	119
E. ‘Communitarian’ Perspectives: An Intermediary?	126
F. Concluding Remarks	128
Chapter Five: Citizenship Voting Qualifications- An Appraisal	130
A. Introduction	130
B. Citizenship Voting Qualifications in Historical Context: United States Case-study	131
C. The Interrelations between Citizenship and Voting: Three Positions	135
D. Citizenship Voting Qualifications: Six Contentions	145
E. Concluding Remarks	155

PART C

Chapter Six: Out-of-Country Voting- The Recognised CSR1951 Refugee Context	158
A. Introduction	158
B. Out-of-Country Voting of Voluntary Migrants	162
C. Out-of-Country Voting of Conflict Forced Migrants	174
D. Out-of-Country Voting of CSR1951 Refugees	179
E. Concluding Remarks	187
Chapter Seven: Protecting Recognised CSR1951 Refugees outside their Countries of Asylum	189
A. Introduction	189
B. Locating Protection of Nationals Abroad in General International Law	192
C. The Pedigree of State Protection Abroad	195
D. The Potential Emergence of a Qualified Duty to Protect Nationals Abroad	205
E. CSR1951 Refugees as Persons in Need of International Protection	212
F. The ‘Nationality of Claims’ Requirement: CSR1951 Refugees as a Special Case	220
G. Concluding Remarks	227
Chapter Eight: Enfranchisement of Recognised CSR1951 Refugees in Elections of their Countries of Asylum	231
A. Introduction	231
B. The Enfranchisement Rationale	234
C. Fundamentality of Voting: Citizenship Voting Qualifications Revisited	245
D. Recognition, Integration and Public Resistance	253
E. Concluding Remarks	263
BIBLIOGRAPHY	265

TABLE OF ABBREVIATIONS

CEDAW	Convention on the Elimination of all forms of Discrimination Against Women
CFMs	Conflict Forced Migrants
CJEU	Court of Justice of the European Union
CoE	Council of Europe
CRC	Convention on the Rights of the Child
CSR1951	Convention Relating to the Status of Refugees
ECHR	European Convention on Human Rights and Fundamental Freedoms
EComHR	European Commission of Human Rights
ECtHR	European Court of Human Rights
EU	European Union
First Additional Protocol	Protocol 1: Enforcement of certain Rights and Freedoms not included in Section I of the Convention (the ECHR)
GA	General Assembly (of the United Nations)
GC	Grand Chamber (of the European Court of Human Rights)
HoL	House of Lords (United Kingdom)
HRA	Human Rights Act 1998 (United Kingdom)
HRC	Human Rights Committee
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of all Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ILC	International Law Commission

IOM	International Organisation for Migration
MoU	Memorandum of Understandings
MS	Member State (of the European Union)
MWC	International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families
OAU	Organisation of African Unity
OCV	Out-of-Country Voting
PACE	Parliamentary Assembly (of the Council of Europe)
PCIJ	Permanent Court of International Justice
RSD	Refugee Status Determination
TEC	Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts
TFEU	Treaty on the Functioning of the European Union
SC	Supreme Court
VCCR	Vienna Convention on Consular Relations
VCLT	Vienna Convention on the Law of Treaties
UDHR	Universal Declaration on Human Rights
UK	The United Kingdom of Great Britain and Northern Ireland
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNRWA	United Nations Relief and Works Agency for Palestine Refugees in the Near East
US	The United States (of America)

TABLE OF CASES

Australia

Barzideah v Minister for Immigration and Ethnic Affairs (1996) 69 FCR 417
Minister for Immigration and Multicultural Affairs v Khawar [2002] HCA 14
Minister for Immigration and Multicultural Affairs v Respondent S152 [2004] HCA 18
NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs [2005] HCA 6

Austria

Case Regarding Cessation of Refugee Status, VwGH No 2001/01/0499 (15 May 2003)

Canada

Canada (Attorney General) v Ward [1993] 2 SCR 689

Court of Justice of the European Union

C-300/04 *Eman and Sevinger v College van Burgemeester en Wethouders van Den Haag* [2006] ECR I-08055
C-175,176,178,179/08 *Salahadin Abdulla and Others v Bundesrepublik Deutschland* (2 March 2010)

England and Wales

Abbassi v Secretary of State for Foreign and Commonwealth Affairs [2002] EWCA (Civ) 1598
Adan v Secretary of State for the Home Department [1999] 1 AC 293
Associated Provincial Picture Houses v Wednesbury Corporation [1947] 1 KB 223
DL (DRC) v the Entry Clearance Officer, Pretoria [2008] EWCA Civ 1420
E1/(OS RUSSIA) v Secretary of State for the Home Department [2012] EWCA Civ 357
Ghaidan v Godin-Mendoza [2004] UKHL 30
Horvath v Secretary of State for the Home Department [2001] 1 AC 489
Lazarevic v Secretary of State for the Home Department [1997] EWCA Civ 1007
Preston v Wandsworth Borough Council, R (on the application of Preston) v Lord President [2011] EWHC 3174
R (AHK and others) v Secretary of State for the Home Department [2009] EWCA Civ 287
R (Alconbury) v SS for the Environment, Transport and the Regions [2003] 2 AC 295
R (Al Rawi and others) v SS for Foreign and Commonwealth Affairs [2006] EWCA Civ 127
R (Daly) v SSHD [2001] 2 AC 532
R (Huang) v SSHD [2007] UKHL 11
R (European Roma Rights Centre) v Immigration Officer at Prague Airport [2004] UKHL 55
R (ST (Eritrea)) v SSHD [2012] UKSC 12

European Court of Human Rights

App No 30158/06 *Doyle v UK* (Fourth Section Chamber) (6 February 2007)
App No 20201/04 *Frodl v Austria* (First Section Chamber) (8 April 2010)
App No 31981/96 *Hilbe v Liechtenstein*, (Grand Chamber) (7 September 1999)
App No 74025/01 *Hirst (No 2) v United Kingdom* (Fourth Section Chamber) (30 March 2004); (Grand Chamber) (6 October 2005)
App No 48787/99 *Ilascu and others v Moldova and Russia*, (Grand Chamber) (8 July 2004)
App No 33802/06 *Kiss v Hungary*, (Second Section Chamber) (20 May 2010)
App No 9267/81 *Mathieu-Mohin and Clerfayt v Belgium*, (2 March 1987)
App No 1707/02 *Melnichenko v Ukraine*, (Second Section Chamber) (30 March 2005)
App No 1948/04 *Saleh Sheekh v The Netherlands*, (Third Section Chamber) (11 January 2007)
App No 126/05 *Scoppola (No 3) v Italy* (Grand Chamber) (22 May 2012)

App No 19480/09 *Shindler v UK* (pending)
App No 42202/07 *Sitaropolous v Greece* (First Section Chamber) (8 July 2010); (Grand Chamber) (15 March 2012)
App No 7730/76 *X v United Kingdom*, (28 February 1979)

General Claims Commission

Dickson Car Wheel Company v United Mexican States, 4 RIAA 669 (July 1931)

Germany

Opinion of the German Federal Constitutional Court, BVerfGE 83 (31 October 1990)
Opinion of the German Federal Constitutional Court, BVerfGE 37 (31 October 1990)

Human Rights Committee

UN Doc CCPR/C/53/D/500/1992, Communication 500/1992 *Joszef Debreczeny v the Netherlands*
UN Doc CCPR/C/75/ D/932/2000, Communication 932/2000 *Gillot v France*

Israel

HCI 3992/04 *Mimon-Cohen v Minister of Foreign Affairs and others*, (2004) PD 59(1) 49

Ireland

Abuissa v MJELR [2010] IEHC 366
Mallak v Minister for Justice Equality and Law Reform [2012] IRSC 59

Inter-American Court of Human Rights

Advisory Opinion, *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, (1999) ser A No 16

International Court of Justice

Advisory Opinion, *Barcelona Traction*, ICJ Rep 1970, 3
Advisory Opinion, *Reparations for Injuries Suffered in the Service of the UN*, ICJ Rep 1949, 181
Avena and Other Mexican Nationals (Mexico v USA), ICJ Rep 2004, 121
Breard (Paraguay v USA), ICJ Rep 1998, 266
Diallo (Republic of Guinea v DRC), ICJ Rep 2010, 692
Interhandel (Switzerland v USA), ICJ Rep 1959, 27
LaGrand (Germany v USA), ICJ Rep 2001, 466
Nottebohm (Lichtenstein v Guatemala), ICJ Rep 1955, 4

New Zealand

Refugee Appeal No 75091/04, NZRSAA 208 (28 June 2004)

Permanent Court of International Justice

Estonia v Lithuania (1939) PCIJ Rep, ser A/B No 76
Mavromartis Palestine Concessions (1924) PCIJ Rep ser A, No 2

Scotland

McGeoch v Lord President of the Council [2011] CSIH 679

South Africa

CCT 08/99 *August v Electoral Commission*, (1999) (3) SA 1
CCT 23/04 *Kaunda v President of the Republic of South Africa*, (2004) (10) BCLR 1009
CCT 03/09 *Richter v Minister for Home Affairs and Others*, (2009) (3) SA 615

United States

Bluman et al v Federal Election Commission, 800 F Supp 2d 281 (D.D.C. 2011)

Cabell v Chavez-Salido, 454 US 432 (1982)

Dred Scott v Sanford, 60 US 393 (1857)

Harper v Virginia, 383 US 663 (1966)

Leal v Texas, No 11-5001 (2011)

Medellín v Texas, 552 US 491 (2008)

Murphy v Ramsey, 114 US 15 (1885)

Nika v McDaniel, Warden and Masto, Attorney General of the State of Nevada, case no CR94P2264

Perez v Brownell, 356 US 44 (1958)

Pope v Williams, 193 US 621 (1904)

Spragins v Houghton, 3 Ill 377 (1840)

United States v Carolene Products, 304 US 144 (1938)

Williams v Mississippi, 170 US 213 (1898)

TABLE OF STATUTES

Australia

Commonwealth of Australia Constitution Act 1900
Commonwealth Electoral Act 1918
Commonwealth Franchise Act 1902

Canada

Charter of Rights and Freedoms 1982
Elections Act 1985

Germany

Basic Law 1949

Hungary

Constitution 2011

New Zealand

Electoral Act 1993
Immigration Act 2009

South Africa

Constitution of the Republic of South Africa 1996
Electoral Laws Amendment Act 2003

United Kingdom

Forfeiture Act 1870
Human Rights Act 1998
Representation of the People Act 1983

United States

Illegal Immigration Reform and Immigrant Responsibility Act 1996

TABLE OF TREATIES

African Charter on Human and Peoples' Rights 1969
American Convention on Human Rights 1969
Arrangement Concerning the Extension to Other Categories of Refugees of Certain Measures Taken in Favour of Russian and Armenian Refugees 1928
Arrangement with regard to the Issue of Certificates to Armenian Refugees 1924
Arrangement with regard to the Issue of Certificates to Russian Refugees 1922
Charter of Fundamental Rights of the European Union 2000
Charter of the United Nations 1945
Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984
Convention Concerning the Status of Refugees Coming from Germany 1938
Convention Governing the Specific Aspects of Refugee Problems in Africa 1969
Convention on Certain Questions relating to the Conflict of Nationality Laws 1930
Convention on the Elimination of All Forms of Discrimination against Women 1979
Convention on the Participation of Foreigners in Public Life at Local Level 1992
Convention on the Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality 1973
Convention on the Reduction of Statelessness 1961
Convention on the Rights and Duties of States 1933
Convention on the Rights of the Child 1989
Convention on the Status of Aliens 1928
Convention Relating to the International Status of Refugees 1933
Convention Relating to the Status of Refugees 1951
Convention Relating to the Status of Stateless Persons 1954
European Convention for the Protection of Human Rights and Fundamental Freedoms 1950
European Convention on Nationality 1997
General Framework Agreement for Peace in Bosnia and Herzegovina, Agreement on Refugees and Displaced Persons 1995
International Convention on the Elimination of All Forms of Racial Discrimination 1966
International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families 1990
International Covenant on Civil and Political Rights 1966
International Covenant on Economic, Social and Cultural Rights 1966
Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes 1963
Protocol I, Enforcement of certain Rights and Freedoms not included in Section I of the Convention 1953
Protocol IV to the Convention for the Protection of Human Rights and Fundamental Freedoms securing certain rights and freedoms other than those already included in the Convention and in the First Protocol thereto 1963
Protocol Relating to Multiple Obligations in Certain Cases of Double Nationality 1930
Protocol Relating to the Status of Refugees 1967
Protocol to the European Convention on Consular Functions Concerning the Protection of Refugees 1967
Treaty of Amsterdam Amending the Treaties Establishing the European Union, the Treaties Establishing the European Communities and Related Treaties 1997
Treaty on the Functioning of the European Union 2007
Vienna Convention on Consular Relations 1963
Vienna Convention on Diplomatic Relations 1961
Vienna Convention on the Law of Treaties 1969

TABLE OF OTHER PRIMARY SOURCES

Colloquium on International Protection of Refugees in Central America, Mexico and Panama

Cartagena Declaration on Refugees 1984

European Union

Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on Standards for the Qualification of Third Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons eligible for Subsidiary Protection, and for the Content of the Protection Granted (Recast)

Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted

Council Directive 2003/9/EC of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers

Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts Between Member States in Receiving such Persons and Bearing the Consequences Thereof

Inter-Parliamentary Union

Declaration on Criteria for Free and Fair Elections 1994

United Nations

General Assembly, Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations 1970

General Assembly, Declaration on Territorial Asylum 1967

Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, and Convention Relating to the Status of Refugees, Final Act 1951

General Assembly, Statute of the Office of the United Nations High Commissioner for Refugees 1950

INTRODUCTION

A. General Framework

This thesis concerns persons who are recognised as refugees based on the criteria set in Article 1A(2) of the 1951 Geneva Convention Relating to the Status of Refugees (CSR1951 refugees).¹ It is assumed that, following their recognition as CSR1951 refugees, they reside in a Contracting States² which complies with its convention obligations in good faith.³ The thesis explores the unique *political* predicament of recognised CSR1951 refugees following

¹ Convention Relating to the Status of Refugees, 28 July 1951, 189 UNTS 137, entered into force 22 April 1954 (CSR1951). While the thesis concerns refugees recognised according to art 1A(2), it should be noted that the provisions of CSR1951 also apply to ‘any person considered a refugee under earlier international arrangements’; Ibid, art 1A(1). The United Nations Economic and Social Council appointed the Ad Hoc Committee on Statelessness and Related Problems to, *inter alia*, ‘consider the desirability of preparing a revised and consolidated convention relating to the international status of refugees and stateless persons and, if they consider such a course desirable, draft the text of such a convention’; ECOSOC Res/248 (IX) of 8 August 1948, para a. Following the conclusion of the work of the Ad Hoc Committee, the General Assembly (GA) decided to convene a Conference of Plenipotentiaries to complete the drafting of a Convention; GA/Res/429 (V) of 14 December 1950, para 1. The Conference met in Geneva (2 - 25 July 1951), culminating in the adoption of CSR1951. For a historical account of CSR1951, see Guy S Goodwin-Gill, *The United Nations Audiovisual Library of International Law*, available at: http://untreaty.un.org/cod/avl/pdf/ha/prsr/prsr_e.pdf.

² The scope of the CSR1951 was limited to those who had become refugees as a result of events occurring in Europe before 1 January 1951. Subsequent developments have demonstrated that movements of refugees were by no means confined to the Second World War and its immediate aftermath. As new refugee groups emerged, it has become increasingly necessary to adapt CSR1951 in order to make it applicable to new refugee situations. With this aim in mind, States have ratified the subsequent Protocol relating to the Status of Refugees, 31 January 1967, 666 UNTS 267, entered into force 4 October 1967. Art 1 thereof extends the substantive provisions of CSR1951 (‘Articles 2 through 34 inclusive’) to all recognised refugees ‘as if the words...1 January 1951...were omitted’. See also Paul Weis, ‘The 1967 Protocol relating to the Status of Refugees and Some Questions relating to the Law of Treaties’ (1967) *British Yearbook of International Law* 39, 60 (maintaining that ‘[w]ith the entry into force of the Protocol there exist, in fact, two treaties dealing with the same subject matter’). There is almost a full overlap between State Parties to the 1967 protocol and State Parties to CSR1951 (Madagascar has only ratified CSR1951, while Cape Verde, the USA and Venezuela are only parties to the 1967 Protocol). In addition, Turkey, Congo, Madagascar and Monaco have kept the geographic limitation to Europe, in accordance with art 7(2) of the 1967 Protocol. See declarations and reservations to CSR1951 and the 1967 Protocol, available at: <http://www.unhcr.org/3d9abe177.pdf> and <http://www.unhcr.org/4dac37d79.html> respectively.

³ Vienna Convention on the Law of Treaties, art 26, 23 May 1969, 1155 UNTS 331, entered into force 27 January 1980 (‘every treaty in force is binding upon the parties to it and must be performed by them in good faith’). Cf Jack L Goldsmith and Eric A Posner, *The Limits of International Law* (Oxford University Press, 2005) 193 (juxtaposing international and domestic laws, situating compliance with the former in the claim that individuals would be better off in a world in which states had an obligation to comply with international law).

recognition, when they reside in their countries of asylum as *non-citizens*.⁴ It appraises the legal obligations of countries of asylum towards ‘their’ recognised CSR9151 refugees, with particular emphasis on their voting rights therein.

The United Nations High Commissioner on Refugees (UNHCR)⁵ asserts⁶ that CSR1951 and the 1967 Protocol ‘...continue to serve as the cornerstone of the international refugee protection regime’. The Executive Committee of UNHCR (an advisory body currently composed of representatives of 87 States) has recently affirmed⁷ that ‘[t]he 1951 Convention Relating to the Status of Refugees and its 1967 Protocol are the foundation of the international refugee protection regime and have enduring value and relevance in the Twenty-First century.’

It is noteworthy that CSR1951 attends to the protection needs of a defined group. According to Article 1A(2), refugees are persons who have crossed an international border and are outside their state of origin and have a well-founded fear of persecution in *that state*

⁴ NB CSR1951, art 1C(3). James C Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press, 2005), 916 (noting that ‘[i]f a refugee opts to accept an offer of citizenship [in the state of asylum], with entitlement fully to participate in all aspects of that state's public life, his or her need for the surrogate protection of refugee law comes to an end. There is no need for surrogate protection in such a case, as the refugee is able and entitled to benefit from the protection of his or her new country of nationality’). See eg the Court of Appeal decision in *DL (DRC) v the Entry Clearance Officer, Pretoria* [2008] EWCA Civ 1420, para 29.

⁵ The UNHCR began operating on 1 January 1951, following the adoption of its Statute as an annex to GA/Res/428 (V) of 14 December 1950. Its mandate was initially set for three years (Statute, para 5), and was subsequently extended several times for fixed periods. The mandate was extended in 2003 until ‘the refugee problem is resolved’; GA/Res/58/153 of 22 December 2003, para 9. According to para 1 of its Statute, UNHCR’s task is to provide ‘international protection’ to refugees’ and seeking ‘permanent solutions for the problem of refugees’. According to CSR1951, art 35(1), ‘[c]ontracting States undertake to co-operate’ with UNHCR, which has assumed the ‘duty of supervising the application of the provisions of this Convention’. UNHCR was preceded by the International Refugee Organisation; GA/Res/62 (I) of 15 December 1946.

⁶ UNHCR, ExCom, Conclusion No 103, *Provision of Diplomatic Protection including through Complementary Forms of Protection*, 56th session, 7 October 2005, available at: <http://www.unhcr.org/refworld/docid/43576e292.html>.

⁷ UNHCR, ExCom, *Note on International Protection*, 63rd session, 1-5 October 2012, A/AC/96/1110/Add.1, Annex, Ministerial Communiqué, para 2, available at: <http://www.unhcr.org/501fd0739.html>.

for reasons of race, religion, nationality, membership of a particular social group, or political opinion; they are either unable or, owing to their fear of persecution, unwilling to avail themselves of the protection of their state of origin.

CSR1951 refugees are entitled to a host of social, economic, and civil rights in their countries of asylum. However, CSR1951 is silent regarding their political rights, including their *voting* rights. It is noteworthy that CSR1951 was drafted shortly after the adoption by the UN General Assembly of the Universal Declaration on Human Rights (UDHR).⁸ The CSR1951 protection regime is rooted in general principles of human rights, aiming to ‘assure[s] refugees the widest possible exercise of [their] fundamental rights and freedoms’.⁹ Hence, the CSR1951 drafters envisaged that additional protection may be granted to CSR1951 refugees.¹⁰ Article 5 stipulates that ‘[n]othing...shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention’. Indeed, it has been suggested that contemporary refugee status is ‘an amalgam of principles drawn from both refugee law and the human rights Covenants’.¹¹

The leading international treaty in the area of political rights is the International Covenant on Civil and Political Rights (ICCPR),¹² to which 167 States have acceded to-date,

⁸ GA/Res/217 (III) of 10 December 1948.

⁹ CSR1951, Preamble, §2. See also Erika Feller, ‘International Refugee Protection 50 Years on: The Protection Challenges of the Past, Present and Future’ (2001) 83 (843) *International Review of the Red Cross* 581, 582.

¹⁰ Representatives of the following states participated in the drafting process (alongside representatives of Non-Governmental Organisations): Belgium, Brazil, Canada, China, Denmark, France, Israel, Sweden, Turkey, the UK, the USA, and Venezuela.

¹¹ Hathaway (n4), 9.

¹² GA/Res/2200/21, 16 December 1966, 999 UNTS 171, entered into force 23 March 1976.

including nearly all Contracting States of CSR1951 and the 1967 Protocol.¹³ Article 2(1) of the ICCPR requires Contracting States to respect, protect and promote a range of rights, including some political rights, of all persons in their territories and subject to their jurisdiction, including CSR1951 refugees. However, with respect to two fundamental rights, the ICCPR draws distinctions along membership lines. Article 12(4) enunciates that ‘no one’ shall be ‘arbitrarily deprived’ of the right to enter ‘*his own country*’;¹⁴ hence, it endorses sovereign exercise of migration control. Article 25 stipulates that ‘every *citizen*’ shall ‘without unreasonable restrictions’ have the right to vote in ‘genuine periodic elections...by universal and equal suffrage’;¹⁵ hence, the right to vote under the ICCPR is not based on *domicile*, though enfranchisement of non-citizen residents would be treaty-compatible.¹⁶

Indeed, while universal suffrage may have largely become a global ideal, all democratic states set eligibility criteria for elections of their institutions of government. Broadly speaking, such criteria fall into two categories: The *first*, which falls outside the remit of this thesis, concerns individual competence, primarily age, mental capacity, and

¹³ Of State-Parties to CSR1951 and 1967 Protocol, only Antigua and Barbuda, Fiji, the Holy See, Solomon Islands, St. Kitts and Nevis, and Tuvalu are *not* also State-Parties to the ICCPR; information regarding ratifications of international treaties is available at: <http://treaties.un.org/Pages/ParticipationStatus.aspx>.

¹⁴ See Human Rights Committee, General Comment No 27: *Freedom of Movement* (Article 12) (2 November 1999), para 20 (positing that ‘[t]he scope of “his own country” is broader than the concept “country of his nationality”’. It is not limited to nationality in a formal sense, that is, nationality acquired at birth or by conferral; 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’). See also Marc J Bossuyt, *Guide to the Travaux Préparatoires of the International Covenant on Civil and Political Rights* (Martinus Nijhof Publishers, 1987) 261. Cf UDHR, art 13(2).

¹⁵ See also UDHR, art 21(3) (pronouncing the right of ‘*everyone*...to take part in the government of *his state*’).

¹⁶ See Guy S Goodwin-Gill, ‘Migration: International Law and Human Rights’ in Bimal Ghosh (ed), *Managing Migration* (Oxford University Press, 2000) 160, 167 (postulating that human rights treaties acknowledge the continuing authority of the state to maintain distinctions between citizens and non-citizens in certain areas of activity). Cf Rainer Bauböck, ‘Rights and Duties of External Citizenship’ (2009) 13(5) *Citizenship Studies* 475, 476 (arguing that decisions about democratic inclusion cannot be based on pure *procedural* legitimacy; rather, they should refer to a substantive conception of the *demos*).

conviction of a criminal offence.¹⁷ The *second*, which lies at the heart of this thesis, is (full) membership of a political community, commonly (though not exclusively) connoted by state citizenship.¹⁸

Even in ‘the age of migration’,¹⁹ ninety-seven per cent of the global population habitually resides in their state of citizenship and are not adversely affected by citizenship-based eligibility. The remaining three per cent are made up of divergent groups, including recognised CSR1951 refugees.

It is submitted that most recognised CSR1951 refugees are excluded *qua* non-citizen residents from participation in elections of their countries of asylum. Concomitantly, they are generally protected from expulsion by their state of asylum *qua* recognised CSR1951 refugees;²⁰ their (conditional) security of residence therein is retained until one or more of the conditions stipulated in an *exhaustive* list of *six cessation clauses*²¹ are satisfied. Crucially, neither CSR1951 refugees nor their state of asylum know *when* or, indeed, *whether* such developments will occur. Their country of asylum may offer them naturalisation, at its

¹⁷ For an appraisal of the disenfranchisement of convicted adult citizens, see generally Reuven (Ruv) Ziegler, ‘Legal Outlier, Again? U.S. Felon Suffrage Policies: Comparative and International Human Rights Perspectives’ (2011) 29(2) Boston University International Law Journal 197.

¹⁸ It should be noted that, the term *citizenship* is usually used in domestic law, and refers to the relations between the individual and her state, whereas the term *nationality* is used in international law to connote legal status and concomitant rights and obligations. However, as there is no ‘fixed’ rule, the terms may co-exist. Ivan Shearer and Brian Opeskin, ‘Nationality and Statelessness’ in Brian Opeskin, Richard Perruchoud and Jillyanne Redpath-Cross (eds), *Foundations of International Migration Law* (Cambridge University Press, 2012) 93. Unless otherwise specified, *citizenship* and *nationality* are used throughout the thesis interchangeably.

¹⁹ See generally T Alexander Aleinikoff, *Citizenship Policies for an Age of Migration* (Carnegie, 2002).

²⁰ CSR1951, art 32. States are only permitted to expel refugees in exceptional circumstances, on grounds of national security or public order; expulsion is subject to procedural constraints (art 32(2)) as well as to the prohibition on *refoulement* (art 33); expulsion depends on the willingness of another state to admit the (allegedly recalcitrant) CSR1951 refugee. See discussion in Chapter One *infra*.

²¹ CSR1951, art 1C.

discretion;²² failing that, recognised CSR1951 refugees will continue to reside in their country of asylum as non-citizens for an *indeterminate* period, during which they are likely to be excluded from participation in (some or all of) its elections.

Oppenheim famously noted that '[t]he concept of a "source" of a rule of law is important, since it enables rules of law to be identified and distinguished from other rules (in particular from rules *de lege ferenda*)'.²³ In the spirit of the Final Act of the Conference of Plenipotentiaries, which recommended²⁴ to entitle refugees 'to special protection on account of their position', the thesis explores a gap in international refugee law and international human rights law between *de lege lata* and *de lege ferenda* regarding enfranchisement of recognised CSR1951 refugees in elections of their countries of asylum.²⁵ As such, the thesis is, *inter alia*, 'an exercise in progressive development of the law'.²⁶ As the refugee issue 'is

²² CSR1951, art 34: '[t]he Contracting States shall as far as possible facilitate the assimilation and naturalisation of refugees'. Chapter Eight *infra* considers the refugee integration requirements ensuing from this provision. Botswana, Chile, Honduras, Latvia, Malawi, Mozambique, Papua New Guinea, and Swaziland retain reservations to art 34.

²³ Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law* (9th edn Oxford University Press, 2008) (1905), vol I: Peace, 23.

²⁴ See Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, unanimous recommendation 'D', *International Co-operation in the Field of Asylum and Resettlement*, Geneva, 28 July 1951.

²⁵ The *lex ferenda* question, namely whether recognised CSR1951 refugees *ought* to be enfranchised in their state of asylum, may be addressed in light of Mill's observation in John Stuart Mill, *The Collected Works of John Stuart Mill, X., Essays on Ethics, Religion and Society* (JM Robert ed, University of Toronto Press, 1969), 250 (stipulating that '[w]hen we call anything a person's right, we mean that he has a valid claim on society to protect him in the possession of it either by the force of law or by that of education and opinion. If he has what we consider a sufficient claim on whatever account to have something guaranteed to him by society we say that he has a right to it...to have a right then is...to have something which society ought to defend me in the possession of'). Regarding recognition of rights in *international law*, see eg Robert Jennings, 'Speech on the Report of the International Court of Justice' (1992) 86 *American Journal of International Law* 249, 254 (contending that '[a] right – even human rights – does not amount to much in practice unless it is established and seen to be established as an integral part of the whole system of international law which alone can create effective corresponding obligations in the international community').

²⁶ Charter of the United Nations, art 13(1), 26 June 1945, 3 Bevans 1153, entered into force 24 October 1945 (stipulating that '[t]he General Assembly shall initiate studies and make recommendations for the purpose of: a. encouraging the progressive development of international law and its codification.') For a recent reference to

international in scope and nature’,²⁷ the inquiry is situated in the international domain, and concerns, in principle, any Contracting State which admits and recognises CSR1951 refugees. References to domestic practices serve solely an illustrative purpose.

B. Structure of the Thesis

PART A of the thesis lays the legal foundations for appraising the political predicament of recognised CSR1951 refugees. Chapter ONE (‘Recognised CSR1951 Refugees in Context’) situates CSR1951 in a contemporary global legal order in which the global refugee regime is a qualified exception to the discretionary power of sovereign states to control entry to their territory and residence therein. The chapter presents general criteria for recognition as a CSR1951 refugee, and considers limits on expulsion of refugees in view of the Draft Articles on Expulsion of Aliens published by the International Law Commission (ILC).

Chapter TWO (‘Rights of CSR1951 Refugees and Citizenship Voting Qualifications’) considers the nature of state obligations towards their refugees *qua* non-citizen residents. It explores interrelations between CSR1951 and leading international human rights instruments, most pertinently the ICCPR, concluding that they are complementary and mutually reinforcing. It is suggested that the permissibility of citizenship voting qualifications in international human rights law accounts for the ubiquitous exclusion of CSR1951 refugees from participation in elections of their states of asylum.

‘progressive realisation’ of international law, see International Law Commission, *Draft Articles on Diplomatic Protection*, Commentary, art 8, para 2, published as part of the ILC Report, 58th session (2006), GAOR Supp No 10, UN Doc A/61/10 (addressed in Chapter Seven *infra*).

²⁷ GA/Res/319A (IV) of 3 December 1949, Preamble.

Part B of the thesis explores theoretical perspectives of voting and citizenship. Chapter THREE ('Perspectives on the Meaning and Purposes of Voting in Elections') considers four grounds for regarding the right to vote as fundamental for individuals: enhancement of human agency and autonomy; the expressive character of voting; human dignity; and enjoyment of equal worth, concern and respect. It is further contended that the instrumental role of voting (as a means for protecting individual interests and expressing preferences) and its expressive role (as a manifestation of non-domination and self-governance) are mutually reinforcing. The chapter offers three perspectives on the collective nature of the electoral process ('liberal', 'republican', and 'deliberative democracy'). The chapter closes by responding to possible 'cultural relativity' challenges to the universality of the right to vote, and by applying the conceptual distinction between 'core' and 'penumbra' of rights to questions of eligibility.

Chapter FOUR ('Perspectives on the Meaning and Purposes of State Citizenship') situates the *legal* institution of state citizenship within an *extra*-legal multi-dimensional framework. The chapter follows Joseph Carens' depiction of citizenship as encompassing three dimensions: legal, psychological and political. Divergent meaning and purposes of citizenship are explored from 'liberal', 'republican' and 'communitarian' perspectives. In tandem with Chapter THREE, this chapter lays the foundations for an appraisal in Chapter FIVE of the plausibility of citizenship voting qualifications.

Chapter FIVE ('Citizenship Voting Qualifications- an Appraisal') offers a brief exploration of the development of citizenship voting qualifications, using a U.S. Case-study. The chapter presents three positions on the desirability of interrelations between voting and citizenship: the *inseparability* position, the *contingent* position, and the *disaggregation* position. It considers six principal contentions, three in support of citizenship-based eligibility

(community cohesion and common identity; loyalty to the state and to its long-term well-being; and electoral inclusion as a catalyst for naturalisation), and three in support of residency-based eligibility (vulnerability of non-citizen residents absent state accountability; the disjuncture between burden-sharing and political participation; and the significance of ‘exit’ options - or lack thereof - in assessing subjection of non-citizens to coercive authority).

Part C of the thesis builds on the normative foundations laid in Parts A and B to critically scrutinise the political predicament of recognised CSR1951 refugees. Chapter SIX (‘Out-of-Country Voting- The Recognised CSR1951 Refugee Context’) points to an emerging global trajectory to set in place Out-of-Country Voting (OCV) procedures which enable non-resident citizens (*expatriates*) to vote in elections of their country of citizenship. It is argued that a distinction should be drawn between three types of expatriates: voluntary migrants, including migrant workers and their families; Conflict Forced Migrants; and CSR1951 refugees. It is contended that CSR1951 refugees have a strong claim to have access to OCV procedures of their country of origin; nonetheless, they are highly unlikely to be able to vote from abroad as long as they hold CSR1951 refugee status.²⁸

Chapter SEVEN (‘Protecting Recognised CSR1951 Refugees Outside their Countries of Asylum’) considers the predicament of CSR1951 refugees when they travel *outside* their state of asylum. Their status entails *ipso facto* that they do not enjoy the protection abroad of their state of nationality. It is contended that state protection abroad retains its pedigree and

²⁸ Cf Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, art 41(1) and 41(2), 18 December 1990, 2220 UNTS 3, entered into force 1 July 2003 (Migrant Workers Convention) (respectively stipulating that ‘[m]igrant workers and members of their families shall have the right to participate in public affairs of their State of origin and to vote and to be elected at elections of that State’, and that ‘[t]he States concerned shall, as appropriate and in accordance with their legislation, facilitate the exercise of these rights’).

significance, a view which the International Law Commission shares.²⁹ States often come to the aid of their nationals abroad, especially in criminal proceedings, and a qualified duty to exercise state protection or to be willing to provide justifications for its refusal may be emerging.³⁰ Under CSR1951, states of asylum are required to issue Convention Travel Documents (CTDs) to recognised refugees, affording these refugees an unqualified right to return to the issuing state as if they were its nationals.³¹ It is submitted that, in appropriate cases, states ought to protect their nationals abroad, and that states of *asylum* should protect their recognised CSR1951 refugees when they travel abroad using CTDs these States have issued as if they were their nationals.

The predicament of CSR1951 refugees is most evident *inside* their states of asylum. Chapter EIGHT ('Enfranchisement of Recognised CSR1951 Refugees in Elections of their Countries of Asylum') presents the central claim of this thesis, namely that, due to their political predicament, CSR1951 refugees are a special category of non-citizen residents: even if their States of asylum generally base voting eligibility on *citizenship*, recognised CSR1951 refugees should be entitled to vote in elections of these states until the occurrence of legal or factual changes leading to *cessation* of their CSR1951 refugee status.

In view of the analyses in Chapters SIX and SEVEN, Chapter EIGHT considers the vulnerabilities of CSR1951 refugees *qua* non-citizen residents. The chapter applies the

²⁹ See GA/Res/62/67 of 6 December 2007, paras 1, 3 (respectively welcoming 'the conclusion of the work of the International Law Commission and its adoption of the draft articles [on diplomatic protection] and commentary on the topic', and commending 'the articles...to the attention of governments').

³⁰ See eg Migrant Workers Convention, art 23 (stipulating that '[m]igrant workers and members of their families shall have the right to have recourse to the protection and assistance of the consular or diplomatic authorities of their State of origin').

³¹ CSR1951, art 28 and schedule, art 13(1) (the latter provision stipulating that '[e]ach Contracting State undertakes that the holder of a travel document issued by it in accordance with article 28 of this Convention shall be readmitted to its territory at any time during the period of its validity').

Chapter THREE rationales for considering the right to vote to be fundamental, and revisits the Chapter FIVE contentions concerning citizenship voting qualifications. The chapter then explores the expressive meaning of CSR1951 refugee recognition, the state's treaty obligations regarding refugee integration, and the public resistance challenge.

C. Some Issues which fall outside the Remit of the Thesis

The underlying assumption of this thesis is that all the persons concerned have been individually recognised and granted CSR1951 refugee status by a Contracting States, and that they reside lawfully therein.

Hence, outstanding issues of concern to international refugee and migration scholars and jurists fall outside its remit. Such issues include, *inter alia*, the possible expansion of the CSR1951 definition to include persons who would be recognised as refugees under the *wider* definition in the Organisation of African Union (OAU) Convention.³² Alongside the CSR1951 Article 1A(2) stipulation,³³ the OAU convention pronounces³⁴ that 'the term "refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality'.

³² Convention Governing the Specific Aspects of Refugee Problems in Africa, art 1 (definition of the term 'Refugee'), 10 September 1969, 1001 UNTS 45, entered into force 20 June 1974.

³³ The Preamble to the OAU Convention stipulates that the parties recognise 'that the United Nations Convention of 28 July 1951, as modified by the Protocol of 31 January 1967, constitutes the basic and universal instrument relating to the status of refugees and reflects the deep concern of States for refugees and their desire to establish common standards for their treatment' and calls upon states which have not yet done so to accede to the treaties and in the interim to apply the provisions. Art 1(1), (3) repeat the CSR1951, art 1A(2) (except the temporal and geographical restrictions which the 1967 Protocol removed). See similarly the *non-binding* Cartagena Declaration on Refugees, 22 November 1984 (concerning refugees in the Americas).

³⁴ Ibid, art 1(2).

Similarly, the thesis does not consider the introduction of ‘climate change’ induced migration³⁵ or economic ‘needs-based’ migration as additional bases for recognition.³⁶ It also does not appraise the treatment of persons *not* recognised as CSR1951 refugees who may nonetheless benefit from protection against *refoulement*,³⁷ predicament of internally displaced persons,³⁸ temporary protection,³⁹ subsidiary protection,⁴⁰ or complementary protection.⁴¹

The thesis does not address the exclusion from status under CSR1951 of persons receiving assistance from the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA),⁴² and of persons falling under one or more of the

³⁵ See eg Katryna M Wyman, ‘Sinking States’ in Daniel H Cole and Elinor Ostrom (eds), *Property in Land and Other Resources* (Lincoln Institute of Land Policy, 2012), ch 15.

³⁶ See eg Richard Falk, ‘Accountability, Asylum and Sanctuary: Challenging Our Political and Legal Imagination’ in Ved P Nanda (ed), *Refugee Law and Policy: International and US Responses* (Greenwood Press Inc, 1989) 23. See also James C Hathaway, ‘Reconsideration of the underlying Premise of Refugee Law’ (1990) 21 *Harvard International Law Journal* 140; Tally Kritzman-Amir, *Socioeconomic Refugees* (PhD dissertation, Faculty of Law, Tel-Aviv University, 2009) (arguing that refugee protection should be granted on social-economic grounds; on her account, it would still be possible to differentiate these claimants from migrant workers, granting refugee protection only to claimants whose fundamental rights would otherwise be harmed).

³⁷ See eg Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, art 3, 10 December 1984, 1465 UNTS 85, entered into force on 26 June 1987; Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS No 005, entered into force 3 September 1953.

³⁸ Adam Roberts, ‘More Refugees, Less Asylum: A Regime in Transformation’ (1998) 11(4) *Journal of Refugee Studies* 375; David A Korn, *Exodus within Borders: An Introduction to the Crisis of Internal Displacement* (Brookings Institution Press, 1999); Francis Mading Deng, ‘The UN and the Protection of Human Rights: The Global Challenge of Internal Displacement’ (2001) 5 *Washington University Journal of Law and Policy* 141.

³⁹ See eg European Union, Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for giving Temporary Protection in the event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts between Member States in receiving such Persons and Bearing the Consequences Thereof.

⁴⁰ See eg European Union, Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons who otherwise need International Protection and the Content of the Protection Granted, art 2(e) (individuals ‘who [do] not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned if returned to his or her country of origin....would face a real risk of suffering serious harm’).

⁴¹ See generally Jane McAdam, *Complementary Protection in International Refugee Law* (Oxford University Press, 2007).

⁴² CSR1951, art 1D; UNHCR statute (n4), para 7(c).

subsections of the exclusion clauses in Article 1F.⁴³ As the thesis assumes that formal recognition has already taken place and a recognised CSR1951 refugee resides in a Contracting State, it does not address the treatment of *asylum seekers* or questions of burden-sharing between Contracting States or of resettlement.⁴⁴

Finally, recognised CSR1951 refugees may be either *citizens* of their country of origin or *stateless persons*; statelessness is *neither a necessary nor a sufficient condition* for obtaining CSR1951 refugee status. As the primary concern of this thesis is the treatment and status of recognised CSR1951 refugees in their country of *asylum*, predicament of stateless persons *qua* stateless persons are not engaged, save for drawing relevant comparisons.⁴⁵

⁴³ For general discussion, see eg Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn Oxford University Press, 2007), ch 4.

⁴⁴ See eg CSR1951, Preamble, para 4 ('considering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation'). See also GA/Res/60/128 of 24 January 2006, para 12 (urging countries 'in a spirit of international solidarity and burden and responsibility-sharing, to cooperate and to mobilize resources with a view to enhancing the capacity of and reducing the heavy burden borne by host countries, in particular those that have received large numbers of refugees and asylum-seekers').

⁴⁵ See eg UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (reissued December 2011), paras 15, 17 (noting that '[i]n the majority of cases, refugees retain the nationality of their country of origin', and that '[n]ot all stateless persons are refugees. They must be outside the country of their former habitual residence for the reasons indicated in the definition. Where these reasons do not exist, the stateless person is not a refugee'). The Convention Relating to the Status of Stateless Persons, art 1, 28 September 1954, 360 UNTS 117, entered into force 6 June 1960 is the primary international instrument regulating the legal status of stateless persons. Its primary purpose is to increase international awareness of the plight of stateless persons who are *not* refugees and who are *not*, therefore, covered by CSR1951. Art 1 thereof defines stateless persons as persons who are not considered nationals 'by any state under the operation of its law'. The Statelessness Convention was intended to be a protocol to CSR1951. However, the Conference of Plenipotentiaries (n1) that had convened to discuss the conditions of both stateless persons and refugees had decided to postpone considerations of stateless persons. Note also the Convention on the Reduction of Statelessness, 30 August 1961, 989 UNTS 175, entered into force 13 December 1975, pronouncing in art 1 that '[i]t is] desirable to reduce statelessness by international agreement', and that '[a] contracting state shall grant its nationality to a person born in its territory who would otherwise be stateless'. Nonetheless, the grant of citizenship under the latter convention is *not automatic*; rather, states retain considerable discretion. Notably, the ICCPR and the Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3, entered into force 3 September 1990, pronounce the *right* of every child 'to acquire a nationality' (arts 24(3) and 7(1) respectively) yet do not impose a correlative *duty* on any state to grant its citizenship to a particular child.

PART A

CHAPTER ONE: RECOGNISED CSR1951 REFUGEES IN CONTEXT

‘[f]or refugees the world is divided into places where they cannot live and places into which they cannot enter’¹

A. Introduction

The world is exhaustively divided between sovereign states. The Charter of the United Nations enunciates that, as a membership organisation, it is based on the principle of the ‘sovereign equality of all its members’.² The state is ‘the organisation capable of and responsible for carrying on relations in respect of a territory with the people or peoples of that territory’.³ Each state determines its membership criteria, and retains sovereign control over access to its territory and residence therein. Hence, state citizenship (or nationality) serves critical international functions.⁴ This chapter situates the international legal regime in which sovereign states recognise individuals as refugees according to the criteria set in Article 1A(2) of the Convention Relating to the Status of Refugees (CSR1951)⁵ as a (qualified) exception to migration control.

¹ Chaim Weizmann, *Minutes of Evidence before the Palestine Royal Commission* (25 November 1936), published in Barnet Litvinoff (ed), *The Letters and Papers of Chaim Weizmann: Series B – Papers* (Transaction Publishers, 1984), vol II, no 22.

² Charter of the United Nations, art 2(1), 26 June 1945, 3 Bevans 1153, entered into force 24 October 1945. At the time of writing, there are 193 UN member states. See also the principle of sovereign equality of states in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, GA/Res/2625 (XXV) of 24 October 1970.

³ Timothy Endicott, ‘The Logic of Freedom and Power’ in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press, 2010) 245, 257.

⁴ Stephen Legomsky, ‘Citizens’ Rights and Human Rights’ (2010) 43 *Israel Law Review* 67, 77. Citizenship is generally acquired in one of the following three ways: acquisition by birth on the territory of the state (*ius soli*); acquisition by patrilineal or matrilineal descent (*ius sanguinis*); and *naturalisation*. In principle, a coordinated *ius soli* would leave no-one stateless; however, the incongruent application by states of *jus soli* and *jus sanguinis* dictates that new cases of statelessness still occur. See eg Ayelet Shachar, *The Birthright Lottery: Citizenship and Global Inequality* (Harvard University Press, 2009), 141.

⁵ 28 July 1951, 189 UNTS 137, entered into force 22 April 1954.

Section B presents the current global legal order which locates migration control at the heart of state sovereignty. It is submitted that sovereign discretion to admit aliens and to expel them, subject to certain safeguards, remains resilient to ‘open borders’ challenges.

Section C considers the exceptionality of CSR1951 refugees vis-à-vis other migrants in light of the CSR1951 legal framework. In view of their predicament, CSR1951 refugees are recognised as persons in need of international protection; nonetheless, they do not enjoy a ‘choate’ right to asylum, as no individual refugee has a right to be granted asylum in a particular state.

Section D considers the absence of centralised decision-making and judicial review bodies from the CSR1951 structure,⁶ leading (perhaps inevitably) to non-uniform application of its ‘inclusion’ clause.⁷ As the thesis concerns individuals whose refugee claim had been processed and found valid by a Contracting State, and who subsequently reside in that state,⁸ interpretive queries concerning the interpretation of the inclusion criteria will *not* be thoroughly explored.

Finally, Section E considers the conditional protection from expulsion that recognised CSR1951 refugees enjoy in their countries of asylum, and its ramifications.

⁶ Cf art 38 (stipulating that ‘[a]ny dispute between Parties to this Convention relating to its interpretation or application, which cannot be settled by other means, shall be referred to the International Court of Justice at the request of any one of the parties to the dispute’). No state has submitted reservations. Notably, rather than a judicial review procedure, the provision illustrates the inter-state character of CSR1951.

⁷ Ibid, art 1A(2).

⁸ Ulrike Davy, ‘Article 32: Expulsion’ in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press, 2011) 1277, 1301.

B. Migration Control and State Sovereignty

‘The question of sovereignty...[has] always been at the centre of the system of public international law’.⁹ ‘The power to admit, exclude and expel aliens was among the earliest and most widely recognised powers of the sovereign state’¹⁰ and is perhaps inherent therein.¹¹ Walzer defines it as an essential element of the (collective) self-determination of current members.¹² Nevertheless, it is a power which is controlled and limited, particularly by treaty obligations, and generally by obligations imposed by Customary International Law.¹³

After the First World War, it has become an accepted norm that, while a sovereign state has a right to deport or expel aliens as an extension of its sovereign right to exclude them,¹⁴ it has a (parallel) obligation to admit its nationals when other states exercise their sovereign discretion and expel them.¹⁵ Equally, a state cannot ‘banish’ its own nationals,

⁹ Robert Jennings, ‘Sovereignty and International Law’ in Gerard Kreijen (ed), *State, Sovereignty and International Governance* (Oxford University Press, 2002) 27, 27.

¹⁰ *R (European Roma Rights Centre) v Immigration Officer at Prague Airport*, [2004] UKHL 55, para 11 (per Lord Bingham, referring to the sovereign power possessed by the Crown).

¹¹ Joseph H Carens, ‘Aliens and Citizens: The Case for Open Borders’ (1987) 49 *Review of Politics* 251, 251-2.

¹² Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (Basic Books, 1983), 31; see also Tom Farer, ‘How the International System Copes with Involuntary Migration’ (1995) 17 *Human Rights Quarterly* 72, 88.

¹³ Guy S Goodwin-Gill, *International Law and the Movement of Persons Between States* (Clarendon Press, 1978), 309.

¹⁴ Bridget Anderson, Matthew J Gibney, and Emanuela Paoletti, ‘Citizenship, Deportation, and the Boundaries of Belonging’ (2011) 15 *Citizenship Studies* 547, 548.

¹⁵ See eg Guy S Goodwin-Gill, *Voluntary Repatriation: Legal and Policy Issues* (December 1986) 5, 7 (noting that a legal relationship comes into existence whenever one state admits the national of another: the general rule in international law is that a state is required to admit its nationals if they are expelled from other states, as nationality represents not only the relationship between individual and their state, but is also a legally relevant fact having consequences in international law). For an early treaty stipulating this principle, see Convention concerning the Status of Aliens, art 6(2), Havana, 20 February 1928, 132 LNTS 301 (‘States are required to receive their nationals expelled from foreign soil who seek to enter their territory’.)

since no other state would be required to admit them.¹⁶ As Schwarzenberger submitted,¹⁷ ‘the practice of states had insisted on the duty of the home State to receive back any national expelled from a foreign State’. Indeed, if states were to refuse readmission of their nationals, forcing other states to retain aliens on their soil whom they have the right to expel under international law, such action would constitute a violation of the territorial supremacy of the latter states.¹⁸

Torpey suggests¹⁹ that control over movement as manifest in the emergence of immigration controls and passports is ‘an essential aspect of the state-ness’ of states. The passport which ensures the ‘returnability’ of the individual to the issuing state has become indispensable for international travel.²⁰ The issuance of Convention Travel Documents for CSR1951 refugees and their protection abroad is considered in Chapter Seven *infra*.

The capacity of the state to control its borders sits uneasily with liberal principles,²¹ according to which allocation of morally significant goods based on morally arbitrary

¹⁶ See eg Hans Kelsen, *General Theory of Law and State* (Anders Wedberg Trans, Russell & Russell, 1961), 236.

¹⁷ Georg Schwarzenberger, *International Law* (3rd edn Stevens, 1957) vol 1, 361.

¹⁸ Paul Weis, *Nationality and Statelessness in International Law* (2nd edn Sijthoff and Noordhoff, 1979) 45.

¹⁹ John Torpey, *The Invention of the Passport: Surveillance, Citizenship and the State* (Cambridge University Press, 1999), 1-3. See also Boldizar Nagy, ‘The Frontiers of the Sovereign’ in Anne Bayefsky (ed), *Human Rights and Refugees, Internally Displaced Persons and Migrant Workers* (Nijhoff, 2006) 91, 97. Cf Human Rights Committee, General Comment No 27: *Freedom of movement (Art. 12)* (2 November 1999) CCPR/C/21/Rev.1/Add.9, para 9 (noting that ‘[s]ince 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. The issuing of passports is normally incumbent on the State of nationality of the individual’).

²⁰ *Movement of Persons* (n13), 24-25. See also Alan Dowty, *Closed Borders: The Contemporary Assault on Free Movement* (Yale University Press, 1997) 62.

²¹ Matthew J Gibney and Randall Hansen, *Deportation and the Liberal State: the Forcible Return of Asylum Seekers and Unlawful Migrants in Canada, Germany and the United Kingdom* (UNHCR, 2003) 1, 15.

considerations is suspect.²² Rawls steers clear of immigration-related questions in *The Law of Peoples*,²³ notwithstanding his (general) contention in *A Theory of Justice* (TOJ)²⁴ that each person is inviolable and should not be favoured or disfavoured based on natural chance or the contingency of social circumstances.

In contradistinction, Carens has asserted²⁵ based on Rawlsian TOJ principles, that birthplace and parentage are arbitrary natural contingencies, and that community membership largely based on these contingencies is a modern equivalent of ‘feudal privilege’, namely an inherited status that greatly enhances one’s life chances. On this view, individuals should be able to join the political community of their choosing pursuant to accepting the terms of its ‘social contract’;²⁶ migration control should restrict such movement only when the wellbeing of current citizens pursuant to admission of migrants is expected to fall below that of refused potential applicants.²⁷

²² See eg Ronald Beiner, *What’s the Matter with Liberalism* (University of California Press, 1992), 102.

²³ See generally John Rawls, *The Law of Peoples* (Harvard University Press, 1999).

²⁴ John Rawls, *A Theory of Justice* (Harvard University Press, 1971), 3.

²⁵ *Open Borders* (n11), 252.

²⁶ Joseph H Carens, ‘Who Belongs? Theoretical and Legal Questions about Birthright Citizenship in the United States’ (1987) 37 *University of Toronto Law Journal* 413, 417-18.

²⁷ *Open Borders* (n11). Cf Seyla Benhabib, ‘Citizens, Residents and Aliens in a Changing World’ (1999) 66(3) *Social Research* 709, 711 (contending that state sovereignty ought to be constrained by human rights considerations). Elsewhere, Benhabib argues that, while states should grant aliens a right to first admittance and temporary sojourn or hospitality (in a Kantian sense), they ought to retain sovereign discretion as to full membership. See generally Seyla Benhabib, ‘Response to Bhikhu Parekh’ in Kate Tunstall (ed), *Displacement, Asylum, Migration* (Oxford Amnesty Lectures 2004 Oxford University Press, 2006) 44. Cf Mark FN Franke, ‘Political Exclusion of Refugees in the Ethics of International Relations’ in Patrick Hayden (ed), *The Ashgate Research Companion to Ethics and International Relations* (Ashgate, 2009) 309, 319 (asserting that a sovereign right to territory brings with it the possibility, and hence possibly the expectation, of hospitality).

Carens' conceptualisation of 'open borders' has been criticised for its impracticability,²⁸ and for its potentially adverse effects on developing states, where arguably only the well-off will be able to afford to migrate, leading to a (further) 'brain-drain'.²⁹

In contradistinction, Walzer offers a principled defence of migration control; he asserts³⁰ that political communities ought to retain 'the collective right of admission and refusal'. Without control over decisions regarding admission and exclusion, 'there could not be communities of character, historically stable on-going associations of men and women with some special commitment to one another and some special sense of their commune life.'³¹ According to Walzer³² '[t]he distinctiveness of cultures and groups depends upon closure without [which] it cannot be conceived as a stable feature of human life'.

Nevertheless, as the next section suggests, the fact that states currently *are* and, on Walzer's account, *should be* institutionally capable to make (first) admissions decisions does not entail that their discretion in making such decisions should be unconstrained.

²⁸ See eg Stephen Perry, 'Immigration, Justice and Culture' in Warren Schwartz (ed), *Justice in Immigration* (Cambridge University Press, 1995) 96, 106.

²⁹ John Woodward, 'Commentary: Liberalism and Migration' in Brian Barry and Robert Goodin (eds), *Free Movement: Ethical Issues in the Transnational Migration of People and of Money* (Harvester Wheatsheaf, 1992) 59, 64-65.

³⁰ *Spheres of Justice* (n12), 44.

³¹ *Ibid*, 62.

³² *Ibid*, 38-9. Cf Bhikhu Parekh, 'Three Theories of Immigration' in Sarah Spencer (ed), *Strangers and Citizens: A Positive Approach to Migrants and Refugees* (Rivers Oram Press, 1994) 91, 102-5 (arguing that the communitarian vision of homogeneous, fixed or close-knit societies appears rather outmoded, even when describing indigenous sections of society); Will Kymlicka, 'Social Unity in a Liberal State' (1996) 13(1) *Social Philosophy and Policy* 105, 117-9 (maintaining that, there is little evidence that immigration as such poses a threat to the unity or stability of a nation-state); Perry (n28), 114 (asserting that, as long as demographic changes are sufficiently gradual, political communities seem to be capable of adjusting to diversification or transformation of the dominant culture, while maintaining institutional stability).

C. CSR1951 Refugees as a (Qualified) Exception to Migration Control

1. Distinguishing Claims of CSR1951 Refugees from other Migrants

It is suggested that the international refugee regime manifests a tension between, on the one hand, the right of states to control and limit immigration as a necessary incident of sovereignty, and on the other hand, persons at risk of persecution in their state of origin from which that state will not or cannot protect them.³³

Vattel's stipulation regarding qualified admission of 'exiles' provides an interesting comparator:³⁴ '[n]o nation can, without good reasons, refuse even a perpetual residence to a man driven from his country.' However, 'if particular and substantial reasons prevent her from affording him an asylum, this man no longer has any right to demand it – because in such a case the country inhabited by the nation cannot at the same time serve for her own use and of that of this foreigner'.

The refugee problem concerns the individual's relationship with a polity and the relationships between polities.³⁵ Carens asserts³⁶ that the desire to set limits to obligations to admit refugees is understandable, given the fundamental characteristics of the state system. The responsibility to admit refugees is a secondary, derivative duty. A Contracting State has a

³³ Kristen Walker, 'Defending the 1951 Convention Definition of Refugee' (2002-2003) 17 *Georgetown Immigration Law Journal* 83, 85.

³⁴ Emmerich de Vattel, *The Law of Nations or the Principles of Natural Law* (1758), Bk I § 231. He argued that 'an *exile* is a man driven from the place of his settlement, or constrained to quit it, but without a mark of infamy. Banishment is a similar expulsion, with a mark of infamy annexed'. *Ibid*, § 228.

³⁵ Gervase JL Coles, 'The Human Rights Approach to the Solution of the Refugee Problem: A Theoretical and Practical Enquiry' in Alan E Nash and John P Humphrey (eds), *Human Rights and the Protection of Refugees under International Law* (The Institute for Research on Public Policy, 1988) 195, 196-7.

³⁶ Joseph H Carens, *Who Belongs: The Ethics of Immigration*, Ch 9: The Dispossessed: Responsibilities for Refugees 27 (draft with author).

responsibility to admit refugees only because another state has failed to carry out its primary moral duty. Indeed, if it is assumed that the state is the primary guardian of its citizens, then a person has a claim for assistance from the international community (funnelled through a state) only when her state is unable or unwilling to perform that role of guardian.³⁷

Nevertheless, it is asserted³⁸ that the special responsibility that a state has towards its citizens is derived from moral considerations similar to those underlying its general duty to refugees. Notwithstanding his defence of migration control (above), Walzer submits³⁹ that ‘there is one group of needy outsiders whose claims can only be met by taking people in. This is the group of refugees whose need is for membership itself...which is a non-exportable good’.

To qualify as a refugee according to Article 1A(2) of CSR1951, a person must be outside her state of origin; must have a well-founded fear of persecution for one (or more) of five specified reasons: race, religion, nationality, membership of a particular social group, or political opinion; and must be either unable or, owing to such fear of persecution, unwilling to avail herself of the protection of their state of origin. Refugees are unable or unwilling to avail themselves of the protection of their country of origin if this country is unable to

³⁷ Joseph H Carens, ‘The Philosopher and the Policymaker: Two Perspectives on the Ethics of Immigration with Special Attention to the Problem of Restricting Asylum’ in Kay Hailbronner et al (eds), *Immigration Admissions: The Search for Workable Policies in Germany and the United States* (Berghahn Books, 1997) 3, 14.

³⁸ Robert Goodin, ‘What is So Special about Our Fellow Countrymen?’ (1988) 98 *Ethics* 663, 684-5.

³⁹ *Spheres of Justice* (n12), 48. Walzer nonetheless cautions against a mass influx of refugees, arguing that the right to restrain the flow remains a feature of communal self-determination. Id 51. Cf Matthew E Price, ‘Politics or Humanitarianism? Recovering the Political Roots of Asylum’ (2004) 19 *Georgetown Immigration Law Journal* 277 (contending that, in a world of closed borders, a refusal to admit is functionally equivalent to a decision to extradite: an asylum-seeker who is refused admission may have nowhere else to go but back home where she will face persecution). See also Rainer Bauböck, *Transnational Citizenship: Membership and Rights in International Migration* (Edward Elgar, 1994), 66 (asserting that, if refugees are denied admission, their ‘fundamental natural rights’ will be infringed).

provide them the minimum of safety and security that arguably serves as the very foundation of the legitimacy of state power.⁴⁰

It is often contended that the conceptual distinction between ‘economic’ migrants and refugees is fundamental to understanding the CSR1951 regime.⁴¹ An economic migrant enjoys (*de jure*) the protection of her government, whilst a refugee does not.⁴² UNHCR contends⁴³ that the ‘need for international protection...most clearly distinguishes [CSR1951] refugees from other aliens’. Refugees’ well-founded fear of persecution⁴⁴ is at the heart of their physical alienage distinguishing their predicament from that of other expatriates.

Moreover, CSR1951 is not designed to protect victims of general human rights violations.⁴⁵ *Persecution* and *alienage*, together manifesting the severance of a bond between

⁴⁰ Walter Kälin, ‘Non-State Agents of Persecution and the Inability of the State to Protect’ (2000-2001) 15 Georgetown Immigration Law Journal 415, 427. Cf Emma Haddad, ‘The Refugee: The Individual between Sovereigns’ (2003) 17(3) Global Society 297, 309 (suggesting that the refugee phenomenon is a feature of an international system characterised by the predominance of states).

⁴¹ UNHCR, *Note on International Protection*, UN Doc A/AC/96/830 (1994). See Erika Feller, ‘Refugees are not Migrants’ (2005) 25(4) Refugee Survey Quarterly 27, 27 (positing that ‘[i]t is dangerous and detrimental to refugee protection to confuse the two groups terminologically or otherwise, even though a refugee situation may be part of a broader migratory movement or may even itself develop into one’). Erika Feller, ‘Asylum, Migration and Refugee Protection: Realities, Myths and the Promise of Things to Come’ (2006) 18 (3-4) International Journal of Refugee Law 509, 525 (suggesting that CSR1951 is not and was never intended to be a migration control tool). Similarly, see James C Hathaway, ‘Reconsideration of the Underlying Premise of Refugee Law’ (1990) 31 Harvard International Law Journal 129, 146.

⁴² Part C of the thesis explores substantive differences between voluntary migrants and CSR1951 refugees in terms of their ability to retain a functioning bond with their country of origin through participation in its elections, access to its protection abroad, and most fundamentally, an effective and practicable right to return.

⁴³ James C Hathaway, ‘Why Refugee Law Still Matters’ (2007) 8 Melbourne Journal of International Law 89, 98 (arguing that ‘a refugee is not just a fundamentally disenfranchised human rights victim but is by definition someone who has managed to get outside his or her own country’).

⁴⁴ The centrality of fear in the CSR1951 refugee definition places a greater emphasis on the experience and circumstances of the *individual* than the treaties which preceded CSR1951. See Chapter Seven *infra*.

⁴⁵ See generally Animesh Ghoshal and Thomas M Crowley, ‘Refugees and Immigrants: A Human Rights Dilemma’ (1983) 5(3) Human Rights Quarterly 327. See also UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol*

refugees and their state which constitutes the normal basis of society, must be present to sustain a CSR1951 refugee claim.⁴⁶ CSR1951 enables a person who no longer has the benefit of protection against persecution in her own country to turn to the international community for protection.⁴⁷ Carens defends the physical alienage requirement, suggesting⁴⁸ that it is *not* morally arbitrary: if asylum seekers are denied entry and sent back to their state of origin, then the sending state becomes directly involved in what happens to them.

The conceptual significance of emphasising protection rather than economic predicament is that, when states accept refugees ‘they are responding to extremity, not equality’.⁴⁹ The ordinary inequalities of the modern world do not give rise to a moral claim to admission as a refugee.⁵⁰ While many CSR1951 refugees fit the vision of those most in need

Relating to the Status of Refugees (reissued December 2011), para 54 (maintaining that ‘[n]ot every breach of a refugee claimant’s human rights constitutes persecution’).

⁴⁶ Andrew Shacknove, ‘Who is a Refugee?’ (1985) 95 *Ethics* 274, 275.

⁴⁷ See eg *Canada (AG) v Ward* [1993] 2 SCR 689, 689 (maintaining that ‘international refugee law was formulated to serve as a back-up to the protection owed to a national by his or her state. It was meant to come into play only in situations where that protection is unavailable, and then only in certain situations. The international community intended that persecuted individuals be required to approach their home state for protection before the responsibility of other states becomes engaged...’).

⁴⁸ Joseph H Carens, ‘Who Should Get in? The Ethics of Immigration Admissions’ (2003) 17(1) *Ethics and International Affairs* 95, 101.

⁴⁹ Matthew J Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees* (Cambridge University Press, 2004), 211.

⁵⁰ Cf Carens (n48) 102-3 (contending that, while in his view the CSR1951 refugee definition is too restrictive, any attempt to modify the definition would be a mistake, because in the current political climate, any change would likely lead to a contraction). Elsewhere, he cautions that ‘[i]n seeking to advance the interests of refugees and other needy people, we should be careful not to undermine the legitimacy of one of the few institutions that offer them any sort of protection and hope, however limited and inadequate it may be in many respects. Joseph H Carens, ‘Refugees and the Limits of Obligation’ (1992) 6 *Public Affairs Quarterly* 31, 41–42.

that is conjured in part of the theoretical discussion, others who are equally or more destitute are not refugees;⁵¹ destitution is neither a necessary nor a sufficient criterion for recognition.

2. An Inchoate Right to Asylum

The UDHR proclaims⁵² that '[e]veryone has the right to seek and to enjoy in other countries asylum from persecution'. Shortly after its adoption, the Institute of International Law defined asylum⁵³ as 'the protection which a State grants on its territory or in some other place under the control of certain of its organs, to a person who comes to seek it'.

Article 1 of the 1967 UN *Declaration on Territorial Asylum* pronounces⁵⁴ that 'asylum granted by a state, in the exercise of its sovereignty...shall be respected by all other states'. Indeed, it could be argued that, conceptually, if states may *exclude* aliens in the exercise of their sovereignty, they may also *admit* them at will. The above declaration defines⁵⁵ the grant of territorial asylum as 'a peaceful and humanitarian act' that cannot be regarded as unfriendly by any other State' (notwithstanding the observation that 'the problem

⁵¹ Catherine Dauvergne, 'Amorality and Humanitarianism in Refugee Law' (1999) 37(3) Osgoode Hall Law Journal 597, 617.

⁵² GA/Res/217 (III) of 10 December 1948, art 14(1). See Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn Oxford University Press, 2007), 358 (noting that when art 14 was being drafted, states were divided between those that regarded asylum as their sovereign prerogative like the UK and those which saw it as a duty of the international community like France; the former view prevailed).

⁵³ Resolution adopted by the Institute of International Law (September 1950), art 1, published in (1951) 45(2) American Journal of International Law 15, 16.

⁵⁴ GA/Res/2312 (XXII) of 14 December 1967.

⁵⁵ Declaration on Territorial Asylum (n54), Preamble. See also UNHCR Statute, art 2, adopted as an annex to GA/Res/428 (V) of 14 December 1950 ('the work of the High Commissioner shall be of an entirely non-political character'). For discussion, see generally William T Worster, 'The Contemporary International Law of the Right to Receive Asylum', available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2025410.

of refugees can never be entirely non-political'⁵⁶). Article 2 acknowledges that the plight of asylum seekers was a matter of international concern. Crucially, however, Article 1(3) states that 'it shall rest with the state granting asylum to evaluate the grounds for the grant of asylum'.

It is submitted that the right to asylum is inchoate, as it fails to satisfy the first of the following three requirements: *first*, right of entry to a given state; *second*, protection from forced return; *third*, entitlements while remaining. Article 33(1) of CSR1951 pronounces that '[n]o Contracting State shall expel or return (refouler) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion', while Articles 3 to 32 and 34 list entitlements of CSR1951 refugees.⁵⁷ By contrast, there is *no* binding obligation on a Contracting State to grant asylum to any individual applicant⁵⁸ nor can such an obligation be derived at present from general international law.⁵⁹

⁵⁶ Guy S Goodwin-Gill, 'The Politics of Refugee Protection' (2008) 27(1) Refugee Survey Quarterly 8, 8.

⁵⁷ See Chapter Two *infra*. Section E *infra* considers the conditional protection from expulsion which recognised CSR1951 refugees enjoy in their state of asylum.

⁵⁸ See eg the ECtHR judgment in App No 1948/04 *Saleh Sheekh v The Netherlands* (Third Section Chamber) (11 January 2007), para 135 (holding that '[c]ontracting States [to CSR1951] have the right, as a matter of well-established international law and subject to their treaty obligations including the Convention, to control the entry, residence and expulsion of aliens. The right to political asylum is not contained in either the Convention or its Protocols'). Cf Goodwin-Gill and McAdam (n52), 357 (emphasising on the one hand the close relationship between the issue of refugee status and the principle of non-refoulement, and on the other hand the concept of asylum). See also Tom Clark, 'Rights Based Refuge, the Potential of the 1951 Convention, and the Need for Authoritative Interpretation' (2004) 16(4) International Journal of Refugee Law 584, 587.

⁵⁹ Agnes Hurwitz, *The Collective Responsibility of States to Protect Refugees* (Oxford University Press, 2009), 209; Guy S Goodwin-Gill, *Declaration on Territorial Asylum*, available at: <http://untreaty.un.org/cod/avl/ha/dta/dta.html>. Cf Charter of Fundamental Rights of the European Union, art 18, 7 December 2000, OJ C 364/01, entered into force 1 December 2009 (stating that 'the right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 Relating to the Status of Refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union'); Grundgesetz für die Bundesrepublik Deutschland [grundgesetz] [GG] [Basic Law], 23 May 1949, BGB I, art 19(2) (Ger), art 16, cited by Dan Diner, 'Nation, Migration and Memory: On Historical Concepts of Citizenship' (1998) 4(3) Constellations 293, 296 (positing

Under CSR1951, no ascertainable agent bears the duty of admission correlative to the claim of any particular refugee.⁶⁰ Indeed, the formal scheme of CSR1951 is ‘one of obligations between Contracting States. The refugee is a beneficiary, with a status to which certain standards of treatment and certain guarantees attach’.⁶¹

Chetail posits⁶² that territorial sovereignty is both the foundation and the limit of the CSR1951 regime. On the one hand, refugees are protected against persecution from their own states as a consequence of the territorial jurisdiction of states of asylum. The duty of every state to respect the territorial integrity of others means that states of origin can no longer exercise any act of authorities upon their nationals who found asylum abroad. On the other hand, states of asylum do not have a correlative obligation to grant protection to these nationals in their territory.

The legal consequences of recognition of a person as a CSR1951 refugee and of her lawful residence in an asylum-granting state, including (pertinently for this thesis) conditional

that the German Basic Law expresses the promise of a sovereign entity to those who, by definition, stand outside of the political community).

⁶⁰ Frank Michelman, ‘Parsing ‘a Right to have Rights’’ (1996) 3(2) *Constellations* 200, 203. Hohfeld has famously asserted that for each claim-right there is a correlative duty; that a right is infringed when the correlative duty is not carried out, is violated when it is unjustifiably infringed, and is overridden when it is justifiably infringed. See eg Alan Gewirth, ‘Are there any Absolute Rights?’ In Jeremy Waldron (ed), *Theories of Rights* (Oxford University Press, 1984) 91, 93.

⁶¹ Guy S Goodwin-Gill, ‘Refugees and their Human Rights’ (RSC Working Paper No 17, August 2004), 8.

⁶² Vincent Chetail, ‘Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law’ in Ruth Rubio-Marín (ed), *Migrations and Human Rights, Collected Courses of the Academy of European Law* (Oxford University Press, forthcoming 2013), available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2147763.

protection from expulsion⁶³ as well as a commitment to facilitate assimilation and naturalisation⁶⁴ may explain the reluctance of states to endorse a choate right to asylum.⁶⁵

D. Recognition: Beyond Non-uniform Interpretation

Refugee recognition under CSR1951 is *declarative*. UNHCR emphasises⁶⁶ that ‘a person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily have occurred prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition but is recognised because he is a refugee.’ Nevertheless, the Refugee Status Determination (RSD) process is significant.

General international law dictates⁶⁷ that ‘[a] state may not invoke the provisions of its internal law as justification for its failure to perform a treaty’. A Contracting State which refuses to determine and identify the status of refugees is in breach of its CSR1951 obligations.⁶⁸ An assessment as to whether an applicant qualifies for CSR1951 refugee status

⁶³ See Section E *infra*.

⁶⁴ See Chapter Eight *infra*.

⁶⁵ Cf Joan Fitzpatrick, ‘Revitalizing the 1951 Refugee Convention’ (1996) 9 Harvard Human Rights Journal 229, 245-249 (lamenting the absence of a right to asylum); Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford University Press, 1998), 21 (arguing that ‘[t]he figure of the asylum-seeker ‘disrupts the holy trinity of nation-state-territory’).

⁶⁶ *Handbook* (n45), para 2.

⁶⁷ Vienna Convention on the Law of Treaties, art 27, 23 May 1969, 1155 UNTS 331, entered into force 27 January 1980.

⁶⁸ Guy S Goodwin-Gill, ‘International Law and Human Rights: Trends Concerning International Migrants and Refugees’ (1989) 23(3) International Migration Review 526, 536.

is incumbent upon Contracting States.⁶⁹ Read together, Articles 1 and 33 of CSR1951 require Contracting States to grant, at a minimum, access to RSD processes.⁷⁰

The CSR1951 refugee regime is global in character: putative refugees arrive from different states of origin to different states of asylum; as an international treaty, universal standards are called for. However, since each Contracting State has to implement CSR1951 through its domestic legislation, and to interpret and apply its provisions through its legal procedures, assessment criteria are non-uniform. The CSR1951 drafters have refrained from regulating RSD procedures;⁷¹ consequently, Chetail argues⁷² that there exist as many refugee statuses as Contracting States, in so far as the content of the applicable standards to aliens and nationals is determined by the legislation of each state.

Almost every term in the Article 1A(2) stipulation is subject to divergent interpretations. Most pertinently, UNHCR observes⁷³ that there is no universally accepted definition of ‘persecution’.⁷⁴ Interpretation of the term ‘well-founded fear’, containing a

⁶⁹ *Handbook* (n45), para 2.

⁷⁰ Alice Edwards, ‘Human Rights, Refugees and the Right to ‘Enjoy’ Asylum’ (2005) 17(2) *International Journal of Refugee Law* 295, 302.

⁷¹ Itamar Mann, ‘Refugees’ (2011) 2e *Mafteah* 81, 85.

⁷² Chetail (n62), 28.

⁷³ Regarding the role of UNHCR, see eg Erika Feller, ‘The UN and the Protection of Human Rights: The Evolution of the International Refugee Protection Regime’ (2001) 5 *Washington University Journal of Law and Policy* 129, 130.

⁷⁴ *Handbook* (n45), para 51. Cf European Union (EU) Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted (QD), art 9 (stipulating that persecutory acts must be ‘sufficiently serious by their nature or repetition’ to constitute ‘a severe violation of basic human rights’). See also generally Deborah Anker and Fatma E Marouf, ‘Socioeconomic Rights and Refugee Status: Deepening the Dialogue between Human Rights and Refugee Law’ (2009) 103(4) *American Journal of International Law* 784, 784-5 (‘persecution is now widely understood as sustained or systemic violation of basic human rights demonstrative of a failure of state protection’).

subjective element (namely, that the individual personally has fear⁷⁵) and an objective examination (namely, that the fear is well-founded⁷⁶) proves challenging, not least due to its prospective nature.

