
Rights of CSR1951 Refugees and Citizenship Voting Qualifications

A Introduction

The starting point of the analysis of 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. While the Universal Declaration of Human Rights ceremoniously proclaims that ‘everyone’ has a ‘right to a nationality’,² 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

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), www.unhcr.org/refworld/docid/3cd6a8444.html.

² Adopted 10 December 1948 UNGA Res 217 A (III) (UDHR) 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 (adopted 28 September 1954, entered into force 6 June 1960) 5158 UNTS 360 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 2002).

international system of rights protection,⁴ notwithstanding states' treaty obligations.⁵

It was noted in the book's introduction that recognised CSR1951 refugees may be either citizens of their states of origin or stateless persons. In their state of *asylum*, following recognition of refugee status, 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 ICCPR,⁶ 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.

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

⁴ See Lassa Oppenheim, *International Law: A Treatise* (Longmans, Green 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 US 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 nothing less than the right to have rights' has arguably been influenced by Hannah Arendt's account in *The Origins of Totalitarianism* (Harcourt 1967) 290–92. 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 Adopted 16 December 1966, entered into force 23 March 1976, 999 UNTS 171.

States undertake a commitment to secure voting rights in their elections (only) for their *citizens*.

It is contended that, currently, international human rights treaties do not require states of asylum to enfranchise recognised CSR1951 refugees *qua* non-citizen residents.⁷ While enfranchisement of (some) non-citizens in local and regional (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 (Migrant Workers Convention) has recently affirmed the resilience of an accepted link between voting and citizenship in international human rights treaties.⁸

Section F explores the unsuccessful attempt by the ILC to establish a 'protected person' status in international law. It was intended that the 'protected person' status be awarded to stateless persons, entitling 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.

B Interrelations between CSR1951 and the ICCPR

CSR1951 entitles recognised refugees to (qualified) protection by their states of asylum.⁹ It is not concerned with the obligations of states of

⁷ 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.

⁸ Adopted 18 December 1990, entered into force 1 July 2003, 2220 UNTS 3.

⁹ David Owen, 'In Loco Civitatis: On the Normative Basis of the Institution of Refugeehood and Responsibilities for Refugees' in Sarah Fine and Lea Ypi (eds), *Migration in Political Theory: The Ethics of Movement and Membership* (Oxford University Press 2016) ch 13. Regarding the present and desirable scope of protection of CSR1951 refugees, see discussion in Chapters 7 and 8. 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 Mazzechi, '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)

origin towards refugees that have left them.¹⁰ The primary purpose of CSR1951 is to ensure that refugees can exercise their fundamental rights and freedoms in the state of asylum.¹¹

It was noted in Chapter 1 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 3–34 of CSR1951 enunciate substantive rights to which refugees are entitled in their states 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 range of her entitlements.¹² 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.¹³

CSR1951 was adopted 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.¹⁴ It

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).

¹⁰ 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 1 considered the failure of states of origin to secure effective protection in the light of the criteria for CSR1951 refugee status.

¹¹ 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').

¹² James C Hathaway and Alexander Neve, 'Making International Refugee Law Relevant Again' (1998) 10 *Harvard Human Rights Law Journal* 115, 158–59.

¹³ See e.g. 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) 305–7.

¹⁴ Charter of the United Nations (adopted 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'.

was the first comprehensive human rights instrument to apply to a special category of persons.¹⁵ Subsequently, binding human rights instruments were adopted to extend state obligations towards both citizens and non-citizens,¹⁶ including CSR951 refugees.¹⁷ It may be 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.¹⁸

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.¹⁹ The fact that states accede freely to human

¹⁵ Nevertheless, the CSR1951 drafters have envisaged that additional protection will be granted to CSR1951 refugees by subsequent treaties. See discussion in Section D.

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

¹⁷ See e.g. 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 states, 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 appraisal, see e.g. Jacqueline Bhabha, 'Internationalist Gatekeepers? The Tension between Asylum Advocacy and Human Rights' (2002) 15 *Harvard Human Rights Journal* 155, 166–67.

¹⁸ 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).

¹⁹ 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

rights treaties should be seen as an affirmation of their international legal sovereignty rather than as a challenge thereto.²⁰

Yaesmin Soysal, advocating *universal personhood* as a basis of political membership, notes that the power of personhood ‘comes across most clearly in the case of political refugees whose status in the host polities exclusively rests on an appeal to human rights’.²¹ Nonetheless, their appeal to protection has to be heeded by a territorial state, which remains the main venue for decision making and rights protection;²² in terms of effective protection, physical presence in a state matters.²³

To date, no international treaty enunciates the rights of non-citizens *qua* non-citizens²⁴ (note the non-binding Declaration on the Rights of

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).

²⁰ 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 sovereign prerogatives, they do so through conventions reliant on national authority for implementation). Cf. Stephen Krasner, *Sovereignty, Organized Hypocrisy* (Princeton University Press 1997) 118.

²¹ 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’).

²² See e.g. Christian Joppke, *Immigration and the Nation-State: The United States, Germany, and Great Britain* (Oxford University Press 2000) 6 (arguing that, absent a supra-national 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).

²³ See e.g. Linda Bosniak, ‘Persons and Citizens in Constitutional Thought’ (2010) 8(1) *International Journal of Constitutional Law* 9 (noting that, to vindicate rights claims of non-citizens *qua* persons, personhood plus territorial presence is required).

²⁴ See e.g. 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

Individuals Who Are Not Nationals of the Country in Which They Live²⁵). 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.²⁶ CSR1951 aims to 'assure refugees the widest possible exercise of [their] fundamental rights and freedoms'.²⁷

UNHCR posits 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'.²⁸ As refugees benefit from protection both under CSR1951 and under general human rights protections, Section D demonstrates that resort to the ICCPR is pertinent in areas that are not covered by CSR1951.²⁹

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.

²⁵ GA/RES/40/144 of 13 December 1985. Cf. Rosalyn Higgins, 'Derogations under Human Rights Treaties' (1976–1977) 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').

²⁶ Jason Pobjoy, 'Treating Like Cases Alike' (2010) 34(1) *Melbourne University Law Review* 181, 192. See also Chapter 7. Conversely, as Harvey notes, 'where applicable human rights guarantees go further than refugee law they can and should be used'. Colin Harvey, 'Time for Reform? Refugees, Asylum-Seekers, and Protection under International Human Rights Law' (2015) 34 *Refugee Survey Quarterly* 43, 46.

²⁷ CSR1951 Preamble §2.

²⁸ UNHCR, *Note on International Protection*, UN Doc A/AC.96/951 (13 September 2001) [4] and [107].

²⁹ 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), *Human Rights and Immigration* (Oxford University Press 2014) 19 (arguing that human rights law, especially the ICCPR, is an

The ICJ has held 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’.³⁰ In turn, the Vienna Convention on the Law of Treaties (VCLT) stipulates 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’.³¹ If one of the (primary) objects and purposes of CSR1951 is protection of refugee rights (notwithstanding the inter-state framing of obligations therein³²), then the interrelations between CSR1951 and other rights instruments such as the ICCPR ought to be considered as complementary and mutually reinforcing,³³ and their respective interpretations should be accordingly engaged.³⁴ Thus, it is submitted that the scope of protection in CSR1951 should be considered and interpreted in light of international human rights instruments.

essential and primary source of refugee protection which supplements and reinforces refugee status).

³⁰ *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, ICJ Rep (1971) 16, 31.

³¹ Adopted 23 May 1969, entered into force 27 January 1980, 1155 UNTS 331 art 31(1). See also James C Hathaway and Michelle Foster, *The Law of Refugee Status* (2nd edn Cambridge University Press 2014) 7. 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 (n 13) 8.

³² See e.g. 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’).