Equally, the appropriate interpretation of ‘for reasons of’, namely whether an enumerated ground should be considered a dominant or a contributing factor to the well-founded fear of being persecuted,⁷⁷ and the scope of each of the five historically-contingent⁷⁸ bases for persecution (especially that of ‘membership of a particular social group’) are subject to on-going debate.⁷⁹

Another challenge concerns the appropriate standard of proof that a claimant must satisfy. In RSD processes, it is necessary to look to the future and ask whether if returned to their country of origin, the claimant would face a serious risk of persecution, and to try and quantify that risk. Hence, every RSD process risks ‘false positives’ (granting refugee status to

⁷⁵ *Handbook* (n45), para 38. See also *The Refugee in International Law* (n52), 54 (‘given the nature of the definition, the assessment of claims to refugee status thus involves a complex of subjective and objective factors’).

⁷⁶ *Id.*

⁷⁷ UNHCR advocates the latter view: see eg *Guidelines on International Protection: The application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked*, para 29, UN Doc HCR/GIP/06/07, 7 April 2006.

⁷⁸ See generally James C Hathaway, ‘The Evolution of Refugee Law’ (1984) 33 *International and Comparative Law Quarterly* 348 (contending that the enumerated grounds were based on the events of the time of drafting: from the persecution of Russians and Armenians and of the opposition in Spain, and especially of Jews and other groups in Nazi Germany, to the developing politics of the Cold War). See also Daniel J Steinbock, ‘Interpreting the Refugee Definition’ (1998) 45 *UCLA Law Review* 743, 766 (noting that the ethnicity, religion and nationality categories followed the ‘archetypical’ example of the persecution of Jews by the Nazis).

⁷⁹ See eg Guy S Goodwin-Gill, ‘Editorial: Asylum 2001 - A Convention and a Purpose’ (2001) 13 *International Journal of Refugee Law* 1, 1-2 (contending that the claims that CSR1951 is ‘functionally inefficient, overly legalistic, complex, and difficult to apply within a world of competing priorities’ can be partly addressed by invoking human rights law to fill in the ‘grey areas’, *inter alia*, in the interpretation of terms such as persecution and social groups). Regarding the latter issue, see eg *Michigan Guidelines on Nexus to a Convention Ground, Guidelines Reflecting the Consensus of Participants at the Second Colloquium on Challenges in International Refugee Law*, Ann Arbor, 23-25 March 2001, para 13.

someone who does not qualify) as well as ‘false negatives’ (denying refugee status to a deserving applicant).⁸⁰

This thesis concerns *recognised* CSR1951 refugees; hence, these questions will not be examined here. It is nonetheless helpful to highlight two key areas.

The first area concerns the *agents of persecution*. The paradigmatic form of persecution is undertaken by organs of the state such as the police, the military, the security services, or a combination thereof.⁸¹ However, neither CSR1951 nor the *Travaux* say much about the source of persecution feared by the refugee.⁸² According to the ‘protection theory’ (*compare*: the ‘attribution theory’⁸³), fear of persecution by non-state agents is a valid basis for a CSR1951 refugee claim as long as it can be shown that the state is unable or unwilling to prevent the persecution.⁸⁴ The political predicament of recognised CSR1951 refugees is present whether the state is persecutory, indifferent to persecution or just incompetent.

⁸⁰ See eg QD (n74), art 4.4 (stipulating that the fact that an applicant has already been subject to persecution or serious harm or to direct threats of such persecution or such harm is a serious indication of the applicant’s well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated). *Who Belongs* (n36) ch 9: The Dispossessed: Responsibilities for Refugees (suggesting that, in the asylum context, the analogy to the presumption of innocence should be a presumption that the claimant is a refugee; the burden of proof would rest on the state to disprove the legitimacy of the applicant’s claim beyond a reasonable doubt).

⁸¹ James C Hathaway, *The Law of Refugee Status* (Butterworths, 1991) 125. See eg *Minister of Immigration and Multicultural Affairs v Respondent S152*, HCA (21 April 2004) (Australia), Para 67 (Hayne and Haydon JJ) (holding that ‘[w]here the State is involved in persecution, it will certainly be in breach of its duty to protect its citizens from persecution’).

⁸² Goodwin-Gill and McAdam (n52), 98. Cf Matthew E Price, *Rethinking Asylum: History, Purpose and Limits* (Cambridge University Press, 2009) (proposing an ‘accountability’ theory); Chapter Eight *infra* critically appraises Price’s propositions.

⁸³ The two theories are described by Lord Lloyd in *Adan v Secretary of State for the Home Department* [1999] 1 AC 293, 306A-B.

⁸⁴ See eg Volker Türk, ‘Non-State Agents of Persecution’ in Vera Gowlland-Debbas and Vincent Chetail (eds), *Switzerland and the International Protection of Refugees* (Kluwer, 2002), 95 (arguing that the *Travaux* are silent on the question of agents of persecution, and do not reflect a discussion on a possible restriction that would stem

The second (and related) area concerns the absence of state *protection*. CSR1951 refugees are outside their country of origin; hence, protection could be read (just) as protection *abroad*, namely protection that a state (may) extend to its nationals outside its borders.⁸⁵ However, it is submitted that the absence of access to protection abroad may be seen as an extension of the absence of protection at home, namely that rights and physical security of refugees are not effectively protected by their government and national institutions in the territory of the state.

As Goodwin-Gill notes⁸⁶ the protection normally to be expected of the government is either lacking or denied to CSR1951 refugees. Fear of persecution cannot be said to exist if it is established that meaningful national protection is available to the claimant.⁸⁷ By contrast, the absence of protection in their state of origin prevents refugees from exercising their internationally recognised right to return to their ‘own country’.⁸⁸ Recognition of this predicament is at the heart of their general protection from expulsion, explored below.

E. After Recognition: Conditional Protection from Expulsion

The CSR1951 regime mandates that, after CSR1951 refugee status has been granted, it is retained unless the recognised CSR1951 refugee comes within the terms of one or more of

from any tight correlation between the risk of persecution and the State. The EU QD (n74), art 6 includes non-state actors among ‘actors of persecution’. See also *Handbook* (n45), para 65.

⁸⁵ See also Chapter Seven *infra*.

⁸⁶ Guy S Goodwin-Gill, ‘Non-refoulement and the New Asylum Seekers’ (1986) 26(4) *Virginia Journal of International Law* 897, 901.

⁸⁷ *Law of Refugee Status* (n81), 125.

⁸⁸ International Covenant on Civil and Political Rights, art 12(4) GA/Res/2200/21, 16 December 1966, 999 UNTS 171, entered into force 23 March 1976 (see the Introduction to the thesis, *supra*).

the *exhaustive* list of six cessation clauses.⁸⁹ Michael Hansson posited (in 1939)⁹⁰ that ‘the refugee ceases to be one...when he is either repatriated to his country of origin or becomes naturalized... naturalization...of course....requires the consent of both...the refugee and the state concerned....meanwhile, the refugee must be enabled to live under conditions which are as satisfactory and as possible to him and to the country of refuge.’ Today, reference is usually made⁹¹ to three ‘durable’ solutions for refugees: repatriation, local integration (in the first state of asylum) or resettlement (in a state other than the first state of asylum).

Importantly, while a refugee ‘has duties’⁹² to her state of asylum, breaching these duties does *not* entail cessation of status. Moreover, having committed a serious non-political crime in the state of asylum is *not* a reason for cessation of refugee status; recognition of a person as a CSR1951 refugee entails a commitment to protect her as long as the well-founded fear of being persecuted persists.⁹³

Article 32 of CSR1951 pronounces⁹⁴ that a recognised CSR1951 refugee is generally protected from expulsion from her state of asylum, save on grounds of national security or

⁸⁹ CSR1951, art 1C. See *Handbook* (n45), para 112. The cessation clauses are considered in Chapter Eight *infra*.

⁹⁰ Michael Hansson, *Survey of the Principal Legal Aspects of the Refugee Question at the Present Time*, ch II *Certain Legal Aspects of the Problem of the Settlement of Refugees* (1939), Annex 4, §1.

⁹¹ Cf UNHCR Statute (n56), art 1 (denoting the role of UNHCR as, *inter alia*, ‘seeking permanent solutions for the problem of refugees by assisting...to facilitate the voluntary repatriation of such refugees, or their assimilation within new national communities’. See also art 9 (stipulating that UNHCR ‘shall engage in such additional activities, including repatriation and resettlement’).

⁹² CSR1951, art 2. See also Chapter Two *infra*.

⁹³ James C Hathaway, ‘What’s in a Label?’ (2005) 5 *European Journal of Migration and Law* 1, 2 (stating that ‘as a matter of international law, there was and is no impediment to seeing refugee status as requiring only protection for the duration of risk’).

⁹⁴ Reservations to art 32 are retained by Botswana, Mexico, Papua New Guinea and Uganda. See eg *Secretary of State of the Home Department v ST (Eritrea)* [2012] UKSC 12, where the UK Supreme Court held that a refugee was not entitled to the protection of art 32 unless she had been granted ‘lawful presence’ in the state in

public order, in pursuance of a decision reached in accordance with due process of law. In view of the dire implications of expulsion for recognised refugees, these grounds ought to be narrowly construed.⁹⁵ According to Article 32, a refugee may be expelled only to a state *other* than the state in relation to which his or her well-founded fear of persecution has been established.⁹⁶

The commission of a serious non-political crime by a recognised refugee may be taken into account by her state of asylum should it wish to expel her.⁹⁷ However, a reprehensible refugee is *still a refugee*: unless she is able to take up residence elsewhere, her expulsion will not be feasible.⁹⁸ The CSR1951 drafters recognised this difficulty: Article 32(2) stipulates that the state must allow the refugee a reasonable period within which to seek admission to another state (other than her state of origin).

Article 32 thus incorporates three distinct elements:⁹⁹ restrictions on state power to expel aliens *qua* refugees; procedural safeguards in the case of an expulsion order being made; and an obligation to grant CSR1951 refugees a reasonable period of time within which

question. As the underlying assumption of this thesis is that the persons concerned *are recognised* by their respective states of asylum and reside lawfully therein, the merits of this judgment will not be discussed.

⁹⁵ See eg Davy (n8), 1310-1 (positing that the ‘national security’ ground excludes criminal activities with respect to life and limb or the property of other individuals that have no bearing on the very existence of the country or the government; moreover, national security is not threatened when aliens are sick, unemployed or destitute. Similarly, the ‘public order’ ground is not applicable when individuals concerned are sick, unemployed or poor and thus in need of social assistance or other social benefits).

⁹⁶ Hence, art 32 complements the (qualified) art 33 prohibition on *refoulement* of refugees.

⁹⁷ See eg *E1/(OS RUSSIA) v Secretary of State for the Home Department* [2012] EWCA Civ 357 (22 March 2012) (upholding the expulsion of a Chechen refugee ‘on the grounds that his presence here was not conducive to the public good, based on the threat that he was assessed to present to national security’).

⁹⁸ See eg Marjoleine Zieck, *UNHCR and Voluntary Repatriation of Refugees* (Nijhoff, 1997), 101-2 (noting that ‘as long as a person satisfies the definition of [CSR1951] refugee...he remains...un-repatriable and consequently benefits from the prohibition of forced return’).

⁹⁹ Davy (n8), 1295.

they may seek legal admission to another state (which, if unsuccessful, would prevent the state of asylum from expelling the CSR1951 refugee).

The recently published International Law Commission (ILC) *Draft Articles on Expulsion of Aliens* recognise¹⁰⁰ a general right of states to expel an alien¹⁰¹ from their territory ‘in accordance with the present draft articles and other applicable rules of international law, in particular those relating to human rights’.¹⁰² Articles 4 and 5 stipulate, respectively, that an expulsion may only be undertaken ‘in pursuance of a decision reached in accordance with the law’ which ‘shall be assessed in good faith and reasonably’. By contrast, Article 6 specifies that a state cannot expel a refugee ‘except on grounds of national security or public order’.¹⁰³ Hence, whilst *general* expulsion power is subject to both procedural and substantive constraints, the threshold for expulsion of *refugees* is set substantively higher in view of their predicament, in congruence with the CSR1951 stipulation.

Finnis, writing about aliens in general, asserts¹⁰⁴ that even if the genuine risk that the presence of an alien in the community poses to the rights of others, to national security,

¹⁰⁰ Report of the International Law Commission on the Work of its Sixty-Fourth Session, UN GAOR 64th Sess Supp No 10, UN Doc A/67/10 (2012). Governments may make comments and observations until 1 January 2014, after which time the articles will be revised with a view to adoption in 2015. See Sean Murphy, ‘The Expulsion of Aliens and Other Topics: The Sixty-Fourth Session of the International Law Commission’ 107 *American Journal of International Law* (forthcoming 2013), available at: <http://ssrn.com/abstract=2170506>.

¹⁰¹ An alien is defined in art 2(b) as ‘a person who does not have the nationality of the state engaging in the expulsion’. According to art 9, a State cannot make its national an alien by deprivation of nationality for the sole purpose of expelling him or her.

¹⁰² Ibid, art 3. Human rights considerations may include interference with the right to family life; see eg Committee on the Elimination of Racial Discrimination, General Recommendation No 30: *Discrimination against Non-citizens* (10 January 2004), para 28.

¹⁰³ Interestingly, Thailand and Malaysia have reserved their position regarding art 6 as they are not a party to the relevant refugee protection treaties. GA, Sixty-Seventh Session, Sixth Committee, 18th meeting, debate on the ILC report, GA/L/3446, 1 November 2012.

¹⁰⁴ John M Finnis, ‘Nationality, Alienage and Constitutional Principle’ (2007) 123 *Law Quarterly Review* 417, 423.

public safety, the prevention of crime, the protection of health or morals or maintenance of *l'ordre public*, or to anything else of 'public interest in a democratic society' is 'relatively slight', it nevertheless *need not be accepted*; such risk can properly be sought to be prevented by exclusion, or terminated by expulsion. On his view, a political community cannot shift to other political communities the risks presented by one of its nationals (members), but it need not unconditionally accept the risk presented by aliens.

It is nevertheless contended that, by recognising a person as a CSR1951 refugee, a state of asylum acknowledges that, unlike other aliens, she does not have a state to which she *can* return.¹⁰⁵ Consequently, the state may have to endure risks from recognised CSR1951 refugees which in ordinary circumstances it perhaps could (and, on Finnis' view, should be entitled to) avert.

Crucially, the length of this recognition-led constraint is *indeterminate*, as it applies until such time as the legal or factual circumstances that serve as the basis for refugee recognition change so that a CSR1951 refugee is no longer in need of international protection.¹⁰⁶ However, neither the state of asylum nor the CSR1951 refugee know when or, indeed, *whether* this will happen.¹⁰⁷ Hence, the CSR1951 refugee has no effective 'exit'

¹⁰⁵ By contrast, voluntary repatriation presupposes that CSR1951 refugees are able to exercise their right to return, and that their state of origin accepts them. See eg Vincent Chetail, 'Voluntary Repatriation in Public International Law: Concepts and Contents' (2004) 23(3) Refugee Survey Quarterly 1, 26.

¹⁰⁶ UNHCR, *The Cessation Clauses: Guidelines on their Application* (1999), §1. Cf judgment of the Court of Justice of the European Union in *Salahadin Abdulla and Others v Bundesrepublik Deutschland*, C-175/08, C-176/08, C-178/08, C-179/08, 2 March 2010, para 76 ('having regard to a change of circumstances of a significant and non-temporary nature in the third country concerned the circumstances which justified the person's fear of persecution... no longer exist and that person has no other reason to fear being 'persecuted').

¹⁰⁷ See also Matthew Lister, 'Who are Refugees', Law and Philosophy (forthcoming 2013), available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2128409, 22 (noting that, to some extent, the inability to predict the length of time during which protection will be required is a consequence of the fact that the asylum-granting state has no duty to directly end the root cause of the danger).

option out of her state of asylum, and is fully dependent on that state's protection during her residence therein; in turn, the state of asylum is bound to protect 'its' recognised CSR1951 refugee as long as such protection is required.

F. Concluding Remarks

This chapter situated the CSR1951 protection regime in an international legal order that considers migration control as a fundamental tenet of state sovereignty. It was suggested that the granting of asylum remains a sovereign decision. Moreover, assessment of asylum applications is done autonomously by each Contracting State; outcomes vary accordingly.

This thesis concerns individuals recognised as CSR1951 refugees under divergent RSD procedures. The state of asylum may offer its recognised CSR1951 refugees a naturalisation path; should they accept, cessation of refugee status would generally ensue. Failing that, refugee status is retained for an indeterminate period, the length of which is *unknown* to both the refugees and to their state of asylum. During such time, unlike other aliens, CSR1951 refugees are generally protected from expulsion, subject to two narrowly construed exceptions.

Meanwhile, while enjoying conditional security of residence, their political predicament is dire; Chapter Two *infra* demonstrates that neither CSR1951 nor international human rights law require states of asylum to entitle their recognised CSR1951 refugees to participate in their elections. Concomitantly, a constitutive condition of their refugee status is that they are unable or unwilling, owing to fear of persecution, to return to their state of origin. The implications are that, for an indeterminate period of time, CSR1951 refugees are effectively excluded from the political community of their state of origin whilst they remain non-members of the political community of their state of asylum.

Lee claims¹⁰⁸ that ‘[t]hrough the grant of asylum the refugee enters...into a special legal relationship with the state of asylum. This relationship is similar to the legal advantages of nationality.’ This thesis argues that CSR1951 refugees *ought* to have a relationship with their state of asylum which reflects their political predicament and should hence be similar to that which the state of asylum has with its nationals (for the indeterminate period during which CSR1951-based protection is required). However, while CSR1951 permits such a relationship to exist, and (as Chapter Eight *infra* suggests) even encourages it, Contracting States are, at present, not required to accept such an obligation.

¹⁰⁸ Luke T Lee, *Consular Law and Practice* (Oxford University Press, 1991), 358, text next to note 34.

CHAPTER TWO: RIGHTS OF CSR1951 REFUGEES AND CITIZENSHIP

VOTING QUALIFICATIONS IN INTERNATIONAL HUMAN RIGHTS LAW

A. Introduction

The starting point of the analysis in this chapter is the characterisation of the modern state as ‘an answer to the question of who is responsible to whom in the modern world: states are responsible to their own citizens’.¹ This conceptualisation empowers citizens and enhances the importance of citizenship. The Universal Declaration of Human Rights (UDHR) ceremoniously proclaims² that ‘everyone’ has a ‘right to a nationality’; nevertheless, the right to nationality remains inchoate.³ Hence, reliance on a state to act as the principal guarantor of human rights may expose a weakness of the international system of rights protection,⁴ notwithstanding states’ treaty obligations.⁵

¹ Matthew J Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees* (Cambridge University Press, 2004), 211. UNHCR notes that ‘[i]t is the responsibility of States to protect their citizens. When governments are unwilling or unable to protect their citizens, individuals may suffer such serious violations of their rights that they are forced to leave their homes, and often even their families, to seek safety in another state. Since, by definition, the governments of their home states no longer protect the basic rights of CSR1951 refugees, the international community steps in to ensure that those basic rights are respected.’ UNHCR, *Refugee Protection: A Guide to International Refugee Law* (1 Dec 2001), available at: <http://www.unhcr.org/refworld/docid/3cd6a8444.html>.

² 10 December 1948, GA Res 217A (III), art 15(1).

³ Laura Van Waas, *Nationality Matters* (Intersentia, 2008), 299 (noting the failure of the Convention Relating to the Status of Stateless Persons, 28 September 1954, 5158 UNTS 360, entered into force 6 June 1960 to address the political disempowerment of stateless persons). See also Matthew J Gibney, ‘Statelessness and the Right to Citizenship’ (April 2009) 32 *Forced Migration Review* 49, 49 (asserting that, in a world where all human beings must live on the territory of one nation state or another, having a nationality is a fundamental principle of justice); James Griffin, *On Human Rights* (Oxford University Press, 2008), 202 (arguing that ‘in some states one can vote and enjoy the protection of the police and army without being a citizen, but only citizenship makes their possession secure. The case for saying that there is a human right to nationality is powerful’); See also Yaffa Zilbershats, *The Human Right to Citizenship* (Transnational Publishing, 2002).

⁴ See Lassa Oppenheim, *International Law: A Treatise* (1912), 369 (contending a century ago that ‘[a]s far as the Law of Nations is concerned, apart from morality there is no restriction whatever to cause a State to abstain from maltreating to any extent such stateless individuals’). The U.S. Federal Supreme Court Chief Justice Warren’s observation in *Perez v Brownell* 356 US 44, 64 (1958) that ‘[c]itizenship is man’s basic right for it is

It was noted in the Introduction to the thesis that recognised CSR1951 refugees⁶ may be either citizens of their state of *origin* or stateless persons. In their state of *asylum*, they are non-citizen residents. This chapter considers the entitlements of CSR1951 refugees in their states of asylum and the ubiquitous exclusion of non-citizen residents, including CSR1951 refugees, from elections of their states of residence.

Section B examines the interrelations between CSR1951 and other leading international human rights instruments, most pertinently the International Covenant on Civil and Political Rights (ICCPR),⁷ concluding that they are complementary and mutually reinforcing.

In turn, Section C considers provisions of CSR1951 that engage political activities of CSR1951 refugees in states of asylum; it is contended that CSR1951 neither prescribes nor proscribes such activities.

nothing less than the right to have rights' has arguably been influenced by Hannah Arendt's account in *The Origins of Totalitarianism* (Harcourt, 1967), 290-2. Arendt lamented the loss of a place to call home, which 'meant the loss of the entire social texture into which they [the stateless] were born and into which they established for themselves a distinct place in the world'. She argued that, while the rights of man have been defined as 'inalienable' because they were supposed to be independent of all government, it turned out that the moment human beings lacked their own government and had to fall back upon their minimum rights, no authority was left to protect them, and no institution was willing to guarantee them.

⁵ Cf David Weissbrodt and Stephen Meili, 'Human Rights and Protection of Non-Citizens: Whither Universality and Indivisibility of Rights?' (2009) 28(4) *Refugee Survey Quarterly* 34, 34 (contending that, while in theory, the universality and indivisibility of human rights in the context of non-citizens is expanding, significant obstacles to the universal and indivisible application of human rights remain as increased human rights protections 'on the books' are not always translated into actual improvements in the lives of non-citizens). Regarding the predicament of stateless persons, see Carol Batchelor, 'Statelessness and the Problem of Resolving Nationality Status' (1998) 10 *International Journal of Refugee Law* 156, 182; Brad Blitz and Maureen Lynch, *Statelessness and the Benefits of Citizenship* (Oxford Brookes, 2009), 7.

⁶ Convention Relating to the Status of Refugees, 28 July 1951, 189 UNTS 137, entered into force 22 April 1954.

⁷ 16 December 1966, 999 UNTS 171, entered into force 23 March 1976.

Section D explores rights that CSR1951 refugees enjoy under the ICCPR *qua* non-citizens. It is submitted that, while the ICCPR entitles CSR1951 refugees to (some) political rights in their states of asylum, Contracting States undertake a commitment to secure voting rights in their elections (only) for their *citizens*.

It is contended that, at present, international human rights treaties do not require states of asylum to enfranchise recognised CSR1951 refugees *qua* non-citizen residents.⁸ While enfranchisement of (some) non-citizens in local and regional (supra-national) elections is increasingly practised, the territorial state continues to define the limits of the democratic community, most evidently in national elections.

Section E demonstrates that the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families has recently affirmed the resilience of an accepted link between voting and citizenship in international human rights treaties.⁹

Section F explores the unsuccessful attempt by the International Law Commission (ILC) to establish a ‘protected person’ status in international law. The ‘protected person’ status was meant to be awarded to stateless persons and would have entitled them to all rights ‘except political rights’. The emphasis that was placed during the drafting process on *voting* as a distinguishing factor between nationals and non-nationals is noteworthy.

⁸ Tony Evans, *The Politics of Human Rights* (2nd edn Pluto Press, 2005), 111. See also Penelope Mathew, ‘Lest we Forget: Australia’s Policy on East Timorese Asylum Seekers’ (1999) 11(1) *International Journal of Refugee Law* 7, 23; Ruth Gavison, ‘Immigration and the Human Rights Discourse’ (2010) 43(2) *Israel Law Review* 1, 27.

⁹ 18 December 1990, 2220 UNTS 3, entered into force 1 July 2003 (Migrant Workers Convention).

B. Interrelations between CSR1951 and the ICCPR

CSR1951 entitles recognised refugees to (qualified) protection of their state of asylum.¹⁰ It is not concerned with the obligations of states of *origin* towards refugees that have left it.¹¹ The primary purpose of CSR1951 is to ensure that refugees can exercise their fundamental rights and freedoms in the state of asylum.¹²

It was noted in Chapter One *supra* that recognition as a CSR1951 refugee is declaratory of status; nevertheless, it is also constitutive of rights: a recognised CSR1951 refugee can claim treatment in accordance with the CSR1951. Articles 3 through 34 of CSR1951 enunciate substantive rights to which refugees are entitled in their state of asylum. The accruing of rights is incremental, based on the refugee's level of attachment to the state of asylum; the longer the refugee remains in the territory of the state party, the broader the

¹⁰ David Owen, *In Loco Civitatis* (draft with author, 4). Regarding the present and desirable scope of protection of CSR1951 refugees, see discussion in Chapters Seven and Eight *infra*. The pronouncement that refugees have rights *irrespective of their nationality* exhibited a shift from the inter-war approach that treated refugees in terms of their membership of national groups, for instance, in the context of various minority treaties aiming to protect rights of ethnic minorities in newly created states. John Torpey, *The Invention of the Passport* (Cambridge University Press, 1999), 144. Traditionally, the treatment of aliens was regulated through reciprocal bilateral agreements between sovereign states; absent such an agreement, the state was (only) expected to offer a minimum international standard of treatment. Riccardo P Mazzeschi, 'The Relationship between Human Rights and the Rights of Aliens and Immigrants' in Ulrich Fastenrath, Rudolf Geiger et al (eds), *From Bilateralism to Community Interest* (Oxford University Press, 2011) 552, 553. Cf Christian Joppke, *Immigration and the Nation-State* (Oxford University Press, 1999), 271 (suggesting that, since the 1789 French Declaration on the Rights of Man and Citizens, domestic constitutions have conceived of civil and social rights as rights of persons residing in territory of the state, irrespective of their citizenship status).

¹¹ Myron Weiner, 'Ethics, National Sovereignty and the Control of Immigration' (1996) 30 *International Migration Review* 171, 188 (suggesting that the refugee 'emerges as a result of the state's unwillingness or failure to secure the ordinary protection offered to its citizens'). Chapter One *supra* considered the failure of states of origin to secure effective protection in the light of the criteria for CSR1951 refugee status.

¹² Niraj Nathwani, *Rethinking Refugee Law* (Nijhoff, 2003) 18. Cf Chaloka Beyani, 'Introduction' in Paul Weis, *The Refugee Convention 1951: The Travaux Préparatoires analysed with a Commentary* (Cambridge University Press, 1995), 8 (contending that, while the ideal would be to place refugees on an equal footing with nationals of the state of refuge in conformity with the principles of non-discrimination set forth in the Universal Declaration, 'it was not possible to grant refugees exactly the same treatment as nationals').

range of her entitlements¹³ A basic set of rights inheres as soon as a CSR1951 refugee comes under the state's jurisdiction; a second set of rights applies upon entering the state's territory; additional rights follow lawful presence in the territory, lawful stay therein, and durable residence, respectively.¹⁴

CSR1951 was adopted as a United Nations (UN) treaty¹⁵ shortly after the adoption of the UDHR; its preamble explicitly proclaims a commitment to human rights, and it was arguably intended to contribute to the achievement of the purposes and principles of the UN which include the advancement of human rights.¹⁶ It was the first comprehensive human rights instrument to apply to a special category of persons.¹⁷

Subsequently, binding human rights instruments were adopted to extend state obligations towards both citizens and non-citizens,¹⁸ including CSR951 refugees.¹⁹ It may be

¹³ James C Hathaway and Alexander Neve, 'Making International Refugee Law Relevant Again' (1998) 10 Harvard Human Rights Law Journal 115, 158-9.

¹⁴ See eg James C Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press, 2005), 154; Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn Oxford University Press, 2007), 305-07.

¹⁵ Weis (n12), 1.

¹⁶ Charter of the United Nations, 24 October 1945, 1 UNTS 16, art 1(3), declaring that one of the aims of the United Nations is 'to achieve international co-operation in...promoting and encouraging respect for human rights and for fundamental freedoms for all', and art 55, declaring that '[t]he United Nations shall promote...universal respect for and observance of human rights and fundamental freedoms for all'.

¹⁷ Nevertheless, the CSR1951 drafters have envisaged that additional protection will be granted to CSR1951 refugees by subsequent treaties. See Section D *infra*.

¹⁸ These treaties include, *inter alia*, the ICCPR; The Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3, entered into force 3 January 1976; Convention on the Elimination of All Forms of Racial Discrimination 7 March 1966, 660 UNTS 195, entered into force 4 January 1969; The Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979, 1249 UNTS 13, entered into force 3 September 1981; The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 26 June 1987, 1465 UNTS 85, entered into force 26 June 1987; Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3, entered into force 2 September 1990.

argued that such treaties are expressions in positive international law of a moral idea that there are inviolable rights inherent in each human being, and that sovereign states have an obligation to respect, protect and fulfil these rights. Indeed, it may be argued that obligations assumed by states towards all those on their territory or subject to their jurisdiction are a corollary of their sovereignty.²⁰

The (global) human rights project, far from being a project that is essentially antithetical to the inter-state order, primarily requires *states* to assume obligations.²¹ The fact that states accede freely to human rights treaties should be seen as an affirmation of their international legal sovereignty, rather than as a challenge thereto.²²

¹⁹ See eg Tom Clark and François Crépeau, 'Mainstreaming Refugee Rights: The 1951 Refugee Convention and International Human Rights Law' (1999) 17(4) *Netherlands Quarterly of Human Rights* 389, 393; Cf Daniel J Steinbock, 'Interpreting the Refugee Definition' (1998) 45 *UCLA Law Review* 733, 785 (contending that there may be a disjunction between general international human rights treaties and CSR1951 as the former are designed to ensure individuals their basic rights within their own state, the primary place of protection); Jane McAdam, *Complementary Protection in International Refugee Law* (Oxford University Press, 2007), 12 (contending that, while general international human rights treaties enhance refugees' rights, CSR1951 'creates a mechanism by which entitlements attach and which does not permit derogation'). For a critical approach, see eg Jacqueline Bhabha, 'Internationalist Gatekeepers? The Tension between Asylum Advocacy and Human Rights' (2002) 15 *Harvard Human Rights Journal* 155, 166-7.

²⁰ Guy S Goodwin-Gill 'Asylum 2001: A Convention and a Purpose' (2001) 13 *International Journal of Refugee Law* 1, 2; Cf Michael Kagan, *We Live in a Country of UNHCR: The UNHCR Surrogate State and Refugee Policy in the Middle East* (New Issues in Refugee Research no 201, February 2011), 19 (submitting that UNHCR is *not* a full substitute for an actual state which should be assigned responsibility for protecting rights).

²¹ Matthew Craven, 'Human Rights in the Realm of Power: Sanctions and Extraterritoriality' in Fons Coomans and Menno T Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Hart, 2004) 233, 255; Louis Henkin, 'Protecting the World's Exiles: The Human Rights of Noncitizens' (2000) 22(1) *Human Rights Quarterly* 280, 296 (arguing that human rights are not really international; rather, they are obligations undertaken within a national system. The purpose of the international movement is to get national systems to work better). See also Fernando Tesón, *A Philosophy of International Law* (Westview Press, 1998), 16 (contending that human rights subscribe to a Kantian international order where governments exist in the first place to protect human rights); Randall Hansen, 'The Poverty of Post-nationalism: Citizenship, Immigration, and the New Europe' (2009) 38(1) *Theory and Society* 1, 7-8 (arguing that human rights norms and conventions are most effective when they are incorporated into domestic legislation and form part of the jurisprudential frame of reference of domestic courts).

²² Seyla Benhabib and Judith Resnik, 'Introduction' in Seyla Benhabib and Judith Resnik (eds), *Migrations and Mobility: Citizenship, Borders and Gender* (NYU Press, 2009) 1, 4 (contending that, when states join together to promulgate legal commitments to universal norms that transcend sovereign boundaries and that constrain

Soysal, advocating *universal personhood* as a basis of political membership, notes²³ that the power of personhood ‘comes across most clearly in the case of political refugees whose status in the host polities rests exclusively on an appeal to human rights’. Nonetheless, their appeal to protection has to be heeded by a territorial state, which remains the main venue for decision-making and rights-protection;²⁴ in terms of effective protection, physical presence in a state matters.²⁵

To-date, no international treaty enunciates the rights of non-citizens *qua* non-citizens;²⁶ the UN *Declaration on the Rights of Individuals who are not Nationals of the Country in which they Live*²⁷ is non-binding.

sovereign prerogatives, they do so through conventions reliant on national authority for implementation). Cf Stephen Krasner, *Sovereignty, Organized Hypocrisy* (Princeton University Press, 1997), 118.

²³ Yasemin N Soysal, *The Limits of Citizenship* (Chicago University Press, 1994), 140. See also Yaesmin N Soysal, ‘Changing Citizenship in Europe: Remarks on Postnational Membership and the National State’ in David Cesarani and Mary Fulbrook (eds), *Citizenship, Nationality, and Migration in Europe* (Routledge, 1996) 17, 24 (describing a ‘de-territorialised expansion of rights despite the territorialised closure of polities’).

²⁴ See eg Christian Joppke, *Immigration and the Nation-State: The United States, Germany, and Great Britain* (Oxford University Press, 2000), 6 (arguing that, absent a supranational polity with implementation force, denizenship does not represent a new model of membership that entails the decline of traditional citizenship; rather, it is an inherently vulnerable status).

²⁵ See eg Linda Bosniak, ‘Persons and Citizens in Constitutional Thought’ (2010) 8(1) *International Journal of Constitutional Law* 9 (noting that, in order to vindicate rights-claims of non-citizens *qua* persons, personhood plus *territorial presence* is required).

²⁶ See eg Lydia Morris, ‘Managing Contradiction: Civic Stratification and Migrants’ rights’ (2003) 37(1) *International Migration Review* 74, 79 (contending that international human rights instruments offer ‘no obvious means of addressing the different legal statuses occupied by non-citizens or the stratified nature of their rights’). Cf David Weissbrodt, *The Human Rights of Non-Citizens* (Oxford University Press, 2008), 5 (postulating that ‘[i]t is useful to see the human rights of non-citizens not as an amalgamation of the rights of various non-citizen subgroups...but rather as a unified domain’ and follow general principles applying to the treatment of non-citizens). Weissbrodt asserts that ‘the principal challenge for advocates and scholars today is one of implementation, not elaboration’, as non-citizens suffer from discriminatory treatment and social vilification, demonstrating the need for a unified movement for their protection. Ibid, 244. Nevertheless, Caroline Bettinger-Lopez and Bassina Farberblum, ‘Book Review of David Weissbrodt, *The Human Rights of Non-Citizens* (Oxford University Press, 2008)’ (UNSW Research Series Paper No 46, 2010), 5-7 contend that the goals and circumstances of each group of non-citizens are not always sufficiently common so that a unified approach will achieve the best outcome, not least regarding CSR1951 refugees.

In contradistinction, CSR1951 addresses, *inter alia*, concerns specific to CSR1951 refugees which are not dealt with under general human rights treaties, such as their need for travel and other identity documents.²⁸ CSR1951 aims²⁹ to ‘assure[s] refugees the widest possible exercise of [their] fundamental rights and freedoms.’

UNHCR posits³⁰ that the human rights base of CSR1951 roots it quite directly in the broader framework of human rights instruments of which it is an integral part, albeit with a very particular focus: CSR1951 and the 1967 New York Protocol ‘were carefully framed to define minimum standards without imposing obligations going beyond those that States can reasonably be expected to assume’.³¹ As refugees benefit both from CSR1951-based protection and from general human rights protections, Section D *infra* demonstrates that resort to the ICCPR is pertinent in areas that are *not* covered by CSR1951.³²

²⁷ GA/RES/40/144 of 13 December 1985. *Cf* Rosalyn Higgins, ‘Derogations under Human Rights Treaties’ (1976–7) 48 *British Yearbook of International Law* 281, 282 (positing that ‘international human rights treaties undoubtedly contain elements that are binding as principles which are recognised by civilised states and not only as mutual treaty commitments’).

²⁸ Jason Pobjoy, ‘Treating Like Cases Alike’ (2010) 34(1) *Melbourne University Law Review* 181, 192. See also Chapter Seven *infra*.

²⁹ CSR1951 Preamble, §2.

³⁰ UNHCR, *Note on International Protection*, UN Doc A/AC.96/951 (13 September 2001), para 4.

³¹ *Ibid*, para 107.

³² Santhosh Persau, *Protecting Refugees and Asylum-Seekers under the ICCPR* (New Issues in Refugee Research No 132, November 2006) 5–6. *Cf* Vincent Chetail, ‘Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law’ in Ruth Rubio Marin (ed), *Migrations and Human Rights, Collected Courses of the Academy of European Law* (Oxford University Press, forthcoming 2013), available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2147763 (arguing that human rights law, especially the ICCPR, is an essential and primary source of refugee protection which supplements and reinforces refugee status).

The ICJ has held³³ that ‘an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation’. The Vienna Convention on the Law of Treaties (VCLT) stipulates³⁴ that a treaty ‘shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’.

If (the) primary object and purpose of CSR1951 is protection of refugee rights (even though its provisions are framed as inter-state obligations³⁵), then the interrelations between CSR1951 and other rights instruments such as the ICCPR ought to be considered as complementary and mutually reinforcing,³⁶ and their respective interpretations should be accordingly engaged.³⁷ Thus, it is submitted that the scope of protection in CSR1951 should be considered in the light of international human rights instruments.

³³ *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, ICJ Rep (1971) 16, 31.

³⁴ Art 31(1), 1155 UNTS 331, 23 May 1969, entered into force 27 January 1980. Furthermore, art 31(3)(c) pronounces that ‘any relevant rules of international law applicable in the relations between the parties’ will be taken into account together with the treaty’s context; art 32 stipulates that the *Travaux Préparatoires* should be engaged as ‘supplementary means of interpretation’ when the meaning of the text is ‘ambiguous or obscure’ or leads to a result which is ‘manifestly absurd or unreasonable’. See also Goodwin-Gill and McAdam (n14), 8.

³⁵ See eg Guy S Goodwin-Gill, *Refugees and their Human Rights* (RSC Working Paper No 17, 2004), 7 (noting that ‘[t]he formal scheme of the Convention, however, remains one of obligations between states. The refugee is a beneficiary, beholden to the state, with a status to which certain standards of treatment and certain guarantees attach’)

³⁶ See eg Alice Edwards, ‘Human Rights, Refugees, and the Right to “Enjoy” Asylum’ (2005) 17(2) *International Journal of Refugee Law* 297, 330. See also David Weissbrodt and Stephen Meili, ‘Human Rights and the Protection of Noncitizens’ (2009) 28(4) *Refugee Survey Quarterly* 35, 54 (suggesting that, since many problems frequently faced by non-citizens are covered by more than one treaty, it would be desirable for each of the treaty bodies to take into account the jurisprudence of their counterparts in order to establish a consistent, structured approach to the protection of the rights of non-citizens). Javaid Rehman, *International Human Rights Law* (2nd edn Pearson, 2010), 641 (positing that it is no longer possible to interpret or apply CSR1951 ‘without drawing on the text and jurisprudence of other human rights treaties’ and vice versa).

³⁷ Jonas Christoffersen, ‘Impact on General Principles of Treaty Interpretation’ in Menno T Kamminga and Martin Scheinin (eds), *The Impact of Human Rights Law on General International Law* (Oxford University Press, 2009) 37, 60-1.

C. Political Activities of Refugees under the CSR1951

1. Introduction

CSR1951 does not explicitly address political activities of refugees in their states of asylum, in contradistinction to (some of) their social and economic rights, civil status and identity.³⁸ Hence, CSR1951 neither prescribes nor proscribes entitling refugees to vote in their states of asylum. Nonetheless, several CSR1951 provisions *implicitly* address the permissible scope of political activities of refugees: Article 1E, regarding exclusion from refugee status; Article 2, regarding the obligations of refugees towards their state of asylum; Article 15, regarding non-political associations; and Article 34, regarding assimilation and naturalisation.

2. Article 1E

Article 1E excludes from CSR1951 status ‘a person who is recognised by the competent authorities of the country in which he has taken residence [*not* the state of asylum] as having the rights and obligations which are attached to the possession of the nationality of that country’. The interpretation of this provision may be helpful in contextualising the political status of refugees vis-a-vis citizens.

The provision was included to prevent post Second World War displaced Germans residing in neighbouring states from claiming refugee status.³⁹ Goodwin-Gill and McAdam

³⁸ See also Frank Krenz, ‘The Refugee as a Subject of International Law’ (1966) 15(1) International and Comparative Law Quarterly 90, 109 (postulating that general international law is silent on the question of political rights of refugees in their state of residence).

³⁹ The Berlin (Potsdam) Conference, 17 July – 2 August 1945, explicitly discussed in art XII the ‘orderly transfer of German populations’, stipulating that ‘the transfer to Germany of German populations, or elements thereof, remaining in Poland, Czechoslovakia and Hungary, will have to be undertaken...[and] should be effected in an orderly and humane manner.’

argue⁴⁰ that, while Article 1E was not intended to require that, in order to be excluded, the individual in question must enjoy the *full range* of rights incidental to citizenship,⁴¹ the rights to enter the state and remain therein were considered to be essential, given the fundamental objective of CSR1951, namely protection.⁴² According to the drafters,⁴³ an entitlement to ‘political rights’ threshold would have been tantamount to the provision applying only to persons who have the nationality of their state of residence ‘whereas such persons were already excluded from the refugee definition by Article 1A(2).’

3. Article 2

Article 2 stipulates that ‘[e]very refugee has duties to the country in which he finds himself, which require in particular that he conform to its laws and regulations as well as to measures taken for the maintenance of public order.’ Article 2 is ‘an imperfect obligation’, much like Article 29 of the UDHR (stipulating that ‘[e]veryone has duties to the community in which alone the free and full development of his personality is possible’): non-observance of a duty covered by Article 2 does not entail loss of any particular right guaranteed under CSR1951

⁴⁰ Goodwin-Gill and McAdam (n14), 162.

⁴¹ See eg *Refugee Appeal No 75091/04*, NZRSAA 208 (28 June 2004) (holding that, in view of art 1E, an asylum applicant who has obtained refugee status and permanent residence in a third state cannot raise a claim to protection under the refugee convention in respect of any state of former habitual residence).

⁴² See also UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (reissued December 2011), para 145 (referring to the status of a person qualifying under art 1E as ‘largely assimilated’ to that of a national of the state, including full protection against deportation or expulsion ‘like a national’).

⁴³ Reinhard Marx, ‘Article 1E’ in Andreas Zimmermann (ed), *The 1951 Convention relating to the Status of Refugees and 1967 Protocol* (Oxford University Press, 2011) 571, 574. Note, in this regard, Judge Hill’s statement in *Barzideh v Minister for Immigration and Ethnic Affairs* (1996) 69 FCR 417, 429 (‘I do not think that the Article is rendered inapplicable merely because the person who has de facto national status does not have the political rights of a national. That is to say the mere fact that the person claiming to be a refugee is not entitled to vote, does not mean that the person does not have de facto nationality’) quoted approvingly in *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 6 (Australia), paras 51-3.

nor cessation of refugee status. As noted in Chapter One *supra*, CSR1951 refugees are protected from expulsion unless their behaviour is deemed serious enough to qualify under Articles 32 or 33(2).⁴⁴

Pertinently for this chapter's analysis, the *Travaux* indicate that the Ad Hoc Committee rejected a French proposal⁴⁵ to include a provision entailing that '[t]he High Contracting Parties reserve the right to restrict the political activity of refugees'. It was feared that such a provision could be misunderstood as approving limitations on areas of activity of refugees which are unobjectionable. States were reassured⁴⁶ that 'in the absence of a provision to the contrary any sovereign government retained the right it has to regulate any activities on the part of an alien which it considers objectionable'.

4. Article 15

Article 15 requires states to accord to 'refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country, in the same circumstances' regarding '*non-political* and non-profit-making associations and trade unions' (my emphasis).

⁴⁴ Hélène Lambert, 'Article 2: General Obligations' in Zimmermann (n43), 625, para 48.

⁴⁵ The Ad Hoc Committee on Statelessness and Related Problems, UN Doc E/1618 and E/AC.32/5 (1950), 41.

⁴⁶ Weis (n12), 32. *Cf* Organisation of African Unity, *Convention Governing the Specific Aspects of Refugee Problems in Africa*, 1001 UNTS 45, 10 September 1969, entered into force 20 June 1974 (OAU Convention), art 3 (demanding that refugees 'abstain from any subversive activities against any Member State of the OAU'). Moreover, the provision requires Member States to 'prohibit refugees residing in their respective territories from attacking any State Member of the OAU by any activity likely to cause tension between Member States'. See Lambert (n44), para 20 (noting that the CSR1951 drafters had not agreed to include an equivalent provision).

The drafters debated⁴⁷ the extent to which refugees should be permitted to engage in *political* activities, namely whether the article should be modified to authorise states of asylum to restrict political activities of refugees. The French representative, echoed by the Swiss representatives, argued that refugees like other non-citizens were under an obligation to refrain from taking part in internal politics until they had become naturalised citizens.

Contrarily, the U.S. representative, seconded by the Canadian representative, questioned whether, in light of their predicament, refugees should not be granted better treatment than aliens generally. He expressed concern that the French proposal can be interpreted as prohibiting expression of political opinion, an area of human activity in which refugees should have ‘at least as much right to engage as other aliens’.⁴⁸ Ultimately, the French or Swiss view did not prevail (nor did the American or Canadian), and the provision as well as CSR1951 as a whole remained silent regarding political activities of refugees.

5. Article 34

Article 34 stipulates that ‘[t]he Contracting States shall as far as possible facilitate the assimilation and naturalisation of refugees’. The provision, which may trigger one of the bases for cessation of status under CSR1951, namely acquisition of a new nationality,⁴⁹ will be further discussed in Chapter Eight *infra*. For the purposes of this chapter, the potential significance of ‘assimilation’ of refugees into their host communities should be considered.

⁴⁷ Weis (n12), 90-3. Regarding rights of CSR1951 refugees to participate in *political* associations under the ICCPR, see discussion in Section D *infra*.

⁴⁸ Michael Teichmann, ‘Article 15’ in Zimmermann (n43) 909, 914.

⁴⁹ CSR1951, art 1C(3): ‘This Convention shall cease to apply to any person falling under the terms of Section A if...[h]e has acquired a new nationality, and enjoys the protection of the country of his new nationality’.

The Israeli representative, Nehemia Robinson, was concerned⁵⁰ about the sociological connotation of the term *assimilation*, noting that it may be regarded as ‘form[ing] an attack on the spiritual independence of the refugees’, and offering in its stead the term ‘integration’. However, his concerns were not shared by other representatives, who contended⁵¹ that assimilation inferred integration. Notably, there was no discussion of how electoral inclusion of CSR1951 refugees or other political engagement in the state of asylum may affect assimilation (or integration), and ultimately facilitate naturalisation.

D. Refugee Rights under CSR1951 and the ICCPR

1. The General Principle

It was suggested in Section C *supra* that no CSR1951 provisions regulate the extent to which refugees ought to enjoy *political* rights in their states of asylum. Article 7(1) promulgates that ‘except where this Convention contains more favourable provisions, a Contracting State shall afford to refugees the same treatment as is accorded to aliens generally’.⁵²

The Austrian representative to the Conference of Plenipotentiaries noted⁵³ that ‘[i]f it were to be posited that refugees should not have rights greater than those enjoyed by other aliens, the Convention seemed pointless, since its object was precisely to provide for

⁵⁰ Weis (n12), 348.

⁵¹ *Id.* See also Chapter Eight *infra*.

⁵² Notably, the OAU Convention and the Cartagena Declaration on Refugees, adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama (19-22 November 1984), extends the refugee definition beyond CSR1951; however, they do *not* provide a new set of specific rights and standards but refer instead to those established in the 1951 Convention; see arts viii (2) and iii (8), respectively.

⁵³ UN Doc. A/CONF.2/SR.6.

specially favourable treatment to be accorded to refugees.’ Hence, absent CSR1951 provisions concerning political rights, refugees are to be afforded the same political rights as other aliens in the state of asylum.⁵⁴

According to Article 7(2), refugees may enjoy rights even when such rights are ordinarily accorded to an alien on the basis of *reciprocity*. Absent generally applicable human rights standards at the time of drafting (see Section B *supra*), states were inclined to grant certain aliens broader rights (only) if their citizens were to be reciprocally treated in these aliens’ state of nationality.⁵⁵ However, the CSR1951 drafters recognised⁵⁶ that the *raison d’être* of reciprocity requirements does not apply in the case of CSR1951 refugees who, by definition, do not enjoy the protection of their state of nationality.

Based on a similar rationale, Article 6 exempts CSR1951 refugees from requirements relating to length and conditions of sojourn or residence which non-refugee aliens would have to fulfil for the enjoyment of a Convention right, when such requirements are by their

⁵⁴ Achilles Skordas, ‘Article 7’ in Zimmermann (n43), 715, 719. CSR1951 entitles refugees to treatment *at least as favourable as that accorded to citizens* with respect to religion, protection of intellectual property, rationing measures, elementary education, public relief and assistance, labour legislation and social security, as well as fiscal taxes and charges. CSR1951, arts 4, 16, 20, 22(1), 23, 24 and 29. In turn, CSR1951 entitles refugees to treatment *no less favourable than that accorded to aliens generally* with respect to acquisition of property, wage earning employment, self-employment, professions, housing, post-elementary education, freedom of movement, and (as noted above) participation in non-political and non-profit making associations and trade unions. Ibid, arts 7(1), 13, 17, 18, 19, 21, 22(2), 26, 15.

⁵⁵ Nehemia Robinson, *The Universal Declaration of Human Rights: Its Origin, Significance, Application and Interpretation* (Institute of Jewish Affairs, 1950) art 7, Commentary; Hathaway (n14), 78 (noting that refugees are unlikely to derive even indirect protection from general principles of ‘Aliens Law’ because they lack the relationship with a state of nationality that is legally empowered to advance a claim to protection).

⁵⁶ Weis (n12), 47.

nature such that a refugee is incapable of fulfilling. The exception from reciprocity ‘was...intended to grant [refugees] treatment commensurate with their special situation.’⁵⁷

2. Complementary Rights Protection

Article 5 stipulates that ‘[n]othing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention’, and Article 7(3) proclaims that states ‘shall continue to accord to refugees the rights to which they were already entitled, in the absence of reciprocity, at the date of entry into force of this Convention for that state’.

Hence, it was emphasised⁵⁸ that CSR1951 should not be construed as restricting the application of other human rights instruments. Rather, the above provisions conform to the purported purpose of CSR1951, that is to secure the enjoyment of rights by refugees under both existing and prospective arrangements.⁵⁹ They also reinforce the need for a dynamic interpretation of CSR1951 provisions.⁶⁰

⁵⁷ Comment by the representative of the International Refugee Organisation; *ibid*, 51.

⁵⁸ Penelope Mathew, ‘Review: James Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press, 2005)’ (2008) 102(1) *American Journal of International Law* 206, 207.

⁵⁹ Robinson (n55), Commentary, para 2.

⁶⁰ *Guidelines Reflecting the Consensus of Participants at the Fifth Colloquium on Challenges in International Refugee Law*, para 4, Ann Arbor, 13-15 November 2009, published in (2010) 31 *Michigan Journal of International Law* 293.

3. Political Rights of Refugees under the ICCPR

It was noted in the introduction that the ICCPR has 167 State Parties, including nearly all the CSR1951 and 1967 Protocol State Parties.⁶¹ Article 1 of the ICCPR stipulates that a state must ‘respect and ensure to all individuals within its territory and subject to its jurisdiction...the rights recognised in the present Covenant’. The ICCPR does not sub-classify rights as ‘civil’ or ‘political’, though electoral rights quite plausibly belong to the latter category.⁶²

The Human Rights Committee (HRC) comments⁶³ that ‘[t]he enjoyment of Covenant rights is not limited to citizens of States parties but must also be available to all individuals, regardless of nationality or statelessness, such as...*refugees*.’ Obligations must be given effect ‘in good faith’.⁶⁴ Indeed, ‘in general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness’,⁶⁵ and while it is ‘in principle a matter for the State to decide who it will admit to its territory...once

⁶¹ Of the 147 State Parties to CSR1951 and 1967 Protocol, only Antigua and Barbuda, Fiji, the Holy See, Solomon Islands, St. Kitts and Nevis, and Tuvalu have *not* ratified the ICCPR.

⁶² John Humphrey, ‘Political and Related Rights’ in Theodor Meron (ed), *Human Rights in International Law: Legal and Policy Issues* (Oxford University Press, 1986) 171, 172 (suggesting that ‘freedoms of expression, assembly, and association, though not exclusively political, are each in a special way part of the democratic process’).

⁶³ HRC, General Comment No 31: *Article 2: The Nature of the General Legal Obligations Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004), para 10.

⁶⁴ *Ibid*, para 3.

⁶⁵ HRC, General Comment No 15: *The Position of Aliens under the Covenant*, UN Doc HRI/GEN/1/Rev.7 (11 April 1986), para 1.

aliens are allowed to enter the territory of a State Party they are entitled to the rights set out in the Covenant’.⁶⁶

Article 2(1) stipulates that states ‘undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised...without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.’ The absence of *nationality* as a prohibited distinction is not considered ‘fatal’ because ‘the list clearly is intended to be illustrative and not comprehensive...[and] nationality would appear to fall into the category of ‘distinction of any kind.’⁶⁷

The HRC notes⁶⁸ that ‘the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens. Aliens receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant as provided for in Article 2.’ Indeed, ‘[n]on-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitutes a basic and general principle relating to the protection of human rights’.⁶⁹

⁶⁶ HRC, General Comment No 18: *Non-Discrimination*, UN Doc HRI/GEN/1/Rev.5 (10 November 1989), paras 5-6.

⁶⁷ A similar question was addressed by the Committee on Economic, Social and Cultural Rights in its General Comment No 20: *Non-Discrimination in Economic, Social and Cultural Rights*, E/C.12/GC/20 (2 July 2009), para 15: ‘...the inclusion of ‘other status’ ground indicates that this list is not exhaustive and other grounds may be incorporated in this category entails a number of implied grounds.’

⁶⁸ GC15 (n65), para 2.

⁶⁹ GC18 (n66), para 1.

Moreover, the centrality of the concept of non-discrimination ‘imbu[ed] and inspire[ed] similar protection in every other major international human rights instrument’.⁷⁰

Nevertheless, the non-discrimination principle is subject to two significant qualifications. The *first* qualification⁷¹ is that ‘not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant’. The burden is on the *state* to show that nationality is a relevant basis for differentiation; that the distinction is implemented in pursuit of a reasonable aim or objective; that it is necessary; that there is no alternative action available; and that the discriminatory measures taken or contemplated are proportional to the end to be achieved.⁷²

The *second* qualification,⁷³ explored *infra*, is that ‘[e]xceptionally some of the rights recognised in the Covenant are expressly applicable only to citizens (art. 25)’. By contrast,

⁷⁰ Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd revised edn Engel, 2005), 598.

⁷¹ GC18 (n66), para 13.

⁷² Guy S Goodwin-Gill, ‘International Law and Human Rights: Trends Concerning International Migrants and Refugees’ (1989) 23(3) *International Migration Review* 526, 532.

⁷³ GC15 (n65), para 2. See also GC18 (n68), para 8, where the HRC notes that ‘[a]rticle 25 guarantees certain political rights, differentiating on grounds of citizenship’. Guy S Goodwin-Gill, ‘Migration: International Law and Human Rights’ in Bimal Ghosh (ed), *Managing Migration* (Oxford University Press, 2000) 160, 167 (noting that the major human rights treaties acknowledge the continuing authority of the state to maintain distinctions between citizens and non-citizens in certain areas of activity); See also Stephanie Farrior, ‘International Human Rights Treaties and the Rights of Female Refugees’ in Anne Bayefsky (ed), *Human Rights and Refugees, Internally Displaced Persons and Migrant Workers* (Nijhoff, 2006) 283, 291. Analogously, the ICESCR, art 2(3) permits ‘developing countries’ to limit ‘economic rights’ of non-nationals. Ryszard Cholewinski, *Migrant Workers in International Human Rights Law: Their Protection in Countries of Employment* (Clarendon Press, 1997) 58. Notably, the French Declaration of the Rights of Man, 26 August 1789 used the term ‘citizen’ with regard to *electoral participation* (alongside a few other rights); art 6 thereof stipulates that ‘[l]aw is the expression of the general will. Every citizen has a right to participate personally, or through his representative, in its foundation’.

the ICCPR stipulates⁷⁴ that ‘everyone’ enjoys other political rights such as freedom of expression, freedom of peaceful assembly, and freedom of association without distinction based on citizenship.

Hence, as with other ICCPR rights, the burden of demonstrating the validity of restrictions on the exercise of the political (non-electoral) rights lies with the protecting state. In the context of CSR1951 refugees, absent reasonable and objective justifications that concern the interests of the state of *asylum* (rather than possible effects on a third state such as the state of origin), an imposition of greater restrictions on refugees *qua* non-citizens (for instance with regard to the right to express political opinions whether these opinions be on matters pertaining to their state of origin or to the host state) may constitute discrimination under the ICCPR.⁷⁵

4. Article 25: The Explicit Citizenship Voting Qualification

Article 25 of the ICCPR enunciates⁷⁶ that every *citizen* shall have the right to vote in ‘genuine periodic elections which shall be by universal and equal suffrage’, and to exercise the right ‘without unreasonable restrictions’. Article 25 is the only ICCPR provision that refers explicitly to rights of citizens.⁷⁷ It is widely seen as a concretisation of Article 21(3) of the

⁷⁴ ICCPR, arts 19, 21 and 22 respectively.

⁷⁵ Ruma Mandal, *Political Rights of Refugees* (UNHCR Department of International Protection, 2003), para 20.

⁷⁶ See also General Comment No 25: *The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service*, CCPR/C/21/Rev.1/Add.7 (12 July 1996), para 6. Hence, in some jurisdictions, certain voting qualifications are imposed *on citizens* such as age, mental competence, or conviction of a criminal offence. The reasonableness of the latter qualification was the subject of the inquiry in Reuven (Ruvi) Ziegler, ‘Legal Outlier, Again? U.S. Felon Suffrage Policies: Comparative and International Human Rights Perspectives’ (2011) 29(2) Boston University International Law Journal 197, and falls outside the remit of this thesis.

⁷⁷ In contradistinction, art 12(4) of the ICCPR stipulates that ‘no one shall be arbitrarily deprived of the right to enter his own country’. See Zilbershats (n3), 59 (suggesting that a person’s ‘own country’ may also be a state to

UDHR⁷⁸ ('the right of 'everyone...to take part in the government of his state, directly or through freely chosen representatives') which some authors consider to reflect custom,⁷⁹ though it could be argued that the stipulation in Article 25 is more restrictive than in the UDHR.⁸⁰

The HRC notes⁸¹ that '[i]n contrast with other rights and freedoms recognized by the Covenant...Article 25 protects the rights of "every citizen"'. Hence, basing eligibility on

which she feels attached due to the fact that her ancestors lived there in the past or the members of her national or ethnic community live there in the present). The HRC has interpreted the phrase 'own country' to permit 'a broader interpretation that might embrace other categories of long-term residents including, but not limited to stateless persons arbitrarily deprived of the right to acquire the nationality of the country of such residence'. General Comment No 27: *Freedom of Movement (Art. 12)*, CCPR/C/21/Rev.1/Add.9 (2 November 1999), para 20. Indeed, 'there are few, if any, circumstances in which deprivation of the right to enter one's own state could be reasonable'. Ibid, para 21. The provision, discussed further in Chapter Eight *infra*, is of 'the utmost importance for refugees seeking voluntary repatriation'. Ibid, para 19. See also Marc J Bossuyt, *Guide to the Travaux Préparatoires of the International Covenant on Civil and Political Rights* (Nijhoff, 1987), 26 (suggesting that the drafters intended for the right to apply also to permanent residents). Furthermore, under art 12(3), only persons 'lawfully within the territory of a state' enjoy freedom of movement and choice of residence. However, as the thesis concerns recognised refugees, it is assumed that they reside lawfully in their state of asylum.

⁷⁸ See eg Henry Steiner, 'Political Participation as a Human Right' (1988) 1 Harvard Human Rights Yearbook 77, 79; Allan Rosas, 'Article 21' in Gudmundur Alfredson and Asbjorn Eide (eds), *The Universal Declaration of Human Rights: A Common Standard of Achievement* (Nijhoff, 1999) 431, 438; Gregory H Fox, 'The Right to Political Participation in International Law' in Gregory H Fox and Brad Roth (eds), *Democratic Governance and International Law* (Cambridge University Press, 2000) 48, 54; Nowak (n70), 567.

⁷⁹ See eg Thomas Franck, 'The Emerging Right to Democratic Governance' (1992) 86 American Journal of International Law 46, 61 (contending that art 21 reflects 'a customary rule of state obligation'). See also Christina M Cerna, 'Universal Democracy: An International Legal Right or the Pipe Dream of the West?' (1995) 27 NYU Journal of International Law and Politics 289, 294-97. Cf Guy S Goodwin-Gill, *Free and Fair Elections* (Inter-Parliamentary Union, 2006), 93 (contending that 'the provision in Article 21(3) stands as a straightforward statement of the principle of representative democracy which is now increasingly seen as essential to the legitimation of governments among the community of states').

⁸⁰ Cf Robinson (n55), 131-2 (asserting that 'Article 21 is different than other articles as it does not deal with the rights of men but with those of citizens' and that '[t]he third paragraph was considered to contain a political principle rather than a human right'); *Common Standard* (n79), 440 (concluding that the difference between the provisions 'is apparently more symbolic than substantial').

⁸¹ GC25 (n76), para 3. Notably, ICERD, art 1(2) excludes from the instrument's purview 'exclusions, restrictions or preferences made by a State Party to the Convention between citizens and non-citizens' as well as 'laws about nationality, citizenship or naturalization provided they do not target a particular nationality', thereby emphasising the nearly unfettered discretion that states enjoy in these matters. Thus, the CERD Committee in General Recommendation No 30: *Discrimination against Non-citizens* (10 January 2004), para 3 notes that 'rights, such as the right to participate in elections, to vote and stand for election, may be confined to citizens'.

citizenship status rather than *domicile* is permissible. Nonetheless, the HRC stipulates⁸² that '[s]tate reports should indicate whether any groups, such as permanent residents, enjoy these rights on a limited basis, for example, by having the right to vote in *local* elections' (my emphasis). The HRC celebrates the prominence of Article 25, positing⁸³ that it '...lies at the core of democratic government based on the consent of the people and in conformity with the principles of the Covenant'.

Article 25 reflects the idea that every person, whether a member of a majority or a minority, has the right to participate in public life.⁸⁴ Read in conjunction with Article 1, according to which 'all peoples are entitled to freely determine their political, economic and cultural destiny', Article 25 can be taken to affirm the contention that the sovereignty of the

Nonetheless, the Committee posits that 'human rights are, in principle, to be enjoyed by all persons. States Parties are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of these rights to the extent recognised under international law'; hence 'ICERD is fully applicable if the discrimination a person faces is on the basis of race or ethnic origin rather than alien status.' Ibid, para 2. See also Report of the Committee on the Elimination of Discrimination against Women, General Recommendation No 21: *Equality in Marriage and Family Relations*, UN GAOR 49th Sess., Supp No.38, UN Doc A/49/38 (1994), noting at para 2 that '[n]ationality is critical to full participation in society...[w]ithout status as nationals or citizens, women are deprived of the right to vote or to stand for public office and may be denied access to public benefits and a choice of residence'.

⁸² GC25 (n76), para 3. See also CCPR, Observations regarding Portugal, A/58/40 vol I (2003) 56, para 82(6) (welcoming 'the granting to foreigners of the rights to vote and to be elected in local elections'), and similar observations regarding Belgium (Belgium, ICCPR, A/59/40 vol I (2004) 56, paras 72(5) and 72(27)); See also the observations of the CERD Committee re Netherlands, A/59/18 (2004) 29, para 147 (commending the fact that foreigners who have been legally resident in the Netherlands for five years are entitled to vote and to stand for local election) and regarding Latvia (where '[t]he Committee recognizes that political rights can be legitimately limited to citizens. Nevertheless, noting that most non-citizens have been residing in Latvia for many years, if not for their whole lives, the Committee strongly recommends that the State party consider facilitating the integration process by making it possible for all non-citizens who are long time permanent residents to participate in local elections'). Cf Raimo Pekkanen and Hans Danelius, *Human Rights in the Republic of Estonia* (Report submitted to the Parliamentary Assembly of the Council of Europe, 17 December 1991), para 36 (positing that '[I]f substantial parts of the population of a country are denied the right to become citizens, and thereby are also denied for instance the right to vote in parliamentary elections this could affect the character of the democratic system in that country').

⁸³ GC25 (n76), para 1.

⁸⁴ James Crawford, 'Democracy and the Body of International Law' in Fox and Roth (n78) 91, 92.

people shall find its expression, *inter alia*, in periodic and genuine elections.⁸⁵ It has even been asserted⁸⁶ that, while international law still protects state sovereignty, it is now the *people's* sovereignty that it protects rather than the *sovereign's* sovereignty.

The reference in Article 25 to *citizens* rather than persons or individuals may be seen as a reaffirmation of the state as the essential forum of political activity and expression.⁸⁷ The *Travaux* indicate no discussion regarding the justifications for the citizenship qualification or for the distinction between the enjoyment of electoral rights and the enjoyment of other

⁸⁵ See eg Nowak (n70), 570 (noting that art 25 implies that ‘the government ultimately is responsible to the people and may also be controlled and deposed by it’); Henry Steiner, ‘Do Human Rights Require a Particular Form of Democracy?’ in Eugene Cotran and Adel O Sherif (eds), *Democracy, Human Rights and Islam* (Kluwer, 1999) 193, 201 (explaining that art 25 is irreconcilable with the existence of any authoritarian regime that denies its citizens the right to take part in free and fair elections); Peter R Baehr, ‘Democracy and the Right to Political Participation’ in David P Forsythe (ed), *Encyclopaedia of Human Rights* (Oxford University Press, 2009) vol I, 487, 490 (arguing that art 25 requires governments to be accountable to their citizens). The HRC notes in General Comment No 12: *Article 1*, UN Doc HRI/GEN/1/Rev.6 at 134 (13 March 1984), paras 4, 6 that art 1 imposes specific obligations on states ‘in relation to their own people’ and asserts that ‘it [the HRC] may take Article 1 into account when interpreting Article 25 of the Covenant’. See eg its conclusions in *Gillot v France*, UN Doc CCPR/C/75/ D/932/2000, para 13.4. In its Concluding Observations on the Second Periodic Report of the Republic of the Congo, the HRC called ‘to organize general elections as soon as possible in order to enable its citizens to exercise their rights under articles 1 and 25 of the Covenant’; UN Doc CCPR/C/79/Add.118 (27 March 2000), para 20. Cf Rosalyn Higgins, *Problems and Process: International Law and How we Use it* (Clarendon Press, 1994) 120-1 (arguing that ‘while there is a close relationship between Article 25(1) and Article 1, nothing in the former requires a narrow reading of the right of self-determination. The two articles are complementary’).

⁸⁶ Michael Reisman, ‘Sovereignty and Human Rights in Contemporary International Law’ (1990) 84 *American Journal of International Law* 866, 868-9. Thomas Franck’s article (n79) triggered a scholarly debate regarding the ‘right to democratic governance’: see eg Stephen Wheatley, *The Democratic Legitimacy of International Law* (Hart, 2010), 224-8 (postulating that there is no international law norm requiring that all governments should be democratic, although democracy as a principle has a significant influence on the interpretation and application of international law norms). This debate falls beyond the remit of the thesis which assumes a state of asylum that holds elections and excludes CSR1951 refugees there-from.

⁸⁷ Michael Goodhart, *Democracy as Human Rights* (Routledge, 2005), 131 (arguing that the territorial limits of modern democratic institutions are not mere contingencies, but are directly related to foundational normative assumptions concerning the demos and its sovereignty). See also Ruth Lister, ‘Children and Citizenship’ (2007) 8(2) *Theoretical Inquiries in Law* 695, 703 (asserting that the right to vote in national elections is what divides denizens, namely persons with a legal and permanent residence status, from citizens).

political rights such as freedom of expression, assembly and association, almost as if this differentiation in scope of rights protection was deemed conceptually predetermined.⁸⁸

Subsequent regional treaties in the Americas and in Africa enunciate a right to vote for *citizens*.⁸⁹ In contradistinction, the (earlier) European Convention of Human Rights⁹⁰ does not explicitly proclaim an individual right to vote.⁹¹ Nevertheless, in 1987, the European Commission on Human Rights (EComHR) endorsed⁹² a transition ‘from the idea of an “institutional” right to the holding of free elections...to “universal suffrage”...and then, as a consequence, to the concept of subjective rights of participation - the “right to vote” and the “right to stand for election to the legislature”’. However, the EComHR held⁹³ that ‘[t]he

⁸⁸ Myres S McDougal, Harold D Lasswell and Lung-Chu Chen, ‘The Protection of Aliens from Discrimination and World Public Order: Responsibility of States Conjoined with Human Rights’ (1976) 70 *American Journal of International Law* 432, 459 (positing that the stipulation reflects the ‘long shared community expectation’ that differentiation on the basis of alienage is permissible in regard to participation in the making of community decisions). Carmen Tiburcio, *The Human Rights of Aliens under International and Comparative Law* (Nijhoff, 2001), xvi (positing that ‘[t]he basis for this exclusion [of non-citizens] is that if the state created this right it may restrict it to whoever it deems appropriate. Conversely, if the right was not created by the State but rather considered as inherent to the human nature, then the State cannot restrict its enjoyment...the right to vote, to be elected and to work for the government...are not inherent to human nature’). Cf Bhikhu Parekh, ‘Finding a Proper Place for Human Rights’ in Kate Tunstall (ed), *Displacement, Asylum, Migration* (Oxford Amnesty Lectures 2004 Oxford University Press, 2006) 17, 20 (rejecting Tiburcio’s distinction between inherent and created rights, and suggesting that ‘[all] human rights are socially defined and validated. They are normative statements about what human beings require to lead a life of dignity and what is therefore due to them. They are not natural or inherent in human nature but social in origin in the sense that we decide what is essential to their dignity and that they should receive this as of right’).

⁸⁹ African Charter on Human and Peoples’ Rights, art 13, 27 June 1981, 21 ILM 58 (1982); American Convention on Human Rights, art 23, 21 November 1969, 1144 UNTS 123, entered into force 18 July 1978.

⁹⁰ Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 3 November 1950, ETS No 005 (ECHR).

⁹¹ Protocol I to the Convention for the Protection of Human Rights and Fundamental Freedoms, Enforcement of certain Rights and Freedoms not included in Section I of the Convention, art 3, Paris, 20 March 1952, ETS No 009 (enunciating that ‘[t]he High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature’).

⁹² App No 9267/81 *Mathieu-Mohin and Clerfayt v Belgium* (2 March 1987), para 51.

⁹³ *Ibid*, para 54.

phrase “conditions which ensure the free expression of the opinion of the people in the choice of the legislature” implies essentially, apart from freedom of expression...the principle of equal treatment of all *citizens* in the exercise of their right to vote and to stand for elections’ (emphasis added).

Article 16 of the ECHR mandates Contracting States to impose restrictions on the ‘political activity of aliens’. The Parliamentary Assembly of the Council of Europe (PACE) called for this provision to be repealed,⁹⁴ contending in a recent report⁹⁵ that ‘[I]t should be borne in mind that Article 16 dates from a time when it was considered legitimate to restrict the political activity of aliens generally. Subsequent human rights treaties, such as the United Nations Covenant on Civil and Political Rights, the American Convention on Human Rights and the African Charter of Human and Peoples’ Rights all do without such a clause.’ Regarding the case-law of the ECtHR mentioned above, the PACE report notes⁹⁶ that ‘...a very small number of decisions on admissibility made reference to Article 16....[and] in no single case [had] the Court used Article 16 to justify a restriction on the provisions of the Convention’.

5. Non-citizen Voting: Some Contemporary Practice

It is contended⁹⁷ that Article 25 of the ICCPR ‘begins to approximate prevailing practice’, at least in terms of the removal of *unreasonable* restrictions on voting rights of citizens.

⁹⁴ Recommendation 799 (1977) on the *Political Rights and Position of Aliens*, 21st Sitting, 25 January 1977.

⁹⁵ Council of Europe, *Thematic Monitoring Report presented by the Secretary General and Decisions on Follow-up Action taken by the Committee of Ministers*, 943th Meeting, 19 October 2005, para 38.

⁹⁶ *Ibid*, para 36.

⁹⁷ Franck (n79), 64.

Meanwhile, citizenship qualifications are ubiquitous in *national* elections: only four states entitle all their non-citizen permanent residents to vote in national elections:⁹⁸ New Zealand (after one year of permanent residence); Chile (after five years); Malawi (after seven years); Uruguay (after fifteen years). In contradistinction, some states extend full voting rights to citizens of *specific* states, usually former colonies; for instance, non-citizen residents from some Commonwealth states can vote in national elections in the United Kingdom, while other non-citizens are excluded there-from.

Participation of non-citizen residents in elections for local or regional bodies is more common.⁹⁹ States parties to the *European Convention on Participation of Foreigners in Public Life at Local Level* (ratified by eight members of the Council of Europe) undertake¹⁰⁰ ‘...to grant to every foreign resident the right to vote and to stand for election in local

⁹⁸ *Free and Fair elections* (n79), 126; André Blais, Louis Massicotte, and Antoine Yoshinaka, ‘Deciding who has the Right to Vote: A Comparative Analysis of Election Laws’ (2003) 20 *Electoral Studies* 41, 52. See generally David C Earnest, ‘Neither Citizen nor Stranger: Why States Enfranchise Resident Aliens’ (2006) 58(2) *World Politics* 242; David T Graham and Nana Poku, *Migration, Globalisation and Human Security* (Psychology Press, 2009), 58. The electoral practices of New Zealand will be considered in Chapter Eight *infra*.

⁹⁹ Rainer Bauböck, ‘Expansive Citizenship: Voting beyond Territory and Membership’ (2005) 38 *Political Science and Politics* 683, 684 (noting that forty five States have extended the franchise to non-citizens in some form).

¹⁰⁰ Art 6(1), Strasbourg, 5 February 1992, ETS No 144. Art 7 stipulates that Contracting States may require a shorter period of residence. The *Explanatory Report*, [1992] COETSER 2, para 18 notes that ‘[f]or those who live in a local community, numerous aspects of their daily life - such as housing, education, local amenities, public transport, cultural and sports facilities - are influenced by decisions taken by the local authority. Moreover, foreign residents participate actively in the life and prosperity of the local community’. It is suggested that, while ‘[s]imilar considerations could be applied to some aspects of decision-making at central government level...it is arguable that there is a closer link between possession of citizenship and participation in procedures for determining what may be conceived of as the "national will", which would exclude participation of foreigners in national political life.’ Ibid, para 19. Regarding the required length of residence, the report suggests that ‘...it is clear that it should be long enough for the elector to have become familiar with the local community and its political situation and issues’. Ibid, para 38. See also Andreas Gross, *The State of Democracy in Europe: Specific Challenges Facing European Democracies- The Case of Diversity and Migration* (Political Affairs Committee, Parliamentary Assembly, Council of Europe, Doc 11623, 6 June 2008), Draft Resolution, para 9 (‘[t]he Assembly fails to see any justification for different treatment between long-term migrants who are lawfully resident in a country solely on the basis of their country of origin’) and para 10 (‘one of the ultimate objectives of every democratic system should be equal opportunities for the exercise of political rights’).

authority elections, provided that he fulfils the same legal requirements as apply to nationals and furthermore has been a lawful and habitual resident in the State concerned for the five years preceding the elections.’

In contradistinction, the European Union has special arrangements for Second Country Nationals (SCNs),¹⁰¹ namely citizens of one EU Member State (MS) residing in another EU MS. SCNs may vote in local elections of the EU MS in which they habitually reside, as well as in EU Parliament elections.¹⁰² However, these arrangements are exclusive by their nature (based on residency *and EU citizenship*) and do not extend to national elections.¹⁰³

E. Electoral Participation under the Migrant Workers Convention

The Migrant Workers Convention enunciates¹⁰⁴ the right of migrant workers and members of their families to vote in elections of their state of *origin*, noting that it does not affect their legal status in a host state. In contradistinction, migrant workers and their families may be

¹⁰¹ Committee on Migration, Refugees and Demography, *Report on Participation of Immigrants and Foreign Residents in Political Life in the Council of Europe Member States*, Doc no 8916 (22 December 2000), para 20 (noting that ‘some foreigners [EU nationals] are granted more rights than others. If this system does not change, parts of the foreign population, particularly non-Europeans, risk being excluded’).

¹⁰² Treaty of Amsterdam amending the Treaty on European Union, the Treaties Establishing the European Communities, and Certain Related Acts, art 19, 10 November 1997.

¹⁰³ Concomitantly, as non-resident citizens, SCNs may only vote in national elections of their EU state of citizenship if *its* legislation makes suitable arrangements for out-of-country voting; EU treaties do not require such arrangements. The fact that, by exercising their EU right to freedom of movement, EU citizens may be effectively disenfranchised (in national elections) has led to the initiation of a *European Citizen Initiative* which (if adopted by the EU) would entitle SCNs to vote in national elections of their EU state of residence. For a discussion paper, see Rainer Bauböck, Philippe Cayla and Catriona Seth (eds), *Should EU Citizens Living in other Member States Vote there in National Elections?* (EUI Working Paper RSCAS 2012/32, June 2012), available at: http://eudo-citizenship.eu/docs/RSCAS_2012_32.pdf.

¹⁰⁴ Art 41. Out-of-Country Voting and the predicament of CSR1951 refugees are considered in Chapter Six *infra*.

entitled to vote in *local* elections in their states of employment at the discretion of these states.¹⁰⁵

The juxtaposition of the dual obligation on the part of the host and sending states to facilitate *expatriate* voting of migrant workers and members of their families with the non-binding recommendation to grant migrant workers *qua* non-citizen residents voting rights in local elections of their *host state* is a clear testament both of the emphasis in international human rights instruments on a link between citizens residing abroad and their state and of the resilience of the citizenship voting qualification.

F. The Failed Attempt to Create a ‘Protected Person’ Status in International Law

The International Law Commission (ILC) identified the topic of ‘Nationality, including Statelessness’ as suitable for codification at its first session in 1949, aiming initially to draft a comprehensive treaty concerning both refugees and stateless persons. Nevertheless, following the adoption of CSR1951, the ILC considered separately issues relating to statelessness with a view to their codification.

At its Sixth session in 1954, the ILC considered a report concerning *present statelessness* submitted by its special Rapporteur, Roberto Córdova.¹⁰⁶ In the discussion, ILC member El Khouri proposed¹⁰⁷ the creation of a ‘protected person’ status which would entail

¹⁰⁵ Ibid, art 42(3). States of employment are expected to facilitate, *in accordance with their national legislation*, the consultation and participation of migrant workers and members of their families in decisions concerning the life and administration of local communities; however, such consultations cannot be considered a substitute for electoral participation. Ibid, art 42(2). See Chapters Five, Six and Eight *infra*.

¹⁰⁶ *Third Report on the Elimination or Reduction of Statelessness* (Yearbook of the ILC, 1954), vol II.

¹⁰⁷ 246th meeting, A/CN.4/SR.246, 14 June 1954, paras 9-10.

‘all the civil rights with the exception of political rights’. Córdova supported this proposition, suggesting¹⁰⁸ that a *habitual residence* requirement be included because, in his view, states would be reluctant to grant political rights to a stateless person whose connection with the host state was not sufficiently strong.

The ILC debated Córdova’s draft, consisting of seven articles. Article 1 proclaimed that ‘a state in whose territory a stateless person is resident shall, on his application, grant him the legal status of “protected person”’. According to Article 2, a ‘protected person’ ‘shall be entitled to all the rights enjoyed by the nationals of the protecting state with the exception of *political rights*...[and] shall also be entitled to diplomatic protection’ (my emphasis). The draft articles stipulated that stateless persons would be entitled to a ‘protected person’ status until such time as they naturalise in the state of residence or elsewhere (when such protection would no longer be required). Lauterpacht’s reservation that a ‘protected person’ status ought to be granted only upon failure to qualify for naturalisation did not prevail.¹⁰⁹

Intriguingly, in justifying the new status, Córdova asserted¹¹⁰ that there was ‘some analogy’ between the status of “protected persons” and ‘the position of women in those countries where they had not yet received political rights’. Reading this statement in context, it appears that the expression ‘political rights’ was probably not intended to refer to the full scope of political expression but rather to electoral rights.

¹⁰⁸ 247th meeting, A/CN.4/SR.247, 15 June 1954, para 44.

¹⁰⁹ 248th meeting, A/CN.4/SR.248, 16 June 1954, para 25.

¹¹⁰ Ibid, para 80. Moreover, Córdova proposed that *de facto* stateless persons be assimilated to *de jure* stateless persons as regards the right to a status of ‘protected person’ and the right to naturalisation, provided that they renounced the ineffective nationality they possessed. His proposal was rejected. *Nationality, including Statelessness, Report on Present Statelessness* (Yearbook of the ILC, 1954) vol II, para 35.

The ILC included the draft articles as described above in its final report to the UN General Assembly.¹¹¹ However, the report noted¹¹² that ‘in view of the great difficulties of a non-legal nature which beset the problem of present statelessness, the Commission considered that the proposals adopted though worded in the form of articles should merely be regarded as suggestions which governments may wish to take into account’. The draft articles never materialised as a treaty.¹¹³

G. Concluding Remarks

Persons recognised as CSR1951 refugees reside in a state of asylum of which they are *non-citizens*. The CSR1951 drafters have acknowledged the vulnerable status of CSR1951 refugees; they listed civil, social and economic rights which states of asylum are required to accord ‘their’ refugees, exempting refugees from reciprocity and other requirements that had been considered ill-suited for persons who do not enjoy the protection of their state of origin.

Political rights are noticeably absent from CSR1951; their omission cannot be read as an implicit expectation that states nonetheless grant non-citizens the full gamut of political rights. Indeed, the concurrent attempt to create a ‘protected person’ status for stateless persons in international law that would entail enjoyment by such persons of all rights save for

¹¹¹ Ibid, para 31.

¹¹² Ibid, para 36.

¹¹³ The report has led to the adoption of the Convention Relating to the Status of Stateless Persons (n1) and of the Convention on the Reduction of Statelessness, 989 UNTS 175, 30 August 1961, entered into force 13 December 1975. The former convention guarantees stateless persons a set of rights similar to those enjoyed by recognised refugees under CSR1951 and is equally silent regarding political rights; the latter convention is concerned with reducing statelessness rather than with rights of currently stateless persons.

political rights is a clear testament that Contracting States were quite wary (at the time) of according political rights to non-citizens.

Importantly, however, the CSR1951 drafters have created ‘legal space’ for expanding protection of CSR1951 refugees, signifying the character of CSR1951 as a human rights treaty. The subsequent adoption of the ICCPR has meant that CSR1951 refugees should enjoy some, but not necessarily full political rights, on a par with other non-citizens.

Nevertheless, while most political rights are guaranteed under the ICCPR to ‘everyone’, the Covenant permits states to set citizenship voting qualifications that exclude non-citizens, including refugees; regional treaties, international practice, and the recently adopted Migrant Workers Convention generally conform.

Following Mandal’s taxonomy,¹¹⁴ there are activities undertaken by CSR1951 refugees that states of asylum are *obliged to allow*, such as political rights guaranteed under the ICCPR; activities which states of asylum are *obliged to prevent*, which fall outside the remit of the thesis; and activities which states of asylum *may allow*, including participation in their electoral processes.

It was noted in the introduction that the vast majority of persons hold citizenship of their state of residence; according to the ICCPR, as well as to regional rights instruments, they should have the right and the opportunity to participate in electoral processes of that state. According to the Migrant Workers Convention, the participation of migrant workers

¹¹⁴ Mandal (n75), 45.

and their families in elections of their state of citizenship should be facilitated in their states of employment, maintaining their political ‘bond’ with their state of nationality.

CSR1951 refugees do not ‘fit’ the above legal and conceptual framework. Their political ties with their state of origin were severed by their fear of persecution, and their period of absence from their state of origin is indeterminate. While the state of asylum may choose to enfranchise CSR1951 refugees, neither CSR1951 nor the ICCPR can be read to *require* it to do so. Consequently, their predicament highlights a tension between two principles of the inter-national legal order, state sovereignty and protection of individual rights: the former seeks to promote specifically-defined citizen rights, while the latter espouses a universal application of entitlements.¹¹⁵ Against this background, Part B of the thesis explores the nature and purposes of voting and state citizenship, and their interrelations.

¹¹⁵ George Gigauri, ‘Resolving the Liberal Paradox: Citizen Rights and Alien Rights in the UK’ (RSC Working Paper No 31, July 2008), 3.

PART B

CHAPTER THREE: PERSPECTIVES ON THE MEANING AND PURPOSES OF VOTING IN ELECTIONS

A. Introduction

The electoral process stands at the heart of representative democracy.¹ The thesis concerns voting rights of recognised CSR1951 refugees in elections of their states of asylum. This chapter explores the meaning and purposes of the right to vote in elections for individuals *qua* voters, and for the electoral process in political communities. It thereby facilitates analysis of the adverse effects of excluding CSR1951 refugees from such processes.

Section B considers the claim that determining eligibility may be constitutive for defining membership in a political community. It sets the scene for a discussion of the meaning and purposes of state citizenship in Chapter Four *infra*, as well as for an appraisal of the interrelations between state citizenship and voting in Chapter Five *infra*.

In Section C, it is argued that voting is fundamental for individuals on four *mutually reinforcing* grounds. In turn, it is suggested in Section D that, for individuals, voting plays both an instrumental role as a means for securing other rights (stemming from ‘liberal’ thought), and an expressive-intrinsic role in manifesting ‘non-domination and self-governance’ (stemming from ‘republican’ thought).

Section E introduces three leading perspectives on the role of electoral processes in decision-making: a ‘liberal’ perspective, a ‘republican’ perspective, and a ‘deliberative democracy’ perspective. In turn, it is argued in Section F that, in view of the facilitative role

¹ George Kateb, ‘The Moral Distinctiveness of Representative Democracy’ (1981) 91 *Ethics* 357, 357.

of voting, 'cultural relativity' challenges that are often mounted in relation to claims that human rights are 'universal' are less likely to be mounted against the right to vote. Lastly, Section G suggests that the distinction between *core* and *penumbra* of legal rights may be helpful in considering questions of voting eligibility.

B. Voting Eligibility and Political Community Membership: Prelude

The world is divided into political communities; each political community sets eligibility criteria both for *membership* and for elections of *its* institutions of government.² This section briefly introduces the notion (which shall be explored further in Chapter Five *infra*) that determining eligibility to vote in election has a constitutive role in defining full membership in a political community,³ namely the claim⁴ that 'in deciding who may and who may not vote in its elections, a community takes a crucial step in defining its identity...a community should be empowered to exclude from its elections persons with no real nexus to the community as such'.

Rousseau based his Eighteenth century 'social contract' theory⁵ on the premise that, in order to avoid the state of nature, man joins together with others to form a society based on an agreed 'compact' which, *inter alia*, sets conditions for membership. Society, in turn, sets in place a legislative system, aiming to achieve two main objectives: liberty and equality.

² Richard Katz, *Democracy and Elections* (Oxford University Press, 1997), 216.

³ James A Gardner, 'Liberty, Community and the Constitutional Structure of Political Influence: A Reconsideration of the Right to Vote' (1997) 145(4) *University of Pennsylvania Law Review* 893, 967.

⁴ Lawrence Tribe, *American Constitutional Law* (2nd edn Foundation Press, 1988), 1084.

⁵ Jean-Jacques Rousseau, *On the Social Contract*, Judith Masters (tr) (St. Martin's Press, 1978) (1762), bk II ch 11.

Rousseau was averse to the notion of representative government (namely, of elections), postulating⁶ that '[s]overeignty, for the same reason as makes it inalienable, cannot be represented; it lies essentially in the general will, and does not admit of representation.' However, modern manifestations of direct democracy, such as referenda, have been increasingly deemed unsuitable for effective governance due to increases in size of population and territory⁷ and have been replaced by representation.⁸ Montesquieu argued⁹ that, in a democracy, the people are sovereign, and ought to have 'the management of everything within their reach'; nonetheless 'that which exceeds their abilities must be conducted by their ministers whom they shall choose'.

It is also helpful to recall Madison's distinction in *The Federalist Papers*¹⁰ between 'pure' democracy, in which citizens jointly administer public affairs, and a 'republic' where there is 'a government in which the scheme of representation takes place...a small number of citizens [are] elected by the rest...' However, in principle, determination of eligibility to participate in governance should *not* be affected by the choice of governance structure:¹¹ if persons would be eligible to vote directly, resort to representation should not affect their eligibility.

⁶ Ibid, bk III ch 15.

⁷ Katz (n2), 24.

⁸ Robert Dahl, *Democracy and its Critics* (Yale University Press, 1989), 214.

⁹ Charles de Secondat, Baron de Montesquieu, *The Spirit of Laws*, Thomas Nugent (tr) (Printed for J Collingwood, 1823) (1748), bk II ch 2.

¹⁰ *The Federalist Papers*, No 10, available at: <http://www.foundingfathers.info/federalistpapers>.

¹¹ Notably, the question whether *standing for elections* may be subjected to different eligibility criteria is outside the scope of this thesis.

C. The Fundamentality of Voting for Individuals: Four Grounds

1. Introduction

This section considers four grounds for the claim that voting is fundamental for individuals. *First*, voting manifests human agency and has an autonomy-enhancing effect. *Second*, voting is an expressive act that is both intrinsically worthwhile and has the capacity to legitimise other forms of political speech. *Third*, voting manifests human dignity. *Fourth*, the declarative character of suffrage is an affirmation of political equality: eligible voters enjoy equal worth, concern and respect of society. As noted above, these grounds have a cumulative effect on voters; conversely, together, they aggravate the adverse ramifications of electoral exclusion.

2. Voting as Agency and Autonomy-Enhancing

It may be suggested that individuals are the best judges of their own good or interests, and that freedom and wellbeing are features of human agency.¹² These maxims seem to resonate well with Raz's general theory of rights. Raz distinguishes¹³ between *core* rights and *derivative* rights, suggesting that the latter are grounded in the former. Individuals have a core interest in being respected as *autonomous* beings, namely as authors of their lives who should be able to choose from a variety of acceptable options.¹⁴

¹² Patrick Capps, *Human Dignity and the Foundations of International Law* (Hart, 2009), 123.

¹³ Joseph Raz, *The Morality of Freedom* (Clarendon Press, 1986), 168.

¹⁴ Robert Dahl, *On Democracy* (Yale University Press, 1998), 86.

Raz defines¹⁵ *legal* rights as legally protected interests. He suggests¹⁶ that rights should be protected and considered valuable either because they advance the autonomy of rights-bearers or because they advance a public culture which, in turn, facilitates the autonomy of rights-bearers. It is contended that voters act as autonomous agents when they vote on questions that concern their perceptions of a worthwhile life. Voting enables individuals to display desires, beliefs, judgments, and perceptions. By voting, they exercise control (albeit partial) over their social environment,¹⁷ and perform actions which, if performed by enough others, may alter the assignment of rights and duties in the political community.¹⁸

Raz asserts¹⁹ that political communities do not just have a (negative) duty to refrain from denying individuals their freedom, but also a (positive) duty to enhance it by ‘creating the conditions of autonomy’. If one were to accept Raz’s argument, and if one were to accept the connection between voting and autonomy, it would follow that the state is obliged to allocate resources and to undertake positive and effective measures such as voter registration,

¹⁵ Joseph Raz, ‘Legal rights’ in Joseph Raz (ed), *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Clarendon Press, 1995) 254, 266.

¹⁶ John Griffin, *On Human Rights* (Oxford University Press, 2008), 39.

¹⁷ Johannes Morsink, *Inherent Human Rights: Philosophical Roots of the Universal Declaration* (University of Philadelphia Press, 2009), 266-7.

¹⁸ Jeremy Waldron, *Law and Disagreement* (Clarendon Press, 1999), 233. Elsewhere, Waldron suggests that voting rights have ‘the character of Hohfeldian powers rather than claim rights to negative freedom’ since ‘each voter has the power to make a difference...formally no smaller than that made by anyone else- to the appointment of legislators and the passage of legislation’. Jeremy Waldron, *Liberal rights* (Cambridge University Press, 1991), 343.

¹⁹ Joseph Raz, ‘Right-based Moralities’ in Jeremy Waldron (ed), *Theories of Rights* (Oxford University Press, 1984) 182, 191. Eleftheriadis argues that Raz’s ‘perfectionist account of autonomy’ cannot serve as a basis for a legal theory of rights that can be shared and followed by public institutions, since it does not grant adequate respect to other conceptions of the good which many people hold dear, such as religious observances, which do not see autonomy as an (the) ultimate value. Pavlos Eleftheriadis, *Legal Rights* (Oxford University Press, 2008), 100-10.

campaign-financing, ballots-drawing, and vote-counting in order to secure the right to vote (see discussion of Out-of-Country Voting procedures in Chapter Six *infra*).

It may be doubted whether exercising one's right to vote actually contributes to personal autonomy, since it is hard to envision how a marginal effect over the outcome of an election could be seen as having more than a slim contribution to the autonomy of each voter.²⁰ One response is to highlight the *exercise* of agency rather than the direct impact of each person's vote, and to note that, while votes of others are required in order to elect office-holders, each person casts a ballot as an (autonomous) *individual*.²¹

The awareness that one's agency extends to the most fundamental questions may also be autonomy-enhancing. Research in the United States has shown that turnout in Federal elections is higher than in State or local elections, whereas the share and effect of each vote is clearly greater in the latter elections.²² Such findings may be explained by the fact that voters consider the issues that are decided in Federal elections to be more significant.

3. Voting as an Expressive Act

Voting may be performed in a multitude of ways including, *inter alia*, calling at a polling station, casting absentee ballots, and voting electronically. While in most electoral systems,

²⁰ William Talbott, *Which Rights Should Be Universal?* (Oxford University Press, 2005), 139.

²¹ Joshua Douglas, 'Is the Right to Vote Really Fundamental?' (2008) 18 Cornell Journal of Law and Public Policy 143.

²² Adam Winkler, 'Expressive Voting' (1993) 68 NYU Law Review 330, 359. *Cf* *McGeoch v Lord President of the Council* [2011] CSH 679 (dismissing an EU law based motion to entitle a British national incarcerated in Scotland to vote in Scottish Parliament elections; the judgment notes that '[the] phrase [municipal elections] would naturally be understood as referring to local bodies whose responsibilities are primarily of an administrative nature, rather than a regional legislature within a state with federal or devolved arrangements for law-making').

individual preferences for parties, candidates and policies are generally not disclosed in public, the fact that one *voted* is oftentimes visible and may even be celebrated, for instance by wearing ‘I voted’ stickers.²³

Voters may express themselves for constitutive reasons, seeking to project aspects of their identity such as their values, ideals and experiences in order to exert themselves among others, even if the particular exertion will remain generally unrecognised. Hence, voting may be considered a meaningful participatory act which transforms individual (and collective) identities.²⁴ Some voters may wish to limit their engagement with political processes and to refrain from expressing political opinions in public; for them, voting may be a rather inexpensive (time and otherwise) means of expressing their views and of pursuing political ends.

Modern communication channels increasingly enable individuals to express their views and preferences by a variety of means, including writing blogs, twittering or using virtual social networks to participate in online debates. Indeed, some voters may consider such channels to be more personally fulfilling, more influential and, perhaps, more ‘expressive’ than voting, due to the public forum element that is lacking when one casts a *secret* ballot. It is nonetheless contended that, for participants in these forums, the fact that they are eligible voters may encourage their participation, enhance it and perhaps even legitimise it. In such forums, participants will often identify as community members or will be asked to do so by others. Non-electoral means of communication may thus complement and reinforce the expressive character of voting.

²³ <http://blogs.wsj.com/independentstreet/2008/11/04/election-day-perks-businesses-hand-out-freebies-to-voters/>

²⁴ Winkler (n22), 343.

4. Voting and Human Dignity

International declarations and treaties herald the assertion that all human beings have equal, inherent, and inviolable dignity.²⁵ Article 1 of the Universal Declaration of Human Rights (UDHR) pronounces²⁶ that ‘all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood’. Similarly, the Preamble to the International Covenant on Civil and Political Rights proclaims²⁷ ‘the inherent dignity and inalienable rights of all members of the human family’, noting that rights ‘derive from the inherent dignity of the human person’.

Nonetheless, McCrudden asserts²⁸ that a global consensus has not yet emerged in the philosophical debate concerning whether the *origin* of human dignity is metaphysical, religious, transformative or otherwise. While identifying the source of human dignity falls outside the remit of the thesis, it is submitted that eligibility to vote manifests human dignity, whatever its source may be.

Gardner regards democratic rights as ‘structural’ rather than as fundamental, suggesting that voting has a relational aspect, concerning the way eligible voters are treated vis-à-vis fellow eligible voters. According to Gardner,²⁹ the dignity of eligible voters is

²⁵ Michael Perry, ‘Secular Viewpoints, Religious Viewpoints and the Morality of Human Rights’ (Emory University School of Law Public Law and Legal Theory Research Paper Series 102-10), 6.

²⁶ GA/Res/217A (III) of 10 December 1948.

²⁷ 19 December 1966, 999 UNTS 171, entered into force 23 March 1976.

²⁸ Christopher McCrudden, ‘Human Dignity and Judicial Interpretation of Human Rights’ (2008) 19(4) *European Journal of International Law* 655, 679.

²⁹ James A Gardner, ‘The Dignity of Voters’ (2010) 64 *University of Miami Law Review* 435, 455.

associated with a socially constructed role that is unique to democracies. This thesis concerns societies where elections are held. The South African Constitutional Court held³⁰ that '[t]he vote of each and every citizen is a badge of dignity and of personhood. Quite literally, [the vote] says that everybody counts.'

The dignity of voters may be most clearly observed in its breach: since voting is emblematic of social standing and civic dignity, exclusion may be viewed as an insult, a form of dishonour, or denigration.³¹ Hence, on Gardner's account, it could be argued that *exclusion* infringes the 'role dignity' of excluded would-be voters. For instance, in the case of convicted adult citizens, their disenfranchisement (deliberately) conveys a message of inferiority (lesser dignity): they are excluded from their previously-held status of eligible voters.

In contradistinction, when the state refrains from enfranchising non-citizen residents, it fails to equalise their status to that of citizens, sending a message of *non-inclusion*. Even though no denigration is meant, dignity harms may ensue. It is contended that the non-enfranchisement of CSR1951 refugees, who are effectively excluded from participation in elections of their state of origin (Chapter Six *infra*), emphasises their *dual* non-membership.

5. Equal Worth, Concern and Respect

Dahl advanced the principle of intrinsic equality,³² according to which we ought to treat all persons as if they possess equal claims to life, liberty, happiness and other fundamental goods

³⁰ CCT 08/99 *August v Electoral Commission* (1999) (3) SA 1, para 31 (South Africa).

³¹ Jeremy Waldron, 'Participation: The Right of Rights' (1998) 98(3) *Proceedings of the Aristotelian Society* 307, 314.

³² *On Democracy* (n14), 64 (stressing that his account is not meant 'to express a factual judgment...[or] to describe when we believe is or will be true...' but instead 'to express a moral judgment about human beings').

and interests. The House of Lords held³³ that '[d]emocracy is founded on the principle that each individual has equal value'. In a democracy, equal suffrage may be an indication of whether individuals are treated properly by institutions and by their peers.³⁴

The extent to which a political community distributes decision-making power *equally* matters.³⁵ When distributing opportunities or goods, governments ought not to assume that some community members are entitled to more because they are worthy of more concern and respect;³⁶ the 'value theory of democracy' rests on 'respect of citizens as rulers'.³⁷ Hence, while tossing a coin instead of holding elections may give all prospective voters an equal chance, it does not allow them any influence on decision-making, and so does not treat them with concern and respect.³⁸

In the female suffrage debates, it was suggested that the interests of married women can be guarded by their husbands, and that women are not generally suited for politics but, rather, for other spheres of life. However, on this account, even if it could be shown that wives' interests may be secured by votes of their husbands, their equal worth entails that they

³³ *Ghaidan v Godin-Mendoza* [2004] UKHL 30, para 132 (per Baroness Hale).

³⁴ Jeff Manza and Christopher Uggen, *Locked Out: Felon Disenfranchisement and American Democracy* (Oxford University Press, 2006), 18.

³⁵ Ronald Dworkin, *Sovereign Virtue* (Harvard University Press, 2000), 200.

³⁶ Ronald Dworkin, *Taking Rights Seriously* (Duckworth, 1978) 272-3.

³⁷ Corey Brettschneider, *Democratic Rights: The Substance of Self-Government* (Princeton University Press, 2007).

³⁸ Ben Saunders, 'Majority Rule and Procedural Equality' (2010) 23(1) *Ratio Juris* 113, 118 (arguing that lottery voting, that is tossing a coin, however undemocratic, satisfies procedural equality. In turn, he concludes that procedural equality does not suffice to justify majority-rule based decision-making). *Cf* the 'protective democracy' account in Section D *infra* which emphasises the ways in which suffrage effectuates protection of other rights.

should have their views *heard in their own voice*.³⁹ Similarly, slaves were not entitled to participate in political community decision-making regarding the abolition of slavery; rather, claims for abolition were debated by slave-owners and by other ‘free’ persons. The fact that these processes may have a plausible outcome does not make up for the indignity of their exclusionary nature.

Now, it is generally assumed that parents are ‘virtually representing’ their childrens’ interests; it could be similarly argued that rights of members of excluded groups, such as non-citizens, may be similarly protected by special representatives. However, unlike children, non-enfranchised competent adults are assumed to have the *capacity* to participate; *their* exclusion signifies that they are not treated by society with equal worth, concern and respect.

On this account, *contra* pure instrumentalism (which may have prompted Mill’s support for weighted voting power based on the prospective voter’s level of education⁴⁰), political equality has *independent* value: loss of political equality cannot be ‘compensated for’ by having a more equitable redistribution.⁴¹ Following Rawls,⁴² it is submitted that persons ought to conceive of themselves and of other members of their society both as possessing the moral power to have a conception of the good and as self-authenticating sources of valid claims which they are able to make in the political process.

³⁹ Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* (Basic Books, 2000), 175.

⁴⁰ See John S Mill, *Considerations of Representative Government* (Bibliobazaar, 2007) (1862) ch viii: On the Extension of Suffrage (‘...[t]he distinction in favour of education, right in itself, is farther and strongly recommended by its preserving the educated from the class legislation of the uneducated; but it must stop short of enabling them to practice class legislation on their own account...’).

⁴¹ Wojciech Sadurski, ‘Legitimacy, Political Equality and Majority Rule’ (2008) 21 Ratio Juris 39, 53.

⁴² John Rawls, *Political Liberalism* (Columbia University Press, 1996), 30-2.

For Rawls,⁴³ political equality stems from mutual recognition of individual equal worth and capacities. Political liberties are thus a 'public affirmation of the status of equal citizenship for all', and individuals who possess them retain their self-respect and self confidence. Eligibility to participate in political processes demonstrates that a person possesses *de jure* equal voice in 'settling the ways in which basic social conditions are to be arranged' in a given political community.⁴⁴ By contrast, *exclusion* is a mark of (social) inferiority.⁴⁵ Participation is not only a 'status symbol' but also facilitates feelings of 'belongingness' among members of the polity.⁴⁶ The participatory experience may generate a sense of belonging and transcendence.⁴⁷ Enfranchisement may have a constitutive effect on one's sense and conception of membership.⁴⁸

Moreover, when persons are respected and treated as equals by their peers, it may confirm their own sense of value. Consequently, enfranchisement may enhance their self-esteem and give voters a sense of (political) competence. In this context, Nussbaum's contention that individuals are both *capable* and *needy* is helpful. She argues that an appropriate institutional environment is required in order to provide affirmative support for all relevant individual capabilities; settling for a (liberal) sphere of non-interference would be

⁴³ John Rawls, *A Theory of Justice* (Harvard University Press, 1971), 545.

⁴⁴ *Ibid*, 233-4.

⁴⁵ Jesse Furman, 'Political Illiberalism: The Paradox of Disenfranchisement and the Ambivalence of Rawlsian Justice' (1997) 106 *Yale Law Journal* 1197, 1217.

⁴⁶ Carol Paternan, *Participation and Democratic Theory* (Cambridge University Press, 1970) 22, 27.

⁴⁷ Winkler (n22), 367.

⁴⁸ *Ibid*, 377.

insufficient.⁴⁹ Hence, because enfranchisement symbolises equal concern and respect, it can help persons who are capable beings yet are also in need of social support to fulfill their potential and, in turn, to contribute to society.

D. Functions of Voting: Protection and Non-Domination

1. Introduction

This section considers two primary functions of voting: *First*, an instrumental function: the utilisation by individuals of their vote, *inter alia*, to advance their interests and those of members of their social groups (a rights-protective account). *Second*, an intrinsic-expressive function, namely the contention that eligible voters are not subject to the arbitrary rule of others of voting as an expression of non-domination and self-governance. It may be argued that, despite emanating from ‘liberal’ and ‘republican’ schools of thought, respectively, these functions are compatible and indeed mutually reinforcing: eligible voters are better placed to protect their interests, and they are (symbolically) non-dominated whether or not they choose to exercise their right to vote.

2. Rights-protective account

It may be suggested that governments can be trusted to protect and reinforce rights only when they are accountable to those whose lives they govern. The U.S. Constitution ceremoniously declares⁵⁰ that ‘[w]e hold these truths to be self-evident, that all men are created equal, that

⁴⁹ Martha Nussbaum, *Capabilities as Fundamental Entitlements: Sen and Social Justice* (Hitotsubashi University, 2002), 21.

⁵⁰ *The Unanimous Declaration of the Thirteen United States of America* (4 July 1776), available at: <http://www.ushistory.org/declaration/document/index.htm>.

they are endowed...with certain inalienable rights....Life, Liberty and the Pursuit of Happiness. That to secure these rights, Governments are instituted among men, deriving their just powers from the consent of the governed'. Notwithstanding the selective nature of the rights that the Declaration listed, and the property, gender and other non-benign voting qualifications that were applied at that time,⁵¹ the notion that governments are elected by individuals to secure *their* rights⁵² was and remains a prominent tenet of liberal thought.

On this account, the right to vote is a necessary (though not a sufficient) condition for securing other rights.⁵³ By contrast, electoral exclusion leaves individuals with an inadequate ability to influence outcomes of political decision-making on matters which would secure their rights. Mill asserted⁵⁴ that, in order to protect their rights and interests from governmental abuse, individuals should participate in determining the conduct of government; he postulated that '[m]en, as well as women, do not need political rights in order that they may govern, but in order that they may not be misgoverned'.

Along similar lines, the U.S. Supreme Court held⁵⁵ that since 'the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and

⁵¹ Keyssar (n39), xviii. See the discussion in Chapter Five *infra*.

⁵² Some of these perceptions can be traced back to John Locke, *Two Treatises of Government* (Peter Laslett ed Cambridge University Press, 1960) (1690). Locke constructed a theory of tacit consent of the governed, seeing that few people entering an established civil society affirmatively consent to its government.

⁵³ Gregory Fox, 'The Right to Political Participation in International Law' (1992) 17 *Yale Journal of International Law* 539, 595.

⁵⁴ Mill (n40), ch viii. Mill asserted that '[t]he limitation of the power of government over individuals loses none of its importance when the holders of power of government are regularly accountable to the community that is to the strongest party therein'. *Ibid*, ch i.

⁵⁵ *Reynolds v Sims* 377 US 533, 561-2 (1964).

meticulously scrutinized'. Elsewhere, it ruled⁵⁶ that '[n]o right is more precious in a free society than that of having a voice in the election of those who make the laws under which as good citizens we must live. Other rights, even the most basic, are illusory if the right to vote is undermined'.

According to a rights-protective account, voters are *expected* to exert power and advance their interests as well as interests of their social groups in the electoral process.⁵⁷ Hence, for instance, even if convicts are arguably 'biased' and choose to vote for candidates who support laxer punishments, their supposed bias cannot justify their disenfranchisement, because voting is about expressing biases, loyalties, commitments, and personal values.⁵⁸

In this context, the electoral process may be a useful channel for vulnerable communities to enter the social discourse, especially in light of the fact that other channels may be effectively blocked.⁵⁹ For this reason, dominant groups ('the ins') may have an incentive to 'choke' off the channels of political change, block members of disempowered groups ('the outs') from entering the political process, and consequently further marginalise them.

Electoral exclusion of individuals adversely affects their respective communities, which consequently lack the (collective) ability to choose representatives that are sensitive to

⁵⁶ *Wesberry v Sanders* 376 US 1, 17 (1964) (per Black J).

⁵⁷ Adam Cox, 'Temporal Dimension of Voting Rights' (2007) 93 *Virginia Law Review* 361, 362.

⁵⁸ George Fletcher, 'Disenfranchisement as Punishment: Reflections on the Radical Uses of Infamia' (1999) 46 *UCLA Law Review* 1895, 1906.

⁵⁹ John H Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, 1980), 103.

their needs.⁶⁰ It may be concluded that, on a rights-protective account, electoral exclusion adversely affects both individuals and their social groups, and enhances their vulnerability.

3. Non-Domination and Self-Governance

The fear that even a consensual transfer of power to the government entails a risk of abuse and that government ought to leave individuals enough latitude to choose their own ends⁶¹ is captured by Isaiah Berlin's notion of liberty as 'negative' freedom or *non interference*.⁶² On Berlin's account, electorally excluded individuals could be free(r) living under a liberal-minded despot than as enfranchised members of a participatory democracy which adopts personal freedom-infringing policies. Liberty in this sense is not incompatible with some kinds of autocracy, or at any rate with the absence of self-government as it is principally concerned with the area of control, not with its source. Berlin concluded that there is no necessary connection between individual liberty and democratic rule.

In contradistinction, on an account of liberty as 'positive' freedom' or as non-domination and self-governance, a person is dominated by the mere possibility of arbitrary interference even if such interference does not occur; the relevant question to be asked is 'by

⁶⁰ David Mitchell, 'Undermining Individual and Collective Citizenship: The Impact of Exclusion Laws on the African-American Community' (2007) 34 Fordham Urban Law Journal 833, 856. See also *On Democracy* (n14), 77 (asserting that 'the fundamental interests of adults who are denied opportunities to participate in governing will not be adequately protected and advanced by those who govern').

⁶¹ For instance, the Tenth Amendment to the U.S. Constitution (1791), enunciating that '[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people', arguably reflects a perception that government ought to have limited powers.

⁶² See Isaiah Berlin 'Two Concepts of Liberty' In Isaiah Berlin (ed) *Four Essays on Liberty* (Oxford University Press, 1969) 155, 164 (arguing that 'liberty is liberty, not equality or fairness or justice or culture, or human happiness or a quiet conscience. If the liberty of myself or my class or nation depends on the misery of a number of other human beings, the system which promotes this is unjust and immoral. But if I curtail or lose my freedom in order to lessen the shame of such inequality, and do not thereby materially increase the individual liberty of others, an absolute loss of liberty occurs. This may be compensated for by a gain in justice or in happiness or in peace, but the loss of freedom - 'social' or 'economic' - is increased').

whom am I ruled'. Hence, even if the rights of excluded individuals may be theoretically secured by a benevolent ruler, the excluded are dominated by the very fact that policies that affect them are decided in their (political) absence.

Enfranchisement is a manifestation of *non-domination and self-governance*: having one's rights affected by a decision in which one had the opportunity to participate is qualitatively different than having that decision made in one's (political) absence.⁶³ Only rights of political participation ground the citizen's reflexive, self-referential legal standing.⁶⁴ On this view, domination is averted even if participatory rights are not exercised in actuality,⁶⁵ since it is enfranchisement which prevents the risk of being subjected to the *arbitrary* will of others.⁶⁶ Freedom as self-governance entails having the capacity to deliberate and change the terms of democratic cooperation, which in turn means having normative power over the consequent distribution of normative powers.⁶⁷

On this account, electoral participation is conceptually grounded in a pre-political right to *individual* self-determination.⁶⁸ In turn, self-determination mandates that individuals

⁶³ Peter Jones, *Rights* (Macmillan, 1994), 181.

⁶⁴ Jürgen Habermas, *Between Facts and Norms* (Polity Press, 1996), 504.

⁶⁵ See eg Michael Ignatieff, 'The Myth of Citizenship' in Ronald Beiner (ed), *Theorizing Citizenship* (SUNY Press, 1995), 53.

⁶⁶ Michael Goodhart, *Democracy as Human Rights: Freedom and Equality in the Age of Globalization* (Routledge, 2005), 147.

⁶⁷ James Bohman, *Democracy across Borders: From Demos to Demoi* (MIT Press, 2007), 7.

⁶⁸ Michael Cholbi, 'A Felon's Right to Vote' (2002) 21 *Law and Philosophy* 543, 549. The right to self-determination is often considered a 'collective' right; cf Antonio Cassese, *UN Law/Fundamental Rights: Two Topics in International Law* (Sijthoff & Noordhoff, 1979), 137 (arguing that the opening sentence of art 1 of the ICCPR, '[a]ll peoples have the right of self-determination...' should be read as enunciating an individual right to participate in national affairs). The collective aspects of self-determination fall *outside the scope of this thesis*.

play an equal part in making collective decisions which subsequently bind them. Enfranchised individuals possess a fraction of sovereign power that is equal to their share of the population that is subject to that sovereign power. Reiman suggests that, while the relations between voters as lawmakers and the electorally excluded should not be described as slavery because, unlike slave-masters, lawmakers cannot exercise absolute arbitrary power, these relations may be described as *subjection*,⁶⁹ namely of lawmakers imposing rules of behaviour on (competent) adults without consulting them. Hence, the right to participate may be sufficient to secure freedom as non-domination. Enfranchised individuals who choose not to vote signal their willingness to go along with an outcome decided by others; by taking this decision they are not being dominated by others, as they retain the right to change their minds and participate.⁷⁰

Nonetheless, a ‘strong’ (Aristotelian) account of self-governance holds⁷¹ that participation is an *intrinsic* part of the ‘good life’ and individuals must live together in political associations in order to reach their full potential; *actual* political participation has intrinsic value that is superior to forms of merely private enjoyment which relate to their family, neighbourhood and profession. On this view, since most persons at present do not engage with the political process, they live an unsatisfying life: a good man must be also a good citizen; a good polity is an association constituted by good citizens; and good citizens possess civic virtue that is the predisposition to seek the good of all in public matters.

⁶⁹ Jeffrey Reiman, 'Liberal and Republican Arguments against Felon Disenfranchisement' [2005] Criminal Justice Ethics 3, 12.

⁷⁰ Ben Saunders, *Republicanism and Abstention* (unpublished manuscript) (copy with author).

⁷¹ Aristotle, *Politics* (350 BCE) Book VII, available at: <http://classics.mit.edu/Aristotle/politics.html>.

In contradistinction, some contemporary scholars contend that laws and norms can embody the common good even without universal participation of citizens in their formation. Kymlicka and Norman consider Aristotelian contentions to be artificial and archaic. They posit⁷² that Aristotle's supposedly ideal political life was made artificially possible by slavery and other forms of domination of non-citizens which are no longer tolerated. Moreover, private life has become richer and consequently encompasses a greater part of individuals' lives; participation is thus inevitably occupying a lesser, though still important, part of individuals' lives.

E. The Electoral Process and Social Decision-Making: Three Perspectives

1. Introduction

The previous sections discussed the fundamentality of voting for individuals. Following the maxim that government is constituted 'of the people, by the people, for the people'⁷³ this section turns to the *collective* nature of the electoral process.⁷⁴ It may be contended that the right to vote is qualitatively different than, for instance, the right to freedom of conscience: whereas the latter right is realised by individuals *qua* individuals, individual votes are given

⁷² Will Kymlicka and Wayne Norman, 'Return of the Citizen: A Survey of Recent Work on Citizenship Theory' in Ronald Beiner (ed), *Theorizing Citizenship* (SUNY Press, 1995), 293.

⁷³ The phrase was famously coined by Abraham Lincoln in the Gettysburg Address, 19 November 1863, available at: <http://myloc.gov/Exhibitions/gettysburgaddress/Pages/default.aspx>.

⁷⁴ Richard Pildes, 'What Kind of Right is "the Right to Vote"?' (2007) 93 Virginia Law Review in Brief 43, 44-5 (suggesting that 'the right to vote can be violated when election structure dilute[s] the voting power of particular groups through the way in which those structures aggregate individual votes...an individual voter can be disenfranchised but no vote can be diluted in and of itself'). Queries related to the *structure* of electoral processes fall outside the scope of the thesis.

meaning when they are counted and given effect as part of a system of collective decision-making.⁷⁵

The electoral process is a vehicle for initiating social, economic, and political change.⁷⁶ It enables governments to receive feedback on how to solve collective action problems.⁷⁷ Democratic governance, to a substantially greater degree than any alternative, provides an orderly and peaceful process for a majority of citizens to induce their government to do what they most want it to do, and to avoid doing what they most want it not to do.⁷⁸ Sound collective decisions require assembling diverse perspectives and experiences.⁷⁹

Three perspectives concerning the purposes and ends of electoral processes will be presented: A ‘liberal’ perspective according to which the electoral process is an aggregation of competing individual and group preferences; individual voters are expected to vote according to their interests; as the protective democracy account in Section D *supra* suggested, having a voice matters, personally. By contrast, a ‘republican’ perspective views the electoral process as an attempt by the political community as a whole to construct a ‘common good’; the role of each voter is to contribute to this effort. Lastly, a ‘deliberative democracy’ perspective diverges from the ‘liberal’ perspective by attributing a transformative character to inclusive deliberation.

⁷⁵ *Law and Disagreement* (n18), 237.

⁷⁶ Ludvig Beckman, *The Frontiers of Democracy: The Right to Vote and its Limits* (Palgrave Macmillan, 2009), 1.

⁷⁷ Talbott (n20), 158.

⁷⁸ *Democracy and its Critics* (n8), 95.

⁷⁹ Jeremy Waldron, 'A Right-Based Critique of Constitutional Rights' (1993) 13(1) *Oxford Journal of Legal Studies* 18, 36.

2. A 'Liberal' Perspective

On a liberal account, individuals are considered to be the best judges of their own interests and to have divergent interests and preferences. The electoral process aggregates individual preferences in order to influence collective decisions⁸⁰ and to form a political will⁸¹ which does not (necessarily) reflect a 'common good'. It is assumed that individuals bring with them divergent understandings of the good of society to the electoral process; inclusive suffrage helps ascertain the well-being of society, which, in turn, is made up of the well-being of its members.

Talbott's moderated liberal perspective suggests that the reason that democratic decision-making is required is that people are neither angels nor devils: if they were angels, there would be no need for external enforcement, whereas if they were devils, they would not be willing to incur even small costs in cases in which they have no strong countervailing personal interests.⁸² In order to reflect individual preferences accurately, the electoral process must be inclusive. Hence, alongside their fear of majoritarian biases that (absent constitutional guarantees) can marginalise participating minorities, liberals are concerned that that 'the channels of political change' will be 'choked off' by parliamentary majorities.⁸³ If majorities succeed, then not only excluded individuals and their social groups but *society as a whole* will be adversely affected.

⁸⁰ Thomas Christiano, 'Voting and Democracy' (1995) 25(3) Canadian Journal of Philosophy 394, 395-97.

⁸¹ David Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Polity Press, 1995), 64.

⁸² Talbott (n20), 155.

⁸³ Ely (n59), 87.

Sen asserted⁸⁴ that famines do not occur in democracies both because of pressure exerted by those directly suffering from them, and because the rest of the population signals to the authorities that famines cannot be tolerated. Process-theory liberals advocate a participation-oriented, representation-reinforcing approach to ensure that attempts to cast weaker and marginalised individuals or groups out of the political process will fail.⁸⁵

3. A 'Republican' Perspective

'Republican' perspectives note⁸⁶ that the electoral process is designed to arrive at an autonomous substantive *common* interest or good that is *independent* of the sum of interests of individual participants. Community members are expected to engage in the electoral process with 'the common good' in mind, and to support policies which, in their view, cumulatively advance the good of society as a whole, even if they do not also advance their personal interests or the interests of the social group to which they belong.

While on a 'liberal' account, a more inclusive process better reflects the *divergent* interests that exist in society, and facilitates the aggregation thereof (and the subsequent formation of a public will), a 'republican' account values participation because of the contribution that each person makes to the *joint* project of identifying a 'common good'. Citizens may disagree in good faith over which principles best serve the public will despite

⁸⁴ Amartya Sen, *Development as Freedom* (Oxford University Press, 1999), 150.

⁸⁵ See eg Ely (n59). Cf Waldron in *Law and Disagreement* (n18), 299-303 (suggesting that, in a democracy, all rights are 'up for grabs' including democratic rights; it does not follow from the fact that a majority of men has no moral right to decide in the name of the whole political community whether women should have a right to vote that others institutions, like courts, can legitimately determine the answer; questions of voting eligibility are a 'legitimacy-free zone').

⁸⁶ Frank Michelman, 'Conceptions of Democracy in American Constitutional Argument: Voting Rights' (1989) 41 Florida Law Review 439, 445.

overlooking the personal interests and differences that separate them as private persons in favour of their shared interest in the common good. These differences are mediated through the political process: participation has a transformative effect on positions that citizens are willing to adopt and hold.

4. A 'Deliberative Democracy' Perspective

On a 'deliberative democracy' account,⁸⁷ the electoral process is the institutionalisation of public use of reason in a decentralised society that is jointly exercised by autonomous persons. When individuals are required to articulate their arguments in public forums, they are forced to think of reasons that others involved in the process would consider plausible: a deliberative setting can shape outcomes that will be formed independently of the participants' motives.⁸⁸

On this account, personal ends are 'discovered'⁸⁹ through participation rather than, as the liberal perspective suggests, *predetermined* prior to and independently of individual engagement in the process. This feature makes the electoral process *transformative* rather than aggregative. However, a deliberative democracy perspective is conceptually closer to a liberal perspective insofar as the electoral process is not expected to produce a 'common good'. Rather, the prospective outcome of a successful process is a better understanding by all community members of their needs vis-à-vis other members.

⁸⁷ See eg Jürgen Habermas, 'Three Normative Models of Democracy' in Seyla Benhabib (ed), *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton University Press, 1996) 21.

⁸⁸ Jon Elster, 'Deliberation and Constitution Making' in Jon Elster (ed), *Deliberative Democracy* (Cambridge University Press, 1998) 97, 104.

⁸⁹ Heather Lardy, 'Citizenship and the Right to Vote' (1997) 17(1) *Oxford Journal of Legal Studies* 76, 87.

F. 'Cultural Relativity' Challenges

1. The General 'Cultural Relativity' Challenge to Universality of Rights

A global commitment to the universality of human rights is oftentimes proclaimed.⁹⁰ The 'Vienna Declaration and Programme of Action' was unanimously adopted by representatives of 171 states that participated in the World Congress on Human Rights. The Declaration pronounces,⁹¹ *inter alia*, that '...it is the duty of States, regardless of their political, economic or cultural systems, to promote and protect all human rights and fundamental freedoms.' However, the *content* of many rights that are proclaimed universally remains highly contentious. One current example is the divergent approaches to prohibitions on Islamic head coverings,⁹² considered in some societies to be an infringement of freedom of religion, while in others they are presented as a means to advance gender equality.

Consequently, 'cultural relativity' challenges are mounted⁹³ against the presumed universal character of human rights obligations. An-Na'im contends⁹⁴ that claims of the international human rights system to 'universal cultural legitimacy should be based on a

⁹⁰ Jack Donnelly, *Universal Human Rights in Theory and Practice* (2nd edn Cornell University Press, 2003), 157.

⁹¹ UN Doc A/CONF 157/24 (Part 1) at 20 (1993) art 8.

⁹² See eg Reuven (Ruvy) Ziegler, 'The French Headscarves Ban: Intolerance or Necessity?' (2006) 40(1) John Marshall Law Review 235.

⁹³ For a discussion of cultural relativism, see generally Jack Donnelly, 'Cultural Relativism and Universal Human Rights' (1984) 6 Human Rights Quarterly 400. In recent decades, there has also been a particular focus on a purported 'Asian values' dimension of the cultural relativism claim. See eg Damien Kingsbury, 'Universalism and Exceptionalism in "Asia"' in Leena Avonius and Damien Kingsbury (eds), *Human Rights in Asia: A Reassessment of the Asian Values Debate* (Palgrave Macmillan, 2008) 19.

⁹⁴ Abdullahi Ahmed An-Na'im, 'State Responsibility under International Human Rights Law to Change Religious and Customary Laws' in Rebecca Cook (ed), *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press, 1994) 167, 173.

moral and political ‘overlapping consensus’ among major world cultural traditions’ that has not yet fully emerged. Mutua asserts⁹⁵ that human rights documents are ‘veiled attempts’ to universalise particular civil and political rights that are either accepted or aspired to by Western liberal democracies.

However, the notion of cultural relativity seems to be self-contradictory, since it is premised on a *universal* tenet, namely that everyone should follow and be defined by their culture.⁹⁶ Moreover, it may be argued that the suggestions that Europe has a longstanding democratic tradition or that there is an ‘Asian’ tradition of obedience to authority are erroneous. Indeed, if respect for human rights has emerged from Europe despite its despotic and intolerant past, then it can be plausibly contended that human beings possess some characteristics by virtue of which *any* cultural tradition can and should respect human rights.⁹⁷

2. The Facilitative Role of the Right to Vote

The right to vote has been characterised as ‘the right of rights’:⁹⁸ as was noted in Section D, voters participate in decision-making processes that impact the protection of *other rights*. This characterisation does not imply that the right to vote has moral priority over other rights;

⁹⁵ Makau Mutua, *Human Rights: A Political and Cultural Critique* (University of Pennsylvania Press, 2002), 173.

⁹⁶ James Sweeney, 'Margin of Appreciation, Cultural Relativity, and the European Court of Human Rights in the Post Cold-War Era' (2004) 54 *International and Comparative Law Quarterly* 459, 461.

⁹⁷ Talbott (n20), 40.

⁹⁸ *Law and Disagreement* (n18), 232 citing William Cobbett, *Advice to Young Men and Women, Advice to a Citizen* (1829) quoted in Leslie J MacFarlane, *The Theory and Practice of Human Rights* (Dartmouth Publishing, 1985), 142. This phrase should not be confused with Arendt's depiction of nationality as the 'right to have rights' (Chapters Two and Four). Hannah Arendt, *The Origins of Totalitarianism* (Harcourt, 1967), 293.

rather, it points to the fact that, reasonable right-bearers resolve through the electoral process disagreements about rights that they may or may not have.⁹⁹

On Ronald Dworkin's account, some rights are 'trumps'¹⁰⁰ that are supposed to protect vulnerable minorities from 'tyranny of the majority'.¹⁰¹ In contradistinction, it could be argued that, since the right to vote facilitates the electoral process itself,¹⁰² support for inclusive electoral processes can be based on divergent perceptions of individual and community life.¹⁰³ McGinnis and Somin assert¹⁰⁴ that 'controversial substantive rights' are better left to domestic democratic processes, and that international law should instead establish global norms facilitating democracy in order to ensure that governments are periodically held accountable to their peoples.

'Democratic rights' are absent from the list of 'basic rights' in John Rawls' *Law of Peoples*.¹⁰⁵ The list includes the rights enunciated in Articles 3 to 18 of the Universal Declaration of Human Rights (civil rights), while the political rights in Articles 19-21 (freedom of expression, assembly and association, and democratic rights of participation) are

⁹⁹ *Law and Disagreement* (n18), 282.

¹⁰⁰ TRS (n36), 328.

¹⁰¹ See eg *On Democracy* (n14), 64 (arguing that '[d]emocratic governments can also inflict harm on a minority of citizens who possess voting rights but are outvoted by majorities- the tyranny of the majority').

¹⁰² Goodhart (n66), 147.

¹⁰³ Joshua Cohen, 'For a Democratic Society' in Samuel Freeman (ed), *The Cambridge Companion to Rawls* (Cambridge University Press, 2003) 86, 109-10.

¹⁰⁴ John McGinnis and Ilya Somin, 'Democracy and International Human Rights Law' (2009) 84(4) *Notre Dame Law Review* 1739, 1742-7.

¹⁰⁵ John Rawls, *The Law of Peoples* (Harvard University Press, 1999), 80.

regarded by Rawls as ‘liberal aspirations’.¹⁰⁶ He describes¹⁰⁷ non-democratic societies that respect basic rights, but not political rights, as ‘decent’ and ‘hierarchical’.

Now, Rawls does *not* support cultural relativism, since he clearly posits that *basic* rights should be considered ‘binding on all peoples and societies’, and that their violation is ‘equally condemned by both reasonable liberal peoples and decent hierarchical peoples’.¹⁰⁸ Hence, Rawls’ universality ‘test’ seems to correspond to Sen’s contention¹⁰⁹ that we cannot judge the universality of a value by whether it commands the assent of everyone at a given point in time but, rather, by whether people anywhere may have reasons to consider it valuable. *Contra* Sen, Rawls opts for a non-universal application of the political equality principles of his ‘theory of justice’, suggesting that these principles apply (only) to liberal societies.

A plausible interpretation of Rawls’ account considers his objection to the use of force by international actors against ‘decent hierarchical’ regimes that do not engage in the most extreme forms of human rights violations to be grounded in international relations. It is nonetheless possible to interpret *Law of Peoples* as (morally) legitimising such regimes.¹¹⁰

¹⁰⁶ Ibid, 80-2.

¹⁰⁷ Ibid, 63-7.

¹⁰⁸ Ibid, 79-80.

¹⁰⁹ See generally Amartya Sen, ‘Human Rights and Economic Achievements’ in Joanne R Bauer and Daniel A Bell (eds), *The East Asian Challenge for Human Rights* (Cambridge University Press, 1999), 88.

¹¹⁰ Fernando Tesón, *A Philosophy of International Law* (Westview, 1998), 107.

Hence, Rawls' account can be seen either as an exercise in *realpolitik* or as a conceptual challenge to the universality of 'the right to democratic governance'.¹¹¹

G. 'Core' and 'Penumbra' of Rights

German constitutional law draws a distinction between the *core* or *essence* of basic rights, which legislation may not infringe under any circumstances, and their *penumbra* (which may be restricted pursuant to generally applicable laws).¹¹² It is contended that, eligibility to vote, namely the determination *whether* a person may vote in particular elections, is at the *core* of the right to vote, whereas the conditions and procedural regulations which facilitate or hinder the *exercise* of a pre-determined right to vote are at its *penumbra*.

Non-invidious procedural requirements may inconvenience voters. For instance, in all representative democracies, including those based on proportional representation, political parties need to pass an effective percentage bar due to the limited number of seats in the legislature(s). Consequently, voters who support very marginal parties may have to 'settle' for a second preference, or having their votes discounted. Some electoral systems require prior registration that may impose technical difficulties. However, provided that such restrictions are benign and eligible voters are still effectively able to exercise their rights (an assumption that has been proven rather shaky in certain states), they affect the penumbra of

¹¹¹ See eg Thomas Franck, 'The Emerging Right to Democratic Governance' (1992) 86 American Journal of International Law 46, 46.

¹¹² German Basic Law, art 19(2). See also the jurisprudence of the Human Rights Committee eg General Comment No. 27: *Freedom of Movement (Art. 12)* (2 November 1999) CCPR/C/21/Rev.1/Add.9, para 13 ('in adopting laws providing for restrictions permitted by Article 12, paragraph 3, States should always be guided by the principle that the restrictions must not impair the essence of the right').

the right to vote. By contrast, disenfranchisement of eligible voters is an infringement of the *core* of their aforementioned right.

In an England and Wales Court of Appeal judgment concerning the compatibility of domestic legislation that disenfranchises prisoners with Article 3 of the First Protocol of the European Convention on Human Rights,¹¹³ Kennedy LJ held that:¹¹⁴

[o]f course as far as an individual prisoner is concerned, disenfranchisement does impair the very essence of his right to vote, but that is too simplistic an approach, because what Article 3 of the First Protocol is really concerned with is the wider question of universal franchise, and the free expression of the opinion of the people in the choice of the legislature

The above judgment seems to frame the question in terms of how disenfranchisement affects the ‘very essence’ of universal suffrage as a *collective* enterprise. However, Article 3 has been consistently interpreted by the ECtHR as manifesting an *individual* right to vote.¹¹⁵

A broader debate between ‘relative’ and ‘absolute’ theories of legal rights concerns the question whether legal rights have (or should have) a ‘core’. Alexy draws a distinction

¹¹³ Protocol I: Enforcement of Certain Rights and Freedoms not included in Section 1 of the Convention, Paris, 20 March 1952, ETS No 009.

¹¹⁴ *R (Pearson and Martinez) v Home Secretary; Hirst v Attorney General* [2001] EWHC 239 (Admin), para 41 cited in App No 74025/01 *Hirst* (No 2) v UK (GC), para 16. In *Hirst*, the ECtHR held that §3(1) of the Representation of the People Act 1983 c2 (mandating blanket disenfranchisement of prisoners serving a custodial sentence) is incompatible with Protocol I, art 3, above.

¹¹⁵ See eg Ziegler (n92). See eg app No 18747/91 et al *Gitonas and others v Greece* (1 July 1997) (GC), para 39 (the court ‘has to satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness...’). See also the discussion of ECtHR art 3 jurisprudence in Chapter Two *supra*.

between *rules* and *principles*, suggesting¹¹⁶ that rules are definitive, non-balanceable norms, whereas principles are competing optimisation requirements which should be implemented to the ‘greatest possible extent’. According to Alexy, if rights are to be regarded as *principles*, it would entail that they do not have inviolable ‘core’ content; rather, the ‘core’ of a right is what remains *after* balancing has taken place.

However, it may follow from Alexy’s structural approach that the question whether a right is a (non-balanceable) rule or a (balanceable) principle does not depend on the nature, fundamentality or content of the right which the analysis engages but, rather, on linguistic formulae. Consequently, the right to vote may be regarded either as a rule *or* as a principle, depending on the particular legal stipulation. Rivers argues¹¹⁷ that the ‘problem with the “very essence” of a right is that it is almost impossible to define usefully without reference to competing public interest’.

By contrast, Möller asserts¹¹⁸ that normative assessments regarding the importance of rights or interests relative to one another ought to determine which rights or interests should *generally* take precedence when a conflict arises between them. On this account, if one accepts that eligibility is at the core of the right to vote, then it is reasonable to argue that eligibility should not be subjected to individualised balancing or proportionality assessment; rather, it should reflect the respective meanings of enfranchisement and of membership.

¹¹⁶ Robert Alexy, *A Theory of Constitutional Rights* (Oxford University Press, 2002), 47.

¹¹⁷ Julian Rivers, ‘Proportionality and Variable Intensity of Review’ (2006) 65 Cambridge Law Journal 174, 187.

¹¹⁸ Kai Möller, ‘Balancing and the Structure of Constitutional Rights’ (2007) 5(3) International Journal of Constitutional Law 453, 465.

H. Concluding Remarks

This chapter explored aspects of the fundamentality of voting for individuals and for polities in view of individual rights and capacities as well as the collective nature of the electoral process. The constitutive nature of voting as a manifestation of membership in a political community will be explored further in subsequent chapters, as will the ramifications of rights-protective and non-domination accounts.

Following Waldron,¹¹⁹ it may be argued that voters take at times a *Benthamite self-interest* path and at other times a *Rousseauian general will* path; both paths, separately and jointly, offer solid justifications for considering the right to vote to be fundamental. In a ‘Benthamite’ democracy, individuals ought to be allowed to assert their interests, whereas in a ‘Rousseauian’ democracy, all opinions should be respected, voiced in debate and given an effective opportunity to win supporters. It was further contended that the right to vote is less susceptible to ‘cultural relativity’ challenges to universality of rights, and hence a global cross-cultural consideration of questions of voting eligibility should be less contentious. Finally, it was asserted that, following the analytical distinction between core and penumbra of rights, questions of *eligibility* stand at the core of the right to vote.

It is submitted in Chapter Eight *infra* that, in view of the diverse, complementary, and mutually reinforcing roles of voting, the exclusion of CSR1951 refugees from elections of their states of asylum aggravates their political predicament and that, conversely, their enfranchisement is both intrinsically and instrumentally significant.

¹¹⁹ Jeremy Waldron, *Liberal Rights* (Cambridge University Press, 1993) 408, 415 (suggesting that, while in a ‘Benthamite’ democracy, the minority has to also be protected against majoritarianism, in a ‘Rousseauian’ democracy institutional decision-making need not be constrained by counter-majoritarian mechanisms).

CHAPTER FOUR: PERSPECTIVES ON THE MEANING AND PURPOSES OF STATE CITIZENSHIP

A. Introduction

The traditional claim in international law that ‘acquisition and loss of citizenship is, in principle, regulated by national legal orders’¹ appears to hold firmly. As Chapter One *supra* demonstrated, absent a ‘world state’,² states are responsible for determining their membership so long as such determination does not conflict with principles of international law.³

The term *citizenship* is usually used to denote (full) membership in a statist political community; references to *citizen* in other contexts are made analogously or metaphorically.⁴

¹ See eg Hans Kelsen, *General Theory of Law and State* (Anders Wedberg Trans, Russell & Russell, 1961), 233 (asserting that ‘acquisition and loss of citizenship is in principle regulated by the national legal orders’).

² See eg Immanuel Kant, *Perpetual Peace: A Philosophical Sketch* (W Hastie trans, 1891) (1795), 17. Ayelet Shachar, *The Birthright Lottery: Citizenship and Global Inequality* (Harvard University Press, 2009), 47-9 (arguing that a world citizenship or a ‘world government’ may lead to the disintegration of social bonds and of mutual responsibilities that bind people together, motivating them to redistribute benefits gained from membership. It may also cause cultural and social capital losses of rich and diverse forms of modern statehood such as history, identity narratives, political struggles, social experiments, and linguistic diversity). See also Michael Walzer, ‘Spheres of Affection’ in Joshua Cohen (ed), *For Love of Country: Debating the Limits of Patriotism* (Beacon Press, 1996), 125, 126-7 (claiming that he is ‘not even aware that there is a world such that one could be a citizen of it’).

³ Convention on Nationality, art 1, The Hague, 12 April 1930, 179 LNTS 89, entered into force 1 July 1937 (the Hague Convention) proclaims that ‘[i]t is for each State to determine under its own law who are its nationals. This law shall be recognized by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality’. The latter qualification indicates that, while sovereign, states are not free of constraints on the international plain.

⁴ See Richard Ford, ‘City-States and Citizenship’ in T Alexander Aleinikoff and Charles Klusmeyer (eds), *Citizenship Today: Global Perspectives and Practices* (Carnegie, 2001) 209, 210. Cf Jeremy Waldron, ‘Teaching Cosmopolitan Right’ in Kevin McDonough and Walter Feinberg (eds), *Citizenship and Education in Liberal-Democratic Societies* (Oxford University Press, 2003) 23, 41 (noting that ‘citizenship means more than formal participation’, and asserting that ‘the phrase “citizen of the world” should not be regarded as meaningless in the absence of a constituted world government. If anything, the absence of a coercive institution to secure and sustain necessary structures of life and practice at a global level...makes it all the more important for use to use “citizens of the world” as an idea regulating our actions’).

States do not lay claim to the entire globe and to its people(s). Rather, they (attempt to) lay a sovereign claim to control over finite sections of the globe (the territorial dimension) and over finite groups of persons (the human dimension).⁵

In the territorial dimension, boundaries are *physical* referents; in the human dimension, they serve as a function of the legal institution of state citizenship. For individuals, membership in the *international* community funnels through membership in a statist political community. Brubaker described⁶ ‘nationality’ as ‘an international filing system, a mechanism for allocation of persons to states’.

Paraphrasing Mark Twain, reports of the death of citizenship are greatly exaggerated. A person cannot freely choose to become a member of a statist political community, nor can a person substitute their political community membership for membership in another political community at their pleasure.⁷ State citizenship effectively serves as ‘a powerful instrument of social closure’.⁸ Indeed, citizenship is *janus*-faced: it is both a *unifier* (offering members a common set of rights, entitlements, privileges and obligations under law that link them to each

⁵ David R MacDonald, *Difference and Belonging: Liberal Citizenship and Modern Multiplicity* (PhD Thesis LSE, 2002), 161. Convention on the Rights and Duties of States, art 1, Montevideo, 26 December 1933, 16 LNTS 19, entered into force 26 December 1934, lists four conditions for recognising a state as a legal person in international law: a permanent population; a defined territory; a government; and the capacity to enter into relations with other states. *Notably, questions of state recognition fall outside the remit of this thesis.*

⁶ Rogers Brubaker, *Citizenship and Nationhood in France and Germany* (Harvard University Press, 1992), 31. See also Paul Weis, ‘The United Nations Convention on the Reduction of Statelessness 1961’ (1962) 11(4) *International and Comparative Law Quarterly* 1073, 1073 (suggesting that ‘[f]rom the point of view of international law, the stateless person is an anomaly, nationality still being the principal link between the individual and the Law of Nations.’).

⁷ Cf Yaffa Zilbershats, *The Human Right to Citizenship* (Transnational Publishers, 2002) (advocating recognition of a ‘human right to citizenship’).

⁸ Brubaker (n6), x.

other and to the state) and a *divider* (membership status for some designates others as non-members).⁹ By distinguishing between members and non-members, political communities are exclusive:¹⁰ the articulation of the existence of a community is itself a symbol whose purpose is to invoke boundaries.¹¹

Bauböck offers¹² a conceptual distinction between freedom of association (regarding membership in associations *other than the state*) and membership in the state itself, positing that in liberal societies, non-statist associations are founded on three assumptions: First, becoming a member of an association is a *voluntary act*. Second, every member of an association is free to *leave* it. Third, every person is entitled to join with others and *set up a new association*.

For state membership (citizenship), the first and third assumptions do not generally hold as the world is exhaustively divided between states which in turn enjoy discretion in defining their membership. The second assumption may, in principle, apply (at least in liberal states which do not restrict renunciation). Nevertheless, citizenship is increasingly considered a ‘protective shield’, and renouncing citizenship may have dire implications: citizens have a much stronger interest to remain members of their statist association than respective members of

⁹ Matthew J Gibney, ‘The Rights of Non-Citizens to Membership’ in Caroline Sawyer and Brad K Blitz (eds), *Statelessness in the European Union* (Cambridge University Press, 2011), 41.

¹⁰ Paulina Tambakaki, *Human Rights, or Citizenship?* (Birkbeck Law Press, 2010), 35.

¹¹ Elizabeth Frazer, *The Problems of Communitarian Politics: Unity and Conflict* (Oxford University Press, 1999), 81.

¹² Rainer Bauböck, *Immigration and the Boundaries of Citizenship* (Centre for Research in Ethnic Relations, University of Warwick, 1992), 13.

voluntary associations, not least due to the security of residence which citizenship entails in a world characterised by migration control, and to the prioritisation of citizens (considered below).

The (paradigmatic) state is hence a political unit that controls *a bounded territory with a national community*, most of which habitually resides in that territory, and which has the power to impose its (political) will within these boundaries.¹³ Nonetheless, the state's territorial and human dimensions do *not* fully overlap: not every person who is present in the territory of a state at a given time belongs to its corresponding political community and a person does not cease to belong to an association simply by leaving its territory or by residing abroad. Indeed, as Part C of this thesis contends, citizenship is a 'bundle' of rights that occasionally 'transcend the boundaries of the political and territorial entities in whose political institutions these rights are embodied'.¹⁴

It is argued in Section B that state citizenship has both legal and extralegal dimensions, and that the latter significantly affect the extent to which rights (not least, electoral rights) are disaggregated from citizenship status. In turn, Sections C, D, and E respectively explore the meaning and purposes of citizenship from 'liberal', 'republican' and 'communitarian' perspectives.¹⁵ Alongside the exploration of meaning and purposes of voting in Chapter Three *supra*, this chapter contextualises the appraisal of citizenship voting qualifications in Chapter

¹³ See eg Stephen Castles and Alastair Davidson, *Citizenship and Migration: Globalization and the Politics of Belonging* (Routledge, 2000) 12. See also generally Nicholas Barber, *The Constitutional State* (Oxford University Press, 2011) (stipulating that the state claims legitimate, supreme, and effective authority over its people, and that the state is a social group that exists to benefit its members).

¹⁴ Bauböck (n12), 1.

¹⁵ The exposition below should not be considered exhaustive; there are multiple variations of each perspective, and considerable overlaps between them.

Five *infra*. Concordantly, Part B offers divergent bases for appraising (in Part C of the thesis) the political predicament of recognised CSR1951 refugees.

B. The Multi-dimensional Character of State Citizenship

Citizenship is the quintessential *legal* relationship between persons and their state.¹⁶ State citizenship determines both the legal criteria of (full) membership, and the nature of the ‘conversation’ between the state and its (full) members.¹⁷

Kelsen argued¹⁸ that domestic legal orders (at the time of his writing) usually reserve for their citizens ‘the so-called political rights’; such rights include the right to vote which ‘affords the individual the legal possibility of participating in the creation or execution of legal norms’. He asserted that it is for each state to decide if to enfranchise all, some or none of its citizens, as well as all, some or none of its non-citizens.

¹⁶ Barber (n13), 48-9 (outlining other types of relationships that an individual can have with a state: on his account, resident non-nationals may have a relationship with their host state even though they are not members; friendly aliens can trade with nationals of the state, and receive its protection whilst in its territory; enemy aliens are considered a threat to the state).

¹⁷ David Jacobson, *Rights across Borders: Immigration and the Decline of Citizenship* (Johns Hopkins University Press, 1996), 7.

¹⁸ Kelsen (n1), 238.

On Kelsen's account, states could exist just with subjects, namely without *citizens*, except insofar as they wish to require parts of their populations to perform duties of military service; according to his reading of international law,¹⁹ such duties may only be imposed on citizens.

Kelsen's depiction arguably suffers from two fundamental flaws: it downplays the significance of *legal* rights of citizenship; and it fails to address the *extralegal* dimensions of state citizenship that may explain social choices concerning the assignment of legal rights and obligations. In its oft-quoted *Nottebohm* judgment, the International Court of Justice held²⁰ that 'nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interest and sentiments, together with the existence of reciprocal rights and duties'.

Chapter Two *supra* described how State Parties to international human rights treaties assume (some) obligations towards all persons in their territories and subject to their jurisdiction. The wording in (some) contemporary bills of rights is similarly inclusive, securing the enjoyment of rights without regard to citizenship status. Thus, it was submitted that, in the 'age of human rights',²¹ referring to state citizenship as the 'right to have rights'²² is an overstatement.²³ U.S.

¹⁹ Ibid, 240. Kelsen does not explain the distinction between military service and e.g. taxation. See also Protocol Relating to Multiple Obligations in Certain Cases of Double Nationality, The Hague, 2 April 1930, entered into force 25 May 1937 (implicitly assuming that only nationals will be liable for conscription).

²⁰ *Nottebohm (Lichtenstein v Guatemala)*, Judgment of 6 April 1955, ICJ Rep 1955, 4, 22.

²¹ Louis Henkin, 'Refugees and their Human Rights' (1994-1995) 18 *Fordham International Law Journal* 1079, 1079.

²² *Trop v Dulles*, 356 US 86, 102 (per Warren CJ) (holding provisions stripping certain convicts of their U.S. citizenship to be unconstitutional).

Federal Supreme Court Justice Frankfurter held²⁴ that ‘[t]he very substantial rights and privileges that the alien...enjoys under the Federal and State Constitutions puts him in a very different condition from that of an outlaw in Fifteenth-Century England.’

Nonetheless, as Part A of the thesis demonstrated, two fundamental rights remain typically attached to nationality: the unconditional right to enter the country and return to it, coupled with immunity from involuntary removal; and the right to elect representatives and to be governed by self-given laws.²⁵

Chapter One *supra* suggested that the migration control regime is at the heart of the present international legal order. It was emphasised that the granting of CSR1951 refugee status is a sovereign decision which emphasises the general resilience of migration control. Chapter Two *supra* demonstrated that, even when states generally adhere to their international human rights obligations and adopt inclusive bills of rights (above), these instruments do not require states to extend voting rights to their non-citizen residents.

²³ See eg T Alexander Aleinikoff, ‘Theories of Loss of Citizenship’ (1986) 84 Michigan Law Review 1471, 1486.

²⁴ *Trop* (n22), 127 (Frankfurter J, dissenting). See also Jeremy Waldron, ‘Special Ties and Natural Duties’ (1993) 22(1) *Philosophy and Public Affairs* 3, 15 (noting that, historically, communities were established in order to avoid conflict and violence, leading to an evolution of a limited system of justice that was not duly concerned with temporary migrants).

²⁵ Shai Lavi, ‘Citizenship Revocation as Punishment: On the Modern Duties of Citizens and their Criminal Breach’ (2011) 61(4) *University of Toronto Law Journal* 783, 797. See eg Charter of Fundamental Rights of the European Union, ch v: citizens’ rights, OJ 2000 C364, 18 December 2000. *Cf* Linda Bosniak, ‘The Meaning of Citizenship’ (2011) 9 *Issues in Legal Scholarship* (Article 12), 14 (asserting that, ‘if citizenship is a term that we conventionally deploy to talk about a range of political and social relationships, it does not seem controversial to say that non-citizens enjoy aspects of citizenship or membership though obviously not others’).

As Chapter Three *supra* reflected, elections matter, *inter alia*, because the electoral process gives legal effect (and legitimacy) to collective decisions regarding allocation of finite resources. On a ‘liberal’ account, voters protect their interests by expressing their preferences; on a ‘republican’ account, the enfranchised are expected to seek (the) common good, which they collectively define. Interests and preferences of the electorally excluded are under-represented for potentially protracted periods; thus, it is unsurprising that the outcomes of these processes tend to disfavour their needs.

The thesis appraises the *legal* exclusion of CSR1951 refugees *qua* non-citizen residents from voting in elections of their states of asylum; it is nevertheless suggested that the *extralegal* dimensions of state citizenship (absent from Kelsen’s account) affect both the criteria for naturalisation of non-citizens and their electoral exclusion.