³³ See e.g. 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, because 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 to establish a consistent, structured approach to the protection of the rights of non-citizens). Javid 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).

³⁴ 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, 60–61.

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.³⁵ Hence, CSR1951 neither prescribes nor proscribes states entitling refugees to vote in their states of asylum. Nonetheless, several CSR1951 provisions *implicitly* address the scope of political activities of refugees: Article 1E, regarding exclusion from refugee status; Article 2, regarding the obligations of refugees towards their states 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-à-vis citizens.

The provision was included to prevent post-Second World War displaced Germans residing in neighbouring states from claiming refugee status.³⁶ Guy Goodwin-Gill and Jane McAdam argue that, while Article 1E was not intended to require that, to be excluded, the individual in question must enjoy the *full range* of rights incidental to citizenship,³⁷ the rights to enter the state and remain therein were considered to be essential, given the fundamental objective of CSR1951, namely

³⁵ 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 states of residence).

³⁶ 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’. See also Law of Refugee Status (n 31) 500.

³⁷ Goodwin-Gill and McAdam (n 13) 162. See e.g. *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).

protection.³⁸ Arguably, an entitlement to a ‘political rights’ threshold would have been tantamount to the provision applying only to persons who have the nationality of their states of residence ‘whereas such persons were already excluded from the refugee definition by Article 1A(2)’.³⁹

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 nor cessation of refugee status. As noted in Chapter 1, CSR1951 refugees are protected from expulsion unless their behaviour is deemed serious enough to qualify under Article 32 or 33(2).⁴⁰

Pertinently for this chapter’s analysis, the *Travaux* indicate that the Ad Hoc Committee rejected a French proposal to include a provision entailing that ‘[t]he High Contracting Parties reserve the right to restrict the political activity of refugees’.⁴¹ It was feared that such a provision could be misunderstood as approving limitations on areas of activity of refugees which are unobjectionable. States were reassured that ‘in the absence of a provision to the contrary any sovereign government retained the right

³⁸ 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) [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’).

³⁹ 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) [51–53].

⁴⁰ Hélène Lambert, ‘Article 2: General Obligations’ in Zimmermann (n 39) 625 [48].

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

it has to regulate any activities on the part of an alien which it considers objectionable'.⁴²

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' (emphasis added).

The drafters debated 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.⁴³

In contrast, the American 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'.⁴⁴ 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 'the Contracting States shall as far as possible facilitate the assimilation and naturalisation of refugees'. The

⁴² Weis (n 11) 32. Cf. Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45 (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 (n 40) [20] (noting that the CSR1951 drafters had not agreed to include an equivalent provision).

⁴³ Weis (n 11) 90–93. Regarding rights of CSR1951 refugees to participate in political associations under the ICCPR, see discussion in Section D.

⁴⁴ Michael Teichmann, 'Article 15' in Zimmermann (n 39) 909, 914.

provision, which may trigger one of the six bases for cessation of status under CSR1951 (acquisition of a new nationality⁴⁵), is further discussed in Chapter 8. For this chapter's purposes, the potential significance of 'assimilation' of refugees into their host communities should be considered. The Israeli representative was concerned 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*.⁴⁶ However, his concerns were not shared by other representatives, who contended that assimilation inferred integration.⁴⁷ 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 that no CSR1951 provision regulates 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'.⁴⁸

The Austrian representative to the Conference of Plenipotentiaries noted 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 specially favourable treatment to be accorded to refugees'.⁴⁹ Hence, absent CSR1951 provisions concerning political rights, refugees are to be afforded the same political rights as other aliens in the state of asylum.⁵⁰

⁴⁵ 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.'

⁴⁶ Weis (n 11) 348. ⁴⁷ *Ibid.* See also Chapter 8.

⁴⁸ 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 art viii (2) and iii (8), respectively.

⁴⁹ UN Doc. A/CONF.2/SR.6.