Zilbersahts posits²⁶ that state citizenship operates on ‘vertical’ and ‘horizontal’ plains. On the ‘vertical’ plain, it is a legal status bestowed on those considered full and equal members of the political community, engendering the rights and duties of individuals vis-à-vis their state. On the ‘horizontal’ plain, it is a ‘nexus’ between persons and their state and between political community members themselves. Carens suggests²⁷ that citizenship has three interrelated dimensions: *legal*, *political*, and *psychological*. As an institution, citizenship may be regarded both as a bundle of rights and obligations, and as a set of political, cultural and social practices.²⁸

²⁶ Zilbershats (n7), xiii. See also Aleinikoff (n23), 1488.

²⁷ Joseph H Carens, *Culture, Citizenship, and Community* (Oxford University Press, 2000), ch 7, esp pp 162-66.

²⁸ Law Commission of Canada, *Citizenship and Identity* (Sage, 1999), 4.

Citizenship status affects citizens who, in turn, affect the changing character of citizenship. Citizenship in an idealised form manifests political equality and is (nearly) irrevocable; citizens have control over their lives, can choose the projects and relationships that they wish to pursue, and can make decisions about how to pursue such projects. Following the discussion in Chapter Three *supra* of the fundamentality of voting, state citizenship arguably furthers both individual autonomy (in Razian terms) and non-domination (in Pettit's terms).²⁹ Citizens enjoy the opportunity to advance their most important interests and can exercise a wide range of moral autonomy.³⁰ Hence, in its ideal form, citizenship may accomplish both self-protection (on a 'liberal' account), and self-governance (on a 'republican' account).³¹

C. 'Liberal' Perspectives

1. Equal Citizenship and the Role of Participation

On 'liberal' accounts, state citizenship is the creation of a political community that is a product of human imagination, coordination and agency (rather than a creation of nature).³² The 1789 French *Declaration of the Rights of Man and of the Citizen* defined³³ the relationship between states and their inhabitants in terms of rights rather than authority, adopting a Lockean notion of a political association established by individuals in order to secure their (natural) rights to life,

²⁹ Barber (n13), 55.

³⁰ Robert Dahl, *On Democracy* (Yale University Press, 1998), 75.

³¹ Melissa Williams, 'Non-Territorial Boundaries of Citizenship' in Seyla Benhabib, Ian Shapiro and Danilo Petranovic (eds), *Identities, Affiliations, and Allegiances* (Cambridge University Press, 2007) 226, 247-48.

³² Shachar (n2), 147.

³³ Andreas Fahrmeir, *Citizenship: The Rise and Fall of a Modern Concept* (Yale University Press, 2007), 1.

liberty and property.³⁴ The Declaration proclaimed that ‘the preservation of the natural and inalienable rights of man is the purpose of every political association’.³⁵ Notably, it enunciated universal suffrage of citizens, pronouncing that ‘[l]aw is the expression of the general will. Every citizen has a right to participate personally, or through his representative, in its foundation.’³⁶

Contemporary liberals contend that state citizenship manifests *equal status* in a political community. Marshall portrayed the development of (British) citizenship as a process of full realisation of equality among citizens. He described³⁷ a process whereby the scope of rights has gradually increased from civil rights, to political rights, to social rights. He defined the political element of citizenship as the ‘right to participate in the exercise of political power, as a member of a body invested with political authority or as an elector of the members of such a body.’

In *A Theory of Justice*, Rawls argued³⁸ that, in order to ensure just distribution of rights and duties, individuals possessed with inviolable rights established political associations. On his account,³⁹ a person is ‘someone who can be a *citizen*, that is, a normal and fully cooperating member of society over a complete life’ whereas *citizens* are ‘free and equal persons’.⁴⁰ Bauböck

³⁴ John Locke, *Two Treatises of Government* (Peter Laslett ed Cambridge University Press, 1997) (1690), bk ii.

³⁵ The Declaration was approved by the National Assembly of France, 26 August 1789, available at: <http://www.hrcr.org/docs/frenchdec.html>.

³⁶ *Ibid*, para 6.

³⁷ Trevor H Marshall and Tom Bottomore, *Citizenship and Social Class* (Pluto Press, 1992) (1950), 6-8.

³⁸ John Rawls, *A Theory of Justice* (2nd revised edn, Oxford University Press, 1999), 3.

³⁹ John Rawls, *Political Liberalism* (Columbia University Press, 2005), 18.

⁴⁰ *Ibid*, 18-19.

submits⁴¹ that state citizenship is a ‘set of rights exercised by the individuals who hold the rights, equal for all citizens and universally distributed within a political community, as well as a corresponding set of institutions guaranteeing these rights.’

On a ‘liberal’ account,⁴² a political community is ‘an association of individuals who share an understanding of what is public and what is private within their polity.’ The political community provides a framework of coexistence for individuals who share a common public life yet maintain separate and occasionally divergent private lives⁴³ in which members may hold loyalties to different groups and cultures. The primary role of citizenship is instrumental, namely to facilitate advancement of individual interests which exist *independently* of their individual citizenship status.

On this account, not all citizens need to be equally enthusiastic about their citizenship status: the state can tolerate (some) passive, disinterested, and even partial citizens.⁴⁴ While liberals would rather see a cultural convergence around liberal norms, they do not consider such convergence critical for the state’s survival.⁴⁵ Nonetheless, the stability and health of public institutions and the political culture of the political community depend on a political community having a *sufficient* number of members who value their membership, and who are consequently

⁴¹ Bauböck (n12), 16.

⁴² Chandran Kukathas, ‘Liberalism, Communitarianism, and Political Community’ (1996) 13(1) *Society Philosophy and Policy* 80, 86.

⁴³ *Ibid*, 104.

⁴⁴ *Difference and Belonging* (n5), 232.

⁴⁵ Jeff Spinner, *The Boundaries of Citizenship* (Johns Hopkins University Press, 1994), 6; Stephen Macedo, *Liberal Virtues* (Clarendon Press, 1991), 251.

willing to take actions that exceed *legal* demands. Hence, while liberals reject an imposition of a duty to vote, they would also consider low turnout in elections as a failure.

2. Identity and Attachment

Carens usefully distinguishes between *identity* and *attachment*. He posits⁴⁶ that a person may have a strong sense of political identity as a member of a given political community, yet lack a corresponding sense of attachment to that community. On a ‘liberal’ account, a political community may only use non-coercive means in order to make state citizenship seem more valuable and enhance its psychological dimension. It may be argued that individuals have different reasons for valuing their membership in a particular polity, and that citizenship may be meaningful to them because it represents *their* full and equal membership in the political community that, in turn, they consider valuable for reasons that may differ from those of other community members.

Some citizens may undergo a transformative process whereby their objective belonging may turn to subjective affective belonging.⁴⁷ Habermas suggests⁴⁸ that, in an ideal context, citizens adopt constitutional patriotism, namely identify with their political community because they take pride in its (democratic) principles of free, equal, and inclusive collective self-determination, and in its (liberal) principles of rights-protection. If citizens are able to feel ‘at

⁴⁶ Carens (n27), 163.

⁴⁷ *Difference and Belonging* (n5), 246.

⁴⁸ See eg Jorgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (William Rehg transl, MIT Press, 1996) appendix ii: Citizenship and National Identity, 491-515.

home' in their political community, identify with its interests, and on balance regard its major institutions (especially its political and legal ones) as valuable, then they may (freely) choose to make their citizenship a fundamental basis of their moral or personal identity.⁴⁹

Tamir asserts⁵⁰ that most liberals 'except for some cosmopolitans and radical anarchists' are liberal *nationalists* who assume that states/nations exist, have been successful, and are resilient. Citizens in a modern polity are connected by 'the belief that [they] all belong to a group whose existence [they] consider valuable'.⁵¹ On her account, citizens value the existence of the political community *because* of its national character. Thus, Tamir argues⁵² that 'the liberal tendency to overlook the value inherent in nationalism is mistaken'.

In contradistinction, Kostakopoulou considers⁵³ citizenship to be a 'network good' that is characterised by the fact that a person's 'consumption' of a good does not hinder other persons' usage thereof. She asserts⁵⁴ that citizenship 'would mean very little if citizens belonged to borderless communities', and advocates substituting naturalisation procedures with automatic

⁴⁹ Andrew Mason, *Community, Solidarity and Belonging: Levels of Community and their Normative Significance* (Cambridge University Press, 2000), 138.

⁵⁰ Yael Tamir, *Liberal Nationalism* (Princeton University Press, 1993), 139.

⁵¹ *Ibid*, 98.

⁵² *Ibid*, 3. See also Dario Castiglione, Emilio Santoro and Richard Bellamy, *Lineages of European Citizenship: Rights, Belonging, and Participation in Eleven Nation-states* (Palgrave Macmillan, 2004), 7 (contending that national identity shapes a common civic consciousness and allegiance to the state and one's fellow citizens. It encourages reciprocity and solidarity in both politics and economics. National systems of education created a public political language and inducted citizens into a certain civic culture and set of values).

⁵³ Dora Kostakopoulou, *The Future Governance of Citizenship* (Cambridge University Press, 2008), 109.

⁵⁴ *Ibid*, 196.

civic registration subject only to residence and non-criminality qualifications.⁵⁵ Kostakopoulou argues⁵⁶ that liberal nationalists are ‘mak[ing] a virtue out of the necessity of nations’, that nation-states are not timeless constructions, and their success is less a measure of their intrinsic value than an expression of political projects and socio-political contingency.⁵⁷

However, Kostakopoulou recognises⁵⁸ the contemporary prominence of the state (even if she contests its normative salience, by criticising contemporary liberal attempts to transform citizenship, suggesting that they are ‘underpinned by citizenship that is wedded to the nation-state’). It was noted in Chapter Two *supra* that the de-territorialised notion of rights which Soysal offers⁵⁹ does not negate the importance of state provision of rights-protection; rather, it celebrates the advent of human rights law, and the ideal that states are no longer permitted to restrict rights to their citizens. Similarly, Bauböck’s transnational citizenship embraces⁶⁰ the notion that individuals have multiple belongings to (statist) political communities. The analysis in this thesis endorses both contentions.

⁵⁵ Ibid, 86.

⁵⁶ Ibid, 49.

⁵⁷ Ibid.

⁵⁸ Ibid, 78. Cf Ayelet Shachar, ‘The Future of National Citizenship: Going, Going, Gone?’ (2009) 59 University of Toronto Law Journal 579, 585 (arguing that Kostakopoulou’s book exhibits a prevalent tension between the desire to make citizenship free from any attachment to notions of collectivity while at the same time demanding even more robust provision of services and pathways to redistribution via the state).

⁵⁹ Yasemin Soysal, *The Limits of Citizenship: Migrants and Postnational Membership in Europe* (University of Chicago Press, 1994), 512.

⁶⁰ Bauböck (n12), 59.

The introduction of European Union (EU) Citizenship is quite pertinent for the above discussion. Weiler argues⁶¹ that one of the purported aims of institutionalising EU citizenship was an attempt to create a European *demos* that has communal psychological identity and a feeling of belonging that is built around a commitment to shared values. EU citizenship *supplements* rather than replaces state citizenship; the decision to institutionalise citizenship and to make it contingent on member-state citizenship arguably supports the claim that state citizenship remains significant and resilient.⁶²

3. Prioritisation of Citizens

It was noted above that, through the electoral process, societies determine, *inter alia*, provision and allocation of finite public goods and services. On a rights-protective account, voters are advancing their individual and group preferences when making their electoral choices; non-citizens are likely to be disfavoured. The conjunction of electoral exclusion of non-citizens gives rise to a liberal difficulty. The longer non-citizens reside in a state, the more difficult it is for liberals to justify denying them benefits that citizens enjoy.

The prioritisation of citizens is often justified on two ('liberal') grounds.

⁶¹ See eg Joseph HH Weiler, 'To be a European Citizen – Eros and Civilization' (1997) 4(4) *Journal of European Public Policy* 495, 500.

⁶² See Linda Bosniak, 'Denationalising Citizenship' in T Alexander Aleinikoff and Douglas Klusmeyer (eds), *Citizenship Today: Global Perspectives and Practices* (Carnegie, 2001) 237, 241; Will Kymlicka, *Politics in the Vernacular: Nationalism, Multiculturalism and Citizenship* (Oxford University Press, 2001), 320-23.

The *first* ground suggests⁶³ that membership is institutionalised by rights, benefits and obligations which distinguish members from non-members. On this view, if non-citizens are exempt from obligations such as military service and are not subject to personal taxation, then it would be reasonable to deny them equal provision of goods and services.

However, conscription may require non-citizen (male) residents to serve alongside (male) citizens, while (female) citizens may be exempt.⁶⁴ Reliance on conscription as an indicator of fair distribution based on burden sharing is thus both over and under-inclusive. Such reliance would logically entail that ending conscription requires alteration of eligibility criteria. Also, extending both rights and obligations to non-citizens, rather than by denying them both, can plausibly address the presumed ‘inequality’. Moreover, ‘liberals’ are generally wary of ‘conditionality’ of rights;⁶⁵ thus, they are likely to oppose denial of benefits to persons who are unable to contribute to production and services because they are severely handicapped.⁶⁶

The *second* justification invoked by liberals for internal prioritisation is the social significance of inter-generational cooperation and of concerns for its long-term survival. Thus, it may be fair to prioritise citizens over newcomers even if they both contribute to the society’s

⁶³ Miriam Feldblum, ‘Reconfiguring Citizenship in Europe’ in Christian Joppke (ed), *Challenges to the Nation-State* (Oxford University Press, 1998) 231, 233.

⁶⁴ *Citizenship and Migration* (n13), 11. Some political communities recognise the special contribution of non-citizens to their armed forces by offering them expedited naturalisation. See eg Naturalization Information for Military Personnel (United States), available at: <http://www.uscis.gov/files/form/m-599.pdf>.

⁶⁵ *Ibid*, 11.

⁶⁶ Allen Buchanan, ‘Justice as Reciprocity versus Subject-Centered Justice’ (1990) 19(3) *Philosophy and Public Affairs* 227, 232.

wellbeing.⁶⁷ However, since the same rationale could also apply to naturalised individuals *after* their naturalisation, its application would need to be qualified.

D. ‘Republican’ Perspectives

1. Equal Citizenship and the Role of Participation

‘Republican’ citizenship is associated with Aristotle’s assertion in *Politics*⁶⁸ that ‘[a]s soon as a man becomes entitled to participate in authority, deliberative and judicial, we deem him to be citizen’. Aristotle considered a person to be a ‘political animal’, and believed that citizens undertake a moral obligation to be actively and significantly involved in the life of their political community.

Aristotle based his analysis on Greek city-states; he favoured a compact *polis* where citizens know each other's characters, and considered Athens (with 40,000 citizens) as too big.⁶⁹ Moreover, in Aristotle’s Athens, citizenship was a privileged status permanently denied to *metics*, the property-less resident aliens (the majority of the polis’ residents).⁷⁰ Aristotle justified this political inequality by contending that, in order to act in the public sphere, citizens had to possess special qualities, and that merely belonging to the human species does not suffice. He

⁶⁷ Stephen Perry, ‘Immigration, Justice and Culture’ in Warren Schwartz (ed), *Justice in Immigration* (Cambridge University Press, 1995) 94, 96.

⁶⁸ Aristotle, *Politics* (350 BCE) bk iii, 1, available at: <http://classics.mit.edu/Aristotle/politics.3.three.html>.

⁶⁹ Derek Heater, *What is Citizenship?* (Polity Press, 1999), 45.

⁷⁰ *Citizenship and Migration* (n13), 10.

believed⁷¹ that since the *essence* of citizenship consists in active political participation, citizenship should be restricted to those who are capable of both ruling and being ruled.

Rousseau rejected the exclusionary perception of citizenship. By contrast, he believed⁷² that (all) individuals are born free, and are capable of self-rule; however, they ‘remain as free as before’ only after the conclusion of a social contract under which no man, regardless of property or wealth, was subject to another man. Rousseau took a more inclusive approach to eligibility, viewing⁷³ participation in decision-making and submission to the general will as traits of universal (male) citizenship, rather than as special qualities expected of a particular class of men.

Political participation, whether exclusionary or inclusionary, stands at the core of ‘republican’ perspectives of citizenship,⁷⁴ as its ‘ultimate badge’.⁷⁵ Chapter Three *supra* explored a distinction between a ‘liberal’ notion of freedom as non-interference, and a ‘republican’ notion of freedom as non-domination,⁷⁶ manifested through participation in self-governance.⁷⁷ ‘Republican’ accounts consider state citizenship as personally significant *far and beyond* its legal

⁷¹ Hannah Arendt, *The Human Condition* (The University of Chicago Press, 1989), 63-4.

⁷² Jean-Jacques Rousseau, *On the Social Contract*, Judith Masters (tr) (St. Martin's Press, New York 1978) (1762), 191-2.

⁷³ *Ibid*, 203.

⁷⁴ Barber (n13), 50.

⁷⁵ Peter Goldsmith, *Citizenship: Our Common Bond* (Ministry of Justice, 2008) 43, para 60; 75-6, para 13.

⁷⁶ James Bohhman, *Democracy across Borders: From Demos to Demoï* (MIT Press, 2007), 7.

⁷⁷ See eg Charles Taylor, ‘Cross-purposes: the Liberal-Communitarian Debate’ in Nancy Rosenblum (ed), *Liberalism and the Moral Life* (Harvard University Press, 1989), 179.

status:⁷⁸ citizenship, like friendship, is more than a set of objective entitlements and opportunities.⁷⁹ Charles Taylor suggests⁸⁰ that, ‘in a functioning republic the citizens do care very much what others think’.

‘Republicans’ are averse to rights-centred accounts of citizenship because of their supposed failure to account for the *obligations* that citizens owe to their state and to their fellow citizens. The alleged link between liberal citizenship and phenomena such as low voter turnout and exploitation of the welfare state has led to a revival of a ‘civic-republican’ citizenship discourse⁸¹ and to an attempted shift from a ‘rights-centred’ to a ‘responsibilities’ discourse.⁸²

A ‘republican’ account describes⁸³ citizens as office-holders with attendant responsibilities and duties, noting that citizens should manifest civic virtues. Good citizens *should* vote even though requiring citizens to vote may be unwise.⁸⁴ Citizens should reflect on

⁷⁸ Richard Dagger, *Civic Virtues: Rights, Citizenship and Republican Liberalism* (Oxford University Press, 1997), 101.

⁷⁹ Mason (n49), 153.

⁸⁰ Charles Taylor, ‘The Politics of Recognition’ in Amy Gutmann (ed), *Multiculturalism: Examining the Politics of Recognition* (Princeton University Press, 1994) 25, 46.

⁸¹ Michael Ignatieff, ‘The Myth of Citizenship’ in Ronald Beiner (ed), *Theorizing Citizenship* (SUNY Press, 1995) 53, 68-9.

⁸² See eg Goldsmith (n75), ch 3: ‘Legal Rights and Responsibilities of Citizenship’.

⁸³ Jason Schall, ‘The Consistency of Felon Disenfranchisement with Citizenship Theory’ (2006) 22 *Harvard Blackletter Law Review* 53, 86.

⁸⁴ See eg Goldsmith (n75), ch 6: ‘Enhancing the Bond of Citizenship’, para 98.

politics and governance, assist state officials when these officials are acting for the public good,⁸⁵ and promote the *common* interests of the community.⁸⁶

2. Identity and Attachment

‘Republican’ accounts expect a tight fit between the legal, political and psychological dimensions of citizenship: citizens ought to feel a strong sense of emotional identification with their political community, and to draw their primary political identity from their state membership. ‘Republicans’ reject⁸⁷ what they see as an instrumentalist non-collectivist conception of liberal citizenship. Rather, they consider the political community as a good in and of itself, and contend⁸⁸ that genuine political community goes beyond mere cooperation and mutual benefit: it shapes the identity of the participants.

Rousseau deplored the perceived lack of a social bond in real-world politics. He advocated⁸⁹ the formation of a ‘civic religion’ that is designed for sanctifying the social contract, enabling citizens to love laws, justice, and duty. He stressed the need to inform and teach citizens of the value of the rights and duties attached to citizenship. Rousseau suggested that citizens in a

⁸⁵ Barber (n13), 52.

⁸⁶ David Miller, ‘Bounded Citizenship’ in Kimberly Hutchings and Roland Dannreuther (eds), *Cosmopolitan Citizenship* (Macmillan, 1999) 60, 62-3.

⁸⁷ Schall (n83), 83.

⁸⁸ Ronald Beiner, ‘Introduction: Why Citizenship Constitutes a Theoretical Problem in the Last Decade of the Twentieth Century’ in Ronald Beiner (ed), *Theorizing Citizenship* (n82), 15.

⁸⁹ Rousseau (n72), 142-52.

modern state manifest their patriotism by having a sense of nationhood; on this account,⁹⁰ if a political community does not have a national character, it has to *create* one.

Miller, a contemporary ‘civic republican’, argues⁹¹ that the promotion of national identity and characteristics will create the mutual trust and assurance that are necessary for promoting civic responsibilities, and that nationality may serve as a foundation for republican citizenship as a ‘partial replacement for the patriotic loyalty of the city-state’.⁹² Miller suggests⁹³ that a common national identity is required to preserve robust commitments to social distributive justice, to voluntary cooperation, and to meaningful democratic participation among those who belong to the polity.

It may, however, be argued that compatriot feelings can also be generated on local, regional and transnational levels of identification.⁹⁴ Moreover, Arendt critically observed⁹⁵ that, modern national citizenship deviates from the classical ideal of citizenship; she contended that artificially constructed national identity replaced the special bond of intimacy, personalities, and duties. According to ‘republican’ theories, current levels of cultural and national pluralism may exceed the level that may sustain a ‘republican’ society. Hence, in order to preserve the

⁹⁰ Derek Heater, *Citizenship: The Civic Ideal in World History, Politics and Education* (Longman, 1990), 51.

⁹¹ David Miller, *Citizenship and National Identity* (Polity Press, 2000), 68.

⁹² *Ibid*, 87.

⁹³ David Miller, *On Nationality* (Clarendon Press, 1995), ch 3.

⁹⁴ See eg Shachar (n2), 150.

⁹⁵ Hannah Arendt, *The Origins of Totalitarianism* (Harcourt, 1967), 230-1.

community, a culturally ‘thick’ and potentially exclusionary ethnic nationalism may follow making minority groups a point of dissention rather than a force for ‘republican’ unity.⁹⁶

Toleration of multiple citizenships dovetails the above debate. Carens contends that the Republican reluctance to accept multiplicity in the *legal* dimension of citizenship misses the reality of multiplicity in the *psychological* dimension.⁹⁷ The 1789 French Constitution, much inspired by Rousseau's work, provided for the naturalisation of a foreigner by undertaking a civic oath to obey the law and the constitution *and renounce other allegiances*.⁹⁸ In today's United States, persons wishing to naturalise are required, in addition to bearing ‘true faith and allegiance’ to the United States to ‘declare, on oath, that [they] absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, *state*, or sovereignty of whom or which [they] have heretofore been a subject or citizen’.⁹⁹

Historically, international law has been quite hostile to multiple nationalities. The Preamble to the 1930 Hague Convention stipulated that ‘[i]t is in the general interest of the international community to secure that all its members should recognise that every person should

⁹⁶ *Difference and Belonging* (n5), 291.

⁹⁷ Carens (n27), 172. See also David A Martin, ‘New Rules on Dual Nationality for a Democratizing Globe: Between Rejection and Embrace’ (1999) 14 *Georgetown Immigration Law Journal* 1, 8-9 (asserting that allegiance to more than one state seems possible). It will be argued in Chapter Five *infra* that reluctance to accept multiple political identities explains not only the objection to dual citizenship but also the unwillingness to extend suffrage to non-citizens.

⁹⁸ Heater (n69), 49.

⁹⁹ United States Naturalization Regulations of 1929, Rule 8, Subdivision C. Interestingly, the U.S. does not require naturalised persons to renounce their former citizenship (though their state of origin may require them to do so), manifesting a rather ambivalent approach to citizenship. *Cf* the Canadian Citizenship Act 1946, which requires applicants to swear or affirm that they will be faithful and bear true allegiance to Her Majesty Queen Elizabeth II, Queen of Canada, Her Heirs and Successors, and that [they] ‘will faithfully observe the laws of Canada and fulfil [my] duties as a Canadian citizen’.

have a nationality and should have one nationality only... the ideal...is the abolition of all cases both of statelessness and of double nationality'.¹⁰⁰ Multiple citizenships are becoming more accepted, and international instruments partially conform.¹⁰¹

However, it may be too early to define insistence on singular membership in a nation-state as an 'outmoded norm':¹⁰² many states still consider renunciation of other citizenship(s) as a condition for naturalisation, while others regard acquisition of a new citizenship as *implicit renunciation* of their citizenship. In the CSR1951 refugee context, the relevance of restrictive approaches to multiple citizenships will be addressed in Chapter Eight *infra*.

¹⁰⁰ The Hague Convention (n3), Preamble.

¹⁰¹ Maarten P Vink and Gerard-Rene de Groot, 'Citizenship Attribution in Western Europe: International Framework and Domestic Trends' (2010) 36(5) Journal of Ethnic and Migration Studies 713, 715. Council of Europe treaties are quite instructive in this regard. Convention on the Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality, art 1, 6 May 1963, ETS No 043 (entered into force 28 March 1968) stipulated that citizens of a contracting state who voluntarily acquire the citizenship of another contracting state *lose* their previous citizenship by operation of law. Second Protocol Amending the 1963 Convention, 2 February 1993, ETS No 149, amended art 1 so that, under certain conditions, voluntary acquisition of a foreign citizenship will not *necessarily* lead to loss of previous citizenship. According to the explanatory notes, 'the 1963 Convention...is based on the principle that dual nationality is undesirable and should therefore be avoided. However, since 1963, a number of intervening factors have meant that there should be a *relaxation of that strict principle*: labour migrations between European States leading to substantial immigrant populations, the need for integration of long-term immigrants and the recognition of the principle of equality of the sexes' (my emphasis). In paras 5 and 6, it is noted that, '[t]here is no doubt that for many immigrants and their children the prospect of losing their nationality of origin is often a disincentive to seeking the nationality of the country in which they live and whose nationality they would like to have...[a]cquisition of the nationality of the host country is certainly an important, even crucial factor as far as integration in that country is concerned...seen from the viewpoint of immigrants of long standing, who are recognised in the host country in practically all aspects, the absence of full participation in its political life can only be regarded as deplorable'. Available at: <http://conventios.coe.int/Treaty/EN/Repots/Html/149.htm>.

¹⁰² Stephen Castles, 'Globalisation and the Ambiguities of National Citizenship' in Rainer Bauböck and John Rundell (eds), *Blurred Boundaries: Migration, Ethnicity, Citizenship* (Ashgate, 1998) 224, 238-42.

3. Prioritisation of Citizens

‘Republican’ accounts *presuppose* the autonomous (insulated) nature of particular political communities. On ‘republican’ accounts, a state ought to advance the well-being of *its* members.¹⁰³ ‘Republicans’ expect citizens who take part in self-governance to seek the good of society as a whole rather than their private interests; citizens ought to adopt policies that prioritise citizens only if such policies help society as a whole. Hence, it is up to state members, based on their understanding of the ‘common good’, to decide how to treat non-members.

E. ‘Communitarian’ Perspectives: An Intermediary?

On a ‘communitarian’ account,¹⁰⁴ in order to live meaningful lives, individuals need to be part of communities of shared meanings and identities to which they can feel that they belong. Hence, while ‘communitarian’ perspectives share common ground with liberal tenets, ‘communitarians’ consider the ‘liberal’ vision of membership to be rootless and too abstract.¹⁰⁵

As noted above, a ‘liberal’ account considers citizenship to be a status, an entitlement, and a set of rights that the citizen may choose to enjoy passively or actively. Citizenship is life’s *outer frame*, unless an individual chooses to make it otherwise. By contrast, a ‘republican’

¹⁰³ Barber (n13), 12.

¹⁰⁴ See eg Michael J Sandel, *Liberalism and the Limits of Justice* (2nd edn Cambridge University Press, 1998), 179 (asserting that we ordinarily think of ourselves ‘as members of this family or community or nation or people, as bearers of this history, as sons or daughters of that revolution, as citizens of this republic’).

¹⁰⁵ Neera Badhwar, ‘Moral Agency, Commitment and Impartiality’ (1996) 13(1) *Social Philosophy and Policy* 1, 14.

account considers citizenship to be an office, a responsibility, and a burden proudly assumed, making it *the core* of each citizen's life.¹⁰⁶

Communitarians borrow from both accounts. While 'communities of character' are supposed to give meaning and shape to individual efforts to make *their* life choices, individuals are constituted inside the political arena and the state ought to encourage the pursuit of a common good or collective goal by its citizens.¹⁰⁷ Indeed, Walzer claims¹⁰⁸ that '[m]an the citizen who obeys only the laws he has made, is man at his very best: free, virtuous and powerful.'

'Communitarians' share the ('liberal') anxiety and attempted justifications of unequal allocation of resources between citizens and non-citizens. However, they also accept the ('republican') contention that non-citizens do not yet possess the indispensable sense of belonging to the political community manifested by successful completion of a naturalisation process. Consequently, communitarians emphasise the need to facilitate naturalisation: Walzer suggests¹⁰⁹ that once society has made a (first admission) migration control decision (which on his account it is entitled to make), a (second admission) decision regarding full community membership, namely naturalisation, should 'never [be subject] to the ultimate constraint of closure'.

¹⁰⁶ Michael Walzer, 'Citizenship' in Terence Ball, James Farr and Russell Hanson (eds), *Political Innovation and Conceptual Change* (Cambridge University Press, 1982) 211, 216.

¹⁰⁷ Heather Lardy, 'Citizenship and the Right to Vote' (1997) 17(1) *Oxford Journal of Legal Studies* 75, 82.

¹⁰⁸ Michael Walzer, *Obligations: Essays on Disobedience, War, and Citizenship* (Clarion Books, 1970), 210-12.

¹⁰⁹ Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (Robertson, 1983), 60.

F. Concluding Remarks

States regulate their ‘human dimension’ through migration control (*external* prioritisation of their citizens). Concomitantly, citizenship often serves as a basis for ensuring citizens tangible benefits that non-citizens do not receive (*internal* prioritisation). Meanwhile, admission as full members of the polity through naturalisation is not automatic but is rather subject to varying conditions. Dovetailing the multi-dimensional account of state citizenship offered by Carens, the chapter explored three broad perspectives on state citizenship that may account for divergent approaches to these *extralegal* dimensions.

‘Liberal’ perspectives view citizenship as a means to (multiple) ends. A citizenship that is premised on political equality is designed to better the lives of (all) members of the political community by advancing individual interests which exist independently of citizenship status. In order to achieve these goals, it is desirable that some citizens be politically involved, while others may remain uninvolved. Some citizens may feel that their objective belonging to the state, manifested by citizenship, also entails a subjective, affective belonging, which recreates their citizenship as a primary good, while others may express apathy or even dissidence towards their state.

The adverse effects of internal prioritisation of citizens on the electorally excluded are a concern for liberals. Some ‘liberal’ accounts offer ‘contractarian’ and inter-generational justifications, emphasising the need for greater access to naturalisation, while others opt for full decoupling of rights and access to provision of goods and services from citizenship status.

On 'republican' accounts, the institution of state citizenship is foundational for each member of the political community. Self-governance stands at the core of the institution of state citizenship, with the ensuing assumption that all community members are committed and enthusiastic citizens that are concerned with a general good shared by their fellow citizens.¹¹⁰ The particular political character of the community is emphasised. Citizenship is considered to make persons truly free, equal and worthy of recognition by their fellow community members. The psychological dimension follows: citizens ought to feel a great attachment towards their (ideally exclusive) political community.

'Republicans' may accept internal prioritisation of citizens if the 'common good' (as defined by citizens) so requires based on the assumption that the needs of non-citizens will be taken into account even in their (political) absence, and that non-citizens who wish to do so will ultimately naturalise after satisfying appropriate conditions.

In contradistinction, communitarian perspectives attribute to the institution of citizenship a strong identity element. 'Communitarians' attribute great significance to state citizenship; they thus believe that the solution to internal prioritisation and its ensuing predicament for non-citizens is their naturalisation. Non-citizens should not remain outside the political bounds of the polity for protracted periods: once a political community has decided to admit a non-citizen, its prerogative concerning naturalisation is restricted, in part because of the acknowledged adverse effects of electoral exclusion and their implications for facilitation of social cohesion.

¹¹⁰ Ronald Beiner, *Liberalism, Nationalism, Citizenship: Essays on the Problem of Political Community* (University of British Columbia Press, 2003), 6.

CHAPTER FIVE: CITIZENSHIP VOTING QUALIFICATIONS- AN APPRAISAL

A. Introduction

This thesis assumes the existing global legal order in which sovereign states make first admission decisions (immigration), second admission decisions (naturalisation), and determine eligibility for voting in their elections.¹

Chapter Two *supra* presented the ubiquitous practice of exclusion of non-citizen residents from elections of their states of residence, and the permissibility thereof according to international and regional human rights treaties. Chapter Three *supra* offered perspectives on the meaning and purpose of voting and elections, concluding that there are mutually reinforcing reasons for considering the right to vote to be fundamental for individuals and, conversely, that electoral exclusion has adverse effects. Chapter Four *supra* offered perspectives on the meaning and purposes of state citizenship, emphasising its political and psychological dimensions which, in turn, affect the rights and obligations that are attached to citizenship as a legal status.

Against this background, this chapter appraises the plausibility of citizenship-based voting eligibility. Section B uses a U.S. case-study to offer a historical context for citizenship voting qualifications. Section C explores three positions concerning the interrelations between voting and citizenship: the *inseparability* position, the *contingent* position, and the

¹ See eg Bill Jordan and Franck Duvel (eds), *Migration* (Polity Press, 2003), 6. Hence, Jennings' self-determination logical paradox ('[t]he people cannot decide until somebody decides who are the people') falls outside the scope of the remit of this thesis. See Ivor Jennings, *The Approach to Self-Government* (Cambridge University Press, 1958), 56. Similarly, questions relating to collective self-determination and secession are not engaged.

disaggregation position. Section D presents six principal contentions in contemporary discourse, three in support of citizenship-based eligibility, and three in support of residency-based eligibility. Chapter Eight *infra* revisits the citizenship voting qualifications; it is contended that the political predicament of recognised CSR1951 refugees² weaken the citizenship-based arguments and strengthen the residency-based arguments.

B. Citizenship Voting Qualifications in Historical Context: United States Case-study

It is often assumed that citizenship and voting are inseparable, especially in national elections.³ Levinson wonders⁴ 'why do we so automatically (almost thoughtlessly) link citizenship and suffrage'; Brubaker attributes⁵ the absence of a 'serious challenge' to the electoral exclusion of non-citizens to forces of nationalism, even in states where long-term residents constitute a sizeable part of the population.

Nevertheless, as the following U.S. case-study demonstrates, the notion that citizenship status is both a *necessary* and a *sufficient* voting qualification is of rather recent vintage. In 1840,

² It was noted in Chapter One *supra* that persons holding CSR1951 refugee status *have not been naturalised* in their states of asylum. See CSR1951, art 1C(3), stipulating that CSR1951 will cease to apply to a person who 'has acquired a new nationality, and enjoys the protection of the country of his new nationality'. See also Susan Kneebone and Maria O'Sullivan, 'Article 1C' in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press, 2011), 481.

³ See Simon Caney, *Justice Beyond Borders: A Global Political Theory* (Oxford University Press, 2005), 64 (depicting citizenship rights as 'special rights arising from a person's membership in a political community' which 'may include the right to vote in elections', juxtaposing them against 'human rights' that are enjoyed by a person 'by virtue of being a human being'). See also Thomas Hammar, *Democracy and the Nation State: Aliens, Denizens and Citizens in a World of International Migration* (Aldershot, 1990), 27 (describing non-citizen permanent residents as *denizens*. The term 'denizen' may have originated in medieval England; see <http://www.oed.co.uk/view/Entry/49985?rskey=3JMpLI&result=1&isAdvanced=false#eid>).

⁴ Sanford Levinson, 'Suffrage and Community: Who Should Vote?' (1989) 41 Florida Law Review 545, 556.

⁵ Rogers Brubaker, *Citizenship and Nationhood in France and Germany* (Harvard University Press, 1992), 28.

The Supreme Court of the State of Illinois upheld⁶ the State Constitution's grant of suffrage in State elections to those who 'although they may be neither native nor adopted citizens, have identified their interests and feelings with the state by habitation and residence, in view of the just principle of reciprocity between the government and the governing'. Sixty-Four years later, the U.S. Federal Supreme Court reiterated⁷ that '[t]he state might provide that persons of foreign birth could vote without being naturalised'.

Suffrage, of course, was far from 'universal' at that time.⁸ Citizenship was *neither necessary nor sufficient* for eligibility to vote: instead, race, colour, gender and property ownership were considered permissible voting qualifications. It was generally assumed that the interests of the excluded will be effectively represented by wise, fair minded, endowed white men.⁹ African-Americans were assumed to be 'intellectually inferior' and hence to lack the

⁶ *Spragins v Houghton*, 3 Ill 377, 408 (1840).

⁷ *Pope v Williams*, 193 US 621, 632-33 (1904). During the first 150 years of U.S. history, non-citizens voted in many U.S. states and territories. The 1928 Federal elections were the first in which no non-citizen was permitted to vote. James B Raskin, 'Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage' (1993) 141(4) *University of Pennsylvania Law Review* 1391, 1397 citing Leon E Aylsworth, 'The Passing of Alien Suffrage' (1931) 25 *American Political Science Review* 114, 114. It is now a Federal crime for non-citizens to vote in Federal elections. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub L 104-208, Div C, Title II, § 216(a), *codified as amended at* 18 USCA § 611(a). However, U.S. States and local authorities may still enfranchise non-citizens in state and local elections, respectively. Joseph Fishkin, 'Equal Citizenship and the Individual Right to Vote' (2011) 86 *Indiana Law Journal* 1289, 1350 (defining this phenomenon as rendering non-citizen residents *local citizens*).

⁸ Cf Ludvig Beckman, 'Who Should Vote? Conceptualizing Universal Suffrage in Studies of Democracy' (2007) 15(1) *Democratization* 29, 42 (arguing that satisfaction of a 'universal suffrage' standard is a matter of definition; in his view, a suggestion that 'universal suffrage' should be measured in relation to eligibility of competent adult citizens masks normative assumptions about age and citizenship which ought to be acknowledged explicitly rather than disguised as objective criteria).

⁹ Michael Levin, *The Spectre of Democracy: The Rise of Modern Democracy as seen by its Critics* (Macmillan, 1992), 45.

competence to vote;¹⁰ they were disenfranchised even in states in which they were *citizens*. In its infamous *Dred Scott* judgment, the Federal Supreme Court ruled¹¹ that ‘a person may be a citizen, that is a member of the community who form the sovereignty, although he exercises no share of the political power and is incapacitated from holding particular offices’.

In tandem, property qualifications were justified on two main grounds: first, property owners had unique stakes in society, and personal interests in state policies, especially concerning taxation.¹² Second, property ownership was the way to be freed from dependence: the property-less could be too easily manipulated or controlled.¹³ By contrast, it was assumed that paupers, namely recipients of public relief from the community, have surrendered their independence.¹⁴ Others argued¹⁵ that suffrage had to be ‘earned’ by paying taxes, by serving in the military or by labouring on public roads, since ‘[t]hose who bear the burdens of the state should choose those that rule it’. The latter requirement was applied rather inconsistently, as

¹⁰ Eric Foner, *Reconstruction, America's Unfinished Revolution 1863-1877* (Harper & Row, 1988), 278.

¹¹ *Dred Scott v Sanford*, 60 US 393 (1857) (Taney C.J.).

¹² Virginia Harper-Ho, ‘Noncitizen Voting Rights: The History, the Law and Current Prospects for Change’ (2000) 21 *Immigration and Nationality Law Review* 477, 485 (regarding the State of Michigan 1850 Constitutional Convention).

¹³ Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* (Basic Books, 2000), 166.

¹⁴ *Ibid*, 54.

¹⁵ *Ibid*, 44.

women were disenfranchised despite paying taxes:¹⁶ they were considered too delicate for the ‘worldly’ experiences necessary for politics.¹⁷

In 1885, the Federal Supreme Court held¹⁸ that '[i]t would be quite competent for the sovereign power to declare that no one but a married person shall be entitled to vote'. Following the enfranchisement of African-Americans,¹⁹ several Southern States introduced literacy tests requiring voters to demonstrate that they could understand and interpret the Federal Constitution, as well as a two-dollar poll tax, a sum which was considered prohibitively high. Both types of measures withstood constitutional challenges,²⁰ despite the fact that they were intended to effectively disenfranchise African-Americans.²¹

As late as 1966, when the Federal Supreme Court declared the Virginia poll tax to be unconstitutional, Justice Stewart dissented, noting²² that ‘property qualifications and poll taxes have been a traditional part of our political structure...these and other restrictions were gradually

¹⁶ Ibid.

¹⁷ Ibid, 175.

¹⁸ *Murphy v Ramsey* 114 US 15, 43 (1885).

¹⁹ US Const, amend xv (1870): ‘The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color [sic], or previous condition of servitude.’

²⁰ See eg *Williams v Mississippi*, 170 US 213 (1898). In 1920, there were nearly five million illiterate Americans, making up roughly eight percent of the voting age population. The impact of literacy tests was hence significant. Keyssar (n13), 144.

²¹ This may have also been the motive behind alteration of provisions sanctioning the disenfranchisement of convicts. Reuven (Ruvi) Ziegler, ‘Legal Outlier, Again? U.S. Felon Suffrage Policies: Comparative and International Human Rights Perspectives’ (2011) 29(2) Boston University International Law Journal 197, 240.

²² *Harper v Virginia*, 383 US 663, 684 (1966).

lifted, primarily because popular theories of political representation had changed...whether one agrees or not, arguments have been and still can be made in favor [sic] of them’.

Times have changed, indeed. Race, gender, wealth, and literacy are no longer considered acceptable voting qualifications;²³ as Chapter Two *supra* demonstrated, electoral democracy premised on the maxim that ordinary people are qualified to govern themselves is now required by international and regional human rights treaties, and is increasingly practised globally.²⁴ In turn, *citizenship* has become (the) primary voting qualification;²⁵ it is the basis on which (adult competent) CSR1951 refugees are excluded from elections of their states of asylum.

C. The Interrelations between Citizenship and Enfranchisement: Three Positions

The analysis below presents three main positions that emerge from the contemporary discourse concerning the interrelations between citizenship and enfranchisement: the *inseparability* position, the *contingent* position, and the *disaggregation* position.

²³ See eg Judith N Shklar, *American Citizenship: The Quest for Inclusion* (Harvard University Press, 1991), 2 (critically asserting that ‘the ballot has always been a certificate of full membership in society, and its value depends primarily on its capacity to confer a minimum of social dignity.’)

²⁴ Robert Dahl, *Democracy and Its Critics* (Yale University Press, 1989), 97.

²⁵ Voting qualifications that affect *citizens* fall outside the scope of this thesis. They include age, mental competence, and current or previous criminal conviction. Regarding mental competence, see eg Velmer S Burton, ‘The Consequences of Official Labels: A Research Note on Rights Lost by the Mentally Ill, Mentally Incompetent and Convicted Felons’ (1990) 26(3) Community Mental Health Journal 267. Regarding age qualifications, see eg Aoilfe Nolan, ‘The Child as ‘Democratic Citizen’- Challenging the Participation Gap’ [2010] Public Law 126; Vivian E Hamilton, ‘Democratic Inclusion, Cognitive Development, and the Age of Electoral Majority’ (2012) 77(4) Brooklyn Law Review 1. Regarding disenfranchisement of convicts, see Ziegler (n21), 199.

1. The Inseparability Position

The inseparability position maintains a strict correlation between national citizenship and voting in all electoral processes, including local elections, adopting a version of the ‘republican’ account set in Chapters Three and Four *supra*, namely that enfranchisement defines full membership in a self-governing polity. Benhabib asserts²⁶ that there is no way to cut the ‘Gordian knot’ that links territoriality, representation and democratic voice. As Cohn argues,²⁷ the democratic participation is at the centre of full citizenship. Consistent application of the inseparability position equally opposes enfranchisement of persons who are not full community members and disenfranchisement of (some) full community members.²⁸

Both U.S. Federal courts and the German Federal Constitutional Court appear to have adopted the first part of the above stipulation. The U.S. Court held in *Cabell*²⁹ that ‘exclusion of aliens [non-citizens] from basic governmental processes is not a deficiency in the democratic system, but a necessary consequence of the community's process of political self-definition. Self-government, whether direct or through representatives, begins by defining the scope of the community of the governed, and thus the governors as well; aliens are by definition outside this

²⁶ Seyla Benhabib, *The Rights of Others* (Harvard University Press, 2004), 220-1.

²⁷ Jean L Cohn, ‘Changing Paradigms of Citizenship and the Exclusiveness of the Demos’ ((1999) 14 *International Sociology* 245, 249.

²⁸ Richard Katz, *Democracy and Elections* (Oxford University Press, 1997), 216.

²⁹ *Cabell v Chavez-Salido*, 454 US 432, 439-40 (1982). The case concerned a citizenship requirement for holding a probation officer position. The Supreme Court held that ‘[a] citizenship requirement may seem an appropriate limitation on those who would exercise and, therefore, symbolize this power of the political community over those who fall within its jurisdiction’.

community.’ The Federal District court in Washington D.C. has recently upheld³⁰ Federal law criminalising financial contributions by (non-permanent) non-citizens to electoral campaigns, holding that such contributions amount to participation in governance which states may legitimately restrict to citizens (though the restriction was not imposed on permanent residents).

The German Federal Constitutional Court held³¹ in 1990 that State (Land) legislation in Schleswig-Holstein enfranchising some non-citizens in municipal elections was incompatible with the German Constitution (as it stood at that time). It maintained³² that ‘[a]ccording to the [German] Basic Law, the people from whom state authority emanates comprises German citizens...citizenship is both the legal precondition for the equal status of individuals and the foundation for equal rights and duties; the exercise of legal rights and duties legitimates democratic state authority.’ Elsewhere, the German Court held³³ that the ‘German people’ were designated as possessors of the constitution-giving power, and that ‘[e]lections in which foreigners can vote cannot convey democratic legitimacy.’

³⁰ *Bluman et al v Federal Election Commission*, 800 F Supp 2d 281 (D.D.C. 2011) (holding that ‘it is fundamental to the definition of our national political community that foreign citizens do not have a constitutional right to participate in, and thus may be excluded from, activities of democratic self-government’) (*certiorari* to the Federal Supreme Court denied on 9 January 2012).

³¹ Following the adoption of the Treaty on European Union in 1992, the German Basic Law had to be amended so that EU citizens residing in Germany *would* be allowed to vote in regional and local elections. Other non-citizens are still excluded. For a general discussion see eg Cristina M Rodriguez, ‘Noncitizen Voting and the Extraconstitutional Construction of the Polity’ (2010) 8(1) *International Journal of Constitutional Law* 30.

³² *Opinion of the German Federal Constitutional Court*, 31 October 1990, BVerfGE 83 (FRG), reprinted in Donald P Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Duke University Press, 1997), 197.

³³ See Gerald Neuman, ‘We the People: Alien Suffrage in German and American Perspective’ (1991-1992) 13 *Michigan Journal of International Law* 259, 277.

In a later judgment concerning similar arrangements in the State of Hamburg, the German Court held³⁴ that any exercise of state authority must be supported by a ‘chain of legitimation’ reaching back to the sovereign people, which did not include aliens. Hence, rather than adopt a perception of democracy as a means of facilitating *individual* self-determination (Chapter Two *supra*), it took the view that democracy is a form of *collective* self-determination, and that the collective will of the community as a whole may be threatened if outsiders are enfranchised.³⁵

It may be contended that, if the franchise defines the political community, and if full membership in a political community is inseparable from enfranchisement, then a disenfranchised person should no longer be considered a full member of that community³⁶ but, perhaps, a ‘second-class’ or ‘semi’ citizen.³⁷ It has been suggested that disenfranchisement of otherwise full members institutionalises a double polity in which enfranchised members rule over disenfranchised members.³⁸ The German Federal Court has recently declared³⁹ legislation requiring German citizens living abroad to have resided in Germany for three consecutive months at some point in their lives in order to vote in national elections to be unconstitutional.

³⁴ Ibid, 287.

³⁵ Ibid, 285.

³⁶ Ronald Dworkin, ‘What is Equality?’ (1987) 22 University of Simon Fraser Law Review 1, 4.

³⁷ Elizabeth Cohen, *The Myth of Full Citizenship: A Comparative Study of Semi-Citizenship in Democratic Polities* (Phd dissertation, Yale University, 2003) 26 (referring to ‘semi-citizenship’). Interestingly, Cohen suggests that ‘some people don’t need citizenship’, mentioning two categories: children (who arguably have citizen-parents) and partial nationals (who arguably have full citizenship in the country that they chose to leave). Ibid, 234.

³⁸ Katherine Pettus, *Felony Disenfranchisement in the Contemporary United States: An Ancient Practice in a Modern Polity* (PhD dissertation, Columbia University 2002) 21-22 (on file with author). See also Heather Lardy, ‘Citizenship and the Right to Vote’ (1997) 17 Oxford Journal of Legal Studies 75, 85.

³⁹ http://www.bundesverfassungsgericht.de/entscheidungen/cs20120704_2bvc000111.html (German).

According to the inseparability position, naturalisation must precede enfranchisement. In turn, states set divergent requirements for naturalisation. Earnest argues⁴⁰ that the predicament of non-citizen residents in *jus sanguinis* states is compounded, as such states tend to provide non-citizens fewer economic, civil and political rights as well as set higher barriers for naturalisation; by contrast, *jus soli* states are more likely to engage in ‘denationalising citizenship’.⁴¹

Ethnic nationalists support restricting access to naturalisation to applicants from similar ethnic origins to those of the (majority) state population. States which adopt ethnic naturalisation criteria are likely to host a sizeable electorally excluded non-citizen resident population for protracted periods. By contrast, ‘civic republicans’ and ‘liberals’ alike reject ethnic criteria for naturalisation purposes, taking the view that those wishing to naturalise should, in principle, be offered the opportunity to do so.⁴² Nonetheless, their views diverge as to the desirable qualifications for naturalisation, as well as with regard to toleration of multiple citizenships: according to expansive approaches, any non-citizen satisfying a (reasonable) residence requirement should be entitled to naturalise, and should not have to forego previous citizenships;

⁴⁰ See David C Earnest, *Voting Rights for Resident Aliens: Nationalism, Postnationalism and Sovereignty in an Era of Mass Migration* (PhD Dissertation, George Washington University, 2004) (on file with author).

⁴¹ See eg Linda Bosniak ‘Denationalizing Citizenship’ in T Alexander Aleinikoff and Charles Klusmeyer (eds), *Citizenship Today: Global Perspectives and Practices* (Carnegie, 2001) 237, 241.

⁴² See eg Peter Goldsmith, *Citizenship: Our Common Bond* (Ministry of Justice, 2008) ch 4, para 23 (suggesting that ‘it should not be commonplace for people to live in a society for a very long time without becoming a part of that society and taking on their social responsibilities as citizens’ and proposing a system whereby ‘people who have come to the UK either have limited leave to be here or they have to apply to become citizens’). See also Cohn (n27), 262-3 (contending that there are good *democratic* as well as *liberal* grounds to avoid permanent presence of a large immigrant population that is permanently denied access to citizenship).

restrictive views require applicants to pass language as well as citizenship or integration tests, to exhibit self-sufficiency, to pay fees and possibly to renounce other citizenship(s).⁴³

Miller, for instance, posits⁴⁴ that states which deny citizenship to long-term immigrants ‘are justifiably accused of violating democratic principles’. Nevertheless, he also contends⁴⁵ that nations legitimately wish to restrict membership to those who identify themselves with the nation, culturally and otherwise; on his view, giving citizenship rights ‘freely’ to all non-citizen residents risks undermining the conditions of mutual trust and assurance which make ‘responsible citizenship’ possible. Similarly, Van Gunsteren advocates⁴⁶ requiring a reasonable residence period, capacity of dialogic performance, knowledge of the language and culture of the particular political community, recognition of its political institutions, and a reasonably secure access to the means of subsistence. On his account, only those who satisfy these qualifications should be admitted to citizenship.

However, it could be argued that, if enfranchisement depends on naturalisation, then *requiring* applicants to pass language, citizenship and other courses (rather than *providing* such courses to applicants) may effectively become a modern-day equivalent of literacy tests. Lister

⁴³ See Rainer Bauböck and Sarah Wallace Goodman, *Naturalisation* (EUDO Citizenship Policy Brief No 2, 2011), available at: http://eudo-citizenship.eu/docs/policy-brief-naturalisation_revised.pdf (analysing legislative trends regarding naturalisation requirements); Gerard Rene de Groot and Maarten Vink, *Loss of Citizenship* (EUDO Citizenship Policy Brief no 3, 2012), available at: http://eudo-citizenship.eu/docs/policy_brief_loss.pdf (analysing legislative trends regarding loss of citizenship).

⁴⁴ David Miller, ‘Democracy’s Domain’ (2009) 37(3) *Philosophy and Public Affairs* 201, 219; David Miller, ‘Immigrants, Nations and Citizenship’ (2008) 16(4) *Journal of Political Philosophy* 371 (arguing for citizenship tests); Cf Jonathan Seglow, ‘Arguments for Naturalisation’ (2008) 57(5) *Political Studies* 788.

⁴⁵ David Miller, *On Nationality* (Oxford University Press, 1995), 88.

⁴⁶ Herman R Van Gunsteren, ‘Admission to Citizenship’ (1988) 98 *Ethics* 731, 736-7.

suggests⁴⁷ that access to citizenship must be fairly easy and open to all who want it and who will undertake fairly limited, largely formal steps to achieve it, so that ‘legal aliens’ would be able to ‘remove themselves from the disadvantaged class by naturalising’. Pertinently for this thesis, Lister’s underlying assumption is that ‘the non-citizen in question has a “home” state to which he could return if he found the situation in the state to which he immigrated undesirable’. She notes that ‘[o]bviously this condition does not apply to refugees’ which thus ‘speaks strongly in favour of granting a larger basket of social benefits to refugees and similarly situated individuals’.

Walzer describes⁴⁸ ‘the rule of citizens over non-citizens’ as ‘probably the most common form of tyranny in human history’. States may undertake community cohesion measures as part of the naturalisation process, but ‘membership’s rights and rule...be equally open to all those men and women who live within a political community’s territory and are subject to local law’.⁴⁹ Zilbershats asserts⁵⁰ that naturalisation should be based on a ‘nexus’ to a common present and future, and should only be subject to fulfilment of residence requirements. Most radically, Rubio-Marín posits⁵¹ that residency-based naturalisation should be *automatic* except in cases where the state of origin of the resident non-citizen would require her to forego its citizenship.

⁴⁷ Ruth Lister, ‘Citizenship in the Immigration Context’ (2010-2011) 70 Maryland Law Review 175, 230.

⁴⁸ Michael Walzer, *Spheres of Justice* (Basic Books, 1983) 62. Cf Karen Knop, ‘Citizenship, Public and Private’ (2008) 71 Law and Contemporary Problems 309, 320 (basing eligibility on *domicile* can transform the construction of political membership as a two-way relationship between the individual and the state).

⁴⁹ Walzer (n48), 60-1.

⁵⁰ Yaffa Zilbershats, ‘Reconsidering the Concept of Citizenship’ (2001) 36 Texas International Law Journal 689, 692. See also T Alexander Aleinikoff and Douglas Klusmeyer (eds), *Citizenship Policies for an Age of Migration* (Carnegie, 2002) 46 (contending that all long-term migrants should be naturalised).

⁵¹ See generally Ruth Rubio-Marín, *Immigration as a Democratic Challenge* (Cambridge University Press, 2000).

2. The Contingent Position

The Contingent position shares the conceptual stance of the inseparability view that naturalisation should precede full electoral inclusion of non-citizens. Nonetheless, it endorses habitual residence (*ius domicile*) as a basis for participation in sub-national elections, retaining citizenship-based eligibility for *national* elections *and referenda* in which the issues under consideration are arguably ‘fundamental’ and concern the ‘long-term future’ of the polity.⁵²

According to this view, *all citizens* should retain voting rights in national elections and referenda of their state of citizenship regardless of whether they reside therein. The fact that some voters in sub-national elections are *not* part of ‘the people’ is accepted: non-citizen residents are citizens ‘in the making’ whose integration may be facilitated by local suffrage.⁵³

Hence, the inseparability and contingent positions share a perception of an inseparable link between full enfranchisement and full membership in a political community. However, the contingent position takes a *non-binary* approach to the link between membership and enfranchisement,⁵⁴ recognising that territoriality ought to matter – at least on the local level.

⁵² Rainer Bauböck, ‘Stakeholder Citizenship and Transnational Political Participation: A Normative Evaluation of External Voting’ (2006-2007) 75 Fordham Law Review 2393, 2429-30. Section D *infra* considers Bauböck’s position. Interestingly, the U.S. Supreme Court upheld residence-based qualifications in *municipal* elections, holding that ‘[a] governmental unit may legitimately restrict the right to participate in its political processes to those who reside within its borders’. The question whether residence *substitutes* for citizenship or *complements* it as a voting qualification is not addressed directly in the judgment. *Holt Civic Club v City of Tuscaloosa*, 439 US 60, 68 (1978).

⁵³ James Hampshire, ‘Becoming Citizens: Naturalisation in the Liberal State’, in Gideon Calder, Peter Cole and Jonathan Seglow (eds), *Citizenship Acquisition and National Belonging* (Palgrave, 2010) 74, 79. See also the Human Rights Committee, Latvia (CCPR/CO/79/LVA), 6 November 2003, paras 16-18.

⁵⁴ See eg Linda Bosniak, ‘Being Here: Ethical Territoriality and the Rights of Immigrants’ (2007) 8(2) Theoretical Inquiries in Law 389, 390-1.

3. The Disaggregation Position

The disaggregation position addresses the non-congruence between the ‘input’ and ‘output’ of democratic self-government⁵⁵ which the inseparability and contingent positions tolerate: the notion that only *resident or non-resident* citizens are eligible to vote in elections and referenda that enable the enactment of laws that are applicable in a territorially-bound jurisdiction where only some of these citizens *as well as non-citizens* reside habitually. Since all habitual residents are subject to the continuous authority of the state, residence-based enfranchisement would thus come closer to symmetry between the rulers and the ruled.⁵⁶ Generally speaking, legislation applies territorially, though in some states legislation has (in certain areas such as personal taxation) extra-territorial application.

On this view, while the state should facilitate naturalisation of non-citizens especially in view of the security of residence which ensues, it should also enfranchise non-citizen residents. The one person, one vote rule is *not* violated when a person is eligible to vote in two separate states, nor does such dual enfranchisement lead to dual representation.⁵⁷

⁵⁵ See eg Gerald M Rosberg, ‘Aliens and Equal Protection: Why Not the Right to Vote?’ (1977) 75(5-6) Michigan Law Review 1092; Lea Brilmayer, ‘Shaping and Sharing in Democratic Theory: Toward a Political Philosophy of Interstate Equality’ (1987) 15 Florida State University Law Review 389, 390 (suggesting that exclusion of residents ‘separates the shaping of the laws from the sharing of its consequences’).

⁵⁶ See Beckman (n8), 45 (asserting that ‘[a] perfect symmetry between rulers and ruled is not as fanciful as it may sound. Organisations that aspire to be ruled democratically, such as many political parties, trade unions, and even chess clubs and other voluntary associations, typically recognize that every member has the right to vote’).

⁵⁷ Similarly, enfranchising dual residents in *local* elections in two residential communities does not result in double representation, because these residents would only vote once in each election. Cf EU nationals of two EU Member States whose enfranchisement in both states arguably breaches the ‘one person one vote’ rule as the outcomes of such elections determine the composition of the Council of Ministers.

Disaggregation view-holders would point to the fact that the eligibility of *citizens* to vote in local and regional elections in their state is already based on residency: if a person relocates to a different city or area her voting rights ‘migrate’ as well. Hence, it is argued that a distinction may be drawn between the permanent nature of state citizenship and the (transient) nature of voting in a particular locality. A radical version of the disaggregation position entails that, since most legislation applies territorially, voting rights of *non-resident* citizens should become dormant after a period of non-residence, both at the local and at the national level.⁵⁸ On this account, voting rights are automatically restored if and when expatriates exercise their (unconditional) right to return and reside in their state of citizenship.

It is noteworthy that most disaggregation view-holders are not ‘post-nationalists’: they consider voting eligibility questions through a statist prism.⁵⁹

⁵⁸ Claudio Lopez-Guerra, ‘Should Expatriates Vote?’ (2005) 12 *Journal of Political Philosophy* 216, 226-7. Cf David Owen, ‘Resident Aliens, Non-resident Citizens and Voting Rights’ in *Citizenship Acquisition* (n53), 63 (supporting enfranchisement of non-resident citizens, as well as of non-citizen residents).

⁵⁹ Cf Thomas Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* (Polity Press, 2008) 98. David Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Stanford University Press, 1995), 223-32 (contending that citizenship rights embody a conception of empowerment that is strictly limited to the framework of the nation-state, whereas formulations of rights in treaties, regional documents, and international law, which directly transcend the claims of individual nation-states have emerged of late). Elsewhere, Held advocates a *cosmopolitan* model of democracy that entails the creation of new political institutions that would coexist with the system of states but would override states in clearly defined spheres of activities where those activities have demonstrable transnational and international consequences. David Held, *Models of Democracy* (Polity Press, 1996), 304. See also James Bohman, *Democracy across Borders: From Demos to Demoi* (MIT Press, 2007) 5 (asserting that ‘transnational democracy...as realized in a variety of institutions and communities...is not only more democratic, but is the only feasible way...in which to realize the democratic minimum and the rights of members of the human political community’).

D. Citizenship Voting Qualifications: Six Contentions

This section explores six principal contentions in the citizenship voting qualifications discourse. The first three arguments are invoked to support citizenship-based eligibility in light of the inseparability or contingent positions, discussed above. They concern community cohesion and common identity; loyalty to the state and stakeholding in its long-term well-being; and the promise of electoral inclusion as a catalyst for naturalisation. The latter three arguments advance residency-based eligibility in light of the disaggregation position. They centre on the vulnerability of non-citizen residents in the absence of state accountability; the apparent disjuncture between burden-sharing and political participation; and the significance of ‘exit’ options - or lack thereof - in assessing the extent to which non-citizen residents are subjected to coercive authority.

1. Community Cohesion and Identity-Formation

Schauer suggests⁶⁰ that political communities need organising symbols to delineate membership. An inclusive nature of democratic citizenship paradoxically explains the insistence on exclusion of *non-citizens*.⁶¹ On this view, today, the lines which divide members from strangers, citizens from foreigners, ‘we’ from ‘they’ are drawn most sharply around political privileges; absent other voting qualifications such as the qualifications that were explored in Section B *supra*, citizenship-based eligibility facilitates social cohesion and strengthens identity formation.⁶²

⁶⁰ Fredrick Schauer, ‘Community, Citizenship and the Search for National Identity’ (1986) 84 Michigan Law Review 1504, 1514-5.

⁶¹ Charles Taylor, ‘The Dynamics of Democratic Exclusion’ (1998) 9(4) Journal of Democracy 143, 143.

⁶² Seyla Benhabib, ‘Citizens, Residents and Aliens in a Changing World’ (1999) 66 Social Research 708, 722.

It may be argued that, citizenship-based eligibility increases its real and symbolic significance, and improves the sense of community among (all) citizens⁶³ as equal partners in the common enterprise of governing the commonweal.⁶⁴ Hence, a sense of social solidarity depends on exclusion of non-citizens,⁶⁵ since even on ‘liberal’ accounts (Chapter Four *supra*), democratic politics requires some shared values and understandings, as well as a commitment to cooperation among most community members.⁶⁶

However, there is circularity in excluding non-citizens because they do not ‘fit’ in if citizenship is regarded as (the) criterion for ‘fitting in’ and non-citizens are not given a reasonably accessible path to citizenship.⁶⁷ Moreover, it can be argued that electoral exclusion of immigrants negatively affects social cohesion and social justice by compromising the democratic quality of representation.

2. Loyalty to the State and to its Long-term Wellbeing

It may be suggested that, while non-citizen residents are (only) required to obey the laws of their host state, citizens can also be expected to be loyal to their state. On this account, only citizens,

⁶³ Gerald L Neuman, ‘Aliens and Equal Protection: Why not the Right to Vote?’ (1977) 75 Michigan Law Review 1092, 1110.

⁶⁴ Ayelet Shachar, *The Birthright Lottery: Citizenship and Global Inequality* (Harvard University Press, 2009), 32.

⁶⁵ Frank I Michelman, ‘Conceptions of Democracy in American Constitutional Argument: Voting Rights’ (1989) 41 Florida Law Review 443, 456.

⁶⁶ David A Martin, ‘Due Process and Membership in the National Community: Political Asylum and Beyond’ (1983) 44 University of Pittsburgh Law Review 165, 198-9.

⁶⁷ T Alexander Aleinikoff, ‘Citizens, Aliens, Membership and the Constitution’ (1990) 7 Constitutional Commentary 9, 15.

who are *full* and *permanent* members of the polity, can be presumed to be committed to the continued success of the polity, and to have its long-term interests at heart. By contrast, non-citizens may consider their own interests rather than those of their host state, particularly on questions concerning regulation of future migration and naturalisation.⁶⁸ The fear is that, in a conflict between interests of the non-citizen's state of origin and interests of the state of residence, the former may take precedence.⁶⁹ It is further contended that, if non-citizen residents forego (for economic, familial, political or psychological reasons) a reasonable opportunity to naturalise, their refusal may cast doubts on their long-term commitment to the well-being of the polity.⁷⁰

However, as non-citizens are not protected from deportation, they have an incentive to remain loyal to their host state.⁷¹ Moreover, enfranchisement (signifying inclusion) may make them feel more committed and loyal.⁷²

Bauböck suggests⁷³ that the reason citizens should be enfranchised is because they are 'stakeholders': by virtue of their permanent membership, they have a life-long interest in the

⁶⁸ Note the 'republican' view of the purposes of the electoral process (Chapter Three *supra*), namely that good citizens are expected to advance the 'common good' rather than use the process to advance their private interests.

⁶⁹ Ron Hayduk, 'Democracy for All: Restoring Immigrant Voting Rights in the United States' (2004) 26(4) New Political Science 499, 515.

⁷⁰ Raskin (n7), 1448.

⁷¹ Interestingly, the U.S. Federal Supreme Court held that it should not be assumed that U.S. citizens who vote in foreign elections have thereby voluntarily renounced their U.S. citizenship. *Afroyim v Rusk*, 387 US 253 (1967). By contrast, the German Federal Constitutional Court described dual nationality as 'an evil that should be avoided or eliminated in the interests of States as well as the interests of the affected citizens'. *Opinion of the German Federal Constitutional Court*, 21 May 1974, BVerfGE 37, cited in Richard Plender, Basic Documents on International Migration Law (Nijhoff, 1997) 217.

⁷² Hayduk (n69), 510.

future of the polity, its survival and success. This rationale applies both to resident and to non-resident citizens, as the latter enjoy an unconditional right to return, but does not extend to non-citizen residents.⁷⁴

However, it may be argued that permanent residence in a political community indicates a strong commitment thereto, whereas some expatriates are merely nominal citizens (especially if they hold multiple citizenships).⁷⁵ Moreover, the assumption that all citizens, most of whom natural-born, share an undivided commitment to the long-term success of their polity, which all non-citizens *prima facie* lack is contentious.⁷⁶ For instance, there is little reason to assume that persons who have chosen to leave their original homes and migrate permanently to a new polity will necessarily harbour less allegiance than those whose citizenship was purely ascriptive.⁷⁷

3. Using Electoral Inclusion as a Catalyst for Naturalisation

Chapter Four *supra* addressed the internal prioritisation of citizens, referring to the predicament of non-citizens resulting there-from. Conversely, it has been suggested that the removal of internal prioritisation and, subsequently, the decoupling of civil, social and economic rights from

⁷³ See also Peter Spiro, 'Perfecting Political Diaspora' (2006) 81 NYU Law Review 207 (refuting the claims that expatriates are more akin to irresponsible, uninformed or undisciplined voting, as well as the contention that such participation diverts expatriates from having deeper political engagement in the place where they reside).

⁷⁴ *Stakeholder Citizenship* (n52), 2393; Rainer Bauböck, 'The Rights and Duties of External Citizenship' (2009) 13(5) *Citizenship Studies* 476, 478-483. See also Chapter Six *infra* (regarding expatriate voting).

⁷⁵ Cf Christian Joppke, 'The Inevitable Lightning of Citizenship' in Ricard Zapata-Barrero (ed), *Citizenship Policies in the Age of Diversity* (CIDON Foundation, 2009) 37 (asserting that there is a fundamental tension between freedom of movement and the principle of solidarity).

⁷⁶ Lardy (n38), 95.

⁷⁷ Stephen H Legomsky, 'Citizens' Rights and Human Rights' (2010) 43(1) *Israel Law Review* 67, 76.

citizenship has led to a devaluation of the institution of citizenship.⁷⁸ On this account, non-citizens no longer feel a compelling need to naturalise, and enfranchisement will further reduce their incentives.⁷⁹ EU citizens residing in another EU Member States are a case in point as they tend *not* to naturalise therein.

However, this phenomenon can be partly explained by the fact that EU citizens enjoy several entitlements that are otherwise reserved to *citizens of their state of residence*, including diplomatic and consular protection, (conditional) freedom of movement in and out of the state, as well as enfranchisement in *local* and *EU parliament* elections.⁸⁰

More fundamentally, following Walzer (Chapter Four *supra*), if citizenship signifies membership in a ‘community of character’ and consists of more than merely legal status and concomitant rights, then naturalisation ought to be encouraged for morally sound reasons; enticing non-citizens to naturalise by restricting access to goods and services seems rather questionable.

⁷⁸ Peter Shuck, ‘Membership in the Liberal Polity: The Devaluation of American Citizenship’ (1989) 3 *Gerogetown Immigration Law Journal* 1, 9 (suggesting that the decoupling of rights from citizenship status has led to a reduction in the number of applications for naturalisation in the United States).

⁷⁹ David Jacobson, *Rights across Borders: Immigration and the Decline of Citizenship* (Johns Hopkins University Press, 1996) 9. Jacobson suggests that ‘the civic and even nationalist symbolism of parliamentary elections is, it appears, the last bastion and expression of nationhood’. *Ibid*, 38.

⁸⁰ Kiran Banerjee, *Political Community of Fate or Postnational State? The Persistence of the other in Contemporary German Citizenship*, 14, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1767041.

4. Accountability and Vulnerability

It may be argued that, even if *de jure* the enjoyment of non-electoral rights is generally residency-based rather than citizenship-based, then *de facto* non-citizen residents often do not enjoy equal treatment.⁸¹ It was suggested in Chapter Three *supra* that elected officials can benefit from taking into account the knowledge, views, and preferences of citizens and non-citizens alike.⁸² Nonetheless, it seems reasonable to assume that officials will have greater incentives to attend to the needs and interests of non-citizens if the latter are enfranchised;⁸³ hence, non-citizens may be more vulnerable *because* they lack voting rights.⁸⁴

It may be asserted that, even if it does not satisfy the ‘republican’ ideal of self-governance, the extent to which non-citizens can hold authorities of their host state accountable for violations of rights through *non-electoral* means matters as it can further protection of their rights and interests.⁸⁵ On this account, non-citizen residents are less vulnerable if they are nationals of a powerful state that protects its nationals abroad, holds host states accountable for

⁸¹ See eg Linda Bosniak, ‘Citizenship, Non-citizenship and the Trans-nationalization of Domestic Work’ in Seyla Benhabib and Judith Resnik (eds), *Migrations and Motilities: Citizenship, Borders and Gender* (NYU Press, 2009) 127, 143 (suggesting that alienage still serves as a source of disadvantage: lack of citizenship status disqualifies aliens from enjoyment of a range of rights in many political communities). See also Vicky Jackson, ‘Citizenships, Federalisms and Gender’, *Ibid.*, 439, 446 (arguing that a territorially-based government remains a human necessity, and that while citizenship should *not* be the only basis for rights-holding it is a concept and rhetorical trope that has been effectively invoked in connection with claims of political rights).

⁸² *Ibid.*

⁸³ Daniel Munro, ‘Integration through Participation: Non-Citizen Resident Voting Rights in an Era of Globalization’ (2008) 9(1) *Journal of International Migration and Integration* 63, 74-5.

⁸⁴ Ludvig Beckman, ‘Citizenship and Voting Rights: Should Resident Aliens Vote?’ (2006) 10(2) *Citizenship Studies* 153, 154.

⁸⁵ Meghan Benton, ‘The Tyranny of the Enfranchised Majority? The Accountability of States to their Noncitizen Population’ (2010) 16(4) *Res Publica* 397, 408.

violating rights of its nationals, entitles its expatriates to vote, and to which repatriation is both possible and plausible.⁸⁶

It may also be argued that electoral exclusion of non-citizens can be mitigated by exercising *non-electoral* political rights in the states of residence, such as demonstrating, debating in public arenas, joining parties or forming new parties.⁸⁷ However, even if *de jure* non-citizens enjoy political rights, their views and preferences may be given less weight (or discarded wholesale) because they are not eligible voters (see Chapter Three *supra*).

5. Burden-Sharing and Fairness in Participation

Chapter Four *supra* assessed a ‘contractarian’ burden-sharing justification for internal prioritisation of citizens. The argument can be applied *mutatis mutandis* to justify enfranchisement of non-citizen residents. Based on a ‘no taxation without representation’ principle,⁸⁸ it may be asserted that non-citizen residents who make financial contributions through taxation and engage in other contributory social activities should be entitled to vote, especially as elections are a medium through which societies allocate finite resources (the argument also applies to expatriates who are taxed abroad or who send remittances to their state of origin). As PACE has recently stressed,⁸⁹ ‘democratic legitimacy requires equal participation

⁸⁶ The predicament of recognised CSR1951 refugees, to whom none of the above-mentioned mitigating circumstances are applicable, will be considered in Chapter Eight *infra*.

⁸⁷ *Citizenship Policies* (n50), 46.

⁸⁸ Hayduk (n69), 507.

⁸⁹ Recommendation No 1500: Participation of Immigrants and Foreign Residents in Political Life in the Council of Europe Member States, 26 January 2011 (8th sitting) (‘urg[ing] the governments of member states (a) to grant the

by all groups of society in the political process, and that the contribution of legally resident non-citizens to a country's prosperity further justifies their right to influence political decisions in the country concerned'.

However, as was noted in Chapter Four *supra*, making rights-protection dependent on financial contributions may be reminiscent of property qualifications: not all non-citizens work or pay taxes, nor do all citizens, so relying on financial contribution to construe eligibility would be (at least) as over and under-inclusive as it was in previous centuries. Rather than being a *sine qua non* for enfranchisement, taxation can serve as an additional *indicator* of the contribution of non-citizens to the community in which they reside. Zilbershats helpfully refers to the centre of meaningful life as part of the 'nexus' to the present and future test, asserting⁹⁰ that 'logic requires that those who decide the nature of life in the state should be those who live, work, and educate their children [there]'.

6. 'Exit Options' and Subjection to Coercive State Authority

Resident non-citizens are subject to the entire corpus of laws in their state of residence including the redistribution of public goods and services and the regulation of private behaviour.⁹¹ Citizenship-based eligibility comes in direct tension with a basic liberal tenet (Chapter Three *supra*), namely that '[g]overnments are instituted among Men, deriving their just powers from

right to vote and stand in local elections to all migrants legally established for at least three years irrespective of their origin').

⁹⁰ Yaffa Zilbershats, *The Human Right to Citizenship* (Transnational Publishers, 2002), 96.

⁹¹ Adam Przeworski, 'Minimalist Conception of Democracy: A Defense' in Ian Shapiro and Casiano Hacker-Cordón (eds), *Democracy's Value* (Cambridge University Press, 1999) 23, 47.

the *consent* of the governed'.⁹² On Dahl's *strong principle of equality*⁹³ 'the criterion of inclusion stipulates that the demos should include all adults subject to the binding collective decisions of the association'. Dahl asserted⁹⁴ that 'every adult subject to a government and its laws must be presumed to be qualified as and has an unqualified right to be a member of the demos'.

However, if all personal interests that may be affected by state-mandated action are to be included under the umbrella of the 'all affected' principle, then 'virtually (maybe literally) everyone in the world...should be entitled to vote on any proposal or any proposal for proposals'.⁹⁵ While being bound by legislation implies being affected by that legislation, being affected by legislation does not necessarily imply being bound by it.⁹⁶ Hence, a qualified version of Dahl's principle suggests that electoral participation should be considered as a *presumptive right* which materialises when fundamental interests are at stake;⁹⁷ for instance, permanent residents are not just *affected* by coercive legislation, but are also meaningfully *bound* by it.

Lopez-Guerra argues⁹⁸ (as per the disaggregation position) that the principle of subjection to coercive authority entails that the electorate should *exclude* non-resident citizens because *they*

⁹² See United States Declaration of Independence, 4 July 1776, discussed in Chapter Three *supra*. See also Peter Jones, *Rights* (Macmillan, 1994) 88.

⁹³ Dahl (n24), 129.

⁹⁴ *Ibid.*

⁹⁵ Robert E Goodin, 'Enfranchising all Affected Interests, and its Alternatives' (2007) 35(1) *Philosophy and Public Affairs* 40, 55.

⁹⁶ See eg Beckman (n8), 161.

⁹⁷ Sarah Song, 'Democracy and Noncitizen Voting Rights' (2009) 13(6) *Citizenship Studies* 607, 609.

⁹⁸ Lopez-Guerra (n58), 223.

are not subject to the laws passed by the *demos*. By contrast, Owen argues⁹⁹ that, while habitual residents are subjected to binding decisions, residency is not a necessary condition for subjection: non-resident citizens are often subject to coercive power of their state of nationality through personal or property taxation, liability for conscription, the denial of future electoral participation, or restrictions on future enjoyment of goods and services; hence, *enfranchisement of non-citizen residents is compatible with enfranchisement of non-resident citizens*.

Still, it may be contended that, even if non-citizens are subject to binding decisions of their state of residence, they should not necessarily have a right to participate in creating its law. Rather, like children, they should have a right to be protected from harm by law. On this view, *most* non-citizens are not inescapably tied to the fate of the community: they have chosen to enter a society which they can leave by returning to their state of citizenship (refugees and stateless non-citizens notwithstanding). In other words, since they have an ‘exit option’, they are not involuntarily subject to state coercion.¹⁰⁰

However, a ‘times & ties’ argument¹⁰¹ would suggest that, as time passes, non-citizen residents establish social membership in a community through employment, education, housing, and community involvement; the adverse consequences of repatriation may outweigh their (*de jure*) right to return. Hence, their formal ‘exit option’ is considerably weaker. It can also be argued that persons should not be expected to relinquish their right to participate in the

⁹⁹ See eg Owen (n58) 53.

¹⁰⁰ Neuman (n33), 277. See also Seglow (n44), 793.

¹⁰¹ Cf Joseph H Carens, ‘The Case for Amnesty’, *Boston Review Online* (May/June 2009), available at: <http://www.bostonreview.net/BR34.3/carens.php>.

administration of state-imposed coercive power for lengthy periods as a ‘price’ for migration.¹⁰²

It is also noteworthy that dual or multiple nationals have an ‘exit option’, so the same logic would apply.¹⁰³

E. Concluding Remarks

Successful struggles for inclusive suffrage have led to a (legal) reality where almost all mentally competent adult (resident) citizens are, in principle, eligible voters in elections of their states of citizenship. The transition from exclusionary to a near-universal suffrage altered the way in which voters are perceived: political equality, rather than presumed moral virtuousness, dictates eligibility. Citizenship has thus become (the) main voting qualification.

This chapter presented three general positions concerning the plausibility of the citizenship voting qualification. The *inseparability* position holds that enfranchisement on all electoral levels emanates from ‘the people’ of a given state; it would be as wrong to enfranchise a non-citizen as it would be to disenfranchise a citizen (wherever the latter resides). The *contingent* position distinguishes sub (and supra) national from national elections and referenda, basing enfranchisement in the former on *domicile*, and in the latter on citizenship. By contrast, the *disaggregation* position substitutes citizenship for residence as (the) basis for enfranchisement of non-citizen residents, leading (on some accounts) to disenfranchisement of non-resident citizens.

¹⁰² Ibid, 793.

¹⁰³ See n71 (U.S. and German judgments concerning multiple citizenships).

The *inseparability* and *contingent* positions entail exclusion of non-citizens (from all or from national) elections, respectively, until such time as they are legally able (and willing) to naturalise. In states which base naturalisation policies on ethnic nationalist criteria, for some non-citizens, the path to naturalisation may be either blocked or highly cumbersome, compounding their predicament. More inclusive approaches to naturalisation require applicants to satisfy conditions ranging from (on liberal views) residency and self-sufficiency requirements to (on more restrictive accounts) passing language, citizenship and integration tests, taking oaths of allegiance, paying fees, and renouncing other citizenship(s). Pertinently, even following the *least* restrictive account, non-citizen residents are electorally excluded for a (potentially protracted) period of time.

The chapter presented six contentions that feature prominently in the scholarly discourse. Preservation of community identity, loyalty to the state and to its long-term wellbeing, and incentives to naturalisation generally support the (partial or total) electoral exclusion of non-citizens; the absence of state accountability towards its non-citizen population, the unfairness of burden-sharing without participation, and the subjection of non-citizens to coercive state authority, absent ‘exit options’, support residence-based eligibility. The principal tenets of the above contentions and, indeed, of Part B as a whole, will be revisited in Chapter Eight *infra* and applied to the political predicament of recognised CSR1951 refugees.

PART C

CHAPTER SIX: OUT-OF-COUNTRY VOTING – THE CSR1951 REFUGEE CONTEXT

A. Introduction

The effective exercise of the right to vote ‘imposes an obligation upon the state not merely to refrain from interfering with the exercise of the right, but to take positive steps to ensure that it can be exercised’.¹ The State’s positive² obligations include, *inter alia*, the promulgation of election laws that regulate the formation of political parties, facilitate registration and voting processes, and enable access to information.

It was noted in Part B *supra* that all states have non-citizen resident populations and, pertinently for this chapter, have *non-resident citizens*. Before considering accessibility to Out-of-Country Voting (OCV) arrangements, states must first determine whether their non-resident citizens remain on the electoral roll; failing that, expatriates have to exercise their (recognised) right to return to their state and reside there in order for their (dormant) voting rights to be re-established (see Chapter Five *supra*). If expatriates *remain* eligible voters, an effective exercise of their right to vote may depend on accessible OCV procedures.³ As the analysis below demonstrates, the analytically distinct questions of *eligibility* and *accessibility* are often conflated.

¹ *Richter v Minister for Home Affairs and Others*, 2009 (3) SA 615 (CC) (12 March 2009), para 53.

² See generally Rory O’Connell, ‘Realising Political Equality: The European Court of Human Rights and Positive Obligations in a Democracy’ (2010) 61(3) Northern Ireland Law Quarterly 263.

³ See Rainer Bauböck, ‘Towards a Political Theory of Migrant Transnationalism’ (2003) 37 International Migration Review 700, 714 (arguing that, since most states do not grant voting rights to non-citizen residents, they are deprived of any opportunity for democratic participation unless they can vote in their states of citizenship).

The thesis concerns persons recognised as refugees under the Convention Relating to the Status of Refugees (CSR1951 refugees).⁴ This chapter explores their political predicament *qua expatriates*. It is suggested that expatriates requiring access to OCV procedures may be (broadly) divided to three categories: *first*, voluntary expatriates, including migrant workers and their families; *second*, Conflict Forced Migrants (CFMs); *third*, CSR1951 refugees. It is argued that, among expatriates, CSR1951 refugees are *least* likely to have access to OCV.

Section B demonstrates that residency-based eligibility (*in addition* to citizenship) is not explicitly proscribed by the ICCPR or by regional treaties, although most states consider their expatriates as eligible voters. However, whereas OCV procedures used to be rare⁵ and eligible expatriates were expected to travel to the state to cast their ballot in person, today 115 States have OCV procedures in place.⁶ ‘Soft law’ instruments, most notably of the Council of Europe (CoE), advocate an expansive approach to both eligibility and to accessibility; judicial bodies are more reluctant to require Contracting States to include expatriates on their electoral rolls, or (when they already do so) to facilitate full access to OCV procedures. In contradistinction, Contracting States to the Convention on the Protection of the Rights of All Migrant Workers and Members of their Families⁷ legally undertake to enable their expatriates to vote in their states of employment.

⁴ 28 July 1951, 189 UNTS 137, entered into force 22 April 1954.

⁵ Peter Spiro, ‘Citizenship and Diaspora: A State Home for Transnational Politics?’, available at: <http://ssrn.com/abstract=1755231> (noting that, historically ‘[t]he grant of political rights to those who have established residence outside the national territory is anomalous’).

⁶ See *Voting from Abroad: The International IDEA Handbook on External Voting* (Institute for Democracy and Electoral Assistance, 2007), 1-3 (positing that ‘external voting’ has two main purposes: ensuring the realisation of political rights for citizens living outside their state, and increasing political participation and thereby building trust and confidence in electoral processes and the democratic governments they produce).

⁷ 18 December 1990, 2220 UNTS 3, entered into force 1 July 2003 (Migrant Workers Convention).

Section C considers accessibility of CFMs to OCV procedures. It is contended that access is normally made possible against the backdrop of post-conflict transformation or peace-building. In such circumstances, elections often play a pivotal role in internationally sponsored agreements: CFMs voting in these elections are seen either as being symbolically (re)admitted to the political community of their state of origin, or as actively participating in the (new) formation thereof. International organisations would often offer their assistance and cooperation in order to secure the widest possible participation, and to enhance legitimacy and accountability. The rationale underlying OCV of CFMs and the facilitation of such procedures by states of asylum is an imminent or forthcoming repatriation of CFMs; indeed, oftentimes, the two processes take place in parallel.

Section D considers the predicament of CSR1951 refugees (notably, CSR1951 refugees may flee states that hold elections and have OCV procedures in place⁸). It is contended that, among expatriates, CSR1951 refugees have a particularly strong claim to remain eligible voters and to have access to OCV procedures:⁹ it is a constitutive element of their status that CSR1951 refugees have left their State involuntarily,¹⁰ and cannot or will not exercise their right to return and vote in person; hence, absent access to OCV, they are effectively disenfranchised. Importantly, CSR1951 refugees are *stakeholders* in their state's elections;

⁸ Bayard Roberts, *Guide to Forced Migration and Electoral Participation* (Forced Migration Online, 2003), 16, available at: <http://www.forcedmigration.org/research-resources/expert-guides/forced-migration-and-electoral-participation>.

⁹ CFMs may not necessarily satisfy the criteria set in CSR1951, and their arrival *en masse* often results in states of asylum being unable or unwilling to conduct Refugee Status Determination procedures. CFMs failing to satisfy the CSR1951 criteria may be granted 'temporary protection' status or some form of 'subsidiary protection' (see sources cited in the Introduction, nn 38-40, *supra*).

¹⁰ UNHCR, Excom, Conclusion No 62 (xli), *Note on International Protection* (5 October 1990) (noting '...(iii) the difference between refugees and persons seeking to migrate for economic and related reasons, and the need for any refugee policy to respect fundamental distinctions between the two categories of people, and be fully consonant with the principles particular to, and essential for, the protection of refugees including...non refoulement').

indeed, effective repatriation may depend on its results. Moreover, denying CSR1951 refugees access to OCV procedures creates perverse incentives for regimes which may aim to achieve desirable political results by persecution or by failing to adequately offer CSR1951 refugees protection from persecution by non-state actors.¹¹

Nevertheless, it is suggested that access of CSR1951 refugees to OCV poses unavoidable impediments over and above those facing voluntary expatriates and CFMs in post-conflict circumstances. CSR1951 refugees suffer alienage from the political community of their state of origin as a result of their well-founded fear of persecution, and their repatriation is neither imminent nor forthcoming. While international organisations may conduct OCV operations in the context of post-conflict or peace-building transitional elections, they are highly unlikely to offer such assistance to individual CSR1951 refugees.

Participation of CSR1951 refugees in OCV processes requires formal engagement with authorities of their state of origin for the purposes of identification, registration and voting. If their well-founded fear of persecution results from actions of a persecutory regime, it would be manifestly unreasonable to expect CSR1951 refugees to be willing to make such contact. Moreover, persecutory regimes may view defectors as criminals and disenfranchise them, while states of asylum may, for ideological reasons, refuse to facilitate political engagement with a persecutory regime on their territory.¹²

¹¹ Jeremy Grace, *External and Absentee Voting in Challenging the Norms and Standards of Election Administration* (IFES, 2007) 35, 39.

¹² Importantly, OCV takes place on the territory of the state of asylum; thus, it requires the acquiescence of that state. For a recent example, see 'Returning Officers', *The Economist Online*, 2 June 2012, available at: <http://www.economist.com/node/21556222> (regarding OCV in Canada of French expatriates).

In contradistinction, where the fear of persecution stems from non-state actors, states of origin that are unable to provide their citizens with adequate protection from persecution may not necessarily be able to maintain functioning OCV processes. Moreover, states of asylum may view political engagement between CSR1951 refugees and officials of their state of origin as indicative of voluntary re-availment of that state's protection, and initiate proceedings for cessation of refugee status; in turn, CSR1951 refugees may be reluctant to engage with the diplomatic missions of their state of origin for fear of losing their status.

Consequently, despite having a *prima facie* strong claim to an effective right to vote from abroad, CSR1951 refugees normally remain *de facto* disenfranchised. Their forced alienage from the political community of their state of origin means that they can neither take part in its elections through OCV procedures nor exercise their right to return to that state. In addition, as Chapter Seven *infra* demonstrates, they do not enjoy the protection abroad of their state of origin. In light of these predicament, Chapter Eight *infra* addresses the main contention of this thesis, namely that CSR1951 refugees have a unique need for citizenship-dependent rights in their state of asylum for the indeterminate period during which they remain refugees, and that their 'protection gap' may be mitigated by enfranchisement in their state of asylum.

B. Out-of-Country Voting of Voluntary Migrants

1. OCV and the International Covenant on Civil and Political Rights (ICCPR)

Article 25 of the ICCPR stipulates¹³ that '[e]very *citizen* shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and *without unreasonable restrictions...*(2) *to vote* and to be elected at genuine periodic elections which shall be by

¹³ GA/Res/2200 (XXI), 16 December 1966, 999 UNTS 171, entered into force 23 March 1976.

universal and equal suffrage.’ In tandem, Article 12(4) pronounces that every person has a right to return ‘to his own country’¹⁴ and reside there.

Chapter Two *supra* considered Article 25 in the context of non-citizen suffrage. The Human Rights Committee (HRC) notes¹⁵ that ‘the right provided for by Article 25 is not an absolute right and that restrictions of this right are allowed as long as they are not discriminatory or unreasonable.’ Residency is *not* one of the prohibited grounds in Article 2 of the ICCPR; hence, the question is whether residency may be considered a *reasonable* restriction on the exercise by an otherwise eligible citizen of her right to vote.¹⁶

According to Article 2(2), State Parties are required to respect and ensure rights to all persons within their territories and subject to their jurisdiction. The HRC opined¹⁷ that the ICCPR may apply extraterritorially to ‘anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.’ Indeed, it may be argued

¹⁴ The provision clearly applies to citizens, and potentially to other persons who have a strong attachment to the state. In General Comment No 27: *Freedom of movement* (Article 12), CCPR/C/21, Rev 1, Add 9 (2 November 1999), the HRC notes that ‘[t]he right of a person to enter his or her own country recognizes the special relationship of a person to that country’ and considers ‘that there are few, if any, circumstances in which deprivation of the right to enter one’s own country could be reasonable.’ It emphasises that ‘[t]he right to return is of the utmost importance for refugees seeking voluntary repatriation’. Ibid, paras 19 and 21.

¹⁵ Communication 500/1992 *Josze Debreczeny v the Netherlands*, para 9.2. According to the HRC, the factors which should determine whether a particular residency requirement is reasonable are *the nature and purpose* of the election, and the effect *on the concerned population*; see Communication 932/2000 *Gillot v France*, para 14.2 (holding that the imposition of lengthy prior residency requirements which effectively disenfranchised French settlers in the context of a referendum on autonomy for the pacific territory of New Caledonia was reasonable).

¹⁶ Cf the American Convention on Human Rights, 22 November 1969, art 23(1): ‘[e]very citizen shall enjoy the following rights and opportunities: (b) *to vote...*in genuine periodic elections, which shall be by universal and equal suffrage...’; art 23(2): ‘The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph *only on* the basis of age, nationality, *residence*, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings’ (my emphases). In contradistinction, art 13 of the African Charter on Human and Peoples’ Rights (1982) 21 ILM 58 pronounces that ‘[e]very citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law’ without explicit qualifications (my emphasis).

¹⁷ HRC, General Comment No 31: *The Nature of the General Legal Obligation imposed on States Parties to the Covenant*, CCPR/C/21, Rev 1, Add 13 (29 March 2004), para 10.

that a purposive interpretation of the ICCPR entails that, for the purposes of Article 25, expatriates are under effective control of their state.¹⁸ The HRC notes¹⁹ that '[s]tates must take effective measures to ensure that all persons entitled to vote are able to exercise that right [to vote]'. Nevertheless, it implicitly acknowledges the legitimacy of residency requirements by maintaining²⁰ that '*when* residency requirements apply...they must be reasonable...and should not be imposed in such a way as to exclude the homeless from the right to vote' (my emphasis).

2. OCV in the Council of Europe

Article 3 of Protocol 1 of the European Convention on Human Rights (ECHR) proclaims²¹ that '[t]he High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which ensure the free expression of the opinion of the people in the choice of the legislature.' While the provision does not explicitly enunciate an *individual* right to vote, the European Commission on Human Rights (EComHR) held in *Mathieu-Mohin*²² that

¹⁸ Caroline Carter, 'The Right to Vote for Non-resident Citizens: Considered through the example of East Timor' (2011) 46 Texas International Law Journal 655, 657.

¹⁹ General Comment No 25: *The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to public service* (Article 25), CCPR/C/21, Rev 1, Add 7 (12 July 1996), para 3.

²⁰ Ibid, para 11. The latter point may be significant in the context of CSR1951 refugees. See also Inter-Parliamentary Union, *Declaration on Criteria for Free and Fair Elections*, adopted unanimously by the Inter-Parliamentary Council in its 154th session, Paris, 26 March 1994, art 2(1): '[e]very adult citizen has the right to vote in elections on a non-discriminatory basis'; art 2(3): '[n]o eligible citizen shall be denied the right to vote or disqualified from registration as a voter, otherwise than in accordance with objectively verifiable criteria prescribed by law, and provided that such measures are consistent with the State's obligations under international law'; and art 2(5): '[e]very voter has the right to equal and effective access to a polling station in order to exercise his or her right to vote'.

²¹ Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, ETS No 005; Protocol I, Enforcement of certain Rights and Freedoms not included in Section I of the Convention, Paris, 20 March 1952, ETS No 009.

²² App No 9267/81 *Mathieu-Mohin and Clerfayt v Belgium* (2 March 1987), para 54.

the provision entails a subjective ‘right to vote’ based on the concept of ‘universal suffrage’.²³ It further held²⁴ that, while the right to vote is not absolute, its exercise should not be curtailed to such an extent as to impair its ‘very essence’ and deprive it of its effectiveness.

OCV features highly on the agenda of the Council of Europe (CoE). Its Committee of Ministers adopted a recommendation stipulating²⁵ that the right to vote is an essential part of the democratic process, and that every European expatriate should be *entitled* to fully exercise it. The Parliamentary Assembly of the Council of Europe (PACE) adopted a series of ‘soft law’ instruments concerning access to OCV. A 2004 recommendation entitled *Links between Europeans Living Abroad and their Countries of Origin* pronounced²⁶ that expatriates should have ‘the right to vote...in embassies and consulates in the host states’ while maintaining their ‘right of return’, and called on signatories to ‘take account of their expatriates’ interest in policy making, in particular concerning questions of...political rights, including voting rights.’

²³ Ibid, para 51. See also Guy S Goodwin-Gill, *Free and Fair Elections* (Inter-Parliamentary Union, 2006), 103-4. The ECtHR has recently subjected eligibility-restricting measures to heightened scrutiny. See eg App No 33802/06 *Kiss v Hungary* (Second Section Chamber) (20 May 2010) (holding that a provision in the Hungarian Constitution disenfranchising persons under the partial guardianship of another due to their mental incapacity is in contravention of Article 3 of Protocol I. The ECtHR emphasised that, where a provision disenfranchises ‘a particularly vulnerable group in society’, the ‘margin of appreciation’ must be considered narrower and the state must offer very weighty reasons for its decisions). See also its recent cases concerning prisoner voting: App No 126/05 *Scoppola* (No 3) v *Italy* (GC) (22 May 2012); App No 20201/04 *Frodl v Austria* (First Section Chamber) (8 April 2010); App No 74025/01 *Hirst* (No 2) v *UK* (Fourth Section Chamber) (30 March 2004); (GC) (6 October 2005). For analysis of prisoner voting jurisprudence, see Reuven (Ruvi) Ziegler, ‘Legal Outlier, Again? U.S. Felon Suffrage: Comparative and International Human Rights Perspectives’ (2011) 29(2) *Boston University International Law Journal* 197, 222-34.

²⁴ *Mathieu-Mohin* (n22), paras 54, 56.

²⁵ Recommendation R(86), *The Exercise in the State of Residence by Nationals of other Member States of the Right to Vote in the Elections of the State of Origin* (21 March 1986). Notably, the CoE is advocating OCV of non-resident citizens and enfranchisement of non-citizen residents; Convention on the Participation of Foreigners in Public Life at Local Level, Strasbourg, 5 February 1992, CETS No 144 (see also Chapter Two *supra*).

²⁶ Recommendation No 1650 (2004), §5.v.d.iv, paras 6 and 9.1.c respectively. The PACE notes that ‘it is in states’ interest that their nationals should continue to exercise their nationality consciously and actively’ and that ‘nationals can play an important go-between role in host countries, working for better political, cultural, linguistic, economic, financial and commercial relations between their countries of origin and the countries where they live’. Ibid, para 3.

The explanatory memorandum emphasised²⁷ that ‘[t]he right to vote may be regarded as the principal attribute of citizenship and its exercise as the very basis of democracy’ and that ‘[m]ember States [should] allow their expatriates to vote by post, in person at their consulates, or by proxy. In its 2005 resolution entitled *Abolition of Restrictions on the Right to Vote*, PACE urged²⁸ states to ‘allow citizens living abroad to participate to the fullest extent possible in the electoral process’, *inter alia*, by ‘grant[ing] electoral rights to all their citizens (nationals) without imposing residency requirements.’

A 2011 Venice Commission Report entitled *Out-of-Country Voting* recommended²⁹ that ‘states adopt a *positive approach* to the right to vote of citizens living abroad, since this right fosters the development of national and European citizenship’. Nonetheless, it noted³⁰ that ‘the Commission does *not* consider at this stage that the principles of the European electoral heritage *require* the introduction of such a right’. As the analysis below demonstrates, the European Court of Human Rights (ECtHR) has generally refrained from proscribing the application of residency eligibility requirements and (absent such requirements) from requiring states to ensure effective access to OCV procedures.

In a case concerning eligibility, the Fourth Section Chamber rejected a challenge to Lichtenstein’s legislation, stipulating that only Liechtenstein nationals who ordinarily reside (*ordentlicher Wohnsitz*) in Liechtenstein one month before the date of the elections or the

²⁷ Ibid, *Explanatory Memorandum*, §4.3.1, para 36.

²⁸ Resolution No 1459 (2005), paras 7 and 11(b). See also Recommendation No 1714 (2005), para 1.ii.

²⁹ Venice Commission, *Report on Out-of-Country Voting*, adopted at its 87th plenary (17-18 June 2011).

³⁰ Ibid, paras 98-9.

referendum are entitled to vote. The judgment³¹ offered four rationales: *first*, a non-resident citizen is less directly or less continually concerned with his state's day-to-day problems and has less knowledge of them. *Second*, it is impracticable for parliamentary candidates to present electoral issues to citizens abroad; moreover, non-resident citizens have no influence on the selection of candidates or on the formulation of their electoral programmes. *Third*, there is a close connection between the right to vote in parliamentary elections and the fact of being directly affected by the acts of the political bodies so elected. *Fourth*, the legislature may legitimately wish to limit the influence of citizens living abroad in elections on issues which, while admittedly fundamental, primarily affect persons living in the state.³² The judgment emphasised³³ that Mr Hilbe (residing in Switzerland) retains an *unqualified right to return* to Lichtenstein; should he choose to exercise this right, his right to vote would be restored. The (effective) right of return was thus recognised as a justification for *ineligibility* of expatriates.

The Second Section Chamber upheld a challenge to a residency requirement for *candidacy*. Ukraine contended that the applicant had provided false information concerning his residency in the five years preceding the elections. The Chamber reiterated³⁴ that residency 'was not an unreasonable or arbitrary requirement *per se*', noting that 'stricter requirements may be imposed on the eligibility to stand for election to parliament, as distinguished from voting eligibility', as it would 'enable [candidates] to acquire sufficient knowledge of the

³¹ App No 31981/96 *Hilbe v Liechtenstein* (GC) (7 September 1999) (in French). Cf Court of Justice of the European Union (CJEU) judgment concerning the exclusion of Dutch nationals residing in Dutch overseas territories from participation in elections for the European Parliament (C-300/04 *Eman v College van burgemeester en wethouders van Den Haag* [2006] ECR I-08055). The CJEU applied similar reasoning to uphold the reasonableness of residency requirements. For discussion, see generally Panos Stasinopolous, 'EU Citizenship as a Battle of the Concepts: *Travailleur v Citoyen*' (2011) 4(2) *European Journal of Legal Studies* 74.

³² *Hilbe* (n31) (p3 of the English translation).

³³ *Ibid.*

³⁴ App No 17707/02 *Melnichenko v Ukraine* (Second Section Chamber) (30 March 2005).

issues associated with the national parliament's tasks'.³⁵ However, in the circumstances of the case, since Ukrainian law did not distinguish between 'legal' and 'habitual' residence, the fact that the applicant's internal passport (*Propsika*) indicated that he retained legal residence should have sufficed for satisfying registration requirements.³⁶

Moreover, the applicant has been granted *refugee* status in the United States, and the Chamber recognised that 'he [the applicant] was in a difficult position: if he had stayed in Ukraine, his personal safety or physical integrity might have been seriously endangered, rendering the exercise of any political rights impossible, whereas, in leaving the state, he was prevented from exercising such rights'.³⁷ Hence, it may be assumed that *Melnychenko* would have been decided differently, had the applicant *not* been a recognised refugee.

CoE jurisprudence regarding restrictive access to *OCV procedures* dates back to 1979, when the EComHR rejected a challenge to U.K. legislation restricting OCV procedures to servicemen and diplomats. The EComHR reasoned³⁸ that servicemen and diplomats are distinguishable from other expatriates in that they 'are not living abroad voluntarily but have been sent to a state other than their own by their government in the performance of services to be rendered their country'. The EComHR also noted that 'there is...no risk of electoral fraud in their use of postal votes'.

³⁵ Ibid, paras 56-7.

³⁶ Ibid, para 61. *Cf* Judge Loucaides (dissenting), maintaining that reliance on the applicant's 'undisputed *actual* residence rather than on the *formal* registration of such residence...cannot be considered an arbitrary or even a wrong decision' (emphases in original).

³⁷ Ibid, para 65. See also the analysis in Section D *infra*.

³⁸ App No 7730/76 *X v United Kingdom* (28 February 1979), European Commission of Human Rights Decisions and Reports 15, p 137.

In *Doyle*,³⁹ current U.K. legislation, denying access to OCV procedures to non-resident citizens absent from the U.K. *for more than fifteen years*, withstood legal challenge. The Fourth Section Chamber held that ‘over such a time period, the applicant may reasonably be regarded as having weakened the link between himself and the U.K. and he cannot argue that he is affected by the acts of political institutions to the same extent as resident citizens’. The court emphasised⁴⁰ that if ‘he [the applicant] returns to live in the U.K., his eligibility to vote as a British citizen will revive’.

Another challenge to U.K. legislation is pending before the Fourth Section Chamber.⁴¹ The applicant, a Second World War veteran living with his Italian wife in Italy, argues⁴² that the rationales that were outlined in *Hilbe* (and cited in *Doyle*) for justifying restrictions on access to OCV procedures are archaic. Modern technology enables non-resident citizens to keep in contact with their state of origin, and it is entirely possible for a person living in Italy to be as informed as a person living in London on the day-to-day problems of the U.K. and to follow a general elections campaign. Moreover, since the applicant is entitled to return to the U.K. at any time, his interests are directly affected, *inter alia*, by NHS reforms, pensions, financial and banking regulations, and taxation.

³⁹ App No 30158/06 *Doyle v UK* (Fourth Section Chamber) (6 February 2007).

⁴⁰ Ibid. Cf the High Court judgment in *Preston v Wandsworth Borough Council* [2011] EWHC 3174, paras 39-42 (rejecting a claim that the UK legislation serves as a deterrent for British citizens *qua* EU nationals wishing to exercise their EU right to freedom of movement. The High Court held that, while the right to vote is a fundamental UK constitutional right and the claimant is aggrieved by its removal, the UK government was entitled to hold that there is a legitimate objective which the rule is designed to achieve, namely to remove the right to vote from those whose links with the UK have diminished and who are not, for the most part at least, directly affected by the laws passed in the UK. According to the judgment, there is no evidence to suggest that the rule creates a barrier of any kind to freedom of movement. The judgment was upheld by the Court of Appeal in *R (on the application of Preston) v Lord President of the Council*, [2012] EWCA Civ 1378.

⁴¹ App No 19480/09 *Shindler v UK* (pending).

⁴² Ibid, pp 4-5 to the applicant’s submission (draft with author).

In 2010, the First Section Chamber upheld⁴³ a legal challenge mounted by Greek nationals residing in Strasbourg and working for the CoE. Article 51(4) of the 1975 Greek Constitution stipulates that ‘[t]he conditions for the exercise of the right to vote by persons living outside the country may be specified by statute adopted by a majority of two thirds of the total number of Members of Parliament.’ The applicants argued that, absent legislative regulation setting up OCV procedures in Greek Embassies and Consulates, they were effectively unable to vote in Greek parliamentary elections.

The Chamber held (by a 5-2 majority, Judges Vajic and Flogaitis dissenting)⁴⁴ that, whilst the applicants could have returned to Greece in order to vote, a *de facto* obligation to travel is expensive and disturbs professional and family life. Thus, the lack of legislative implementation in respect of OCV constitutes unfair treatment of Greek citizens living abroad, particularly of ‘expatriates who, due to their financial circumstances or the fact that their place of residence is even further away, are *de facto* deprived of the opportunity to exercise their right to vote.’ Per *Melnychenko*, the Chamber emphasised that restrictions on the exercise of voting rights (the ‘active’ aspect) should be subject to greater scrutiny than restrictions on the ‘passive’ aspect (the right to stand for election), permitting a narrower ‘margin of appreciation’ to Contracting States. Drawing on the above-mentioned CoE resolutions and recommendations, as well as on legislative developments in other members of the CoE, the Chamber held⁴⁵ that ‘Greece clearly falls short of the common denominator...as regards the effective exercise of voting rights by expatriates.’

⁴³ App No 42202/07 *Sitaropolous v Greece* (First Section Chamber) (8 July 2010).

⁴⁴ Ibid, para 43.

⁴⁵ Ibid, para 46.

In March 2012, the Grand Chamber (GC) *unanimously reversed*.⁴⁶ Its reasoning (based on *Hilbe*) seemed to conflate issues of eligibility and accessibility. The GC maintained⁴⁷ that ‘bright line’ rules are inevitable even if they may not do justice to particular applicants. According to the GC,⁴⁸ Contracting States are *not* under an obligation to enable citizens living abroad to exercise their right to vote, nor is there a European consensus of which Greece supposedly falls short. On the facts, while traveling to Greece in order to exercise one’s right to vote disrupts one’s financial, family and professional lives, such disruption is not ‘disproportionate to the point of impairing the very essence of the voting rights in question’.⁴⁹

The questions whether expatriates should retain their right to vote and, if so, whether they should have access to OCV procedures receive increasing political and jurisprudential attention, albeit with divergent outcomes. Nonetheless, it is asserted that four assumptions underly all cases involving *voluntary* expatriates: *First*, states of origin can establish effective OCV procedures if they so wish. *Second*, in order to vote from abroad, expatriates are able to engage with diplomatic services of their states of origin if they so wish. *Third*, states of residence generally tolerate such political foreign engagements on their territory. *Fourth*, expatriates can return to their state to vote in person, though it may cause disruption to their

⁴⁶ App No 42202/07 *Sitaropolous v Greece* (GC) (15 March 2012).

⁴⁷ Ibid, paras 68-9.

⁴⁸ Ibid, para 75.

⁴⁹ Ibid, para 80. Cf the South African Constitutional Court judgment in *Richter* (n1), quashing domestic legislation listing professions and post-holders that may enjoy access to OCV procedures, to the exclusion of others, including the applicant (a teacher working in the United States). The Court held that ‘a voter may not complain if the burden imposed does not prevent the voter from voting, as long as the voter takes reasonable steps to do so. Ibid, para 56. However, ‘[while] [i]t is acceptable to ask voters to travel some distances from their homes to a polling station...[i]t cannot be said...that requiring a voter to travel thousands of kilometres across the globe to be in their voting district on voting day is exacting reasonable compliance from a voter’. Ibid, para 68. The Court further observed that expatriate voting ‘is an expression both of...continued commitment to...[the] country and...civic-mindedness from which...democracy will benefit. Ibid, para 69.

work and family life. As Section D *infra* demonstrates, none of these conditions are likely to be satisfied regarding access of CSR1951 refugees to OCV procedures.

3. OCV and the Migrant Workers Convention

The Migrant Workers Convention concerns migrant workers and their families; *refugees* are explicitly excluded from its purview.⁵⁰ The treaty imposes obligations both on states of *employment* (defined as states ‘where the migrant worker is to be engaged, is engaged or has been engaged in a remunerated activity, as the case may be’) and on sending states (defined as states ‘of which the person concerned is a national’).⁵¹ Thus, the treaty aims to protect rights of migrants *qua non-citizen residents*⁵² as well as their rights *qua expatriates* of their sending states. By contrast, Chapter Two *supra* demonstrated that CSR1951 imposes obligations only on the state of asylum in view of the political predicament of CSR1951 refugees.

Alongside the individual right to have access to diplomatic and consular services, enunciated in Article 23 (see discussion in Chapter Seven *infra*), the Migrant Workers Convention imposes obligations on states of origin with regard to voting rights of their citizens. According to Article 41(1), ‘[m]igrant workers and members of their families *shall* have the right to participate in public affairs of their State of *origin* and to vote...at elections of that State, in accordance with its legislation’ (my emphases).

⁵⁰ Migrant Workers Convention, art 3(d). A ‘migrant worker’ is defined in art 2(1) as ‘a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.’ Notably, the Convention steers clear of questions of migration control (art 79: ‘Nothing in the present Convention shall affect the right of each State Party to establish the criteria governing admission of migrant workers and members of their families’).

⁵¹ Ibid, art 6.

⁵² Similarly to CSR1951, the Migrant Workers Convention distinguishes between rights granted to all migrant workers and members of their families regardless of legal status (enumerated in part iii) and ‘[o]ther rights of migrant workers and members of their families who are documented or in a regular situation’ (enumerated in Part iv) which such persons shall enjoy in addition to the rights set forth in part iii.

In order to regulate acts taking place outside the state's territory, the acquiescence of the territorial state is required; hence, OCV procedures are subject to limitations imposed by host states.⁵³ In view of this (international) norm, Article 41(2) of the Migrant Workers Convention pronounces that states of employment ‘shall, as appropriate and in accordance with their legislation, facilitate the exercise of these rights.’

Alongside the obligations regarding voting rights of migrants in elections of their states of *origin*, Article 42(3) of the Migrant Workers Convention stipulates that ‘[m]igrant workers may enjoy political rights in the State of *employment* if that State, in the exercise of its sovereignty, grants them such rights’ (my emphasis). Hence, like the CoE, the Migrant Workers Convention considers OCV of non-resident citizens and enfranchisement of non-citizen residents to be conceptually compatible.

The Committee on Migrant Workers (the treaty’s monitoring body) receives reports concerning fulfilment of convention obligations.⁵⁴ The Committee has commended Mali, noting⁵⁵ ‘with satisfaction that many expatriate Malians have the opportunity to participate in certain countries’. Similarly, it commended⁵⁶ Mexico, which established OCV processes in 2005, as well as Azerbaijan, BiH, Colombia, Ecuador, The Philippines, and Senegal. By

⁵³ Carlos Navarro, ‘The Political Rights of Migrant Workers and External Voting’ in *Voting from Abroad* (n6), 178.

⁵⁴ The individual complaints mechanism requires 10 accessions; so far, only two State Parties have acceded to it.

⁵⁵ CMW/C/MLI/CO/1 of 31 May 2006.

⁵⁶ CMW/C/MEX/1 of 18 November 2005 (Mexico); CMW/C/AZE/CO/1 of 19 May 2009 (Azerbaijan); CMW/C/BIH/CO/1 of 3 June 2009 (BiH); CMW/C/COL/CO/1 of 22 May 2009 (Colombia); CMW/C/ECU/2 of 26 January 2010 (Ecuador); CMW/C/PHL/CO/1 of 22 May 2009 (The Philippines); CMW/C/SEN/1 of 4 January 2010 (Senegal).

contrast, the Committee expressed concern⁵⁷ that no arrangements were established by Albania, Algeria, Bolivia, Chile, Egypt, El Salvador, Guatemala, Paraguay, and Sri Lanka. Two states, Azerbaijan and Paraguay, indicated⁵⁸ in their reports that they entitle non-citizen residents to vote in local elections, in accordance with the recommendation in Article 42(3).

Article 8(2) of the Migrant Workers Convention further affirms⁵⁹ the state-citizen bond by enunciating the *right* of migrant workers and members of their families ‘at any time to enter and remain in their state of origin.’ Hence, the underlying assumption is similar to that of Article 12(4) of the ICCPR, namely that voluntary migrants *retain* their bond of citizenship with their state of origin whilst residing abroad, reflected in their right to return to that state at will, in the availability of protection abroad, and in the dual commitment on the part of the sending state and of the state of employment to effective exercise of OCV.

C. Out-of-Country Voting of Conflict Forced Migrants

Conflicts oftentimes cause displacement.⁶⁰ Settlements of conflicts may include elections and, occasionally, the establishment of representative institutions as part of a transition to

⁵⁷ CMW/C/ALB/CO/1 of 22 February 2010 (Albania); CMW/C/DZA/1 of 22 June 2008 (Algeria); CMW/C/BOL/CO/1 of 29 April 2008 (Bolivia); CMW/C/CHL/CO/1 of 19 October 2011 (Chile); CMW/C/EGY/CO/1 of 25 May 2007 (Egypt); CMW/C/SLV/CO/1 of 4 February 2009 (El Salvador); CMW/C/GTM/CO/1 of 18 October 2011 (Guatemala); CMW/C/PRY/1 of 23 February 2011 (Paraguay); CMW/C/LKA/CO/1 of 19 October 2009 (Sri Lanka).

⁵⁸ CMW/C/AZE/CO/1 of 19 May 2009 (Azerbaijan); CMW/C/PRY/1 of 23 February 2011 (Paraguay).

⁵⁹ Nonetheless, the Migrant Workers Convention has only 45 signatories. As most of the duties are imposed on states of employment, State Parties tend to be *sending* states such as Mexico and the Philippines, which consider the treaty as a vehicle to protect their citizens working abroad; states of employment are noticeably absent. Moreover, at present, the only European State Party is BiH. See Srdjan Vucetic, ‘Democracies and International Human Rights: Why is there no Place for Migrant Workers?’ (2007) 11(4) International Journal of Human Rights 403, 418 (analysing the *Travaux*, Vucetic suggests that the Migrant Workers Convention was largely drafted by developing states for developing states).

⁶⁰ Grace defines a ‘Conflict Forced Migrant’ as any person displaced from their home community due to a deteriorating security or human rights situation generally as a consequence of violence; notably, this is a far

democracy as a key component of durable peace-building.⁶¹ Transitional elections in which CFMs are effectively disenfranchised may be considered deficient; by contrast, participation of CFMs enhances the legitimacy of the outcomes of negotiations and of election results, and increases the commitment of CFMs to the peace-building process. Elections may help reunite a conflict-torn society around common institutions.⁶²

It may be argued that the involvement of CFMs in post-conflict elections has played an important role in the peace-building process in cases as diverse as Angola, Bosnia-Herzegovina, Cambodia, Guatemala, Mozambique, and Nagorno-Karabakh, by providing direct opportunity for conflict victims to participate in the selection of their post-conflict leadership.⁶³ Indeed, Diaspora members have participated in peace-building commissions and in other forms of post-conflict political activity: for instance, the Iraqi Diaspora has recently played a prominent role in post-invasion governance.⁶⁴

Recognition of a claim to effective citizenship, and consequent inclusion of CFMs in formal political activities such as elections or referenda, serve as powerful symbols of their (re)admission to the political community as equal citizens.⁶⁵ The underlying assumptions

broader definition than that of a CSR1951 refugee. Jeremy Grace, *Enfranchising Conflict Forced Migrants* (IOM Participatory Elections Project Discussion Paper no 2, 2003), 5.

⁶¹ Jeremy Grace, *The Electoral Rights of Conflict Forced Migrants: A Review of Relevant Legal Norms and Instruments* (IOM Participatory Elections Project discussion paper no 1, 2003), 3.

⁶² The Electoral Knowledge Network, *Voting from Abroad*, available at: <http://aceproject.org/ace-en/topics/va/external-voting-a-world-survey-of-214-countries>. See also *Voting from Abroad* (n6), 18-9.

⁶³ James Milner, *Refugees and the Peace-Building Process* (UNHCR, 2011), 5-6.

⁶⁴ Katy Long, *Voting with Their Feet: A Review of Refugee Participation and the Role of UNHCR in Country of Origin Elections and other Political Processes*, (UNHCR, 2010) 47. Cf 'Expats vote start Egypt's Presidential race', 20 May 2012, available at: <http://www.ft.com/cms/s/0/09b52072-a102-11e1-9fbd-00144feabdc0.html#axzz27qrJKOgM>.

⁶⁵ Long (n64), 13.

behind electoral processes taking place in such circumstances are either that the conflict has ended or that it is likely to be resolved soon and, consequently, that repatriation is either imminent or forthcoming.

UNHCR notes⁶⁶ that ‘conflict settlements often include the holding of national elections, and refugees may be expected to repatriate according to a certain schedule in order to vote’. Repatriation arguably plays an important part in validating the post-conflict political order. When CFMs voluntarily go back to their homeland, they are quite literally ‘voting with their feet’ and expressing confidence in the future of their state; enabling CFMs to repatriate and express their political preference is arguably inherent in the concept of a free, fair and democratic election.⁶⁷

The logic of repatriation and enfranchisement guides the interpretation of Article 5(c) of the *Convention on the Elimination of All Forms of Racial Discrimination* (CERD).⁶⁸ The provision requires signatories to guarantee the enjoyment of ‘political rights, in particular the right to participate in elections, *to vote...on the basis of universal and equal suffrage*’, while Article 5(d)(ii) guarantees everyone ‘[t]he right to leave any country, including one's own, *and to return to one's country.*’

The Committee on the Elimination of Racial Discrimination emphasised⁶⁹ that ‘(a) all such refugees and displaced persons have the right freely to return to their homes of origin

⁶⁶ *Handbook on Voluntary Repatriation* (UNHCR, 1996), 66.

⁶⁷ *The State of the World's Refugees: A Humanitarian Agenda* (UNHCR, 1997), ch 4.

⁶⁸ 21 December 1965, 660 UNTS 195, entered into force 4 January 1969.

⁶⁹ CERD Committee, General Recommendation No 22, *Article 5 and Refugees and Displaced Persons*, Forty-Ninth session, UN Doc A/51/18, annex VIII at 126 (1996), para 2. The recommendation recalls ‘the 1951

under conditions of safety’, and ‘...*after the return* to their homes of origin, the right to *participate fully and equally* in public affairs at all levels...’⁷⁰ (my emphases).

Annex 7 of the Dayton agreement concerning BiH⁷¹ is illustrative of the approach to participation of CFMs in a post-conflict electoral process. The agreement stipulated⁷² that ‘[a]ll refugees and displaced persons have the right freely to return to their homes of origin’ and that ‘the parties confirm that they will accept the return of such persons who have left their territory, including those who have been accorded temporary protection by third countries’. The agreement established⁷³ that ‘the parties shall ensure that refugees and displaced persons are permitted to return in safety, without risk of harassment, intimidation, persecution or discrimination.’

Crucially, the agreement pronounced⁷⁴ that ‘[t]he exercise of a refugee’s right to vote shall be interpreted as confirmation of his or her intention to return to Bosnia and Herzegovina’ and that ‘by Election Day, the return of refugees should already be underway, thus allowing many to participate in person in elections in Bosnia and Herzegovina.’ Had CFMs been excluded from the democratic processes, the legitimacy of these processes would be strongly compromised.

Convention and the 1967 Protocol relating to the Status of Refugees as the main sources of the international system for the protection of refugees in general’.

⁷⁰ Ibid, paras 2(a) and (d) respectively.

⁷¹ General Framework Agreement for Peace in Bosnia and Herzegovina, *Agreement on Refugees and Displaced Persons*, signed on 14 December 1995.

⁷² Ibid, para 1.

⁷³ Ibid, para 2.

⁷⁴ Ibid, annex 3: Agreement on Elections, art iv (Eligibility), para 1.

There were instances in which the linkage between elections and repatriation had arguably led states of asylum to withdraw protection prematurely while effective repatriation was impeded by local resistance.⁷⁵ Indeed, host states eager to see CFMs depart may attempt to bring asylum to an imminent end following participation in post-conflict elections.⁷⁶ For instance, in the 1997 Liberian elections, Guinea refused re-entry to Liberians who had returned to Liberia to vote, even though international agencies argued that *repatriation* was unsafe.⁷⁷

Furthermore, host states may prefer to see immediate repatriation of CFMs rather than allow OCV on their territory.⁷⁸ They may be concerned about jeopardising their security, stability and sovereignty by allowing political party campaigning, voter education, and voter registration to take place on their soil. Thus, the international community may have to ‘persuade’ host states that participation of CFMs in elections will expedite their repatriation.

An Organisation for Security and Cooperation in Europe (OCSE) conference convened in 1999 resolved⁷⁹ ‘to secure the full right of persons belonging to minorities to vote and to facilitate the right of refugees to participate in elections in their countries of origin.’ It may be argued that effective OCV of CFMs sometimes *requires* international support, *inter alia*, through provision of funding, administrative assistance in issuance of documentation,

⁷⁵ Lauren Prather and Erik S Herron, ‘Enfranchising Displaced Voters: Lessons from Bosnia-Herzegovina’ (2007) 6(4) Election Law Journal 354, 357.

⁷⁶ Jeremy Grace and Erin Mooney, ‘Peacebuilding through the Electoral Participation of Displaced Populations’ 28(1) (2009) Refugee Survey Quarterly 95, 102.

⁷⁷ Brett Lacy, *Building Accountability, Legitimacy and Peace: Refugees, Internally Displaced Persons, and the Right to Political Participation* (International Foundation for Electoral Systems, 2004), 4.

⁷⁸ Liberian and Cambodian refugees refused to allow electoral activities of the home state on their territories thereby compelling refugees to repatriate if they wished to vote. Dennis Gallagher and Anna Schowengerdt, ‘Participation of Refugees in Postconflict Elections’ in Krishna Kumar (ed), *Postconflict Elections, Democratization, and International Assistance* (Lynne Rienner Publishers, 1998) 199, 208-9.

⁷⁹ Istanbul Summit Declaration, 18-19 November 1999, para 26.

registration, distribution of election material, monitoring and verification. The International Organisation for Migration (IOM) has conducted large-scale OCV operations in transitional elections.⁸⁰ From the point of view of CFMs, the involvement of the international community creates a secure and sustaining environment auspicious to electoral participation.

It may be concluded that, in contradistinction from voluntary expatriates, effective participation of CFMs in OCV is likely to occur in a post-conflict or peace building context, with international assistance, and with a view to forthcoming repatriation, notwithstanding the challenges relating to premature termination of protection.

D. Out-of-Country Voting of CSR1951 Refugees

1. Introduction

The well-founded fear of persecution that the international community recognises as a basis for CSR1951 refugee status is a symptom of a more fundamental political rupture between the refugee-citizen and their state of origin, leaving a CSR1951 refugee without national protection and without access to a political forum.⁸¹

⁸⁰ The IOM led OCV processes in the 1999 BiH elections through the 'Refugee Elections Steering Group' set up following the signing of a Memorandum of Understanding (MOU) between the IOM and the OSCE. IOM offices in 17 States registered 630,000 voters, of whom 394,000 cast their ballots. The IOM provided similar assistance following the 1999 East Timor tripartite agreement (Indonesia, Portugal, and the United Nations). In 2000-2001, the IOM operated the 'Out of Kosovo Voting Programme' registering nearly 300,000 Kosovars. The IOM was also responsible for OCV of 846,000 Afghani refugees residing in Pakistan and Iran in the 2004 elections in Afghanistan; an MOU was signed with the respective governments. In 2005, the IOM assisted the Independent Electoral Commission of Iraq in registering and administering elections for the 2005 Transitional National Assembly in 14 states, registering 279,000, of whom 265,000 voted (the information is available on the IOM website: <http://www.iom.int/cms/home>).

⁸¹ Long (n64), 5. Cf Andrew Shacknove, 'Who is a Refugee?' (1985) 95 Ethics 274, 277 (arguing that persecution is a sufficient but not a necessary condition for the severing of the normal social bond; persecution is one manifestation of a broader phenomenon: the absence of protection of the citizen's basic needs, which constitutes the full and complete negation of society and the basis of refugee-hood). Shacknove asserts that 'under normal conditions, protection appends to the citizen following him into foreign jurisdictions. For the refugee, protection of basic needs is absent, even at home' and suggests that 'refugee status should only be granted to persons whose

Hathaway suggests⁸² that a CSR1951 refugee is ‘by definition a person who no longer enjoys the assumed bond between citizens and the state’. Because CSR1951 refugees receive a form of substitute protection, international refugee law excludes those who enjoy the basic entitlements of citizenship in a national community.⁸³ Forced displacement is an indication that the web of rights and obligations which links the citizen to her state has broken down.⁸⁴

It is asserted that, OCV requires a cumulative tri-partite effort on part of the CSR1951 refugee, the state of origin, and the state of asylum. Notwithstanding normative commonalities with CFMs, the unique predicament of CSR1951 refugees dictates that they are unlikely to enjoy effective access to OCV.

2. CSR1951 Refugees and CFMs in Post-conflict Elections: Normative Commonalities

Section B considered jurisprudence challenging preferential access to OCV procedures of non-resident citizens serving as military personnel and diplomats. It was suggested that their claims are considered stronger than general claims of voluntary migrants because they are sent abroad by their governments, render services to their state, and remain strongly attached thereto.

By contrast, CSR1951 refugees, like CFMs, reside outside their state of origin involuntarily;⁸⁵ in seeking asylum, they have not in any way manifested a wish to relinquish

government fails to protect their basic needs, who have no remaining recourse other than to seek international restitution of these needs, and who are so situated that international assistance is possible’. Ibid, 284.

⁸² James C Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press, 2005), 210.

⁸³ James C Hathaway, *The Law of Refugee Status* (Butterworth, 1991), 135.

⁸⁴ *The State of the World's Refugees* (n67), ch 1: Safeguarding Human Security.

⁸⁵ Long (n64), 25.

their citizenship.⁸⁶ Indeed, an effective exclusion of CSR1951 refugees from OCV processes may create perverse incentives for persecutory governments to use displacement as a means of securing and legitimising their rule.⁸⁷ However, in terms of their relations with their state of origin, and their attachment thereto, it may be contended that CSR1951 refugees are in a diametrically opposed position to that of diplomats working at state embassies and consulates.

It has been suggested that OCV is pertinent when non-resident citizens are *stakeholders* in election results rather than merely affected by them. Mr. Shindler asserts before the ECtHR that his right to OCV as a non-resident British citizen stems, in part, from the fact that, should he choose to exercise his right to return to the U.K., he will be subject to government policies decided in his (political) absence. For recognised CSR1951 refugees, election results may even determine *whether* they are likely to be able to exercise their right to return;⁸⁸ hence, their ‘stakes’ in such elections are high.

Importantly, recognised CSR1951 refugees are entitled to hold their status until one of the *exhaustive* list of Article 1C cessation clauses can be invoked by their state of asylum, in which case they would no longer require international protection and would no longer be able to refuse to avail themselves of the protection of their state of origin.⁸⁹

⁸⁶ Gallagher and Schowengerdt (n78), 199. See also Venice Commission, *Report on Out-of-Country Voting* (24 June 2011), c.i.v (‘if persons, in exceptional cases, have been displaced against their will, they should, provisionally, have the possibility of being considered as resident at their former place of residence’).

⁸⁷ Note, in this context, the decision in *Melnichenko* (n34).

⁸⁸ See eg ‘Congolese refugees in Zambia await elections in their homeland before deciding to return’ (2 June 2006), available at: <http://unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=448049544&query=elections>.

⁸⁹ Joan Fitzpatrick, ‘The End of Protection: Legal Standards for Cessation of Refugee Status and Withdrawal of Temporary Protection’ (1998-1999) 13 *Georgetown Immigration Law Journal* 343, 346. See also Chapter Eight *infra*.

Article 1C(5) is particularly noteworthy in this context, as it concerns changes in circumstances in the state of origin of the CSR1951 refugee that have a ‘fundamental, stable and durable character’ and that result both in eradication of the refugee’s well-founded fear of being persecuted and in restoration of protection.⁹⁰ UNHCR has issued formal declarations of general cessation of refugee status regarding changes in a particular territory.⁹¹ Post-conflict or peace-building transitions are often perceived in such terms.⁹² The analysis below is premised on the assumption built into the CSR1951 framework: that absent such changes, CSR1951 refugees are either unable or unwilling to repatriate.⁹³

⁹⁰ UNHCR, ExCom, Conclusion No 65 (xlii) (1991), recalled in ExCom, Conclusion No 69 (xlili) (1992), para b. UNHCR advocates a waiting period of minimum 12-18 months before assessing developments in a country of origin. UNHCR, ExCom, Discussion Note, *The Application of the Ceased Circumstances Clause in the 1951 Convention*, UN Doc EC/SCP/1992/CRP.1 (20 December 1991), para 12. A similarly phrased cessation clause, Article 1C(6), concerns refugees who are *de jure stateless*. The analysis in the thesis centres on the predicament of refugees who *are* citizens of their state of origin, and who would be able to vote in its elections save for their persecution-induced involuntary non-residence. See also Joan Fitzpatrick and Rafael Bonoan, ‘Cessation of Refugee Status’ in Erika Feller, Volker Türk, and Frances Nicholson (eds), *Refugee Protection in International Law* (Cambridge University Press, 2003) 491, 495.

⁹¹ UNHCR, *Guidelines on International Protection: Cessation of Refugee Status under Articles 1C(5) and (6) of the convention* (2003), n3 (references to UNHCR formal declarations of general cessation regarding the situations in Poland and Czechoslovakia, 15 November 1991; Chile, 28 March 1994; Malawi and Mozambique, 31 December 1996; Bulgaria and Romania, 1 October 1997; Ethiopia, 23 September 1999; Timor Leste, 20 December 2002).

⁹² See eg James C Hathaway, ‘The Rights of States to Repatriate Former Refugees’ (2005) 20 *Ohio State Journal on Dispute Resolution* 175, 185 (suggesting that the paradigmatic change which the CSR1951 drafters conceived of was the reversion of a totalitarian regime to democratic governance).

⁹³ Cf UNHCR’s contention that the ‘compelling reasons’ clause in Article 1C(5) (textually confined to pre-convention refugees) has come to reflect a general humanitarian principle that is applicable to Article 1A(2) refugees; *Guidelines on International Protection* (n91), para 21. See also J Randal Montgomery, ‘Components of Refugee Adaptation’ (1996) 30 *International Migration Review* 679, 697-8 (arguing that refugees have a natural inclination to develop ties to the community within which they reside and a human need to build a new life following severe trauma); Gregor Noll, *Rejected Asylum Seekers: The Problem of Return* (UNHCR, 1999), 6 (suggesting that refugees may resist repatriation ‘in order to preserve the value of their integrative effort’). See also John Fitzpatrick and Rafael Bonoan, ‘Cessation (Article 1C)’ in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law* (Cambridge University Press, 2003) 492, 502 (enclosing a table of ‘ceased circumstances’ situations, ranging from Sudan in 1972 to Ethiopia in 1999).

3. Out-of-Country Voting of CSR1951 Refugees: Impediments

a. Introduction

OCV *ipso facto* takes place outside the state's territory. It requires recognition on the part of the state of origin of the need to give effect to the right to vote of its expatriates. As was noted above, in post-conflict or peace-building contexts, international assistance is oftentimes provided. By contrast, it seems highly improbable that international organisations will assist individual CSR1951 refugees to exercise OCV in their states of asylum.⁹⁴

In a [draft] policy paper, UNHCR suggests⁹⁵ that the organisation should refrain from facilitating or promoting large-scale refugee OCV unless elections are likely to be ‘transformative’. It sets four *cumulative* parameters for such engagement that are *unlikely* to be satisfied in a ‘regular’ CSR1951 refugee context: *First*, elections have to take place in post-conflict situations, and the security situation has to be generally stable. *Second*, the overall political and social environment should be generally considered conducive to free and fair elections. *Third*, the exercise of the right to vote should foster durable solutions. *Fourth*, refugees must be able to participate voluntarily in national elections and not be subjected to misrepresentation, intimidation or manipulation.

⁹⁴ Long (n64), 7.

⁹⁵ *The Participation of Refugees in Elections of their Country of Nationality and the Role of UNHCR* (UNHCR, Geneva 2010) (draft with author), 2. For instance, in 2005, UNHCR was considering whether to assist OCV of Iraqi CFMs, notwithstanding its assessment at the time that conditions in Iraq were not conducive to return, as the authorities were not yet able to protect citizens from violent attacks, and as basic services needed for a secure and stable existence could not be guaranteed. ‘Iraqi election enthusiasm reflected among refugee Diaspora’ (16 December 2005), available at: <http://www.unhcr.org/43a2e9fe4.html>. In 2010, the Iraqi Election Commission requested assistance from UNHCR regarding OCV of Iraqis living in states neighbouring Iraq (Jordan, Lebanon, Syria and Egypt). The CFMs were divided on whether to participate, citing sectarian violence as the greatest threat if they return. Wafa Amr, ‘Refugees Watch Iraqi Elections with Doubts and Hopes’ (1 March 2010), available at: <http://www.unhcr.org/print/4b8bcfb36.html>.

In view of the above, international involvement in cases of CSR1951 refugees is highly improbable. OCV requires, *first*, direct engagement of CSR1951 refugees with officials of their state of origin, at least for registration and voting purposes. *Second*, their state of origin has to be both willing and able to conduct OCV in the respective state of asylum, and to permit their participation. *Third*, the state of asylum must agree to facilitate or, at the very least, permit OCV procedures on its territory as well as, arguably, election-related activities. When the states of origin are persecutory, none of these cumulative conditions are likely to be fulfilled; when fear of persecution emanates from non-state actors, it is highly improbable that *all* three conditions can be satisfied.

b. Fear of Persecution by the Regime (of the State of Origin)

OCV procedures may require citizens to present themselves at embassies or consulates in order to register and vote. CSR1951 refugees whose well-founded fear of persecution stems from the actions of a predatory regime may wish to refrain from engaging with officials of their states of origin.⁹⁶ Indeed, Article 25 of CSR1951 pronounces⁹⁷ that the state of asylum must provide administrative assistance to CSR1951 refugees that would normally be provided by their state of origin. A persecutory regime may not even necessarily have diplomatic relations with the state of asylum; however, even if there OCV procedures are in place in the state of asylum, a persecutory regime is unlikely to consider itself as such, and may not permit CSR1951 refugees (whom *it* may view as criminals⁹⁸) to participate in such elections.⁹⁹

⁹⁶ Ruma Mandal, *Political Rights of Refugees* (UNHCR, 2003), 19–20.

⁹⁷ Ad Hoc Committee on Refugees and Stateless Persons, *Draft Report of the Ad Hoc Committee on Statelessness and Related Problems* (15 February 1950), annex II.

⁹⁸ Cf *Melnychenko* (n34) (regarding the treatment of the applicant by the Ukrainian authorities).

Article 2 of CSR1951 requires that refugees in a state of asylum ‘conform to its laws and regulations as well as to measures taken for the maintenance of public order’. Hence, OCV of CSR1951 refugees requires both *de jure* and *de facto* consent of the state of asylum. When a state grants asylum to CSR1951 refugees based on their well-founded fear of persecution stemming from their state of origin, the state of asylum may object to official engagement between the refugee and their persecutory regime, just as it would refuse to accept an attempt by the latter state to exercise protection abroad on behalf of its refugee-national.¹⁰⁰

c. Fear of Persecution by Non-state Actors

It was contended in Chapter One *supra* that a well-founded fear of persecution may stem from the actions of non-state actors, where the state of origin fails to comply with its primary protection obligation to establish and operate a system of effective protection against persecution. In such circumstances, CSR1951 refugees may not fear engagement *as such* with officials of their state of origin; indeed, the authorities may even be sympathetic to their cause. Nonetheless, UNHCR views with suspicion engagement of CSR1951 refugees with officials of their state of origin, especially with regard to the issuance of official documentation such as national passports.¹⁰¹

⁹⁹ *Voting from abroad* (n6), ch 1.

¹⁰⁰ See Chapter Seven *infra*; while states of asylum are required to issue CTDs to CSR1951 refugees, they may limit their validity so that refugees are prohibited from travelling to their state of origin.

¹⁰¹ For instance, UNHCR advises that, once recognised, a CSR1951 refugee should not normally retain her national passport, and that if a refugee applies for and obtains a national passport or its renewal, it will (in the absence of evidence to the contrary) be presumed that she intends to avail herself of the protection of her state of nationality. UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (reissued 2011), paras 49-50. Notably, however, it is ordinary practice for expatriates to identify themselves using their national passports when residing abroad. See also Rosa Da Costa, *Rights of Refugees in the Context of Integration* (UNHCR, 2006), ch 9, 131.

Drawing on instances of application for national passports or renewal thereof as creating a presumption that re-availment of protection is intended, Goodwin-Gill and McAdam emphasise¹⁰² that, for the purposes of re-availment of protection, the CSR1951 refugee must not only act voluntarily, but must also intend to and actually obtain protection so as to indicate the establishment of normal relations with the authorities of the state of origin.

CSR1951 refugees may fear that their state of asylum will consider their (potentially continuous) *voluntary engagement* with officials of their state of origin concerning OCV *qua expatriates* to be indicative of their willingness to accept the protection of their state of origin and of the ability of that state to provide adequate protection. A state of asylum may then invoke the Article 1C(1) cessation clause, which stipulates that if a CSR1951 refugee has ‘voluntarily re-availed himself of the protection of the country of his nationality’ she no longer requires international protection. Hathaway contends that, once a state of asylum determines that protection in the state of origin is viable, it is entitled to withdraw CSR1951 refugee status, as CSR1951 does not require that asylum be granted as *permanent* admission to a new political community.¹⁰³

Grace and Mooney argue¹⁰⁴ that ‘the act of refugees voting in their home state’s elections, whether in person or by absentee ballot should never be taken to signal that refugees and asylum-seekers no longer require international protection’. However, in practice, these acts *are* likely to be considered as such a signal by states of asylum; moreover, it may not always be

¹⁰² Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn Oxford University Press, 2007), 136.

¹⁰³ James C Hathaway, ‘The Meaning of Repatriation’ (1997) 9(4) *International Journal of Refugee Law* 551, 551. See also Chapter Eight *infra* (regarding the distinction between naturalisation and CSR1951 refugee status).

¹⁰⁴ Grace and Mooney (n76), 114.

unreasonable to assume that, if a state of origin is able to conduct OCV procedures and to enable effective participation of CSR1951 refugees therein, it is also able to provide them adequate protection.

E. Concluding Remarks

Recent developments in international practice and jurisprudence suggest that expatriates are generally considered as eligible voters, and that OCV procedures are increasingly available to them, notwithstanding the fact that most expatriates are able to exercise the right to return to their state of citizenship. In post-conflict or peace-building transitional elections, internationally-supported concerted efforts may be made to enhance participation of CFMs with a view to their imminent or forthcoming repatriation. By contrast, recognised CSR1951 refugees are both electorally excluded *and* unable (due to their well-founded fear of persecution) to exercise their internationally recognised right to return to their state of origin.

Thus, the analysis above suggests that the strength of normative claims of CSR1951 refugees to have access to OCV is met with a political reality in which their disenfranchisement is highly likely. CSR1951 refugees are harmed in a manner which repudiates their claim to political membership.¹⁰⁵ They are both effectively and symbolically, territorially and extraterritorially, shunned from the political community of their state of origin. Their vulnerability is heightened by the fact that the length of their stay in the state of asylum is indeterminate, and their repatriation is thus neither imminent nor necessarily forthcoming.

Moreover, both CSR1951 and the Migrant Workers Convention impose obligations on host states to guarantee rights of non-citizens residing in their state; the state's 'good faith'

¹⁰⁵ Matthew E Price, *Rethinking Asylum: History, Purpose and Limits* (Cambridge University Press, 2009), 70.

compliance¹⁰⁶ is expected. However, as Chapter Seven *infra* demonstrates, while migrant workers and their families can, in principle, avail themselves of the assistance and protection of their state of origin, CSR1951 refugees do not enjoy the protection abroad of their state of origin; thus, when they are ill-treated in their state of asylum, they are left without effective protection.

In view of the above predicament and of the fact that, under CSR1951, material, administrative and symbolic obligations are undertaken by states of *asylum*, it is argued in Chapter Eight *infra* that states of asylum should mitigate the ‘protection gap’ of CSR1951 refugees, *inter alia*, by enfranchising them in their elections.

¹⁰⁶ 'Good faith' is 'one of the basic principles governing the creation and performance of legal obligations whatever their source'. See eg Nuclear tests case (*Australia v France*), 1974 ICJ Rep 253, 268, para 46, cited in Goodwin-Gill and McAdam (n102), 456.

CHAPTER SEVEN: PROTECTING RECOGNISED CSR1951 REFUGEES OUTSIDE THEIR COUNTRIES OF ASYLUM

A. Introduction

In a world of sovereign states, when travelling abroad, every person needs a state to play the role of ‘guardian angel’,¹ that is to have a state to which they can turn for protection and assistance in their dealings with other states. This chapter highlights the predicament of persons recognised as refugees according to the Convention Relating to the Status of Refugees (CSR1951 refugees)² when they travel *outside* their state of asylum.

Weis has famously depicted³ CSR1951 refugees as ‘a vessel on the open sea...not sailing under any flag’ and as ‘internationally unprotected persons’.⁴ The United Nations High Commissioner for Refugees (UNHCR) considers them to be persons ‘in need of international protection’.⁵ Indeed, as Chapter Two *supra* illustrated, according to CSR1951, when states of

¹ Stephen Legomsky, ‘Why Citizenship’ (1994) 35 Virginia Journal of International Law 279, 300.

² 28 July 1951, 189 UNTS 137, entered into force 22 April 1954.

³ Paul Weis, ‘The International Protection of Refugees’ (1954) 48 American Journal of International Law 193, 193. See Recommendation CM/Rec (2009) 13 of the Committee of Ministers to Member States (MS) on the Nationality of Children, Principle 7, available at: <https://wcd.coe.int/ViewDoc.jsp?id=1563529> (defining persons as *de facto* stateless if they possess solely the nationality of the state which they have left while they are recognised by their state of habitual residence as *de jure* refugees). See also Hugh Massey, *UNHCR and De Facto Statelessness* (UNHCR, April 2010), 40 (contending that, generally, non-enjoyment of rights attached to nationality does not in of itself constitute *de facto* statelessness, the only exception being the non-enjoyment of diplomatic protection and consular assistance of the state of nationality in relation to other states).

⁴ Paul Weis, ‘Human Rights and Refugees’ (1971) Israel Yearbook on Human Rights 35, 35; Paul Weis, *Nationality and Statelessness in International Law* (2nd edn Sijthoff and Noordhoff, 1979), 164 (advocating the use of the term ‘unprotected persons’ in lieu of *de facto* stateless). In an oft-quoted statement, the General Claims Commission held in *Dickson Car Wheel Company v United Mexican States*, 4 RIAA 669, 678 (July 1931) that ‘[a] state...does not commit an international delinquency in inflicting an injury upon an individual lacking nationality, and consequently, no state is empowered to intervene or complain on his behalf either before or after the injury.’ Notwithstanding its archaic nature, this statement illustrates a particular vulnerability of CSR1951 refugees which this chapter analyses.

⁵ *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (reissued December 2011), para 90: ‘[a]s long as he [the person

asylum recognise persons as CSR1951 refugees, they assume obligations towards them, acting *in loco civitatis*; CSR1951 refugees enjoy a ‘bundle’ of rights and entitlements in these states.

However, when recognised CSR1951 refugees travel outside their state of asylum, they are left effectively without protection. Their status entails *ipso facto* that, if they are ill-treated abroad, they cannot turn to representatives of their state of origin and request its diplomatic protection, nor can they expect to receive its consular assistance. Additionally, they do not enjoy the protection which their state of asylum offers *its nationals* abroad. It is submitted that a state of asylum ought to extend the scope of protection that it offers recognised CSR1951 refugees residing in its territory, and provide them diplomatic protection and consular assistance when they travel abroad *as if they were its nationals*.

Following a general exposition of diplomatic protection and consular assistance in section B, the argument in this chapter is advanced in four steps. *First*: the advent of human rights treaties has *not* rendered protection of nationals abroad obsolete nor has the practice fallen into disuse. On the contrary, state protection abroad retains its pedigree and significance, as is illustrated by the International Law Commission Draft Articles on Diplomatic Protection⁶ that were adopted by the General Assembly with a favourable view to their forthcoming

claiming refugee status] has no fear in relation to the state of his nationality, he can be expected to avail himself of that state's protection. He is not in need of international protection and is therefore not a refugee’.

⁶ ILC Report, 58th session (2006), GAOR supp. no. 10, UN doc. A/61/10. See GA/Res/61/35, 4 December 2006, inviting governments ‘to submit comments concerning the recommendation by the Commission to elaborate a convention on the basis of the articles’ (ILC Articles). See also GA/Res/61/34, 4 December 2006, ‘emphasising the importance of furthering the codification and progressive development of international law as a means of implementing the purposes and principles set forth in the Charter’. In its 59th session, the General Assembly adopted GA/Res/62/67, 6 December 2007 welcoming ‘the conclusion of the work of the International Law Commission and its adoption of the Draft Articles [on diplomatic protection] and commentary on the topic’ and commending ‘the articles...to the attention of governments’ at para 1 and para 3, respectively. It further decided to include ‘diplomatic protection’ in its agenda for its 2010 session with a view to considering ‘the question of a convention on diplomatic protection, or any other appropriate action, on the basis of the articles’.

codification in an international treaty, by recent jurisprudence of the International Court of Justice, and by frequent resort by states to consular assistance.

Second: while states previously enjoyed unfettered discretion regarding whether and when to protect their nationals abroad, recent developments in domestic jurisdictions as well as regional provisions (European Union treaties) point to the potential emergence of a (qualified) duty to exercise protection or to justify its refusal; interventions by states on behalf of their nationals abroad are likely to become more prevalent, especially as states are increasingly expected to fulfil rights-protecting obligations extraterritorially.⁷

Third: according to CSR1951, states of asylum are required to issue Convention Travel Documents (CTDs) to refugees lawfully staying in their territory. While CTDs do not require states of asylum to provide protection abroad to CSR1951 refugees, they reflect partial recognition of the instrumental role of these states in facilitating safe refugee travel. Indeed, as was noted above, the absence of protection by their state of nationality is a constitutive element of CSR1951 refugee status: whilst nationals travelling abroad may turn to their state's consular officers for assistance, and (as noted above) perhaps even demand that their state come to their aid, recognised CSR1951 refugees cannot even approach the consulate of their state of nationality to request renewal of their passport, as engagement with consulate officials can trigger cessation or loss of refugee status; hence, CSR1951 refugees cannot reasonably expect to be assisted by a state which they have fled.

Fourth: the 'nationality of claims' requirement remains pivotal to the international law institution of diplomatic protection, and efforts to effectuate its *general* relaxation have thus far

⁷ For a recent contribution on extraterritoriality, see Marko Milanović, *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy* (Oxford University Press, 2011).

failed. As noted above, most travellers are able to receive such protection from representatives of their state of nationality; by contrast, when CSR1951 refugees travel outside their state of asylum, they are left effectively without protection. A protection-enhancing agenda has thus led the International Law Commission (ILC) to 'carve out' an exception to the 'nationality of claims' requirement, authorising states of asylum to provide protection abroad to their recognised refugees.⁸ Chapter Eight *infra* analyses the contention that justifications for extending protection abroad to CSR1951 refugees by their states of asylum, notwithstanding nationality requirements, applies *mutatis mutandis* to entitlements *in* their states of asylum.

B. Locating Protection of Nationals Abroad in General International Law

State protection abroad takes the form of diplomatic protection and consular assistance. As Section C will demonstrate, these two forms of protection are often linked: a state whose nationals abroad are denied access to its consular assistance may wish to exercise its diplomatic protection in pursuit of a remedy.

Weis defined diplomatic protection⁹ as 'a right of the state accorded to it by *customary* international law to intervene on behalf of *its nationals* if their rights are violated by another

⁸ ILC Draft Articles (n6), art 8(2). Notably, some refugees are *de jure stateless*: their vulnerability, both in international law and in domestic law, extends above and beyond their fear of persecution, and is generated first and foremost by their statelessness. The ILC Draft Articles purport to ameliorate their travel-related predicament by enunciating that '[a] State may exercise diplomatic protection in respect of a stateless person who, at the date of injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State.' Ibid, art 8(1). The analysis focuses on the predicament of recognised CSR1951 refugees who *are* nationals of their state of origin, and who would be eligible for its protection abroad but for their fear of persecution.