⁵⁰ Achilles Skordas, 'Article 7' in Zimmermann (n 39) 715, 719. CSR1951 entitles refugees to treatment at least as favourable as that accorded to citizens with respect to religion,

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), states were inclined to grant certain aliens broader rights only if their citizens were to be reciprocally treated in these aliens’ state of nationality.⁵¹ However, the CSR1951 drafters recognised that the *raison d’être* of reciprocity requirements does not apply in the case of CSR1951 refugees who *qua* CSR1951 refugees do not enjoy the protection of their state of origin.⁵²

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 CSR1951 right, when such requirements are by their nature such that a refugee is incapable of fulfilling. The exception from reciprocity ‘was . . . intended to grant [refugees] treatment commensurate with their special situation.’⁵³

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’.

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.

⁵¹ Nehemiah Robinson, *The Universal Declaration of Human Rights: Its Origin, Significance, Application and Interpretation* (Institute of Jewish Affairs 1950) art 7 commentary; Hathaway (n 13) 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).

⁵² Weis (n 11) 47.

⁵³ Comment by the representative of the International Refugee Organisation; *ibid* 51.

Hence, it was emphasised that CSR1951 should not be construed as restricting the application of other human rights instruments.⁵⁴ Rather, the above provisions conform to the purported purpose of CSR1951: to secure the enjoyment of rights by refugees under both existing and prospective arrangements.⁵⁵ They also reinforce the need for a dynamic interpretation of CSR1951 provisions.⁵⁶

3 *Political Rights of Refugees under the ICCPR*

It was noted in the introduction that 168 states are parties to the ICCPR, including nearly all states that are parties to the CSR1951 and the 1967 Protocol.⁵⁷ 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.⁵⁸

The Human Rights Committee (HRC) comments 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.’⁵⁹ Obligations must be given effect ‘in good faith’.⁶⁰ 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’;⁶¹ while it is ‘in principle a matter for the State to decide who it will admit to its territory . . . once aliens are allowed to enter the

⁵⁴ 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.

⁵⁵ Robinson (n 51) Commentary [2].

⁵⁶ Guidelines Reflecting the Consensus of Participants at the Fifth Colloquium on Challenges in International Refugee Law [4], Ann Arbor, 13–15 November 2009, published in (2010) 31 *Michigan Journal of International Law* 293.

⁵⁷ Of the State Parties to the 1967 Protocol, only very small (mostly island) states, Antigua and Barbuda, Fiji, the Holy See, St. Kitts and Nevis have not ratified the ICCPR.

⁵⁸ 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’).

⁵⁹ 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) [10].

⁶⁰ *Ibid* [3].

⁶¹ HRC, General Comment No 15: *The Position of Aliens under the Covenant*, UN Doc HRI/GEN/1/Rev.7 (11 April 1986) [1].

territory of a State Party they are entitled to the rights set out in the Covenant.⁶²

Article 2(1) of the ICCPR 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 should not be 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”’.⁶³

The HRC notes 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’.⁶⁴ 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’.⁶⁵ Moreover, the centrality of the concept of non-discrimination ‘imbu[ed] and inspire[ed] similar protection in every other major international human rights instrument’.⁶⁶

Nevertheless, the non-discrimination principle is subject to two significant qualifications. The first qualification 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’.⁶⁷ 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

⁶² HRC, General Comment No 18: *Non-Discrimination*, UN Doc HRI/GEN/1/Rev.5 (10 November 1989) [5–6].

⁶³ 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) [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’.

⁶⁴ GC15 (n 61) [2]. ⁶⁵ GC18 (n 62) [1].

⁶⁶ Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd revised edn Engel 2005) 598.