⁹ Paul Weis, *Nationality and Statelessness in International Law* (Stevens, 1956), 35; Guy Leigh, 'Nationality and Diplomatic Protection' (1971) 20 *International and Comparative Law Quarterly* 453, 455. See, for example, Intergovernmental Committee on Refugees, *Memorandum: Statelessness and some of its Causes: An Outline* (UNRRA, 1946), ch II: 'even where no specific (bilateral) treaties exist, a national residing abroad enjoys, according to general principles of international law, the protection of the consular and diplomatic representatives of his nationality'. Diplomatic protection has a contested history: it is associated with actions taken selectively by imperialist states in the 19th and early 20th centuries to protect their nationals who were engaged in commercial activities in developing states. John Dugard, 'Diplomatic Protection' in *Max Planck Encyclopaedia of Public International Law*, available at: http://www.mpepil.com/subscriber_article?script=yes&id=/epil/entries/law-9780199231690-e1028&recno=1&searchType=Quick&query=diplomatic+protection++.

state in order to obtain redress' (my emphases). The ILC Draft Articles, aiming to codify diplomatic protection in an international treaty, link it with the notion of *state responsibility*.¹⁰ They define diplomatic protection¹¹ as 'the invocation by a state through diplomatic action or other means of peaceful settlement of the responsibility of another state for an injury caused by an internationally wrongful act of that state to a natural or legal person that is a national of the former state.'

Diplomatic protection has been commonly associated with the 'Vattelian fiction'¹² that 'whoever ill-treats a citizen *indirectly* injures the state which must protect that citizen'¹³ (emphasis added). Notably, the ILC Draft Articles refrain from engaging directly with the debate surrounding the contemporary relevance of this 'fiction'.¹⁴

¹⁰ Crawford points out that the articles on diplomatic protection were originally seen as belonging to the *study on state responsibility*. In 1996, the General Assembly identified diplomatic protection as a separate topic appropriate for codification and progressive development. James Crawford, 'The ILC Articles on Diplomatic Protection' (2006) 31 South Africa Yearbook International Law 19, 20 (referring to GA/Res/51/160, supp no 1, para 249, 19 December 1996). According to the Articles on Responsibility of States for Internationally Wrongful Acts, ILC Report, 53rd session (2001), GAOR supp no 10, UN Doc. A/56/10, 'every internationally wrongful act of a state entails the international responsibility of that state'. In turn, 'a state commits an internationally wrongful act when its conduct consists of an action or omission attributable to that state under international law which constitutes a breach of an international obligation of that state'. Ibid, arts 1-2.

¹¹ ILC Draft Articles (n6), art 1. The commentary notes that, in view of the customary distinction between primary and secondary rules, the Articles do not seek to define or describe the *content* of the internationally wrongful acts giving rise to the responsibility of the state for injury to an alien. Ibid, para 2. Article 14 stipulates that 'local remedies' should be exhausted prior to exercising diplomatic protection, since international litigation tends to be more costly, complex and time-consuming, and since domestic courts may be better placed to appraise the facts and apply national law. Mohamed Bennouna, Special Rapporteur, *Preliminary Report on Diplomatic Protection*, ILC Report, 50th session, GA/CN.4/484, 4 February 1998, para 16; Antonio Cassese, *International Law* (2nd edn Oxford University Press, 2005), 121.

¹² For general discussion, see Annemarieke Vermeer-Künzli, 'As If: The Legal Fiction in Diplomatic Protection' (2007) 18 European Journal of International Law 37.

¹³ Emer De Vattel, *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and Sovereigns* (1758) vol 3: Of War.

¹⁴ The Permanent Court of International Justice (PCIJ) held in an oft-quoted judgment that '[i]t is an elementary principle of international law that a state is entitled to protect its subjects when injured by acts contrary to international law committed by another state from whom they have been unable to obtain satisfaction through the ordinary channels...by taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, *a state is in reality asserting its own right*, the right to ensure, in

As noted above, alongside diplomatic protection, states also provide consular assistance to their nationals when their nationals are required to engage with foreign authorities; such assistance is commonly required in criminal proceedings abroad and in emergency situations such as a natural disaster when search and rescue operations may be required. States of nationality also occasionally engage authorities of host states to ensure that their nationals receive proper treatment.

The customary right of states to provide consular assistance to their nationals abroad and the concomitant duty on host states to facilitate such protection were codified in Article 6 of the Vienna Convention on Consular Relations.¹⁵ This convention lists¹⁶ ‘protection in the receiving state of the interests of the sending state and of its nationals’ as the first function of a consular mission, alongside the issuance of passports and travel documents¹⁷ and representation of nationals who are unable to defend their own rights and interests before the courts and other authorities of the receiving state.¹⁸ As the analysis in the following section

the person of its subjects, respect for the rules of international law’. *Mavromartis Palestine Concessions* (1924) PCIJ Rep ser A, no 2, paras 10-12 (emphasis added). The *Mavromartis* ratio has triggered much critique; for instance, Vermeer-Künzli (n12), 58 argues that the essence of the fiction is that a state *pretends* to claim its own right, while in reality it is espousing the right of its national. Indeed, it seems that when the state is claiming its own right, it is not required to resort to diplomatic protection, since a violation of a state’s own substantive rights results in direct injury. See also *Advisory Opinion, Reparations for Injuries Suffered in the Service of the United Nations*, ICJ Rep 1949, 181, 184. The International Law Commission suggests that the ‘Vattelian fiction’ was a means to an end at a time when the individual had no (primary) rights in the international legal order, whereas today an individual is the subject of many primary rules protecting him both at home and abroad. ILC Draft Articles (n6), commentary art 1, para 3. See Section C *infra*.

¹⁵ Vienna Convention on Consular Relations, 24 April 1963, 596 UNTS 261, entered into force 19 March 1967 (VCCR). The VCCR currently has 173 parties. See also Vienna Convention on Diplomatic Relations, art 3(b), 18 April 1961, 500 UNTS 95, entered into force 24 April 1964 (stipulating that a diplomatic mission may protect ‘in the receiving State the interests of the sending state and of its nationals within the limits permitted by international law’). This treaty has 185 parties.

¹⁶ Ibid, VCCR, art 5(a). See also ILC Report, 13th session (1978), GAOR supp no 10 (A/4843), published in the Yearbook of the International Law Commission, vol ii, pt ii, 92 at 96-7, para 7 (noting that the function of safeguarding the interests of the sending state and of its nationals is the most important consular function).

¹⁷ Ibid, art 5(d).

¹⁸ Ibid, art 5(i).

demonstrates, a breach by a host state of its primary obligation to facilitate provision of consular assistance to foreigners by their state of nationality may give rise to a remedial claim by the foreigner's state of nationality by way of diplomatic protection.¹⁹

C. The Pedigree of State Protection Abroad

1. The Advent of Human Rights Treaties and the Individual in International Law

In traditional international law, states alone were considered 'subjects' of international law; individuals who were ill-treated and sought a remedy had to persuade their state to exercise diplomatic protection on their behalf.²⁰ Hersch Lauterpacht thus referred²¹ to diplomatic protection as one of the most important functions of the foreign service of the modern state. Recent decades have seen the advent of human rights treaties recognising the prominence of the individual²² and establishing arrangements that enable individuals to bring claims against

¹⁹ Eileen Denza, *Diplomatic Law: A Commentary on the Vienna Convention on Diplomatic Relations* (3rd edn Oxford University Press, 2008), 33 (questioning whether a distinction can be easily drawn between diplomatic and consular functions). Cf Annemarieke Künzli, 'Exercising Diplomatic Protection: The Fine Line between Litigation, Demarches and Consular Assistance' (2006) 66 *ZaöRV* 321, 335 (contending that the confusion arises because most diplomatic protection cases concern the deprivation of property or arrest, detention, imprisonment and trials of nationals. Künzli notes that when consular officers communicate with officials of the host state involved, their actions do *not* necessarily constitute diplomatic protection).

²⁰ Rosalyn Higgins, *Problems and Process: International Law and how we use it* (Clarendon Press, 1995), 49-50 (arguing that 'we have erected an intellectual prison of our own choosing and then declared it to be an unalterable constraint'; she refers instead to 'participants' in international legal decision-making processes). Cf Riccardo Pisillo Mazzeschi, 'Impact on the Law of Diplomatic Protection' in Menno T Kamminga and Martin Scheinin (eds.), *The Impact of Human Rights Law on General International Law* (Oxford University Press, 2009) 211, 213 (offering to look instead at the identity of an addressee of single international norms or of the holder of single international rights or obligations. He notes that, while traditional international law was formally addressed only to states and other sovereign entities, contemporary international law is occasionally formally addressed also to individuals and directly regulates relationships between states and individuals).

²¹ Hersch Lauterpacht, 'Allegiance, Diplomatic Protection, and Criminal Jurisdiction over Aliens' (1945-1947) 9 *Cambridge Law Journal* 330, 335. See also Edwin Borchard, *The Diplomatic Protection of Citizens Abroad* (Banks law publishing, NYC 1922), v (contending that international law has authorised the state of which the individual is a citizen to vindicate his rights by diplomatic and other methods sanctioned by international law. This right of diplomatic protection constitutes, therefore, a limitation upon the territorial jurisdiction of the state in which the alien is present).

²² See, for example, the International Covenant on Civil and Political Rights, Preamble, GA/Res/2200/21, 16 December 1966, 999 UNTS 171, entered into force 23 March 1976 (ICCPR) (recognising 'the inherent dignity

their state of nationality *or against other states* regarding their alleged maltreatment without having to obtain the assistance or prior consent of the former state.

For instance, under the Optional Protocol to the ICCPR,²³ individuals can submit written communications to the Human Rights Committee (HRC) regarding alleged violations of their ICCPR rights, provided that the respondent state has recognised the committee's competence, and that local remedies have been exhausted.²⁴ Nonetheless, even when individuals are able to initiate such proceedings, remedies are limited, and are usually in the form of a declaratory statement or an observation; enforcement, when applicable, is quite challenging, especially considering the vulnerability of foreign nationals.²⁵ The HRC reports²⁶ that very few communications are submitted by asylum-seekers or refugees, *inter alia*, due to the length of time for assessing applications and the inability to afford legal counsel which may not be provided for this purpose.

Hence, notwithstanding the significant symbolic and practical contribution of human rights treaties to rights-protection, state protection abroad remains an effective remedial rights-

and...equal and inalienable rights of all members of the human family [as]...the foundation of freedom, justice and peace in the world').

²³ GA/Res/2200A, arts 1-2, 16 December 1966, 999 UNTS 302, entered into force 23 March 1976.

²⁴ Individuals may also initiate proceedings concerning treaty-based rights violations before several regional courts: the Inter-American Court of Human Rights, the African Commission on Human and Peoples' Rights, and the European Court of Human Rights.

²⁵ Robert McCorquodale, 'The Individual and the International Legal System' in Malcolm Evans (ed), *International Law* (3rd edn Oxford University Press, 2010) 284, 293-5; Higgins (n20), 51; Lea Brilmayer, 'From "Contract" to "Pledge": The Structure of International Human Rights Agreements' (2006) *British Yearbook of Human Rights* 163, 171 (arguing that a state's strongest reason to comply with such treaties is that the state agrees with the values that the treaty embodies; compliance is thus grounded in recognition of the underlying pre-existing norm as morally binding and not as reciprocal self-interest as per treaties that do not concern individual rights).

²⁶ Santhosh Persau, 'Protecting Refugees and Asylum-Seekers under the ICCPR' (UNHCR New Issues in Refugee Research No 132, November 2006), 4, quoting Michael O'Flaherty: *Human Rights and the UN: Practice Before the Treaty Bodies* (2nd edn Kluwer Law International, 2002), 4 (suggesting that it takes the HRC an average of four years to issue a view on the merits).

protecting measure for foreign nationals. Moreover, states are likely to treat a protection claim launched by another state more seriously than a complaint filed by a foreign national to a human rights monitoring body. In turn, as the case-law analysed below illustrates, states value their right to intervene on behalf of their nationals when they face criminal proceedings abroad, and appear to do so quite frequently.

It is asserted that, if the ultimate goal of diplomatic protection is protection of individuals against infringements of their rights, then it would be a setback to abandon it.²⁷ Consequently, diplomatic protection and human rights treaties mechanisms should be considered as *complementary*.²⁸ Indeed, the ILC Draft Articles proclaim²⁹ that '[t]he rights of states, natural persons, legal persons or other entities to resort under international law to actions or procedures other than diplomatic protection to secure redress for injury suffered as a result of an internationally wrongful act are not affected by the present draft'.

2. Protection Abroad and the Ill-Treatment of Foreign Criminal Defendants

It was noted above that diplomatic protection may be invoked, *inter alia*, with regard to breaches of primary obligations of a party to the VCCR regarding access of foreign nationals to consular services of their state. The VCCR devotes particular attention to criminal proceedings: Article 36 thereof stipulates³⁰ that '[t]he competent authorities of the receiving state shall, without delay, inform the consular post of the sending state if, within its consular district, a

²⁷ John Dugard, Special Rapporteur, *First Report on Diplomatic Protection*, A/CN.4/506, paras 22, 29.

²⁸ John Dugard, Special Rapporteur, *Seventh Report on Diplomatic Protection*, A/CN.4/567, para 3.

²⁹ ILC Draft Articles (n6), art 16. Similarly, the ILC Articles on the Responsibility of States (n10), art 33(2) pronounces that the obligations outlined are 'without prejudice to any right arising from the international responsibility of a state which may accrue directly to any person or entity other than a state'.

³⁰ VCCR (n15), art 36(1)(b).

national of that state is arrested or committed to prison or to custody pending trial or is detained in any other manner'. In turn, the detained foreign nationals have a *right* to communicate freely with their consulates.

Consular officers have a right to visit their nationals in prison, custody or detention, to converse and correspond with them, and to arrange for their legal representation; however, if a detained or imprisoned individual does not wish to receive consular actions, consular officers are required to refrain from pursuance thereof.³¹ The rationale behind the obligation of the host state is that, faced with proceedings in a foreign state, the state of nationality of the detainees may provide them valuable assistance and aim to ensure that their trial will be fair and that they will enjoy proper legal representation.

A State Party to the VCCR may initiate proceedings against another State Party for alleged breaches of its obligations if both states have acceded to the *Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes*.³² In recent years, Paraguay, Germany and Mexico have initiated proceedings before the International Court of Justice (ICJ) against the United States (U.S.) following alleged breaches of the VCCR. In all three cases, U.S. authorities detained foreign nationals and subsequently failed to inform them of their right to consular assistance; they also failed to inform the respective consulates of the detention. All trials resulted in murder convictions and the imposition of the death penalty.

³¹ Ibid, art 36(1)(c). The *Travaux Préparatoires* suggest that the decision to confer individual rights elicited considerable debate and was thus made explicitly. Mark J Kadish, 'Article 36 of the Vienna Convention on Consular Relations: A Search for the Right to Consul' (1997) 18 Michigan Journal of International Law 565, 596.

³² Art 1, 24 April 1963, 596 UNTS 487, entered into force 19 March 1967 (stating that [d]isputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol').

The *first* case concerned Angel Francisco Breard, a Paraguayan national who was sentenced to death in Virginia, and was executed on 14 April 1998 despite an interim order issued by the ICJ on 9 April 1998.³³ Following the issuance of a U.S. apology,³⁴ Paraguay withdrew its claim, and no merits judgment was rendered.

The *second* case concerned two German nationals, Karl and Walter LaGrand, who were tried and convicted in Arizona. Following Karl's execution on 24 February 1999, Germany initiated proceedings on 2 March 1999 requesting a provisional measure ordering a stay of Walter's prospective execution, which the ICJ subsequently issued.³⁵ Walter was nevertheless executed, yet Germany decided to pursue the case on its merits. Germany claimed³⁶ that it was acting both in its own right (demanding redress for the direct injury that it suffered by being denied an opportunity to provide consular assistance to its nationals) and on behalf of its nationals *by way of diplomatic protection* (demanding redress for the injury caused to them by the denial of access to consular assistance). Contrarily, the U.S. claimed that the obligations were owed to Germany alone, not to the LaGrand brothers, since only parties held rights under the VCCR.

Additionally, Germany argued that the right to receive information and to have access to the consulate of one's state of nationality are *human* rights of aliens, not just VCCR-based rights; its claim was based on Article 10 of the (non-binding) *Declaration on the Human Rights*

³³ Breard (*Paraguay v US*), Order of 9 April 1998, ICJ Rep 1998, 266.

³⁴ The U.S. Statement dated 3 November 1998 appears in John B Quigley, William J Aceves, and S Adele Shank, *The Law of Consular Access: A Documentary Guide* (Routledge, 2010), 139-40.

³⁵ LaGrand (*Germany v US*), Order on Provisional Measures, ICJ Rep 1999, 9.

³⁶ LaGrand, Memorial of Germany, 16 September 1999, para 7.01.

of *Individuals who are Not Nationals of the Country in Which They Live*.³⁷ Notably, if the individual right to be notified and to have access to consular assistance has indeed acquired the status of a *human right*, its violation may call into question criminal convictions that followed a procedurally flawed process.³⁸ Moreover, it could strengthen claims that States should be *required* (rather than just entitled) to provide consular assistance to their nationals.³⁹ The ICJ found⁴⁰ the U.S. in breach of its treaty obligations. It accepted Germany's argument that Article 36 establishes *individual treaty rights* which may be invoked by the detainee's state.⁴¹ However, it reserved judgment⁴² on whether the *treaty* right is a *human right*.

The *third* case concerned 51 Mexican nationals awaiting execution in ten states of the United States.⁴³ The Inter-American Court on Human Rights (IACtHR), in an advisory opinion requested by Mexico, opined⁴⁴ that a detained foreign national has a fundamental *human right* that is *recognised* (rather than established) by the VCCR to be informed of the right to contact

³⁷ GA/Res/40/144, art 10, 13 December 1985 (enunciating that '[a]ny alien [defined in art 1 as 'any individual who is not a national of the State in which he or she is present'] shall be free at any time to communicate with the consulate or diplomatic mission of the State of which he or she is a national or, in their absence, with the consulate or diplomatic mission of any other State entrusted with the protection of the interests of the State of which he or she is a national in the State where he or she resides').

³⁸ Christina M Cerna, 'The Right to Consular Notification as a Human Right' (2008) 31 Suffolk Transnational Law Review 419, 442.

³⁹ See the discussion in Section D *infra*.

⁴⁰ LaGrand (*Germany v US*), Merits, Judgment of 27 June 2001, ICJ Rep 2001, 466.

⁴¹ Ibid, paras 76-7. See also Mónica Fera-Tinta, 'Due Process and the Right to Life in the Context of the Vienna Convention on Consular Relations: Arguing the LaGrand Case' (2001) 12(2) European Journal of International Law 363, 364.

⁴² Ibid. See also Joan Fitzpatrick, 'The Unreality of International Law in the US and the LaGrand Case' (2002) 27 Yale Journal of International Law 427, 429.

⁴³ Arizona, Arkansas, California, Florida, Illinois, Nevada, Ohio, Oklahoma, Oregon and Texas. See discussion in Annemarieke Vermeer-Künzli, 'Case Concerning Mexican Nationals' (2005) 18 Leiden Journal of International Law 49.

⁴⁴ *Advisory Opinion, The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, OC-16/99 of 1 October 1999, (1999) ser A no 16, para 129.

consular agents of his state of nationality. The above treaty enunciates the state's right to assist its nationals through the consular officer's actions, and the correlative individual's right to contact the consular officer to obtain that assistance.⁴⁵ The court held⁴⁶ that, fundamentally, the *individual* is the possessor of the right, and she may 'expressly' oppose intervention on her behalf.

The IACtHR held⁴⁷ that consular assistance can significantly affect the outcome of a criminal process, as 'notification of one's right to contact the consular agent of one's state will considerably enhance one's chances of defending oneself'.⁴⁸ The consul is in 'a unique position to offer information to the detainee about the legal system in which he is detained in comparison to his home legal system'.⁴⁹ Nonetheless, the IACtHR stopped short of attaching obligations to the recognition of a human right to consular protection other than those explicitly noted in the VCCR.⁵⁰

The advisory opinion was issued before the ICJ judgment in *LaGrand*, yet the international court made no reference to it. In 2003, Mexico initiated proceedings before the

⁴⁵ Ibid, para 80.

⁴⁶ Ibid, paras 82-3.

⁴⁷ Ibid, para 27.

⁴⁸ Ibid, para 121.

⁴⁹ Linda J Springrose, 'Strangers in a Strange Land' (1999-2000) 14 Georgetown Immigration Law Journal 185, 195.

⁵⁰ Christina M Cerna, 'Impact on the Right to Consular Notification' in Menno T Kamminga and Martin Scheinin (eds), *The Impact of Human Rights Law on General International Law* (Oxford University Press, 2009), 171, 185.

ICJ concerning its nationals, and asked the ICJ to declare that ‘the right to consular notification under the VCCR is a human right’.⁵¹

The ICJ held⁵² that the U.S. breached its VCCR obligations and ordered that the U.S. provide ‘by means of its own choosing, review and reconsideration of the convictions and sentences of the Mexican nationals’. Recalling *LaGrand*, the court ruled⁵³ that Article 36 creates individual rights, and noted the ‘interdependence of the rights of the individual and of the state’. However, on the question of a *human* right to consular assistance, the ICJ held⁵⁴ that ‘neither the text nor the object and purpose of the Convention, nor any indication in the *Travaux Préparatoires*, support the conclusion that Mexico draws from its contention in that regard’. On 8 July 2011, despite the ICJ ruling and pleas from the U.S. Federal government, the State of Texas executed Humberto Leal, one of the 51 Mexican nationals in *Avena*.⁵⁵

Dissatisfaction with repeated violations of U.S. obligations under the VCCR has led to the introduction in the U.S. Senate of the Consular Notification Compliance Act of 2011, aiming to ‘facilitate compliance with Article 36’.⁵⁶ The Senate Judiciary Committee held a

⁵¹ *Avena and Other Mexican Nationals (Mexico v US)*, Application of 9 January 2003, para 281.

⁵² Case concerning *Avena and other Mexican Nationals (Mexico v US)*, Judgment of 31 March 2004, ICJ Rep 2004, 121, para 153.

⁵³ *Ibid*, para 40. In para 21 of his separate opinion, Judge Sepúlveda criticised this stipulation, suggesting that it introduces undesirable vagueness.

⁵⁴ *Ibid*, para 124. In a subsequent case concerning a Guinean national who was expelled by the DRC following his imprisonment after residing there for 32 years, the ICJ held that the Congolese authorities breached their VCCR art 36 obligations by failing to inform Mr. Diallo upon his arrest of his right to consular assistance. The court’s analysis centres on the financial ramifications of Mr. Diallo’s expulsion. Case concerning Ahmadou Sadio Diallo (*Republic of Guinea v DRC*), Judgment of 30 November 2010, ICJ Rep 2010, para 66.

⁵⁵ On 7 July 2011, the U.S. Federal Supreme Court denied a request for stay of execution in a 5 to 4 *per curiam* judgment; *Leal v Texas*, No 11-5001 (2011).

⁵⁶ Available at: <http://leahy.senate.gov/imo/media/doc/BillText-ConsularNotificationComplianceAct.pdf>.

hearing on the proposed bill on 27 July 2011.⁵⁷ The primary impetus for proposing to incorporate the VCCR into U.S. Federal law was fear that, in view of repeated U.S. treaty violations, other states may refuse to abide by their obligations under the VCCR with regard to U.S. citizens.

John Bellinger, a former legal adviser to the U.S. Secretary of State, asserted⁵⁸ that the proposed bill will help protect U.S. citizens who travel around the world and are arrested in foreign states, and suggested that the VCCR (and in particular Article 36(1)(b)) ‘is one of the most important international treaties to which the U.S. is a party’. Patrick Kennedy, a State Department representative and former Congressman, noted⁵⁹ that ‘in 2010 alone consular officers conducted more than 9,500 prison visits and assisted more than 3,500 Americans who were arrested abroad’; he submitted that ‘consular services are extensive and indispensable’.

On 10 August 2011, the Serbian government filed an *amicus curiae* brief in a case before the Court of Appeals of the State of Nevada, seeking to stay the execution of Avram Nika, a Serbian national convicted of killing a man who had stopped to help him on a highway, on the grounds that the Serbian consulate was not informed of his arrest in 1994.⁶⁰ The Serbian government argued⁶¹ that, for a foreign national, the right to consular assistance, or at least the

⁵⁷ Available at: http://judiciary.senate.gov/hearings/testimony.cfm?id=3d9031b47812de2592c3baeba62c686d&wit_id=3d9031b47812de2592c3baeba62c686d-0-1.

⁵⁸ Ibid.

⁵⁹ Ibid. *Cf Human Rights and Democracy: The 2011 Foreign and Commonwealth Office Report* (April 2012), §vi: Human Rights for British Nationals Overseas (stating that ‘[s]upporting British nationals in difficulty around the world sits at the heart of FCO activity as one of the U.K. Government’s three foreign policy priorities’).

⁶⁰ *Nika v McDaniel, Warden and Masto, Attorney General of the State of Nevada*, case no CR94P2264, available at: http://reprieve.org.uk/static/downloads/2011_08_10_PUB_Nika_Serbia_Amicus_Brief.pdf.

⁶¹ Ibid, para 12.

option of requesting such assistance, is vital to ensure due process and access to a fair trial. On the merits, it maintained⁶² that the Serbian consulate *could and would* have monitored the legal team from the outset and advised, supplemented or even replaced it as needed.

It is asserted that the VCCR rights to access consular assistance (for individuals) and to provide it (for states) are frequently exercised; hence, they retain their practical and symbolic significance in the day-to-day dealings of consulates with their nationals. States are willing to invest resources and initiate international proceedings in order to defend their right to offer consular assistance to their nationals and to seek redress for breaches of rights of their nationals. While the U.S. was responsible for several violations of VCCR obligations, its breaches should not be interpreted as dismissal of the convention's importance; rather, they can be attributed, in part, to jurisdictional questions under the U.S. Federal system;⁶³ indeed, the proposed Congressional legislation enjoys bipartisan support and is endorsed by the Obama administration.

While the ICJ did not follow the IACtHR in declaring the right to consular assistance as a *human* right, it nonetheless recognised its *individual* basis under the treaty; seeing that the VCCR has 173 State Parties, such a determination carries great significance. As indicated above, the reluctance to label the right to consular assistance a human right stems, in part, from the ramifications insofar as it may entail a concomitant duty on a national's state to provide such assistance; the next section addresses this question.

⁶² Ibid, para 4.

⁶³ See, for instance, the U.S. Federal Supreme Court's decision in *Medellín v Texas*, 552 US 491 (2008) (concerning US compliance with the ICJ *Avena* judgment).

D. The Potential Emergence of a Qualified *Duty* to Protect Nationals Abroad

1. The Traditional View in International Law and its Discontents

It is conventionally maintained⁶⁴ that ‘[t]here is no duty incumbent upon a state to exercise its protection over its citizens abroad. The matter is in the discretion of every state and no citizen abroad has *by international law* a right to demand protection from his home state although he may have such a right *by municipal law*’ (emphases added).

The ICJ held in *Barcelona Traction*⁶⁵ that ‘a state may exercise diplomatic protection by whatever means and to whatever extent it sees fit...[s]hould the national...consider that their rights are not adequately protected, they have no remedy in international law’. The ILC commentary affirmed⁶⁶ that, in international law, a state has a *right* to exercise diplomatic protection on behalf of its nationals but is under *no duty* to do so.

Section C *supra* suggested, following a rights-centred approach, that diplomatic protection may at times be the only effective means for a state to protect rights of its nationals extraterritorially; hence, it may be suggested that, if a state is reasonably able to exercise protection, then it should be expected to do so in appropriate cases.⁶⁷ Indeed, the first draft published by the ILC Special Rapporteur posited⁶⁸ that, following grave breaches of *ius cogens* norms, states of nationality should be *required* to exercise diplomatic protection upon their

⁶⁴ Lassa Oppenheim and Hersch Lauterpacht, *International Law: A Treatise* (Longmans, 1955), vol I, 686.

⁶⁵ ICJ Rep 1970, 3, 44, para 78.

⁶⁶ ILC Draft Articles (n6), art 2, Commentary, para 3.

⁶⁷ Phoebe Okowa, ‘Issues of Admissibility and the Law on International Responsibility’ in Malcolm Evans (ed), *International Law* (3rd edn Oxford University Press, 2010), 472, 484.

⁶⁸ Dugard First Report (n27), art 4. See also John Dugard, ‘Diplomatic Protection and Human Rights: The Draft Articles of the International Law Commission’ (2005) 24 *Australian Yearbook International Law* 75, 80.

nationals' request, unless these nationals are able to bring their claim before a competent international court or tribunal, and unless the exercise of diplomatic protection would seriously endanger the overriding interest of the state and/or its people.

However, the Rapporteur's proposal was critiqued as arguably too far-reaching.⁶⁹ The ILC Draft Articles include instead a 'soft' obligation: a *recommendation* that states should give 'due consideration' to the possibility of exercising diplomatic protection when significant injury has occurred, taking into account the views of the injured person 'wherever feasible'.⁷⁰

It thus appears that, at present, states are *not required* under international law to exercise diplomatic protection; following the ICJ's reluctance to define the right to receive consular assistance as a human right so as to require states to offer such assistance to their nationals, the ILC Draft Articles similarly opted for a cautious approach.

2. The Emergence of a Qualified Duty to Provide Protection Abroad?

Some domestic constitutions include provisions enunciating an individual right to protection abroad. For instance, Article 27(2) of the 2011 Hungarian Constitution provides⁷¹ that '[e]very Hungarian citizen has the right to enjoy the protection of Hungary while abroad.' Concomitantly, in some common law jurisdictions, such as the United Kingdom and South

⁶⁹ Dugard conceded that 'in all fairness it was probably too much to have expected the commission to approve art 4 *de lege ferenda* in the light of the scant evidence of state practice in its favour.' Ibid, 83. By contrast, the proposal has also been criticised for being too restrictive, since breaches of *jus cogens* norms are considered breaches of *erga omnes* obligations which, according to the *Barcelona Traction* ratio, do not require the satisfaction of conditions that are necessary to trigger diplomatic protection.

⁷⁰ ILC Draft Articles (n6), art 19. See also Menno T Kamminga, 'Final Report on the Impact of International Human Rights Law on General International Law' in Menno T Kamminga and Martin Scheinin (eds), *The Impact of International Human Rights Law on General International Law* (Oxford University Press, 2009), 1, 16.

⁷¹ A similar provision appeared in art 69 of the previous Hungarian Constitution. Other Constitutions containing such provisions are those of Albania, Belarus, Bosnia and Herzegovina, Bulgaria, Cambodia, China, Croatia, Estonia, Georgia, Guyana, Italy, Kazakhstan, Lao People's Democratic Republic, Latvia, Lithuania, Poland, Portugal, Republic of Korea, Turkey, Ukraine and Vietnam. Dugard First Report (n27), paras 80-6.

Africa, that have not codified a right to diplomatic protection, the unfettered discretion that states traditionally enjoyed has been recently constrained.⁷²

In the United Kingdom, applicants demanded that the government intervene on behalf of a British national held in Guantanamo Bay. The Court of Appeal held in *Abbassi*⁷³ that, while the state is not under a duty to provide diplomatic protection, its discretion is not unlimited, since ‘it must be a normal expectation of every citizen that if subjected abroad to a violation of a fundamental right, the British government will not simply wash their hands of the matter and abandon him to his fate.’⁷⁴ Nevertheless, while the citizen’s request ought to be *considered*, the Foreign and Commonwealth Office retains (full) discretion ‘whether to make any representation in a particular case and if so in what form’.⁷⁵

The Constitutional Court in South Africa went somewhat farther in its *Kaunda*⁷⁶ judgment. The case concerned 69 South African citizens who were held in Zimbabwe and faced potential extradition to Equatorial Guinea where they were going to be charged with participation in an attempted coup against that state’s government, and upon conviction were likely to be sentenced to death. Applicants demanded that the South African government take ‘all reasonable and necessary steps’ to ‘seek the release and/or extradition of the applicants’.⁷⁷

⁷² See also the ECtHR judgment in *Case of Ilascu and others v Moldova and Russia*, App No 48787/99 (GC) (8 July 2004), para 331 (holding that losing control over parts of its territory did not release Moldova from its obligation to use diplomatic means to secure the rights of its nationals against possible abuse by the Transnistrian authorities).

⁷³ *Abbassi v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA (Civ) 1598.

⁷⁴ *Ibid*, para 97.

⁷⁵ *Ibid*, paras 98-9.

⁷⁶ *Kaunda v President of the Republic of South Africa*, Case CCT 23/04, 2004 (10) BCLR 1009 (CC) (S Afr).

⁷⁷ *Ibid*, paras 1-4.

The Constitutional Court held⁷⁸ that the application was premature, since the extradition to Equatorial Guinea has not yet taken place. Nevertheless, the court maintained⁷⁹ that, in principle, based on section 3(2) of the South African Constitution (enunciating that all citizens ‘are equally entitled to the rights, privileges and benefits of citizenship’) South African citizens may request that the government offer them protection against wrongful acts of a foreign state; their request has to be considered and responded to appropriately,⁸⁰ even though decisions whether to offer protection and in what form are an aspect of foreign policy.⁸¹

Justice Ngcobo, concurring, stipulated⁸² that citizens have ‘a right to request protection from the government...in South Africa or abroad’ when their human rights are violated or threatened; while the government retains wide discretion, a request must be properly assessed and cannot be arbitrarily refused.⁸³ Moreover, it noted⁸⁴ that states ‘have not only a right but a *legal obligation* to protect their nationals abroad against an *egregious violation* of their human rights’ (emphases added).

Justices O’Regan and Mokgoro (dissenting with regard to the outcome of the case) similarly held⁸⁵ that the government is constitutionally required ‘to provide diplomatic protection to its citizens to prevent or repair egregious breaches of international law norms’.

⁷⁸ Ibid, para 127.

⁷⁹ Ibid, para 58.

⁸⁰ Ibid, para 67.

⁸¹ Ibid, paras 60-4.

⁸² Ibid, para 185.

⁸³ Ibid, paras 191-2.

⁸⁴ Ibid, para 169.

⁸⁵ Ibid, paras 114-5.

Justice Sachs added⁸⁶ that ‘the government has a clear and unambiguous duty to do whatever is reasonably within its power to prevent South Africans abroad, however grave their alleged offences, from being subjected to torture, grossly unfair trials and capital punishment’.

Thus, the British and South African courts appear to have applied (to slightly differing degrees) a ‘Wednesbury reasonableness’⁸⁷ test regarding the propriety of governmental responses to diplomatic protection requests. In South Africa, Justices Ngcobo, O’Regan and Mokgoro held that South Africa was required to act to prevent or seek redress for egregious human rights violations against its nationals.

Notably, while both judgments acknowledged that a protection obligation cannot be derived (yet) from *international* law, they based the qualified duty to provide diplomatic protection or to justify its refusal on principles of citizenship theory, namely the legitimate expectations of citizens from their (democratic) state.⁸⁸

3. Protection-Enhancing Regime for Citizens of the European Union (EU)

This section presents recent developments in the EU treaty regime that are designed to enhance the protection which EU citizens enjoy when they travel outside the EU. The ‘Lisbon Treaty’

⁸⁶ Ibid, para 275.

⁸⁷ *Associated Provincial Picture Houses v Wednesbury Corporation* [1947] 1 KB 223 (‘It is true to say that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere’). Since the passage of the Human Rights Act 1998, UK courts have been applying ECtHR tests in judicial review cases concerning ECHR rights (for instance, balancing or proportionality regarding arts 8-11 of the ECHR). See eg *R (Daly) v SSHD* [2001] 2 AC 532; *R (Huang) v SSHD* [2007] UKHL 11. Indeed, the contemporary relevance of ‘Wednesbury reasonableness’ in non-HRA JR cases has been questioned; see eg *R (Alconbury) v SS for the Environment, Transport and the Regions* [2003] 2 AC 295 (per Lord Slynn).

⁸⁸ Cf the Israeli Supreme Court judgment in H CJ 3992/04 *Mimon-Cohen v Minister of Foreign Affairs and others* (2004) PD 59(1) 49, paras 22-3 (dismissing a petition for intervention on behalf of the petitioner, an Israeli citizen detained in Thailand on murder charges carrying the possible imposition of the death penalty. The Israeli court held that, in *international* law, Israel has full discretion whether to exercise its right to diplomatic protection, reserving the question whether, in *domestic* law, an individual has a right to protection that entails a corresponding duty to exercise such protection).

stipulates⁸⁹ that ‘[e]very citizen of the [European] Union shall, in the territory of a third state [that is, not an EU Member State] in which the Member State of which he or she is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that Member State.’

The Charter of Fundamental Rights of the EU (which came into force the same day) includes an identical provision⁹⁰ in a section entitled ‘Diplomatic and Consular Protection’. Notably, the Charter lists⁹¹ this entitlement alongside the right of EU citizens to vote in European Parliament elections and in local elections taking place in a Member State (MS) other than their EU state of nationality. Implementation by MS of their treaty obligations is subject to judicial review by the Court of Justice of the European Union (CJEU) as well as by their national courts.⁹²

A ‘levelling down’ interpretation could be applied to these provisions, namely that if a MS does *not* provide protection to its nationals abroad, then it would not be required to provide

⁸⁹ Treaty on the Functioning of the European Union, art 23, 13 December 2007, OJ C 83/47, entered into force 1 December 2009 (TFEU). The provision replaced The Treaty of Amsterdam Amending the Treaties Establishing the European Union, the Treaties Establishing the European Communities and Related Treaties, art 20, 10 November 1997, OJ C 340, entered into force 1 May 1999 (TEC). TFEU, art 20 establishes ‘[c]itizenship of the Union’ to which ‘every person holding the nationality of a MS’ is entitled. The provision clearly stipulates that ‘citizenship of the Union shall be additional to and not replace national citizenship’ (the provision replaces TEC, art. 17).

⁹⁰ Charter of Fundamental Rights of the European Union, art 46, 7 December 2000, OJ C 364/01, entered into force 1 December 2009.

⁹¹ Ibid, arts 39, 40; TFEU, art 22. Notably, ‘Third Country Nationals’ are generally entitled to most other rights under the Charter in line with principles of human rights treaties.

⁹² TFEU, art 23 includes an operative clause: ‘Member States shall adopt the necessary provisions and start the international negotiations required to secure this protection.’ On 14 December 2011, the European Commission issued a proposal for a *Council Directive on Consular Protection for Citizens of the Union Abroad*, available at: http://ec.europa.eu/justice/citizen/files/consular-protection_en.pdf. Interestingly, art 3(2) thereof adopts a rather expansive approach to *protection* by considering representation by the citizen’s state of nationality to be available (its absence being a condition sine qua non for requiring another EU MS to offer protection) only when citizens are able to reach their embassy or consulate and return to their place of departure on the same day. The proposed directive is silent on diplomatic protection.

such protection to nationals of other MS. However, it is contended that the provisions assume that EU MS *will* provide protection to their own nationals;⁹³ the aim was to *expand* protection so that EU citizens will have an effective address to turn to wherever they travel globally.⁹⁴

Indeed, the European Commission notes⁹⁵ that more than thirty million EU citizens live in non-EU states, but only in three of these states (United States, China and Russia) are all twenty-seven EU MS diplomatically represented. Recently, more than 100,000 EU citizens were present in major crises areas (Libya, Egypt and Bahrain after the uprisings; Japan and Haiti after the earthquakes), indicating EU citizens' need to have access to consular services.⁹⁶

The significance of the above provisions is threefold: *First*, the treaty provisions manifest the contemporary relevance of state protection abroad, in line with the domestic and international jurisprudence that was previously analysed. *Second*, the provisions create a judicially enforceable EU citizen's right to enjoy protection of consular and diplomatic

⁹³ Alessandro I Saliceti, 'The Protection of EU Citizens Abroad' (2011) 17(1) European Public Law 91, 100. Analogously, TFEU, art 22 provides only a right to *equal treatment*, namely that EU citizens resident in other MS have the right to vote in European Parliament under the same conditions as citizens of these states. Nevertheless, the CJEU held that EU citizens cannot be deprived of their right to vote for the European Parliament if the national legislation which excludes them from the franchise fails a basic rationality test. C-300/04 *Eman and Sevinger v College van burgemeester en wethouders van Den Haag*, [2006] ECR I-8055 (CJEU). According to a recent report, EU governments contend that they offer similar consular assistance to their nationals and to other EU citizens. Five EU MS (Belgium, Cyprus, Malta, Romania and Sweden) also offer consular assistance to refugees. CARE, *Report on Consular and Diplomatic Protection: Legal Framework in the EU Member States* (2010), 619-22.

⁹⁴ EU citizenship is dependent on citizenship of an EU MS; in turn, MS retain full prerogative with regard to granting their nationality; being an EU citizen does *not* mean being a citizen of all MS. Consequently, *prima facie*, EU citizenship does not fulfil the 'nationality of claims' requirement. It is thus questionable whether non-EU states are required to respect these (internal) EU arrangements if and when an EU MS attempts to exercise protection on behalf of a national of another EU MS. Of course, non-EU states may accept a claim in accordance with provisions of bilateral or multilateral treaties between the protecting state or states and the third state or states against which protection is asserted.

⁹⁵ European Commission, *EU Citizenship Report 2010: Dismantling the Obstacles to EU Citizens' Rights* (October 2010), 9, available at: http://ec.europa.eu/justice/citizen/files/com_2010_603_en.pdf.

⁹⁶ Communication from the Commission, *Consular Protection for EU Citizens in Third Countries* (March 2011), 3, available at: http://ec.europa.eu/justice/policies/citizenship/diplomatic/docs/communication_consular_protection.pdf.

authorities of other MS on a par with the protection that these MS provide their own nationals, though the provisions do not explicitly pronounce an individual right to protection abroad as such. *Third*, the provisions adopt a no-EU-citizen-left-behind agenda, and were promulgated with the declared aim of imbuing EU citizenship with substantive meaning for millions of EU citizens, and of potentially relaxing the ‘traditional’ nationality requirement.

Notwithstanding the ambiguity regarding the question whether the above provisions also concern the exercise of diplomatic protection on behalf of nationals of other MS and, if they do, whether EU citizenship satisfies the international law ‘nationality of claims’ requirement, these provisions form part of a cognisable trajectory towards expanding the individual right to receive protection when travelling abroad. As such, they call particular attention to the vulnerabilities of CSR1951 refugees: whereas the professed aim of the EU legal regime is that every EU citizen should enjoy effective protection wherever they travel, CSR1951 refugees to whom the analysis turns are in need of such protection wherever *they* travel.

E. CSR1951 Refugees as Persons in Need of International Protection

1. Absence of Protection as a Constituent Element of CSR1951 Refugee Status

Post First World War international refugee law instruments were non-universal in scope; they addressed the quandaries of particular national groups, and were predicated on a juridical concept of protection aimed at rectifying breakdowns in the international legal order that were caused, *inter alia*, by denial by some states of diplomatic protection and consular assistance to

their nationals abroad.⁹⁷ Thus, according to these instruments, state denial of protection for their nationals formed a constitutive part of refugee definitions.

For instance, a *Russian refugee* was defined⁹⁸ as ‘any person of Russian origin who does not enjoy or who no longer enjoys the protection of the Government of the USSR and who had not acquired another nationality’, and an *Armenian refugee* was defined as ‘any person of Armenian origin formerly a subject of the Ottoman empire who does not enjoy or who no longer enjoys the protection of the Government of the Turkish Republic and who had not acquired another nationality’. The provisions of the 1938 *Convention concerning Refugees Coming from Germany*⁹⁹ similarly applied to persons possessing or having possessed German nationality that are not proved to ‘enjoy in law or in fact the protection of the German Government’.

The scope of application of CSR1951, unlike that of its predecessors, is not restricted to those possessing a particular nationality.¹⁰⁰ Nevertheless, as noted above, the absence of

⁹⁷ Jane McAdam, *Complementary Protection in International Refugee Law* (Oxford University Press, 2007), 24.

⁹⁸ Arrangement with regard to the Issue of Certificates to Russian Refugees, 5 July 1922, 13 LNTS 237 and Arrangement with regard to the Issue of Certificates to Armenian Refugees, 31 May 1924, LN doc CL 72(a) 1924, respectively. See the later Arrangement concerning the Extension to Other Categories of Refugees of Certain Measures Taken in Favour of Russian and Armenian Refugees, 30 June 1928, 89 LNTS 63. Similarly, see Arrangement of 30 June 1928, 2006 LNTS 89, p 63 (regarding ‘Assyrian or Assyro-Chaldean and assimilated refugees’ and ‘Turkish refugees’) and the Convention of 28 October 1933, 3663 LNTS 159, p 199 (regarding ‘Spanish refugees’).

⁹⁹ Convention Concerning the Status of Refugees Coming from Germany, art 1, 10 February 1938, 192 LNTS 59. The Committee report noted that ‘the fact that most of them [referring to the refugees coming from Germany] possess national passports is of no importance in view of the precarious nature of the documents in their possession and the fact that as a rule it is impossible for them to get their passports extended’. League of Nations, Committee of International Assistance to Refugees, Report by the Committee submitted to the League of Nations, C.2.M.2 1936 XII Geneva, 3 January 1936. See also the Protocol of 14 September 1939, 4634 LNTS 198, p 141 (regarding Austrian refugees, victims of Nazi persecution).

¹⁰⁰ Notably, under CSR1951, states can restrict the convention's geographical application, and the convention includes a dateline (1 January 1951). However, parties to the New York Protocol relating to the Status of Refugees, 31 January 1967, 666 UNTS 267, entered into force 13 December 1973 removed the geographic restriction and agreed to apply the substantive provisions of CSR1951 [arts 2 through 34] to recognised refugees *as if the dateline in CSR1951 was omitted*. There is almost a full overlap between parties to the 1967 protocol and

protection abroad is similarly a constituent element of its refugee definition. In order to be recognised as a refugee, a person must be unable or, owing to fear of persecution based on one (or more) of the five convention grounds, unwilling to avail her or himself of the *protection* of their state of nationality.¹⁰¹ Persons possessing more than one nationality have to demonstrate that they lack the protection of each state.¹⁰² Inability or unwillingness to enjoy the protection of the refugee's state of origin is thus a necessary (though not a sufficient) condition for CSR1951 refugee status.

Moreover, four of the six cessation clauses of CSR1951 refugee status concern the availability of protection: voluntary re-avilment of the protection of the state of nationality;¹⁰³ acquisition of a new nationality (usually that of the state of asylum) and enjoyment of protection of that state;¹⁰⁴ voluntary re-establishment in the state of nationality;¹⁰⁵ and the occurrence of a fundamental change in circumstances so that refugees may no longer refuse to avail themselves of the protection of their state of nationality.¹⁰⁶

parties to CSR1951, with Madagascar being only a party to CSR1951, while Cape Verde, the USA and Venezuela are only parties to the 1967 Protocol. Notably, the Convention Relating to the International Status of Refugees, 28 October 1933, 159 LNTS 199 was the first attempt to create a comprehensive binding international legal framework for refugees, including a prohibition on expulsion and *refoulement*. This convention had 14 parties.

¹⁰¹ CSR1951 (n2), art 1A(2).

¹⁰² Ibid.

¹⁰³ Ibid, art IC(1).

¹⁰⁴ Ibid, art IC(3).

¹⁰⁵ Ibid, art IC(4).

¹⁰⁶ Ibid, art IC(5).

The *Travaux Préparatoires* of CSR1951 indicate¹⁰⁷ that *protection* in Article 1(A)(2) was used by the drafters as shorthand for *diplomatic* protection. Domestic courts have adopted similar interpretations.¹⁰⁸ Grahl-Madsen argued¹⁰⁹ that, even if a state of nationality wishes to ‘protect’ its refugee-nationals or act on their behalf, it has lost its (otherwise internationally recognised) right to do so until such time as its refugee-nationals willingly repatriate, and that such intervention may be considered an abuse of right. Indeed, permitting officials to afford ‘protection’ to their refugee-nationals may subvert the foundation of the institution of (political) asylum.¹¹⁰

It is quite instructive to compare the arrangements under CSR1951 with those under the Convention on the Protection of the Rights of All Migrant Workers and Members of their Families: Article 23 thereof stipulates¹¹¹ that ‘[m]igrant workers and members of their families shall have the right to have recourse to the protection and assistance of the consular or diplomatic authorities of their State of origin’. Migrant workers are thus entitled to such protection. As noted in Chapter Six *supra*, Article 3(d) stipulates that the Convention ‘shall not

¹⁰⁷ Antonio Fortin, ‘The Meaning of Protection in the Refugee Definition’ (2001) 12(4) International Journal of Refugee Law 548, 564; David Wilsner, ‘Non-State Actors and the Definition of a Refugee in the United Kingdom: Protection, Accountability or Culpability?’ (2003) 15(1) International Journal of Refugee Law 68, 108.

¹⁰⁸ *Minister for Immigration and Multicultural Affairs v Khawar* [2002] HCA 14, para 72 (Gleeson CJ, McHugh and Gummow JJ) (Australia); *Minister for Immigration and Multicultural Affairs v Respondent S152/2003* [2004] HCA 18, para 23 (Gleeson CJ) (Australia); *Canada (Attorney General) v Ward* [1993] 2 SCR 689, 724; *Horvath v. Secretary of State for the Home Department* [2001] 1 AC 489, 495 (UK); *The Queen (Al Rawi and others) v Secretary of State for Foreign and Commonwealth Affairs and another* [2006] EWCA Civ 127, para 28 (UK).

¹⁰⁹ Atle Grahl-Madsen, ‘Protection of Refugees by their Country of Origin’ (1985-1986) 11 Yale Journal of International Law 362, 389-95. Notably, he contended that the granting of asylum or refugee status ‘resembles acquisition of a new nationality’. Ibid, 389. Cf Niraj Nathwani, ‘The Purpose of Asylum’ (2000) 12 International Journal of Refugee Law 354, 358 (suggesting that the right to exercise diplomatic protection persists as long as a person remains a national, and if a refugee remains a national of the state of origin, that state may in theory exercise such protection). Nathwani asserts that the right of diplomatic protection is a privilege of the state under international law; refugees who do not enjoy diplomatic protection *de facto* share this fate with myriad of persons whose government chooses not to protect them for one reason or the other. Ibid, 360.

¹¹⁰ Luke Lee, *Consular Law and Practice* (Oxford University Press, 1991), 353.

¹¹¹ 18 December 1990, 2220 UNTS 3, entered into force 1 July 2003 (Migrant Workers Convention).

apply to...*refugees*...unless such application is provided for in the relevant national legislation of, or international instruments in force for the state party concerned’.

Chapter One *supra* demonstrated that, in international law, the state’s right to protect its nationals abroad is linked to the state’s *duty to readmit its nationals* should another state wish to deport them.¹¹² Hence, persons who avail themselves of the diplomatic protection of their state of nationality implicitly accept the risk that they would be considered ‘deportable’ to that state. Consequently, unwillingness of CSR1951 refugees to avail themselves of the protection abroad of their state of nationality need not necessarily be based on fear of being persecuted by that state’s diplomatic or consulate staff but, rather, on fear of being subsequently subject to expulsion to their state of nationality where they have a well-founded fear of persecution.¹¹³

This thesis endorses the (prevailing) contemporary interpretations of the ‘protection’ element of the CSR1951 refugee definition which, alongside the absence of state protection abroad, emphasise the pertinence of the state’s failure to provide protection *in its territory* to victims or potential victims of persecution at the hands of the state or of non-state actors. Indeed, fear of persecution and lack of protection from persecution are often interrelated; the latter may create a presumption as to the likelihood of persecution and to the well-founded

¹¹² Richard Plender, *International Migration Law* (Revised 2nd edn Nijhoff, 1988), 468; Oppenheim, (n64), vol I, 646.

¹¹³ Fortin (n107), 576. See eg *Case Regarding Cessation of Refugee Status*, VwGH No. 2001/01/0499, 15 May 2003 (Austrian High Administrative Court [*Verwaltungsgerichtshof*]), para 6, available at: <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3f40c1584> (holding that ‘[T]he successful application for the issuance or extension of validity of a passport of the country of nationality can lead to a cessation of refugee status even when the danger of persecution remains in the country of origin and a return there is not envisaged...where a recognised refugee insists on using a passport issued by the authorities of the country of nationality for purposes for which the Convention travel document would suffice or where a refugee wants to gain advantages bound to nationality by applying for the issuance of such a passport’). See also Refugee Protection Division, 3 August 2004 (Canada) (upholding cessation of refugee status of a Russian national, concluding that ‘the fact that the Respondent went to government authorities to obtain official documents such as passports and driving permits, causes me to conclude that he has sought and received the protection of his state, and voluntarily re-established himself in Russia’).

nature of the refugee's fear.¹¹⁴ The Australian High Court held¹¹⁵ that '[a]n inability or unwillingness to seek diplomatic protection may be explained by a failure of internal protection, that is protection in the wider sense, or may be related to the possibility that seeking such protection could result in return to the place of persecution'.

2. Travel Arrangements of CSR1951 Refugees: The Role of the State of Asylum

From an international law perspective, a fundamental purpose of travel documents is to provide the admitting state a *prima facie* guarantee that another state is prepared to accept individuals which it considers to be aliens, should the admitting state choose to deport them.¹¹⁶

It was noted above that CSR1951 refugees cannot approach the consular authorities of their state of nationality for the issuance or renewal of their passport or other travel documents issued by that state: if a CSR1951 refugee seeks and receives such protection, it may arguably trigger a CSR1951 cessation clause, in view of the stipulation in Article 1(C)(1)¹¹⁷ that 'this convention shall cease to apply to any person falling under the terms of section A if... [h]e has voluntarily re-availed himself of the protection of the country of his nationality'.

¹¹⁴ Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn Oxford University Press, 2007), 22-3. Fortin (n107), 574 (noting that the query as to whether the absence of internal protection brings about well-founded fear of persecution is pertinent regarding persecution by *non-state* actors, whereas it would be awkward to describe the state's action as a breach of its 'protection' obligations when it engages in persecution).

¹¹⁵ S152/2003 (n108), para 19 (Gleeson CJ, Hayne and Heydon JJ).

¹¹⁶ John Torpy, *The Invention of the Passport* (Cambridge University Press, 2000), 162-3.

¹¹⁷ Cf Joan Fitzpatrick and Rafael Bonoan, 'Cessation of Refugee Status' in Volker Türk and Erika Feller (eds), *Refugee Protection in International Law* (Cambridge University Press, 2003) 491, 525 (noting, with regard to refugees traveling through third states with a state of origin-issued passport, that a state of asylum seeking to impose cessation of refugee status must still prove that the refugee in question intended to avail him or herself of national protection and that effective protection is in fact available from the State of origin... simple travel on the passport without assistance from the State of origin would not suffice to justify cessation). See also *Khawar* (n108), para 65 (McHugh and Gummow JJ) where the Australian High Court noted that 'obtaining administrative assistance from the consular authorities of the state of nationality such as renewing a passport may provide an indication that the person enjoys diplomatic protection the strict sense but is not necessarily incompatible with refugee status...'

Based on the assumption that CSR1951 refugees cannot or will not request administrative assistance from the authorities of their states of nationality, Articles 25(1) and 25(3) respectively stipulate that ‘the Contracting States in whose territory he [the refugee] is residing shall arrange that such assistance be afforded to him by their own authorities or by an international authority’ and that ‘documents or certifications so delivered shall stand instead of the official instruments delivered to aliens or by or through their national authorities’.

In order to facilitate refugee travel, and in light of their inability to use their national passports even if they possess them, Article 28(1) *requires*¹¹⁸ states of asylum to issue ‘Convention Travel Documents’ (CTDs) to refugees who are lawfully staying in their territories ‘unless compelling reasons of national security or public order otherwise require’.

CTDs should guarantee refugees an unconditional right to re-enter the territory of the state of issuance,¹¹⁹ and refugees are expected to use them *instead* of their national passports.¹²⁰ Pertinently, according to Article 12(3) of the ICCPR, mentioned in Chapter Two *supra*, CSR1951 refugees should enjoy the right to leave the state; refusal to issue them a CTD may infringe their right to freedom of movement. The CTD specimen does not even mention the

¹¹⁸ UNHCR notes that the terms ‘compelling reasons’, ‘national security’ and ‘public order’ should be interpreted and applied restrictively, and only concern grave and exceptional circumstances. See UNHCR, *Guide for Issuance Machine-Readable Convention Travel Documents for Refugees and Stateless Persons* (October 2012), para 25, available at: <http://www.unhcr.org/refworld/pdfid/5081320d2.pdf>. The issuance of travel documents to refugees has been an important function of post First World War instruments, and is most famously associated with ‘Nansen certificates’; see the 1933 Convention (n2), art 2. While various states have initially submitted reservations to Article 28, the two remaining are Israel’s and Zambia’s. See reservations and declarations to the 1951 convention, available at: <http://www.unhcr.org/3d9abe177.pdf>.

¹¹⁹ CSR1951 (n2), art 28, schedule, para 13. Should a CSR1951 refugee lawfully take up residence in another state, the responsibility for issuing a new CTD shall be of the authorities of that state. *Ibid*, para 11.

¹²⁰ See *Handbook* (n5), para 121 (noting that ‘acquisition or renewal of a passport may raise questions about the refugee’s continued need for international protection. Obtaining or renewing a passport will, in the absence of proof to the contrary [a passport does not always permit re-entry into the state origin], be presumed that he intended to avail himself of the protection of the country of his nationality’).

refugee's nationality, nor does it determine or affect the national status of its holder.¹²¹ Other parties are required to recognise CTDs as passport-equivalent.¹²² States of asylum are required to make the CTD valid for the largest number of states possible, save in special or exceptional cases.¹²³ Nevertheless, Vedsted-Hansen describes¹²⁴ a widespread practice in states of asylum of excluding from the validity of CTDs the state of origin of the refugee.

Thus, *de jure*, CSR1951 refugees are able to enjoy international freedom of movement on terms that are not appreciably different from those that govern the passport-based system of travel and that apply to nationals of their state of asylum.¹²⁵ However, pertinently for this chapter, the CSR1951 schedule stipulates¹²⁶ that the issuance of CTDs 'does not in any way entitle the holder to the protection of diplomatic or consular authorities of the state of issue and does not confer on these authorities a right of protection.'

It can be argued that, while the drafters were conscious of the intuitive appeal of authorising states of asylum to exercise protection on behalf of CSR1951 refugees when they

¹²¹ Ibid, para 15; Grahl-Madsen (n109), 391.

¹²² Ibid, para 7; Hélène Lambert, *Seeking Asylum: Comparative Law and Practice in Selected European Countries* (Nijhoff, 1995), 163. See also Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, and Convention Relating to the Status of Refugees, Geneva, 2 to 25 July 1951, A/CONF.2/108/Rev.1, para iv: Facilitation of refugee travel: 'The conference, considering that the issue and recognition of travel documents is necessary to facilitate the movement of refugees and in particular their resettlement...urges government which are parties to the Inter-Governmental agreement on refugee travel documents....to continue to issue or to recognise such travel documents and to extend the issue of such documents to refugees as defined in Article 1 of the 1951 Convention or to recognise the travel documents so issued to such persons until they have undertaken obligation under Article 28 of the said Convention.'

¹²³ CSR1951 (n2), art 28, schedule, para 4.

¹²⁴ Jens Vedsted-Hansen, 'Article 28/Schedule' in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1951 Protocol: A Commentary* (Oxford University Press, 2011), 1177, 1208 (noting that the Schedule does not stipulate that the travel document will lose its validity if the holder enters the territory of that state; however, such travel may result in *cessation of refugee status*). See also James C Hathaway, *Rights of Refugees under International Law* (Cambridge University Press, 2005), 841-2.

¹²⁵ Hathaway (n124), 874.

¹²⁶ CSR1951 (n2), art 28, para 16.

travel using travel documents that *these states* issued, they knowingly refrained from including an exception to the ‘nationality of claims’ requirement.

Hence, states of asylum assume a vital role in facilitating international travel of CSR1951 refugees, yet CSR1951 neither requires nor authorises them to provide protection to ‘their’ refugees when they travel abroad. Notably, however, states of asylum are not *precluded* by CSR1951 from providing such protection on other legal bases.¹²⁷

F. The ‘Nationality of Claims’ Requirement: CSR1951 Refugees as a Special Case

1. The ‘Nationality of Claims’ Requirement in General International Law

It was noted above that, in general international law, a ‘nationality of claims’ requirement must be satisfied following the ill-treatment of a natural or legal person in order to render a state’s diplomatic protection claim admissible.¹²⁸ The Permanent Court of International Justice (PCIJ) held in *Panevezys Saldutiskis Railways*¹²⁹ that ‘it is the bond of nationality between the state and the individual which alone confers upon the state the right of diplomatic protection...where the injury was done to the national of some other state, no claim to which such injury may give rise falls within the scope of the diplomatic protection’.

¹²⁷ See eg Paul Weis, *The Refugee Convention 1951: The Travaux Analyses with a Commentary* (Cambridge University Press, 1995), 267. The Council of Europe adopted the Protocol to the European Convention on Consular Functions Concerning the Protection of Refugees, 11 December 1967, CETS No 061A. The Protocol entitles the consular officer of the state in which a refugee is habitually residing to ‘protect such a refugee and to defend his rights and interests in conformity with the Convention’. Ibid, art 2(2). However, the Protocol and the Convention only entered into force on 9 June 2011, nearly 44 years from their inception, following the fifth ratification; the last state to ratify was Georgia, preceded by Norway, Greece, Portugal and Spain.

¹²⁸ Ian Brownlie, *Principles of Public International Law* (7th edn Oxford University Press, 2008), 478.

¹²⁹ *Estonia v Lithuania*, (1939) PCIJ Rep, ser A/B no 76, 16, para 65. See also *Interhandel (Switzerland v USA)*, Judgment of 21 March 1959, ICJ Rep 1959, 27. See also Edwin Borchard, ‘Basic Elements of Diplomatic Protection of Citizens Abroad’ (1913) 7 *American Journal of International Law* 497, 515 (asserting that, due to the bond of citizenship, a state ‘must watch over its citizens abroad’).

The ICJ arguably made the nationality requirement more stringent in its *Nottebohm* judgment. It held¹³⁰ that ‘nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties....nationality entitles a state to exercise protection vis-a-vis another state if it constitutes translation into juridical terms of the individual’s connection with the state’. According to the judgment,¹³¹ a respondent state may refuse to recognise a diplomatic protection claim should the claimant state fail to establish a ‘genuine connection’ with its national even if nationality is formally possessed.

Application of the *Nottebohm* stipulation has been subject to scholarly critique.¹³² The ‘genuine connection’ requirement cuts against a protection-enhancing approach by excluding from eligibility for diplomatic protection ‘millions of persons who have drifted away from their state of nationality and made their lives in states whose nationality they never acquire’,¹³³ as well as ‘others who have acquired nationality by birth, descent or operation of law of states with which they have a most tenuous connection’.¹³⁴

¹³⁰ *Nottebohm (Lichtenstein v Guatemala)*, Judgment of 6 April 1955, ICJ Rep 1955, 4, 22. See also Chittharanjan F Amerasinghe, *Diplomatic Protection* (Oxford University Press, 2008), 91-2.

¹³¹ See also United States, *Restatement (III) of Foreign Relations Law* (1987), §211 (noting that ‘an individual has the nationality of a state that confers it, but other states need not accept that nationality when it is not based on a genuine link between the state and the individual’). The ICJ carefully limited its inquiry to the *international* effect of *Nottebohm*’s nationality, preserving the state’s discretion over nationality determinations for domestic law purposes. Peter Spiro, ‘A New International Law of Citizenship’ (2011) 105(4) *American Journal of International Law* 694, 705.

¹³² See eg Robert Sloane, ‘Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality’ (2009) 50 *Harvard International Law Journal* 1, 3-4 (arguing that ‘the genuine link theory...as a purported general norm of international law originates in a misreading of *Nottebohm*’).

¹³³ Dugard First Report (n27), para 117.

¹³⁴ *Ibid.*

Thus, it may be argued that the *Nottebohm* stipulation should be strictly interpreted so as to apply (only) in the circumstances of that case: after residing for decades in Guatemala, the respondent state, Mr Nottebohm has naturalised in Liechtenstein, the claimant state, shortly before the claim was filed, raising suspicion of artificiality. It is also noteworthy that the ICJ phrased the legal question rather narrowly: ‘whether the nationality conferred on Nottebohm can be relied upon by Liechtenstein against Guatemala’.¹³⁵

The ICJ held in *Barcelona Traction* that there are some obligations that states owe to the international community as a whole (*erga omnes*) because they concern ‘basic human rights’. In such cases, as all states may have a legal interest in protection regarding such violations, the nationality requirement is unnecessary. However, the ICJ clarified¹³⁶ that *erga omnes* obligations ‘are not of the same category’ as ‘obligations the performance of which is the subject of diplomatic protection’. The judgment thus hints at the possibility of interventions by states other than states of nationality regarding violations of basic human rights, yet the contours of this exception are unclear. Hence, the *lex lata* nature of the nationality requirement *as such* was affirmed.¹³⁷

2. The ILC Draft Articles and the Refugee Exception

The ‘nationality of claims’ requirement entails that, in principle, CSR1951 refugees can only receive diplomatic protection from their state of nationality. In turn, as was noted in section E *supra*, CSR1951 refugee status entails the *absence* of such protection, and while CSR1951 sets

¹³⁵ *Nottebohm* (n130), 18. See also Sloane (n132), 22.

¹³⁶ *Barcelona Traction* (n66), paras 33-4.

¹³⁷ Leigh (n9), 470 (advocating that diplomatic protection should be made independent of formal nationality, and that states should be allowed to bring claims on behalf of any individual effectively connected with them irrespective of whether the individual is also a national of the respective state in the formal sense).

arrangements for refugee travel abroad, the CTD as such does not entitle CSR1951 refugees to the protection abroad of their state of asylum.¹³⁸

Notably, CSR1951 pronounces¹³⁹ that '[a] refugee shall be accorded in...[matters pertaining to access to the courts]...in states other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence'. However, when Article 16 rights of CSR1951 refugees are violated abroad, they do not have resort to the diplomatic protection of their states of asylum.¹⁴⁰ The ILC Draft Articles follow the general maxim that '[t]he state entitled to exercise diplomatic protection is the state of nationality'.¹⁴¹ Nonetheless, an exception was 'carved out', authorising a state of asylum to exercise diplomatic protection 'in respect of a person who is recognised as a refugee by that state, in accordance with internationally accepted standards' provided that the person resides

¹³⁸ Enrico Milano, 'Diplomatic Protection and Human Rights before the International Court of Justice: Refashioning Tradition?' (2005) 35 Netherlands Yearbook International Law 85, 100.

¹³⁹ CSR1951 (n6), art 16(3).

¹⁴⁰ Cf a Court of Appeal decision concerning two foreign nationals (a Jordanian and a Libyan) recognised in the UK as CSR1951 refugees and in possession of UK-issued CTDs. The claimants were held in Guantanamo bay, where they were allegedly denied access to fair court proceedings in contravention of art 16 of CSR1951. UNHCR, acting as an intervener, argued that, as both the UK and the US are parties to the 1967 Protocol, the UK is entitled to demand that the US fulfil its art 16 obligations in good faith, and may invoke principles of *state responsibility* for alleged breaches of these obligations. Moreover, as CTD holders, the claimants had a right to return to the UK which other parties had to respect and which the UK can and should protect. It was thus contended that, while exceptions to the 'nationality of claims' rule would permit (though not require) the UK to exercise diplomatic protection on behalf of its CSR1951 refugees, resort to such measures was unnecessary. UNHCR, *Written Submissions on Behalf of the Intervener in The Queen (Al Rawi and others) v. Secretary of State for Foreign and Commonwealth Affairs* (12 July 2006) (2008) 20(4) International Journal of Refugee Law 675, paras 20, 38. The Court of Appeal held that, since the claimants were not British nationals, *lex lata* does not entitle the UK to exercise diplomatic protection on their behalf. Regarding a treaty-based intervention as advocated by UNHCR, the court held that, even if it were shown that the rights of claimants under art 16 were violated (a determination which the court suggested would require prior investigation into US detention practices and Federal law), the UK would not be able to demand that detained refugees would be released, as such a demand would constitute an extension of a right of diplomatic protection; the only plausible demand would be that the US fulfil its treaty obligations and treat the detainees properly. Hence, the Court held, the relief sought by the applicants could not be granted. *The Queen (Al Rawi and others) v Secretary of State for Foreign and Commonwealth Affairs* [2006] EWCA Civ 1279, paras 118, 124-9 respectively.

¹⁴¹ ILC Draft Articles (n6), art 3(1).

legally and habitually in its territory.’¹⁴² The commentary considers¹⁴³ the provision to be ‘an exercise in progressive development of the law’, emphasising¹⁴⁴ the predicament of refugees who may lose their status by availing themselves of protection of their state of nationality.

The provision sets¹⁴⁵ a higher threshold for exercising diplomatic protection (‘lawfully and habitually staying’) than the threshold for issuance of travel documents set by CSR1951 (‘lawfully staying’). Notwithstanding the undesirable ramifications of setting a higher threshold for protection of CSR1951 refugees abroad,¹⁴⁶ it is asserted that setting a similar threshold regarding voting rights of CSR1951 refugees in their states of asylum would not be unreasonable. Indeed, most CSR1951 refugees become habitual residents of their states of asylum due to the protracted nature of their fear of persecution and would thus be eligible for protection (see discussion in Chapter Eight *infra*).

The proposed provision attracted mixed reactions. The U.K. government noted the *lex ferenda* nature of the provision; it posited¹⁴⁷ that, while the Crown will be prepared to make representations on behalf of refugees in exceptional cases, *stricto sensu* it would not be an exercise of diplomatic protection. Other states have generally approved of the provision.¹⁴⁸ In

¹⁴² Ibid, art 8(2), art 3(2) (stipulating that ‘diplomatic protection may be exercised by a state in respect of a person that is not its national in accordance with draft article 8’).

¹⁴³ ILC Draft Articles (n6), commentary, art 8, para 2.

¹⁴⁴ Ibid, para 6.

¹⁴⁵ CSR1951 (n2), art 28.

¹⁴⁶ Paula Escarameia, ‘Professor Dugard as an Innovator in the World of the International Law Commission’ (2007) 20 Leiden Journal of International Law 931, 933 (criticising the higher threshold set by the ILC by noting that refugees may desperately need the protection of their state of asylum prior to habitually residing in that state).

¹⁴⁷ Comments and Observations received from Governments, UN Doc A/CN.4/561/Add. 1, 3 April 2006.

¹⁴⁸ See, for example, a statement by the group of Nordic states. Austria and El Salvador expressed reservations about the fact that the arrangement is not strictly limited to CSR1951 refugees, and argued that an open meaning of the term ‘refugee’ means that the respondent state would have to rely on the definition of the term ‘refugee’ by

the deliberations, concern was raised¹⁴⁹ that authorising the exercise of diplomatic protection on behalf of refugees could be seen as a first step towards conferral of nationality of the state of asylum, and may therefore create a disincentive for states to grant CSR1951 refugee status.

Consequently, the commentary emphasises¹⁵⁰ that the exercise of diplomatic protection should *not* be seen as giving rise to a legitimate expectation of conferment of nationality. It further notes¹⁵¹ the discretionary nature of Article 8 which (it argues) follows *a fortiori* from the unfettered state discretion in deciding whether to exercise diplomatic protection.

Moreover, Article 8(3) of the ILC Draft Articles qualifies¹⁵² the state of asylum's right to exercise diplomatic protection, stipulating that such protection cannot be exercised in respect of an injury caused by 'an internationally wrongful act of the state of nationality of the refugee' thereby denying diplomatic protection to CSR1951 refugees in such cases.¹⁵³ The commentary justifies the qualification on policy grounds,¹⁵⁴ positing that refugees may have serious complaints about their treatment in their state of origin, and allowing diplomatic protection in

the claimant state. Comments and observations received from Governments, UN doc. A/CN.4/561, 27 January 2006.

¹⁴⁹ ILC Report, 52nd session (2000), GAOR supp no 10 (A/55/10), 171.

¹⁵⁰ ILC Draft Articles (n6), commentary, art 8, para 12. See also Marjorie Zieck, 'Codification of the Law of Diplomatic Protection: The First Eight Articles' (2001) 14 *Leiden Journal of International Law* 209, 232. See also CSR1951 (n6), schedule, para 15 concerning CTDs, discussed in Section E.

¹⁵¹ ILC Draft Articles (n6), commentary, art 8, para 11. The ILC follows *Barcelona Traction* (see Section D).

¹⁵² ILC Draft Articles (n6), art 8(3).

¹⁵³ CSR1951 refugees may still initiate proceedings before supra-national tribunals or the Human Rights Committee. However, as was noted in Section C, the remedies offered by international human rights treaty bodies are rather limited and are often ineffective.

¹⁵⁴ Cf Luke Lee, 'The Right to Compensation: Refugees and Countries of Asylum' (1986) 80(3) *American Journal of International Law* 532, 560-4 (arguing that, based on principles of *state responsibility*, there are plausible grounds for holding a state of origin liable for compensation to its refugees-nationals for the harm caused to them and to their state of asylum, as well as to UNHCR, in appropriate cases, for expenses incurred by care and maintenance of refugees).

such cases means ‘open[ing] the floodgates for international litigation’.¹⁵⁵ It further suggests¹⁵⁶ that fear of demands for such action by refugees may deter states from accepting refugees.

Article 8(3) thus exposes difficulties in developing the (traditional) law of diplomatic protection in an era when human rights are strongly avowed but unsatisfactorily protected.¹⁵⁷ Indeed, the fact that claims on behalf of refugees may arise from circumstances which caused their plight and which underlie their well-founded fear of being persecuted is a potent reason to *encourage* protection rather than restrict it.¹⁵⁸ Moreover, the claim that entitling states of asylum, at their discretion, to exercise diplomatic protection would deter such states from admitting refugees is unpersuasive in view of the many positive (and costly) obligations that these states have undertaken (arguably, in good faith) under CSR1951 regarding recognised refugees residing in their territory.

Nonetheless, read in concert with Article 8(2), the forward-looking nature of Article 8(3) should be acknowledged. Recognised CSR1951 refugees who reside habitually in states of asylum may now be given protection abroad in circumstances arising from their post-asylum travels and interactions. In any event, as was noted in section E, travel to their state of origin may be either prohibited by their state of asylum or take place on rare or infrequent occasions. Thus, in light of the general resilience of the nationality requirement, the protection-enhancing agenda of the ILC Draft Articles is laudable, even though it has opted for a rather cautious

¹⁵⁵ ILC Draft Articles (n6), Commentary art 8, para 10.

¹⁵⁶ Ibid.

¹⁵⁷ Crawford (n10), 36.

¹⁵⁸ James L Kateka, ‘John Dugard’s Contribution to the Topic of Diplomatic Protection’ (2007) 20 Leiden Journal of International Law 921, 926-7.

approach. Indeed, it is contended that the rationales guiding the ILC Draft Articles are applicable, *mutatis mutandis*, to entitlements of CSR1951 refugees *in* their states of asylum.

G. Concluding Remarks

International law has long recognised the pertinence and significance of protection of nationals abroad. The value of such protection lies not only in the actual instances of its exercise, but in its availability, in the power that lies behind it, and in the resulting respect and security that a national enjoys as a normal accompaniment of his stay abroad.¹⁵⁹ The customary right of a national to receive real-time consular assistance abroad, codified in the widely ratified VCCR, remains unparalleled in its effective contribution to facilitating international travel and overcoming vulnerabilities, especially in emergency situations and when legal aid is sought.

It is contended that the advent of human rights treaties and their tribunals or review bodies has not rendered obsolete the protection of nationals abroad: such instruments offer limited remedies and enforcement is often ineffective. Indeed, resort to proceedings before the ICJ concerning ill-treatment of foreign nationals in the U.S. criminal justice system indicates that protection abroad retains its pedigree in the eyes of both states and individuals.

This chapter argues that a rights-centred approach to protection abroad curtails traditionally unfettered state discretion as to whether and when to exercise such protection. While the ILC Draft Articles follow the *Barcelona Traction* ratio so that, at present, in *international* law, states cannot be required to protect their nationals abroad, recent years have witnessed a rights-centred jurisprudence in domestic courts leading to the potential emergence of a qualified duty to give due consideration to requests for protection abroad or to provide

¹⁵⁹ Lauterpacht (n21), 335.

justifications for refusal to provide such protection. Moreover, some domestic constitutions *entitle* citizens to protection abroad. In recent developments that signify the importance of protection abroad, EU treaties now enunciate a judicially enforceable right of EU citizens to enjoy the protection of consular and diplomatic authorities of other MS on a par with the level of protection these MS provide their own citizens when they travel to a non-EU state.

It is contended that these developments reflect a growing acknowledgment that protection obligations may extend extraterritorially. The bond between citizens and their (democratic) state manifests itself, *inter alia*, in citizens confiding trust in their state to make representations on their behalf when they travel abroad and are in need of assistance or redress; citizenship is thus imbued with an extraterritorial dimension.¹⁶⁰ As Hansen contends, claiming protection abroad is not an entitlement of which most people will ever avail themselves, but rights are not defined by the probability that they will be needed.¹⁶¹

The (revived) prominence of protection abroad highlights the vulnerability of CSR1951 refugees whose ‘bond of nationality’ with their state of nationality is (temporarily) severed: their status entails *ipso facto* that they do *not* enjoy the protection of their state. As recognised CSR1951 refugees residing in a state of asylum, they enjoy a ‘bundle’ of rights that they may exercise in that state, and are also entitled to state of asylum-issued CTD to facilitate their travel. However, when travelling outside their state of asylum using their CTD, they are unable to enjoy the protection that their state of asylum offers to its own nationals.

¹⁶⁰ Cf Nicholas Barber, *The Constitutional State* (Oxford University Press, 2011), 41 (contending that it is a constitutive rule of states that their primary purpose is the advancement of the well-being of their members).

¹⁶¹ Randall Hansen, ‘The Poverty of Postnationalism: Citizenship, Immigration, and the New Europe’ (2009) 38(1) *Theory and Society* 1, 12.

Indeed, the ‘nationality of claims’ requirement which stood at the heart of the institution of diplomatic protection at the time CSR1951 was drafted still does so today. However, sixty years later, the ILC decided to ‘carve out’ an exception to the nationality requirement, for refugee protection by their state of asylum. The ILC Draft Articles’ *lex ferenda* stipulation authorising states of asylum to exercise diplomatic protection on behalf of recognised and habitually resident refugees acknowledges their predicament and transposes human rights considerations to the traditional diplomatic protection arena.¹⁶²

A rights-centred approach to protection abroad entails that, by taking up the claim of its national, a state also serves a broader interest of ensuring that its citizens are accorded proper treatment in accordance with human rights standards, an interest that ought to be shared by other states as well.¹⁶³ The state of asylum that has issued the CTDs used by CSR1951 refugees is (and, indeed, should be) legitimately interested in the way they are treated abroad. The state of asylum is also the state that is most likely to enjoy the confidence and trust of its refugees.

It is contended in this chapter and, indeed, in the thesis as a whole that CSR1951 refugees are a special category of non-citizen residents: their predicament are also of a *political* nature, and are evident when they travel outside their state of asylum without effective state protection. While the ILC Draft Articles may have had to adopt a cautious approach in order to reach consensus, it is submitted that a stronger commitment to state protection abroad would be

¹⁶² Cf David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton University Press, 2004), 203 (asserting that diplomatic protection cannot be fully analogised with refugee protection, since the former primarily concerns reciprocal rights of sovereign states, and the fact that a national gets ‘protected’ is secondary). See also Thomas M. Franck, *The Empowered Self: Law and Society in the Age of Individualism* (Oxford University Press, 2001), 197 (sceptically noting that states rarely have an interest in private causes of their subjects, especially if by taking their cases they risk antagonising fellow-sovereigns with whom they have mutually beneficial relations. Equally, states may resort to *excessive* recourse, making an individual's private claim a *cause célèbre* that is disproportionate to the inflicted wrong).

¹⁶³ Leigh (n9), 456.

welcome. States should be generally expected to protect rights of their citizens upon request where and when they can reasonably do so, and equally they should extend protection to ‘their’ CSR1951 refugees *as if they were their nationals*.

Analogies may be drawn between the rights-centred approach of the ILC Draft Articles to protection abroad of CSR1951 refugees, manifested by the partial exception to the nationality requirement, and the analysis in this thesis of the scope of protection that recognised CSR1951 refugees ought to enjoy *in* their states of asylum. The vulnerability of CSR1951 refugees is manifested when they travel outside their state of asylum, and the ILC Draft Articles seek to ameliorate it, albeit partially, by explicitly authorising states of asylum to provide protection abroad to their recognised CSR1951 refugees. Nevertheless, it is *in* their state of asylum where the predicament of recognised CSR1951 refugees is most significant. It manifests itself in their exclusion from the political community of that state, whilst they remain estranged from the political community of their state of origin for an indeterminate and potentially protracted period. Chapter Eight *infra* addresses their voting rights in elections of their states of asylum.

CHAPTER EIGHT: ENFRANCHISEMENT OF RECOGNISED CSR1951 REFUGEES IN ELECTIONS OF THEIR COUNTRIES OF ASYLUM

A. Introduction

State protection of individuals is clearly significant in a global legal order where rights to permanent security of residence in a state and the right to return to it are (usually) citizenship-dependent;¹ where states are held responsible for protecting rights of their nationals at home² and (to a considerably lesser yet normatively significant extent) abroad;³ and where the right to vote is claimed and increasingly exercised by expatriates⁴ in light of its protective (and expressive) purposes.⁵

Most recognised CSR1951 refugees⁶ in the period following their recognition are excluded from voting in elections of their countries of asylum. Previous chapters have demonstrated that their electoral exclusion *qua* non-citizen residents is *not* incompatible with conventional interpretations of international refugee law and international human rights law obligations undertaken by countries of asylum. This chapter argues that enfranchisement of recognised CSR1951 refugees in elections of their countries of asylum is desirable.

¹ See Chapter One *supra*.

² See Chapter Two *supra*.

³ See Chapter Seven *supra*.

⁴ See Chapter Six *supra*.

⁵ See Chapter Three *supra*.

⁶ Convention Relating to the Status of Refugees, art 1A(2), 28 July 1951, 189 UNTS 137, entered into force on 22 April 1954.

Citizenship-based eligibility coupled with cumbersome naturalisation requirements result in electoral exclusion of non-citizen residents for potentially protracted periods. While this thesis does not appraise naturalisation requirements *as such*,⁷ a few observations are in order.

First, it is contended, *contra* ethnic nationalists, that naturalisation should be generally accessible and reasonably attainable;⁸ a time-dependent right to acquire full membership in the community where one establishes one's life by forming personal, social and economic connections seems appropriate.⁹

Second, general relaxation of naturalisation requirements, for instance, by foregoing citizenship or language tests, will *ipso facto* facilitate naturalisation of non-citizen residents, including CSR1951 refugees. Should states choose to adopt *residency*-based eligibility,¹⁰ CSR1951 refugees would also be enfranchised *qua* residents.

Nevertheless, the central claim of this thesis is that recognised CSR1951 refugees are a *special* category of resident non-citizens; they should be entitled to vote in elections of their countries of asylum even if other non-citizens remain excluded therefrom.

⁷ See Chapter Four *supra*.

⁸ See eg Diane F Orentlicher, 'Citizenship and National Identity' in David Wippman (ed), *International Law and Ethnic Conflict* (Cornell University Press, 1998) 296, 323 (contending that the democratic nature of a state of residence is fundamentally subverted by denying full citizenship to long-time residents). See also Dora Kostakopoulou, *The Future Governance of Citizenship* (Oxford University Press, 2008), 6 (contending that 'long term residents are "outsiders" since they are permitted to enter the private realm of the state but are excluded from the public realm'). Cf David Miller, 'Democracy's Domain' (2009) *Philosophy and Public Affairs* 37(3) 219, 219-20 (applying the *coercion principle* to explain why states that deny citizenship to long-term immigrants who make their life in a new state are justifiably accused of violating democratic principles); David Miller, 'Immigrants, Nations, and Citizenship' (2008) 16(4) *Journal of Political Philosophy* 371, 375 (defining permanent residents as 'citizens in the making').

⁹ See eg Joseph H Carens, *On Belonging* (Boston Review, 2005), available at: <http://bostonreview.net/BR30.3/carens.php>.

¹⁰ See Chapter Five *supra*.

A pre-CSR1951 UN report noted¹¹ that '[t]he refugee's disabilities arise from the fact that he neither possesses the ultimate possibility of returning to his own country, nor enjoys the protection of that country while away from it'. In order for CSR1951 refugees to enjoy adequate state protection as long as they retain their refugee status, they should be entitled in their country of asylum¹² to rights that are (traditionally) considered *citizenship*-dependent.¹³

In other words, they should enjoy full membership of the (political) community of their state of asylum for the indeterminate period during which they hold CSR1951 refugee status, so that they are treated by their country of asylum as if they were its nationals insofar as their voting rights are concerned. Hence, countries of asylum which retain citizenship-based eligibility¹⁴ in some or all of their elections¹⁵ should regard recognised CSR1951 refugees as if they were their citizens for voting eligibility purposes.¹⁶

Section B introduces the enfranchisement rationale; it is contended that enfranchisement of CSR1951 refugees is a desirable and achievable (political) remedy for the (political) predicament which forms a substantive part of the conceptual basis of their

¹¹ UNGA, *Refugees and Stateless Persons: Report of the Secretary General*, A/C.3/527 (26 October 1949), para 20, available at: <http://www.unhcr.org/refworld/docid/3ae68beb10.html>.

¹² *Ibid*, para 18 (noting that '[i]t is understood that the duty of protecting the refugees rests in the first instance upon the governments of countries in the territory of which the refugees are located').

¹³ See Patrick Weil, 'From Conditional to Secured and Sovereign: The New Strategic Link Between the Citizen and the Nation-State in a Globalised World' (2011) 9(3-4) *International Journal of Constitutional Law* 614, 622. *Cf* Kiran Banerjee, 'Political Community of Fate or Postnational State? Tensions and Transformation in Contemporary German Citizenship', p13, available at: <http://ssrn.com/abstract=2019672> (describing the status of EU citizens who 'enjoy important political entitlements traditionally reserved to national citizens, including the right to local political participation, diplomatic and consular protection, and freedom of movement with regard to entering and exiting their state of residence').

¹⁴ *Cf* criteria for voting eligibility in New Zealand, considered in Section D *infra*.

¹⁵ Some states extend voting rights to (some or all of their) non-citizen residents in local elections; see Chapter Two *supra*.

¹⁶ Eligibility remains subject to individual competence, the appraisal thereof falls *outside the scope of the thesis*.

recognition. The analysis draws on the particular vulnerabilities of CSR1951 refugees, distinguishing them from other non-citizen residents.

Section C considers the expressive and protective significance of voting for individuals (Chapter Three *supra*) in the light of the particular predicament of CSR1951 refugees. It revisits the general arguments concerning citizenship voting qualifications (Chapter Five *supra*), emphasising how the subjection of CSR1951 refugees to unaccountable (to them, in the absence of a right to vote) power is compounded by the absence of available ‘exit’ options.

Section D asserts that recognition of CSR1951 refugees is an explicit acknowledgment by a state of asylum of their (political) predicament, and a principled commitment to act *in loco civitatis* to protect CSR1951 refugees as long as protection is required.¹⁷ It is submitted that rationales underlying commitments to assimilation (read: *integration*) are applicable to enfranchisement. While integration of refugees is a considerable challenge for states of asylum, enfranchisement may be a stepping stone on an integration path. Finally, it is conceded that CSR1951 refugees are likely to be drawn to or remain in rights-protecting states of asylum.¹⁸

B. The Enfranchisement Rationale

The predicament that CSR1951 refugees suffer is directly linked to their recognised status as persons in need of international protection. In the case of recognised CSR1951 refugees, the general vulnerabilities that non-citizens *qua non-citizens* suffer due to their physical alienage from the political community of their state of origin are compounded due to the circumstances

¹⁷ See eg UNGA, Declaration on Territorial Asylum, Preamble, GA/Res/2312 (XXII) 22 UN GAOR Supp (No 16) at 81, UN Doc A/6716 (1967) (noting that ‘[t]he grant of asylum by a State is a peaceful and humanitarian act and...as such it cannot be regarded as unfriendly by any other state’).

¹⁸ Cf Matthew E Price, *Rethinking Asylum: History, Purpose and Limits* (Cambridge University Press, 2009), 10 (asserting that public support for asylum has diminished due to a shift from a ‘political’ to a ‘humanitarian’ view of asylum).

that have led to their departure from their state of origin, and due to the *indeterminate* time-horizon of their stay in the state of asylum: neither open-ended nor with a specified endpoint.¹⁹

It was noted in Chapter One *supra* that, absent exceptional circumstances, a state of asylum may not deport recognised CSR1951 refugees. However, their security of residence is contingent on continuing to hold their refugee status. Article 1C of CSR1951 contains an *exhaustive* list of six clauses entailing cessation of CSR1951 refugee status. Article 1C(3) stipulates²⁰ that, if a state of asylum naturalises CSR1951 refugees, their refugee status would generally cease as CSR1951-based protection would no longer be required. It is also possible (though considerably less likely) that CSR1951 refugees will take up citizenship of a third state and avail themselves of its protection.

Crucially, *all* the other cessation clauses materialise as a result of occurrences that are beyond the control of the state of asylum. Three cessation clauses are triggered by the actions of *CSR1951 refugees* and require voluntariness, intent, and effective protection. According to Articles 1C(1) and 1C(2), respectively, refugees may re-avail themselves of the protection of their state of origin²¹ or re-acquire its nationality.²² In both cases, it is assumed that the

¹⁹ David Owen, 'Citizenship and the Marginalities of Migrants' in Philip Cook and Jonathan Seglow (eds), *The Margins of Citizenship* (Routledge, forthcoming 2013) (draft with author, 9).

²⁰ CSR1951, art 1C(3): 'The Convention shall cease to apply to any person falling under the terms of Section A if...[h]e has acquired a new nationality and enjoys the protection of the country of his new nationality'. See UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (reissued December 2011), para 17 (stipulating that, in order to satisfy the conditions of art 1C(3), the new nationality must be effective, namely correspond to a genuine link between the individual and the state; and the refugee must be willing and able to avail herself of the protection of the government of her new nationality).

²¹ *Ibid*, art 1C(1). See *Handbook* (n20), para 119 (stressing the need to show voluntariness, intent, and actual re-availment).

²² *Ibid*, art 1C(2). See *Handbook* (n20), paras 126-8 (suggesting that nationality must be 'expressly or impliedly accepted' before cessation would be appropriate; nevertheless, if recognised refugees have full knowledge that their nationality will be restored automatically by their state of origin unless they opt out, they should signal their rejection; should a refugee decline an offer of nationality, the element of voluntary re-acquisition will be absent).

(political) ties between CSR1951 refugees and their state of origin have been mended. CSR1951 Refugees may voluntarily re-establish themselves in their state of origin,²³ in which case they no longer suffer physical alienage therefrom. In contradistinction, the Article 1C(5) and (6) cessation clauses concern changes in the state of origin that are of a fundamental, stable, and durable nature, and which indicate that CSR1951 refugees no longer require international protection.²⁴ Crucially, neither CSR1951 refugees nor their states of asylum know *when* or, indeed, *whether* such changes in circumstances will occur.

Refugee status is retained unless one or more of the above conditions is satisfied.²⁵ Thus, UNHCR posits²⁶ that, in view of ‘the need to “respect a basic degree of stability for individual refugees”’ a ‘refugee’s status should not in principle be subject to frequent review to the detriment of his sense of security, which international protection is intended to provide’.²⁷

²³ Ibid, art 1C(4). See eg Atle Grahl-Madsen, *The Status of Refugees in International Law* (Sijthoff, 1966), 370 (noting that ‘[i]f he [the refugee] abandons his flight and goes home, it is only natural that he ceases to be considered a refugee’). Refugees may choose to return, risking persecution; and if their decision is made voluntarily, and reestablishment is durable, refugee status may cease.

²⁴ Ibid, arts 1C(5),(6). These provisions have been traditionally invoked on a group basis, though textually individual determination is not precluded. See eg UNHCR, ExCom, Conclusion No 69, *Cessation of Status* (9 October 1992), para (a) (noting that ‘[s]tates must carefully assess the fundamental character of the changes in the country of nationality or origin, including the general human rights situation, as well as the particular cause of fear of persecution, in order to make sure in an objective and verifiable way that the situation which justified the granting of refugee status has ceased to exist’); and para b (noting that ‘an essential element in...assessment by states is the fundamental, stable, and durable character of the changes’ and emphasising ‘that the “ceased circumstances” cessation clauses shall not apply to refugees who continue to have a well-founded fear of persecution’). Cf James C Hathaway, *The Law of Refugee Status* (Butterworths, 1991), 199 (noting that a state of asylum has a prerogative to make a decision on cessation of status, if it is satisfied that protection is viable in the state of origin).

²⁵ See James C Hathaway, ‘Why Refugee Law Still Matters’ (2007) 8 Melbourne Journal of International Law 89, 96 (arguing that an erroneous insistence on an absolutist linkage between refugee status and a right of *permanent* immigration raises the stakes for governments and harms asylum; refugee law requires that states of asylum receive refugees in dignity, but does not compel them to permanently redefine the nature of their own political community).

²⁶ *Handbook* (n20), para 135.

²⁷ UNHCR, *Summary Conclusions: Cessation of Refugee Status*, Lisbon Expert Roundtable (3-4 May 2001), para 12.

Chapter One *supra* noted that, unlike recognised CSR1951 refugees, *citizens* enjoy permanent security of residence in their state(s) of nationality.²⁸ It is an indispensable marker of belonging to a state;²⁹ it may even be argued that the expulsion of non-citizens is a manifestation of the privileged status of citizens.³⁰ The ‘indefeasible right to remain...is what makes the status [of citizen] irreplaceable’.³¹ Freedom from deportation enables citizens to pursue long-term projects, knowing that they may remain in the state.³²

The *raison d’être* behind the non-deportability of CSR1951 refugees is a major distinguishing characteristic which other groups of non-citizens do not generally share; in particular, stateless persons (who are not CSR1951 refugees) are generally non-deportable for

²⁸ An explicit prohibition on expulsion of *nationals* can be found in eg Protocol IV to the Convention for the Protection of Human Rights and Fundamental Freedoms securing certain rights and freedoms other than those already included in the Convention and in the First Protocol thereto, Strasbourg, 16 September 1963, ETS No 046, entered into force 2 May 1968, art 3(1): ‘No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national’. See Clarissa Rile Hayward, ‘The Dark Side of Citizenship: Membership, Territory and the (Anti-) Democratic Polity’ (2011) 9(1) *Issues in Legal Scholarship* (Article 5), 3 (drawing an analogy between the state and a club, and arguing that ‘[a] polity does not admit a resident alien as a member when it grants her some rights any more than a club admits a guest as a member when it allows her to use its facilities and enjoy its services. Guests would be present, and protected, and given (equal) access to club facilities, but at the pleasure of the officers and the members of the club’).

²⁹ Indicatively, in its *Note on the Interpretation of Article 1E of the 1951 Convention Relating to the Status of Refugees* (UNHCR, 2009), paras 13-15, UNHCR posits that, for the purposes of determining the applicability of the provision (discussed in Chapter Two *supra*), rights and obligations ‘need not be identical in every respect to those enjoyed by nationals of the country in question’ and that ‘[t]he status envisaged in Article 1E should normally only be temporary, followed by formal acquisition of the nationality of the country concerned’. Notably, however, it is posited that ‘[n]o difference is allowed as regards protection from forced removal. Persons to whom the application of Article 1E is considered must like nationals be protected against deportation and expulsion.’

³⁰ Bridget Anderson, Matthew J Gibney, and Emanuela Paoletti, ‘Citizenship, Deportation and the Boundaries of Belonging’ (2011) 15 *Citizenship Studies* 547, 548 (contending that ‘the act of expulsion simultaneously rids the state of an unwanted individual and affirms the political community’s idealised view of what membership should (or should not) mean’); Peter Marden, ‘Mapping Territoriality’ in David Graham and Nana Poku (eds), *Migration, Globalisation, and Human Security* (Routledge, 2000), 47, 57 (asserting that the right to unqualified indefinite residence is a key attribute of nationality; conversely, vulnerability to exclusion or expulsion signifies non-belonging).

³¹ Cristina M Rodriguez, ‘Review of Peter J Spiro, *Beyond Citizenship: American Citizenship after Globalization*’ (2009) 103 *American Journal of International Law* 180, 187. See also Cristina M Rodriguez, ‘The Citizenship Paradox in a Transnational Age’ (2008) 106 *Michigan Law Review* 1111, 1120-21.

³² Dominic Abrams and Michael A Hogg, *Social Identity and Social Cognition* (Blackwell Publishing, 1999), 266 (asserting that ‘[p]eople have a fundamental need to feel certain about their world and their place within it...and that [u]ncertainty is aversive because it is ultimately associated with reduced control over one’s life’).

different reasons. The cogency of human rights obligations that a state undertakes towards *all persons* subject to its jurisdiction and present in its territory is pertinently tested regarding CSR1951 refugees:³³ CSR1951 refugees cannot or will not return to their state of origin and regain the full scope of rights protection in that state; hence, they have no effective ‘*exit*’ option from their state of asylum, but have to rely exclusively on that state’s protection.

The *political* predicament of CSR1951 refugees is thus distinguishable from that of voluntary migrants (who may or may not be ‘migrant workers’³⁴). It is also distinguishable from the predicament of ‘stateless persons’³⁵ *as such* which is first and foremost due to their lack of *de jure* nationality, and its effective resolution *requires* the acquisition of a nationality.³⁶ Moreover, stateless persons do not necessarily suffer physical alienage from their state of habitual residence: oftentimes, they are stateless where they were born and raised.³⁷

It was argued in Chapter Six *supra* that states increasingly provide their expatriates access to Out-of-Country Voting (OCV) procedures. By contrast, CSR1951 refugees *qua*

³³ See Yaesmin Soysal, *The Limits of Citizenship* (University of Chicago, 1994), 143 (suggesting that the notion of ‘universal personhood’ as a basis of membership resonates most clearly in the case of ‘political refugees’ whose status in the host polities rests exclusively on an appeal to human rights).

³⁴ The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, art 2(1), GA/Res/45/158, annex, UN Doc A/45/49 (18 December 1990) (Migrant Workers Convention) defines a ‘migrant worker’ as ‘a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national’.

³⁵ A ‘stateless person’ is defined under the Convention Relating to the Status of Stateless Persons, art 1, 28 September 1954, entered into force 6 June 1960, as ‘a person who is not considered as a national by any State under the operation of its law’. See also Preamble, para 3: ‘[c]onsidering that only those stateless persons who are also refugees are covered by the Convention Relating to the Status of Refugees of 28 July 1951, and that there are many stateless persons who are not covered by that Convention’.

³⁶ See eg the Convention on Reduction of Statelessness, Preamble, 30 August 1961, 989 UNTS 175, entered into force 13 December 1975 (‘considering it desirable to reduce statelessness by international agreement’); see also European Convention on Nationality (ECN), art 4, Strasbourg, 6 November 1997, ETS No 066, entered into force 1 March 2000 (stipulating under ‘Principles’ that (a) ‘everyone has the right to a nationality’ and (b) ‘statelessness shall be avoided’).

³⁷ Ruma Mandal, *Protection Mechanisms outside of the 1951 Convention (‘Complementary Protection’)* (Legal and Protection Policy Research Series, PPLA/2005/02, June 2005), para 33.

expatriates are highly unlikely to have access to OCV procedures (should their state of origin generally offer them to its nationals abroad), in view of the fact that they have left their state of origin involuntarily and despite the fact that they are stakeholders in its elections. Unlike OCV of voluntary expatriates or of ‘Conflict Forced Migrants’ (CFMs) in post-conflict elections, access of CSR1951 refugees to OCV procedures requires the (largely unattainable) cooperation of the CSR1951 refugee, the state of asylum and the state of origin; genuine impediments are unavoidable.³⁸

In turn, Chapter Seven *supra* demonstrated that, when travelling outside their state of asylum, CSR1951 refugees *qua* recognised refugees cannot turn to representatives of their state of origin and request its diplomatic protection in the event of ill-treatment, nor can they expect to receive consular assistance therefrom. Consequently, CSR1951 refugees have no recourse to protection abroad should mistreatment occur. It was submitted that, alongside the existing requirement that states of asylum *shall* issue Convention Travel Documents (CTD) to recognised refugees which afford these refugees an unconditional right to return to the issuing state as if they were its nationals,³⁹ states of asylum should extend to their recognised refugees the same protection abroad that these states grant their own nationals when they travel abroad (indeed, that states ought to grant such protection to their nationals in suitable cases).

Grahl-Madsen has characterised⁴⁰ the absence of protection *outside* the state’s territory as ‘a symptom of a deep-rooted conflict between CSR1951 refugees and their states of origin

³⁸ Cf Migrant Workers Convention, art 41(1), guaranteeing migrant workers and members of their families ‘the right to participate in public affairs of their State of origin and to vote and to be elected at elections’ of their *state of origin*.

³⁹ CSR1951, art 28 and schedule, art 13(1) ([e]ach Contracting State undertakes that the holder of a travel document issued by it in accordance with Article 28 of this Convention shall be readmitted to its territory at any time during the period of its validity’).

⁴⁰ *Status of Refugees* (n23), 98-100.

that is based on a well-founded fear of persecution’ and which inhibits them from returning. Importantly, while state protection abroad and proper access to OCV procedures require the consent, cooperation or acquiescence of another state, a commitment to enfranchise CSR1951 refugees is an *internal matter* for the state of asylum.⁴¹ Moreover, the case for extending protection is dependent on establishing the entitlement of nationals to such protection. By contrast, states of asylum may autonomously decide to entitle CSR1951 refugees to vote in their elections; while, as demonstrated in Chapter Two *supra*, human rights treaties do not require states to enfranchise non-citizens, states may choose to do so, exercising sovereignty.

It is therefore argued that, in the case of CSR1951 refugees, disaggregation of citizenship-dependent rights should be three-fold. *First*, they should enjoy the right to unqualified readmission to their state of asylum. Contracting states to CSR1951 are *already* required to issue refugees a CTD that guarantees them such an entitlement. *Second*, when CSR1951 refugees travel outside their state of asylum using their state of asylum issued CTD *in lieu* of their passport, the state of asylum should afford them its protection abroad as if they were its nationals; in turn, nationals increasingly, though still not universally, have recourse to state protection abroad. The ILC Draft Articles on Diplomatic Protection endorse the above proposition. *Third*, the central claim of this thesis: CSR1951 refugees should be entitled to vote in elections of their state of asylum, notwithstanding generally applicable *citizenship*-based eligibility criteria.

⁴¹ See Chapter Five *supra* (noting that, in general, participation in elections of institutions of two states does not violate equality principles, notwithstanding particular issues arising in the context of supra-national institutions like the European Union).

By enfranchising CSR1951 refugees, the state of asylum will be recognising that, for an indeterminate period, CSR1951 refugees have no other political community to return to⁴² or turn to for protection; the state of asylum is best placed to ‘step in’ and let recognised CSR1951 refugees into its political space for such time as they are in need of its protection.

Advocates of *residency*-based eligibility (see Chapter Five *supra*) argue⁴³ that it should be applied to all non-citizen residents, including voluntary migrants who have access to OCV procedures of their state of origin, enjoy its protection abroad, and are able to return to it at will. Nevertheless, this thesis asserts that recognised CSR1951 refugees have *stronger* claims than other non-citizen residents for inclusion in elections of their states of asylum,⁴⁴ as a result of the ‘civic limbo’⁴⁵ in which they find themselves in their state of asylum.

Importantly, extending citizenship-based rights to CSR1951 refugees does not absolve states of asylum from their obligation to ‘as far as possible facilitate the assimilation and naturalisation of refugees.’⁴⁶ Long term, CSR1951 refugee protection cannot isolate itself from

⁴² See Rainer Bauböck, ‘The Rights and Duties of External Citizenship’ (2009) 13(5) *Citizenship Studies* 475, 482 (submitting that ‘[t]he core of external citizenship is the right to return... the return option is an important element in migrants’ overall bundle of citizenship rights, no matter whether they are individually likely to choose it’).

⁴³ Cf Kostakopoulou (n8) (advocating a *domicile*-based ‘a-national citizenship’). She further notes that refugees ‘do not acquire domicile unless they decide to settle in the host country for an indefinite period’ whereas ‘[a] refugee...who decides to remain in the host country even though he can return home could establish domicile’. Ibid, 114. On her model, it is unclear *when* refugees would acquire electoral participation rights in their state of asylum. See, by contrast, Ulrich K Preuss, ‘Migration - A Challenge to Modern Citizenship’ (1998) 4(3) *Constellations* 307, 314 (arguing that membership in a political community requires deeper, more existential and emotional kind of commonness than common residence within the boundaries of a given territory).

⁴⁴ Bauböck (n42), 477 (contending that, in the main, ‘denizenship’ and long-term external citizenship are two sides of the coin, and the normative framework through which migrants’ claim to equal respect and concern should be assessed ought to involve both states of residence and states of origin. He suggests that we ‘abandon not the norm of equal respect and concern for all citizens, but the notion that this demand is exclusively addressed to the government of a single country’).

⁴⁵ David Owen, ‘Citizenship and the Marginalities of Migrants’ in Philip Cook and Jonathan Seglow (eds), *The Margins of Citizenship* (Routledge, forthcoming 2013) (draft with author, p13).

⁴⁶ CSR1951, art 34. See also ECN (n37), art 6(4) (Acquisition of Nationality): ‘[E]ach state shall *facilitate* in its internal law the acquisition of its nationality for...(g)...recognised refugees lawfully and habitually resident on its

its primary objective, namely the re-establishment of the refugee within a community:⁴⁷ the situation of CSR1951 refugees is ‘abnormal and should not be regarded as permanent’.⁴⁸ While UNHCR reiterates⁴⁹ that ‘voluntary repatriation, in safety and dignity, where and when feasible, remains the most preferred solution in the majority of refugee situations’, it could be argued that, in protracted situations, like other long-term residents, CSR1951 refugees may develop a strong attachment to their host community and wish to remain there.⁵⁰

However, even if naturalisation eventually takes place, CSR1951 refugees remain excluded from electoral processes during the (protracted) period between recognition and naturalisation. Moreover, CSR1951 manifests a tension between, on the one hand, obligations undertaken by a state of asylum following recognition and, on the other hand, finding a durable

territory’. The Explanatory Notes, para 52 postulate that ‘state parties still retain their discretion to decide whether to grant their nationality to such applicants [recognised refugees]’. See also Council of Europe, Committee of Ministers, Recommendation R84 (21) on the *Acquisition by Refugees of Nationality of the Host Country* (14 November 1984) (reiterating that ‘the acquisition of the nationality of the host country by refugees who wish to do so and by their children constitutes the most effective means of ensuring their integration in that country’ and recommending that ‘member states consider the fact of being a refugee as a favourable element for the purposes of the procedure for granting nationality...for example by reducing the required period of residence’). The resolution recalled Resolution 70(2) on the *Acquisition by Refugees of the Nationality of their Country of Residence* of 26 January 1970 and Recommendation 564(1969) of the Consultative Assembly of the Council of Europe, para 1(b) (which invited member states to facilitate naturalisation ‘by making every effort to remove or at least reduce, legal obstacles to naturalisation such as the minimum period of residence when it exceeds five years, the costs of naturalisation when it exceeds the financial possibilities of the majority of refugees, the length of time elapsing between the receipt of applications for naturalisation and their consideration, and the requirement that refugees should prove the loss of their former nationality’).

⁴⁷ Guy S Goodwin-Gill, ‘The Language of Protection’ (1989) 1(1) *International Journal of Refugee Law* 1, 17.

⁴⁸ Atle Grahl-Madsen, *Commentary on the Refugee Convention 1951, Articles 2-11, 13-37* (Division of International Protection, 1997) (1963), 247.

⁴⁹ UNHCR ExCom, Conclusion No 104 (lvi), *Local Integration* (7 October 2005), Preamble.

⁵⁰ Jeff Crisp, ‘No Solutions in Sight: The Problem of Protracted Refugee Situations in Africa’ (2003) 22(4) *Refugee Survey Quarterly* 114, 143. See also Will Kymlicka and Wayne Norman, ‘Citizenship in Diverse Societies: Issues, Contexts, Concepts’ in Will Kymlicka and Wayne Norman (eds), *Citizenship in Diverse Societies* (Oxford University Press, 2000) 1, 21. Cf Joan Fitzpatrick, ‘Cessation of Refugee Status and Withdrawal of Temporary Protection’ (1999) 13 *Georgetown Immigration Law Journal* 343, 350 (suggesting that ‘victims of severe past persecution may be traumatised by forced return to the scene of their suffering even if their persecutors have since been routed; conversely, many forced migrants feel such a strong attachment to their homes that they self-repatriate even before conditions are safe sparing the state of refuge the delicate task of deciding when to withdraw protection...’).

long-term solution for refugees in one of three states: their state of origin, the state of asylum or through resettlement a third state.⁵¹ The circumstances which give rise to CSR1951 refugee status may change *after* naturalisation has taken place,⁵² while citizenship is, in principle, meant to be irrevocable.⁵³

Indeed, while liberalising naturalisation procedures is commendable, and may go hand in hand with a rights-centered approach,⁵⁴ states are keen to retain sovereign discretion precisely because of the long-term implications of granting state citizenship.⁵⁵ Weis has argued⁵⁶ that '[a] state cannot be compelled to grant its nationality, even after a long waiting

⁵¹ Cf Nicholas Van Hear, 'Refugees in Diaspora: From Durable Solutions to Transnational Relations' (2006) 23(1) *Refuge* 9.

⁵² See eg *Lazerevic v SSHD* [1997] EWCA Civ 1007 (Brown LJ) (holding that '[i]t is a matter for the secretary of state whether, in the long term, refugees are to be allowed to settle in the UK. He is it seems to me, perfectly entitled to give them sanctuary here only for the limited period of their actual need, returning them to their countries of origin once their conflicts end and their borders re-open. Article 1C (5) [of CSR1951] expressly so allows').

⁵³ Cf generally United States, *Citizenship Laws of the World* (Office of Personnel Management, 2001), available at: www.opm.gov/extra/investigate/is-01.pdf (outlining reasons invoked by states for denationalization, including acquisition of another citizenship, political activity in another State such as voting, holding office, and serving in the military, failure to renew one's passport, residency abroad, obtaining citizenship via fraudulent means, divorce, or being deemed a 'security threat'). See also Matthew J Gibney, 'Should Citizenship be Conditional' (RSC Working Paper Series No 75, July 2011), 10-11, available at: http://www.rsc.ox.ac.uk/publications/working-papers-folder_contents/RSCworkingpaper75.pdf (noting that, historically, the acceptance of the state's right to execute helps explain why the right to strip citizenship was rarely questioned, as for most liberal thinkers the stripping of citizenship in conjunction with banishment was viewed as a humane alternative to the death penalty).

⁵⁴ Roxana Barbulescu, 'Mobile Union Citizens Should have Portable Voting Rights within the EU' in Rainer Bauböck, Philippe Cayla and Catriona Seth, *Should EU Citizens Living in Other Member States Vote There in National Elections* (European University Institute RSCAS 2012/32, July 2012), 37 (claiming that a state that extends voting rights to non-citizens is also more likely to have liberal naturalisation policies).

⁵⁵ See eg *R (AHK and others) v Sec of State of the Home Department* [2009] EWCA Civ 287, para 10 (holding that 'the grant of British citizenship under Section 6(1) of the 1981 Act is not a fundamental human right'). Cf Committee on International Assistance to Refugees, *Report by the Committee* (submitted to the Council of the League of Nations, Geneva, 3 January 1939), pt ii, conclusions, para 9 (noting that '[t]he refugee problem has, as its corollaries, the problems of assimilation and naturalization in the countries of asylum or immigration. This is a very complex question, because it involves both the sovereignty of the state that is either prepared or not prepared to grant its citizenship to these exiles and the sincerity of the immigrants' determination to become loyal citizens of another country...[e]very state must itself decide each individual case.').

⁵⁶ Paul Weis, *The Refugee Convention, 1951: The Travaux Préparatoires Analysed with a Commentary* (Grotius Publications, 1995), 23.

period, to a refugee settled in its territory'. It is submitted that disaggregation of citizenship-dependent rights addresses the *current* protection needs of CSR1951 refugees; thus, it is well within the integration-led spirit of CSR1951, in the light of a contemporary rights-centred understanding of the obligations that ought to be owed to refugees.

An ancillary concern that is raised in the CSR1951 refugee context by making electoral rights *contingent* on naturalisation regards the (still rather prevalent) requirement that persons cannot hold more than one nationality. The number of states that allow their citizens to hold dual citizenship has grown;⁵⁷ indeed, it would be reasonable to expect a state of asylum to forgo a requirement that CSR1951 refugee applicants renounce their former citizenship.

Nonetheless, states of asylum only control their own naturalisation policy.⁵⁸ Following naturalisation, the refugees' state of origin may, under its laws, revoke their citizenship. Consequently, the right to return, as well as rights to possess certain assets and enjoy benefits may be infringed. As Bauböck notes,⁵⁹ losing the right to return is a major deterrent against naturalisation in states that require that applicants abandon a previous citizenship. CSR1951 refugees may wish to retain their attachment to their state of origin in view of the (hopefully

⁵⁷ See David Reichel, 'Do Legal Regulations Hinder Naturalisation? Citizenship Policies and Naturalisation Rates in Europe (European University Institute Working paper RSCAS 2011/51, 2011), 5 (noting that only two EU MS, Estonia and Lithuania, allow no exceptions to their general prohibition on dual nationality).

⁵⁸ EUDO, Modes of Acquisition (Recognised Refugees), available at: <http://eudo-citizenship.eu/modes-of-acquisition/190/?search=1&idmode=A22#.UIETFG9gZho>.

⁵⁹ Rainer Bauböck, 'Boundaries and Birthright' (2011) 9 Issues in Legal Scholarship (Article 3), 5.

temporary) nature of their persecution;⁶⁰ thus, in the case of CSR1951 refugees, making enjoyment of citizenship-dependent rights contingent on their naturalisation is disconcerting.⁶¹

C. The Fundamentality of Voting: Citizenship Voting Qualifications Revisited

It was demonstrated in Chapter Three *supra* that there are both expressive (intrinsic) and protective (instrumental) reasons for valuing participation, and that they should be considered mutually reinforcing.⁶² Voting is considered to be an autonomy-enhancing act, which can potentially legitimate other political involvement in society, and which manifests human dignity, as well as professes the enjoyment of equal worth, concern and respect of society.

It cannot be denied that the ability of CSR1951 refugees to live a fully autonomous life in their state of asylum in the sense of making *life-long* plans is greatly inhibited by the fact that their residence in that state may indeed be temporary. The state of asylum has an interest in retaining the possibility of excluding them if and when the need for international protection is no longer required; this interest comes into tension with the interest of CSR1951 refugees in living a fully autonomous life. CSR1951 refugees may nonetheless choose to make provisional plans in view of prospects of possible naturalisation, and a social recognition that they may

⁶⁰ See eg Tomas Hammar, 'Dual Citizenship and Political Integration' (1985) 19(3) International Migration Review 438, 440 (arguing that '[w]hile political refugees often want to give up their old citizenship, there are, on the other hand, also many who for political reasons want to keep it').

⁶¹ See eg Egon F Kunz, 'Exile and Resettlement: Refugee Theory' (1981) 15 International Migration Review 42, 42-43 (arguing that individuals who are forced to leave their homes will often have a much stronger desire to return than those who leave voluntarily, and differentiating between refugees who 'cling to their [pre-displacement] identity and anticipate return and those who eagerly embrace their new life, leaving the old behind').

⁶² David Owen, 'Transnational Citizenship and Rights of Political Participation' (Normative Orders Working Paper No 06, 2011), 3, available at: <http://publikationen.ub.uni-frankfurt.de/frontdoor/index/index/docId/22387>.

have a stake in society (even if its temporal scope is yet to be decided) manifested through electoral inclusion can in and of itself be autonomy-enhancing.⁶³

A sense of equal worth and belonging to a community is valuable to all persons. Sassen contends that the sense of belonging of CSR1951 refugees is thrown into question both in their state of origin and in their state of asylum, as without citizenship in the latter they are ‘denied not only political rights but also the capacity to speak politically and the right to be heard’.⁶⁴

From a ‘republican’ perspective, the predicament of CSR1951 refugees is pertinently *political*, having had their ties with the political community of their state of origin severed for an indeterminate period; it is thus both symbolically and conceptually significant for them to be embraced into the political community of their state of asylum.⁶⁵ As Arendt postulated,⁶⁶ ‘[t]he fundamental deprivation of human rights [and citizenship] is manifested first and above all in the deprivation of a place in the world [a political space] which makes opinions significant and actions effective’. Indeed, recognition and inclusion in their state of asylum could mirror-image the conditions that prompted their departure from their state of origin.

⁶³ It was noted in Chapter Two *supra* that some states set up consultative bodies for non-citizens *in lieu* of entitling them to participate in electoral processes. While such bodies may be considered autonomy-enhancing, their consultative nature signals (political) inferiority both to the non-citizens and to society more generally.

⁶⁴ Saskia Sassen, ‘The Repositioning of Citizenship’ in Alison Brysk and Gershon Shafir (eds), *People Out of Place: Globalisation, Human Rights and the Citizenship Gap* (Routledge 2004) 191, 191-2.

⁶⁵ It was noted in previous chapters that CSR1951 refugees may be stateless, that is they have fled their state of habitual residence (where they are likely to have been electorally excluded). In such cases, absent persecution, they should have been given the opportunity to acquire their state of origin’s citizenship. See also James Bohman, *Democracy across Borders: From Demos to Demoi* (MIT Press, 2007), 112 (noting that ‘[t]he right to nationality is thus not a mere right to protection. It is a positive normative power that includes all the enabling participatory conditions for social and political rights, and it creates obligations for the international community to all persons lacking membership status or place in an ongoing or functioning political community’).

⁶⁶ Hannah Arendt, *The Origins of Totalitarianism* (Harcourt, 1967) 296, 298.

Now, absent electoral rights, CSR1951 refugees can still express themselves politically: they can try to contribute to public discourse in the state of asylum, for instance, by writing newspaper columns, by using social media and other channels of communication, and by joining civil society organisations. Nevertheless, it is contended that their electoral exclusion casts a wide shadow on other forms of political participation. *First*, questions may be posed by (full) members as to legitimacy of their interventions *qua* non-members; moreover, states may be reluctant to allow non-citizens generally, and CSR1951 refugees in particular, to engage in political activities (see Chapter Two *supra*). *Second*, due to their electoral exclusion, CSR1951 refugees may feel less engaged with the political process; if their state of asylum does not consider them as equal participants and is sending them a message of non-inclusion, they may be less inclined to get involved in its politics. *Third*, in view of the non-permanent (though indeterminate) nature of their status in the host state, the public nature of non-electoral means of political participation may *deter* CSR1951 refugees from causing public stir. Thus, for *enfranchised* persons, having access to non-electoral means of political engagement reinforces their status, whereas for CSR1951 refugees its effective contribution can be questioned.

It was suggested in Chapter Two *supra* that, in international human rights law and international refugee law, CSR1951 refugees are entitled to rights in their states of asylum. Nevertheless, political clout (which CSR1951 refugees crucially lack for an indeterminate period) is required for these rights to be properly respected, protected and fulfilled by states of asylum. Indeed, as Chapter Three *supra* demonstrated, voting is also *instrumentally* significant as a means for expressing individual preferences, especially for members of marginalised groups whose voice is otherwise either side-lined or ignored by policy-makers.

Decision-makers arguably lack an incentive to give proper consideration to rights and interests of non-enfranchised populations. They may deny them access to *intangible* resources, such as involvement in policy consultations and meetings during constituency visits;

consequently, decisions affecting *tangible* resources (such as welfare benefits) are likely to be made in the non-enfranchised's (political) absence.⁶⁷ Indeed, even if (some) rights are 'trumps',⁶⁸ it would not be reasonable to argue that electoral rights have no instrumental function in protecting (other) rights; for instance, if CSR1951 refugees are not heard by the decision-makers, and not represented in political parties, councils, and parliaments, then politicians are less likely to take their interests into account.⁶⁹ Hence, while enfranchised disempowered groups or persons such as CSR1951 refugees may require special institutional protection or 'virtual representation' by civil society organisations, such measures ought to supplement rather than replace their electoral participation.⁷⁰

Notably, the fundamentality of the right to vote for CSR1951 refugees *affects but does not resolve* the question whether, as non-citizens, they should be entitled to vote in elections of their state of asylum, in view of arguments supporting citizenship-based eligibility, presented in Chapter Five *supra*. It is submitted that these arguments carry less weight regarding recognised CSR1951 refugees, and that conversely, the arguments for *residency*-based eligibility carry greater weight for CSR1951 refugees.

It was asserted that social cohesion is largely dependent on having an (exclusive) common (civic) identity, symbolised by enfranchisement. However, if asylum is an expressive

⁶⁷ See eg Pieter Bevelander, 'Naturalisation and Social Inclusion' in OECD, *Naturalisation: A Passport for the Better Integration of Immigrants?* (2011) 238 (discussing the socio-economic ramifications of electoral exclusion and naturalisation of migrants).

⁶⁸ Ronald Dworkin, *Taking Rights Seriously* (Duckworth, 1978), xi.

⁶⁹ Hammar (n60), 439; see also Gaim Kibreab, 'Citizenship Rights and Repatriation of Refugees' (2003) 37(1) *International Migration Review* 24, 58.

⁷⁰ The U.S. Supreme Court famously stipulated in *U.S. v Carolene Products*, 304 US 144 (1938), n4 that 'more searching judicial inquiry' may be called for where 'prejudice against discrete and insular minorities...curtail[s] the operation of those political processes ordinarily to be relied upon to protect minorities'. Hence, the question is whether access to the political process is *sufficient* rather than whether it should be *substituted* by other means.

act of a state, sending a welcoming message to those in need, it seems reasonable to suggest that it may strengthen the state's collective identity as a (political) community that is committed to rights-protection.

It was further argued that voters should be loyal to their state, and that citizenship (on some accounts, *exclusive* citizenship) which has previously manifested allegiance to a ruler now manifests loyalty to the community. However, 'Tebbit tests'⁷¹ contrasting the loyalty of migrants to their state of asylum and to their state of origin seem particularly ill-suited in the case of recognised CSR1951 refugees, especially when fear of persecution stems from the actions of state agents. As the Coalition for Immigrant and Refugee Rights and the National Immigrant Justice Center argued in *Bluman*,⁷² 'the notion that those who come to the U.S. for the express purpose of escaping persecution by their own government are likely to then support some 'foreign' interest- presumably that of their persecutor- in U.S. elections is nothing short of absurd'.

According to the 'stake-holder principle',⁷³ voters should have a long-term interest in the polity's well-being; citizenship guarantees a permanent connection between an individual and her state which in turn generates such interest. It is unclear whether CSR1951 refugees, are necessarily going to have a long-term stake in the polity's well-being, as their length of stay is indeterminate. It was noted above that CSR1951 refugees are unable to make life-long plans; it could be similarly argued that they are also unable to consider the life-long plans of the polity.

⁷¹ See <http://barrettsonthisday.anorak.co.uk/uncategorized/1814/tebbit-proposes-cricket-test.html>.

⁷² *Bluman* (n30), *Amici Curiae* (submitted 3 October 2011), 13.

⁷³ Rainer Bauböck, 'Stakeholder Citizenship and Transnational Political Participation: A Normative Evaluation of External Voting' (2007) 75 *Fordham Law Review* 2393 (see also Chapter Five *supra*).

Three responses may be given.

First, CSR1951 refugees are still distinguishable from migrant workers, students or other temporary residents in that their length of stay is not *fixed* but rather *indeterminate*; it may turn out to be protracted and reach a point at which, according to a state's general naturalisation laws, citizenship may be sought. It cannot be easy for a state of asylum to make assumptions about the long-term stakes of a CSR1951 refugee when analyses depend on circumstances that lie outside that state's control.⁷⁴

Second, the fate of CSR1951 refugees is tied to the state of asylum to a *far greater extent* than that of other migrants who can return to their state of origin. Indeed, their fate may be more effectively and meaningfully tied to the fate of the community than the link between citizens holding multiple citizenships and a state whose citizenship they hold nominally without residing therein. It is thus not unreasonable to assume that refugees' interest in the well-being of their state of asylum is real.

Third, the state of asylum may decide to naturalise refugees, and relax its requirements for doing so. Notwithstanding possible revocation of the refugee's previous nationality by her state of origin, there is a reasonable chance that she will eventually naturalise. It is thus possible that, should the state of asylum decide to make the refugee a permanent member, he or she will become one, thereby guaranteeing his or her long-term stake in the well-being of the polity. On this view, it would not be implausible to assume that (some) CSR1951 refugees are 'citizens in the making'. It should not fall on the individual refugee to be excluded because the state of asylum may eventually choose to exercise its prerogative not to naturalise her.

⁷⁴ Ruth Rubio-Marin, *Immigration as a Democratic Challenge: Citizenship and Inclusion in Germany and the United States* (Cambridge University Press, 2000), 55.

It was also contended that citizenship *qua citizenship* has become devalued because of the decoupling of rights therefrom; enfranchisement remains a tangible benefit that incentivises naturalisation. Nevertheless, it seems sensible to claim that, for recognised CSR1951 refugees, the ‘currency’ of naturalisation is particularly strong and requires no additional incentives in view of their ‘civic and social limbo’.

Chapter Five *supra* has also explored arguments for *domicile*-based suffrage. These arguments include the normative significance of subjection to unaccountable power; the notion of dependency compounded by the unavailability of a viable ‘exit’ option; and the unfairness entailed by exclusion of persons sharing social burdens (primarily, though not exclusively, through taxation). Regarding the latter argument, it may be suggested that, absent an ‘exit’ option, CSR1951 refugees are quite likely to contribute their time and energy to their host society. However, even if the above argument does not carry greater weight for recognised CSR1951 refugees than for other non-citizens, the former two do, for the following reasons.

Persons are vulnerable to domination to the extent that they are dependent on a relationship where a power-holder can exercise arbitrary (that is, unaccountable) power over them. Elections are an important (though not an exclusive) means of making the exercise of power accountable, not just on polling day, but *throughout* public life: incumbents are constantly aware of the possibility that they may be replaced if they fail to engage their constituents and respond to their interests, *and so are their opponents*.

By contrast, decision-makers may consider it unnecessary to devote time and attention to the interests and views of the electorally excluded, and are less likely to take their views into account when formulating policies. Absent enfranchisement, immigrants are less likely to be consulted regarding new policies affecting their employment, housing or welfare rights; visits to their neighbourhoods are more likely to address grievances of *citizens* (often voiced against

migrants). For CSR1951 refugees, enfranchisement will not *close* the accountability gap, especially as pending deportation would still cast a wide shadow, but it can *narrow* it: they would be more likely to enjoy civil rights and other protections if they enjoy rights of political participation.⁷⁵

Indeed, it stands to reason that the absence of accountability of the state to its non-enfranchised population may be a cause for concern, as governments may not feel obliged to *justify* policy changes to the same extent (if at all) and to be *responsive* to their interests through the democratic process. This concern is compounded when the ‘exit costs’ of leaving the state are high, and when the non-citizen does not have a powerful home state ready to hold the host state accountable for rights violations.⁷⁶ Hence, the more non-citizen residents are subject to discrimination and prejudice, the greater the value of the protection of their state of origin and of an ‘exit option’.⁷⁷

In terms of vulnerability caused by lack of access to accountability mechanisms and high ‘exit’ costs, the predicament of recognised CSR9151 refugees may be contrasted with the situation faced by EU ‘Second Country Nationals’ (SCNs), that is EU nationals living in another EU Member State (MS). It was noted in previous chapters that SCNs may enjoy protection abroad when they travel outside the EU: if their state of nationality is not present in that non-EU state, other EU MS are required to provide protection as if the SCNs were their nationals. SCNs are legally entitled to vote in local and European Parliament elections, and

⁷⁵ Sarah Song, ‘Democracy and Noncitizen Voting Rights’ (2009) 13(6) Citizenship Studies 607, 614.

⁷⁶ Meghan Benton, ‘The Tyranny of the Enfranchised Majority? The Accountability of States to their Non-Citizen Population’ (2010) 16(4) Res Publica 397, 408 (asserting that the most effective pressure on the U.S. to free detainees held at Guantanamo was mounted by liberal democracies whose nationals had been detained).

⁷⁷ Ruth Rubio-Marin, ‘Transnational Politics and the Democratic Nation-State: Normative Challenges of Expatriate Voting and Nationality Retention of Emigrants’ (2006) 81 NYU Law Review 117, 123.

many EU nationals have access to OCV. Crucially, they may return to their state of nationality *at any time* should they wish to.

The length of stay in their state of residence increases the dependence of SCNs on that state, and may make the (legal) exit option less relevant. However, on the spectrum of non-citizen populations, CSR1951 refugees have a substantially stronger case residency-based eligibility than SCNs (notwithstanding the potency of EU law rights-based arguments).⁷⁸

D. Recognition, Integration, and Public Resistance

1. The Meaning of Recognition

A decision to admit a person as a CSR1951 refugee signifies a commitment on the part of a state of asylum to extend its protection to individuals whose own state has *failed to protect* by action or omission. It was noted above that, at the time CSR1951 refugees are recognised, neither they nor their state of asylum know when or indeed whether the circumstances that have led to the departure will change. Upon recognition, short of affording permanent membership, the state of asylum undertakes to host and protect a refugee for as long as such protection is required.

Matthew Price suggests⁷⁹ that asylum is a political instrument: viewing it as a humanitarian instrument is a ‘conceptual error’. A decision to grant asylum is *condemnatory* as it ‘constitutes a means to condemn persecutory regimes, eventually leading to their reform and

⁷⁸ Cf art 42(3) of the Migrant Workers Convention, enunciating that ‘[m]igrant workers may enjoy political rights in the State of employment if that State...grants them such rights’. This provision follows art 41, which pronounces the *right* to migrant workers to vote in elections of their states of origin, and art 23, which pronounces their right to have access to their state of origin’s diplomatic and consular services. Hence, despite the fact that migrant workers do not suffer political alienage from their state of origin, states of employment should consider favourably their electoral inclusion. For further discussion of Out-of-Country voting, see Chapter Six *supra*.

⁷⁹ *Rethinking Asylum* (n18), 13.

to solving the root cause of refugee flows by promoting the rule of law and human rights'.⁸⁰ For Price, individual refugees are a means to achieve a broader policy goal, namely condemnation as a foreign policy tool. Adopting an 'accountability approach' to recognition, Price notes⁸¹ that in circumstances where non-state actors are responsible for persecution, the state of origin cannot be condemned and so asylum should not be granted.

It is perhaps unsurprising that, while considering asylum to be an exclusively *political* practice, Price suggests⁸² that 'the right to vote cannot be a measure for persecution', labelling the human rights approach to persecution as 'over-inclusive'.⁸³ Price asserts⁸⁴ that the state of asylum should extend 'membership in a new political community'; nonetheless, he devotes very little attention to the scope of membership, and fails to consider the temporal dimension thereof (or, indeed, the possibility that repatriation may be feasible in future).

By contrast, this thesis suggests that the political predicament of CSR1951 refugees makes them a special category of non-citizen residents. Assuming failure of state protection, the analysis considers the effects of physical and political alienage on individual refugees whether their well-founded fear of persecution emanates from state or from non-state actors.⁸⁵ The argument is that, by recognising persons as CSR1951 refugees, a state of asylum acknowledges the political predicament that these refugees suffer from, and aims to ameliorate them, not by condemning another regime, but by acting *in loco civitatis*. While under Price's

⁸⁰ Ibid, 75.

⁸¹ Ibid, 155.

⁸² Ibid, 116.

⁸³ Ibid.

⁸⁴ Ibid, 248.

⁸⁵ See Chapter One *supra*.

account, asylum carries a condemnatory expressive message,⁸⁶ this thesis views asylum as cementing a commitment to protection: its message is directed both outwardly and internally.

2. Commitment to Refugee Integration

Recognised refugees often face considerable challenges in adapting to new cultures and languages, while separated from family and social support networks. It was previously noted that Article 34 of CSR1951 requires Contracting States ‘so far as possible’ to facilitate ‘the assimilation and naturalisation’ of CSR1951 refugees. While the provision does not establish formal obligations, states should, *inter alia*, give ‘favourable consideration to requests for naturalization received from refugees’ and reduce ‘the financial obstacles which procedural charges and costs may pose to destitute refugees’.⁸⁷ Indeed, while Article 34 does not *require* Contracting States to naturalise refugees,⁸⁸ a state that fails to provide a path to naturalisation would at the very least be expected to provide a cogent explanation.⁸⁹

UNHCR acknowledges⁹⁰ that ‘local integration is a sovereign decision’ exercised by states ‘considering the specific circumstances of each refugee situation’. Nonetheless, it

⁸⁶ Matthew E Price, ‘Politics or Humanitarianism? Recovering the Political Roots of Asylum’ (2004) 19 Georgetown Immigration Law Journal 277, 295.

⁸⁷ Grahl-Madsen (n48), 245, quoting Ad Hoc Committee on Statelessness and Related Problems, *Memorandum by the Secretary-General* (1950), UN Doc E/AC.32/2, p50.

⁸⁸ See eg *Abuissa v MJELR* [2010] IEHC 366 (Ireland).

⁸⁹ James C Hathaway, *Rights of Refugees under International Law* (Cambridge University Press, 2005), 989. See also the December 2012 judgment of the Irish Supreme Court in *Mallak v Minister for Justice Equality and Law Reform* [2012] IRSC 59. The applicant, a Syrian national recognised as a CSR1951 refugee in Ireland, applied for naturalisation; his application was denied, and no reasons were given save for reliance on the minister’s absolute discretion. The Supreme Court quashed the decision, holding that ‘the Minister was under a duty to provide [Mr Mallak] with reasons for his decision to refuse his application for naturalisation’ and that ‘his failure to do so deprived the [Mr Mallak] of any meaningful opportunity either to make a new application for naturalisation or to challenge the decision on substantive grounds.’

⁹⁰ UNHCR, ExCom, Conclusion No 109 (Ixi), *Protracted Refugee Situations* (8 December 2009), para (h). As a matter of *best practice*, UNHCR suggests that the required period of residence for refugees in order to be eligible

describes⁹¹ ‘local integration’ as a process entailing the ‘host state granting refugees a secure legal status and a progressively wider range of rights and entitlements that are broadly commensurate with those enjoyed by its citizens and, over time, the possibility of naturalisation.’

The obligation in Article 34 to facilitate ‘assimilation’ precedes ‘naturalisation’. Indeed, logically, ‘[b]y facilitating “assimilation” the Contracting State is to a certain extent also facilitating the naturalization of refugees.’⁹² Grahl-Madsen argued⁹³ that states should lay ‘foundations, or stepping stones, so that the refugee may familiarise himself with the language, customs and way of life of the nation among whom he lives, so that he - without any feeling of coercion - may be more readily integrated in the economic, social and cultural life of his country of refuge.’

It was contended in Chapter Two *supra* that, according to the *Travaux*, the term ‘assimilation’ refers to *integration*. Da Costa postulates that ‘the international community has always rejected the notion that CSR1951 refugees should be expected to abandon their own culture and way of life so as to become indistinguishable from nationals of the host community.’⁹⁴ CSR1951 refugee integration is arguably a ‘dynamic and multifaceted two-way process which requires efforts by all parties concerned, including a preparedness on the part of

for naturalisation would not exceed five years. See Rosa Da Costa, *Rights of Refugees in the Context of Integration: Legal Standards and Recommendations* (UNHCR Legal and Protection Policy Research Series, Department of International Protection, 2006), 186.

⁹¹ UNHCR, ExCom, Conclusion No 104 (lvi), *Local Integration* (7 October 2005), para (l).

⁹² Grahl-Madsen (n48), 247.

⁹³ Ibid. See Alice Edwards, ‘Human Rights, Refugees and the Right to ‘Enjoy’ Asylum’ (2005) 17(2) *International Journal of Refugee Law* 295, 307 (defining naturalisation as the formalisation of the local integration solution).

⁹⁴ Rosa Da Costa (n90), 9 (citing Nehemiah Robinson, *Convention Relating to the Status of Refugees: Its History and Interpretation, A Commentary* (Institute of Jewish Affairs, 1953), 142, 166).

refugees to adapt to the host society without having to forego their own cultural identity, and a corresponding readiness on the part of host communities and public institutions to welcome refugees and meet the needs of a diverse population.’⁹⁵

The European Union’s recently adopted *Recast Directive* provides a helpful comparison. Article 34 thereof, entitled ‘Access to Integration Facilities’, stipulates⁹⁶ that ‘[i]n order to facilitate the integration of beneficiaries of international protection into society, Member States shall ensure access to integration programmes which they consider to be appropriate so as to take into account the specific needs of beneficiaries of refugee status...or create pre-conditions which guarantee access to such programmes’.

It is submitted that the EU directive should be read in tandem with the recently adopted amendment to the *Long Term Resident Directive*, which extends the application of this directive to beneficiaries of international protection, including recognised refugees.⁹⁷ The accompanying notes suggest⁹⁸ that, on the adoption of the amended directive, beneficiaries shall ‘enjoy equality of treatment with citizens of the Member State of residence on a wide range of economic and social matters’, so that ‘long-term residence status [will constitute] a

⁹⁵ UNHCR, *Note on the Integration of Refugees in the European Union* (May 2007), para 1.

⁹⁶ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons eligible for Subsidiary Protection, and for the Content of the Protection Granted (recast), OJ L 337/22, 20 December 2011 [The Recast Directive amended Council Directive 2004/83/EC of 29 April 2004]. Note the stipulation in art 20(1) (General rules) (‘[t]his Chapter shall be without prejudice to the rights laid down in the Geneva Convention’).

⁹⁷ Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011 amending Council Directive 2003/109/EC [of 25 November 2003 Concerning the Status of Third-Country Nationals who are Long-Term Residents] to Extend its Scope to Beneficiaries of International Protection OJ L 132/1, 19 May 2011.

⁹⁸ Ibid, para 6. In art 9(3), the Directive considers the implications of changes regarding a beneficiary’s eligibility for international protection. The provision stipulates that ‘member states may withdraw the long-term residence status in the event of the revocation of, ending of or refusal to renew international protection...if the long-term resident status was obtained on the basis of international protection.’

genuine instrument for the integration of long-term residents into the society in which they live’.

3. Integration and Enfranchisement: New Zealand’s Best Practices

For many states, the benefits of offering asylum to refugees used to outweigh the costs, as refugees were culturally similar, helped to meet labour shortages, arrived in manageable numbers, and reinforced ideological or strategic objectives.⁹⁹ Today, refugee integration poses challenges for states of asylum, due in part to ethnic, linguistic and other differences between CSR1951 refugees and the receiving population.

Nevertheless, although cultural similarities undoubtedly smooth integration, the ethnicity of a refugee population should not predicate the durable solutions available to them.¹⁰⁰ It was noted earlier that, the assumption underlying refugee recognition is that the length of stay is *indeterminate*: refugees may remain in the state of asylum for protracted periods. Seen in this light, it is in the state’s interest to mitigate the challenges posed by integration.¹⁰¹ While enfranchisement can be seen a reward for integration, the better view is that it should be considered a means for facilitating integration.

⁹⁹ Erika Feller, *The 1951 Convention at 50: New Challenges for the International Refugee Protection Regime* (Presentation to the Lauterpacht Research Centre for International Law, 17 October 2000), 4.

¹⁰⁰ Alexandra Fielden, *Local Integration: An Under-Reported Solution to Protracted Refugee Situations* (New Issues in Refugee Research Working Paper no 158, 2008), 6.

¹⁰¹ Cf Diane Barnes, ‘Resettled Refugees’ Attachment to their Original and Subsequent Homelands: Long-Term Vietnamese Refugees in Australia’ (2001) 14 *Journal of Refugee Studies* 394, 409-10 (suggesting that ‘the danger of [host] countries not taking positive steps to promote the full social inclusion of people whom they accept as refugees is that this can lead to a withdrawal of their emotional commitment to, and social engagement with, the [host] country. Refugees who perceive themselves to be excluded...may continue to reside there, but turn inwards and identify themselves in term of their ethnic minority status.’)

While it may be argued that coerced exile impinges on the integration process as refugees may orient themselves towards eventual return, refugees may be inclined to develop ties to the community within which they reside and a human need to build a new life following severe trauma.¹⁰² A state of asylum that decides to enfranchise its refugees will be sending them (as well as the public at large) a message of integration and inclusion.¹⁰³

It was noted in Section C *supra* that voting rights may be instrumentally important to protect rights of refugees. Enfranchised refugees are likely to be empowered, better able, and hopefully more willing to enrich their host society. ECRE posits¹⁰⁴ that allowing recognised refugees to have access to decision-making processes and the political life of the state of durable asylum is ‘key to ensuring a two-way process of integration involving refugees and host societies on an equitable basis.’

In a survey conducted among recognised refugees in Scotland during the run-up to the 2010 UK General Elections, the right to vote was emphasised as one of the main reasons for wishing to attain British citizenship. Interviewees suggested that enfranchisement would be particularly meaningful in view of their pre-flight experiences in their state of origin.¹⁰⁵

New Zealand’s electoral legislation offers an intriguing model for refugee integration, *inter alia*, through enfranchisement. Since 1975, New Zealand entitles *all* permanent

¹⁰² Fitzpatrick (n50), 348.

¹⁰³ See eg Alastair Ager and Alison Strang, ‘Understanding Integration: A Conceptual Framework’ (2008) 21(2) *Journal of Refugee Studies* 166, 181.

¹⁰⁴ European Council of Refugees and Exiles, *Position on the Integration of Refugees in Europe* (December 2002), para 26. See also European Council of Refugees and Exiles, *Good Practice Guide on the Integration of Refugees in the European Union* (2001), 36.

¹⁰⁵ Emma Stewart and Gareth Mulvey, *Becoming British Citizens? Experiences and Opinions of Refugees Living in Scotland* (Scottish Refugee Council and Strathclyde University, February 2011), 39.

residents to vote in *all* of its elections, provided that they have continuously resided in New Zealand for no less than one year.¹⁰⁶ New Zealand has thus adopted a *domicile*-based franchise. Pertinently to this thesis, all refugee claimants who are recognised as having refugee status (according to the CSR1951 Article 1A(2) definition that the legislation incorporates¹⁰⁷) may apply for a permanent resident visa on the basis of that recognition, and ‘[i]mmigration officers may, at their discretion, grant permanent resident visas.’¹⁰⁸

Hence, while permanent residence is not automatically granted,¹⁰⁹ a recognised refugee may launch an application immediately after their recognition. If the application is successful, she will become an eligible voter within a year. In the parliamentary debate, the government representative noted¹¹⁰ that ‘[t]he bill...strengthens New Zealand’s already highly regarded refugee determination system...reflects best-practice standards internationally’.

It is also noteworthy that, under the NZIA,¹¹¹ ‘every New Zealand citizen has by virtue of his or her citizenship the right to enter and be in New Zealand at any time’ whereas ‘a person who is not a New Zealand citizen may...enter and be in New Zealand only if the person is the holder of a visa granted under this Act and...has been granted entry permission’.¹¹² The

¹⁰⁶ Electoral Act 1993 No 87, §74(1)(a)(ii), (b).

¹⁰⁷ New Zealand Immigration Act 2009 No 51, §129(1) (NZIA). New Zealand acceded to CSR1951 on 30 June 1960, and to the New York Protocol on 6 August 1973; CSR1951 is appended to the NZIA as Schedule 1.

¹⁰⁸ Immigration New Zealand, Operational Manual, §3.10.b, available at: <http://www.immigration.govt.nz/opsmanual/>, last update 29 November 2010.

¹⁰⁹ Ibid §C5.15.5.a.

¹¹⁰ NZIA, first reading, 2 November 2007, David Cunliffe (Minister of Immigration), available at: http://www.parliament.nz/en-NZ/PB/Legislation/Bills/4/7/d/00DBHOH_BILL8048_1-Immigration-Bill.htm.

¹¹¹ NZIA, §13(1).

¹¹² NZIA, §14(1)(b).

NZIA clarifies¹¹³ that recognised refugees may only be deported based on CSR1951 Article 32(1) or Article 33 grounds. The NZIA lists¹¹⁴ the Article 1C cessation grounds; in turn, the Operational Manual stipulates¹¹⁵ that ‘[a] holder of a residence class visa granted as a result of refugee or protection status may be liable for deportation if a person suffers loss of refugee or protection status’.

The (recently adopted) New Zealand model of post-recognition permanent residence status that is easily obtainable by refugees and which entails full enfranchisement after one year is an example of best practices by a CSR1951 Contracting State. Nevertheless, it is acknowledged that the geographical location of New Zealand may have an effect on its (liberal) legislative policies.

4. The Public Resistance Challenge

Refugees living in states of asylum where their rights are protected, where they have definite prospects for naturalisation or permanent residence, and where favourable structural factors enable them to enjoy a decent standard of living tend to remain even if the conditions that prompted their displacement are eliminated.¹¹⁶ Indeed, the link between rights-protection, empowerment, integration and (the possibility of) naturalisation cannot be denied. One of the reasons why some African governments keep refugees in spatially segregated sites is, arguably,

¹¹³ NZIA, §164(1).

¹¹⁴ NZIA, §143(b)(i).

¹¹⁵ Manual (n108), §3.40.

¹¹⁶ Kibreab (n69), 63. He argues that ‘the fact that nationals of the same countries displaced by identical factors responded differently to the elimination of the factors that prompted displacement depending on where they resided clearly suggests that return movements are motivated, on the one hand, by lack of civil, political and economic rights and, on the other, by unfavorable [sic] structural conditions manifested in lack of economic and social capacity of absorption in countries of asylum rather than by the desire to belong to particular places or communities of origin.’ Ibid, 58.

to prevent their incorporation into host societies, so that once the circumstances that prompted their displacement and flight have changed, repatriation is easily enforceable.¹¹⁷

States of asylum may thus ‘fear’ that the electoral inclusion of CSR1951 refugees will become a *pull factor* for new refugees and a *push factor* against voluntary repatriation of already recognised CSR1951 refugees. Moreover, governments that are increasingly accountable to public opinion on questions of immigration may be tempted to tighten their refugee policies in response to these negative public perceptions.¹¹⁸

Gibney argues¹¹⁹ that the conflict between respect for the rights of refugees and the provision of asylum is real: just as rights impose constraints on what can be legitimately done to refugees, so they place limits on what can be legitimately done for them. Nevertheless, it may be contended that resistance to electoral inclusion crystallises the symbolic inclusive significance thereof, namely the importance that full members of the political community of the state of asylum attach to their membership. On this account, exclusion signals unwillingness to integrate CSR1951 refugees.

Now, there can be no doubt that a state cannot operate a scheme of refugee protection without solid public support. The argument advanced here is that, for a Contracting State that acknowledges its existing obligations, enfranchising recognised CSR1951 refugees would be in the spirit of the convention (and its commitment thereto) and is likely to make refugee integration more attainable.

¹¹⁷ Gaim Kibreab, ‘Revisiting the Debate on People, Place, Identity and Displacement’ (1999) 12(4) *Journal of Refugee Studies* 387, 400.

¹¹⁸ *Ibid*, 403.

¹¹⁹ Matthew J Gibney, *The Ethics and Politics of Asylum* (Cambridge University Press, 2004), 249-50.

Public resistance to absorption of refugees can usually be expected to appear earlier on, at the eligibility stage,¹²⁰ and may explain restrictive interpretations of CSR1951 which lead to low recognition rates. Indeed, as Fitzpatrick and Bonan argue,¹²¹ ‘the best assimilated and long-resident refugees do not present a likely target for public discontent.’ It is submitted that, by opting to recognise persons as CSR1951 refugees, a Contracting State *has already chosen* its path; enfranchisement of CSR1951 refugees in its elections would be a natural step forward.

E. Concluding Remarks

Political theorists have been considering the desirability of a link between eligibility to vote and state citizenship (as a manifestation of full membership in a political community) in a world divided into sovereign states which, ultimately, retain control over their borders and membership; the mutually reinforcing significance of territoriality and nationality lies at the heart of these analyses. Refugee scholars have been pondering the suitability of the CSR1951 refugee regime and the availability of durable solutions for recognised refugees.

This thesis considers the entitlements of persons who have satisfied the CSR1951 refugee definition; it scrutinises the period between recognition and materialisation of a durable solution (repatriation, naturalisation or resettlement). By conceptualising the political predicament of recognised CSR1951 refugees *qua non-citizens* in their state of asylum, it attempts to bring together elements of the political theory and refugee law discourses.

¹²⁰ See eg Catherine Dauvergne, ‘Refugee Law and the Measure of Globalisation’ in Savitri Taylor (ed), *Nationality, Refugee Status and State Protection Law in Context* (Federation Press, 2005) 62, 76 (arguing that refugee law is becoming a key point of response to a perceived challenge to national sovereignty within a discourse of democratic politics).

¹²¹ See Joan Fitzpatrick and Rafael Bonoan, ‘Cessation of Refugee Status’ in Erika Feller, Volker Türk, and Frances Nicholson (eds), *Refugee Protection in International Law* (Cambridge University Press, 2003), 491, 543.

It is submitted that recognised CSR1951 refugees suffer from a special ‘protection gap’ which may be mitigated by expanding the scope of legal obligations under CSR1951. Hence, CSR1951 refugees are relevantly different from other non-citizen residents, and the case for their enfranchisement is stronger. The closing chapter presented the enfranchisement rationale; it then applied the fundamentality of voting framework to the case of CSR1951 refugees, and scrutinised relevant themes in the voting-citizenship debate. Finally, it explored possible links between integration and enfranchisement.

Some of the arguments that are advanced in this thesis may perhaps be applied, *mutatis mutandis*, to other groups of non-citizens, not least to other forced migrants; moreover, a different conceptualisation of the voting-citizenship ‘nexus’ may broadly affect legal entitlements of non-citizens, CSR1951 refugees notwithstanding.