⁶⁷ GC18 (n 62) [13].

the discriminatory measures taken or contemplated are proportional to the end to be achieved.⁶⁸

The second qualification, explored below, is that '[e]xceptionally some of the rights recognised in the Covenant are expressly applicable only to citizens (art. 25)'.⁶⁹ By comparison, the ICCPR stipulates that 'everyone' enjoys other political rights such as freedom of expression, freedom of peaceful assembly, and freedom of association without distinction based on citizenship.⁷⁰

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 may constitute discrimination under the ICCPR.⁷¹

4 Article 25: Citizenship Voting Qualification

Article 25 of the ICCPR enunciates 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'.⁷²

⁶⁸ Guy S Goodwin-Gill, 'International Law and Human Rights: Trends Concerning International Migrants and Refugees' (1989) 23(3) *International Migration Review* 526, 532.

⁶⁹ GC15 (n 61) [2]. See also GC18 (n 62) [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, 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'.

⁷⁰ ICCPR arts 19, 21 and 22 respectively.

⁷¹ Ruma Mandal, 'Political Rights of Refugees' (UNHCR Department of International Protection 2003) [20].

⁷² See also 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

Article 25 is the only ICCPR provision that refers explicitly to rights of citizens.⁷³ In contradistinction, Article 21(3) of the UDHR pronounces ‘the right of ‘everyone . . . to take part in the government of his state, directly or through freely chosen representatives’. Article 21(3) UDHR may enjoy CIL status,⁷⁴ and Article 25 is often seen as its concretisation,⁷⁵ though its stipulation is arguably more restrictive.⁷⁶

(12 July 1996) [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 book.

⁷³ 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 (n 3) 59 (suggesting that a person’s ‘own country’ may also be a state to 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* (Article 12), CCPR/C/21/Rev.1/Add.9 (2 November 1999) [20]. Indeed, ‘there are few, if any, circumstances in which deprivation of the right to enter one’s own state could be reasonable’. Ibid [21]. The provision, discussed further in Chapter 8, is of ‘the utmost importance for refugees seeking voluntary repatriation’. Ibid [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 book concerns recognised refugees, it is assumed that they reside lawfully in their state of asylum.

⁷⁴ See e.g. 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’).

⁷⁵ See e.g. 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 (n 66) 567.

⁷⁶ Cf. Robinson (n 51) 131–32 (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

The HRC notes 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 citizenship status rather than *domicile* is permissible.⁷⁷ Nonetheless, it stipulates 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*' (emphasis added).⁷⁸ The HRC celebrates the prominence of Article 25, positing that it 'lies at the core of democratic government

paragraph was considered to contain a political principle rather than a human right'); Common Standard (n 75) 440 (concluding that the difference between the provisions 'is apparently more symbolic than substantial').

⁷⁷ GC25 (n 72) [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) [3] notes that 'rights, such as the right to participate in elections, to vote and stand for election, may be confined to citizens'. 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* [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 [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'.

⁷⁸ GC25 (n 72) [3]. See also CCPR, Observations regarding Portugal, A/58/40 vol I (2003) 56 [82(6)] (welcoming 'the granting to aliens 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 [72(5)] and [72(27)]); See also the observations of the CERD Committee re Netherlands, A/59/18 (2004) 29 [147] (commending the fact that aliens 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) [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').

based on the consent of the people and in conformity with the principles of the Covenant'.⁷⁹

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.⁸⁰ 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 people shall find its expression, *inter alia*, in periodic and genuine elections.⁸¹ It has even been asserted that, while international law still protects state sovereignty, it is now the people's sovereignty that it protects rather than the sovereign's sovereignty.⁸²

The reference to *citizens* rather than persons or individuals in Article 25 may be seen as a reaffirmation of the state as the essential forum of political

⁷⁹ GC25 (n 72) [1].

⁸⁰ James Crawford, 'Democracy and the Body of International Law' in Fox and Roth (n 75) 91, 92.

⁸¹ See e.g. Nowak (n 66) 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) [4] and [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 e.g. its conclusions in *Gillot v France*, UN Doc CCPR/C/75/D/932/2000 [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) [20]. Cf. Rosalyn Higgins, *Problems and Process: International Law and How we Use it* (Clarendon Press 1994) 120–21 (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').