It is hoped that this thesis contributes to the conceptualisation of the relations between individuals and their state, and that it will open up new avenues for legal and political inquiry.

BIBLIOGRAPHY

Monographs, Edited Books and Articles

- Abrams, Dominic, Hogg, Michael
Adelman, Howard *Social Identity and Social Cognition* (Blackwell Publishing, 1999)
‘Modernity, Globalization, Refugees and Displacement’ in Alastair Ager (ed), *Refugees: Perspectives on the Experience of Forced Migrants* (Continuum, 1999) 85
- Agamben, Giorgio *Homo Sacer: Sovereign Power and Bare Life* (Stanford University Press, 1998)
- Ager, Alastair, Strang, Alison ‘Understanding Integration: A Conceptual Framework’ (2008) 21(2) *Journal of Refugee Studies* 166
- Albert, Matthew ‘Prima Facie Determination of Refugee Status’ (Refugee Studies Centre, Working Paper Series No 55, January 2010)
- Aleinikoff, T Alexander *Citizenship Policies for an Age of Migration* (Carnegie, 2002)
‘Citizens, Aliens, Membership and the Constitution’ (1990) 7 *Constitutional Commentary* 9
‘Theories of Loss of Citizenship’ (1986) 84 *Michigan Law Review* 1471
- Aleinikoff, T Alexander,
Klusmeyer, Douglas (eds)
Alexy, Robert *A Theory of Constitutional Rights* (Oxford University Press, 2002)
Amerasinghe, Chittharanjan F *Diplomatic Protection* (Oxford University Press, 2008)
An-Na’im, Abdullahi Ahmed ‘State Responsibility under International Human Rights Law to Change Religious and Customary Laws’ in Rebecca Cook (ed), *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press, 1994) 167
- Anderson, Bridget ‘What does ‘The Migrant’ tell us about the (Good) Citizen?’ (University of Oxford Centre for Migration, Policy and Society, Working Paper No 94, 2012)
- Anderson, Bridget, Gibney
Matthew J, Paoletti, Emanuela
Anker, Deborah ‘Citizenship, Deportation and the Boundaries of Belonging’ (2011) 15 *Citizenship Studies* 547
‘Refugee Law, Gender, and the Human Rights Paradigm’ (2002) 15 *Harvard Human Rights Journal* 133
- Anker, Deborah, Marouf, Famta E ‘Socioeconomic Rights and Refugee Status: Deepening the Dialogue Between Human Rights and Refugee Law’ (2009) *American Journal of International Law* 784
- Arendt, Hannah *The Human Condition* (The University of Chicago Press, 1989)
The Origins of Totalitarianism (Harcourt, 1967)
‘We Refugees’ in Marc Robinson (ed), *Altogether Elsewhere: Writers on Exile* (5th edn Faber and Faber, 1994) 110
- Badhwar, Neera ‘Moral Agency, Commitment and Impartiality’ (1996) 13(1) *Social Philosophy and Policy*
- Baehr, Peter R ‘Democracy and the Right to Political Participation’ in David P Forsythe (ed), *Encyclopaedia of Human Rights* (Oxford University Press, 2009)
- Banerjee, Kiran ‘Political Community of Fate or Postnational State? The Persistence of the Other in Contemporary German Citizenship’ (conference paper) *The Constitutional State* (Oxford University Press, 2011)
- Barber, Nicholas
Barbulescu, Roxana ‘Mobile Union Citizens Should have Portable Voting Rights within the EU’ in Rainer Bauböck, Philippe Cayla and Catriona Seth, *Should EU Citizens Living in Other Member States Vote There in National Elections* (European University Institute RSCAS 2012/32, July 2012)
- Batchelor, Carol ‘Statelessness and the Problem of Resolving Nationality Status’ (1998) 10 *International Journal of Refugee Law* 156
- Bauböck, Rainer ‘Boundaries and Birthright’ (2011) 9 *Issues in Legal Scholarship* (Article 3)
‘The Rights and Duties of External Citizenship’ (2009) 13(5)

- Citizenship Studies 475
- ‘Stakeholder Citizenship and Transnational Political Participation: A Normative Evaluation of External Voting’ (2007) 75 *Fordham Law Review* 2393
- ‘Expansive Citizenship: Voting beyond Territory and Membership’ (2005) 38 *Political Science and Politics* 683
- ‘Towards a Political Theory of Migrant Transnationalism’ (2003) 37 *International Migration Review* 700
- Transnational Citizenship: Membership and Rights in International Migration* (Edward Elgar, 1994)
- Immigration and the Boundaries of Citizenship* (Centre for Research in Ethnic Relations, University of Warwick, 1992)
- Naturalisation* (EUDO, Citizenship Policy Brief No 2, 2011)
- Bauböck, Rainer, Goodman, Sarah Wallace
Banerjee, Kiran
- ‘Political Community of Fate or Postnational State? Tensions and Transformation in Contemporary German Citizenship’
- Barnes, Diane
- ‘Resettled Refugees’ Attachment to Their Original and Subsequent Homelands: Long-Term Vietnamese Refugees in Australia’ (2001) 14 *Journal of Refugee Studies* 394
- Beckman, Ludvig
- ‘Citizenship and Voting Rights: Should Resident Aliens Vote?’ (2006) 10(2) *Citizenship Studies* 153
- The Frontiers of Democracy: The Right to Vote and its Limits* (Palgrave Macmillan, 2009)
- ‘Who Should Vote? Conceptualizing Universal Suffrage in Studies of Democracy’ (2007) 15(1) *Democratization* 29
- Beiner, Ronald
- Liberalism, Nationalism, Citizenship: Essays on the Problem of Political Community* (University of British Columbia Press, 2003)
- ‘Introduction: Why Citizenship Constitutes a Theoretical Problem in the Last Decade of the Twentieth Century’ in Ronald Beiner (ed), *Theorizing Citizenship* (SUNY Press, 1995)
- What’s the Matter with Liberalism* (University of California Press, 1992)
- Benhabib, Seyla
- The Rights of Others* (Harvard University Press, 2004)
- ‘Citizens, Residents and Aliens in a Changing World’ (1999) 66 *Social Research* 708
- Benhabib, Seyla, Resnik, Judith
- ‘Introduction’ in Seyla Benhabib and Judith Resnik (eds), *Migrations and Mobility: Citizenship, Borders and Gender* (NYU Press, 2009)
- Bennouna, Mohamed
- Special Rapporteur, *Preliminary Report on Diplomatic Protection*, ILC Report, 50th session (2000)
- Benton, Meghan
- ‘The Tyranny of the Enfranchised Majority? The Accountability of States to their Non-Citizen Population’ (2010) 16(4) *Res Publica* 397
- Caroline Bettinger-Lopez and Bassina Farberblum, ‘Book Review of David Weissbrodt, *The Human Rights of Non-Citizens* (Oxford University Press, 2008)’ (UNSW, Research Series paper No 46, 2010)
- Berlin, Isaiah
- ‘Two Concepts of Liberty’ in Isaiah Berlin (ed), *Four Essays on Liberty* (Oxford University Press, 1969)
- Bevelander, Pieter
- ‘Naturalisation and Social Inclusion’ in *Naturalisation: A Passport for the Better Integration of Immigrants?* (OECD, 2011)
- Beyani, Chaloka
- ‘Introduction’ in Paul Weis, *The Refugee Convention 1951: the Travaux Préparatoires Analysed with a Commentary* (Cambridge University Press, 1995) 8
- Bhabha, Jacqueline
- ‘Internationalist Gatekeepers? The Tension between Asylum Advocacy and Human Rights’ (2002) 15 *Harvard Human Rights Journal* 155
- Blais, Andre, Massicotte, Louis and Yoshinaka, Antoine
- ‘Deciding Who Has the Right to Vote: A Comparative Analysis of Election Laws’ (2001) 20 *Electoral Studies* 41
- Blank, Yishai
- ‘Spheres of Citizenship’ (2007) 8(2) *Theoretical Inquiries in Law* 411
- Bohman, James
- Democracy across Borders: From Demos to Demoi* (MIT Press, 2007)
- Borchard, Edwin
- The Diplomatic Protection of Citizens Abroad* (Banks, 1922)
- ‘Basic Elements of Diplomatic Protection of Citizens Abroad’ (1913) 7 *American Journal of International Law* 497

- Bosniak, Linda 'The Meaning of Citizenship' (2011) 9 Issues in Legal Scholarship (Article 12)
 'Persons and Citizens in Constitutional Thought' (2010) 8(1) International Journal of Constitutional Law 9
 'Citizenship, Non-citizenship and the Trans-nationalization of Domestic Work' in Seyla Benhabib and Judith Resnik (eds), *Migrations and Motilities: Citizenship, Borders and Gender* (NYU Press, 2009) 127
 'Being Here: Ethical Territoriality and the Rights of Immigrants' (2007) 8(2) Theoretical Inquiries in Law 389
 'Denationalising Citizenship' in T Alexander Aleinikoff and Douglas Klusmeyer (eds), *Citizenship Today: Global Perspectives and Practices* (Carnegie, 2001) 237
- Bossuyt, Marc J *Guide to the Travaux Préparatoires of the International Covenant on Civil and Political Rights* (Nijhof, 1987)
- Brettschneider, Corey *Democratic Rights: The Substance of Self-Government* (Princeton University Press, 2007)
- Brilmayer, Lea 'From "Contract" to "Pledge": The Structure of International Human Rights Agreements' [2006] British Yearbook of Human Rights 163
 'Shaping and Sharing in Democratic Theory: Toward a Political Philosophy of Interstate Equality' (1987) 15 Florida State University Law Review 389
- Brownlie, Ian *Principles of Public International Law* (7th edn Oxford University Press, 2008)
- Brubaker, Rogers *Citizenship and Nationhood in France and Germany* (Harvard University Press, 1992)
- Buchanan, Allen 'Justice as Reciprocity versus Subject-Centered Justice' (1990) 19(3) Philosophy and Public Affairs 227
- Burton, Velmer S 'The Consequences of Official Labels: A Research Note on Rights Lost by the Mentally Ill, Mentally Incompetent and Convicted Felons' (1990) 26(3) Community Mental Health Journal 267
- Caney, Simon *Justice Beyond Borders: A Global Political Theory* (Oxford University Press, 2005)
- Capps, Patrick *Human Dignity and the Foundations of International Law* (Hart, 2009)
- Carens, Joseph H *Who Belongs: The Ethics of Immigration* (draft with author)
On Belonging (Boston Review, 2005)
 'Who Should Get In? The Ethics of Immigration Admissions' (2003) 17(1) Ethics and International Affairs 95
Culture, Citizenship, and Community (Oxford University Press, 2000)
 'The Philosopher and the Policymaker: Two Perspectives on the Ethics of Immigration with Special Attention to the Problem of Restricting Asylum' in Kay Hailbronner et al (eds), *Immigration Admissions: The Search for Workable Policies in Germany and the United States* (Berghahn Books, 1997) 3
 'Refugees and the Limits of Obligation' (1992) 6 Public Affairs Quarterly 31
 'Who Belongs? Theoretical and Legal Questions about Birthright Citizenship in the United States' (1987) 37 University of Toronto Law Journal 413
 'Aliens and Citizens: The Case for Open Borders' (1987) 49 Review of Politics 251
- Carter, Caroline 'The Right to Vote for Non-Resident Citizens: Considered through the example of East Timor' (2011) 46 Texas International Law Journal 655
- Cassese, Antonio (ed) *UN Law/Fundamental Rights: Two Topics in International Law* (Sijthoff & Noordhoff, 1979)
- Castles, David 'Globalisation and the Ambiguities of National Citizenship' in Rainer Bauböck and John Rundell (eds), *Blurred Boundaries: Migration, Ethnicity, Citizenship* (Ashgate, 1998)
- Castles, Stephen, Davidson, *Citizenship and Migration: Globalization and the Politics of*

Alastair Castiglione, Dario, Santoro, Emilio, Bellamy, Richard Cerna, Christina M	<i>Belonging</i> (Routledge, 2000) <i>Lineages of European Citizenship: Rights, Belonging, and Participation in Eleven Nation-states</i> (Palgrave Macmillan, 2004) 'Impact on the Right to Consular Notification' in Menno T Kamminga and Martin Scheinin (eds), <i>The Impact of Human Rights Law on General International Law</i> (Oxford University Press, 2009) 'The Right to Consular Notification as a Human Right' (2008) 31 Suffolk Transnational Law Review 419 'Universal Democracy: An International Legal Right or the Pipe Dream of the West?' (1995) 27 NYU Journal of International Law and Politics 289
Chetail, Vincent	'Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law in Ruth Rubio Marin (ed), <i>Migrations and Human Rights, Collected Courses of the Academy of European Law</i> (Oxford University Press, forthcoming 2013) 'Voluntary Repatriation in Public International Law: Concepts and Contents' (2004) 23(3) Refugee Survey Quarterly 1
Cholbi, Michael Cholewinski, Ryszard	'A Felon's Right to Vote' (2002) 21 Law and Philosophy 543 <i>Migrant Workers in International Human Rights Law: Their Protection in Countries of Employment</i> (Clarendon Press, 1997)
Christiano, Thomas	'Voting and Democracy' (1995) 25(3) Canadian Journal of Philosophy 394
Christoffersen, Jonas	'Impact on General Principles of Treaty Interpretation' in Menno T Kamminga and Martin Scheinin (eds), <i>The Impact of Human Rights Law on General International Law</i> (Oxford University Press, 2009) 37
Clark, Tom	'Rights Based Refuge: The Potential of the 1951 Convention and the Need for Authoritative Interpretation' (2004) 16(4) International Journal of Refugee Law
Clark, Tom, Crépau, François	'Mainstreaming Refugee Rights: The 1951 Refugee Convention and International Human Rights Law' (1999) 17(4) Netherlands Quarterly of Human Rights 389
Cohen, Elizabeth	<i>The Myth of Full Citizenship: A Comparative Study of Semi-Citizenship in Democratic Polities</i> (Phd dissertation, Yale University, 2003)
Cohen, Joshua	'For a Democratic Society' in Samuel Freeman (ed), <i>The Cambridge Companion to Rawls</i> (Cambridge University Press, 2003)
Cohn, Jean L	'Changing Paradigms of Citizenship and the Exclusiveness of the Demos' (1999) 14 International Sociology 245
Coles, Gervase JL	'The Human Rights Approach to the Solution of the Refugee Problem: A Theoretical and Practical Enquiry' in Alan E Nash and John P Humphrey (eds), <i>Human Rights and the Protection of Refugees under International Law</i> (The Institute for Research on Public Policy, 1988)
Crawford, James	'The ILC Articles on Diplomatic Protection' (2006) 31 South Africa Yearbook International Law 19 'Democracy and the Body of International Law' in Gregory H Fox and Brad Roth (eds), <i>Democratic Governance and International Law</i> (Cambridge University Press, 2000)
Craven, Matthew	'Human Rights in the Realm of Power: Sanctions and Extraterritoriality' in Fons Coomans and Menno T Kamminga (eds), <i>Extraterritorial Application of Human Rights Treaties</i> (Hart, 2004) 233
Crisp, Jeff	'No Solutions in Sight: The Problem of Protracted Refugee Situations in Africa' (2003) 22(4) Refugee Survey Quarterly 114
Cox, Adam	'Temporal Dimension of Voting Rights' (2007) 93 Virginia Law Review 361
D'Souza, Frances, Crisp, Jeff Dagger, Richard	<i>The Refugee Dilemma</i> (Minority Rights Group Report No 43, 1985) <i>Civic Virtues: Rights, Citizenship and Republican Liberalism</i> (Oxford University Press, 1997)
Dahl, Robert	<i>On Democracy</i> (Yale University Press, 1998) <i>Democracy and its Critics</i> (Yale University Press, 1989)

- Dauvergne, Catherine 'Refugee Law and the Measure of Globalisation' in Savitri Taylor (ed), *Nationality, Refugee Status and State Protection Law in Context* (Federation Press, 2005) 62
- Davy, Ulrike 'Article 32: Expulsion' in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press, 2011)
- Da Costa, Rosa *Rights of Refugees in the Context of Integration* (UNHCR, 2006)
- De Vattel, Emer *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and Sovereigns* (1758)
- Deng, Francis Mading 'The UN and the Protection of Human Rights: The Global Challenge of Internal Displacement' (2001) 5 Washington University Journal of Law and Policy 141
- Denza, Eileen *Diplomatic Law: A Commentary on the Vienna Convention on Diplomatic Relations* (3rd edn Oxford University Press, 2008)
- Derrida, Jacques *On Hospitality* (Stanford University Press, 2000)
- Diner, Dan Dan Diner, 'Nation, Migration and Memory: On Historical Concepts of Citizenship' (1998) 4(3) *Constellations* 293
- Donnelly, Jack *Universal Human Rights in Theory and Practice* (2nd edn Cornell University Press, 2003)
- 'Cultural Relativism and Universal Human Rights' (1984) 6 *Human Rights Quarterly* 400
- Douglas, Joshua 'Is the Right to Vote Really Fundamental?' (2008) 18 *Cornell Journal of Law and Public Policy* 143
- Dowty, Alan *Closed Borders: The Contemporary Assault on Free Movement* (Yale University Press, 1997)
- Dugard, John 'Diplomatic Protection' in Max Planck Encyclopaedia of Public International Law (2006)
- 'Diplomatic Protection and Human Rights: The Draft Articles of the International Law Commission' (2005) 24 *Australian Yearbook of International Law* 75
- Special Rapporteur, *First Report on Diplomatic Protection* (2001)
- Special Rapporteur, *Seventh Report on Diplomatic Protection* (2005)
- Dworkin, Ronald *Sovereign Virtue* (Harvard University Press, 2000)
- 'What is Equality?' (1987) 22 *University of Simon Fraser Law Review* 1
- Taking Rights Seriously* (Duckworth, 1978)
- Earnest, David C 'Neither Citizen nor Stranger: Why States Enfranchise Resident Aliens' (2006) 58(2) *World Politics* 242
- Voting Rights for Resident Aliens: Nationalism, Postnationalism and Sovereignty in an Era of Mass Migration* (PhD Dissertation, George Washington University, 2004)
- Edwards, Alice 'Human Rights, Refugees and the Right to 'Enjoy' Asylum' (2005) *International Journal of Refugee Law* 295
- Eleftheriadis, Pavlos *Legal Rights* (Oxford University Press, 2008)
- Elster, Jon 'Deliberation and Constitution Making' in Jon Elster (ed), *Deliberative Democracy* (Cambridge University Press, 1998)
- Ely, John H *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, 1980)
- Endicott, Timothy 'The Logic of Freedom and Power' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press, 2010) 245
- Escameia, Paula 'Professor Dugard as an Innovator in the World of the International Law Commission' (2007) 20 *Leiden Journal of International Law* 931
- Evans, Tony *The Politics of Human Rights* (2nd edn Pluto Press, 2005)
- Ewald, Alec '"Civil Death": The Ideological Paradox of Criminal Disenfranchisement Law in the United States' (2002) 2002 *Wisconsin Law Review* 1045
- Fahrmeir, Andreas *Citizenship: The Rise and Fall of a Modern Concept* (Yale University Press, 2007)
- Falk, Richard 'Accountability, Asylum and Sanctuary: Challenging Our Political and Legal Imagination' in Ved P Nanda (ed), *Refugee Law and Policy:*

- Farer, Tom *International and US Responses* (Greenwood Press Inc, 1989)
 'How the International System Copes with Involuntary Migration' (1995) 17 *Human Rights Quarterly* 72
- Farrior, Stephanie 'International Human Rights Treaties and the Rights of Female Refugees' in Anne Bayefsky (ed), *Human Rights and Refugees, Internally Displaced Persons and Migrant Workers* (Nijhoff, 2006)
- Feldblum, Miriam 'Reconfiguring Citizenship in Europe' in Christian Joppke (ed), *Challenges to the Nation-State* (Oxford University Press, 1998)
- Feller, Erika 'Asylum, Migration and Refugee Protection: Realities, Myths and the Promise of Things to Come' (2006) 18 (3-4) *International Journal of Refugee Law* 509
 'Refugees are not Migrants' (2005) 25(4) *Refugee Survey Quarterly* 27
 'International Refugee Protection 50 Years on: The Protection Challenges of the Past, Present and Future' (2001) 83 (843) *International Review of the Red Cross* 581
 'The UN and the Protection of Human Rights: The Evolution of the International Refugee Protection Regime' (2001) 5 *Washington University Journal of Law and Policy* 129
 'The 1951 Convention at 50: New Challenges for the International Refugee Protection Regime' (Presentation to the Lauterpacht Research Centre for International Law, 17 October 2000)
- Feria-Tinta, Mónica 'Due Process and the Right to Life in the Context of the Vienna Convention on Consular Relations: Arguing the LaGrand Case' (2001) 12(2) *European Journal of International Law* 363
- Fielden, Alexandra *Local Integration: An Under-Reported Solution to Protracted Refugee Situations* (UNHCR New Issues in Refugee Research, Working Paper No 158, 2008)
- Finnis, John M 'Nationality, Alienage and Constitutional Principle' (2007) 123 *Law Quarterly Review* 41
- Fishkin, Joseph 'Equal Citizenship and the Individual Right to Vote' (2011) 86 *Indiana Law Journal* 1289
- Fitzpatrick, Joan 'The Unreality of International Law in the US and the LaGrand Case' (2002) 27 *Yale Journal of International Law* 427
 'The End of Protection: Legal Standards for Cessation of Refugee Status and Withdrawal of Temporary Protection' (1998-1999) 13 *Georgetown Immigration Law Journal* 343
 'Revitalizing the 1951 Refugee Convention' (1996) 9 *Harvard Human Rights Journal* 229
- Fitzpatrick, Joan, Bonoan, Rafael 'Cessation of Refugee Status in Volker Türk and Erika Feller (eds), *Refugee Protection in International Law* (Cambridge University Press, 2003)
- Fitzpatrick, Joan, Nicholson, Frances 'Cessation (Article 1C)' in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law* (Cambridge University Press, 2003)
- Fletcher, George 'Disenfranchisement as Punishment: Reflections on the Radical Uses of Infamia' (1999) 46 *UCLA Law Review* 1895
- Foner, Eric *Reconstruction, America's Unfinished Revolution 1863-1877* (Harper & Row, 1988)
- Ford, Richard 'City-States and Citizenship' in T Alexander Aleinikoff and Charles Klusmeyer (eds), *Citizenship Today: Global Perspectives and Practices* (Carnegie, 2001)
- Fortin, Antonio 'The Meaning of Protection in the Refugee Definition' (2001) 12(4) *International Journal of Refugee Law* 548
- Fox, Gregory 'The Right to Political Participation in International Law' in Gregory H Fox and Brad Roth (eds), *Democratic Governance and International Law* (Cambridge University Press, 2000)
 'The Right to Political Participation in International Law' (1992) 17 *Yale Journal of International Law* 539
- Franck, Thomas *The Empowered Self: Law and Society in the Age of Individualism* (Oxford University Press, 2001)

- ‘The Emerging Right to Democratic Governance’ (1992) 86 *American Journal of International Law* 46
- Franke, Mark FN ‘Political Exclusion of Refugees in the Ethics of International Relations’ in Patrick Hayden (ed), *The Ashgate Research Companion to Ethics and International Relations* (Ashgate, 2009) 309
- Frazer, Elizabeth *The Problems of Communitarian Politics: Unity and Conflict* (Oxford University Press, 1999)
- Furman, Jesse ‘Political Illiberalism: The Paradox of Disenfranchisement and the Ambivalence of Rawlsian Justice’ (1997) 106 *Yale Law Journal* 1197
- Gallagher, Dennis, Schowengerdt, Anna ‘Participation of Refugees in Postconflict Elections’ in Krishna Kumar (ed), *Postconflict Elections, Democratization, and International Assistance* (Lynne Rienner Publishers, 1998)
- Gardner, James A ‘The Dignity of Voters’ (2010) 64 *University of Miami Law Review* 435
- ‘Liberty, Community and the Constitutional Structure of Political Influence: A Reconsideration of the Right to Vote’ (1997) 145(4) *University of Pennsylvania Law Review* 893
- Gavison, Ruth ‘Immigration and the Human Rights Discourse’ (2010) 43(2) *Israel Law Review* 1
- Gewirth, Alan ‘Are there any Absolute Rights?’ In Jeremy Waldron (ed), *Theories of Rights* (Oxford University Press, 1984) 91
- Ghoshal, Animesh, Crowley, Thomas M ‘Refugees and Immigrants: A Human Rights Dilemma’ (1983) 5(3) *Human Rights Quarterly* 327
- Gibney, Matthew J *Should Citizenship be Conditional?* (RSC Working Paper Series No 75, July 2011)
- ‘The Rights of Non-Citizens to Membership’ in Caroline Sawyer and Brad K Blitz (eds), *Statelessness in the European Union* (Cambridge University Press, 2011)
- The Ethics and Politics of Asylum* (Cambridge University Press, 2004)
- Gibney Mathew J, Hansen, Randall *Deportation and the Liberal State: the Forcible Return of Asylum Seekers and Unlawful Migrants in Canada, Germany and the United Kingdom* (UNHCR, 2003)
- Gigauri, George *Resolving the Liberal Paradox: Citizen Rights and Alien Rights in the UK* (RSC Working Paper no 31, July 2008)
- Goldsmith, Jack, Posner, Eric A *The Limits of International Law* (Oxford University Press, 2005)
- Goldsmith, Peter *Citizenship: Our Common Bond* (UK, Ministry of Justice, 2008)
- Goodhart, Michael *Democracy as Human Rights: Freedom and Equality in the Age of Globalization* (Routledge, 2005)
- Goodin, Robert ‘Enfranchising all Affected Interests, and its Alternatives’ (2007) 35(1) *Philosophy and Public Affairs* 40
- ‘What is So Special about Our Fellow Countrymen?’ (1988) 98 *Ethics* 663
- Goodwin-Gill, Guy S ‘The Politics of Refugee Protection’ (2008) 27(1) *Refugee Survey Quarterly* 8
- Free and Fair Elections* (Inter-Parliamentary Union, 2006)
- Refugees and their Human Rights* (RSC Working Paper No 17, 2004)
- ‘Asylum 2001: A Convention and a Purpose’ (2001) 13 *International Journal of Refugee Law* 1
- ‘Migration: International Law and Human Rights’ in Bimal Ghosh (ed), *Managing Migration* (Oxford University Press, 2000) 160
- ‘Who to Protect, How...and the Future?’ (1997) 9(1) *International Journal of Refugee Law* 1
- ‘International Law and Human Rights: Trends Concerning International Migrants and Refugees’ (1989) 23(3) *International Migration Review* 526
- ‘The Language of Protection’ (1989) 1(1) *International Journal of Refugee Law* 1
- ‘Non-refoulement and the New Asylum Seekers’ (1986) 26(4) *Virginia Journal of International Law* 897
- Voluntary Repatriation: Legal and Policy Issues* (December 1986)
- International Law and the Movement of Persons between States*

- (Clarendon Press, 1978)
- Goodwin-Gill, Guy S, McAdam, Jane
 Ghoshal, Animesh and Crowley, Thomas M
 Grace, James
 Grace, James, Mooney, Erin
 Graham, David T, Poku, Nana,
 Grahl-Madsen, Atle
 Griffin, James
 Habermas, Jorgen
 Haddad, Emma
 Hamilton, Vivian E
 Hammar, Tomas
 Hampshire, James
 Hansen, Randall
 Hanson, Michael
 Harper-Ho, Virginia
 Hathaway, James C
- The Refugee in International Law* (3rd edn Oxford University Press, 2007)
- 'Refugees and Immigrants: A Human Rights Dilemma' (1983) 5(3) Human Rights Quarterly 327
- External and Absentee Voting in Challenging the Norms and Standards of Election Administration* (IFES, 2007)
- Enfranchising Conflict Forced Migrants* (IOM, 2003)
- The Electoral Rights of Conflict Forced Migrants: A Review of Relevant Legal Norms and Instruments* (IOM, 2003)
- 'Peacebuilding through the Electoral Participation of Displaced Populations' 28(1) (2009) Refugee Survey Quarterly 95
- Migration, Globalisation and Human Security (Psychology Press, 2009)
- 'Protection of Refugees by their Country of Origin' (1985-1986) 11 Yale Journal of International Law 362
- The Status of Refugees in International Law* (Sijthoff, 1966)
- Commentary on the Refugee Convention 1951, Articles 2-11, 13-37* (1963)
- On Human Rights* (Oxford University Press, 2008)
- The Postnational Constellation* (Polity Press, 2001)
- Between Facts and Norms* (Polity Press, 1996)
- 'Three Normative Models of Democracy' in Seyla Benhabib (ed), *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton University Press, 1996)
- The Refugee in International Society: Between Sovereigns* (Cambridge University Press, 2008)
- 'The Refugee: The Individual between Sovereigns' (2003) 17(3) Global Society 297
- 'Refugee Protection: A Clash of Values' (2003) 7(3) International Journal of Human Rights 1
- 'Democratic Inclusion, Cognitive Development, and the Age of Electoral Majority' (2012) 77(4) Brooklyn Law Review 1
- Democracy and the Nation State: Aliens, Denizens and Citizens in a World of International Migration* (Aldershot, 1990)
- 'Dual Citizenship and Political Integration' (1985) 19(3) International Migration Review 438
- 'Becoming Citizens: Naturalisation in the Liberal State', in Gideon Calder, Peter Cole and Jonathan Seglow (eds), *Citizenship Acquisition and National Belonging* (Palgrave, 2010) 74
- 'The Poverty of Postnationalism: Citizenship, Immigration, and the New Europe' (2009) 38(1) Theory and Society 1
- Survey of the Principal Legal Aspects of the Refugee Question at the Present Time* (1938)
- 'Noncitizen Voting Rights: The History, the Law and Current Prospects for Change' (2000) 21 Immigration and Nationality Law Review 477
- 'Why Refugee Law Still Matters' (2007) 8 Melbourne Journal of International Law 89
- The Rights of Refugees under International Law* (Cambridge University Press, 2005)
- 'The Rights of States to Repatriate Former Refugees' (2005) 20 Ohio State Journal on Dispute Resolution 175
- 'What's in a Label?' (2005) European Journal of Migration and Law 1
- 'The Meaning of Repatriation' (1997) 9(4) International Journal of Refugee Law 551
- The Law of Refugee Status* (Butterworth, 1991)
- 'Reconsideration of the Underlying Premise of Refugee Law' (1990) 21 Harvard International Law Journal 140
- 'The Evolution of Refugee Law' (1984) 33 International and Comparative Law Quarterly 348

- Hathaway, James C, Neve, Alexander
Hayduk, Ron
Hayward, Clarissa Rile
Heater, Derek
Held, David
Helton, Arthur C
Henkin, Louis
Higgins, Rosalyn
Humphrey, John
Hurschka, Constantin
Ignatieff, Michael
Itchikawa, Minako
Jackson, Vicky
Jacobson, David
Jennings, Ivor
Jennings, Robert
Jennings, Robert, Watts Arthur (eds)
Jones, Peter
Joppke, Christian
Jordan, Bill, Duvel, Franck (eds)
Kadish, Mark J
- 'Making International Refugee Law Relevant Again' (1998) 10 Harvard Human Rights Law Journal 115
'Democracy for All: Restoring Immigrant Voting Rights in the United States' (2004) 26(4) New Political Science 499
'The Dark Side of Citizenship: Membership, Territory and the (Anti-) Democratic Polity' (2011) 9 Issues in Legal Scholarship (Article 5) *What is Citizenship?* (Polity Press, 1999)
Citizenship: The Civic Ideal in World History, Politics and Education (Longman, 1990)
Models of Democracy (Polity Press, 1996)
Democracy and the Global Order: From the Modern State to Cosmopolitan Governance (Polity Press, 1995)
'What is Refugee Protection? A Question Revisited' in Niklaus Steiner, Matthew J Gibney, Gil Loescher (eds), *Problems of Protection: The UNHCR, Refugees and Human Rights* (Routledge, 2003)
'Protecting the World's Exiles: The Human Rights of Noncitizens' (2000) 22(1) Human Rights Quarterly 280
'Human Rights and State Sovereignty' (1995/6) 25 (1/2) Georgia Journal of Comparative and International Law 31
'Refugees and their Human Rights' (1994-1995) 18 Fordham International Law Journal 1079, 1079
Problems and Process: International Law and How We Use It (Clarendon Press, 1995)
'Derogations Under Human Rights Treaties' (1976-7) 48 British Yearbook International Law 281
'Political and Related Rights' in Theodor Meeron (ed), *Human Rights in International Law: Legal and Policy Issues* (Oxford University Press, 1986) 171
'Article 15' in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and 1967 Protocol* (Oxford University Press, 2011) 571
'The Myth of Citizenship' in Ronald Beiner (ed), *Theorizing Citizenship* (SUNY Press, 1995) 53
Citizenship, Human Rights and State Sovereignty in International Relations (PhD Thesis, University of Keele, 2004)
'Citizenships, Federalisms and Gender' in Seyla Benhabib and Judith Resnik (eds), *Migrations and Motilities: Citizenship, Borders and Gender* (NYU Press, 2009) 439
Rights across Borders: Immigration and the Decline of Citizenship (Johns Hopkins University Press, 1996)
The Approach to Self-Government (Cambridge University Press, 1958)
'Speech on the Report of the International Court of Justice' (1992) 86 American Journal of International Law 249
'Sovereignty and International Law' in Gerard Kreijen (ed), *State, Sovereignty and International Governance* (2002) 29
Oppenheim's International Law (9th edn Oxford University Press, 2008) (1905)
Rights (Macmillan, 1994)
'The Inevitable Lightning of Citizenship' in Ricard Zapata-Barrero (ed), *Citizenship Policies in the Age of Diversity* (CIDON Foundation, 2009) 37
Immigration and the Nation-State: The United States, Germany, and Great Britain (Oxford University Press, 2000)
'Asylum and State Sovereignty: A Comparison of the US, Germany and Britain' in Christian Joppke (ed), *Challenge to the Nation State: Immigration in Western Europe and the US* (Oxford University Press, 1998) 110
Migration (Polity Press, 2003)
'Article 36 of the Vienna Convention on Consular Relations: A Search

- for the Right to Consul' (1997) 18 Michigan Journal of International Law 565
- Kagan, Michael *We Live in a Country of UNHCR: The UNHCR Surrogate State and Refugee Policy in the Middle East* (UNHCR New Issues in Refugee Research no 201, February 2011)
- Kälin, Walter 'Non-State Agents of Persecution and the Inability of the State to Protect' in International Association of Refugee Law, *The Changing Nature of Persecution* (Institute of Public Law, University of Berne, October 2000)
- Kamminga, Menno T 'Final Report on the Impact of International Human Rights Law on General International Law' in Menno T Kamminga and Martin Scheinin (eds), *The Impact of International Human Rights Law on General International Law* (Oxford University Press, 2009)
- Kant, Immanuel *Perpetual Peace: A Philosophical Sketch* (W Hastie trans, 1891) (1795)
- Kateb, George 'The Moral Distinctiveness of Representative Democracy' (1981) 91 Ethics 357
- Kateka, James L 'John Dugard's Contribution to the Topic of Diplomatic Protection' (2007) 20 Leiden Journal of International Law 921
- Katz, Richard *Democracy and Elections* (Oxford University Press, 1997)
- Kelsen, Hans *General Theory of Law and State* (Anders Wedberg Trans, Russell & Russell, 1961)
- Kennedy, David *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton: Princeton University Press, 2004)
- 'Residential Associations as State Actors: Regulating the Impact of Gated Communities on Non-members' (1995) 105 (3) Yale Law Journal 761
- Keyssar, Alexander *The Right to Vote: the Contested History of Democracy in the United States* (Basic Books, 2000)
- Kibreab, Gaim 'Citizenship Rights and Repatriation of Refugees' (2003) 37(1) International Migration Review 24
- 'Revisiting the Debate on People, Place, Identity and Displacement' (1999) 12(4) Journal of Refugee Studies 387
- Kingsbury, Damien 'Universalism and Exceptionalism in Asia' in Damien Kingsbury and Leena Avonius (eds), *Human Rights in Asia: A Reassessment of the Asian Values Debate* (Palgrave Macmillan, 2008)
- Knop, Karen 'Citizenship, Public and Private' (2008) 71 Law and Contemporary Problems 309
- Kommers, Donald P *The Constitutional Jurisprudence of the Federal Republic of Germany* (Duke University Press, 1997) 197
- Korn, David A *Exodus within Borders: An Introduction to the Crisis of Internal Displacement* (Brookings Institution Press, 1999)
- Kostakopoulou, Theodora *The Future Governance of Citizenship* (Cambridge University Press, 2008)
- Krasner, Stephen *Sovereignty, Organized Hypocrisy* (Princeton University Press, 1997)
- Krenz, Frank 'The Refugee as a Subject of International Law' (1966) International and Comparative Law Quarterly 90
- Kritzman-Amir, Tally *Socioeconomic Refugees* (PhD dissertation, Faculty of Law, Tel-Aviv University, 2009)
- Kukathas, Chandran 'Liberalism, Communitarianism, and Political Community' (1996) 13(1) Society Philosophy and Policy 80
- Kunz, Egon F 'Exile and Resettlement: Refugee Theory' (1981) 15 International Migration Review 42
- Künzli, Annemarieke 'Exercising Diplomatic Protection: The Fine Line between Litigation, Demarches and Consular Assistance' (2006) 66 ZaöRV 321
- Kymlicka, Will 'Social Unity in a liberal State' (1996) 13(1) Social Philosophy and Policy 105
- Kymlicka, Will, Norman, Wayne 'Citizenship in Diverse Societies: Issues, Contexts, Concepts' in Will Kymlicka and Wayne Norman (eds), *Citizenship in Diverse Societies* (Oxford University Press, 2000) 21
- 'Return of the Citizen: A Survey of Recent Work on Citizenship

- Theory' in Ronald Beiner (ed), *Theorizing Citizenship* (SUNY Press, 1995)
- Lacy, Brett *Building Accountability, Legitimacy and Peace: Refugees, Internally Displaces Persons, and the Right to Political Participation* (International Foundation for Electoral Systems, 2004)
- Lambert, Hélène 'Article 2: General Obligations' in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and 1967 Protocol* (Oxford University Press, 2011)
- Seeking Asylum: Comparative Law and Practice in Selected European Countries* (Nijhoff, 1995)
- Lardy, Heather 'Citizenship and the Right to Vote' (1997) 17(1) *Oxford Journal of Legal Studies* 76
- Lauterpacht, Hersch 'Allegiance, Diplomatic Protection, and Criminal Jurisdiction over Aliens' (1945-1947) 9 *Cambridge Law Journal* 330
- 'Foreword' in Paul Weis, *Nationality and Statelessness in International Law* (2nd edn Sijthoff & Noordhoff, 1979)
- Lavi, Shai 'Citizenship Revocation as Punishment: On the Modern Duties of Citizens and their Criminal Breach' (2011) 61(4) *University of Toronto Law Journal* 783
- Lee, Luke *Consular Law and Practice* (Oxford University Press, 1991)
- 'The Right to Compensation: Refugees and Countries of Asylum' (1986) 80(3) *American Journal of International Law* 532
- Leigh, Guy 'Nationality and Diplomatic Protection' (1971) 20 *International and Comparative Law Quarterly* 453
- Legomsky, Stephen H 'Citizens' Rights and Human Rights' (2010) 43(1) *Israel Law Review* 67
- 'Why Citizenship' (1994) 35 *Virginia Journal of International Law* 279
- Levin, Michael *The Spectre of Democracy: The Rise of Modern Democracy as seen by its Critics* (Macmillan, 1992)
- Levinson, Sanford 'Suffrage and Community: Who Should Vote?' (1989) 41 *Florida Law Review* 545
- Lister, Matthew 'Who are Refugees', *Law and Philosophy* (forthcoming 2013)
- Lister, Ruth 'Citizenship in the Immigration Context' (2010-2011) 70 *Maryland Law Review* 175
- 'Children and Citizenship' (2007) 8(2) *Theoretical Inquiries in Law* 695
- Locke, John *The Second Treatise of Civil Government* (Blackwell, 1946) (1690)
- Two Treatises of Government* (Peter Laslett ed Cambridge University Press, 1960) (1690)
- Lopez-Guerra, Claudio 'Should Expatriates Vote?' (2005) 12 *Journal of Political Philosophy* 216
- Long, Katy *Voting with Their Feet: A Review of Refugee Participation and the Role of UNHCR in Country of Origin Elections and other Political Processes*, (UNHCR, 2010)
- MacDonald, David R *Difference and Belonging: Liberal Citizenship and Modern Multiplicity* (PhD Thesis LSE, 2002)
- Macedo, Stephen *Liberal Virtues* (Clarendon Press, 1991)
- Mandal, Ruma *Political Rights of Refugees* (UNHCR, 2003)
- Protection Mechanisms Outside of the 1951 Convention ('Complementary Protection')* (UNHCR, 2005)
- Mann, Itamar 'Refugees' (2011) 2e *Mafteah* 81
- Manza, Jeff, Uggen, Christopher *Locked Out: Felon Disenfranchisement and American Democracy* (Oxford University Press, 2006)
- Marden, Peter 'Mapping Territoriality' in David Graham and Nana Poku (eds), *Migration, Globalisation, and Human Security* (Routledge, 2000)
- Marshall, Trevor H, Bottomore, Tom *Citizenship and Social Class* (Pluto Press, 1992) (1950)
- Martin, David A 'New Rules on Dual Nationality for a Democratizing Globe: Between Rejection and Embrace' (1999) 14 *Georgetown Immigration Law Journal* 1

- Marx, Reinhard 'Due Process and Membership in the National Community: Political Asylum and Beyond' (1983) 44 *University of Pittsburgh Law Review* 165
- Mason, Andrew 'Article 1E' in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and 1967 Protocol* (Oxford University Press, 2011) 571
- Massey, Hugh *Community, Solidarity and Belonging: Levels of Community and their Normative Significance* (Cambridge University Press, 2000)
- Massicotte, Louis, Blais, Andre, Yoshinaka, Antoine *UNHCR and De Facto Statelessness* (UNHCR, April 2010)
- Mathew, Penelope *Establishing the Rules of the Game: Election Laws in Democracies* (University of Toronto Press, 2004)
- Mazzeschi, Riccardo Pisillo 'Review: James Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press, 2005)' (2008) 102(1) *American Journal of International Law* 206
- Mazzeschi, Riccardo Pisillo 'Lest We Forget: Australia's policy on East Timorese Asylum Seekers' (1999) 11(1) *International Journal of Refugee Law* 7
- Mazzeschi, Riccardo Pisillo 'The Relationship between Human Rights and the Rights of Aliens and Immigrants' in Ulrich Fastenrath, Rudolf Geiger et al (eds), *From Bilateralism to Community Interest* (Oxford University Press, 2011)
- Mazzeschi, Riccardo Pisillo 'Impact on the Law of Diplomatic Protection' in Menno T Kamminga and Martin Scheinin (eds), *The Impact of Human Rights Law on General International Law* (Oxford University Press, 2009)
- McAdam, Jane *Complementary Protection in International Refugee Law* (Oxford University Press, 2007)
- McCorquodale, Robert 'The Individual and the International Legal System' in Malcolm Evans (ed), *International Law* (3rd edn Oxford University Press, 2010)
- McCrudden, Christopher 'A Common Law of Human Rights? Transnational Judicial Conversations on Human Rights' (2000) 20 *Oxford Journal of Legal Studies* 499
- McCrudden, Christopher 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19(4) *European Journal of International Law* 655
- McDougal, Myres S, Lasswell, Harold D, Chen, Lung-Chu 'The Protection of Aliens from Discrimination and World Public Order: Responsibility of States Conjoined with Human Rights' (1976) 70 *American Journal of International Law* 459
- McGinnis, John, Somin, Ilya 'Democracy and International Human Rights Law' (2009) 84(4) *Notre Dame Law Review* 1739
- Michelman, Frank 'Parsing 'a Right to have Rights'' (1996) 3(2) *Constellations* 200
- Michelman, Frank 'Conceptions of Democracy in American Constitutional Argument: Voting Rights' (1989) 41 *Florida Law Review* 439
- Milano, Enrico 'Diplomatic Protection and Human Rights before the International Court of Justice: Refashioning Tradition?' (2005) 35 *Netherlands Yearbook International Law* 85
- Milanović, Marko *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy* (Oxford University Press, 2011)
- Mill, John Stuart *Representative Government* (1861)
- Mill, John Stuart 'Thoughts on Parliamentary Reform' in John Robson (ed), *The Collected Works of John Stuart Mill* (Liberty Fund, 2006)
- Miller, David 'Immigrants, Nations, and Citizenship' (2008) 16(4) *Journal of Political Philosophy* 371
- Miller, David 'Democracy's Domain' (2009) *Philosophy and Public Affairs* 37(3) 219
- Miller, David *Citizenship and National Identity* (Polity Press, 2000)
- Miller, David 'Bounded Citizenship' in Kimberly Hutchings and Roland Dannreuther (eds), *Cosmopolitan Citizenship* (Macmillan, 1999) 60
- Milner, James *On Nationality* (Clarendon Press, 1995)
- Mitchell, David *Refugees and the Peace-Building Process* (UNHCR, 2011)
- Mitchell, David 'Undermining Individual and Collective Citizenship: The Impact of Exclusion Laws on the African-American Community' (2007) 34 *Fordham Urban Law Journal* 833
- Möller, Kai 'Balancing and the Structure of Constitutional Rights' (2007) 5(3) *International Journal of Constitutional Law* 453

Montesquieu, Charles de Secondat, Baron de Montgomery, J Randal	<i>The Spirit of Laws</i> , Thomas Nugent (tr) (Printed for J Collingwood, 1823) (1748) 'Components of Refugee Adaptation' (1996) 30 International Migration Review 679
Morris, Lydia	'Managing Contradiction: Civic Stratification and Migrants' rights' (2003) 37(1) International Migration Review 74
Morsink, Johannes	<i>Inherent Human Rights: Philosophical Roots of the Universal Declaration</i> (University of Philadelphia Press, 2009)
Munro, Daniel	'Integration through Participation: Noncitizen Resident Voting Rights in an Era of Globalisation' (2008) 9(1) Journal of International Migration and Integration 43
Murphy, Sean	'The Expulsion of Aliens and Other Topics: The Sixty-Fourth Session of the International Law Commission' 107 American Journal of International Law (forthcoming 2013)
Mutua, Makau	'Standards Setting in Human Rights: Critique and Prognosis' (2007) 29(3) Human Rights Quarterly 547 <i>Human Rights: A Political and Cultural Critique</i> (University of Pennsylvania Press, 2002)
Nagy, Boldizsar	'The Frontiers of the Sovereign' in Anne Bayefsky (ed), <i>Human Rights and Refugees, Internally Displaced Persons and Migrant Workers</i> (Nijhoff, 2006) 91
Nathwani, Niraj Navarro, Carlos	<i>Rethinking Refugee Law</i> (Nijhoff, 2003) 'The Political Rights of Migrant Workers and External Voting' in <i>Voting from Abroad: The International IDEA Handbook on External Voting</i> (IDEA, 2007)
Neuman, Gerald L	'We the People: Alien Suffrage in German and American Perspective' (1991-1992) 13 Michigan Journal of International Law 259 'Aliens and Equal Protection: Why not the Right to Vote?' (1977) 75 Michigan Law Review 1092
Nolan, Aoilfe	'The Child as 'Democratic Citizen'- Challenging the Participation Gap' [2010] Public Law 126
Noll, Gregor Nowak, Manfred	<i>Rejected Asylum Seekers: The Problem of Return</i> (UNHCR, 1999) <i>UN Covenant on Civil and Political Rights: CCPR Commentary</i> (2 nd revised edn Engel, 2005)
Nussbaum, Martha	<i>Capabilities as Fundamental Entitlements: Sen and Social Justice</i> (Hitotsubashi University, 2002)
O'Connell, Rory	'Realising Political Equality: The European Court of Human Rights and Positive Obligations in a Democracy' (2010) 61(3) Northern Ireland Law Quarterly 263
Okowa, Pohebe	'Issues of Admissibility and the Law on International Responsibility' in Malcolm Evans (ed), <i>International Law</i> (3 rd edn Oxford University Press, 2010)
Oppenheim, Lassa, Lauterpacht, Hersch	<i>International Law: A Treatise</i> (Longmans, 1955)
Owen, David	'Citizenship and the Marginalities of Migrants' in Philip Cook and Jonathan Seglow (eds), <i>The Margins of Citizenship</i> (Routledge, forthcoming 2013) <i>In Loco Civitatis</i> (draft with author) 'Transnational Citizenship and Rights of Political Participation' (Normative Orders Working Paper No 06, 2011) 'Resident Aliens, Non-resident Citizens and Voting Rights' in Gideon Calder, Peter Cole and Jonathan Seglow (eds), <i>Citizenship Acquisition and National Belonging</i> (Palgrave, 2010) 63
Parekh, Bhikhu	'Finding a Proper Place for Human Rights' in Kate Tunstall (ed), <i>Displacement, Asylum, Migration</i> (Oxford Amnesty Lectures 2004 Oxford University Press, 2006) 'Three Theories of Immigration' in Sarah Spencer (ed), <i>Strangers and Citizens: A Positive Approach to Migrants and Refugees</i> (Rivers Oram Press, 1994)
Paternan, Carol	<i>Participation and Democratic Theory</i> (Cambridge University Press, 1970)

- Perry, Stephen 'Immigration, Justice and Culture' in Warren Schwartz (ed), *Justice in Immigration* (Cambridge University Press, 1995) 96
- Persau, Santhosh *Protecting Refugees and Asylum-Seekers under the ICCPR* (UNHCR, New Issues in Refugee Research No 132, November 2006)
- Perry, Michael 'Secular Viewpoints, Religious Viewpoints and the Morality of Human Rights' (Emory University School of Law Public Law and Legal Theory Research Paper Series 102-10)
- Perry, Stephen 'Immigration, Justice and Culture' in Warren Schwartz (ed), *Justice in Immigration* (Cambridge University Press, 1995)
- Pettit, Philip *Republicanism: A Theory of Freedom and Government* (Oxford University Press, 1997)
- Pettus, Katherine *Felony Disenfranchisement in the Contemporary United States: An Ancient Practice in a Modern Polity* (PhD dissertation, Columbia University 2002)
- Pildes, Richard 'What Kind of Right is "the Right to Vote"' (2007) 93 Virginia Law Review in Brief 43
- Plender, Richard *Basic Documents on International Migration Law* (Nijhoff, 1997)
International Migration Law (revised 2nd edn Nijhoff, 1988)
- Pobjoy, Jason 'Treating Like Cases Alike' (2010) 34(1) *Melbourne University Law Review* 181
- Pogge, Thomas *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* (Polity Press, 2008)
- Prather, Lauren, Herron, Erik S 'Enfranchising Displaced Voters: Lessons from Bosnia-Herzegovina' (2007) 6(4) *Election Law Journal* 354
- Preuss, Ulrich K 'Migration - A Challenge to Modern Citizenship' (1998) 4(3) *Constellations* 307
- Price, Matthew E *Rethinking Asylum: History, Purpose and Limits* (Cambridge University Press, 2009)
- Przeworski, Adam 'Politics or Humanitarianism? Recovering the Political Roots of Asylum' (2004) 19 *Georgetown Immigration Law Journal* 277
- Pupavac, Vanessa 'Minimalist Conception of Democracy: A Defense' in Ian Shapiro and Casiano Hacker-Cordón (eds), *Democracy's Value* (Cambridge University Press, 1999)
- Pupavac, Vanessa *Refugees in the Sick Role: Stereotyping Refugees and Eroding Refugee Rights* (New Issues in Refugee Research No 127, August 2006)
- Quigley, John B, Aceves, William J and Shank, S Adele *The Law of Consular Access: A Documentary Guide* (Routledge, 2010)
- Raskin, James 'Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage' (1993) 41(4) *University of Pennsylvania Law Review* 1391
- Raz, Joseph 'Legal rights' in Joseph Raz (ed), *Ethics in the Public Domain* (Clarendon Press, 1995)
The Morality of Freedom (Clarendon Press, 1986)
'Right-based Moralities' in Jeremy Waldron (ed), *Theories of Rights* (Oxford University Press, 1984) 191
- Rawls, John *The Law of Peoples* (Harvard University Press, 1999)
Political Liberalism (Columbia University Press, 1996)
A Theory of Justice (Harvard University Press, 1971)
- Rehman, Javaid *International Human Rights Law* (2nd edn Pearson, 2010)
- Reichel, David *Do Legal Regulations Hinder Naturalisation? Citizenship Policies and Naturalisation Rates in Europe* (European University Institute RSCAS 2011/51, 2011)
- Reiman, Jeffrey 'Liberal and Republican Arguments against Felon Disenfranchisement' [2005] *Criminal Justice Ethics* 3
- Reisman, Michael 'Sovereignty and Human Rights in Contemporary International Law' (1990) 84 *American Journal of International Law* 866
- Richmond, Anthony H *Global Apartheid: Refugees, Racism and the New World Order* (Oxford University Press, 1994)
- Ritzer, Goerge 'Rethinking Globalization: Glocalization/ Globalization and Something/ Nothing' (2003) 21(3) *Sociological Theory* 193
- Rivers, Julian 'Proportionality and Variable Intensity of Review' (2006) 65

- Cambridge Law Journal 174
- Roberts, Adam 'More Refugees, Less Asylum: A Regime in Transformation' (1998) 11(4) *Journal of Refugee Studies* 375
- Roberts, Bayard *Guide to Forced Migration and Electoral Participation* (Forced Migration Online, 2003)
- Robinson, Nehemiah *Convention Relating to the Status of Refugees: Its History and Interpretation, A Commentary* (Institute of Jewish Affairs, 1953)
- Rodriguez, Cristina M *The Universal Declaration of Human Rights: Its Origin, Significance, Application and Interpretation* (Institute of Jewish Affairs, 1950)
- 'Review of Peter J Spiro, *Beyond Citizenship: American Citizenship after Globalization*' (2009) 103 *American Journal of International Law* 180
- 'The Citizenship Paradox in a Transnational Age' (2008) 106 *Michigan Law Review* 1111
- Rosas, Allan 'Article 21' in Gudmundur Alfredson and Asbjorn Eide (eds), *The Universal Declaration of Human Rights: A Common Standard of Achievement* (Nijhoff, 1999) 431
- Rosberg, Gerald M 'Aliens and Equal Protection: Why Not the Right to Vote?' (1977) 75(5-6) *Michigan Law Review* 1092
- Rousseau, Jean-Jacques *On the Social Contract*, Judith Masters (tr) (St. Martin's Press, New York 1978) (1762)
- Rubio-Marin, Ruth 'Transnational Politics and the Democratic Nation-State: Normative Challenges of Expatriate Voting and Nationality Retention of Emigrants' (2006) 81 *NYU Law Review* 117
- Immigration as a Democratic Challenge: Citizenship and Inclusion in Germany and the United States* (Cambridge University Press, 2000)
- Sadurski, Wojciech 'Legitimacy, Political Equality, and Majority Rule' (2008) 21 *Ratio Juris* 39
- Saliceti, Alessandro I 'The Protection of EU Citizens Abroad' (2011) 17(1) *European Public Law* 91
- Sandel, Michael J *Liberalism and the Limits of Justice* (2nd edn Cambridge University Press, 1998)
- Sassen, Saskia 'The Repositioning of Citizenship' in Alison Brysk and Gershon Shafir (eds), *People Out of Place: Globalisation, Human Rights and the Citizenship Gap* (Routledge 2004)
- Saunders, Ben 'Majority Rule and Procedural Equality' (2010) 23(1) *Ratio Juris* 113
- Republicanism and Abstention* (draft with author)
- Schall, Jason 'The Consistency of Felon Disenfranchisement with Citizenship Theory' (2006) 22 *Harvard Blackletter Law Review* 53
- Schauer, Fredrick 'Community, Citizenship and the Search for National Identity' (1986) 84 *Michigan Law Review* 1504
- Schwarzenberger, Georg *International Law* (3rd edn Stevens, 1957)
- Seglow, Jonathan 'Arguments for Naturalisation' (2008) 57(5) *Political Studies* 788
- Sen, Amartya *The Idea of Justice* (Penguin, 2009)
- Development as Freedom* (Oxford University Press, 1999)
- 'Human Rights and Economic Achievements' in Joanna Bauer and Daniel Bell (eds), *The East Asian Challenge for Human Rights* (Cambridge University Press, 1999)
- Shachar, Ayelet *The Birthright Lottery: Citizenship and Global Inequality* (Harvard University Press, 2009)
- 'The Future of National Citizenship: Going, Going, Gone?' (2009) 59 *University of Toronto Law Journal* 579
- Shacknove, Andrew 'Who is a Refugee?' (1985) 95 *Ethics* 274
- Shearer, Ivan and Opeskin, Brian 'Nationality and Statelessness' in Brian Opeskin, Richard Perruchoud and Jillyanne Redpath-Cross (eds), *Foundations of International Migration Law* (Cambridge University Press, 2012) 93
- Shklar, Judith N *American Citizenship: The Quest for Inclusion* (Harvard University Press, 1991)
- Shuck, Peter 'The Devaluation of American Citizenship' in Peter Shuck (ed), *Citizens, Strangers and In-Betweens: Essays on Immigration and Citizenship* (Westview Press, 1998)

- Skordas, Achilles 'Article 7' in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and 1967 Protocol* (Oxford University Press, 2011) 571
- Sloane, Robert D 'Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality' (2009) 50 *Harvard International Law Journal* 1
- Spinner, Jeff *The Boundaries of Citizenship* (Johns Hopkins University Press, 1994)
- Spiro, Peter J *Citizenship and Diaspora: A State Home for Transnational Politics?*
- 'A New International Law of Citizenship' (2011) 105(4) *American Journal of International Law* 694
- Springrose, Linda J 'Strangers in a Strange Land' (1999-2000) 14 *Georgetown Immigration Law Journal* 185
- Soguk, Nevzat *States and Strangers: Refugees and the Displacement of Statecraft* (University of Minnesota Press, 1999)
- Song, Sarah 'Democracy and Noncitizen Voting Rights' (2009) 13(6) *Citizenship Studies* 607
- Soysal, Yaesmin *The Limits of Citizenship* (University of Chicago, 1994)
- 'Changing Citizenship in Europe: Remarks on Post-national Membership and the National State' in David Cesarani and Mary Fulbrook (eds), *Citizenship, Nationality, and Migration in Europe* (Routledge, 1996) 24
- Stasinopolous, Panos 'EU Citizenship as a Battle of the Concepts: Travailleur v Citoyen' (2011) 4(2) *European Journal of Legal Studies* 74
- Steinbock, Daniel J 'Interpreting the Refugee Definition' (1998) 45 *UCLA Law Review* 733
- Steiner, Henry 'Do Human Rights Require a Particular Form of Democracy?' in Eugene Cotran and Adel O Sherif (eds), *Democracy, Human Rights and Islam* (Kluwer, 1999) 193
- 'Political Participation as a Human Right' (1988) 1 *Harvard Human Rights Yearbook* 77
- Stewart, Emma and Mulvey, Gareth *Becoming British Citizens? Experiences and Opinions of Refugees Living in Scotland* (Scottish Refugee Council and Strathclyde University, February 2011)
- Sweeney, James 'Margin of Appreciation, Cultural Relativity, and the European Court of Human Rights in the post Cold-War Era' (2004) 54 *International and Comparative Law Quarterly* 459
- Talbott, William *Which Rights Should Be Universal?* (Oxford University Press, 2005)
- Tahbaz, Christopher C, Takkenberg, Alex, Tambakaki, P, Tamir, Yael, Taylor, Charles *The Collected Travaux Préparatoires of the 1951 Geneva Convention Relating to the Status of Refugees* (Dutch Refugee Council, 1990)
- Human Rights, or Citizenship?* (Birkbeck Law Press, Abingdon 2010)
- Liberal Nationalism* (Princeton University Press, 1993)
- 'The Dynamics of Democratic Exclusion' (1998) 9(4) *Journal of Democracy* 143
- 'The Politics of Recognition' in Amy Gutmann (ed), *Multiculturalism: Examining the Politics of Recognition* (Princeton University Press, 1994) 25
- 'Cross-Purposes: The Liberal-Communitarian Debate' in Nancy Rosenblum (ed), *Liberalism and the Moral Life* (Harvard University Press, 1989)
- Tesón, Fernando *A Philosophy of International Law* (Westview Press, 1998)
- Tiburcio, Carmen *The Human Rights of Aliens under International and Comparative Law* (Nijhoff, 2001)
- Torpey, John *The Invention of the Passport* (Cambridge University Press, 2000)
- Tribe, Lawrence *American Constitutional Law* (2nd edn Foundation Press, 1988)
- Türk, Volker 'Non-State Agents of Persecution' in Vincent Chetail and V Gowlland-Debbas (eds), *Switzerland and the International Protection of Refugees* (Kluwer, 2002) 95
- Van Gunsteren, Herman R 'Admission to Citizenship' (1988) 98 *Ethics* 731
- Van Hear, Nicholas 'Refugees in Diaspora: From Durable Solutions to Transnational Relations' (2006) 23(1) *Refuge* 9
- Van Waas, Laura *Nationality Matters* (Intersentia, 2008)

- Vedsted-Hansen, Jens 'Article 28/Schedule' in Andreas Zimmermann (ed), *The 1951 Convention relating to the Status of Refugees and its 1951 Protocol: A Commentary* (Oxford University Press, 2011)
- Vermeer-Künzli, Annemarieke 'As If: The Legal Fiction in Diplomatic Protection' (2007) 18 *European Journal of International Law* 37
'Case Concerning Mexican Nationals' (2005) 18 *Leiden Journal of International Law* 49
- Vink, Maarten P and de Groot, Gerard-Rene *Loss of Citizenship* (EUDO Citizenship Policy Brief No 3, 2012)
- Vucetic, Srdjan 'Citizenship Attribution in Western Europe: International Framework and Domestic Trends' (2010) 36(5) *Journal of Ethnic and Migration Studies* 713
'Democracies and International Human Rights: Why is there no Place for Migrant Workers?' (2007) 11(4) *International Journal of Human Rights* 403
- Waldron, Jeremy 'Teaching Cosmopolitan Right' in Kevin McDonough and Walter Feinberg (eds), *Citizenship and Education in Liberal-Democratic Societies* (Oxford University Press, 2003) 23
Law and Disagreement (Clarendon Press, 1999)
'Participation: The Right of Rights' (1998) 98(3) *Proceedings of the Aristotelian Society* 307
'A Right-Based Critique of Constitutional Rights' (1993) 13(1) *Oxford Journal of Legal Studies* 18
Liberal Rights (Cambridge University Press, 1993)
'Special Ties and Natural Duties' (1993) 22(1) *Philosophy and Public Affairs* 3
- Walker, Kristen 'Defending the 1951 Convention Definition of Refugee' (2002-2003) 17 *Georgetown Immigration Law Journal* 583
- Walzer, Michael 'Spheres of Affection' in Joshua Cohen (ed), *For Love of Country?* (Beacon Press, 1996)
Spheres of Justice: A Defense of Pluralism and Equality (Robertson, 1983)
'Citizenship' in Terence Ball, James Farr and Russell Hanson (eds), *Political Innovation and Conceptual Change* (Cambridge University Press, 1982) 216
Obligations: Essays on Disobedience, War, and Citizenship (Clarion Books, 1970)
- Weil, Patrick 'From Conditional to Secured and Sovereign: The New Strategic Link Between the Citizen and the Nation-State in a Globalised World' (2011) 9(3-4) *International Journal of Constitutional Law* 614
- Weiler, Joseph HH 'To be a European Citizen – Eros and Civilization' (1997) 4(4) *Journal of European Public Policy* 495
- Weiner, Myron 'Ethics, National Sovereignty and the Control of Immigration' (1996) 30 *International Migration Review* 171
- Weis, Paul *The Refugee Convention 1951: The Travaux Préparatoires Analysed with a Commentary* (Grotius Publications, 1995)
Nationality and Statelessness in International Law (2nd edn Sijthoff and Noordhoff, 1979)
'Human Rights and Refugees' [1971] *Israel Yearbook on Human Rights* 35
'The 1967 Protocol relating to the Status of Refugees and Some Questions relating to the Law of Treaties' (1967) *British Yearbook of International Law* 39
'The United Nations Convention on the Reduction of Statelessness 1961' (1962) 11 *International and Comparative Law Quarterly* 1073
Nationality and Statelessness in International Law (Stevens, 1956)
'The International Protection of Refugees' (1954) 48 *American Journal of International Law* 193
- Weissbrodt, David
Weissbrodt, David and Meili, Stephen *The Human Rights of Non-Citizens* (Oxford University Press, 2008)
'Human Rights and Protection of Non-Citizens: Whither Universality and Indivisibility of Rights?' (2009) 28(4) *Refugee Survey*

Wheatley, Stephen	Quarterly 34
Williams, Melissa	<i>The Democratic Legitimacy of International Law</i> (Hart, 2010)
	'Non-Territorial Boundaries of Citizenship' in Seyla Benhabib, Ian Shapiro and Danilo Petranovic (eds), <i>Identities, Affiliations, and Allegiances</i> (Cambridge University Press, 2007)
Wilsner, David	'Non-State Actors and the Definition of a Refugee in the United Kingdom: Protection, Accountability or Culpability?' (2003) 15(1) <i>International Journal of Refugee Law</i> 68
Winkler, Adam	'Expressive Voting' (1993) 68 <i>NYU Law Review</i> 330
Woodward, John	'Commentary: Liberalism and Migration' in Brian Barry and Robert Goodin (eds), <i>Free Movement: Ethical Issues in the Transnational Migration of People and of Money</i> (Harvester Wheatsheaf, 1992) 59
Worster, William T	'The Contemporary International Law of the Right to Receive Asylum' (SSRN)
Wyman, Katryna M	'Sinking States' in Daniel H Cole and Elinor Ostrom (eds), <i>Property in Land and Other Resources</i> (Lincoln Institute of Land Policy, 2012)
Zieck, Marjorie	'Codification of the Law of Diplomatic Protection: The First Eight Articles' (2001) 14 <i>Leiden Journal of International Law</i> 209
	<i>UNHCR and Voluntary Repatriation of Refugees</i> (Nijhoff, 1997)
Ziegler, Reuven (Ruvi)	'Legal Outlier, Again? U.S. Felon Suffrage: Comparative and International Human Rights Perspectives' (2011) 29(2) <i>Boston University International Law Journal</i> 197
	'The French Headscarves Ban: Intolerance or Necessity?' (2006) 40(1) <i>John Marshall Law Review</i> 235
Zilbershats, Yaffa	<i>The Human Right to Citizenship</i> (Transnational Publishing, 2002)
	'Reconsidering the Concept of Citizenship' (2001) 36 <i>Texas International Law Journal</i> 689

Other Sources

Canada, Law Commission CARE	<i>Citizenship and Identity</i> (Sage, 1999) <i>Report on Consular and Diplomatic Protection: Legal Framework in the EU Member States</i> (2010)
Committee on International Assistance to Refugees	<i>Report by the Committee</i> (submitted to the Council of the League of Nations, Geneva, 3 January 1939)
Committee on Social, Economic and Cultural Rights	General Comment No 20: <i>Non-Discrimination in Economic, Social and Cultural Rights</i> (2 July 2009)
Committee on the Elimination of Discrimination against Women	General Recommendation No 21: <i>Equality in marriage and family</i> (1994)
Committee on the Elimination of Racial Discrimination	General Recommendation No 30: <i>Discrimination against Non-citizens</i> (10 January 2004) Concluding Observations (Netherlands) (2004) General Recommendation No 22: <i>Article 5 and Refugees and Displaced Persons</i> (1996)
Committee on Migrant Workers	Report, CMW/C/ALB/CO/1 of 22 February 2010 (Albania) Report, CMW/C/DZA/1 of 22 June 2008 (Algeria) Report, CMW/C/AZE/CO/1 of 19 May 2009 (Azerbaijan) Report, CMW/C/BIH/CO/1 of 3 June 2009 (BiH) Report, CMW/C/BOL/CO/1 of 29 April 2008 (Bolivia) Report, CMW/C/CHL/CO/1 of 19 October 2011 (Chile) Report, CMW/C/COL/CO/1 of 22 May 2009 (Colombia) Report, CMW/C/ECU/2 of 26 January 2010 (Ecuador) Report, CMW/C/EGY/CO/1 of 25 May 2007 (Egypt) Report, CMW/C/SLV/CO/1 of 4 February 2009 (El Salvador) Report, CMW/C/GTM/CO/1 of 18 October 2011 (Guatemala) Report, CMW/C/MLI/CO/1 of 31 May 2006 (Mali) Report, CMW/C/MEX/1 of 18 November 2005 (Mexico) Report, CMW/C/PRY/1 of 23 February 2011 (Paraguay) Report, CMW/C/PHL/CO/1 of 22 May 2009 (Philippines) Report, CMW/C/SEN/1 of 4 January 2010 (Senegal) Report, CMW/C/LKA/CO/1 of 19 October 2009 (Sri Lanka)
Council of Europe, Committee of Ministers	<i>Thematic Monitoring Report presented by the Secretary General and Decisions on Follow-up Action taken by the Committee of Ministers</i> (19 October 2005) Recommendation R84 (21) <i>The Acquisition by Refugees of Nationality of the Host Country</i> (14 November 1984)
Council of Europe, Committee on Migration, Refugees and Demography	<i>Report on Participation of Immigrants and Foreign Residents in Political Life in the Council of Europe Member States</i> (22 December 2000)
Council of Europe, European Commission for Democracy through Law	<i>Report on Out-of-Country Voting</i> (17-18 June 2011) <i>European Code of Good Practice in Electoral Matters</i> (30 October 2002)
Council of Europe, Parliamentary Assembly	Andreas Gross, Rapporteur, <i>The State of Democracy in Europe: Specific Challenges Facing European Democracies- The Case of Diversity and Migration</i> (6 June 2008) Recommendation No 1714 (2005) Resolution No 1459, <i>Abolition of Restrictions on the Right to Vote</i> (2005) Recommendation No 1650, <i>Links between Europeans Living Abroad and their Countries of Origin</i> (2004) Recommendation No R(86), <i>The Exercise in the State of Residence by Nationals of other Member States of the Right to Vote in the Elections of the State of Origin</i> (21 March 1986) Recommendation No 799 (1977), <i>The Political Rights and Position</i>

	<i>of Aliens</i> (25 January 1977) Resolution 70(2), <i>The Acquisition by Refugees of the Nationality of their Country of Residence</i> (26 January 1970) <i>European Code of Good Practice in Electoral Matters</i>, Opinion 190/2002 (5-6 July and 18-19 October 2002) <i>Position on the Integration of Refugees in Europe</i> (December 2002)
European Council of Refugees and Exiles	
European Union	<i>Good Practice Guide on the Integration of Refugees in the European Union</i> (2001) Commission, <i>Proposed Council Directive on Consular Protection for Citizens of the Union Abroad</i> (2011) Commission, <i>Consular Protection for EU Citizens in Third Countries</i> (March 2011) Commission, <i>EU Citizenship Report 2010: Dismantling the Obstacles to EU Citizens' rights</i> (October 2010)
Human Rights Committee	Recommendation CM/Rec (2009): <i>The Nationality of Children</i> Concluding Observations (Portugal) (2003); Belgium (2004); Latvia (2004) General Comment No 31: <i>The Nature of the General Legal Obligation imposed on States Parties to the Covenant</i> (29 March 2004) General Comment No 27: <i>Freedom of movement</i> (Article 12) (2 November 1999) General Comment No 25 (57): <i>The Right to Take Part in the Conduct of Public Affairs, Voting Rights and the Right of Equal Access to Public Service</i> (27 August 1996) General Comment No 18: <i>Non Discrimination</i> (10 November 1989) General Comment No 15: <i>The Position of Aliens under the Covenant</i> (11 April 1986) General Comment No 12: <i>Article 1</i> (13 March 1984)
Institute for Democracy and Electoral Assistance	<i>Voting from Abroad: The International IDEA Handbook on External Voting</i> (2007)
Intergovernmental Committee on Refugees	<i>Memorandum: Statelessness and some of its Causes: An Outline</i> (UNRRA, 1946)
International Law Commission	<i>Draft Articles on Expulsion of Aliens</i>, ILC Report, 64th session (2012) <i>Draft Articles on Diplomatic Protection</i>, ILC Report, 58th session (2006) <i>Articles on Responsibility of States for Internationally Wrongful Acts</i>, ILC Report, 53rd session (2001) <i>Nationality, including Statelessness, Report on Present Statelessness</i>, Yearbook of the International Law Commission (1954)
Michigan Guidelines on Nexus to a Convention Ground	<i>Guidelines Reflecting the Consensus of Participants at the Second Colloquium on Challenges in International Refugee Law</i> (23-25 March 2001)
New Zealand	<i>Immigration New Zealand, Operational Manual</i> (March 2012)
United Kingdom, Foreign and Commonwealth Office	<i>Human Rights and Democracy: the 2011 Report</i> (April 2012)
United Nations, Ad Hoc Committee on Refugees and Stateless Persons	<i>Draft Report of the Ad Hoc Committee on Statelessness and Related Problems</i> (15 February 1950)
United Nations, High Commissioner for Refugees	<i>Guide for Issuance of Machine-Readable Convention Travel Documents for Refugees and Stateless Persons</i> (October 2012) Executive Committee, <i>Note on International Protection</i> (1-5 October 2012) <i>Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees</i> (reissued December 2011) <i>The Participation of Refugees in Elections of their Country of Nationality and the Role of UNHCR</i> (2010) <i>Note on the Interpretation of Article 1E of the 1951 Convention</i>

Relating to the Status of Refugees (March 2009)
 Executive Committee, Conclusion No 109, *Protracted Refugee Situations* (8 December 2009)
Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity (21 November 2008)
Note on the Integration of Refugees in the European Union (May 2007)
Written Submissions on Behalf of the Intervener in R (Al Rawi and others) v Secretary of State for Foreign and Commonwealth Affairs (12 July 2006)
Guidelines on International Protection, The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons at Risk of Being Trafficked (7 April 2006)
 Executive Committee, Conclusion No 104, *Local Integration* (7 October 2005)
 Executive Committee, Conclusion No 103, *The Provision of Diplomatic Protection including through Complementary Forms of Protection* (7 October 2005)
Handbook for Repatriation and Reintegration Activities (May 2004)
Guidelines on International Protection: Cessation of Refugee Status under Articles 1C(5) and (6) of the Convention (2003)
Refugee Protection: A Guide to International Refugee Law (1 December 2001)
Note on International Protection (13 September 2001)
Summary Conclusions: Cessation of Refugee Status, Lisbon Expert Roundtable (3-4 May 2001)
Note on International Protection (7 July 2000)
The Cessation Clauses: Guidelines on their Application (26 April 1999)
Introduction to International Protection: UNHCR Emergency Management Training Program (1 July 1999)
The State of the World's Refugees: A Humanitarian Agenda (1997)
 Executive Committee, Conclusion No 69, *Cessation of Status* (9 October 1992)
 Executive Committee, Discussion Note, *The Application of the Ceased Circumstances Clause in the 1951 Convention* (20 December 1991)
 Executive Committee, Conclusion No 62 (xli), *Note on International Protection* (5 October 1990)
Note on Expulsion of Refugees (24 August 1977)
 Department of State, *Citizenship Laws of the World* (2001)

United States of America