⁸² Michael Reisman, 'Sovereignty and Human Rights in Contemporary International Law' (1990) 84 *American Journal of International Law* 866, 868–69. Thomas Franck's article (n 74) triggered a scholarly debate regarding the 'right to democratic governance': see e.g. Stephen Wheatley, *The Democratic Legitimacy of International Law* (Hart 2010) 224–28 (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 book which assumes a state of asylum that holds elections and excludes CSR1951 refugees there-from.

activity and expression.⁸³ 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 political rights such as freedom of expression, assembly, and association, almost as if this differentiation in scope of rights protection was deemed conceptually predetermined.⁸⁴

Subsequent regional treaties in the Americas and in Africa enunciate a right to vote for citizens.⁸⁵ In contradistinction, the (earlier) ECHR does not explicitly proclaim an individual right to vote.⁸⁶ Nevertheless, in 1987, the European Commission on Human Rights (EComHR) described

⁸³ 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).

⁸⁴ 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').

⁸⁵ African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 21 ILM 58 (1982) art 13; American Convention on Human Rights (adopted 21 November 1969, entered into force 18 July 1978) 1144 UNTS 123 art 23.

⁸⁶ 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 (adopted 20 March 1952, entered into force 18 May 1954) ETS No 009 (First Additional Protocol) art 3 (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').

a conceptual 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”’.⁸⁷ However, the EComHR held that ‘[t]he 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).⁸⁸

Article 16 of the ECHR mandates Contracting States to impose restrictions on the ‘political activity of aliens’. In 1977, the Parliamentary Assembly of the Council of Europe (PACE) called for its repeal,⁸⁹ contending 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.’⁹⁰ Regarding the case-law of the ECtHR mentioned above, the PACE report notes 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.’⁹¹

5 *Non-citizen Voting: Some Contemporary Practice*

It is contended 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.⁹² Meanwhile, citizenship qualifications are ubiquitous in *national* elections: only four states entitle all their non-citizen *permanent* residents to vote in national elections:⁹³ New Zealand

⁸⁷ *Mathieu-Mohin and Clerfayt v Belgium* App no 9267/81 (ECHR, 2 March 1987) [51].

⁸⁸ *Ibid* [54].

⁸⁹ Recommendation 799 (1977) on the Political Rights and Position of Aliens, 21st Sitting, 25 January 1977.

⁹⁰ 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 [38].

⁹¹ *Ibid* [36]. ⁹² Franck (n 74) 64.

⁹³ Free and Fair elections (n 74) 126; André Blais, Louis Massicotte, and Antoine Yoshinaka, ‘Deciding who has the Right to Vote: A Comparative Analysis of Election Laws’ (2003) 20

(after one year of permanent residence); Chile (after five years); Malawi (after seven years); and Uruguay (after fifteen years).⁹⁴ In contradistinction, some states extend full voting rights to citizens of *specific* states, usually former colonies; for instance, non-citizen residents from Commonwealth states and Irish citizens are eligible to vote in UK general election, while other non-citizens are excluded therefrom (see further discussion in Chapter 8).

Participation of non-citizen residents in elections for local or regional bodies is more common.⁹⁵ States parties to the European Convention on Participation of Foreigners in Public Life at Local Level (ratified by nine members of the Council of Europe: Albania, the Czech Republic, Denmark, Finland, Iceland, Italy, the Netherlands, Norway, and Sweden) undertake 'to grant to every foreign resident the right to vote and to stand for election in local 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.'⁹⁶

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 8.

⁹⁴ See David C Earnest, 'The enfranchisement of resident aliens: variations and explanations' (2015) 22(5) *Democratization* 861, 864. For a list of countries with local voting rights for non-citizen residents, see p 865.

⁹⁵ 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).

⁹⁶ (adopted 5 February 1992, entered into force 1 May 1997) ETS No 144 art 6(1). Art 7 stipulates that Contracting States may require a shorter period of residence. The Explanatory Report [1992] COETSER 2 [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 aliens in national political life'. Ibid [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 [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)

In contradistinction, the European Union has special arrangements for Second Country Nationals (SCNs),⁹⁷ namely citizens of one EU Member State (MS) residing in another EU MS. SCNs may vote in local government elections of the EU MS in which they habitually reside, as well as in elections to the EU Parliament.⁹⁸ However, these arrangements are based cumulatively on residence *and EU citizenship*: they do not extend to national elections.⁹⁹

E Electoral Participation under the Migrant Workers Convention

The Migrant Workers Convention enunciates 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.¹⁰⁰ In contradistinction, migrant workers and their families may be entitled to vote in *local* elections in their states of employment at the discretion of these states.¹⁰¹

Draft Resolution [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 [10] ('one of the ultimate objectives of every democratic system should be equal opportunities for the exercise of political rights').

⁹⁷ 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) [20] (noting that 'some aliens [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').

⁹⁸ Treaty of Amsterdam amending the Treaty on European Union, the Treaties Establishing the European Communities, and Certain Related Acts (10 November 1997) OJ C 340 art 19.

⁹⁹ 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), http://eudo-citizenship.eu/docs/RSCAS_2012_32.pdf.

¹⁰⁰ Art 41. Out-of-Country Voting and the predicament of CSR1951 refugees are considered in Chapter 6.

¹⁰¹ *Ibid* art 42(3). Receiving states 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 5, 6, and 8.

The juxtaposition of the dual obligation on the part of the host and sending states to facilitate voting of migrant workers and members of their families *qua* non-resident citizens with the non-binding recommendation to grant migrant workers *qua* non-citizen residents voting rights in local elections of their host state is a 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 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.¹⁰² In the discussion, ILC member El Khouri proposed the creation of a ‘protected person’ status which would entail ‘all the civil rights with the exception of political rights’.¹⁰³ Córdova supported this proposition, suggesting 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.¹⁰⁴

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’ (emphasis added). The draft articles stipulated that stateless persons would be entitled to a ‘protected person’ status until such time

¹⁰² Third Report on the Elimination or Reduction of Statelessness (Yearbook of the ILC 1954) vol II.

¹⁰³ 246th meeting A/CN.4/SR.246, 14 June 1954 [9–10].

¹⁰⁴ 247th meeting A/CN.4/SR.247, 15 June 1954 [44].

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.¹⁰⁵

Intriguingly, in justifying the new status, Córdova asserted 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'.¹⁰⁶ 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.

The ILC included the draft articles as described above in its final report to the UNGA.¹⁰⁷ However, the report noted 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'.¹⁰⁸ The draft articles have not materialised as a treaty.¹⁰⁹

G Concluding Remarks

Persons recognised as CSR1951 refugees are non-citizen residents of their state of asylum. 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.

¹⁰⁵ 248th meeting A/CN.4/1954 [25]. SR.248, 16 June

¹⁰⁶ Ibid [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 [35].

¹⁰⁷ Ibid [31]. ¹⁰⁸ Ibid [36].

¹⁰⁹ The report has led to the adoption of the Convention Relating to the Status of Stateless Persons and of the Convention on the Reduction of Statelessness (adopted 30 August 1961, entered into force 13 December 1975) 989 UNTS 175. The former treaty 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 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 in international law for stateless persons that would entail enjoyment by such persons of all rights save for 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, 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, falling outside the remit of the book; activities which states of asylum may allow including participation in electoral processes.¹¹⁰

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 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

¹¹⁰ Mandal (n 71) 45.

protection of individual rights: the former seeks to promote specifically defined citizen rights, while the latter espouses a universal application of entitlements.¹¹¹ Against this background, Part II of the book explores the nature and purposes of voting and state citizenship, and their interrelations.

¹¹¹ George Gigauri, *Resolving the Liberal Paradox: Citizen Rights and Alien Rights in the UK* (RSC Working Paper No 31 July 2008) 3.

